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FEDERALISM IN THE COASTAL ZONE: THREE MODELS OF STATE JURISDICTION AND CONTROL

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In the last decade both the government and the public have come to recognize fully the great importance of the nation's coastal and marine resources. A major result of this realization has been a vastly increased federal role in coastal and offshore areas, illustrated by federal legislation in the principal substantive areas of coastal zone lands and waters,¹ coastal fisheries,² marine mammals,³ marine pollution and ocean dumping,⁴ outer continental shelf oil, gas and mineral resources,⁵ and deep water port development.⁶ This spate of federal activity and assertion of jurisdiction might lead one to assume that the power of the states over coastal resources has radically diminished and that federalism in this context is dead. The thesis of this article is that, paradoxically, new avenues of state assertion of authority have opened and federalism is alive and well in the coastal zone. The states must act, however, to take full advantage of the new opportunities that are presented; a default by the states of their responsibilities will result in unnecessary abdication to federal control.

The purpose of this article is to provide a guide through the maze of problems relating to federal-state authority in order to show how a coastal state may maximize its role in the management of coastal and

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offshore resources. Three principal models of state jurisdiction and control are distinguished and analyzed. First, a coastal state may exercise its authority directly through a grant of power under federal law. Second, state power may be asserted by virtue of a right to control federal activities in the coastal area. Third, coastal state police power may be exercised within the framework of federal law.

I. FEDERAL GRANTS OF AUTHORITY TO THE STATES

Under the United States Constitution, the federal government's authority over coastal and marine resources is clearly paramount. In United States v. California, the Supreme Court held that the ownership, control and protection of the three mile belt beyond the low water mark is a function of national sovereignty. In addition, Congress has broad powers to enact legislation affecting these resources because of its delegated powers, especially under the commerce clause of the Constitution. But Congress has chosen to exercise this power in certain instances by making direct grants of power to the states under federal law. This pattern of federalism is evident in two principal subject areas: outer continental shelf resources and water pollution control.

A. Outer Continental Shelf Resources

In 1953 Congress passed the Submerged Lands Act, which ceded to coastal states title to the resources and lands beneath the navigable waters within their boundaries. The delimitation of the baseline and the seaward boundary of this grant kept the United States Supreme Court busy for the next twenty-five years, but it is now clear that the limit of state coastal jurisdiction is three geographical miles, except in the case of Texas and Florida, which enjoy proprietary rights in the Gulf of Mexico extending three marine leagues (nine geographical miles). Although power over navigation, commerce and international

8. U.S. CONST. art. I, § 8, cl. 3.

As indicated in the text, the Submerged Lands Act has generated more than its share of controversy. Part of the problem has been that the Act does not specify how a state's baseline should be drawn, nor which bodies of water may qualify as "inland waters." These questions were partially resolved in United States v. California, 381 U.S. 139 (1965), in which the Supreme Court adopted, for purposes of the Act, definitions employed by the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S.
affairs was specifically retained by the United States, the grant to the states is quite broad, including the mineral, fishery and plant resources of the seabed and water column.11

In 1976, when Congress passed the Fishery Conservation and Management Act, which extended fisheries management jurisdiction to 200 miles seaward of the coastal baseline, state control over the fishery within the three mile zone was retained.12 Thus states will continue to manage fisheries in the territorial sea subject to constitutional restraints,13 preemption by inconsistent federal law,14 and the possibility of federal override of state jurisdiction by the Secretary of Commerce in the case of fish stocks found predominantly within the 197 mile zone seaward of state jurisdiction.15 Furthermore, the United States Supreme Court, in Douglas v. Seacoast Products, Inc.,16 held that, despite the language of the Submerged Lands Act,17 the doctrine that a state "owns" wildlife resources within its boundary may not be taken literally; nonetheless, this doctrine does grant a state special power to preserve and regulate the exploitation of these resources.18

Even beyond the three mile band of state jurisdiction, within the


13. See, e.g., Toomer v. Witsell, 334 U.S. 385 (1948) (state statute requiring nonresidents to pay $2,500 fishing license fee and residents only $25 violated privileges and immunities clause of Constitution).
15. Section 306(b) of the Fishery Conservation and Management Act provides that the Secretary of Commerce may regulate a fishery within state territorial waters in cases in which the state's acts or omissions "substantially and adversely affect" fishery management in the federal 197 mile zone. 16 U.S.C. § 1856(b) (1976). No override is possible, however, when the fishery in question operates predominantly within state waters. Whether this exception should be corrected by additional legislation is a subject of current debate. See, e.g., S. 2265, 95th Cong., 1st Sess., 123 Cong. Rec. S.18,244 (daily ed. Oct. 31, 1977), providing for direct federal regulation of fisheries in state territorial and internal waters.
18. 431 U.S. at 284. See also Baldwin v. Fish & Game Comm'n, 98 S. Ct. 1852 (1978), which held that the efforts of Montana to allocate access to "recreational" hunting through a differential licensing scheme were "rationally" related to the state's substantial interest in the preservation of finite resources and violated neither the equal protection clause nor the privileges and immunities clause of the Constitution.
area of the outer continental shelf under federal control, the states may exercise substantial power and influence. Under the Outer Continental Shelf Lands Act, the civil and criminal laws of the United States, including laws of the adjacent states, are extended to the subsoil, seabed, artificial islands and fixed structures, to the limit of federal jurisdiction over the outer continental shelf. In *Rodrigue v. Aetna Casualty Co.*, the United States Supreme Court relied on this provision to hold that Louisiana state law was applicable in an action for wrongful death brought by the families of two men killed on a drilling rig located on the continental shelf more than three miles from the Louisiana coast. The Court reasoned that the Outer Continental Shelf Lands Act adopts adjacent state law as "surrogate federal law" whenever it has not been supplanted by inconsistent federal law or regulation. The relevant state law is to be applied by federal authorities and is enforceable in the federal courts as if the areas in question were federal enclaves in a landlocked state. The implications of this doctrine have not generally been recognized by coastal states: since many areas of law are not addressed by federal legislation, the bulk of state law would not be preempted. Another mechanism for the exercise of federalism in the area of the outer continental shelf that is beyond state jurisdiction is found when the states are given shared power of decisionmaking under applicable federal law. Under the Deepwater Ports Act of 1974, which provides a framework for licensing construction of deepwater ports beyond the three mile zone, adjacent coastal states are given the power to veto a decision by the Secretary of Transportation to issue a license for

21. The Court concluded that federal admiralty jurisdiction is not applicable to artificial islands or drilling structures on the continental shelf. Id. at 360-61, 363, 366. Section 19 of the Deepwater Ports Act, which provides that state law shall apply to deepwater ports "to the extent applicable and not inconsistent with" federal laws and regulations, also embraces this concept. See 33 U.S.C. § 1518 (1970).
22. State implementation plans to control emissions of pollutants under the Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (West Supp. 1977), would be enforceable by federal authorities under this theory. House and Senate Conferences working on proposed amendments to the Outer Continental Shelf Lands Act have agreed upon language that would require the Secretary of the Interior to promulgate regulations for Outer Continental Shelf compliance with Air Act standards, but not the statutory requirements. [1978] ENVIR. REP. (BNA) Current Devs. 310 (June 23, 1978). The Environmental Protection Agency has recently determined that Exxon Corporation's proposed installation of an offshore storage and treatment facility on the outer continental shelf off the coast of Santa Barbara County, California, is subject to Clean Air Act requirements. 43 Fed. Reg. 16,393 (1978).
such a port.\textsuperscript{24} Other instances of federal grants of shared decisionmaking are less far-reaching. For example, under the Fishery Conservation and Management Act of 1976,\textsuperscript{25} state participation in the formulation of fisheries management plans in the 197 mile Federal Fishery Conservation Zone is assured through state representation on the regional councils created by the Act, but the Secretary of Commerce has final approval power over the management plans.\textsuperscript{26}

