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# The Coastal Zone Management Act: A Protective Mandate<sup>†</sup>

## RATIONALE FOR THE COASTAL ZONE MANAGEMENT ACT

Congress enacted the Coastal Zone Management Act (CZMA) in 1972 because of the recognized need for increased protection of the natural, biological, and physical resources of the coast. The CZMA repeatedly emphasizes the “important ecological, cultural, historical and aesthetic values of the coastal zone”<sup>1</sup> and provides that population growth and economic development “have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.”<sup>2</sup>

The Act’s legislative history illustrates the national problems to which Congress responded. The Senate Report emphasized that passage of the Act was based on the following findings that: by 1964, over one-quarter of the nation’s salt marshes had been destroyed; the commercial fishery of the United States depends on coastal and estuary waters and marshlands as fish nursery areas and spawning grounds; increased commercial and recreational demand in the coastal zone endangers biologic organisms; and the fragmentation of state and local government authority in the coastal zone has exacerbated pressure for economic development.<sup>3</sup>

The House Report noted the “[l]arge metropolitan areas with their suburban sprawls . . . [h]eavy developments . . . and massive landfill operations,” and concluded that “[e]ach of these activities has contributed to the pollution and attendant deterioration of the coastal waters.”<sup>4</sup> The legislative need was summarized in this manner:

The information developed during the course of the hearings on this legislation was remarkably consistent with the findings of all the

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1. Coastal Zone Management Act § 302(e), 16 U.S.C. § 1451(e) (1982).

2. Coastal Zone Management Act § 302(c), (e), 16 U.S.C. § 1451(c), (e) (1982); *see also* § 303(a), (b), 16 U.S.C. § 1452(a), (b) (1982).

3. SENATE COMM. ON COMMERCE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, AS AMENDED IN 1974 AND 1976 194–98 (Comm. Print 1976) [hereinafter cited as CZMA LEG. HISTORY].

4. *Id.* at 315.

predecessor groups that have considered the problem. Witnesses representing the National Governors' Conference, the National Legislative Conference, the Coastal States' Organization, individual state governments, and various conservation and public interest groups were uniformly concerned for the deteriorating condition of the coastal zone and were united in their support for early legislative action. Similar support was indicated in letters from various states and public organizations which were unable to furnish witnesses during the hearings.<sup>5</sup>

The congressional debate on the bill is further evidence of the concerns precipitating its passage. South Carolina Senator Ernest Hollings, a major sponsor of the bill, said it simply: "The bill I propose today is aimed at saving the waters of our coasts and the land whose use has a direct, significant, and adverse impact upon that water."<sup>6</sup> Throughout the debate, the senators who spoke expressed their understanding that the purpose of the bill was the need for increased protection of the coastal environment.<sup>7</sup>

Underlying the whole congressional consideration was the recognition that existing statutes and institutions had been unable to curb the abuses of coastal resources. Concern was reflected in this specific finding in the CZMA:<sup>8</sup> "In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, *present State and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.*"<sup>9</sup> Accordingly, states were required under the CZMA to develop comprehensive coastal management programs to protect their coastal resources.

In 1976, the CZMA was amended to assist the states in strengthening their management programs. The amendments were passed in the face of action by the Administration to accelerate development of the Outer Continental Shelf (OCS).<sup>10</sup> The primary thrust of the amendments was the creation of the Coastal Energy Impact Fund for the purpose of enabling states to apply effective mitigation measures in the face of increasing energy pressures.<sup>11</sup>

The statements of numerous senators in the debates clearly expressed that the 1976 amendments were not intended to compel energy facility siting on the coast, but to help states cope with the impact of energy

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5. *Id.* at 314.

6. *Id.* at 249.

7. *Id.* at 247-94.

8. Coastal Zone Management Act § 302(h), 16 U.S.C. § 1451(h) (1982).

9. *Id.* (emphasis supplied).

