Section 5. THE FEDERAL CONSISTENCY REQUIREMENT

Although federal funding provided an initial impetus for states to participate in coastal zone planning, the provisions of section 307(c) of the CZMA may assure state participation when federal funding dwindles. The so-called federal consistency requirement provides the states with the potential to participate effectively in federal decision-making that affects their coastal areas. Section 307(c), 16 U.S.C. 1456, is set out below:

Section 307(c) Consistency of Federal activities with state management programs; certification.

(1) 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.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

(3) (A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the
Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 306 [16 USCS 1455], any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seg.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed, as provided for in subparagraph (A); or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan in which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification,
or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

(d) Applications of local governments for Federal assistance; relationship of activities with approval management programs. State and local governments submitting applications for Federal assistance under other Federal programs affecting the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of title IV of the Inter-governmental Coordination Act of 1968 (82 Stat. 1098). Federal agencies shall not approve proposed projects that are inconsistent with a coastal state’s management program, except upon a finding by the Secretary that such project is consistent with the purposes of this title or necessary in the interest of national security.

FEDERAL CONSISTENCY MATRIX

The diagram on the following pages illustrates how "consistency" works. Note who makes the decision as to whether the action is consistent with the state's approved management plan.
# Federal Consistency Matrix

<table>
<thead>
<tr>
<th>CZMA Section</th>
<th>307(c)(1)&amp;(2)</th>
<th>307(c)(3)(A)</th>
<th>307(c)(3)(B)</th>
<th>307(d)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Federal action</strong></td>
<td>Direct federal activities including development projects.</td>
<td>Federally licensed and permitted activities</td>
<td>Federally licensed and permitted activities described in OCS plans</td>
<td>Federal assistance to state and local gov’ts</td>
</tr>
<tr>
<td><strong>Coastal Zone Impact</strong></td>
<td>Directly affecting the coastal zone</td>
<td>Affecting the coastal zone</td>
<td>Affecting the coastal zone</td>
<td>Affecting the coastal zone</td>
</tr>
<tr>
<td><strong>Responsibility to notify state agency</strong></td>
<td>Federal agency proposing the action</td>
<td>Applicant for federal license or permit</td>
<td>Person submitting OCS plan</td>
<td>Intergov’tal review procedure</td>
</tr>
<tr>
<td><strong>Notification procedure</strong></td>
<td>Chosen by federal gov’t</td>
<td>Consistency certification</td>
<td>Consistency certification</td>
<td>Intergov’tal review procedure</td>
</tr>
<tr>
<td><strong>Consistency requirement</strong></td>
<td>Consistent to the maximum extent practicable with CZM program</td>
<td>Consistent with CZM program</td>
<td>Consistent with CZM program</td>
<td>Consistent with CZM program</td>
</tr>
</tbody>
</table>
## FEDERAL CONSISTENCY MATRIX (CONT'D)

<table>
<thead>
<tr>
<th>Consistency determination</th>
<th>Made by federal agency (review by state)</th>
<th>Made by state agency</th>
<th>Made by state agency</th>
<th>Made by state agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal agency responsibility following a disagreement</td>
<td>Federal agency not required to disapprove action following state agency disagreement (unless judicially impelled to do so)</td>
<td>Federal agency may not approve license or permit following state agency objection</td>
<td>Federal agency may not approve federal licenses or permits for activities described in OCS plan following state agency objection</td>
<td>Federal agency may not grant assistance following state objection</td>
</tr>
<tr>
<td>Administrative conflict resolution</td>
<td>Mediation by the Secretary</td>
<td>Appeal to the Secretary by applicant or independent secretarial review</td>
<td>Appeal to the Secretary by person or independent secretarial review</td>
<td>Appeal to the Secretary by applicant agency or independent secretarial review</td>
</tr>
</tbody>
</table>
States do not always agree with federal determinations that an activity does not "affect" or "directly affect" the coastal zone, or that an activity is consistent with the states' programs. Section 307 also provides for mediation of serious disputes by the Secretary of Commerce. Of course, federal mediation of an agency decision by the secretary of a federal agency is not considered a satisfactory resolution by some states. Several cases are currently in the courts.

Section 307(h) Mediation of disagreements. In case of serious disagreement between any Federal agency and a coastal state--
(1) in the development or the initial implementation of a management program under section 305 [16 USCS 1454]; or
(2) in the administration of a management program approved under section 306 [16 USCS 1455];
the Secretary [or Commerce], with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

SECRETARY of INTERIOR v. CALIFORNIA
104 S.Ct. 656 (1984)

Justice O'CONNOR delivered the opinion of the Court.

This case arises out of the Department of Interior's sale of oil and gas leases on the outer continental shelf off the coast of California. We must determine whether the sale is an activity "directly affecting" the coastal zone under section 307(c)(1) of the Coastal Zone Management Act (CZMA). That section provides in its entirety:

"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).

We conclude that the Secretary of the Interior's sale of outer continental shelf oil and gas leases is not an activity "directly affecting" the coastal zone within the meaning of the statute.
I

CZMA defines the "coastal zone" to include state but not federal land near the shorelines of the several coastal states, as well as coastal waters extending "seaward to the outer limit of the United States territorial sea." 16 U.S.C. 1453(1).

* * *

CZMA was enacted in 1972 to encourage the prudent management and conservation of natural resources in the coastal zone.

* * *

Through a system of grants and other incentives, CZMA encourages each coastal state to develop a coastal management plan. Further grants and other benefits are made available to a coastal state after its management plan receives federal approval from the Secretary of Commerce. To obtain such approval a state plan must adequately consider the "national interest" and "the views of the Federal agencies principally affected by such program." 16 U.S. 1455(c)(8), 1456(b).

Once a state plan has been approved, CZMA section 307(c)(1) requires federal activities "conducting or supporting activities directly affecting the coastal zone" to be "consistent" with the state plan "to the maximum extent practicable." 16 U.S.C. 1456(c)(1). The Commerce Department has promulgated regulations implementing that provision. Those regulations require federal agencies to prepare a "consistency determination" document in support of any activity that will "directly affect" the coastal zone of a state with an approved management plan. The document must identify the "direct effects" of the activity and inform state agencies how the activity has been tailored to achieve consistency with the state program. 15 CFR 930.34, .39 (1983).

II

OCS lease sales are conducted by the Department of the Interior (Interior). Oil and gas companies submit bids and the high bidders receive priority in the eventual exploration and development of oil and gas resources situated in the submerged lands on the OCS. A lessee does not, however, acquire an immediate or absolute right to explore for, develop, or produce oil or gas on the OCS; those activities require separate, subsequent federal authorization.

In 1977, the Department of Commerce approved the California Coastal Management Plan. The same year, Interior began preparing Lease Sale No. 53 -- a sale of OCS leases off the California coast near Santa Barbara. * * * Interior issued a Draft Environmental Impact Statement in April, 1980.

On July 8, 1980 the California Coastal Commission informed Interior that it had determined Lease Sale No. 53 to be an activity "directly affecting" the California coastal zone. The state commission therefore demanded a consistency determination
-- a showing by Interior that the lease sale would be
"consistent" to the "maximum extent practicable" with the state
coastal zone management program. Interior responded that the
Lease Sale would not "directly affect" the California coastal
zone. Nevertheless, Interior decided to remove 128 tracts,
located in four northern basins, from the proposed lease sale,
leaving only the 115 tracts in the Santa Maria Basin. In
September 1980, Interior issued a final Environmental Impact
Statement.