A major issue has been the extent of state participation in decisions by the Secretary of the Interior to lease and to permit development and production of the oil and gas resources of the outer continental shelf beyond state jurisdiction. The Outer Continental Shelf Lands Act is devoid of any mechanism for shared state decisionmaking, and participation by the states has been only through informal advisory committees created by the Secretary of the Interior.\textsuperscript{27} Several states have sought unsuccessfully to assert a veto power over lease sales by bringing suit under the National Environmental Policy Act.\textsuperscript{28} Although injunctions of lease sales were granted in several instances by lower federal courts, all were ultimately reversed on appeal.\textsuperscript{29} Recent amendments to the Outer Continental Shelf Lands Act do formalize a procedure of federal consultation with affected states regarding the size, timing, or location of proposed development and production plans, but the states essentially remain in an advisory role.\textsuperscript{30}

\textsuperscript{24} Id. § 1508. An analogous veto provision is contained in title III of the Marine Protection, Research, and Sanctuaries Act (MPRSA), 16 U.S.C. §§ 1431-1434 (1976), which provides that the governor of a state may veto the proposed designation of a federal marine sanctuary that would embrace waters within the state's three mile limit. 16 U.S.C. § 1432(b) (1976).


\textsuperscript{26} Id. §§ 1852(b)(1), 1854(a).

\textsuperscript{27} Rules and regulations pertaining to advisory committees utilized by the Department of the Interior may be found at 43 C.F.R. § 1784 (1976). For a general critique of the issue of state participation in outer continental shelf resource development, see Breeden, \textit{Federalism and the Development of Outer Continental Shelf Mineral Resources}, 28 STAN. L. REv. 1107 (1976).

\textsuperscript{28} National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1970). NEPA requires preparation of a detailed environmental impact statement for any "major federal actions significantly affecting the quality of the human environment." \textit{Id.} § 4332(2)(C). An impact statement for a lease sale could be challenged on the sufficiency of its anticipation of the range and magnitude of the onshore and offshore impacts of the project.


\textsuperscript{30} The Outer Continental Shelf Lands Act Amendments of 1978, S. 9, 95th Cong., 2d Sess.,
B. Water Pollution Control Activities in the Coastal Zone

The Federal Water Pollution Control Act (FWPCA)\(^{31}\) has long recognized the basic responsibility of the states for the control of water quality within their jurisdictions. States are granted the authority under this Act for waste treatment facilities and area-wide waste management,\(^{32}\) to adopt water quality standards subject to the approval of the Environmental Protection Agency,\(^{33}\) and to apply for and receive approval to administer the National Pollutant Discharge Elimination System for enforcing effluent limitations and water quality standards.\(^{34}\)

The section 404 permit program\(^{35}\) of the FWPCA was a significant exception to this pattern of broad delegation of federal authority to the states. This program was created as a result of a court decree\(^{36}\) accepting the argument of environmentalists that the term "navigable waters" in the FWPCA\(^{37}\) referred not just to bodies of water that were historically used for navigation or were capable by artificial means of being made navigable, but referred, in accordance with the literal language of the Act, to all "waters of the United States."\(^{38}\) This expanded definition of navigable waters effectively extended the jurisdiction of the FWPCA to include mangrove wetland areas above mean high tide\(^{39}\) and coastal wetland areas characterized by brackish-water-dependent vegetation, even though they might be inundated by the tides.

\(^{124}\) CONG. REC. S.13,998 (daily ed. Aug. 22, 1978), was given final approval by the House, 124 CONG. REC. H.8883 (daily ed. Aug. 17, 1978), and the Senate, \(\text{id.}\) at S.13,998 (daily ed. Aug. 22, 1978), and was signed into law September 18, 1978. The amendments do much to increase the level of state participation in federal leasing decisions, while clearly giving the federal government primary responsibility for minimizing or eliminating conflicts between exploitation of outer continental shelf oil and gas reserves and other uses of the marine environment. See generally H.R. REP. No. 1474, 95th Cong., 2d Sess. (1978); S. REP. No. 1091, 95th Cong., 2d Sess. (1978).

32. \(\text{id.}\) §§ 1281, 1288.
33. \(\text{id.}\) § 1313.
34. \(\text{id.}\) § 1342.
only a few times a year.\textsuperscript{40} The Corps of Engineers promulgated regulations establishing the section 404 permit program under the FWPCA and directly regulating dredging and filling activities in coastal wetlands.\textsuperscript{41}

Many criticized this program as an undue assertion of federal authority, and as a result of this criticism, Congress amended the FWPCA in 1977 to provide for possible delegation of the administration of the program to the states.\textsuperscript{42} The delegation procedure requires the governor of the state to submit an application for the right to administer the permit program to the Administrator of the Environmental Protection Agency (EPA), accompanied by a statement of the state attorney general that the state has adequate legal authority to administer the program.\textsuperscript{43} The application will be approved if the state program satisfies the substantive requirements of federal law;\textsuperscript{44} thereafter, the federal permit program is suspended.\textsuperscript{45} The EPA Administrator retains the power to object to and hold a hearing on any individual permit application\textsuperscript{46} and can even withdraw his approval of the state program if it is determined after a public hearing that the program is not being administered within federal requirements.\textsuperscript{47}

Despite the necessity to adhere rigidly to federal standards, it would appear to be in coastal states' interests to gain approval to administer section 404 as an integral part of the coastal zone management. Most states with operative coastal zone management programs will want to eliminate the duplication and possible conflict involved in a federally run section 404 program. This delegation procedure leaves intact much of the federal authority now exercised in coastal waters. The section 10 authority exercised by the Corps of Engineers under the Rivers and Harbors Act,\textsuperscript{48} which extends to mean-high tide in tidal waters.

\textsuperscript{40} Conservation Council v. Costanzo, 398 F. Supp. 653 (E.D.N.C.), aff'd, 528 F.2d 250 (4th Cir. 1975).

\textsuperscript{41} 42 Fed. Reg. 37,122, 37,144 (1977) (to be codified at 33 C.F.R. §§ 323.1-.5); see Comment, \textit{Corps of Engineers Promulgates Revised Dredge and Fill Regulations, 7 ENVIR. L. REP. 10193 (1977)}.


\textsuperscript{43} 33 U.S.C.A. § 1344(g) (West Supp. 1977).

\textsuperscript{44} \textit{Id.} §§ 1317, 1318, 1343.

\textsuperscript{45} \textit{Id.} § 1344(h)(2)(A).

\textsuperscript{46} \textit{Id.} § 1344(j).

\textsuperscript{47} \textit{Id.} § 1344(i).

areas and mean-high water of traditionally navigable rivers, is unaf-
fected by the delegation. Furthermore, the state is given no jurisdic-
tion under section 404 over either federal projects specifically
authorized by Congress or the Corps of Engineers' dredging activities
to maintain navigation.

II. STATE CONTROL OF FEDERAL ACTIVITIES:
"CONSISTENCY" DETERMINATIONS

The Coastal Zone Management Act of 1972 (CZMA) creates a
federal grant program to enable coastal states and territories to develop
and implement comprehensive management programs for their coastal
areas. States may receive up to four program development grants and, once the Secretary of Commerce approves the state program, federal
money is available for its administration. Another provision of
the CZMA provides matching federal funds for the acquisition and op-
eration of estuarine sanctuaries, beach access, and island preservation.
In order to mitigate the impact on coastal states of outer continental shelf energy development, a Coastal Energy Impact Fund (CEIF) makes available loans and grants to anticipate the consequence
of offshore energy development, to provide for the mitigation of dam-
age to environmental and recreational resources, and to finance the
new public services necessary to accommodate energy development.

