Area Contingency Plans: Is the Coastal Zone Management Act on a Collision Course with Unfettered Oil Spill Response?

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AREA CONTINGENCY PLANS: IS THE COASTAL ZONE MANAGEMENT ACT ON A COLLISION COURSE WITH UNFETTERED OIL SPILL RESPONSE?

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I. INTRODUCTION

In 2002 the United States Coast Guard responded to 12,000 reports of water pollution or hazardous material releases1 under a mandate by the Clean Water Act ("CWA").2 The goal of oil spill response is to mitigate damage to the environment, and the United States Coast Guard seeks to lessen the harm caused not only by the spill itself, but also by the response actions. Oil spill response is often a coordinated effort between the federal government, states, and local governments. Intergovernmental cooperation and coordination begins even before the oil spills, during the development of National, Regional, and Area Contingency Plans and during the development of State coastal zone management plans under the Coastal Zone Management Act ("CZMA").3 States with coastal zone management programs and the federal government, in particular the Coast Guard, have been successfully coordinating oil spill response efforts so as to most effectively minimize negative impact on state coastal areas, as envisioned by the CZMA. While this coordination allows the Coast Guard official in charge of response efforts, the On Scene Coordinator ("OSC"), to carry out his duties of containment and removal of oil as required by the CWA, the potential exists for state governments to use the CZMA more assertively to control, and in effect curtail, federal government response activity. 

Admittedly, Congress intended the CZMA to be more than a procedural impediment for approval of activities that have a foreseeable

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impact on the nation's coastal zones.\textsuperscript{4} The problem will arise, however, when States refuse or neglect to use the efficient informal cooperative mechanisms in place to assert substantive control over federal activities through pre-approval coordination and try to force the federal government to participate in both the informal and formal consistency review mechanisms allowed in the CZMA. This Note addresses the conflict between states and the federal government over whether and when Area Contingency Plans ("ACP's") developed as required by the CWA using a process encouraged by the CZMA are subject to the requirement for a formal federal consistency determination.

The second part of the Note provides a history and explanation of pertinent provisions of the CZMA. The third part is a more detailed overview of the federal consistency provisions of the CZMA. The fourth part is a summary of the CWA, describing the authority for federal involvement in oil spill response and the federal organization structure implemented to carry out the President's responsibilities under the CWA. This part provides an introduction to the creation and amendment process for ACPs. The fifth part of the Note begins with an analysis of California's oil spill response structure and the California Coastal Commission's ("CCC") involvement in Area Contingency Planning. The state perspective is that ACPs are subject to federal consistency review, and currently that review is being conducted through active participation in the planning stages before approval of the ACPs. This part then details a description of the Coast Guard's involvement in Area Contingency Planning and its interpretation of the CCC's role. The Coast Guard has been operating as if the ACP is not subject to federal consistency review and the CCC has an important, but not mandatory, role in the creation and amendment of ACPs. The comparison of the state and federal perspectives concludes with a finding that it is impossible to assert that ACPs are not subject to federal consistency review as a category of

\textsuperscript{4} Federal Consistency with Approved Coastal Management Programs, 15 C.F.R. § 930.32(a)(2) (2003) ("The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing in such agencies."). See also, e.g., Michael C. Blumm & John B. Noble, The Promise of Federal Consistency Under § 307 of the Coastal Zone Management Act, 6 Envtl. L. Rep. (Envtl. L. Inst.) 50,047, 50,053 (1976) ("This distinction between substantive and procedural compliance should be kept in mind throughout the discussion of the consistency provisions.").
federal agency activities. All that can be said with certainty is that ACPs cannot categorically be excluded from federal consistency requirements, and that each plan must be considered independently, based on the state whose shores it governs and the provisions contained within the plan.

II. The Coastal Zone Management Act

A. Before the Act

Documented active federal concern for the coastal environment began with the Marine Resources and Engineering Development Act of 1966. With this Act, Congress articulated the value of developing the nation’s marine resources and created a Commission on Marine Science, Engineering and Resources to produce a thorough study of marine science and recommend “an overall plan for an adequate national oceanographic program that will meet the present and future national needs.” The 1969 report created by this Commission was the first mention of the concept of national involvement in coastal zone environmental protection and resource management.

In 1971 two coastal zone management bills with widely differing approaches were proposed in the Senate, but neither passed by the time the 91st Congress adjourned. The 92nd Congress proposed the precursor to the

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7 Grad, supra note 6, at 10-241. Congress recognized “the need to encourage private investment in marine exploration, development and commercial utilization, as well as the preservation of the nation’s ‘leadership role’ in marine sciences and resources development.” Id.

8 Id.

9 Senate Commerce Committee Chairman Magnuson proposed S. 2802 to amend the Marine Resources and Engineering Act of 1966 to allow federal review and grants for state coastal zone development plans and programs. Id. (discussing S. 2802, 91st Cong. (1971)). In an
current CZMA in 1971 and the Land Use Policy and Planning Assistance Act,\textsuperscript{10} which influenced the CZMA implementing regulations.\textsuperscript{11}

B. \textit{Goals and Objectives of the Coastal Zone Management Act}

When the Coastal Zone Management Act was enacted in 1972, Congress set forth specific findings\textsuperscript{12} and national policy objectives,\textsuperscript{13} which are helpful in determining how to apply the statute in the administration of Coastal Zone Management Plans ("CMP"s)\textsuperscript{14} and why Congress enacted the CZMA. Congress recognized that states were not effectively controlling development of their coastal zones to the detriment of natural coastal resources.\textsuperscript{15} Furthermore, Congress stated that successful coastal zone management would require states to take an active interest in their own coastal zones as well as federal support.\textsuperscript{16} The national policy declared by

\textsuperscript{10} Id. at 10-51, 10-242 (referring to Land Use Policy and Planning Assistance Act, S. 268, 92d Cong. (1973), which was not passed by the House of Representatives).

\textsuperscript{11} Id.


\textsuperscript{13} 16 U.S.C. § 1452.

\textsuperscript{14} See infra Part V.

\textsuperscript{15} 16 U.S.C. § 1451(d), (f), (g), (h).

\textsuperscript{16} 16 U.S.C. § 1541(i), (m).

The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

\textsuperscript{16} U.S.C. § 1451 (i).

Because of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such
Congress is to preserve and develop natural coastal zone resources for future generations, to encourage the states to be responsible for their coastal zones through area-specific management plans, to encourage participation and coordination between "public, state and local governments, and interstate and other regional agencies, as well as . . . Federal agencies," and to encourage states to be aware of potential coastal zone impacts.\(^\text{17}\)

The CZMA may be a reflection of the emerging concept touted by President Nixon from 1968 to 1972, "New Federalism,"\(^\text{18}\) as both stress federal and state cooperation and state responsibility for coastal zones coupled with federal support. Both the CZMA and the New Federalism ideal emphasize efficiency, cooperation, power sharing, and increased state power guided by federal leadership.\(^\text{19}\) Congress essentially placed the success of the CZMA in states' hands by making them "the focal point for developing resources and, wherever appropriate, by the development of state ocean and resource plans as part of their federally approved coastal zone management programs.

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16 U.S.C. § 1451 (m).
18 HARVEY LIEBER & BRUCE ROSINOFF, FEDERALISM AND CLEAN WATERS: THE 1972 WATER POLLUTION CONTROL ACT 2 (1975). In his State of the Union Message on January 22, 1971, President Nixon said:

The time has come for a new partnership between the Federal Government and the States and localities—a partnership in which we entrust the States and localities with a larger share of the Nation’s responsibilities, and in which we share our Federal revenues with them so that they can meet those responsibilities.