10. CZMA LEG. HISTORY, *supra* note 3, at 614-15, 630.

11. Coastal Zone Management Act § 308(h), 16 U.S.C. § 1456a(h) (1982).

developments in the coastal zone.<sup>12</sup> Senator Harrison Williams of New Jersey, for example, stated:

Proposals are being made for a deep-water port, oil drilling and floating nuclear power plants off our shore, and the only protection our precious coastal resource has is the Coastal Zone Management Act of 1972. This act was created to assist the states in developing adequate controls to prevent damage to the adjacent land and to preserve the fragile ecological balance in coastal areas.<sup>13</sup>

Congress did not intend to mandate any particular energy posture for participating states. For example, the Senate Report emphasized that the requirement in Section 305(b)(8) of an energy facility siting process, which was added by the 1976 amendments, "requires a State to develop and maintain a planning process, but does not imply intercession in specific siting decisions."<sup>14</sup>

In the House, a similar philosophy prevailed in the consideration of the 1976 amendments. As the House Report on a predecessor bill stated: "[t]he Committee 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."<sup>15</sup> Some interest advocates have argued that the 1976 amendments altered the Act's basic character. These arguments, made by the American Petroleum Institute (API) and various oil companies, have been rejected in one federal court which held that: "[A]lthough sensitive to balancing competing interests, it [the CZMA] is first and foremost a statute directed to and solicitous of environmental concerns."<sup>16</sup>

Authorization of key sections of the CZMA expired in 1980, but Congress saw the need for reauthorizing and strengthening the Act in order to meet the increased pressures on the nation's coasts.<sup>17</sup> Bills were reported out of the House Merchant Marine and Fisheries Committee and the Senate Commerce Committee, providing for improvements in the original and amended CZMA.

The House bill (H.R. 6979) set out seven national coastal objectives on which states must spend an increasing percentage of their federal funds.<sup>18</sup> Thirty percent was set as the upper limit on the proportion of federal funds which a state must allocate for achievement of these ob-

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12. CZMA LEG. HISTORY, *supra* note 3, at 634, 660, 705, 711, 713.

13. *Id.* at 713; *see also id.* at 634, 660, 711 (statements of senators).

14. *Id.* at 760.

15. *Id.* at 931 (emphasis supplied).

16. American Petroleum Inst. v. Knecht, 456 F. Supp. 889, 919 (C.D. Cal. 1978), *aff'd* 609 F.2d 1306 (9th Cir. 1979).

17. Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060 (codified as amended at 16 U.S.C. §§ 1451-64 (1982)).

18. H.R. 6979, 96th Cong., 2d Sess. (1980).

jectives. The national coastal objectives included protection of natural systems (including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat); the management of coastal development to minimize the loss of life and property; priority consideration for coastal-dependent uses and orderly processes for siting major facilities; public access for recreational purposes; the coordination and simplification of governmental procedures; continued consultation and coordination with federal agencies; and public participation in program implementation.<sup>19</sup>

Under this bill, the program remained voluntary; no provision was made for states without a federally-approved coastal program. New incentives were provided, however, to participating states through an important new grants provision providing funds for acquisition of valuable natural areas, urban waterfront rehabilitation, and the provision of public access. The bill also provided an eight-year reauthorization of all sections of the bill. It not only called for increasing state attention to the general national coastal objectives, but also encouraged participating states to protect coastal resources of national significance. The availability of money under the new coastal grants program was linked to state progress in protecting such areas, as well as to a state's progress in achieving the national coastal objectives. Objectives and procedures under Section 312 for evaluation of state implementation of approved programs were clarified. Finally, a mechanism was provided in Section 316 for putting the federal house in order and bringing federal programs into conformity with the policies of the Act. The vehicle was a federal coastal policy review to be conducted by National Oceanic and Atmospheric Administration (NOAA), the results of which were to be translated into federal regulatory changes.<sup>20</sup>

The Senate bill (S. 2622) did not go as far as the House bill in improving the Act.<sup>21</sup> It omitted the provision (Section 306(i)) calling on states to protect coastal resources of national significance. The Senate bill failed to require federal agencies to conform their regulations to the policies of the Act as determined by NOAA through the federal coastal policy review. It also provided fewer incentives to participating states by providing only a five-year (rather than eight-year) reauthorization, at levels below the authorization levels provided in the existing law. In all other ways, the House and Senate bills were similar.<sup>22</sup>

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19. *Id.*

20. *Id.*

21. S. 2622, 96th Cong., 2d Sess. (1980).

22. *Id.*; H.R. 6979, 96th Cong., 2d Sess. (1980).