* * *

On December 16, 1980, the state commission reiterated its
view that the sale of the remaining tracts in the Santa Maria
Basin "directly affected" the California coastal zone. The
commission expressed its concern that oil spills on the OCS could
threaten the southern sea otter, whose range was within 12 miles
of the 31 challenged tracts. The commission explained that it
"has been consistent in objecting to proposed offshore oil
development within specific buffer zones around special sensitive
marine mammal and seabird breeding areas. . . ." The commission
concluded that 31 more tracts should be removed from the sale
because "leasing within 12 miles of the Sea Otter Range in Santa
Maria Basin would not be consistent" with the California Coastal
Management Program. California Governor Brown later took a
similar position, urging that 34 more tracts be removed.

Interior rejected the State's demands. In the Secretary's
view, no consistency review was required because the lease sale
did not engage CZMA section 307(c)(1), and the Governor's request
was not binding because it failed to strike a reasonable balance
between the national and local interests. On April 10, 1981,
Interior announced that the lease sale of the 115 tracts would go
forward, and on April 27 issued a final notice of sale. 46

Respondents filed two substantially similar suits in federal
district court to enjoin the sale of 29 tracts situated within 12
miles of the Sea Otter range. Both complaints alleged, inter
alia, Interior's violation of section 307(c)(1) of CZMA. They
argued that leasing sets in motion a chain of events that
culminates in oil and gas development, and that leasing therefore
"directly affects" the coastal zone within the meaning of section
307(c)(1).

The district court entered a summary judgment for
respondents on the CZMA claim. The Court of Appeals for the
Ninth Circuit affirmed that portion of the district court
judgment that required a consistency determination before the
sale. We granted certiorari, and now reverse.

III

Whether the sale of leases on the OCS is an activity
"directly affecting" the coastal zone is not self-evident.

* * *
We are urged to focus first on the plain language of section 307(c)(1). Interior contends that "directly affecting" means "[h]aving [an] [d]irect, [i]dentifiable [i]mpact on [t]he [c]oastal [z]one." Respondents insist that the phrase means "[i]nitiat[ing] a [s]eries of [e]vents of [c]oastal [m]anagement [c]onsequence." But CZMA nowhere defines or explains which federal activities should be viewed as "directly affecting" the coastal zone, and the alternative verbal formulations proposed by the parties, both of which are superficially plausible, find no support in the Act itself.

We turn therefore to the legislative history. A fairly detailed review is necessary, but that review persuades us that Congress did not intend OCS lease sales to fall within the ambit of CZMA section 307(c)(1).

In the CZMA bills first passed by the House and Senate, section 307(c)(1)'s consistency requirements extended only to federal activities "in" the coastal zone. The "directly affecting" standard appeared nowhere in section 307(c)(1)'s immediate antecedents. It was the House-Senate Conference Committee that replaced "in the coastal zone with "directly affecting the coastal zone." Both chambers then passed the conference bill without discussing or even mentioning the change.

At first sight, the Conference's adoption of "directly affecting" appears to be a surprising, unexplained, and subsequently unnoticed expansion in the scope of section 307(c)(1), going beyond what was required by either of the versions of section 307(c)(1) sent to conference. But a much more plausible explanation for the change is available.

The explanation lies in the two different definitions of the "coastal zone." The bill the Senate sent to the Conference defined the coastal zone to exclude "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." * * * By contrast, the House bill's definition of "coastal zone" included lands under federal jurisdiction; thus federal activities on those lands were to be fully subject to section 307(c)(1)'s consistency requirement. Under both bills, however, submerged lands on the OCS were entirely excluded from the coastal zone, and federal agency activities in those areas thus exempt from section 307(c)(1)'s consistency requirement.

Against this background, the Conference Committee's change in section 307(c)(1) has all the markings of a simple compromise. The Conference accepted the Senate's narrower definition of the "coastal zone," but then expanded section 307(c)(1) to cover activities on federal lands not "in" but nevertheless "directly affecting" the zone. By all appearances, the intent was to reach at least some activities conducted in those federal enclaves excluded from the Senate's definition of the "coastal zone." * * *
Nonetheless, the literal language of section 307(c)(1), read without reference to its history, is sufficiently imprecise to leave open the possibility that some types of federal activities conducted on the OCS could fall within section 307(c)(1)'s ambit. We need not, however, decide whether any OCS activities other than oil and gas leasing might be covered by section 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.

B

If section 307(c)(1) and its history standing alone are less than crystalline, the history of other sections of the original CZMA bills impel a narrow reading of that clause.

* * *

C

To recapitulate, the "directly affecting" language in section 307(c)(1) was, by all appearances, only a modest compromise, designed to offset in part the narrower definition of the coastal zone favored by the Senate and adopted by the Conference Committee. Section 307(c)(1)'s "directly affecting" language was aimed at activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone as formally defined by the Act. Consistent with this view, the same Conference Committee that wrote the "directly affecting" language rejected two provisions in the House bill that would have required precisely what respondents seek here -- coordination of federally sponsored OCS activities with state coastal management and conservation programs. In light of the Conference Committee's further, systematic rejection of every other attempt to extend the reach of CZMA to the OCS, we are impelled to conclude that the 1972 Congress did not intend section 307(c)(1) to reach OCS lease sales.

IV

A

A broader reading of section 307(c)(1) is not compelled by the thrust of other CZMA provisions. First, it is clear beyond peradventure that Congress believed that CZMA's purposes could be adequately effectuated without reaching federal activities conducted outside the coastal zone.

* * *

Moreover, a careful examination of the structure of CZMA section 307 suggests that lease sales are a type of federal agency activity not intended to be covered by section 307(c)(1) at all.

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Section 307(c) contains three coordinated parts. Paragraph (1) refers to activities "conduct[ed] or support[ed]" by a federal agency. Paragraph (2) covers "development projects" "undertake[n]" by a federal agency. Paragraph (3) deals with activities by private parties authorized by a federal agency's issuance of licenses and permits. The first two paragraphs thus reach activities in which the federal agency itself the principal actor, the third reaches the federally approved activities of third parties. Plainly, Interior's OCS lease sales fall in the third category. Section 307(c)(1) should therefore be irrelevant to OCS lease sales, if only because drilling for oil or gas on the OCS is neither "conduct[ed]" nor "support[ed]" by a federal agency. Section 307(c)(3), not section 307(c)(1), is the more pertinent provision. Respondents' suggestion that the consistency review requirement of section 307(c)(3) is focused only on the private applicants for permits or licenses, not federal agencies, is squarely contradicted by abundant legislative history and the language of section 307(c)(3) itself.

CZMA section 307(c)(3) definitely does not require consistency review of OCS lease sales. As enacted in 1972, that section addressed the requirements to be imposed on federal licensees whose activities might affect the coastal zone. A federal agency may not issue a "license or permit" for any activity "affecting land or water uses in the coastal zone" without ascertaining that the activity is consistent with the state program or otherwise in the national interest. Each affected state with an approved management program must concur in the issuance of the license or permit; a state's refusal to do so may be overridden only if the Secretary of Commerce finds that the proposed activity is consistent with CZMA's objectives or otherwise in the interest of national security. Significantly, section 307(c)(3) contained no mention of consistency requirements in connection with the sale of a lease.

In 1976, Congress expressly addressed -- and preserved -- that omission. Specific House and Senate Committee proposals to add the word "lease" to section 307(c)(3) were rejected by the House and ultimately by the Congress as a whole. It is surely not for us to add to the statute what Congress twice decided to omit.

Instead of inserting the word "lease" in section 307(c)(3), the House-Senate Conference Committee renumbered the existing section 307(c)(3) as section 307(c)(3)(A), and added a second paragraph, section 307(c)(3)(B). Respondents apparently concede that of these two subparagraphs, only the latter is now relevant to oil and gas activities on the OCS. The new paragraph section 307(c)(3)(B), however, provides only that applicants for federal licenses or permits to explore, produce, or develop oil or gas on the OCS must first certify consistency with affected state plans. Again, there is no suggestion that a lease sale by Interior requires any review of consistency with state management plans.