Id.


The CZMA, in line with the "new federalism" of the Nixon Administration, attempts to focus federal efforts on the adequacy of state processes, rather than reviewing the merits of specific land and water use decisions. The Act therefore does not seek to create a uniform national regulatory scheme regarding the use of the coastal zone. Instead, it seeks to foster the establishment of state coastal zone plans within certain minimum national criteria.

Blumm & Noble, supra note 4, at 50,048.
comprehensive plans and implementing management programs in the coastal zone,” because they “have the resources, administrative machinery; enforcement powers, and constitutional authority on which to build a sound management program.”

Cooperation and coordination between the federal government and states is supposed to begin before a state has an approved management program and continue throughout coastal zone management.

C. The Coastal Zone Management Act, Generally

State participation in the federal coastal zone management program is voluntary. The national policy is “to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through development and implementation of management programs” and “to encourage the preparation of special area management plans.” When a state chooses to participate, however, its coastal management program must meet certain federal requirements, beginning with federal approval by the National Oceanic and Atmospheric Administration’s (“NOAA”) Office of Ocean and Coastal Resource Management. The state plan must be approved if it meets the requirements listed in section 306(d) of the CZMA:

(1) The State has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and

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20 Blumm & Noble, supra note 4, at 50,049 (quoting S. REP. No. 92-753, at 5-6 (1972)).
21 See supra notes 16, 17. See also, e.g., Blumm & Noble, supra note 4, at 50,048 (“Eligible states are not required to apply for federal funds to develop a management program, and there are no federal sanctions if a state chooses not to participate.”).
23 16 U.S.C. § 1452(3). See also 16 U.S.C. § 1454 (2000) (stating that “[a]ny coastal state which has completed the development of its management program shall submit such program to the Secretary”) (emphasis added), which makes it clear that coastal states may develop management programs but are not required to.
24 16 U.S.C. § 1454 grants authority to the Secretary of Commerce to approve state management plans, and the Secretary has delegated that authority through the Administrator of the National Oceanic and Atmospheric Administration to the Assistant Administrator for Ocean Services and Coastal Zone Management. 16 U.S.C. §§ 1453(16), 1454; 15 C.F.R. § 923.1(a) (2002); Blumm & Noble, supra note 4, at 50,048.
with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in [16 U.S.C. § 1452] . . .

(2) The management program includes [certain] required program elements . . .

(3) The State has . . . coordinated its program with local areawide, and interstate plans, . . . established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (6) and with local governments, interstate agencies, regional agencies, and areawide agencies . . .

(4) The State has held public hearings in the development of the management program.

(5) The management program . . . [has] been reviewed and approved by the Governor of the State.

(6) The Governor of the State has designated a single State agency to receive and administer grants for implementing the management program . . .

(8) The management program provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance . . .

(10) The State, acting through its chosen agency or agencies . . . has authority for the management of the coastal zone in accordance with the management program . . .

(11) The management program provides for any one or a combination of the following general techniques for control of land uses and water uses within the coastal zone:

   (A) State establishment of criteria and standards for local implementation . . .

   (B) Direct State land and water use planning and regulation.
(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, . . . proposed by any State or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings . . .

(13) The management program provides for . . . designation of areas that contain . . . coastal resources of national significance; and . . . standards to protect such resources.

(16) The management program contains . . . [provisions] to implement the applicable requirements of the Coastal Non-point Pollution Control Program of the State required by . . . [16 U.S.C. § 1455b].

In spite of this long list of detailed requirements, 34 out of 35 coastal states have approved CMPs. This is because the CZMA provides two strong incentives for states to develop CMPs: federal funding and federal consistency.

The Secretary of Commerce may only make a grant of federal funds to a coastal state if the requirements of section 306, summarized above, are met and the state's coastal management program is approved. Funds granted to states for the administration of the states' management programs must be matched by the states according to "federal-to-state contribution" ratios varying between four to one and one to one, depending on the year of program approval. If a state has an approved plan, the Secretary may also

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28 16 U.S.C. § 1455(a), (b).
29 16 U.S.C. § 1455(a). The ratios are:
   For those States for which programs were approved prior to [enactment of
make "[r]esource management improvement grants" to assist the state in preserving or restoring designated areas of the state, redeveloping certain urban waterfrents, providing access to public beaches, or developing an intra-state process to regulate aquaculture. The resource management improvement grants are also subject to use restrictions and matching requirements. The Secretary may provide grants to states to use in developing a nonpoint source pollution control program. The Secretary maintains the Coastal Zone Management Fund, from which "emergency grants to State coastal zone management agencies [may be made] to address unforeseen or disaster-related circumstances." Grants may be made to states to fund development of coastal management program changes to "support attainment of . . . coastal zone enhancement objectives," which include, for example, protection of wetlands, increased public access, and siting energy facilities and aquaculture facilities. Coastal zone enhancement grants are not subject to a funds matching requirement. Congress recently added a grant provision that was not part of the 1972 CZMA or subsequent CZMA

the Coastal Zone Act Reauthorization Amendments of 1990 on Nov. 5, 1990], 1 to 1 for any fiscal year. . . . For programs approved after [enactment of the Coastal Zone Act Reauthorization Amendments of 1990], 4 to 1 for the first fiscal year, 2.3 to 1 for the second fiscal year, 1.5 to 1 for the third fiscal year, and 1 to 1 for each fiscal year thereafter.

Id.

16 U.S.C. § 1455 (c). 16 U.S.C. § 1455 (d)(9) requires the management program to include procedures "whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values." 16 U.S.C. § 1455(d)(9).

31 The management program must include "[a]n inventory and designation of areas of particular concern within the coastal zone." 16 U.S.C. § 1455(d)(2)(C).

32 The management program must include "[a] definition of the term 'beach' and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value." 16 U.S.C. § 1455(d)(2)(G).

33 16 U.S.C. § 1455a(a), (b).

34 16 U.S.C. § 1455a(c), (d).


amendments requiring the Secretary of Commerce to establish a Coastal and Estuarine Land Conservation Program, under which funds are to be distributed to states subject to guidelines yet to be issued.40

III. THE FEDERAL CONSISTENCY REQUIREMENT

The second incentive for states to create CMPs is what is known as the federal consistency requirement. The federal consistency requirement is one part of the statutory requirement for federal and state cooperation and coordination in coastal zone management.41 Coordination begins with the development of the state’s plan, before it is submitted for federal government approval. In fact, the Secretary of Commerce and the Administrator of the Office of Ocean and Coastal Resource Management (“OCRM”) by delegation, must coordinate with “other interested Federal agencies” in the administration of the requirements of the CZMA.42 Furthermore, a state’s management plan “shall not” be approved “unless the views of Federal agencies principally affected by such program have been adequately considered.”43

The incentive for states comes after federal approval of the state CMP. States with approved management plans may have a direct impact on the federal government though the requirement that four types of federal action be consistent with the approved state CMPs. The first is federal agency activities: “Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable polices of approved state management programs.”44 Federal activities is considered a “residual category”45 that

