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MICHAEL ALLAN WOLF*

Accommodating Tensions in the Coastal Zone: An Introduction and Overview[†]

Roll on, thou deep and dark blue ocean—roll!
Ten thousand fleets sweep over thee in vain;
Man marks the earth with ruin—his control
Stops with the shore.

—George Noel Gordon, Lord Byron¹

INTRODUCTION

Even before the time Lord Byron penned this poetic warning, various elements of American government sought to exert some semblance of control over the land within the reach of the oceans and lakes which define much of the nation's boundaries.² From the time of our earliest settlements, coastal land has been considered the most desirable for aesthetic, economic, and recreational reasons.³ As America matured, even

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†The seed for this symposium was planted at a conference, devoted to the state of federal Coastal Zone Management (CZM) and related coastal issues, sponsored by the Lincoln Institute Land Policy Roundtable, Cambridge, Massachusetts. Subsequent developments—most notably funding decisions made in Washington—forced serious re-thinking of the future of CZM and prompted revisions of several of the papers presented before the Roundtable. In addition, a national conference on "Our Nation and the Sea in the 1980s"—sponsored jointly by the New Jersey Department of Environmental Protection (NJDEP), Division of Coastal Resources; the Woodrow Wilson School of Public and International Affairs, Princeton University; and the Coastal States Organization—was convened in November 1981. Many fruitful suggestions for revisions of these papers were offered there and subsequently incorporated. One additional paper, on the West Coast experience with CZM, was also commissioned by the Lincoln Institute of Land Policy for this collection.

The three comparative articles included in the symposium, independent contributions to *Natural Resources Journal*, provide important points of comparison with, and comprise a fitting complement to, the U.S. pieces.

My editorial tasks were made less strenuous and, I believe, more worthy, by aid from the following people: Charles Haar, Ralph Johnson, William Matuszeski, Marilyn McLeod, Amy Henrich, Jill Friedlander, David Kinsey, Albert Utton, Jacqueline Jacobs, and Angela Berkowitz. Professor Haar served a dual role as Chairman of the Land Policy Roundtable and as chief critic of editorial contributions. The assistance of the Lincoln Institute, particularly Arlo Woolery, and of the NJDEP are also greatly appreciated.

1. Childe Harold's Pilgrimage, Canto IV (1818).
2. See, e.g., the colonial ordinance of 1641–47, codified in THE BOOK OF THE GENERAL LAWEs AND LIBERTYEs (1649), discussed in *In re Opinion of the Justices*, 365 Mass. 681, 685, 313 N.E. 2d 561, 565 (1974).
3. See, e.g., *State ex. rel. Thornton v. Hay*, 254 Ore. 584, 586, 462 P.2d 671, 673 (1969).

as the population began to inhabit the great center of the continent, the coast retained its magnetism.⁴

In recent decades, two new movements—attendant with profound social, economic, and political ramifications—have been identified with the coast: efforts to conserve the country's natural treasures and the race for energy independence. The tensions and demands occasioned by these key developments proved too much for the state and local mechanisms that had been established to plan and manage activities within and affecting coastal areas.⁵ Cries for a national mediatory presence culminated in the passage of the Coastal Zone Management Act of 1972 (CZMA),⁶ a controversial legislative scheme that has since been refined three times (in 1976, 1978, and 1980).⁷

The promulgation and implementation of the CZMA signified a dramatic break with federal legislative and administrative schemes created in the late 1960s and early 1970s. The familiar "sticks"—threatened cut-offs of desperately needed funds,⁸ new and expanded causes of action in federal courts,⁹ and detailed regulatory and statutory orders¹⁰—were replaced by two attractive "carrots": substantial direct financial assistance in the form of matching grants,¹¹ and a provision mandating that federal coastal activities must be consistent with approved state programs.¹²

As the contributions to this symposium testify, the twelve years which have followed passage of the CZMA have witnessed a wide range of experimentation in coastal area planning, development, and preservation. CZM has attracted the attention, criticism, and study of activists and experts (drawn from the public and private sectors and from academia) in the environmental, energy development, land-use, and government fields. What was, and remains, the only comprehensive zoning scheme

4. See generally WENK, *THE POLITICS OF OCEAN* 7-26 (1972) (discussion entitled "An Unsteady Love Affair with the Sea").

5. The disastrous Santa Barbara oil spill in 1969 is perhaps the most familiar symbol of the risks involved in failing to meet the demands of competing coastal uses.

6. Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451-1464 (1982)). For a detailed appraisal of the Act, see Chasis, *The Coastal Zone Management Act: A Protective Mandate*, 25 NAT. RES. J. 21 (1985).

7. Pub. L. No. 94-370, 90 Stat. 1013; Pub. L. No. 95-372, 92 Stat. 690, 692, 693; Pub. L. No. 96-464, 94 Stat. 2064.

8. See, e.g., Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028 (codified as amended at 23 U.S.C. §§ 131, 135 note, 136, 319 (1982)).

9. See, for example, 42 U.S.C. § 3610 (1982) (the fair housing enforcement provisions of the Civil Rights Act of 1968).

10. See, e.g., Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (originally codified as amended at 33 U.S.C. §§ 1251-1376 (1982)).

11. See, e.g., 16 U.S.C. §§ 1454-1455 (1982).

12. 16 U.S.C. § 1456(c) (1982). A third incentive, assistance in the form of grants, loans, and bond guarantees, is made available to coastal states through the Coastal Energy Impact Program (CEIP), as provided by § 308. *Id.* § 1456a.

national in scope, encompassing publicly and privately held property alike, promises to hold the interest—and, on occasion, to raise the ire—of politicians, energy companies, conservationists, professors, and bureaucrats for years to come, and with good reason.

Unlike “pure” environmental or “pure” energy development interest legislation, the CZMA’s chief focus is on the planning side, as suggested by the term “management.” In fact, it is this planning element—the refusal to take a substantive stand on either side of the struggle between conservation and resource development—that has led to the most heated debates over the purpose and implementation of the decade-old program.¹³

Yet, perhaps ironically, one telling measure of this tenuous, tightrope-walking function lies in the amount of disapproval directed at the program administrators from all sides: environmentalists, industry, local government, etc.¹⁴ Balancing, diversity, coordination, comprehensiveness—these terms (and not favoritism or prejudice) are brought up time and again to describe the mission and conduct of CZM programs which seek to structure a meaningful and competent approach to the amorphous and crucial problems of our coastal zone.¹⁵

In many ways CZMA presents an archetypal New Federalism blueprint, for it attempts to restructure local, state, and federal relationships, often placing the concerns and demands of the former two levels of government over and above the usually ascendant third. With its declared emphasis on management and planning,¹⁶ 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.¹⁷ Still, because CZM funds are budget line items, the program has been subjected to severe economic constraints,¹⁸ a fate shared by other promising federal cooperative projects.

Inevitably, this balancing act has led to disputes among officials of,

13. The most prominent example of this conflict is the struggle over the applicability of the Act’s consistency provisions to offshore oil and gas leasing. See *infra* text accompanying notes 39–55 (discussion of the United States Supreme Court’s recent decision on this issue).

14. The first five papers in this symposium will acquaint the reader with most of the major criticisms of federal CZM.

15. See, e.g., Finnell, *Intergovernmental Relationships in Coastal Land Management*, 25 NAT. RES. J. 31 (1985).

16. E.g., 16 U.S.C. § 1452(2)(I) (1982) (state management programs to provide for “assistance to support comprehensive planning, conservation, and management . . .”).

17. See, e.g., Inaugural Address, 1981 PUB. PAPERS 1, 2 (Jan. 20, 1981):

It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers 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.

18. See *infra* note 29 and accompanying text.

and interest groups appearing before, all three governmental strata. As will become clearer in the articles which follow, certain interests have come to favor a strong national presence while others champion decentralized control.¹⁹ In their attempts to attack the pervasive problems of delay, inconsistent development, and coastal decay, the Office of Coastal Zone Management (OCZM—now called the Office of Ocean and Coastal Resource Management)²⁰ and state and local officials have often found themselves mired in a morass of territorial jealousy, confusion, overburdening red tape, and frustrating litigation. Moreover, intragovernmental disputes, often based on envy and mistrust, have made the road to efficient coastal management a rocky one in several instances.²¹

The obvious tensions between developers and environmentalists also come into clear focus when placed under the CZM microscope. In fact, the history of federal CZM reflects an appreciable shift, as the 1970s began, from public alarm over pollution, such as oil spills, to concern for American energy independence and economic revitalization as the decade drew to a close.²² If the pendulum begins to swing again in the direction of conservation, it is important that the CZM machinery and cooperative mentality remain in place, just as they presently serve the nation's needs within a pro-development milieu.