If the distinction between a sale of a "lease" and the issuance of a permit to "explore," "produce," or "develop" oil or
gas seems excessively fine, it is a distinction that Congress has codified with great care. CZMA section 307(c)(3)(B) expressly refers to the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1331 et seq., (OCSLA), so it is appropriate to turn to that Act for a clarification of the differences between a lease sale and the approval of a plan for "exploration," "development," or "production."

OCSLA was enacted in 1953 to authorize federal leasing of the OCS for oil and gas development. The Act was amended in 1978 to provide for the "expeditious and orderly development, subject to environmental safeguards," of resources on the OCS. 43 U.S.C. 1332(3) (1976 ed., Supp. III). As amended, OCSLA confirms that at least since 1978 the sale of a lease has been a distinct stage of the OCS administrative process, carefully separated from the issuance of a federal license or permit to explore, develop, or produce gas or oil on the OCS.

Before 1978, OCSLA did not define the terms "exploration," "development," or "production." But it did define a "mineral lease" to be "any form of authorization for the exploration for, or development or removal of deposits of, oil, gas, or other minerals..." 43 U.S.C. 1331(c). The pre-1978 OCSLA did not specify what, if any, rights to explore, develop, or produce were transferred to the purchaser of a lease; the Act simply stated that a lease should "contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease." 43 U.S.C. 1337(b)(4).

Thus before 1978 the sale by Interior of an OCS lease might well have engaged CZMA section 307(c)(3)(B) by including express or implied federal approval of a "plan for the exploration or development of, or production from" the leased tract.

The leases in dispute here, however, were sold in 1981. By then it was quite clear that a lease sale by Interior did not involve the submission or approval of "any plan for the exploration or development of, or production from" the leased tract. Under the amended OCSLA, the purchase of a lease entitles the purchaser only to priority over other interested parties in submitting for federal approval a plan for exploration, production, or development. Actual submission and approval or disapproval of such plans occurs separately and later.

Since 1978 there have been four distinct statutory stages to developing an offshore oil well: (1) formulation of a five year leasing plan by the Department of the Interior; (2) lease sales; (3) exploration by the lessees; (4) development and production. Each stage involves separate regulatory review that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS. And each stage includes specific requirements for consultation with Congress, between federal agencies, or with the States. Formal review of consistency with state coastal management plans is expressly reserved for the last two stages.

(1) Preparation of a leasing program. The first stage of OCS planning is the creation of leasing program. Interior is required to prepare a 5-year schedule of proposed OCS lease sales. 43 U.S.C. 1344 (1976 ed., Supp. III). During the
preparation of that program Interior must solicit comments from interested federal agencies and the governors of affected states, and must respond in writing to all comments or requests received from the state governors. 43 U.S.C. 1344 (1976 ed., Supp. III). The proposed leasing program is then submitted to the President and Congress, together with comments received by the Secretary from the governor of the affected state. 43 U.S.C. 1344(d)(2) (1976 ed., Supp. III).

Plainly, prospective lease purchasers acquire no rights to explore, produce, or develop at this first stage of OCSLA planning, and consistency review provisions of CZMA section 307(c)(3)(B) are therefore not engaged. There is also no suggestion that CZMA section 307(c)(1) consistency requirements operate here, though we note that preparation and submission to Congress of the leasing program could readily be characterized as "initiat[ing] a [s]eries of [e]vents of [c]oastal [m]anagement [c]onsequence."

(2) Lease sales. The second stage of OCS planning -- the stage in dispute here -- involves the solicitation of bids and the issuance of offshore leases. 43 U.S.C. 1337(a) (1976 ed., Supp. III). Requirements of the National Environmental Protection Act and the Endangered Species Act must be met first. The governor of any affected state is given a formal opportunity to submit recommendations regarding the "size, timing, or location" of a proposed lease sale. 43 U.S.C. 1345(a) (1976 ed., Supp. III). Interior is required to accept these recommendations if it determines they strike a reasonable balance between the national interest and the well-being of the citizens of the affected state. 43 U.S.C. 1345(c) (1976 ed., Supp. III). Local governments are also permitted to submit recommendations, and the Secretary "may" accept these. 43 U.S.C. 1345(a), (c) (1976 ed., Supp. III). The Secretary may then proceed with the actual lease sale. Lease purchasers acquire the right to conduct only limited "preliminary" activities on the OCS -- geophysical and other surveys that do not involve seabed penetrations greater than 300 feet and that do not result in any significant environmental impacts. 30 CFR 250.34-1 (1982).

Again, there is no suggestion that these activities in themselves "directly affect" the coastal zone. But by purchasing a lease, lessees acquire no right to do anything more. Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production that might trigger CZMA section 307(c)(3)(B); the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.

3) Exploration. The third stage of OCS planning involves review of more extensive exploration plans submitted to Interior by lessees. 43 U.S.C. 1340 (1976 ed., Supp. III). Exploration may not proceed until an exploration plan has been approved. A lessee's plan must include a certification that the proposed activities comply with any applicable state management program developed under CZMA. OCSLA expressly provides for federal disapproval of a plan that is not consistent with an applicable state management plan unless the Secretary of Commerce finds that
the plan is consistent with CZMA goals or in the interest of national security. 43 U.S.C. 1304(c)(2) (1976 ed., Supp. III). The plan must also be disapproved if it would "probably cause serious harm or damage ... to the marine, coastal, or human environment." 43 U.S.C. 1334(a)(2)(A)(1), 1340(c)(1) (1976 ed., Supp. III). If a plan is disapproved for the latter reason, the Secretary may "cancel such lease and the lessee shall be entitled to compensation." 43 U.S.C. 1340(c)(1) (1976 ed., Supp. III).

There is, of course, no question that CZMA consistency review requirements operate here. CZMA section 307(c)(3)(B) expressly applies, and as noted, OCSLA itself refers to the applicable CZMA provision.

(4) Development and production. The fourth and final stage is development and production. 43 U.S.C. 1351 (1976 ed., Supp. III). The lessee must submit another plan to Interior. The Secretary must forward the plan to the governor of any affected state and, on request, to the local governments of affected states, for comment and review. 43 U.S.C. 1345(a), 1351(a)(3) (1976 ed., Supp. III). Again, the governor's recommendations must be accepted, and the local governments may be accepted, if they strike a reasonable balance between local and national interests. Reasons for accepting or rejecting a governor's recommendations must be communicated in writing to the governor. 43 U.S.C. 1345(c) (1976 ed., Supp. III). In addition, the development and production plan must be consistent with the applicable state coastal management program. The State can veto the plan as "inconsistent," and the veto can be overridden only by the Secretary of Commerce. 43 U.S.C. 1351(d) (1976 ed., Supp. III). A plan may also be disapproved if it would "probably cause serious harm or damage ... to the marine, coastal or human environments." 43 U.S.C. 1351(h)(1)(D)(1) (1976 ed., Supp. III). If a plan is disapproved for the latter reason, the lease may again be cancelled and the lessee is entitled to compensation. 43 U.S.C. 1351(h)(2)(C) (1976 ed., Supp. III).

Once again, the applicability of CZMA to this fourth stage of OCS planning is not in doubt. CZMA section 307(c)(3)(B) applies by its own terms, and is also expressly invoked by OCSLA.

Congress has thus taken pains to separate the various federal decisions involved in formulating a leasing program, conducting lease sales, authorizing exploration, and allowing development and production. Since 1978, the purchase of an OCS lease, standing alone, entails no right to explore, develop, or produce oil and gas resources on the OCS. The first two stages are not subject to consistency review; instead, input from State governors and local governments is solicited by the Secretary of Interior. The last two stages invite further input for governors or local governments, but also require formal consistency review. States with approved CZMA plans retain considerable authority to veto inconsistent exploration or development and production plans put forward in those latter stages. The stated reason for this four part division was to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the latter stages of OCS exploration and production.
Having examined the coordinated provisions of CZMA section 307(c)(3) and OCSLA we return to CZMA section 307(c)(1).