45 “The Federal agency activity category is a residual category for federal actions that are not covered under subparts D [Consistency for Activities Requiring a Federal License or Permit],
includes any federal action that does not fall within any of the other types of federal actions, which are development projects, issuance of federal licenses or permits (including licenses or permits for Outer Continental Shelf exploration, development, and production activities), and federal assistance to state and local governments. A federal activity that is subject to the consistency requirement is one that will have a "reasonably foreseeable" impact on a state's coastal zone. Although the statutory language is "consistent to the maximum extent practicable," federal agency activities must be "fully consistent with enforceable polices of management programs," or fully consistent with approved management plans. A federal agency may escape the consistency requirement if full consistency is legally prohibited, for example, if there is a federal law that gives the agency no discretion in its actions, if there is an emergency or "exigent circumstance," or if the President exempts the activity from compliance upon a determination that the activity is in the "paramount interest of the United States," for example in the interest of national security. Even in emergency situations, however, the federal agency activity must be as consistent as

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E [Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities], or F [Consistency for Federal Assistance to State and Local Governments] of this part." 15 C.F.R. § 930.31(c) (2003); Memorandum from Robert W. Knecht, Acting Assistant Administrator for Coastal Zone Management, to Reviewers of the Federal Consistency Regulations (Apr. 11, 1978), at http://hydra.gsa.gov/pbs/pt/call-in/cnstguid.htm (last visited Mar. 14, 2003). In the regulations, federal development projects referenced by 16 U.S.C. § 1456(c)(2) are defined within the Federal activities category as "a Federal agency activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and includes the acquisition, use, or disposal of any coastal use or resource." 15 C.F.R. § 930.31(b).


49 15 C.F.R. § 930.31(a). Examples include "rulemaking, planning, physical alteration, and exclusion of uses." Id.

50 Id.

51 16 U.S.C. § 1456(e), (f); 15 C.F.R. § 930.32.

52 15 C.F.R. § 930.32(b).

possible with the state management plan, and once the emergency has passed, the activity must come into compliance with the plan.\textsuperscript{54}

The second category of federal action that must be consistent with approved state management plans is federal licensing and permitting:  

\textit{[A]ny applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone . . . shall provide . . . a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program.}\textsuperscript{55}

Federal agencies are not included in the definition of applicant,\textsuperscript{56} rather they \textit{issue} the permits or licenses. The definition of "federal license or permit" in NOAA's regulations is broader than the plain language of the statute: "any required authorization, certification, approval, lease, or other form of permission which any Federal agency is empowered to issue to an applicant."\textsuperscript{57}

The third category requiring federal consistency review is Outer Continental Shelf ("OCS") exploration, development, and production activities. The Secretary of the Interior determines which federal license or permit activities must be "described in detail" in an OCS plan for the exploration or development of or production from an area that has been leased under the Outer Continental Shelf Lands Act.\textsuperscript{58} The person submitting the plan must certify that such activities "compl[y] with the enforceable policies of [the] state's approved management program and will be carried out in a manner consistent with such program."\textsuperscript{59} A consistency determination can be avoided if the activity described in detail in the plan is

\textsuperscript{54} 15 C.F.R. § 930.32(b).
\textsuperscript{55} 16 U.S.C. § 1456(c)(3)(A).
\textsuperscript{56} 15 C.F.R. § 930.52.
\textsuperscript{57} Id. § 930.51. In \textit{New Jersey v. Long Island Power Authority}, 30 F.3d 403, 420 (3d Cir. 1994), the Third Circuit Court of Appeals held that federal agency "approval" of a voluntarily submitted operations plan, however, did not create a federal license or permit requirement subject to the consistency review.
“consistent with the objectives of [Chapter 33] or is otherwise necessary in the interest of national security.”

The fourth category is applications of local governments for federal assistance. "[F]ederal assistance’ means assistance provided under a federal program to an applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid." A federal agency may approve an inconsistent project if the Secretary of Commerce finds “that such project is consistent with the purposes of [Chapter 33] or necessary in the interest of national security.”

The determination of whether a proposed federal agency activity is consistent with the enforceable policies of a state management program is made by the federal agency, not by the state, and that determination must be made not later than ninety days before the federal activity is approved, unless the state and the federal agency otherwise agree. A federal agency shall make a negative determination if it finds that there will be no coastal effects, and that determination must also be submitted to the state no later than “[ninety] days before final approval of the activity.” In either case, the state must concur or object to the federal determination within sixty days, or the state will be presumed to concur, unless it has requested an extension of time to consider. The federal agency may proceed with the proposed activity at the end of the ninety-day period, over state objection, if the federal agency concludes either that consistency “to the maximum extent practicable” with the enforceable policies of the state plan is prohibited by law or the proposed

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65 15 C.F.R. § 930.35(c).
66 Id.
activity is fully consistent with those policies, and if the federal agency informs the state of its decision to proceed before doing so.\textsuperscript{67}

Thus, if a law "leaves . . . no discretion" to the federal agency in carrying out a prescribed duty, the consistency requirement should not apply.\textsuperscript{68} Although the federal government has discretion in deciding when to respond to some oil spills, a response is required when "a discharge [is] posing a substantial threat to public health or welfare of the United States."\textsuperscript{69} This lack of discretion, however, is more likely to arise in a response situation than in planning for the response, because the ACP addresses the discretionary details of response. The CZMA specifically states that it does not "in any way affect any requirement . . . established by the Federal Water Pollution Control Act, as amended . . . or . . . established by the Federal Government or by any state or local government pursuant to such Act[]."\textsuperscript{70}

A related concept is federal preemption. If a federal law preempts the state law, the state law is no longer valid, thus no longer an enforceable policy requiring consistency review.\textsuperscript{71}

\textsuperscript{67} Id. § 930.43(a)(3).
\textsuperscript{68} Paul J. Atelsek, The Coastal Zone Management Act: Impact on the Coast Guard 18 (Dec. 1992) (unpublished Coast Guard report) ("Therefore, if the Coast Guard can demonstrate that the statute it is administering leaves it no discretion—for example, vessel documentation actions, or where Congress directs a Coast Guard station to be built in a certain place—then the consistency requirements of the CZMA do not apply."). The regulations state:

If a Federal agency asserts that full consistency with the management program is prohibited, it shall clearly describe, in writing, to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to be fully consistent with the enforceable policies of the management program.

15 C.F. R. § 930.32(a)(2).

\textsuperscript{69} 40 C.F.R. § 300.130(b) (2002). The EPA or the USCG is authorized to initiate . . . and direct, appropriate response activities when the [EPA or USCG] determines that any oil . . . is discharged or there is a substantial threat of such discharge from any vessel or offshore or onshore facility into or on the navigable waters of the United States, on the adjoining shorelines to the navigable waters, into or on the waters of the [EEZ], or that may affect natural resources belonging to, appertaining to, or under exclusive management authority of the United States.


\textsuperscript{71} See 16 U.S.C. § 1453(6a) ("The term 'enforceable policy' means State policies which are
Either party may request mediation by the Secretary of Commerce or the Office of Ocean and Coastal Resource Management if the federal and state agencies cannot resolve a "serious disagreement" on the federal consistency determination. Finally, a state may bring a lawsuit against the federal agency.

NOAA took advantage of the room left in the statutory language, "no . . . later than [ninety] days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule," and made explicit the Congressional goals of coordination and cooperation in its regulations. 15 C.F.R. § 930.36 states that "[f]ederal agencies should consult with State agencies at an early stage in the

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legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions . . . "). See also Atelsek, supra note 68, at 19.

For example, the unenforceable policy may be a requirement to get a permit related to the State's comprehensive land use plan. The Coast Guard must comply with the policy underlying the comprehensive plan, but would not actually have to apply for the permit because there has been no waiver of sovereign immunity in the context of land use planning.

Id.; see also infra Part V.B.