OVERVIEW

The first five articles in this collection present the reader with a wide-ranging CZM portrait, at first narrowly focused and then progressively expanded to a panoramic view. The inquiry begins with Sarah Chasis' "The Coastal Zone Management Act: A Protective Mandate," a detailed, albeit colored, description of the legislative blueprint: the CZMA, in its original and amended forms. The following piece, "Intergovernmental Relations in Coastal Land Management," Gilbert Finnell's careful study of a central component of the CZM initiative, directs our attention to the procedural aspects of the unique "cooperative federalism"²³ approach of CZM.

19. Compare, for example, the Chasis and O'Connell articles in this symposium.

20. The change in name from the Office of Coastal Zone Management (OCZM) to the Office of Ocean and Coastal Resource Management (OCRM) was part of a general reorganization of the Commerce Department's National Oceanic and Atmospheric Administration (NOAA), effective November 28, 1982. OCRM was placed within the National Ocean Service of NOAA. [13 Current Developments] ENV'T REP. (BNA) 1495 (December 31, 1982).

21. See, e.g., Hildreth & Johnson, *CZM in California, Oregon, and Washington*, 25 NAT. RES. J. 103 (1985).

22. The New Jersey CZM experience, as portrayed by David Kinsey, is a sort of microcosm for this phenomenon. Kinsey, *CZM from the State Perspective: The New Jersey Experience*, 25 NAT. RES. J. 73 (1985).

23. For a discussion of this term in the coastal management context, see Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L.Q. 401, 403 (1984).

Our attention is shifted in the next article, Daniel O'Connell's "Florida's Struggle for Approval under the Coastal Zone Management Act," to the "real world" give and take involved in satisfying objective and subjective statutory and administrative criteria before obtaining federal approval for the program in a key coastal state. David Kinsey's "CZM from the State Perspective: The New Jersey Experience," an insider's "micro" view, takes the reader beyond the approval phase to the struggles over, and actual implementation of, state and local coastal development, environmental, and recreational programs.

The final domestic contribution—Richard Hildreth and Ralph Johnson's multistate study, "CZM in California, Oregon, and Washington"—incorporates elements and approaches from the four previous pieces. Hildreth and Johnson present some timely and troubling conclusions about the theory and reality of coastal zone planning and development in the United States.

Not surprisingly, certain patterns and themes arise from these varied materials. The nature and prominence of the federal role in the CZM drama is debated by three authors, each of whom places special emphasis on the concerns and activities of one governmental branch. Chasis, true to her position as advocate for the Natural Resources Defense Council, takes Congress to task for overemphasizing procedure in the current CZM statutory scheme and for making the federal overseeing role too weak in regard to state program approval and implementation. Rather than faulting CZM for being too decentralized or locally controlled, law professor Finnell is most concerned with those instances of unnecessary and inefficient homogeneity imposed from above by federal regulation. To Finnell, judicial opinions, in which jurists attempt to balance and prioritize the powers and responsibilities of the central and local governments, present the most fertile source of inquiry. The long series of travails documented in O'Connell's essay is punctuated by confrontations with a demanding, if not obstinate, federal coastal zone program bureaucracy.

There is yet another potential source of tension that tends to surface at times in the complex realm of coastal area management: the friction among different branches of the *same* level of government. In sharp contrast to the Tower of Babel that arose to thwart, for a time, Florida's efforts, Kinsey depicts the successful accommodation of potentially debilitating internecine struggles over coastal land management. Kinsey's hearty endorsement of one state program cannot be totally attributed to bias, for other states have used New Jersey as a model of innovation and efficiency.