As we have noted, the logical paragraph to examine in connection with a lease sale is not 307(c)(1), but 307(c)(3). Nevertheless, even if OCS activity "conduct[ed]" or "support[ed]" by a federal agency, lease sales can no longer aptly be characterized as "directly affecting" the coastal zone. Since 1978 the sale of a lease grants the lessee the right to conduct only very limited, "preliminary activities" on the OCS. It does not authorize full scale exploration, development, or production. These activities may not begin until separate federal approval has been obtained, and approval may be denied on several grounds. If approval is denied, the lease may then be cancelled, with or without the payment of compensation to the lessee. In these circumstances, the possible effects on the coastal zone that may eventually result from the sale of a lease cannot be termed "direct."

It is argued, nonetheless, that a lease sale is a crucial step. Large sums of money change hands, and the sale may therefore generate momentum that makes eventual exploration, development, and production inevitable. On the other side, it is argued that consistency review at the lease sale stage is at best inefficient, and at worst impossible: Leases are sold before it is certain if, where, or how exploration will actually occur.

The choice between these two policy arguments is not ours to make; it has already been made by Congress. In the 1978 OCSLA amendments Congress decided that the better course is to postpone consistency review until the two later stages of OCS planning, and to rely on less formal input from State governors and local governments in the two earlier ones. It is not for us to negate the lengthy, detailed, and coordinated provisions of CZMA section 307(c)(3)(B), and OCSLA sections 1344-1346 and 1351, by a superficially plausible but ultimately unsupported construction of two words in CZMA section 307(c)(1).

Collaboration among state and federal agencies is certainly preferable to confrontation in or out of the courts. In view of the substantial consistency requirements imposed at the exploration, development, and production stages of OCS planning, the Department of the Interior, as well as private bidders on OCS leases, might be well advised to ensure in advance that anticipated OCS operations can be conducted harmoniously with state coastal management programs. But our review of the history of CZMA section 307(c)(1), and the coordinated structures of the amended CZMA and OCSLA, persuades us that Congress did not intend section 307(c)(1) to mandate consistency review at the lease sale stage.
Accordingly, the decision of the Court of Appeals for the
Ninth Circuit is reversed insofar as it requires petitioners to
conduct consistency review pursuant to CZMA section 307(c)(1)
before proceeding with Lease Sale No. 53.
It is so ordered.

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NOTES

1. Secretary of Interior v. California was a 5-4 decision, with
a strong dissent refuting each point of the majority’s argument.
States are having a difficult time applying the decision to
determine which federal activities are still subject to review.
What is the holding? What is dicta? Proposed revisions to
NOAA’s regulations limit changes simply to excluding OCS oil and
gas lease sales from the federal consistency requirements of
section 307(c)(1) of the CZMA.

2. Legislation that would effectively overrule Secretary of
Interior v. California was introduced in both houses of
Congress, but has not yet passed. Congressional reauthorization
of the CZMA is scheduled for 1985, and the consistency issue is
likely to be revisited at that time.

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KEAN v. WATT
13 E.L.R. 20618

Civ. No. 82-2420 (D.N.J. 1982)

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Two substantive issues remain to be resolved:
First, when the Secretary of the Interior determines under
section 307(c)(1) of the Coastal Zone Management Act whether a
proposed lease sale on the Outer Continental Shelf directly
affects a state’s coastal zone should he consider only the
effects of the preleasing activities, or is he required also to
consider the likely effects upon the coastal zone of exploration,
development and production activities which may flow from any
leases which are granted?
Second, if the Secretary is required to consider the likely
effects of exploration, development and production activities
flowing from any leases, does the potential destruction of the
tiliefish and other fish habitats on the Outer Continental Shelf,
the potential interference with fishing nets and lines on the
Outer Continental Shelf, and the consequent financial injury
inflicted on commercial activities conducted within the coastal
zone directly affect New Jersey’s coastal zone within the meaning
of Section 307(c)(1)?

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The only likely environmental effects of preleasing activities is the destruction of the forces required to produce the vast quantities of paper generated by such activities. It is no answer to say that the state will be protected by the lessees' consistency certification at various stages of the program. The states are entitled under the statute to both forms of protection -- the Secretary's review and determination of the consistency of the entire program under Section 307(c)(1) and the lessees' certification of consistency under Section 307(c)(3)(B) at the various stages of the program as it progresses.

** * * *

E. Economic Effects of Outer Continental Shelf Leases:

There are two kinds of effects upon which New Jersey relies to support its contention that the lease of the 23 tracts at issue would be inconsistent with its Coastal Zone Management Program. The principal effects upon which it relies are economic in nature and do not have a physical impact upon the natural order within the coastal zone. The tilefish habitat is in the two canyons, far beyond New Jersey's coastal zone. Similarly the areas in which fishing might be interfered with are outside the coastal zone. The fishing industry which would be affected by loss of the tilefish and interference with nets is headquartered within the coastal zone. New Jersey argues that actions affecting that industry are subject to the consistency requirements of Section 307(c)(1).

The other kind of effects of the leasing upon which New Jersey relies to establish inconsistency to take place in the coastal waters. Relying on the affidavit of Bruce L. Freeman, the State noted that summer flounder, black sea bass and scup migrate in summer periods from the Outer Continental Shelf area to waters within the coastal zone. According to the State, these fish are not denizens just of the seven tracts which the State sought to remove from the leasing program or the 16 tracts where special lease stipulations were sought. Rather, they inhabit the entire inshore edge of the warm bank of water at the upper edge of the Continental Shelf. The Freeman affidavit conceded "It is not presently known what direct biological impact the drilling operation will have upon these species." Thus the data developed to date would hardly support a finding of inconsistency based on the effect of the leasing on summer flounder, black sea bass and scup.

Thus the only significant effect upon which the State relies to establish inconsistency and which would be felt within the New Jersey coastal zone is the financial impact which a destruction of Outer Continental Shelf fish and impediments to fishing in the Outer Continental Shelf would have upon New Jersey's fishing industry. I conclude that this is not the kind of injury to which the Coastal Zone Management Act is directed.
Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. 1456(c)(1), the provision of the Act upon which New Jersey here relies, states that:

"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."

Section 304(a) and (b) of the Coastal Zone Management Act, 16 U.S.C. 1453(a) and (b) limit the "coastal zone" to the "coastal waters within the territorial jurisdiction of the United States," i.e., for New Jersey those waters within three miles of the New Jersey coast. See 15 CFR 920.2(b), part of the interpretative regulations published by the United States Department of Commerce to implement the Coastal Zone Management Act: "The [coastal] zone extends ... seawards to the three-mile limit of the U.S. territorial sea." See also N.J.A.C. 7:7B-4.3(a) defining the "ocean" segment of the New Jersey coastal zone as extending to "three nautical miles from the shoreline."

In expressing concern as to a fishery more than 60 miles offshore, New Jersey does not allege any physical impact on its coastal zone other than the possible effect (as yet not established) upon the summer flounder, black sea bass and scup.

It would be in clear conflict with the Federal Government's exercise of its jurisdiction over the Outer Continental Shelf to extend the reach of the State's Coastal Management Program to actions and effects felt exclusively in the Outer Continental Shelf area. I need not go into the question whether, as the Government contends, the subject of the protection of the tilefish and other fish which the State seeks to protect is preempted by the Fisheries Conservation and Management Act of 1976. 16 U.S.C. 1801, et seq.