The latest amendments to the CZMA were signed into law in the fall of 1980.<sup>23</sup> In form, the amendments are similar to the House bill described above with four key variations: (1) two more national coastal objectives (assistance in urban waterfront and port redevelopment and in aesthetic preservation and restoration, and support for planning, conservation, and management for living marine resources) were added; (2) a proposed Section 311A, authorizing civil actions to compel compliance with the Act, was deleted; (3) the federal coastal review in Section 314(c)(1) was watered down; and (4) reauthorization was for five years.<sup>24</sup> Then, less than six months after Congress had reauthorized and strengthened the Act, the Reagan Administration proposed a total elimination of federal funding for state implementation of coastal zone management programs under Section 306.<sup>25</sup> The Carter Administration budget for fiscal year 1982 requested \$34.7 million to fund section 306 grants to the 25 states and territories with approved programs.<sup>26</sup>

The justifications given by the Reagan Administration for elimination of this money were that the objectives of the program had been achieved and that the states could and would assume full responsibility for funding their programs.<sup>27</sup> In fact, the program had not achieved the stage of maturity alleged. Congress, recognizing this, had just reauthorized the program for five more years and had set new national interest objectives which state programs were to achieve.<sup>28</sup> In addition, most states could not immediately assume full funding responsibility. Indeed, Reagan's proposal would have brought most state management programs either to a screeching halt or would have led to their severe curtailment.<sup>29</sup>

The Coast Alliance and many of the nation's environmental organizations, the Coastal States Organization, the League of Women Voters, the governors of many coastal states, as well as others worked diligently to save the program. This public support—combined with strong backing in Congress from such Senators as Ernest Hollings and Lowell Weicker and Representatives Norman D'Amours (New Hampshire), Joel Pritchard

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23. Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060 (codified as amended at 16 U.S.C. §§ 1451-64 (1982)).

24. 16 U.S.C. §§ 1452(2)(E), 1462, 1464 (1982).

25. Eliopoulos, *Coastal Zone Management: Program at a Crossroads* [Monograph 30], ENV'T REP. (BNA) at 8 (Sept. 17, 1982).

26. *Id.*

27. *Id.*

28. Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060 (codified as amended at 16 U.S.C. §§ 1451-64 (1982)).

29. For a discussion of federal CZM funding struggles during the first Reagan Administration, see Wolf, *Accommodating Tensions in the Coastal Zone: An Introduction and Overview*, 25 NAT. RES. J. 7, 15 n.29 (1985).

(Washington), Walter Jones (North Carolina), and others—helped save the program, although at a reduced level of funding.<sup>30</sup>

### PROVISIONS OF THE ACT

Thirty states (including those bordering the Great Lakes) and five territories are eligible for federal funds under the CZMA. The grants may cover up to 80 percent of the cost of developing and administering a coastal zone management program. Grants for the development of a program are awarded under the criteria set forth in Section 305 of the Act. Grants for program administration, when approved, are awarded under Section 306.<sup>31</sup>

Responsibility for administering the CZMA is assigned to the secretary of commerce, who designated the NOAA as the agency within the Department of Commerce to manage the program. Within NOAA, this responsibility resides in the Office of Ocean and Coastal Resources Management (OCRM).<sup>32</sup>

The state management program must do the following: establish specific boundaries for the coastal zone, define permissible land and water uses, establish guidelines for priority of uses in certain areas, include an inventory and designation of geographic areas of particular concern, and contain a planning process to address problems such as beach access and protection, energy siting, and coastal erosion.<sup>33</sup> Other CZMA provisions require that a state's program provide for adequate consideration of the national interest involved in the siting of facilities, including energy facilities,<sup>34</sup> and for a method of assuring that local regulations do not unreasonably restrict regional beneficial uses.<sup>35</sup>

Those agencies responsible for implementation of the coastal program, whether they be state agencies or local governments, must possess the legal authority to control development in order to ensure conformance with the management program. If local governments are involved in implementation of the program, substantial state-level control also is required. Once a state has developed an approved CZM program, Section 307 provides that federal agencies must conform their activities to the program, including the issuance of federal licenses and permits. An order

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30. Eliopoulos, *supra* note 25, at 8–9.

31. There are currently 23 states and 5 territories with approved CZM programs; 17 coastal states either declined to participate or dropped out. See Eliopoulos, *supra* note 25, at 24–25.