The CZMA is more than a grant program; it offers the unprece-
dented inducement to coastal states that upon federal approval of their

49. State authority under a delegated § 404 permit program extends only to nonnavigable
waters and salt and freshwaters above the mean-high water mark. 33 U.S.C.A. § 1344(g)(1) (West
50. A federal project specifically authorized by Congress is exempt from § 404 regulation if
the environmental impact statement for the project has addressed the probable effects of dredge-
and-fill activities and the statement has been submitted to Congress prior to project authorization.
Id. § 1344(t).
51. Section 404 "shall not be construed as affecting or impairing the authority of the Secre-
tary to maintain navigation." Id. § 1344(t). This section appears to preserve the sense of the
holding in State v. Hoffman, 543 F.2d 1198 (8th Cir. 1976), cert. denied, 430 U.S. 977 (1977), that
the delegation to a state of § 402 permit authority gave the state no added control over Corps of
Engineer dredging activities. As with any federal agency, however, the Corps is otherwise subject
to state water pollution requirements. 33 U.S.C.A. § 1323 (West Supp. 1977). Further, the Corps' own regulations provide for state review of dredging activities. See, e.g., 33 C.F.R. § 209.145(f)(1)
53. Id. § 1454.
54. Id. § 1455.
55. Id. § 1461.
56. Id. § 1456(a).
coastal zone management programs, federal actions within or affecting their coastal zones will be conducted in a manner “consistent” with the states’ programs.\textsuperscript{57} Four distinct categories of federal agency action are made subject to the consistency requirement: (1) conducting or supporting activities directly affecting the coastal zone; (2) development projects in the coastal zone; (3) licensing and permitting activities in the coastal zone; and (4) approval of local and state government assistance programs.\textsuperscript{58}

Several factors diminish the reality of state control despite the consistency requirements. First, although the touchstone of federal consistency is a state’s own coastal zone management plan, the contours of that plan itself are initially shaped by federal requirements. A state program may not be approved by the Secretary of Commerce if the views of federal agencies “principally affected by such programs” do not appear to have been “adequately considered.”\textsuperscript{59} Although these requirements can be read to give federal agencies a significant amount of leverage over the policy choices incorporated into a state’s plan, their intent is to establish a reciprocal state-federal consultative relationship early in the program development process. A trade-off is implied—“in exchange for providing relevant Federal agencies with the opportunity for full participation during program development and for adequately considering the views of such agencies, States can effectuate the Federal consistency provisions.”\textsuperscript{60} The general “inadequacy” of a state’s consideration of federal agency views is evaluated in light of the “reasonableness” of the state’s response.\textsuperscript{61} It is clear, however, that a state is not required to accommodate every federal agency comment; it is sufficient to provide for federal input, to respond to comments received and, “where appropriate in the opinion of the State,” to incorporate the substance of relevant federal commentary into the body of the management program.\textsuperscript{62}

Second, a state’s management plan must give “adequate consideration of the national interest” in planning for the siting of facilities (including energy facilities) that are necessary to meet other than local

\textsuperscript{57} Id. § 1456(c)(1). See also id. § 1456(a).
\textsuperscript{58} Id. §§ 1456(c)(1)-(3), (d).
\textsuperscript{59} Id. § 1456(b).
\textsuperscript{60} National Oceanic and Atmospheric Administration, Interim Final Regulations on the Development and Approval of Coastal Zone Management Programs, 43 Fed. Reg. 8,378, 8,413 (1978) (to be codified at 15 C.F.R. § 923.51).
\textsuperscript{61} Id.
\textsuperscript{62} Id.
requirements. The management program must also include a planning process for energy facilities likely to be located in the coastal zone. A state thus may not arbitrarily fail to balance national concerns with the state and local interest in protecting against adverse social and environmental impacts.

Third, a major qualification to the consistency requirements is section 304(1) of the CZMA, which specifically excludes from the definition of coastal zone "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers, or agents." The federal government holds public lands under four different types of jurisdiction: (a) exclusive jurisdiction over federal enclaves under article I of the United States Constitution; (b) concurrent jurisdiction over article I property partially ceded to federal control by a state; (c) "proprietary" jurisdiction pursuant to the property clause, article IV of the United States Constitution; and (d) trust jurisdiction over Indian lands. About ninety-five percent of public lands are held by the federal government in its article IV proprietary

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64. Id. § 1454(b)(8).
65. Although these sections arguably can be read to support an affirmative duty on the part of a state to provide for the siting of new energy facilities in the coastal zone, at least one court has recently rejected the contention that a demonstrable affirmative accommodation of energy facilities is a prerequisite to state plan approval. In American Petroleum Inst. v. Knecht, No. 77-3375-RJK (C.D. Cal. Aug. 31, 1978), a federal district court upheld the Department of Commerce's approval of the California Coastal Zone Management Plan against an industry challenge based upon the alleged insufficiency of the plan to provide for the "national interest" in energy development. The court ruled that the CZMA is primarily directed to environmental concerns and that the nation's interest in energy is to be balanced with, rather than placed above, the national environmental interests addressed by the Act. See [1978] ENVIR. REP. (BNA) Current Devs. 909 (Sept. 15, 1978). Similar challenges by the petroleum lobby to the Massachusetts and Wisconsin programs were dismissed for lack of ripeness and standing. See American Petroleum Inst. v. Knecht, Nos. 78-623, 78-684 (D.D.C., filed Sept. 6, 1978).
67. U.S. CONST. art. I, § 8, cl. 17, provides that Congress shall have power [t]o exercise exclusive Legislation in all Cases whatsoever over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, arsenals, Dock-Yards, and other needful Buildings.
68. This jurisdiction operates when the land has been acquired by cession or consent of the state but the state retains certain jurisdiction and authority. In general, such a reservation is permitted for so long as it does "not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired." James v. Dravo Contracting Co., 302 U.S. 134, 149 (1937) (land purchased with state consent); accord, Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885) (land acquired by state cession).
69. U.S. CONST. art. IV, § 3, cl. 2, provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."
70. Indian lands have been held to be owned by the United States in trust for the Indian
capacity. Although it has been argued that the article IV property power was not originally conceived to encompass a general federal government jurisdiction over public lands within a state, the United States Supreme Court recently stated in Kleppe v. New Mexico that "Congress exercises the powers both of a proprietor and of a legislature over the public domain" article IV property. Relying on an earlier case and this statement in Kleppe, a United States Department of Justice advisory opinion contends that, although the state may regulate some private activities on federal lands in cases of nonexclusive federal jurisdiction, the federal use of such lands is in no way subject to state regulation. Since federal use is unimpaired by state control, it is "subject solely to the discretion" of the federal government; thus section 304(1) of the CZMA operates to exclude all federal lands from the definition of "coastal zone" and from the consistency requirements. Regulations issued by the National Oceanic and Atmospheric Administration (NOAA) have adopted this theory of total exclusion of federal lands, with the important qualification that federal activities on such lands are subject to the consistency requirements if they produce spillover impacts that "significantly affect" nonfederal areas.


73. 426 U.S. 529 (1976).

74. Id. at 540 (citations omitted).

75. Utah Power & Light Co. v. United States, 243 U.S. 389 (1917). The Court in dictum said that state laws do not apply to article IV lands except "as they may have been adopted or made applicable by Congress." Id. at 405.

76. U.S. Dep't of Justice, Federal Lands Exclusion of the Coastal Zone Management Act of 1972 (August 10, 1976) (opinion of Assistant Att'y Gen.) (copy on file with authors)

The Department of Justice's conclusion may be vulnerable to at least two arguments. First, it may be contended that use of the word "solely" in § 304(a) indicates that Congress intended the exclusion to apply only to the federal enclave lands subject to exclusive federal jurisdiction. This contention, however, is weakened by a statement in the Act's legislative history that the consistency requirements do not extend state authority "to land subject solely to the discretion of the Federal Government such as national parks, forests and wildlife refuges, Indian reservations and defense establishments." S. REP. No. 753, 92d Cong., 2d Sess. 9, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4776, 4783.