A reading of the Act suggests most strongly that the protection which it is designed to afford is protection of the coastal zone's natural resources such as wetlands, flood plains, estuaries, beaches, dunes, barrier islands, coral reefs and fish and wildlife and their habitat within the coastal zone, e.g., 16 U.S.C. 1453(a). There are, of course, numerous references to the fishing industry and other commercial ventures in the Act. It is clear that these references are made in two contexts. First, these ventures are often dependent upon the success of preserving the natural resources of the coastal zone. Second, these ventures, if not properly conducted, may themselves pose a threat to the natural resources of the coastal zone. There is nothing in the Act that suggests to me that it is concerned with the economic health of a particular industry located within the coastal zone except as its economic health may be affected by management of the physical resources of the coastal zone itself.

New Jersey and the amici supporting New Jersey's position refer to certain isolated statements constituting part of the legislative history of the Coastal Zone Management Act to support their contention that the economic impact within the coastal zone should be considered in a Section 307(c)(1) determination, even
though no natural conditions in the coastal zone are affected at all. The legislative history of the 1980 reauthorization of the Coastal Zone Management Improvement Act of 1980, Public Law 96-464, 94 Stat. 2060 (1980) includes a House Report, HR Rep. No. 96-1012, 96 Congress, Second Session 34-35 (1980). There the Committee spoke in terms of a requirement of a consistency determination where a program had an "economic, geographical or social" relationship to a state coastal program. If this was intended to refer to such a relationship which did not arise out of an impact on the coastal environment, it is inconsistent with the sense of the Act itself and with the sense of other legislative history. I do not think it is controlling.

The consequence of adopting New Jersey's construction of the Act would be an extraordinary extension of the Act's reach. If each Federal action affecting an industry conducted within the coastal zone were to be subjected to a consistency determination and had to be accomplished in a way which is, to the maximum extent practicable, consistent with the state management programs, all manner of Federal actions, not just those on the Outer Continental Shelf, would be subjected to the Act's rather severe inhibitions on Federal activities. That cannot have been the intent of Congress, and I conclude that a state cannot cite an adverse effect upon a coastal industry as an inconsistency with its coastal management program unless the effect arises from some interference with the natural order within the coastal zone.

To the extent that a threatened injury to the natural environment is totally outside the coastal zone, New Jersey's objections must be made not through the mechanism of the Coastal Zone Management Act but through the procedures established by Section 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1345(a).

As described earlier in this opinion, under Section 19(a) of the Outer Continental Shelf Lands Act, the Governor of a state may submit recommendations to the Secretary regarding the size, timing or location of a proposed lease sale.

Section 19(c) provides that: "[t]he Secretary shall accept recommendations of the Governor . . . if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state." This is a much broader inquiry than is provided in the Coastal Zone Management Act. It is not enough for the Secretary to consider effects upon the natural order and to the economic well-being of persons within and without the coastal zone. However, the weight to be given to the state and national interest is very different under the two acts. Under the Coastal Zone Management Act, the state interests are given great weight, and Federal officials must conduct their activities directly affecting the coastal zone to the maximum extent practicable consistently with state management programs. Under the Outer Continental Shelf Lands Act, on the other hand, the Federal authorities are given great weight. The Secretary is given the authority to balance the Federal and state interest, and under Section 19(d) of the Act, his determination in this regard shall be final and shall not be the basis for invalidation of a
proposed lease sale in any suit, unless found to be arbitrary and capricious.

Section 19 will be available to the Governor of New Jersey prior to the lease sales scheduled for April 1983. I cannot anticipate whether additional data will be available to him before he makes his recommendations. Nor can I anticipate whether the response of the Department of the Interior will be the same as it was with respect to recommendations addressed to Lease Sale No 59 and Resale No. 2. That will have to abide the event.

F. Relief to be Granted

Summary judgment will be entered as follows:

** *

Judgment will be entered declaring that activities of the Federal agencies outside of New Jersey's coastal zone which affect commercial activities within the State's coastal zone but which do not affect the natural environment within such coastal zone do not directly affect the coastal zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act.

** *

No costs will be allowed any party.

CAPE MAY GREENE, INC. v. WARREN
698 F.2d 179 (3d 1983)

WEIS, Circuit Judge.

Finding that circumstances warranted an exception to its general prohibition against floodplain development, New Jersey granted permission for construction of dwelling units in a seaside community. The federal Environmental Protection Agency later agreed to grant funds for the construction of an indispensable sewage treatment plant in the area, but only on the condition that no hookups be permitted to the proposed residences. In view of the record in this case and because Congress has encouraged state and local regulation of coastal areas, we conclude that EPA acted arbitrarily in imposing the hookup restriction in defiance of the state and local action. Accordingly, we vacate the judgment entered in favor of EPA and remand for further proceedings.

Plaintiff Cape May Greene, Inc. sought injunctive and declaratory relief against the restrictive condition, but the district court denied relief and entered summary judgment against plaintiff. Other claims against non-federal defendants and cross-claims were ultimately terminated, and plaintiff appeals.

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In 1979, the plaintiff developer applied to the New Jersey Department of Environmental Protection for a permit to construct 264 residential units in tract A. The state agency reviewed the developer's proposal in accordance with the Coastal Area Facility Review Act, N.J. STAT. ANN. sections 13.19-1 to -21 (West 1979 & Supp. 1982). That Act, which is the New Jersey management plan for regulation of the coastal area, had been approved by the federal government pursuant to the Coastal Zone Management Act of 1972, 16 U.S.C. 1451-1464 (1976 & Supp. IV 1980). The New Jersey agency reviewed such factors as flood hazard possibilities, air and water quality, traffic volume, road access, and the effect on environmentally sensitive areas. In 1980, a permit was approved, conditioned on the availability of sewage hookups to the housing units.

As the New Jersey agency was aware, the developer expected that a proposed regional sewage disposal plant would service the new housing. The treatment plant had been under consideration for some years, but the federal EPA had indicated it might restrict sewer connections to the plant.

The existing waste water treatment plant is owned and operated by the City of Cape May. Constructed in 1958, it has a capacity of 3.0 m.g.d. The plant is unsatisfactory because of the high level of pollutants it discharges Into Delaware Bay. The need to improve the plant's efficiency became apparent in the summer of 1975 when the beaches in this resort area had to be closed because of pollution. In the following year, the New Jersey Department of Environmental Protection imposed a ban on any further hookups to the plant. The ban was lifted in November 1978 after plans to rehabilitate the facility were undertaken.

The Cape May County Municipal Utilities Authority proposed to construct a new, more efficient and slightly larger (3.2 m.g.d.) system on the site of the existing plant and applied to EPA for a matching funds grant. EPA is authorized to grant funds for the construction of sewage facilities under the Water Pollution Control (Clean Water) Act, 33 U.S.C. 1251-1376 (1976 & Supp. IV 1980).

In October 1978, EPA informed the Authority that it would fund a disposal plant whose capacity could service the existing population and projected growth in the area, but not any development within the floodplain or environmentally sensitive areas of the Cape May region.

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After extensive consultations with the affected municipalities, the Authority submitted an amendment to the disposal plant plan in January 1980 and supplemented it in April of that year. In brief, the Authority's proposal excluded sewer hookups in environmentally sensitive areas, such as beaches, dune complexes, intermittent stream corridors, bogs, and fresh water wetlands. These areas had already been designated by the state coastal management plan as prohibited for development. Although, with the exception of wetlands, the state plan applied only to housing projects consisting of 25 or more units, the Authority's
proposal would extend the ban on hookups to individual lots as well.

In addition, the prohibition against hookups would be extended to critical wetland and upland habitat areas, consistent with local plans and the state coastal management program. The net result would be that any new construction in the region would be forced to take place within or adjacent to areas that were previously developed and already had available the infrastructure for transmission of waste water to the disposal plant. With respect to tracts A and B, the Authority pointed out that the value of the store, sanitary and water service infrastructure in place was approximately $1,423,000. Moreover, both of these tracts had been identified as development areas in the Cape May County comprehensive plan and the state’s Coastal Zone Management Plan.