In case of a serious disagreement between any Federal agency and a coastal state—(1) in the development or the initial implementation of a management program under [16 U.S.C.S. § 1454]; or (2) in the administration of a management program approved under [16 U.S.C.S. § 1455]; the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement.


development of the proposed activity in order to assess whether such activities will be consistent to the maximum extent practicable with the enforceable policies of such programs." \(^{75}\) NOAA further suggests that a federal agency should make a consistency determination as soon as it has enough information to make a reasonable determination, but before it reaches the final stages of its activity planning process, "i.e., while the Federal agency has the ability to modify the activity." \(^{76}\)

According to NOAA regulations, federal and state agencies may even forgo the consistency review process described above, with mutual agreement, as long as the regulatory and statutory requirements for public participation are met and the appropriate enforceable state management policies are considered. \(^{77}\) OCRM describes the federal consistency requirement as a "mandatory, but flexible, mechanism to avoid potential conflicts." \(^{78}\)

IV. **AREA CONTINGENCY PLANS**

The Federal Water Pollution Control Act, known today as the Clean Water Act, was enacted in 1948\(^ {79}\) and extensively amended in 1972\(^ {80}\) and in 1990\(^ {81}\) to place more control of environmental pollution prevention and

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\(^{75}\) 15 C.F.R. § 930.36(a) (emphasis added); Cf. 16 U.S.C. § 1456(b) (requiring opportunity for Federal agency input into proposed State management programs).

\(^{76}\) 15 C.F.R. § 930.36(b)(1).

\(^{77}\) *Id.* § 930.1(c). 15 C.F.R. § 930.1(c) states that "[f]ederal agencies, State agencies, and applicants should coordinate as early as possible in developing a proposed federal action, and may mutually agree to intergovernmental coordination efforts to meet the requirements of these regulations, provided that public participation requirements are met and applicable State management program enforceable policies are considered." *Id.* § 930.1(c).


response procedures in the hands of the federal government. The CWA expressly grants authority to the President to "ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of discharge, of oil or a hazardous substance... on the adjoining shorelines to the navigable waters" in accordance with his National Contingency Plan and "any appropriate Area Contingency Plan." The President may "direct or monitor all Federal, State, and private actions to remove a discharge." The President has an "immediate obligation" to assume responsibility for the removal of oil spills, and it was the intent of Congress that oil spill removal efforts be "federalize[d]." Area Contingency Plans are produced by Area Committees, under the direction of the federal On-Scene Coordinator. Federal and state cooperation is provided for as Area Committee members are appointed by the President and usually consist of personnel from federal, state, and local agencies. The CWA specifically requires state cooperation in:

identifying... dispersants... and other spill mitigating devices and substances, if any, that may be used in carrying out the Plan... the waters in which such dispersants... and other spill mitigating devices and substances may be used,

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82 LIEBER & ROSINOFF, supra note 18, at 8-9.
83 40 C.F.R. pt. 300 (1994). "The requirement for the preparation of a National Contingency Plan and for compliance with the requirements of the plan is now to be found in § 311(d) [OPA § 4201, amending § 311(d) of the Federal Water Pollution Control Act, 33 U.S.C. § 1321(d)]." 2 GRAD, supra note 6, at 3-291. The Oil Pollution Act of 1990 is codified at 33 U.S.C. §§ 2701-2761.
86 2 GRAD, supra note 6, at 3-291 (citing House Conf. Rep. No. 101-653, 145-146). "Subtitle B of Title IV of the Oil Pollution Act of 1990 provides substantial authority for the removal of oil and hazardous waste, for the amendment of the National Contingency Plan, and for the establishment of a national response system, including provisions for area contingency plans and related authorizations for the removal of oil and hazardous substances and for the mitigation of damages resulting from the spill of oil." Id. at 3-316.34, 3-316.35.
87 Regional Contingency Plans are in 33 C.F.R. § 153.
89 2 GRAD, supra note 6, at 3-295.
and . . . the quantities of such dispersant . . . or substance which can be used safely in such waters. . . .

In addition the Act specifies that the National Contingency Plan include:

[a] fish and wildlife response plan, developed in consultation with the United States Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and other interested parties (including state fish and wildlife conservation officials), for the immediate and effective protection, rescue, and rehabilitation of, and the minimization of risk of damage to, fish and wildlife resources and their habitat that are harmed or that may be jeopardized by a discharge.

The Act mandates cooperation between state and federal officials but does not specify which state officials must be involved, with the exception of the fish and wildlife officials. The Coast Guard is responsible for the execution of the CWA provisions, through the Secretary of Homeland Security. The federal OSC is supported by Coast Guard personnel and pre-positioned equipment at each port.

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work with State and local officials to enhance contingency planning of those officials and to assure preplanning of joint response efforts, including appropriate procedures for mechanical recovery, dispersal, shoreline cleanup, protection of sensitive environmental areas, and protection, rescue, and rehabilitation of fisheries and wildlife; and . . . work with State and local officials to expedite decisions for the use of dispersants and other mitigating substances and devices.

Id.

93 Exec. Order No. 12, 580, 3 C.F.R. 193 (1987), as amended by Exec. Order No. 12,777, 3 C.F.R. 351 (1992) [hereinafter Exec. Order No. 12,777] (delegating certain responsibilities under the CWA and OPA to the “Secretary of the Department in which the Coast Guard us operating for the coastal zone” and other agencies).
94 2 GRAD, supra note 6, at 3-294.
The President is required to "prepare and publish a National Contingency Plan ("NCP") for removal of oil and hazardous substances pursuant to [33 U.S.C. § 1321]," and the President has delegated "[t]he responsibility for the revision of the NCP and all the other functions vested in the President by Section 311(d)(1) of the Federal Water Pollution Control Act, and by Section 4201(c) of the Oil Pollution Act of 1990" to the Administrator of the Environmental Protection Agency. The nation is divided into regions and areas, and under the National Response System, each area has an Area Committee headed by the area federal OSC, who must prepare an ACP in accordance with the NCP. The OSC is generally the Coast Guard Captain of the Port for the coastal zone areas in which an ACP is required. The OSC heads the planning and preparedness for response as

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96 Exec. Order No. 12,777.
98 33 U.S.C. § 1321(j)(4); 40 C.F.R. 300.120 (2002). Area Committee is defined as "the entity appointed by the President consisting of members from qualified personnel of federal, state, and local agencies with responsibilities that include preparing an area contingency plan for an area designated by the President." 40 C.F.R. § 300.5. See also 40 C.F.R. § 300.205(c). Note that the regulations "request" the governor of each state to designate an agency or office to represent the state's interests to the Regional Response Team. 40 C.F.R. § 300.115(h). Area Contingency Plan is defined as

the plan prepared by an Area Committee that is developed to be implemented in conjunction with the NCP and RCP, in part to address removal of a worst case discharge and to mitigate or prevent a substantial threat of such a discharge from a vessel, offshore facility, or onshore facility operating in or near an area designated by the President.