Second, it may be argued on constitutional grounds that despite Kleppe's dictum, see text accompanying note 74 supra, the constitutional property clause power has not traditionally been held to be capable per se of preempting state laws. For a discussion of the "preemptive capability" of article IV in classic property clause doctrine, see Engdahl, supra note 72.

A. Consistency of Federal Activities and Development Projects:
CZMA Sections 307(c)(1) and (2)

Section 307(c)(1) requires that all federal agency activities “directly affecting the coastal zone” be conducted in a manner consistent “to the maximum extent practicable” with approved state management programs. Section 307(c)(2) contains a similar provision on federal development projects “in the coastal zone.” As a preliminary matter, it should be noted that the language employed throughout section 307 is not uniform. In addition to the terms just quoted, section 307(c)(3)(A) uses the term “affecting land or water uses”; section 307(c)(3)(B) mentions outer continental shelf activities “affecting any land use or water use”; section 307(d) addresses federal assistance activities “affecting the coastal zone.” Neither the Act nor its legislative history give any guidance concerning the substantive differences, if any, in the definitions of these terms. The National Oceanic and Atmospheric Administration (NOAA) takes the position that uniformity is necessary and has applied the single definition of “significantly affecting the coastal zone” to all these sections. Thus, federal action described in subsections 307(c) and (d) will trigger the appropriate consistency compliance requirement if it causes significant changes in the use and quality of coastal zone resources or results in significant limitations on the range of resource uses. The provision casts a wide net; a federal action that causes such changes or limitations will meet the “significantly affecting” test even when the cumulative effects are determined to be beneficial.

NOAA regulations provide that the federal agencies, not the state government, determine which federal activities “significantly affect” a state’s coastal areas and are consequently subject to consistency review. The state, however, can ensure a certain amount of input at this stage by incorporating into its management program a list of federal activities that, in the opinion of the state, are likely to “significantly affect”

79. Id. § 1456(e)(2).
80. Id. § 1456(c)(3)(A).
81. Id. § 1456(c)(3)(B).
82. Id. § 1456(d).
84. Id. at 10,520 (to be codified at 15 C.F.R. § 930.33(b)).
Although federal agencies are not obligated to afford consistency review to all activities identified on a state list or through case-by-case monitoring, if a federal agency does decide that a consistency determination is not required for a listed or identified activity, it must notify the state of the reasons for its negative determination at least ninety days before final approval of the activity. The state thus has an opportunity to review borderline cases and, in the case of a serious disagreement, to seek mediation by the Secretary of Commerce.

Once an activity or development project is determined to “significantly affect” the coastal zone, the responsible federal agency must provide the state with a consistency determination. It may do so in any manner it chooses (although agencies are encouraged to use existing notification procedures such as the National Environmental Policy Act process) as long as state agencies receive the information at least ninety days before the final approval of the activity or project. The determination is to detail whether the project or activity, its primary effects (for example, air, water and waste discharges), and its associated facilities (such as access roads and connecting pipelines) will be consistent “to the maximum extent practicable” with the “enforceable, mandatory policies” of the management program. State agencies then have forty-five days from receipt of the federal notification to provide a response. In no case may final federal action be taken on the activity or project sooner than ninety days from the issuance of the consistency determination.

If the state disagrees with the federal agency’s determination of consistency, it should notify the agency of the basis of its disagreement and what alternate measures might be adopted by the federal agency to ensure consistency. If the disagreement is “serious,” either party may invoke CZMA’s secretarial mediation provision. As implemented in the regulations, the mediation process is entirely voluntary; either party may decline to participate in the first phase, may withdraw at any time,

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85. Id.
86. Id. at 10,521 (to be codified at 15 C.F.R. § 930.3(d)).
87. Either the state or a federal agency may seek mediation in the event of a “serious disagreement . . . regarding a determination related to whether proposed activity significantly affects the coastal zone.” Id. (to be codified at 15 C.F.R. § 930.36). Secretarial mediation is discussed in text accompanying note 91 infra.
89. Id. at 10,522 (to be codified at 15 C.F.R. § 930.39(a)).
90. Id. (to be codified at 15 C.F.R. § 930.41).
and is under no compulsion to come to a resolution. 92 Although the mediation procedure does allow the Secretary to attempt to persuade the parties to resolve disagreement, there is no guarantee that will be the outcome. Significantly for the states, in the event of a continuing state-federal disagreement regarding the consistency of a particular activity or project, the commentary to the regulations makes it clear that federal agencies are free to proceed after the ninety-day period has expired. 93 Although NOAA “encourages” federal agencies to suspend implementation of a decision pending resolution of a disagreement, the Act “does not mandate . . . suspension.” 94

Subsections 307(c)(1) and (2) thus appear to provide the states with little more than an opportunity to react to federal consistency determinations for activities and projects. This idea is also implicit in the treatment in the regulations of consistency determinations for activities initiated prior to a state’s management program approval. Although the consistency provisions on the whole are generally prospective in force, requiring federal compliance with state management policies for actions begun after inception of the state’s program, the regulations do require consistency review for those activities and projects initiated prior to program approval that can be reassessed, modified, or completed in major phases. 95 This provision, however, does not apply to phased federal decisions that have already been “described, considered, and approved” prior to state program implementation, such as in a final National Environmental Protection Agency (NEPA) environmental impact statement. 96

The key to the degree of consistency required lies buried in the statutory directive “to the maximum extent practicable.” NOAA has construed this phrase in light of the Act’s “saving clause,” section 307(e), 97 which provides that the CZMA is not intended either to diminish federal or state jurisdiction and responsibilities or to modify existing laws applicable to federal agencies. The resulting interpretation is that “consistency” means consistent to the fullest degree permitted by existing law. 98 Furthermore, the regulations permit a federal agency to deviate from “full consistency” in cases of “unforeseen circumstances”

93. Id. at 10,523 (to be codified at 15 C.F.R. § 930.42, Comment).
94. Id. at 10,513.
95. Id. at 10,521-22 (to be codified at 15 C.F.R. § 930.38).
96. Id. at 10,522 (to be codified at 15 C.F.R. § 930.38(b)).
98. 43 Fed. Reg. 10,510, 10,519 (1978) (to be codified at 15 C.F.R. § 930.32(s) & Comment).
that present a "substantial obstacle" to complete adherence to the management program.  

Although these provisions could be used by federal agencies as a ready means to avoid the consistency requirements, they are probably not the serious loopholes they appear to be at first glance. First, if a federal agency asserts that consistency compliance in a given case is legally prohibited, it must clearly set forth the statutory provisions, legislative history, or other legal authority upon which it relies. This requirement indicates that NOAA does not intend to tolerate casual abuse of the "legally impracticable" defense, and the provision at least guarantees the state a record on which to seek mediation or even judicial review. Second, comments to the regulations make it clear that deviations are expected to occur only in exceptional cases of serious "unforeseen" circumstances. Such circumstances would tend to arise only when there is a substantial lack of communication between the state and federal agencies, or when either side is seriously deficient in its planning capabilities. Since the practical thrust of the entire CZMA is to encourage federal-state cooperation and consultation in the planning process, these situations are likely to be infrequent.