Kinsey and O'Connell engage, as well, in a kind of dialogue concerning the characterization of the proper constituency for CZM. In a sense, this discussion seeks to identify the "audience" before whom each concerned public and private sector party "struts and frets," seeking approval and

support. O'Connell, the attorney, is convinced that there exists a constituency for the "improved or better management" envisioned by CZMA. Thus, the state and federal programs need not be captured by (and therefore devoted to the goals and desires of) interest groups like developers, energy companies, or environmentalists.²⁴

Kinsey, the planner and former state CZM official, takes a more cynical stand, rejecting the notion of a good government constituency as mere "wishful thinking." Sounding more like a lawyer, Kinsey asserts that "public decisions are made through an adversarial process of consideration of multiple interests." Indeed, the current limbo status of federal CZM²⁵ testifies both to the absence of one constituency powerful enough to move the program forward and to the weakness of any "counter-constituency" seeking to eliminate the program altogether. We are thus returned to the overall theme of this collection: the careful balancing that is pursued within the geographic and political boundaries of the coastal zone.

The darker side of intrastate competition (as well as some noted successes) is revealed by Professors Hildreth and Johnson. Perhaps their most significant finding concerns yet another tension hidden beneath the bubbly surface of coastal land planning and management, a tension that arises only after the struggles for public recognition and approval have been hard-fought and won. This conflict, between effective enforcement and comprehensiveness, threatens either to enervate CZM to the point of futility, or to turn CZM into a one-issue (e.g., a beach access or offshore drilling) program to the detriment of less prominent, controversial, or newsworthy coastal concerns. In a statement reeking of heresy to diehard adherents of comprehensive CZM, yet grounded in common sense and in a serious and careful study of the subject matter, Hildreth and Johnson observe that, "Both the issues addressed and geographic coverage may need to be narrowed [in California and Oregon], so that they are similar to the more restricted . . . programs. Unfortunately, to sacrifice comprehensiveness for enforceability may be the more realistic way to insure meaningful program survival and continued federal support."

The key to the marked success, even survival, of CZM in the United States lies in the ability of local, state, and federal program managers and planners to reconcile the needs and desires of a wide range of parties with the harsh realities of funding and administrative shortfalls. If we indulge in the lawyer's favoritism of process at the expense of substantive goals, or if we opt for paper-thin (though comprehensive) coverage over limited and innovative experimentation, the legacy of this cooperative

24. The most prominent elaboration of the "capture theory" generally, is G. KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1963).

25. See *infra* notes 31-34 and accompanying text.

land-use scheme may well be years of internecine, intergovernmental, economic, political, and legal disputes.

As a way of avoiding such a fruitless legacy, it is important that we not only direct our attention to current programs and struggles at home, but also to developments in economically crucial and environmentally sensitive coastal areas abroad. The three comparative papers featured in this symposium form a study in contrast and counterpoint for those interested in successful coastal planning and development in the United States. Although the geographical, economic, and political contexts with which they are concerned vary dramatically, the authors of these three articles are all seeking to devise a framework for resolving many of the same tensions posed by coastal area use and preservation that the five initial pieces in the symposium address.

In "Existing Institutional Arrangements and Implications for Management of Tokyo Bay," Professors Kazuo Sumi and Ken Hanayama carefully detail the perils of decentralized and uncoordinated planning in a key coastal region. Patterns familiar to those acquainted with the coastal history of the United States are retraced here: a shift in public (and governmental) concern from economic revitalization to environmental protection, stiff competition among neighboring communities for industry and investment at the expense of uniform planning for development and conservation, and a dearth of public concern except in the case of a severe ecological disaster. It should be no surprise to those familiar with American CZM that critics of the Japanese system of local control are advocating a move away from the "complex patchwork of *ad hoc* measures" toward "a comprehensive and an integrated approach to management of Tokyo Bay."

Mark Valencia and Abu Bakar Jaafar, in "Legal and Institutional Issues in the Environmental Management of the Malacca/Singapore Straits," present a series of choices designed to resolve the potentially devastating impact of several competing uses in an environmentally sensitive area. Mineral exploration and exploitation, shipping, rapid urbanization and industrialization, tourism, and cultivation of crops are all taking their toll on a region managed almost haphazardly by three nations, Malaysia, Indonesia, and Singapore, and directly affected by many other users and abusers from within and without the region. State or local officials in the United States who feel unreasonably burdened by the amount of red tape and control imposed from above need only review the crazy quilt of local, national, regional, and international regulations and statutes asserted in the Malacca/Singapore Straits area to realize that, indeed, ours is the greener grass.