40 C.F.R. § 300.5. See 40 C.F.R. 300.210 for a list of the required contents of an ACP. ACPs "are available for inspection at...USCG district offices." 40 C.F.R. § 300.210. Some ACPs are also published on the internet. For example, the Area Contingency Plan for the California North Coast, San Francisco Bay & Delta, and the Central Coast is at http://www.uscg.mil/11/msos/Plans/ACP/acp+.htm (last visited Mar. 13, 2003).
99 40 C.F.R. § 300.120(b). See also 40 C.F.R. § 300.5 for a definition of On-Scene Coordinator. The EPA provides OSCs for spills that threaten inland areas and Remedial Project Managers ("RPM"s) for remedial actions. 40 C.F.R. § 300.120.
well as the actual response to an oil spill.\textsuperscript{100} Area Committees consist of representatives from federal, state, and local government agencies.\textsuperscript{101}

V. CONSIDERATION OF STATE COASTAL ZONE MANAGEMENT PLANS IN THE AREA CONTINGENCY PLANNING PROCESS

Each state is different, but only one state is considered here, as an example of a relationship between state and federal government. In California, the way that the question whether Area Contingency Plans are subject to federal consistency review under the Coastal Zone Management Act has been dealt with is to sweep it under the rug in order to stay the potential conflict between the state and the federal government by acting with mutual respect and cooperation early in the Area Contingency Planning process.\textsuperscript{102} Lurking in the background, however, is stubborn insistence by each side, one, the California Coastal Commission, reserving the right to demand formal consistency review, the other, the Coast Guard, reserving the unfettered right to carry out the planning process without considering the ACP's consistency with the California Coastal Act.\textsuperscript{103}

The governor of California designated the Office of Oil Spill Prevention and Response ("OSPR") in the Department of Fish and Game as the state's agency representative to the Regional Response Team ("RRT").\textsuperscript{104}

\textsuperscript{100} 40 C.F.R. § 300.120 (2002). \textit{See also} Establishment of Area Committees and Development of Area Contingency Plans, U.S. Coast Guard Commandant Notice 16471 (Sep. 30, 1992 (cancelled Mar. 29, 1993)) (on file with author) ("The predesignated Federal On-scene Coordinator for the area will serve as chairman of the Committee. He/she will... provide general direction and guidance for the Committee. . . . The OSC directs the Area Committee’s development and maintenance of the Area Contingency Plan.").


\textsuperscript{102} \textit{See infra} Parts V.A., V.B.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Cal. Gov’t Code} §§ 8670.3(a), 8670.4, 8670.5 (West 1992) (detailing that “[t]he administrator shall be a chief deputy director of the Department of Fish and Game . . . [and] shall be appointed by the Governor” § 8670.4; and “shall . . . represent the state in any coordinated response efforts with the federal government” § 8670.5). The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, Article 3.5 of Chapter 7 of the California Government Code and Division 7.8 of the California Public Resources Code, mandates the establishment and implementation of a state oil spill contingency plan, analogous to the
The RRT, established pursuant to the NCP, provides guidance to the Area Committees within its region to ensure that ACPs are consistent with the NCP.\(^\text{105}\) The RRT members nominate representatives from their agencies to participate in the Area Committees.\(^\text{106}\) The administrator of the OSPR chairs the State Interagency Oil Spill Committee ("SIOSC") that provides state input to the RRT, and the California Coastal Commission is a member of the SIOSC but not directly a member of the RRT.\(^\text{107}\) The California Coastal Act is "California’s coastal zone management program within the coastal zone for purposes of the Federal Coastal Zone Management Act of 1972,"\(^\text{108}\) and it gives “primary responsibility” to the CCC to implement the California Coastal Act, designating the CCC “as the state coastal zone planning and management agency for any and all purposes” with authority to “exercise any and all powers set forth in the” CZMA.\(^\text{109}\) The California Coastal Act contains another provision that only the CCC may concur, object to, or otherwise make findings concerning federal consistency with the Act.\(^\text{110}\) Both the OSPR and the CCC participate in Area Committee meetings.\(^\text{111}\) The

\(^{105}\) 40 C.F.R. §300.115.

\(^{106}\) 40 C.F.R. §300.115(g).


\(^{108}\) CAL. PUB. RES. CODE § 30,008 (West 1996).

\(^{109}\) CAL. PUB. RES. CODE § 30,330. See also CAL. PUB. RES. CODE § 30,105, which defines “commission” as the California Coastal Commission.

\(^{110}\) CAL. PUB. RES. CODE § 30,400, states:

In the absence of a specific authorization set forth in [Division 20, the California Coastal Act] or any other provision of law or in an agreement entered into with the commission, no state agency, including the Office of Planning and Research, shall exercise any powers or carry out any duties or responsibilities established by this division or by the Federal Coastal Zone Management Act of 1972 . . . or any amendment thereto.

\(^{111}\) In an informal personal communication with the author, the Supervisor of the California Coastal Commission Oil Spill Program state that the CCC does attend all California area Committees, including San Francisco. Memorandum from Ellen Faurot-Daniels, Oil Spill
significance of the CCC's participation is interpreted differently by the CCC itself and the Coast Guard, stemming in part from the exclusive designation of the OSPR as the state's representative in oil spill response planning in the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act\textsuperscript{112} and the exclusive designation of the CCC as the state's authority to review consistency determinations under the CZMA and CCA.

Currently, the Area Committees, chaired by the OSC from the Coast Guard and attended by various state and federal agencies, including the OSPR and the CCC create and periodically update Area Contingency Plans. The Coast Guard does not make a consistency determination, and the ACPs do not explicitly mention a requirement to consider either the Coastal Zone Management Act or the California Coastal Act.\textsuperscript{113} The ACP is created, however, in cooperation with the CCC, presumably asserting its influence to ensure that the ACP is ultimately compliant with the CCA.\textsuperscript{114}

The lurking tension between the opposing perspectives has not been addressed by litigation,\textsuperscript{115} because it seems that the cooperative planning process has allowed each side of the debate to voice its concerns and protect its interests in reaching mutually beneficial solutions in oil spill response planning.\textsuperscript{116} Examples of the opposing views are found in unofficial

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\textsuperscript{112} CAL. GOV'T CODE §§ 8670.1-8670.72, 8574.1-8574.10 (West 1992); CAL. PUB. RES. CODE §§ 8750-8760 (West 2001).

\textsuperscript{113} See, e.g., Los Angeles/Long Beach Area Contingency Plan (2000) (on file with author).


\textsuperscript{115} Informal personal communications with the California Coastal Commission Oil Spill Program Supervisor, and the Coast Guard Maintenance and Logistics Command Pacific Environmental Law Branch Chief confirmed the negative results of a search for cases holding for or against the requirement for federal consistency review of Area Contingency Plans. Telephone Interview with Ellen Faurot-Daniels, Oil Spill Program Supervisor, California Coastal Commission (Feb. 28, 2002) (stating that the federal consistency question was almost litigated in the early 1990s) (emphasis added); Telephone Interview with Merry Goodenough, Environmental Law Branch Chief, U.S. Coast Guard Maintenance and Logistics Command Pacific (Mar. 6, 2002) (stating that there is no case law directly on point).

\textsuperscript{116} See supra Part IV.
statements and guidance documents from the California Coastal Commission and the United States Coast Guard.\textsuperscript{117}

A. \textit{The State Perspective}

The CCC actively participates in the creation of ACPs, voicing its concerns early in the planning process in order to ensure that the California Coastal Act objectives are met.\textsuperscript{118} The CCC interpretation of the participation, as stated through unofficial correspondence, is that the ACPs are subject to federal consistency review, and the Area Committee meetings serve as a forum for informal federal consistency review,\textsuperscript{119} an authorized alternative to formal consistency determinations.\textsuperscript{120} The CCC also asserts that the OSPR may not make findings as to federal consistency, because only the CCC may do so pursuant to section 30,400 of the California Public Resources Code.\textsuperscript{121}

The reasoning behind the CCC's view that ACPs are subject to federal consistency review begins with a consideration of the three phases of oil spill response: planning, response, and post-response.\textsuperscript{122} Creation and modification of the ACP and the ACP itself would fit within the planning phase. Post-response activities may include clean-up measures taken after the oil spill, such as disposal of contaminated soil, building temporary barriers to prevent spread of contamination, and facility or pipeline repairs in sensitive areas.\textsuperscript{123} These activities could be considered development projects.