B. Consistency for Activities Requiring a Federal License or Permit: CZMA Section 307(c)(3)(A)

In contrast to the relatively weak consistency review opportunities given to the states by sections 307(c)(1) and (2), CZMA section 307(c)(3)(A) provides the states with a limited veto power over the issuance of federal licenses and permits. The provision requires that "any applicant" for a federal "license or permit" to conduct an activity affecting "land and water uses" in the coastal zone must certify to the state that the proposed activity will be consistent with the state's approved program. If the state objects to the certification within six months of its receipt, no permit or license may be issued unless the Secretary of Commerce overrides the state's objection on the grounds that the activity is "consistent with the objectives" of the Act or "is otherwise necessary in the interest of national security."
The regulations make it clear in this case that it is the state, rather than federal agencies, that determines what license and permit activities require consistency certification.\textsuperscript{105} State agencies are required to include in their management program a listing of license and permit categories that are likely to "significantly affect" the coastal zone. Thereafter, consistency compliance is required for any listed activity before a federal license or permit may be issued, unless the secretarial override is brought into play.\textsuperscript{106} It is apparent that the scope and degree of detail incorporated into the state's list is all-important to state control over federal license and permit activities. If a state wishes to receive a consistency determination for an unlisted activity, it may do so only if the NOAA Assistant Administrator agrees with the state's contention that the activity is likely to have significant coastal zone impacts.\textsuperscript{107} On the other hand, if the state's program is meticulous both in its listing of federal permit activities that will require consistency certification and in its description of the data and information necessary to assess consistency,\textsuperscript{108} the state will be reasonably well assured that no activities requiring federal licenses or permits will take place without state concurrence. One simple way of guaranteeing consistency in this context is for the state to require state or local government agency permits in addition to those required from federal agencies. The state's management program may then declare that state concurrence will be presumed to have been granted based upon the applicant's receipt of the state permit prior to federal action.\textsuperscript{109}

Although section 307(c)(3)(A) affords the states a limited veto power, it is qualified in both scope and finality. First, the regulations exclude from the definition of "applicant" all federal agencies applying for federal licenses or permits.\textsuperscript{110} Numerous state reviewers of the draft regulations note that states that have already received federal approval for management programs that do not contain a license and permit list must amend their programs to add the list.\textsuperscript{106} If the state's program is meticulous both in its listing of federal permit activities that will require consistency certification and in its description of the data and information necessary to assess consistency, the state will be reasonably well assured that no activities requiring federal licenses or permits will take place without state concurrence. One simple way of guaranteeing consistency in this context is for the state to require state or local government agency permits in addition to those required from federal agencies. The state's management program may then declare that state concurrence will be presumed to have been granted based upon the applicant's receipt of the state permit prior to federal action.

\begin{itemize}
\item \textsuperscript{105} 43 Fed. Reg. 10,510, 10,523-24 (1978) (to be codified at 15 C.F.R. § 930.52).
\item \textsuperscript{106} States that have already received federal approval for management programs that do not contain a license and permit list must amend their programs to add the list. \textit{Id.} at 10,524 (to be codified at 15 C.F.R. § 930.53(d), Comment).
\item \textsuperscript{107} \textit{Id.} (to be codified at 15 C.F.R. § 930.54(a)).
\item \textsuperscript{108} A state program may describe requirements regarding the data and information necessary to assess the consistency of federal license activities. \textit{Id.} at 10,525 (to be codified at 15 C.F.R. § 930.56(b)).
\item \textsuperscript{109} This is suggested in the comments to the federal regulations, \textit{id.} (to be codified at 15 C.F.R. § 930.56(b), Comment). This approach gains added force from President Carter's recent order to all federal agencies and facilities to obey state and local pollution control standards and to comply with state procedural regulations, including permit requirements, to the same degree as any private agency. Exec. Order No. 12,088, 43 Fed. Reg. 47,770 (1978). To the degree that federal agencies comply with this mandate, a state may regain some of the "consistency" control it lost through the federal agency exclusion discussed in text accompanying note 110 infra.
\item \textsuperscript{110} 43 Fed. Reg. 10,523-24 (1978) (to be codified at 15 C.F.R. § 930.52).
\end{itemize}
regulations strenuously objected to this exclusion, but NOAA has determined that the exemption is "appropriate" based upon the Act and its legislative history. 111 Thus, although federal agency "activities" requiring federal licenses or permits are still subject to the consistency requirements of section 307(c)(1), it is clear that section 307(c)(3)(A) does not apply.

Second, the regulations do not allow a state to withdraw its concurrence once it is given. If a state finds that a permitted activity previously believed to be consistent with its management program is being conducted incorrectly or is having effects other than as originally proposed, it may request that the appropriate federal agency take remedial action, 112 but it has no direct means of voiding a license or permit already issued. Secretarial mediation is again available in the case of a continuing disagreement, but no resolution of the conflict is guaranteed.

Third, the regulations include "all leases" within the definition of federal "license or permit" except lease sales on the Outer Continental Shelf (OCS). 113 Senate Bill 586, 114 proposed in 1976 to amend the CZMA, would have added the word "lease" to section 307(c)(3). The Senate committee report accompanying S. 586 stated that the intent of the 1972 Act was that federal leases for offshore oil and gas development would be within the phrase "licenses or permits"; the new amendment was consequently offered for clarification. 115 The Conference Committee substitute that attained final passage, however, dropped the term "lease" and instead added a new consistency provision applying to post-lease production plans. 116 There are indications that the conference report compromised on this issue to avoid the threat of a presidential veto of the entire bill. 117 In any event, OCS leases are clearly not

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111. Id. at 10,513. NOAA cites nothing in either the Act or its legislative history in support of this position. It is unlikely, however, that a court would overrule the agency's interpretation of this point. In light of the Act's disclaimer of any modification of existing laws applicable to federal entities, 16 U.S.C. § 1456(e) (1976), it is difficult to argue that the Act gives the states control over federal permit issuance to federal agencies. Federal operations are traditionally immune from state interference, and the Supreme Court has held that a legislative waiver of immunity will be found only when Congress has expressed such an intent very clearly. See, e.g., Hancock v. Train, 426 U.S. 167 (1976).

112. 43 Fed. Reg. 10,510, 10,526 (1978) (to be codified at 15 C.F.R. § 930.66(b)).

113. Id. at 10,523 (to be codified at 15 C.F.R. § 930.51(a), Comment).


within the ambit of "license or permit" consistency, and it is not yet settled whether they are to be deemed federal "activities" subject to the more general consistency requirements of section 307(c)(1).118

Finally, even when a state does not concur that a license or permit activity will be consistent with its management plan, the Secretary of Commerce may override the state's objection upon a finding that the activity is consistent with "the objectives" of CZMA, or "is otherwise necessary in the interest of national security."119 The Secretary may make this finding on his initiative, either before or after the completion of state review, or upon appeal by a disappointed applicant.120 The regulations make it clear, however, that an appeal to the Secretary's override power is not available when the applicant asserts simply that the state was incorrect in its declaration of inconsistency;121 the secretarial review process is intended only in the cases of inconsistent federal actions that warrant approval "based upon overriding national concerns."122

The regulations provide that an inconsistent activity may be found to be "consistent" with the objectives and purposes of CZMA if four conditions are met: (a) the activity furthers one or more of the competing national objectives or purposes contained in section 302 (congressional findings) or 303 (congressional declaration of policy) of the Act; (b) the activity's total adverse effects on the coastal zone's natural resources "are not substantial enough to outweigh" the activity's contribution to the national interest; (c) there is no violation of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended; and (d) no reasonable alternatives are available that would permit the activity to be conducted in a manner consistent with

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118. In the preamble to the previously proposed consistency regulations, 42 Fed. Reg. 43,586, 43,591 (1977), NOAA indicated that it was considering a position that would treat pre-lease sale decisions such as tract selection and choice-of-lease stipulations as federal "activities" subject to the consistency requirements of § 1456(c)(1). At the same time, the Department of the Interior was arguing that OCS leasing is not subject to any consistency provision. The controversy continues, and NOAA now states that the issue "will most likely be addressed during Congressional oversight of the Federal consistency provisions of the Act." 43 Fed. Reg. 10,510, 10,512 (1978).


121. The Secretary may dismiss an appeal for "good cause," including failure of the applicant/appellant to base the appeal on grounds that the proposed activity is consistent with the objectives of the Act or is necessary for national security reasons. Id. (to be codified at 15 C.F.R. § 930.128).