* * *

In a published report of its Cape May environmental review, EPA stated it would take steps to designate the critical and floodplain areas as unsuitable for septic tanks. It also stated, "EPA will deny permits for any package treatment plant that is proposed to serve development that is delineated as "nonsewerable" in the approved 201 facilities plan." Thus, the agency announced its intention to ban, not only sewer hookups, but any other means of waste water disposal as well.

The developer then asked the district court to declare the restrictive condition void as beyond EPA’s authority, and to prohibit the Authority from agreeing to the grant condition. The district court, however, granted summary judgment in favor of EPA, finding the grant condition to be reasonable and in accordance with the agency’s authority. The court read Executive Order 11,988, 42 Fed. Reg. 26951, reprinted in 42 U.S.C. 4321 app. at 320 (Supp. IV 1980), as exhorting EPA to minimize floodplain development as far as possible and to supply the necessary authorization for the grant condition.

* * *

II


EPA asserts that the grant condition was reasonable and that its authority extends to deterrence of development in floodplains. It argues that its action is within the scope of
Executive Order 11,988, and a federal environmental standard more demanding than one adopted by a state in its management plan may be enforced.

The parties' arguments are wide ranging, and it is helpful to narrow the issues to those presented in the case. There is no dispute about environmentally sensitive sites such as sand dunes, bogs, marshes, wetlands, or wildlife habitats. All areas of the dissection in the Cape May region are already protected by the local and state land use plans, and no objection is raised to incorporating sewer restrictions for these places into the grant conditions. The controversy is limited to the restriction as applied to floodplain locations whose sole function is said to be storage of flood waters and wave energy dissipation. No plant, animal or marine life, or other ecological considerations, are advanced as additional values which must be considered with respect to tracts A and B.

In addition, the need to improve the efficiency of the existing sewage disposal plant has existed for years and that circumstance is unrelated to the floodplain. The current pollution problem must be alleviated, even apart from whether development takes place in the parcels at issue.

Narrowing the matter even more are the facts that state and local plans have previously found that disputed area suitable for development, and that sewers and water lines are adjacent to the tracts and available for service. Further, local building restrictions mandate compliance with federal flood protection insurance standards. In short, the local and state governments would allow some regulated development in tracts A and B. EPA would allow none because its prohibition against sewer hookups is as effective a ban against residential building as can be devised, particularly when considered in conjunction with its announced policy that no septic tanks or package treatment systems will be allowed in the area.

EPA does not contend that the resulting land use control is simply an unavoidable by-product of the grant condition. Rather, it has openly stated that its aim is to prohibit housing the floodplain. Nor does EPA argue that the restriction is needed to insure the efficiency of the sewage plant. Thus, the agency has reversed its earlier view that land use controls must come from the state and local governments, and has asserted authority that it previously disclaimed.

It is also clear that EPA is using its power to regulate grants under the Clean Water Act to accomplish matters not included in that statute. Although it also cites the National Environmental Policy Act, the agency relies primarily on the Executive Order to support its action. Essentially, the conflict here centers on federal agency action not explicitly required by statute and contrary to state and local legislation in a field where congressional intervention has been hesitant and tentative.

Land use planning has traditionally been considered a matter of local concern and Congress has not been hospitable to demands that it preempt the field. See Bidderman v. Morton, 497 F.2d 1141, 1144 [6 ERC 1639] (2d Cir. 1974). (In enacting the Fire Island National Seashore Act, 16 U.S.C. 459(e) (1976 & Supp. V 1981), "Congress carefully avoided interfering with the power of
the municipalities on the Seashore to enact zoning ordinances or grant zoning variances." In 1972, Congress did tentatively touch a toe in the water when the Coastal Zone Management Act was passed. Although the statute is designed to incorporate national environmental policies into land use decisions, the approach is one of encouragement, rather than mandate.

The legislative history of the Coastal Zone Management Act is emphatic in stating this guideline:

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


State participation in the program is voluntary. Funding is offered for the preparation and implementation of state plans which meet federal approval. These plans must incorporate designated policy interests, but are administered by the states and it is they who make the development and local use decisions.

New Jersey's plan was submitted to and approved by the federal government. See 45 Fed. Reg. 71640 (Oct. 29, 1980); 43 Fed. Reg. 51829 (Nov. 7, 1978). The state, therefore, has accepted the congressional invitation to regulate coastal areas with due regard for national policies. The management plan, as defined by the statute, is to set forth "objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone." 16 U.S.C. 1453(g)(1). The Act provides that it shall not supersede, modify or repeal existing laws, id. 1456(e)(2), but also states 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." Id. 1456(e)(1).

1. (10) The 1980 amendments to the Coastal Zone Management Act state that the management plan should include provisions for the protection of floodplains and minimizing the loss of life or property caused by "improper development in flood-prone areas." 16 U.S.C. 1452(2)(A), (B). The House Committee Report emphasized that this clarification of national policy did not represent a new program requirement. *** The approved New Jersey plan has incorporated the protection of floodplain areas as one of its policies for coastal management.
The role assigned to EPA by the Clean Water Act, 33 U.S.C. 1251-1376, is to reduce the discharge of pollutants into the nation's waterways and coastal areas. In carrying out that task, EPA is authorized to grant funds for the construction of sewage treatment plants. In addition to this direct and primary obligation, EPA asserts a secondary or indirect role, along with other federal agencies, in the protection of the environment under the National Environmental Policy Act, 42 U.S.C. 4321-4370, and Executive Order 11,988.

The purpose of the National Environmental Policy Act is to "provid[e] a statement of national environmental goals, policies, and procedures," and to impose on federal agencies a responsibility to consider the consequences of their actions on the environment. Sen. Rep. No. 296, 91st Cong., 1st Sess. 14. All agencies of the federal government are required to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." 42 U.S.C. 4332(2)(B) (emphasis added).


Thus, the National Environmental Policy Act provides little, if any, support for an agency taking substantive action beyond that set forth in its enabling act. EPA's reliance on the National Environmental Policy Act is general. Because it has authority under the Clean Water Act to condition grants and NEPA mandates a consideration of environmental effects, EPA argues that it can condition funding for sewage plants on terms designed to avert environmental consequences that pose risks to human health and safety. The agency does not contend, indeed it could not in light of the statute's "essentially procedural" nature, that the Act dictates any particular substantive policy authorizing EPA to impose land use controls or ban floodplain development.

The other ground on which EPA relies is Executive Order 11,988, issued on May 25, 1977, in part "to avoid the direct or indirect support of floodplain development whenever there is a practicable alternative." 42 Fed. Reg. 26951. The order was based on the National Environmental Policy Act, the National Flood Insurance Act of 1968, 42 U.S.C. 4001-4128, and the Flood Disaster Act of 1973, Pub. L. 95-128, 91 Stat. 1144, 1145, codified at 42 U.S.C. 4003, 4106 (Supp. IV 1980). The order was prompted to some extent by the unsatisfactory federal experience with losses under the Flood Insurance Programs. In addition, federal agencies had not properly observed flood protection precautions for their own installations despite the fact that these measures had been required for state and nongovernmental structures.

Executive Order 11,988 was designed to apply to federal facilities, as well as those constructed for other entities through the use of federal funds. Essentially, the Order requires federal agencies to avoid taking action in a floodplain whenever there is a practicable alternative and to minimize the harm to floodplains that might be caused by any agency action.

Two aspects of this case touch on floodplain policy. The sewage plant itself is to be located in the floodplain for reasons of economy. The existing plant is there and some of its structures are to be integrated into the new facility. Largely for that reason, EPA concluded that other sites would not be practical alternatives and decided that an exception to its ban on action within the floodplain was appropriate.