\textsuperscript{117} See infra Part V.A-B. (discussing the views of the California Coastal Commission and the Coast Guard).
\textsuperscript{118} See CA Oil Spill Program, supra note 114.
\textsuperscript{119} Note that "informal," as used here, is not a legal term of art, but rather denotes a sort of proxy for formal consistency review.
\textsuperscript{120} Telephone Interview with Ellen Faurot-Daniels, supra note 115. See supra note 77 and accompanying text (discussing the NOAA regulations authorizing informal federal consistency review by mutual agreement between the state and federal agencies as a substitute for the formal consistency determination process).
\textsuperscript{121} Memorandum from Ellen Faurot-Daniels, supra note 112. See supra notes 104-11 and accompanying text (discussing the California Coastal Act provisions governing the responsibilities of the California Coastal Commission).
\textsuperscript{122} See Memorandum from Ellen Faurot-Daniels, supra note 112.
\textsuperscript{123} See CA Oil Spill Response Program, supra note 110.
requiring CCC permits.\textsuperscript{124} The argument for a consistency requirement is that all phases may have an effect on the state’s coastal zone, and any activity that has a foreseeable effect on the coastal zone is subject to consistency review.\textsuperscript{125} There seems to be some difference of opinion over the existence of an override provision in the National Contingency Plan that would allow the OSC, during an oil spill response, to override “otherwise applicable Federal, State, and local requirements”\textsuperscript{126} after consultation with the RRT, which presumably represents and can authorize response actions on behalf of all interested agencies, including the state.\textsuperscript{127} The assertion of the OSC’s authority under the NCP to override other federal and state requirements, opposed by the state, may stem from an interpretation of the preamble to the 1994 revisions to the NCP in the Federal Register, which states that although the OSC must consult with the RRT, “consultation with the trustees does not mean that the OSC must obtain the concurrence of the trustees, although such concurrence is highly desirable. Ultimately the OSC, consistent with sections 300.120 and 300.125,\textsuperscript{128} has the authority to direct response efforts and coordinate all other efforts at the scene of a discharge.”\textsuperscript{129} The argument is that even if there is such an override provision in the NCP, it does not apply to the planning phase, in which ACPs are created and modified, thus ACPs are still subject to federal consistency review.\textsuperscript{130}

\textsuperscript{124} Id. (asserting that oil spill response activities such as “construction within the coastal zone for temporary storage . . . access to roads or staging areas” may require a State coastal development permit).

\textsuperscript{125} See supra note 49 and accompanying text (discussing the statutory requirement of federal consistency review for federal agency activities that have a foreseeable impact on a state coastal zone).

\textsuperscript{126} National Oil and Hazardous Substances Pollution Contingency Plan, 59 Fed. Reg. 47,384, 47,389 (Sep. 15, 1994).

\textsuperscript{127} See Memorandum from Ellen Faurot-Daniels, supra note 112.

\textsuperscript{128} 33 C.F.R. §§ 300.120 & 300.125 (2002).

\textsuperscript{129} National Oil and Hazardous Substances Pollution Contingency Plan, 59 Fed. Reg. at 47,390.

\textsuperscript{130} See Memorandum from Ellen Faurot-Daniels, supra note 112.
B. The Federal Perspective

The Coast Guard appears to have been functioning with the interpretation of CCC participation in Area Committee meetings that it is a mutually beneficial arrangement that does not constitute informal federal consistency review, which is unnecessary anyway because California ACPs are not subject to a federal consistency requirement. The prevailing view seems to be that since the OSPR has been designated as the state’s representative for oil spill planning and response, it is the sole required state voice on the Area Committee, authorized to speak for all the other state agencies. Furthermore, neither the NCP, nor the ACP mentions the need for federal consistency review. The Coast Guard ACP Coordinator for District Eleven reviews ACPs before District Commander approval and promulgation for consistency with the OPA-90 amendments to the CWA and implementing regulations alone. Several arguments support this interpretation.

One argument is based on the requirement in the federal consistency provision of the CZMA that federal agency activities be consistent with “enforceable policies of approved State management programs.” Two provisions of the California Coastal Act mention oil. One requires that “[p]rotection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials . . . and . . . [e]ffective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.” The other provision deals with industrial oil and gas.

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131 Telephone Interview with Tim Holmes, ACP Coordinator, U.S. Coast Guard District Eleven (Mar. 5, 2002).
132 Id.
133 Id.
134 See infra notes 135-149 and accompanying text (discussing possible Coast Guard arguments in support of no consistency requirement for ACPs in California).
137 Id. at 30,232.
development platforms. The argument is that neither provision governs oil spill response planning, so there is no enforceable policy in the approved state management program with which to be consistent.

A second argument is that even if there is an applicable policy, it is preempted by federal law and thus unenforceable. The federal consistency requirement can be viewed as a "limited waiver of federal supremacy," in that states are given the power to substantively control federal activities by requiring that they be consistent with enforceable state policies. Even the CWA contains a savings clause stating that State law is not to be preempted by section 311, as amended:

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to discharge of oil or

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138 Id. at 30,260-30,265.5.
139 The California Coastal Act is California's State management program.
140 See Telephone Interview with Merry Goodenough, supra note 115.
141 Atelsek, supra note 68, at 19. See also supra note 66 and accompanying text. California Coastal Commission v. Granite Rock Co. provides a concise summary of traditional preemption analysis:

[s]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

142 Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124, 77,142 (Dec. 8, 2000) ("[T]he CZMA federal consistency requirement can be thought of as a limited waiver of federal supremacy."). See Atelsek, supra note 68, at 19; see, e.g., Commander Richard Lee Kuersteiner & Commander Paul M. Sullivan, Coastal Federalism: The Role of the Federal Supremacy Doctrine in Federal and State Conflict Resolution, 33 JAG. J. 39 (1984) (arguing that the CZMA's "consistent, to the maximum extent practicable" standard is ambiguous and inefficient and proposing a solution under the federal supremacy doctrine). See also supra note 3 and accompanying text.
hazardous substance into any waters within such state, or with respect to any removal activities related to such discharge.  

The CZMA, however, contains two noteworthy provisions that indicate that the Act was not intended to affect existing federal law. The first states, "[n]othing in this section shall be construed . . . to diminish either Federal or state jurisdiction, responsibility or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters." The second provision is:

Notwithstanding any other provision of this chapter, nothing in this title shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended . . . or (2) established by the Federal Government or by any state or local government pursuant to such Act. Such requirements shall be incorporated in any program developed pursuant to this chapter and shall be the water pollution control and air pollution control requirements applicable to such program.