122. Id. at 10,516.
the management program. Override may apply if, after an independent review of comments from the applicant, federal and state agencies, and the public, the Secretary finds that all four requirements are satisfied. It is interesting to note that state reviewers have argued that the range of discretion afforded the Secretary by these provisions is too broad; industry reviewers have taken a completely opposite position, arguing that the scope of discretion is much too narrow. NOAA has retained the provision, clearly proposing a procedure by which the Secretary can have the final word in determining the proper balance between "ecological, cultural, historic, and esthetic values as well as . . . needs for economic development." 

For override on the grounds of national security to apply, the Secretary must again conduct an independent study and find the inconsistent activity to be permissible "because a national defense or other national security interest would be significantly impaired" if the activity is not allowed. National security review is to be "aided" but not determined by the views submitted by the Department of Defense and "other interested Federal agencies." The legislative history makes it clear that the override may not be invoked merely upon a showing by the Defense Department or other agencies that the activity is "needed" in the interests of national security; instead, the Secretary should make all reasonable efforts to reconcile national security demands with the state's management program. Beyond these points, there is nothing in the regulations or the Act's history to delineate the scope of "national security." The determination appears to be largely within the discretion of the Secretary. Thus, one of the major concerns of the state in this regard—the extent to which coastal energy production and transmission will be considered to override national security interests—will have to await clarification through a case-by-case review.

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123. Id. at 10,531 (to be codified at 15 C.F.R. § 930.12).
124. Public notice of an appeal is required to be provided at a minimum in the immediate geographical area of the coastal zone likely to be significantly affected by the proposed activity. Thereafter, "interested persons" may submit comments on the appeal. Id. at 10,532 (to be codified at 15 C.F.R. § 930.127).
125. Id. at 10,516.
C. Consistency for Outer Continental Shelf Activities: CZMA Section 307(c)(3)(B)

In contrast to the confusion surrounding the consistency status of OCS leasing, there is no disagreement that consistency compliance is required with regard to the exploration, development and production phases of the overall OCS development process. CZMA section 307(c)(3)(B) requires "any person" submitting an OCS exploration or development plan to the Secretary of the Interior to provide a certification that "each activity which is described in detail" in the plan complies with the state's approved management program. Any "person" in this case includes federal agencies. As with section 307(c)(3)(A) license or permit consistency, the state has six months in which to object to the plan; otherwise concurrence is conclusively presumed. If the state objects, no federal licenses or permits for activities described in detail in the plan may be issued, unless the plan is amended and accepted by the state, or unless the Secretary of Commerce overrides the objection on the grounds that each activity is consistent with CZMA objectives or is necessary in the interest of national security.

Section 307(c)(3)(B) was part of the 1976 amendment package that was intended in part to facilitate OCS oil and gas development by providing funding and planning assistance to the states to compensate for energy development impacts in the coastal zone. The provision clarifies the state's authority to participate in federal decisions regarding OCS exploration and production, but it also expedites the entire.

131. The regulations provide that the term "person" includes "any individual, corporation, partnership, association, or other entity organized or existing under the laws of any State, the Federal Government, any State, regional, or local government, or any entity of such Federal, State, regional, or local government" that submits an OCS plan. 43 Fed. Reg. 10,510, 10,527 (1978) (to be codified at 15 C.F.R. § 930.72). If the definition is read to include federal agencies, as it appears to do, then it is interesting to note by contrast that "person" as defined in the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(d) (1970), does not include the federal government or its agencies. Although federal agencies do not normally engage in OCS exploration or development activities, they are authorized to conduct "geological and geophysical explorations in the outer Continental Shelf." Id. § 1340.
132. See text accompanying note 56 supra.
133. The federal government has exclusive jurisdiction over the resources of the outer continental shelf. United States v. Maine, 420 U.S. 515 (1975). Nevertheless, many OCS activities are likely to "significantly affect" a state's coastal zone. Section 307(c)(3)(B) was added specifically to apply the consistency requirement to "the basic steps in the OCS leasing process—the exploration, development, and production plans submitted to the Secretary of the Interior." HOUSE CONFERENCE REP. NO. 94-1298, 94th Cong., 2d Sess. 30, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 1768, 1828.
OCS consistency determination process. Once a state has concurred with a plan, or has had its objection overridden by secretarial review, no further consistency challenge to the many activities conducted pursuant to the plan is possible.\textsuperscript{134} If the state claims that a previously approved OCS plan is no longer being followed in a manner consistent with its management program, it first must appeal for remedial action by the United States Geological Survey supervisor for the area involved. Only if the state remains unsatisfied following a request for corrective action may it file an objection with the Secretary of Commerce, who in turn makes an independent determination whether the OCS activities are substantially in compliance with the originally approved plan.\textsuperscript{135}

It is obvious that the scope of the OCS consistency obligation depends upon the number of federal license or permit activities that must be “described in detail” in an OCS plan. These are determined by the Secretary of the Interior, and NOAA’s regulations now refer to Interior Department requirements governing OCS operations.\textsuperscript{136} In addition, NOAA commentary makes it clear that federal license and permit activities \textit{not} required by Interior to be described in detail in an OCS plan are still subject to section 307(c)(3)(A) consistency.\textsuperscript{137} It would seem that to guarantee consistency review under one or the other provisions of section 307(c)(3), the state should be careful to specify in its management plan those OCS license and permit activities that will “significantly affect” its coastal zone.\textsuperscript{138}

\begin{footnotesize}
\begin{enumerate}
\item[135.] If the Secretary finds substantial noncompliance, an amended or new OCS plan must be submitted along with a new consistency certification. 43 Fed. Reg. 10,510, 10,529 (1978) (to be codified at 15 C.F.R. § 930.86(c)). The state would then have three months within which to concur or object to the new or amended plan. \textit{Id.} at 10,528 (to be codified at 15 C.F.R. § 930.84(c)).
\item[136.] Interior Department regulations governing OCS exploration, development, and production operations are to be found in \textit{id.} at 3880 (to be codified at 30 C.F.R. § 250.34). Regulations pertaining to an OCS information program are at \textit{id.} at 3887 (to be codified at 30 C.F.R. § 252).
\item[137.] \textit{Id.} at 10,510, 10,527 (to be codified at 15 C.F.R. § 930.71, \textit{Comment}).
\item[138.] The regulations provide that state program lists of § 307(c)(3)(A) license and permit activities “shall include a reference to OCS plans which describe in detail Federal license and permit activities.” \textit{Id.} at 10,526-27 (emphasis added). A state plan should be fairly explicit in its “reference” so that even when a license or permit activity is not required to be detailed in an OCS plan, and hence is not subject to § 307(c)(3)(B) review, it will still be referenced in the state’s program list and thus automatically subject to § 307(c)(3)(A) consistency requirements. \textit{See} text accompanying notes 105-09 \textit{supra}.
\end{enumerate}
\end{footnotesize}
D. Consistency for Federal Assistance to State and Local Governments: CZMA Section 307(d)

CZMA's final consistency provision\(^{139}\) prohibits federal agencies from providing financial assistance for proposed projects to any unit of a state or local government unless the state agrees that the project is consistent with its management plan. The regulations indicate that consistency review of federal assistance activities is to operate in the same manner as the federal license and permit provisions, with the state making the initial consistency determination subject to override by the Secretary. The state should provide in its management plan a listing of specific types of federal assistance programs subject to consistency review.\(^{140}\) If the state chooses to review federal assistance activities outside its coastal zone that nevertheless are likely to affect significantly its coastal area, it must include in the management program a description of the geographic area within which federal assistance applications will be subject to review.\(^{141}\) The state may also monitor for consistency proposed assistance activities outside its coastal zone or described geographic area; however, its decision to review in these cases is subject to approval by the NOAA Assistant Administrator.\(^{142}\)