The concluding offering in this collection, Lakshman Guruswamy's "Environmental Management in a North Sea Coastal Zone: Law, Insti-

tutions and Policy," demonstrates the overwhelmingly reactive nature of governments, local, national, and international alike. Despite the presence, even prominence, of technical experts close to the seat of power, the state all too often considers the negative implications of a course of action only after moving headlong down that course. So, in the North Sea, it is only after years of exploration and development of energy resources that the European Community is beginning to consider seriously the reality, and not just the idea, of "an integrated environmental and resource strategy." It can only be hoped that once a comprehensive study is undertaken, such as that proposed here by Guruswamy, the advances and mistakes of the unique cooperative scheme of U.S. CZM will provide a fertile source of comparison and guidance.

In 1985, the CZMA is once again scheduled for reauthorization.²⁶ It is appropriate, therefore, to take the time to reconsider the accomplishments and drawbacks of the first years of operation under the statute as the bases for the decisions to be made about coastal planning and management in the coming decades. Perhaps the greatest value of this collection of articles is that the reader is introduced to the full range of the U.S. experience to date—from promulgation, to implementation, to early operation—in one sitting.

To the editor goes not only the job of introducing, summarizing, and comparing the pieces in the set, but also the privilege of discussing future problems and prospects. That future is far from self-determined, for the course of CZM has always been, and will continue to be, primarily in the hands of legislative, executive, and judicial policymakers and interpreters.

While Congress has not as a body agreed on any amendments since 1980, the laboratory of state and local legislative bodies has produced a number of innovative coastal experiments. In the absence of specific federal orders and specifications, a wide range of programs has been prodded and nurtured through CZM:

[C]oastal programs range from stringent regulation in California, where a coastal property owner may be forbidden to build on his own land, to permissive overseeing in Louisiana, where some conservationists complain that oil companies are allowed to mangle the fragile shoreline at will.

In South Carolina, helicopter crews on regular patrol look for landowners illegally diking marsh lands. In Massachusetts, no fewer than 315 community conservation commissions coordinate with the state in carrying out 27 coastal conservation policies.²⁷

26. 16 U.S.C. § 1464 (1982).

27. Hill, *Federal Law on Coastal Land Use, After 12 Years, Is Having Wide Impact*, N.Y. Times, Sept. 16, 1984, at 36, col. 1.

While some uniformity results from interaction, study, and exchange of ideas, this process of experimentation and variation should continue to be one of the hallmarks of the CZM program.

On the state and federal levels, the personality and politics of the chief executive and his or her administration will continue to have a significant impact on the future course of CZM. One need only look at the shift in environmental policy from King to Dukakis in Massachusetts, from Brown to Deukmejian in California, and from Evans to Ray in Washington to appreciate the vulnerability of the best laid coastal plans.

In the District of Columbia, the result of the turnover in administrations is best illustrated by comparing Jimmy Carter's endorsement of the last year of his term as "The Year of the Coast,"²⁸ with Ronald Reagan's proposed \$43.4 million cut in CZM funding for fiscal year 1982.²⁹ Indeed, former Interior Secretary James Watt's sweeping five-year oil and gas leasing plan stands as the most prominent symbol of the administration's coastal regime.³⁰

What does the second Reagan term hold for CZM? Unfortunately for those seeking a clear message, recent signals have been curiously mixed. In an October 1983 hearing, Congressman Norman D'Amours of New Hampshire, chairman of the House Oceanography Subcommittee, lambasted OCRM Director Peter Tweedt for "clearly ignoring" and "trying to decimate" the CZMA.³¹ Moreover, in July 1984, much to the dismay of environmentalists and several state governments, the Interior Department revealed plans for a second five-year Outer Continental Shelf (OCS) oil and gas leasing plan.³² Yet, only one month before, Interior Secretary William Clark voiced support for the idea of coastal state revenue sharing from oil and gas leasing in the OCS.³³ It remains to be seen whether the second Reagan term will witness a stronger commitment to environmental

28. Environmental Priorities and Programs, Message to the Congress, 1979 PUB. PAPERS 1353, 1362 (August 2, 1979).

29. Eliopoulos, *Coastal Zone Management: Program at a Crossroads*, Monograph 30, [13 Current Developments] ENV'T REP. (BNA) at 8 (Sept. 17, 1982). President Reagan's plans met with some stiff Congressional resistance, as did his CZM budget proposals over the following three years. In 1984, despite the President's renewed zero-budget proposal for state CZM grants, Congress appropriated \$36 million for CZM state grants, a figure that compares well with Carter's last budget figures. The President authorized this allocation as part of the supplemental appropriations for the Commerce Department. Telephone interview with William Matuszeski, Deputy Assistant Administrator for Ocean Services and Coastal Zone Management (October 19, 1984).