Perhaps the most telling indication of the viability of federal preemption despite the CWA savings clause is found in the CZMA regulations: "The term 'consistent to the maximum extent practicable' means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency."
A final argument is that the ACPs fit within an exemption enumerated in the CZMA. One such exemption is the so-called emergency exception, where “[a] Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of an emergency or other similar unforeseen circumstance . . . which presents the Federal agency with a substantial obstacle that prevents complete adherence to the approved program.”\textsuperscript{148} Another means of avoiding the requirement to submit a consistency determination is \textit{de minimis} agency activities, as described in NOAA regulations. “\textit{De minimis} activities are activities that are expected to have insignificant direct or indirect . . . coastal effects and which the State agency concurs are \textit{de minimis}.”\textsuperscript{149} The argument is that the response activities have a minimal impact on the environment relative to the spill itself. To successfully use this provision, the Federal agency must have State concurrence.\textsuperscript{150}

C. \textit{Federal Consistency Analysis for Area Contingency Plans}

The question of whether consistency determinations are required for ACPs arises from the requirement in section 307 of the CZMA that, “[e]ach Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency . . .”\textsuperscript{151} “Paragraph (1)” refers to what is often called the “Federal consistency requirement.”\textsuperscript{152} It states, “[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.”\textsuperscript{153} Whether “subject to paragraph (1)” means, literally, subject to

\textsuperscript{148} 15 C.F.R. § 930.32(b).
\textsuperscript{149} 15 C.F.R. § 930.33(a)(3)(ii).
\textsuperscript{150} \textit{Id}. Note, however, that state concurrence of \textit{de minimis} impact on the coastal zone may not be the equivalent of submission of a consistency determination.
\textsuperscript{152} NRT, \textit{supra} note 73, at 1 (“The Federal consistency requirement of the [CZMA] requires that Federal actions which are reasonably likely to affect any land or water use or natural resource of the coastal zone be consistent with the enforceable policies of an approved state [CMP].”).
paragraph (1) or, more liberally, subject to the federal consistency requirement may have an impact on whether ACPs must be accompanied by a federal consistency determination. If the literal reading is taken, then one should only consider whether the elements of paragraph (1) of section 307(c) are met.

Under the literal interpretation, a determination must be provided if [1] a "[f]ederal agency activity within or outside the coastal zone . . . [2] affects . . . the coastal zone . . . [and must be] consistent to the maximum extent practicable [3] with enforceable policies of approved State management programs."\(^{154}\) This interpretation, in effect, leaves consistency out of the elements as a requirement of the paragraph, asserting that a determination has to be provided if there is a federal agency activity that affects the coastal zone and there are enforceable state policies with which to be consistent.

If ACPs were to fit within section 307 at all, they would most likely fall under paragraph (1), because they are neither development projects, which are governed by paragraph (2), nor licensing or permitting activities or outer continental shelf activities, which are governed by paragraph (3).\(^{155}\)

\(^{154}\) Id.

\(^{155}\) 16 U.S.C. §1456(c)(1)(A) ("A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3)."'); 16 U.S.C. §1456(c)(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 the enforceable policies of approved state management programs.").

[A]ny applicant for a required Federal license or permit to conduct an activity . . . affecting any land or water use or natural resource of the coastal zone . . . shall provide . . . to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program.


[A]ny person who submits . . . any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act . . . shall . . . attach to such plan a certification that each activity which is described . . . in such plan complies with the enforceable policies of such state’s approved management program and will be carried out in a manner consistent with such program.

Regulations elucidate the definition of "federal agency activity" left undefined in the statute, providing that it "means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities." The Coast Guard is statutorily required to create ACPs under the NCP. ACPs might be excluded from the definition by calling them plans rather than activities were it not for the continuation of the regulatory explanation of activities, which clarifies that "activities" includes "planning" where the plan "initiate[s] . . . events where coastal effects are reasonably foreseeable."

It is difficult to argue that no ACPs call for actions that might affect the coastal zone, but it is conceivable that a particular ACP might escape this element of the definition of activities. ACPs lay out the procedures to be followed in cleaning up oil spills, and the acts of cleaning up a spill in a coastal zone are likely to have some impact on resources in coastal zone and land and water uses in the zone.

activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and includes the acquisition, use, or disposal of any coastal use or resource." Federal Consistency with Approved Coastal Management Programs, 15 C.F.R. § 930.31(b) (2003). Although it may be arguable that ACPs fit within the definition of development project, that argument is beyond the scope of this note, which focuses on ramifications of ACPs more generically fitting within the "residual category" of "federal agency activities."

The Federal agency activity category is a residual category for federal actions that are not covered under subparts D ['Activities Requiring a Federal License or Permit'], E ['Consistency for Outer Continental Shelf . . . Exploration, Development and Production Activities'], or F ['Consistency for Federal Assistance to State and Local Governments'] of [Part 930].

15 C.F.R. § 930.31(c).

See supra note 68 and accompanying text.

15 C.F.R. § 930.31(a).

See supra note 68 and accompanying text.

15 C.F.R. § 930.31(a) ("This encompasses a wide range of Federal agency activities which initiate an event or series of events where coastal effects are reasonably foreseeable, e.g., rulemaking, planning, physical alteration, exclusion of uses.").

15 C.F.R. § 930.11(g) ("Effects are not just environmental effects, but include effects...".

Although undefined in the statute, "consistent to the maximum extent practicable" is taken to mean "fully consistent" and read with the next provision of the statute, "with the enforceable policies of approved State management programs." \(^{161}\) Room for the federal agency to maneuver in avoiding having to make a consistency determination is found in the phrase "enforceable policies of approved State management programs." \(^{162}\) "[E]nforceable policy' means State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone." \(^{163}\) The regulations incorporate the statutory definition exactly, but continue with a requirement that the policies be incorporated in a CMP. \(^{164}\) The regulatory definition of "consistent to the maximum extent practicable" also includes a sort of escape provision for the federal government, "unless full consistency is prohibited by existing law applicable to the Federal agency," \(^{165}\) that when read in conjunction with the statutory definition of "enforceable policy" leaves room for operation of federal preemption. \(^{166}\)

\[^{161}\text{16 U.S.C. § 1456(c)(1)(A); 15 C.F.R. 930.32(a)(1) ("The term ‘consistent to the maximum extent practicable’ means fully consistent with the enforceable policies of the management programs... ").}\]

\[^{162}\text{16 U.S.C. § 1456(c)(1)(A) (emphasis added).}\]

\[^{163}\text{16 U.S.C. § 1453(6a).}\]

\[^{164}\text{15 C.F.R. § 930.11(h) (adding “and which are incorporated in a management program as approved by OCRM... as part of program approval”).}\]

\[^{165}\text{15 C.F.R. §930.32(a)(1).}\]

\[^{166}\text{NRT, supra note 73, at 1 ("Federal actions must be consistent to the maximum extent practicable (fully consistent unless the Federal agency’s legal authority prohibits full compliance.").")}\]

The Coast Guard is only required to be consistent with the ‘enforceable policies' of the State [CZMP]. This means that the policies must be mandatory and be backed by State law enforcing them. If the State law backing a mandatory policy is invalid due to preemption, then it is not an enforceable policy and consistency review for that policy is not required. Atelsek, supra note 68, at 19 (citations omitted).
It is possible for a particular ACP to avoid a requirement to be accompanied by a consistency determination, then, if there are no state policies applicable to the actions described in the ACP; if there is no state CMP, or if a provision in the ACP is specifically required by a federal law.\(^{167}\) This analysis requires a case-by-case review of ACPs and state CMPs within the geographic area impacted by each ACP. It would probably be more efficient, however, for the Coast Guard to assert nationwide federal preemption of CMP and CZMA consistency requirements. Whether such an assertion is legislatively or legally sound is another question.