The second aspect is only peripheral to the plant itself and that is the prohibition on hookups to the proposed residences within the floodplain. EPA's ban was not directed at the operator of the sewage plant or its appurtenances, but rather to customers who would be serviced by the plant -- people who are not directly subject to EPA authority. The agency persisted in its position, even though the state plan required developers to comply with federal flood insurance protection standards, thus reducing the government's loss exposure, one of the principal objects of the Executive Order. Not satisfied with the state's limitations, however, EPA went further and adopted a zero growth approach, the ultimate in minimization. Congress has never taken such a drastic step in regulating overall floodplain development.
When Congress did act with respect to specific regions, the coastal barrier areas, it made its position absolutely clear. 2/

We do not meet the issue in this case of whether EPA lacked all authority to take the action it did, but decide the case on a narrower ground. 3/ Our brief review of the National Environmental Policy Act and the Executive Order authority relied on by EPA is but a backdrop to our consideration of whether EPA’s action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A)(1976).

The Supreme Court has stated that "[i]t is make this finding the court must consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 [2 ERC 1250] (1971). Yet, "the concept of "arbitrary and capricious" review defies generalized application and demands instead, close attention to the nature of the particular problem faced by the agency." Natural Resources Defense Council, Inc. v. Securities Exchange Commission, 606 F.2d 1031, 1050 [13 ERC 1321] (D.C. Cir. 1979). Thus, the scope of judicial review necessarily admits of some flexibility and the stringency of our inquiry will depend on, and often vary according to, the variety of factors presented by a particular case.

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2. (14) The Coastal Barriers Resource Act, Pub. L. No. 97-348, 96 Stat. 1653 (approved Oct. 18, 1982) establishes the coastal barrier resources system, consisting of bay barriers, tombolos, barrier spits, and barrier islands within specified areas of the Atlantic and Gulf coasts. Further federal assistance, with certain limited exceptions, for development within or access to those areas is banned. The Act also prohibits flood insurance for any new construction or substantial improvements of structures within the system after October 1, 1983. The stated purpose of the legislation is "to minimize the loss of human life, wasteful expenditure of federal revenues, and the damage to fish, wildlife, and other natural resources ... by restricting future federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers." Id. section 2(b). This statute demonstrates that when Congress intends to adopt a zero growth approach for an area by withdrawing all financial incentive to development, it does so expressly. Congress has never taken such an approach to floodplain development generally.

3. (15) In City of New Brunswick v. Borough of Milltown, 686 F.2d 120 (3d Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3321 (1982)(No. 82-662), we held that EPA has authority to withhold federal grant funds for a sewage plant because one of the municipalities to be serviced by the plant had not adopted a system of user’s charges as required by the Clean Water Act. *** The EPA action there was based upon an express provision of the Clean Water Act ... Hence, unlike here, EPA’s action was directly related to its primary obligation under the statute.
If an agency’s action is clearly within its statutory authority, then the arbitrary and capricious standard focuses on the factual issues. When, however, there is some doubt about the agency’s compliance with statutory constraints, that factor may throw a somewhat different light on the factual evaluation. As agency action moves toward the gray area at the outer limits of statutory authority, the arbitrary and capricious nature of the action may be more evident. For that reason, we have discussed the agency’s asserted sources of power. Another shadow is cast when agency action, not clearly mandated by the agency’s statute, begins to encroach on congressional policies expressed elsewhere.

We conclude that there are a number of factors which demonstrate that the EPA action was arbitrary. The most obvious is the agency’s failure to give sufficient weight to the congressional admonition in the Coastal Zone Management Act that, to the “maximum extent practicable,” federal actions are to be consistent with the state’s management plan.

EPA contends that “the consistency requirement of the statute only contemplates that federal agencies will not support activities in the coastal zone which are prohibited by the state’s plan.” (Appellee’s Brief at 31). In essence, EPA is arguing, not that its action is consistent, but that the consistency requirement does not apply to its action since rather than allowing prohibited development, it seeks to prohibit allowed development. EPA also points out that a request by the New Jersey Department of Environmental Protection for mediation of the dispute resulting from EPA’s action was denied by the Secretary of Commerce. See 16 U.S.C. 1456(h).

The Secretary’s decision to deny mediation and EPA’s argument here both rest on a regulation promulgated by the National Oceanic and Atmospheric Administration, the federal agency charged with administering the Coastal Zone Management Act. That regulation reads:

“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 (e.g., restrict project development or design alternatives notwithstanding permissive management program policies) . . . .”


The regulation is contained in Subpart C of NOAA’s regulations on “Federal Consistency with Approved Coastal Management Programs.” Subpart C deals with “Consistency for Federal Activities.” The regulations expressly provide that “[t]he term ‘federal activity’ does not include . . . the granting of Federal assistance to an applicant agency (see Subpart F of this part).” Id. 930.31(c).

It is Subpart F, which deals with “Consistency for Federal Assistance to State and Local Governments, that is pertinent to EPA’s action here and that section contains no counterpart to the regulation cited by EPA. Subpart F states that “[n]otwithstanding State agency consistency for the proposed project, the Federal agency may deny assistance to the applicant agency.” Id. 930.96(a). The regulations thus make a distinction
between "federal activity" and "federal assistance to a non-
federal activity."

When federal assistance is provided for what is essentially a state or local activity, the congressional preference for having policies initiated at the state level must be respected. Consistency to the maximum extent practicable with the state's determination is at the heart of the statutory scheme of encouraging, but not directing, state management of the coastal areas. The congressionally mandated consistency requirement becomes even more compelling where, as here, the federal agency seeks to reach beyond the local activity it is funding and impose a federal standard on private activity traditionally subject only to state and local regulation. In short, the inconsistency of EPA's action with the state's plan is a factor to be considered in determining whether that action was arbitrary.

EPA should not have defied the state's decision to allow development in the limited areas of the floodplain at issue here. The same national interest in floodplains that EPA purports to uphold has been incorporated into the New Jersey coastal management plan. In compliance with the directive of the Coastal Zone Management Act that "[t]he management program provide [ ] for adequate consideration of the national interest involved in the siting of facilities," 42 U.S.C. 1455(c)(8), New Jersey adopted a policy that "[i]n general, coastal development is discouraged in flood-hazard areas." State of New Jersey Coastal Management Program — Bay and Ocean Segment (FEIS), Part II, Chap. 4, Sec. 5.232(a) at 161 (effective September, 1978). That policy was based on a review of the Flood Disaster Protection Act, the National Flood Insurance Act and Executive Order 11,988 and a recognition that "the national interest in these areas is to avoid the long and short term adverse impacts associated with the occupancy and modification of floodplains." Id., Chap. 6 at 190.

The developer's proposal for development of Tract A was approved as an exception to the general policy because all structures would be elevated one foot above the base flood level and would not increase flood damage potential by obstructing flood waters. Thus, the state had not acted irresponsibly.

In addition, the state decision to allow development in tract A was based to some extent on a local need to encourage building close to other developed areas, rather than at scattered sites away from the population center or near environmentally sensitive areas. In essence, this was simply "fill in" on a somewhat larger scale than EPA proposed. The difference between the EPA position and the state plan in this respect was of degree. EPA wished to limit "fill in" to lots of 3.4 acres; the state plan looked to a larger area.

A related economic concern of the local municipality was its investment of over a million dollars in roads, sewers and water mains to the area. The plan to use the existing infrastructure is tied in with the local government's aversion to scattered site development in areas where no such facilities had been constructed.

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Under the EPA restrictions, houses may be built on lots that are at an elevation of more than 10 feet above mean sea level. These lots comprise 7.7 acres in tract A and 22 acres in tract B. The record reveals no efforts by EPA to have serious discussions about the concept of cluster zoning in the area, which would allow development but at the same time reduce the number of structures on land lower than 10 feet above sea level.

We note also that EPA's assertion that the tracts under scrutiny would provide flood water storage and wave energy dissipation have been sharply attacked and have little record support.