30. Watt approved a final five-year oil and gas leasing plan—covering nearly one billion offshore acres—on July 21, 1982. [13 Current Developments] ENV'T REP. (BNA) 420 (July 30, 1982).

31. [14 Current Developments] ENV'T REP. (BNA) 989 (October 14, 1983).

32. [15 Current Developments] ENV'T REP. (BNA) 416 (July 13, 1984).

33. Pasztor, *Reagan Is Moving Toward Giving States Larger Share of Offshore Leasing Money*, Wall St. J., June 13, 1984, at 12, col. 1.

protection in general, as was hinted early in the presidential campaign.³⁴

As with any other program grounded in law and regulation, CZM has as its ultimate arbiter the judiciary. While there have been some exceptions,³⁵ generally the courts, as in the land-use field as a whole, have been quite deferential to states and localities in their efforts to plan and manage coastal regions in accordance with the tone and substance of the CZMA. For example, a federal district court upheld the right of the California Coastal Commission, in accordance with the consistency provision of the CZMA,³⁶ to review the Interstate Commerce Commission's approval of plans to remove nearly seven miles of railroad tracks on the Monterey Peninsula.³⁷ Similarly, the U.S. Court of Appeals, Third Circuit, ruled that the Environmental Protection Agency acted arbitrarily and contrary to the CZMA by insisting on grant conditions that, if enforced, would have run contrary to state and local coastal planning decisions.³⁸

It was left to five justices of the United States Supreme Court, in a decision announced January 11, 1984, to provide the most significant (and controversial) interpretation of the statutory foundation of CZM.³⁹ *Secretary of the Interior v. California* arose from the Interior Department's plans to sell oil and gas leases on the OCS off the California coast. The California Coastal Commission viewed these activities as "directly affecting" the coastal zone and demanded a consistency review in accordance with § 307(c)(1) of the CZMA.⁴⁰ The demand was rejected by Interior. The state, along with the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53, instituted litigation against the Interior Department, Secretary Watt and two other department officials, and the Bureau of Land Management, seeking declaratory and injunctive relief.⁴¹ The federal district court and the Ninth Circuit Court

34. At a July 11, 1984, bill-signing ceremony held on Theodore Roosevelt Island on the Potomac River, President Reagan stated that Americans must be "determined to avoid the waste of our resources and destruction of the ecological systems on which these precious resources are based." [15 Current Developments] ENV'T REP. (BNA) 411, at 412 (July 13, 1984).

35. See, e.g., *infra* text accompanying notes 39-55 (discussing the United States Supreme Court's recent decision in *Secretary of the Interior v. California*).

36. 16 U.S.C. § 1456(c) (1982).

37. *Southern Pac. Transp. Co. v. California Coastal Comm'n*, 520 F. Supp. 800 (N.D. Cal. 1981).

38. *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3d Cir. 1983).

39. *Secretary of the Interior v. California*, ___ U.S. ___, 104 S.Ct. 656 (1984).

40. "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1) (1982).

41. *Secretary of the Interior v. California*, 104 S.Ct. at 660 n. 3. In addition, Western Oil and Gas Association and twelve of its members intervened as defendants, while some local governments in California intervened as plaintiffs. *Id.*

of Appeals agreed with the plaintiffs that a consistency determination was required prior to the lease sale.⁴² The Supreme Court granted certiorari, and heard oral arguments on November 1, 1983.