State review is to be carried out pursuant to the A-95 review process,\(^{143}\) with the state notifying the appropriate clearing house of any objection it may have to the proposed project. An objection must specifically describe how the project is inconsistent with the state's program and what alternative measures exist to ensure project consistency.\(^{144}\) When the state and a federal agency continue to disagree over whether a particular assistance activity is subject to review (and the Assistant Administrator has not disapproved the state review), or when there is a serious disagreement about the present consistency of a federally funded project that was formerly approved, either party may seek secretarial mediation.\(^{145}\)

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141. Id. (to be codified at 15 C.F.R. § 930.94(b)).
142. Id. at 10,530 (to be codified at 15 C.F.R. § 930.98).
143. The term "A-95 process" describes the project notification and review procedures set forth in Office of Management and Budget Circular A-95 (revised) for the evaluation, review and coordination of federally assisted programs. See 41 Fed. Reg. 2052 (1976).
145. Id. (to be codified at 15 C.F.R. §§ 930.98-.100).
The effect of section 307(d) is actually to maximize consistency between a state's management plan and the actions of its own governmental entities, rather than federal agencies. The state has a qualified veto power that can be exercised through A-95 review to cut the federal purse strings for a local project. The provision, however, applies only to applications for federal assistance filed after program approval by governmental or "related" public entities. Federal assistance activities affecting nongovernmental organizations are still subject to the milder consistency requirements of section 307(c)(1) and (2).

III. STATE LAW AND THE FEDERAL PREEMPTION DOCTRINE

The increasing federal interest and legislative activity affecting coastal and offshore areas have produced a dramatic rise in the number of constitutional challenges to state law provisions applicable to coastal resources. The pervasiveness of federal law has compelled states to reexamine the validity of many rules of common law as well as statutory enactments under the police power. Increasingly, state law must be tailored to fit within the framework of federal law rules. The issue of conflict between state and federal law applicable to the coastal zone has arisen in two principal contexts: property law relating to riparian land titles and federal preemption of state regulatory measures.

4. State Property Law and Riparian Land Title

State law normally has exclusive application to any question regarding rights and interests in land. A series of United States Supreme Court cases carved out some exceptions to this principle regarding federal grantees, and holders under them, of riparian and littoral lands. In Hughes v. Washington, the Court held that federal common law governed the right of an ocean front property owner to accreted lands when the landowner traced title to a federal grant prior to statehood. The federal rule that the littoral owner gains accretions was applied rather than the state rule cutting off the right to accretions occurring after statehood. The Court thus guaranteed to federal grantees the continuing protection of federal law.

146. Id. at 10,529 (to be codified at 15 C.F.R. §§ 930.90-.95).
148. Although the Court held that the question was governed by federal, not state law, Justice Stewart's concurrence was based principally upon the grounds that the application of state law (as interpreted by the Washington Supreme Court) in the case at bar would operate to cut off previously vested federal rights and would constitute a compensable taking. Id. at 296-98 (concurring opinion). In the usual case, however, "it must be conceded as a general proposition that the law of
This principle was applied in *Bonelli Cattle Co. v. Arizona*,149 which involved a dispute over title to lands that were uncovered by a narrowing of the channel of the Colorado River. The riparian, a holder of title under federal grant prior to statehood, claimed these lands under federal common law, but the state of Arizona maintained under the doctrine of avulsion that title remained in the state. The Supreme Court held that the riparian claimant was entitled to the land under the federal law doctrine of accretion and once again refused to apply state law to federal grantees of riparian land.150

In 1977, however, the Supreme Court, in the case of *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*,151 reasserted the primacy of state property law and overruled *Bonelli*.152 The Court reasoned that the original thirteen colonies held title to lands under their navigable waters at the time the federal union was created and, under the equal footing doctrine,153 states formed from federal territories gained title to such lands within their boundaries at the time of their admission to statehood. The federal common law is only applicable to fix riparian boundaries at the time of admission, and state law controls thereafter. Thus, when an avulsive cut converted formerly dry privately owned land into the channel of the Williamette River, the state rule that sovereign title to a riverbed follows the course of the river applied, rather than the federal rule that private title is unaffected.154 This is a rejection of the proposition that a preadmission federal grant embodies vested rights not defeasible by later-created states’ rights to lands under navigable waters.155 Federal common law is applicable
only in the case of a paramount federal interest, as when an interstate boundary dispute is involved. ¹⁵⁶

A major uncertainty remaining is the impact of Corvallis on ocean front lands. The reasoning of the opinion would appear to overrule the Hughes decision, but the Court declined to take this step. In fact, a footnote suggests the continuing applicability of the federal common law rule of riparian proprietorship to ocean front lands because of the "international sea" margin and the vital interests of the nation in its own boundaries. ¹⁵⁷ This argument would appear to be vulnerable, however, since the states own the tidelands and the submerged lands of the continental shelf seaward to the three mile limit. Thus, the statement by the Court that the nation's own boundaries were involved is factually incorrect. The Hughes doctrine remains, requiring that federal common law govern property rights in the case of changes in the land-sea margin in those states in which title can be traced to federal grant prior to admission to statehood, but the underlying logic of the decision is gone. ¹⁵⁸ It should, therefore, be overruled by the Supreme Court.

B. Federal Preemption of State Regulatory Laws

In order to analyze the permissible scope of state regulatory legislation, it is helpful to review the basic constitutional principles that govern the exercise of federalism. The enactment of legislation by Congress pursuant to its constitutional authority rarely operates in itself to oust state regulatory jurisdiction. ¹⁵⁹ As a general rule, both the federal and state governments are permitted to exercise jurisdiction concurrently over the same subject matters. Instances do exist, however, when state law must retreat because of the presence of federal authority. Even in the absence of conflicting federal legislation, states are not permitted through legislation to discriminate against or place a

¹⁵⁶. 429 U.S. at 371-72, 381-82; see, e.g., Arkansas v. Tennessee, 246 U.S. 158 (1918).
¹⁵⁷. 429 U.S. at 377 n.6.
¹⁵⁸. The Hughes doctrine would not apply to those states that made up the original thirteen colonies, since there were obviously no federal grants made prior to the existence of the Union. It was exactly this kind of differentiation between the original states and the subsequently admitted states that led the Corvallis Court to overrule Bonelli. See id. at 378.
¹⁵⁹. For preemption to apply, state law must operate in some way "to the contrary" of the federal legislation, U.S. Const. art. VI, § 2, and the federal legislation itself must have been passed "in pursuance of" one of the constitutionally delegated powers, cf. Oregon v. Mitchell, 400 U.S. 112, 128 (1970) ("our national government of enumerated powers").
burden upon interstate commerce.\textsuperscript{160}

State law is most likely to be declared invalid when Congress has passed conflicting legislation. Under the supremacy clause\textsuperscript{161} of the United States Constitution, federal law preempts inconsistent state police power measures. Under principles established by the United States Supreme Court, analysis is necessary on a case-by-case basis to determine the existence of actual conflict when Congress is silent on the matter. Several indices of conflict are used: (1) whether compliance with both federal and state law is a physical impossibility;\textsuperscript{162} (2) whether the federal interest is so dominant or pervasive that it precludes state power;\textsuperscript{163} or (3) whether state law frustrates the legitimate objectives or purposes of federal legislation.\textsuperscript{164}

Recent cases involving the application of these principles of preemption to coastal resources law indicate that the Supreme Court recognizes the interest of the states in regulating and protecting such resources and will invalidate state law only when there is a clear frustration of a federal objective. \textit{Askew v. American Waterways Operators}\textsuperscript{165} is notable for rejecting a broad approach to state law preemption. This case involved a challenge to Florida's Oil Spill Prevention and Pollution Control Act, which imposes strict liability for oil spill damage to private persons and allows the state to recover clean-up

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\textsuperscript{161} U.S. Const. art. VI, \S 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.