It is significant also that the compromise plan which the Authority submitted to the EPA provided for a tightening of local control. Although the provisions of the coastal management plan apply to development of 25 or more lots, the Authority proposed to extend the restrictions to individual lots. Thus, the building limitations which had previously been applicable only to large developments would be applied to all.

When passing the Coastal Zone Management Act, Congress was cognizant of the valuable contribution local governments can make to responsible management of the coastal areas.

"Local government does have continuing authority and responsibility in the coastal zone. *** Whenever local government has taken the initiative to prepare commercial plans and programs which fulfill the requirements of the Federal and coastal state zone management legislation, such local plans and programs should be allowed to continue to function under the state management program."


After weighing all the factors, we are persuaded that EPA acted arbitrarily and contrary to law in refusing to accept the Authority's compromise. That proposal was fully in accord with the state's management plan and the Coastal Zone Management Act. Even if it be conceded that EPA had the power to enforce the land use restriction, a question we do not decide, the agency's action was in excess of that required under the circumstances.

We recognize the legitimate interest in limiting development of floodplains and that, under other circumstances, EPA's actions might be sustainable. But the circumstances here lead us to hold that the district court erred in entering judgment for the defendants.
NOTES

1. Florida is in the process of determining just how powerful a management tool the consistency requirement can be. Florida is challenging a federal fishery management plan that allows use of purse seine; Florida regulation is stricter than the federal plan and prohibits purse seining. See Florida v. Baldridge, Civ. No. TCA 83-7071-WS (filed March 4, 1983, N.D. Fl.). Florida has challenged offshore lease sales in both the Atlantic and Gulf as inconsistent with Florida’s coastal plan. EPA ocean dumping site designations that threaten water quality and endanger coral reefs, as well as federal highway projects that will destroy wetlands and interfere with growth management planning have been the subjects of negotiations concerning federal consistency with the state coastal plan. Projects for the ocean incineration of hazardous wastes may also be attacked as inconsistent with the state’s plan.

2. The term “directly affects” is not the only term limiting application of the consistency requirement to federal activities. What does “to the maximum extent practicable” mean? NOAA regulations currently define the phrase as follows:

Section 930.32 Consistent to the maximum extent practicable.
   (a) The term “consistent to the maximum extent practicable” describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency’s operations. If a Federal agency asserts that compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency’s discretion to comply with the provisions of the management program.

3. Is there a “positive” obligation on federal agencies to support activities authorized under a state’s coastal plan as well as a “negative” duty not to participate in activities that are inconsistent with the state plan? Although federal regulations attempt to preclude such an application of the consistency regulations, Cape May Greene could certainly be read as requiring “positive” federal consistency in relation to local land use decisions. See Blumm, Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency, 5 Colum. J. Envtl. L. 69 (1978).

4. Consistency determinations are difficult in Florida where the effect of an activity on 25 different statutes must be analyzed. The Governor’s Office serves as a clearinghouse for consistency review. See the diagram below.
FLORIDA'S INTERGOVERNMENTAL COORDINATION & REVIEW PROCESS

State ICAR Clearinghouse
Gov's Office

Non State agency
Project reviews

State Agency
Project reviews

Selected Projects to Policy Analysis
State Agencies
Other Regional Agencies

Selected Projects & State Plans to Policy Analysis

Resource Allocations
Inspector General
State Agencies
Other Regional & Local Agencies

SCH Convenes Conference as Needed

SCH Prepares Final Review & Comment

Applicant
Federal Agency

Director, Office of Planning and Budgeting

Regional Clearinghouses

Reviews

Conferences

RPC Action

Regional Clearinghouse Prepares Review & Comment

Applicant
Federal Agency
5. Consider the effect the following section of the Florida Coastal Management Act has on state consistency determinations.

Fla. Stat. 380.23 Federal consistency.-

(1) When an activity requires a permit or license subject to federal consistency review, the issuance or renewal of a state license shall automatically constitute the state's concurrence that the licensed activity or use, as licensed, is consistent with the federally approved program. When an activity requires a permit or license subject to federal consistency review, the denial of a state license shall automatically constitute the state's finding that the proposed activity or use is not consistent with the state's federally approved program, unless the United States Secretary of Commerce determines that such activity or use is in the national interest as provided in the Federal Coastal Zone Management Act of 1972.

(2) Where federal licenses, permits, activities, and projects listed in subsection (3) are subject to federal consistency review and are seaward of the jurisdiction of the state, or there is no state agency with sole jurisdiction, the Department of Environmental Regulation shall be responsible for the consistency review and determination; however, the department shall not make a determination that the license, permit, activity, or project is consistent if any other state agency with significant analogous responsibility makes a determination of inconsistency. All decisions and determinations under this subsection shall be appealable to the Governor and Cabinet.

(3) Consistency review shall be limited to review of the following activities, uses, and projects to ensure that such activities and uses are conducted in accordance with the state's coastal management program:

(a) Federal development projects and activities of federal agencies which significantly affect coastal waters and the adjacent shorelands of the state.

(b) Federal assistance projects which significantly affect coastal waters and the adjacent shorelands of the state and which are reviewed as part of the review process developed pursuant to OMB Circular A-95.

(c) Federally licensed or permitted activities affecting land or water uses when such activities are in or seaward of the jurisdiction of local governments required to develop a coastal zone protection element as provided in s. 380.24 and when such activities involve:

1. Permits required under ss. 10 and 11 of the Rivers and Harbors Act of 1899, as amended.

2. Permits required under s. 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.

3. Permits required under ss. 201, 402, 403, 404, and 405 of the Federal Water Pollution Control Act of 1972, as amended, unless such permitting activities pursuant to such sections have been delegated to the state pursuant to said act.

4. Permits required under the Marine Protection, Research and Sanctuaries Act of 1972, as amended, 33 U.S.C. ss. 1401,
5. Permits for the construction of bridges and causeways in navigable waters required pursuant to 33 U.S.C. s. 401, as amended.

6. Permits relating to the transportation of hazardous substance materials or transportation and dumping which are issued pursuant to the Hazardous Materials Transportation Act, 49 U.S.C. ss. 1801-1812, as amended, or 33 U.S.C. s. 419, as amended.

7. Permits and licenses required under 43 U.S.C. s. 717 for construction and operation of interstate gas pipelines and storage facilities.


9. Permits and licenses required for the siting and construction of any new electrical power plants as defined in s. 403.503(7), as amended.

10. Permits and licenses required for drilling and mining on public lands.

11. Permits for areas leased under the OCS Lands Act, as amended, including leases and approvals under 43 U.S.C. s. 1331, as amended, of exploration, development, and production plans.

12. Permits for pipeline rights of way for oil and gas transmissions.


(4) The department shall by rule adopt procedures for the expeditious handling of emergency repairs to existing facilities for which consistency review is required pursuant to subsections (1), (2), and (3).

(5) In any coastal management program submitted to the appropriate federal agency for its approval pursuant to this act, the department shall specifically waive its right to determine the consistency with the coastal management program of all federally licensed or permitted activities not specifically listed in subsection (3).

(6) Agencies shall not review for federal consistency purposes an application for a federally licensed or permitted activity if the activity is vested, exempted, or excepted under its own regulatory authority.

(7) The department shall review the items listed in subsection (3) to determine if in certain circumstances such items would constitute minor permit activities. If the department determines that the list contains minor permit activities, it may by rule establish a program of general concurrence pursuant to federal regulation which shall allow similar minor activities, in the same geographic area, to proceed without prior department review for federal consistency.

(8) This section shall not apply to the review of federally licensed or permitted activities for which permit applications are filed with the appropriate federal agency prior to approval of the state coastal management program by the appropriate federal agency pursuant to 16 U.S.C. ss. 1451 et seq.

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