Justice Sandra Day O'Connor's majority opinion first noted the ambiguity of the phrase "directly affecting" and then turned to the legislative history in an effort to clarify the meaning of the two words. She concluded that the language was added to the CZMA as a compromise between a broad House and a restrictive Senate interpretation: "The [House-Senate] Conference accepted the Senate's narrower definition of the 'coastal zone,' but then expanded § 307(c)(1) to cover activities on federal lands not 'in' but nevertheless 'directly affecting' the zone."⁴³ Further study of the 1972 CZMA Conference Report led the majority to a dramatic (and nearly determinative) assertion: "[W]e are impelled to conclude that the 1972 Congress did not intend § 307(c)(1) to reach OCS lease sales."⁴⁴

Justice O'Connor did not stop there, however; she proceeded to make the following findings: (1) § 307(c)(1) is "irrelevant to OCS lease sales,"⁴⁵ an activity covered by § 307(c)(3), a section that "definitely does *not* require consistency review of OCS lease sales."⁴⁶ (2) The 1978 amendments to the Outer Continental Shelf Lands Act of 1953 (OCSLA) confirm that a lease sale is a distinct statutory stage that gives the lessee "only a priority in submitting plans to conduct those activities"⁴⁷ (i.e., exploration, development, and production) that *will* trigger the consistency requirements of § 307(c)(3)(B). (3) Even if § 307(c)(1) were applicable, a lease sale "grants the lessee the right to conduct only very limited, 'preliminary activities' on the OCS."⁴⁸ Granted, that right might come at a high price;⁴⁹ still, because federal approval may be denied at several points down the line, "the possible effects on the coastal zone that may eventually result from the sale of a lease cannot be termed 'direct.'"⁵⁰

It would be difficult to craft an opinion that focused more narrowly on statutory language *qua* language.⁵¹ The majority declared that Congress,

42. *California ex rel. Brown v. Watt*, 520 F. Supp. 1359 (C.D. Cal. 1981), *modified*, 683 F.2d 1253 (9th Cir. 1982).

43. *Secretary of the Interior v. California*, 104 S.Ct. at 662.

44. *Id.* at 666 (footnote omitted).

45. *Id.* at 667.

46. *Id.* (emphasis in original).

47. *Id.* at 670. The 1978 amendments to the OCSLA (Pub. L. No. 95-372, 92 Stat. 632) are found at 43 U.S.C. §§ 1331-1356 (1982).

48. *Secretary of the Interior v. California*, 104 S.Ct. at 672.

49. In his dissent, Justice John Paul Stevens noted, "In the lease sale at issue in this case, \$220,000,000 was bid on the disputed tracts." *Id.* at 679 n. 15.

50. *Id.* at 672.

51. The majority opinion is unsatisfactory not only because it ignores the broader implications of the Court's findings. There are other serious shortcomings:

(1) Justice O'Connor's understanding of "directly affecting" went beyond even the

not the Court, had made the policy choice⁵² and that the plaintiffs' (and dissent's) contrary construction of the CZMA was "superficially plausible but ultimately unworkable."⁵³ Justice O'Connor did pay lip service to the benefits of collaboration between state and federal agencies.⁵⁴ Ultimately, however, she and her colleagues paved the way for the ascendancy of the latter's policies and goals over those of the former in the setting—

position briefed by Interior, to the extent that *all* OCS activities conducted or supported by a federal agency could be exempt from the consistency requirement of § 307(c)(1). *Id.* at 661.

(2) The majority refused to consider four key post-1972 statements appearing in congressional committee reports, as "of little help in construing the intent behind the law actually enacted." *Id.* at 666 n. 15. This posture is contrary not only to the dissent ("this nevertheless qualifies as the view of a subsequent Congress and is not without persuasive value" (*Id.* at 688 n. 36)), but also to previous opinions penned and endorsed by O'Connor and other members of the majority. *See, e.g.,* *Bell v. New Jersey and Pennsylvania*, 103 S.Ct. 2187, 2194 (1983) (O'Connor: "the view of a later Congress . . . does have persuasive value"); *Bowsher v. Merck & Co.*, 103 S.Ct. 1587, 1595 n. 12 (1983) (O'Connor: "subsequent congressional rebuffs of GAO requests for expansion of its access authority are instructive both with regard to the GAO's view of the limits of the 1951 legislation and Congress' apparent reluctance to broaden that legislation."); *Bob Jones Univ. v. United States*, 103 S.Ct. 2017, 2032-2034 (1983) (Chief Justice Burger considered, in detail, failed congressional efforts to modify IRS rulings); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n. 8 (1980) (Chief Justice Burger: "while arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent.") The majority would have done well to heed Chief Justice John Marshall's advice: "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805).