32. Originally the NOAA office responsible for overseeing the CZMA was the Office of Coastal Zone Management (OCZM). See Wolf, *supra* note 29, at 10 n.20.

33. Coastal Zone Management Act § 305(b), 16 U.S.C. § 1454(b) (1982).

34. *Id.* § 306(c)(8), 16 U.S.C. § 1455(c)(8) (1982).

35. *Id.* § 306(e)(2), 16 U.S.C. § 1455(e)(2) (1982).

by the secretary of commerce is required (and may be issued on only limited grounds) before a federal agency may issue a permit inconsistent with a state program.<sup>36</sup> Finally, states with approved programs (as well as those still developing programs either under the federal Act or comparable state law) are eligible under Section 308, which establishes a Coastal Energy Impact Fund, for grants and loans to anticipate and mitigate the adverse impacts of coastal energy development.<sup>37</sup>

## PROBLEMS OF STATUTORY STRUCTURE AND IMPLEMENTATION

As is the case with many initiatives which must run the legislative gamut of compromise and concession, the CZM program has several drawbacks. Many of these weaknesses are attributable, in large part, to the statute itself, federal implementation of the Act, and the uncertainty of the benefits accruing to states with approved programs.

### *The Statute*

A major source of the problem is the statute itself. The statement of findings and declaration of policy in Sections 302 and 303 are extremely broad; yet they are the only sections which provide substantive direction to OCRM and the states.<sup>38</sup> Great discretion is given to OCRM with an absence of clear substantive standards for judging state programs. The level of federal funding provided is small in comparison to the magnitude of the problems states are asked to address. State participation is voluntary. The result is the total absence of coastal programs in a number of states and the presence of ineffective programs in others.

### *Weak Federal Implementation*

#### *Federal Standards for Program Approval*

From commencement of the federal program, OCZM altered and revised the requirements for Section 306 approval. First, program approval regulations were issued in 1975.<sup>39</sup> Then OCZM issued a series of threshold papers interpreting the regulations and, at the same time, significantly altering them. These threshold papers were never published in the Federal Register nor made available generally for public comment. Proposed revised program approval regulations were issued for public comment on August 29, 1977.<sup>40</sup> Interim-final revised program approval regulations

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36. *Id.* § 307, 16 U.S.C. § 1456 (1982).

37. *Id.* § 308, 16 U.S.C. § 1456a (1982).

38. *Id.* §§ 302, 303, 16 U.S.C. §§ 1451, 1452 (1982).

39. Coastal Zone Management Program Development and Approval Regulations, 15 C.F.R. §§ 923.1-.105 (1984).

40. 42 Fed. Reg. 43,552-43,583 (1977).

were issued March 1, 1978.<sup>41</sup> Final revised program approval regulations were finally issued in March 1979, after more than 13 state programs had already been approved.<sup>42</sup>

The final coastal zone management program approval regulations have major deficiencies. They fail to ensure that one of the most important, if not the key, goal of the CZMA, greater protection of valuable coastal resources, is furthered. The regulations fail to lend substantive direction to the states in their development of programs. Instead, the standards place heavy emphasis on procedure rather than substance. These negative conclusions are based on the regulations' failure to explain or give any interpretation to the general goals and purposes of the statute; the absence of a requirement that coastal areas, which are highly productive and threatened by development, be designated as areas of particular concern and subject to specific management controls; the arbitrary limitation of the requirement for establishing a priority of uses to only those areas which a state may happen to designate as an area of particular concern; the failure to require that states have a mechanism for controlling the cumulative impacts of coastal development on valuable coastal resources; and the exemption of governors' executive orders from the requirement for program enforceability.

#### *Standards for Review of State Performance*

Another major area in which federal implementation has been extremely inadequate is under Section 312.<sup>43</sup> This section calls for continuing federal review of state management programs and performance, and authorizes a reduction or withdrawal of funding or unjustified deviations from state programs.<sup>44</sup> Before the 1980 amendments to the CZMA, no regulations were issued under this important component of the Act. No clear objective standards were set for judging a state's performance, determining whether a state was justified in deviating from its program, or terminating or reducing a state's funding.

The procedure which has been followed is disturbing. For example, before the Section 312 evaluations have been published, O CZM (and now O CRM) give the evaluated states copies of the draft findings and opportunities for comment. The draft evaluations generally are not available to other interested persons; nor have public comments been requested.