It is apparent that, except in the case of an absolutely clear and irreconcilable conflict between a state statute and a federal regulatory provision, the typical preemption case necessarily invokes a certain degree of judicial choice concerning the proper degree of state preclusion (if any) warranted by the "federal system." This is especially true when the issue is framed in terms of a "pervasive federal scheme," see, e.g., Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973), or the "need for national uniformity," see, e.g., Goldstein v. California, 412 U.S. 546, 554 (1973). A decision on preemption is a decision on where the line will be drawn in the state/federal balance of power. For a suggestion that such a balancing analysis by the Supreme Court is part and parcel of "dynamic federalism," see, Freeman, \textit{Dynamic Federalism and the Concept of Preemption}, 21 De Paul L. Rev. 630 (1972).

\textsuperscript{165} 411 U.S. 325 (1973).
\end{flushleft}
costs. A lower court had invalidated this statute on the grounds that it interfered with the exclusive federal admiralty jurisdiction. The Supreme Court, upholding the state law, stated that federal admiralty jurisdiction and maritime interests do not per se displace historic state police power jurisdiction. The correct approach is to permit concurrent jurisdiction, and state law must retreat only in the case of actual conflict with federal law.

The unlimited and strict liability provisions of the Florida statute arguably conflicted with provisions of federal law limiting liability for damages and for clean-up costs incurred by the federal government. Despite this, the Court preferred to wait until an actual case arose, stating that “there need be no collision” between state and federal law on the face of the statute. It specifically left open the questions (1) whether state-imposed liability for vessel-source oil spill damage would be limited by federal law, (2) whether recovery by the state of its clean-up costs would be limited by the federally imposed ceiling on recovery by the federal government, and (3) whether state requirements of specified oil spill containment gear for vessels were invalid. Interestingly, subsequent cases, taking their cue from Askew, have held that liability under state law for state-incurred clean-up costs is not limited by federal law; state and federal liability provisions can be reconciled by holding that federal law limits liability merely to the federal government and states are free to protect their own interests and their citizens by separate recovery of clean-up costs without limitation.

State law regulatory access or use of coastal resources does at times directly clash with federal law. In Douglas v. Seacoast Products, Inc., a Virginia statute that prohibited nonresidents from catching menhaden in the Virginia portion of Chesapeake Bay was held to be preempted by the Federal Enrollment and Licensing Act, which was interpreted to confer the right to perform the activity for which the vessel was federally enrolled or licensed. Thus the state law could not

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166. *Id.* at 328.
167. *Id.* at 341.
170. 411 U.S. at 336.
171. *Id.* at 336-37.
discriminate against nonresident owners of federally enrolled vessels.\textsuperscript{174} The Court emphasized that this result was based on statutory considerations, thereby avoiding a constitutional approach based on the need for national uniformity that would have thrown into question state law in other regulatory areas.\textsuperscript{175}

The recent case of \textit{Ray v. Atlantic Richfield Co.}\textsuperscript{176} continues the Supreme Court's cautious, analytical approach to preemption of state authority in coastal resource matters. \textit{Ray} was an action brought by the Atlantic Richfield Company to challenge several provisions of the Washington Tanker Law, which regulates the passage of oil tankers on Puget Sound. Three provisions of the law were involved: (1) a requirement that both enrolled and registered\textsuperscript{177} oil tankers of at least 50,000 dead-weight loss tons (DWT) take on a pilot licensed by the State of Washington; (2) a requirement that enrolled and registered tankers of from 40,000 to 125,000 DWT possess specified safety features or be under escort of a tug boat; and (3) a ban on any oil tanker larger than 125,000 DWT from Puget Sound.

To determine the validity of these requirements under federal law, the Court engaged in close statutory analysis of each separate provision of the law. The pilotage requirement was declared to be in direct conflict with a federal statute requiring enrolled vessels to be under the control of pilots licensed by the Coast Guard, but the state was free to impose the pilotage requirements on registered tankers.\textsuperscript{178} A similarly fine distinction was drawn in respect of the Tanker Law's safety requirements. The Court found that because the federal Ports and Waterways Safety Act of 1972 (PWSA)\textsuperscript{179} comprehensively regulates design and construction standards applicable to oil tankers operating in the navigable waters of the United States, national uniformity mandated that Washington not promulgate safety standards of its own.\textsuperscript{180}

On the other hand, the alternative safety requirement of tug escort was

\textsuperscript{174} Essentially the same situation was involved in \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat.) 1 (1824), which established that the federal licensing of a vessel conferred the right to perform the licensed activity notwithstanding state regulation. Since the original statutory language construed in \textit{Gibbons} had been reenacted unchanged by Congress several times, the \textit{Douglas} Court concluded that the interpretation of congressional intent in \textit{Gibbons} was still valid. 431 U.S. at 282.

\textsuperscript{175} 431 U.S. at 271-72.

\textsuperscript{176} 98 S. Ct. 988 (1978).

\textsuperscript{177} "Enrolled" vessels are those engaged in domestic trade or fishing; "registered" vessels are those engaged in foreign trade. \textit{Douglas v. Seacoast Prods., Inc.}, 431 U.S. at 272-73.

\textsuperscript{178} 98 S. Ct. at 995.


\textsuperscript{180} 98 S. Ct. at 997.
a permissible local safety measure. The Court rejected the argument that because the Secretary of Transportation had the authority to deal with tug escort, the state regulation must fall. State standards, the Court found, could be enforced until an inconsistent federal rule had actually been established. The state was also free to enforce reasonable, nondiscriminatory environmental and conservation measures. Finally, the absolute ban on tankers larger than 125,000 DWT was invalidated on the basis that the Secretary of Transportation had acted to impose federal size limitations in Puget Sound and Congress did not intend higher standards to be imposed by the state. The Court also cited the legislative history of the PWSA, which stressed the need for national uniformity in tanker design and size limitations.

This jurisprudence of the United States Supreme Court involving the preemption of state police power regulation indicates that states retain a great deal of legislative authority despite the increasing federal legislative activity in this area. The courts will engage in statutory analysis to reconcile apparent conflicts, invalidating state law only when federal law compels a directly contrary result or when Congress has unmistakably called for national uniformity in a matter.

**CONCLUSION**

Despite the flood of federal legislative activity concerning coastal and offshore resources, the individual states have adequate legal authority to formulate and maintain the management policies they choose to apply in their coastal areas. Three independent but related models exist for the exercise of state authority in conjunction with federal action. First, the federal government has granted the states wide powers over resources in the territorial sea and has provided mechanisms for shared decisionmaking even in offshore areas under federal control. Second, the consistency requirements of the federal Coastal Zone Management Act give the states concrete, although incomplete, power over federal actions. The machinery implementing these requirements is complicated and many important concepts are only vaguely defined, but there are now important limitations on the freedom of action of

182. 98 S. Ct. at 1003.
183. *Cf.* California v. United States, 98 S. Ct. 2985 (1978) (states may impose conditions on irrigation permits granted to federal authorities if such conditions are not inconsistent with congressional provisions authorizing project in question); City of Philadelphia v. New Jersey, 98 S. Ct. 2531 (1978) (federal waste disposal legislation does not clearly preempt state authority in field).
federal agency officials preventing them from arbitrarily ignoring state policies. To take full advantage of this new power, a state should actively formulate and define its own coastal management program under state law. Third, recent decisions indicate that states can continue to address property and police power issues concerning the management of coastal and marine resources even when federal law applies. State law will not be preempted absent direct conflict with federal legislation.

States will continue to play the dominant role in determining the future of their coastal and offshore areas. They should realize, however, that this dominant role will not be theirs automatically, but will depend on their vigorous and active participation in the process of resource management and upon their willingness to understand and use the new legal tools available to them.