(3) Important questions were left unresolved by the majority's opinion. *See, e.g.,* *Secretary of the Interior v. California*, 104 S.Ct. at 660 n. 3 (standing of respondents other than California not addressed); *Id.* at n. 5 ("who holds final authority to determine when sufficient consistency has been achieved" not decided); *Id.* at 663 ("whether any OCS activities other than oil and gas leasing might be covered by § 307(c)(1)" not determined).

(4) The majority displayed an attitude toward Congressional debate and decision-making that was naive at best, misleading at worst. *See* those parts of Justice Stevens' dissent addressing the majority's questionable use of legislative history. *Id.* at 683-88.

52. Some members of Congress have reacted to the majority's opinion by proposing amendments to the CZMA, changes designed to ensure that federal OCS activities (including oil and gas leasing) are consistent with approved state plans. H.R. 4589, 98th Cong., 2d Sess. (1984); S. 2324, 98th Cong. 2d Sess. (1984). *See also* [15 Current Developments] ENV'T REP. (BNA) 40 (May 11, 1984). The Ninety-Eighth Congress adjourned before enacting either of these proposals.

The Administration's response has been twofold: NOAA has sought public comment as to how to revise its consistency regulations in the light of *Secretary of the Interior v. California*, and Interior Secretary William Clark has stated that he will advise the President to veto legislation attempting to expand the consistency requirements as interpreted by the Court. [15 Current Developments] ENV'T REP. (BNA) 175 (June 8, 1984); [14 Current Developments] ENV'T REP. (BNA) 2212 (Apr. 6, 1984).

53. *Secretary of the Interior v. California*, 104 S.Ct. at 672.

OCS energy development—that has become the central focus of the CZM movement.⁵⁵

It may well be that, for two key reasons, 1984 will be cited as a turning point in the history of the U.S. CZM program. First, the year opened with the Supreme Court finally putting to rest a controversy that in many ways diverted energy and attention away from the substantive goals and achievements of the federal-state cooperative scheme. Members of Congress, commentators, advocates, and bureaucrats alike were embroiled in the elaborate tug-of-war over the meanings of one statutory clause, a clause that to many represented the heart of CZM. While the future holds in store more debates over proposed amendments to CZMA to clarify consistency,⁵⁶ there is still a marked shift away from past contexts and interpretations and toward the needs and desires of CZM policymakers in the late 1980s.

Second, the year closed with reports of a severe decline in interest in offshore leasing, most notably off the New England coast, but also in the Beaufort Sea off Alaska.⁵⁷ Declining world oil prices, state opposition, unsuccessful explorations, and lengthy legal diversions have all contributed to a lack of interest in the very plan that has been the chief CZM battleground.⁵⁸

If, indeed, these “distractions” are eliminated or significantly downplayed, and if the CZMA is reauthorized as scheduled in 1985, perhaps the federal CZM experiment can go on relatively unhindered for the remainder of the decade. As Lord Byron and the history of CZM so far suggest, however, external and internal tensions are the price we pay for attempts to control—or to accommodate and balance—the use and abuse of our magnetic and abundant coast.

54. *Id.*

55. See, e.g., Berger & Saurenman, *The Role of Coastal States in Outer Continental Shelf Oil and Gas Leasing: A Litigation Perspective*, 3 VA. J. OF NAT. RESOURCE L. 35 (1983); Harvey, *Federal Consistency and OCS Oil and Gas Development: A Review and Assessment of the “Directly Affecting” Controversy*, 13 OCEAN DEV. & INT’L L. J. 481 (1984); Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 ECOLOGY L. Q. 401 (1984); Note, *The Seaweed Rebellion: Federal-State Conflicts Over Offshore Oil and Gas Development*, 18 WILLAMETTE L. REV. 535 (1982); Comment, *The Seaweed Rebellion Revisited: Continuing Federal-State Conflict in OCS Oil and Gas Leasing*, 20 WILLAMETTE L. REV. 83 (1984).

56. See *supra* note 52.

57. [15 Current Developments] ENV’T REP. (BNA) 842 (Sept. 28, 1984); Shabecoff, *The Quest for Offshore Oil Wanes*, N.Y. Times, October 7, 1984, § 3, at 8, col. 4.

58. Shabecoff, *supra* note 57.