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41. 43 Fed. Reg. 8,378-8,432 (1978).

42. 44 Fed. Reg. 18,590-18,624 (1979) (codified at 15 C.F.R. §§ 923.1-.105 (1984)).

43. Coastal Zone Management Act § 312, 16 U.S.C. § 1458 (1982).

44. *Id.*

### *Uncertainty of Program Benefits*<sup>45</sup>

Another drawback in state coastal zone management is the uncertainty of the benefits accruing to states with approved programs. Because the program is voluntary, the incentives must be significant if states are to respond to the demands of the federal program. The level of funding provided to states under Section 306 of the Act, however, is relatively small compared to the problems states are asked to address. States with approved programs may receive only \$500,000–\$3 million per year for program implementation. Furthermore, funds have not been made available to states under the other special assistance sections of the Act. For example, Section 315(2), which authorized grants to states for land acquisition in order to provide public coastal access and for the preservation of islands, has never been funded.<sup>46</sup>

Finally, the federal consistency provision, Section 307, appears to give states less new authority over federal actions than the states originally had been led to believe. For example, within a state's coastal zone, it is unclear to what extent the state obtains any additional control over a proposed activity with a federal connection than it would otherwise possess through the state's direct exercise of its own policies. This is because OCZM stated that for federal consistency to apply, a state must already have a state policy in force which is applicable to the proposed activity and enforceable under state law.<sup>47</sup> Even if such an enforceable state policy exists, it remains unclear what increased control over the activity the state obtains through the exercise of federal consistency. Beyond a state's jurisdiction where the federal consistency provisions clearly expand a state's powers, the value of federal consistency has been significantly diluted by the refusal of federal agencies to cooperate. For example, the Interior Department, despite a Department of Justice opinion to the contrary,<sup>48</sup> refused to admit that its pre-lease sales activities (e.g., tract selection, lease stipulations) on the OCS must be reviewed for consistency with state coastal programs.<sup>49</sup>

### CONTINUED IMPORTANCE OF THE ACT'S PURPOSES

The same needs which prompted Congress to pass the CZMA exist today. Indeed, the needs are more pressing. The threats to the coast are

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45. The author's criticisms in this section are based on observations of the Act's implementation prior to passage of the 1980 amendments. The author is currently engaged in evaluating the existing federal coastal zone program in preparation for the 1985 reauthorization of the CZMA.

46. Coastal Zone Management Act § 315(2), 16 U.S.C. § 1461(2) (1982).

47. *Id.* § 307, 16 U.S.C. § 1456 (1982).

48. The Department of Justice opinion is discussed at 44 Fed. Reg. 37,142 (1979).

49. See Wolf, *supra* note 29, text accompanying notes 39–55 (discussion of U.S. Supreme Court's decision on this issue).

accelerating, as is our understanding of the values and functions performed by coastal ecosystems. By 1990, it is projected that over 75 percent of the nation's population will be living in the coastal zone.<sup>50</sup> Pressures for development and expanded use of the coast will rise with this population increase. Pressures on the coast also will increase as a result of increasing energy development, as well as expanded port development, the intense impacts from residential development, and demands for coastal recreation.

At the same time that these accelerated pressures on the coast occur, our understanding of the importance of the coast is rapidly expanding. The critical functions coastal resources such as wetlands, barrier islands, dunes, and estuaries perform—as fish and wildlife habitat, storm buffers, water purifiers, nutrient producers—are becoming increasingly well-recognized.<sup>51</sup> The need to preserve and maintain a healthy and productive coast for ourselves and succeeding generations is thus greater than ever.

Because the future of the federal CZM program is so uncertain, it is more essential than ever to build support for effective coastal management programs at the state and local level. As federal funding and oversight diminish, the states must be encouraged to assume full responsibility for funding and implementation. Because the national interests in the coast are so great, it would be extremely unwise for the federal program to terminate. For this reason, Congress and the Administration should be encouraged to maintain a federal CZM program which provides both funding and supervision.

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50. H.R. REP. NO. 1012, 96th Cong. 2d Sess. 32, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4362, 4380.

51. See generally, *Coastal Zone Management*, 25 NAT. RES. J. — (1985) (coastal programs in New Jersey, Florida, California, Oregon, and Washington).