Generally, preemption occurs when federal law occupies a field of legislation or when a state and federal law conflict.\(^{168}\) Clearly, a statement within a statute that it is intended to preempt state law will do so.\(^{169}\) Conversely, if Congress intends that its legislation not preempt state law or other federal legislation, an express statutory statement to not preempt should have the same effect as an express statement to preempt. Section 311 of the CWA, the foundation of the Coast Guard’s statutory obligation to oversee the creation of ACPs, states that “'[n]othing in this section shall be construed as preempting any State... from imposing any requirement... with respect to the discharge of oil or hazardous substance into any waters within such state, or with respect to any removal activities related to such discharge.’”\(^{170}\) Section

\(^{167}\) See Atelsek, supra note 68, at 18 (“[I]f the Coast Guard can demonstrate that the statute it is administering leaves it no discretion—for example, vessel documentation actions, or where Congress directs a Coast Guard station to be built in a certain place—then consistency requirements of the CZMA do not apply.”).


[S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Id. (citations omitted).


307, the source of the consistency requirement, states that "nothing in this title shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended . . . or (2) established by the Federal Government . . . pursuant to such Act[]." If the pertinent field of the CWA is removal of oil spills and the field of CZMA is protection of the coastal zone, these two provisions clearly state that Congress did not intend either statute to preempt the other.

In addition, courts have found that the CZMA "contemplates a joint federal-state regulatory program." Thus, the question of whether a state CMP preempts the CWA requirements may actually be a question of whether the CZMA preempts the CWA. Two federal laws cannot preempt each other and must be interpreted so as to give each effect when they are "capable of co-existence." Because both the CWA and the CZMA contain express statutory statements of congressional intent to work in concert, state CMPs, created under authority of the CZMA, cannot preempt or be preempted by the CWA, or ACPs created under authority of the CWA.

Further support for the assertion that CZMA and the CWA were meant to work in concert is that even though the CZMA may constitute a "limited waiver of federal supremacy" that waiver is certainly limited by the specific statutory provision in section 307 addressing the possibility of an actual conflict between a state policy under the CZMA and a federal duty under the CWA, which states that federal activities must be consistent only with enforceable policies. Recalling that enforceable policies are defined in section 304 as those that are "legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or

173 Id. at 804 ("[I]n view of the clear intent of Congress in enacting the CZMA to develop a joint federal-state system for management of coastal zone resources, the question...is whether the abandonment provision, a federal statute, preempts or repeals in part the CZMA, another federal law.") (emphasis added).
174 Id. at 805 (quoting Morton v. Maucari, 417 U.S. 535, 550-51 (1974)).
175 See supra note 169-174 and accompanying text.
administrative decisions," one can see that the CZMA has provided that conflict preemption will allow a federal activity to escape the consistency requirement. A state policy, although otherwise enforceable (as part of an approved CMP), may be unenforceable as to a federal activity if it is preempted by a conflict with a federal law that "limits the Federal agency's discretion to be fully consistent with the enforceable policies of the management program." Because the CZMA specifically contemplates preemption by conflict, and both the CZMA and CWA expressly state that they are not intended to preempt other statutes or state laws in their overlapping fields of coastal zone protection and oil spill response, ACPs generally must be subject to the consistency requirements of the CZMA except when particular provisions of the ACP are legally required and conflict with an otherwise enforceable state policy.

If "subject to paragraph (1)" means, more loosely, that a consistency determination is required if a Federal agency activity is subject to the consistency requirement or must be consistent with a CMP, rather than subject to the elements of paragraph (1) as discussed above, then theoretically, if the regulations go beyond defining the elements of paragraph (1) and excuse an activity from consistency with a CMP, no determination would be required under the statute. For example, the regulations provide, "'[a] Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of an emergency or other similar unforeseen circumstance ('exigent circumstance'), which presents the Federal agency with a substantial obstacle that prevents complete adherence to the approved program.'" Considering just this sentence of the regulations, one could argue that if there were an emergency, the federal agency activity would not have to be consistent with the CMP, so the federal agency should not have to submit a consistency determination to the state, because a determination is only required when an activity must be consistent with a CMP. The argument fails, however, if

178 Federal Consistency with Approved Coastal Management Programs, 15 C.F.R. § 930.32(a)(2) (2003); Atelsek, supra note 68, at 19.
179 15 C.F.R. § 930.32(b).
180 See Atelsek, supra note 68, at 16 ("In emergency situations, it will usually be impossible to issue a consistency determination 90 days before the final approval of action. . . . Although
ACPs are not considered an unforeseen circumstance, or, if ACPs somehow constitute an emergency,\(^1\) and one reads further in the regulations. "Federal agencies shall carry out their activities consistent to the maximum extent practicable with the enforceable policies of a management program, to the extent that the exigent circumstance allows."\(^2\) Furthermore, federal agencies are still required to be consistent with CMPs, "to the extent that the exigent circumstance allows" and to "provide the State agency with a description of its actions and their coastal effects" after the emergency has passed or the "response activities" are no longer being conducted.\(^3\) Thus, even though a consistency determination may not have to be submitted before approval of an ACP,\(^4\) the ACP, even if considered an "emergency," would still have to be as consistent as possible. The Area Committee would still have to follow up with documentation of the proposed actions and coastal effects. Despite the apparent lenience in the regulations, emergencies are subject to the consistency requirement, they must be consistent, and a determination of consistency must be made, even if after the fact.\(^5\) The regulations also

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\(^1\) 15 C.F.R. § 930.32(b).

\(^2\) This Note deals only with whether ACPs must be accompanied by a consistency determination, not whether the oil spill response activities that actually take place must be consistent or accompanied by a consistency determination.

\(^3\) Id.

\(^4\) 15 C.F.R. § 930.32(b) ("Once the exigent circumstances have passed, and if the Federal agency is still carrying out an activity with coastal effects, Federal agencies shall comply with all applicable provisions of this subpart to ensure that the activity is consistent to the
encourage the federal government to seek state “concurrence” before responding to the emergency, \(^{186}\) or, if the ACP is considered part of the emergency, before final approval of the ACP. So, if the ACP is an emergency, it might be able to escape the statutory requirement for a consistency determination ninety days prior to approval, \(^{187}\) but the Coast Guard or the Area Committee must still confer with the state and provide documentation as to consistency at some point.

The regulations reflect paragraph (1) of CZMA section 307 in providing that if an activity will have no effects on the coastal zone or use of it, then the federal agency does not have to comply with the requirements of section 307. \(^{188}\) They extend the statute, however, in excluding activities from state review if they will have *de minimis* or “insignificant direct or indirect (cumulative and secondary) coastal effects.” \(^{189}\) Perhaps NOAA gets away with supplementing the CZMA with this exclusion because the regulations require the state to concur that the federal activity will have insignificant effects and to provide for public participation in its review of a federal agency’s request to be excluded from consistency review. \(^{190}\) If the Coast Guard believes that an ACP is a *de minimis* activity, it must request to escape

\(^{186}\) *Id.* ("Federal agencies shall consult with State agencies to the extent that an exigent circumstance allows and shall attempt to seek State agency concurrence prior to addressing the exigent circumstance.").


\(^{188}\) 16 U.S.C. § 1456(c)(1)(A) (requiring consistency for “[e]ach Federal agency activity... that affects any land or water use or natural resource of the coastal zone”); 15 C.F.R. §930.33(a)(2) (“If the Federal agency determines that a Federal agency activity has no effects on any coastal use or resource... then the Federal agency is not required to coordinate with State agencies under section 307 of the [CZMA].”). This provision of the regulations also requires a “negative determination” that there will be no coastal effects, if the State agency listed the activity in its CMP, the activity is one for which “consistency determinations have been prepared in the past,” or if the Federal agency already did a consistency assessment. 15 C.F.R. §§ 930.33(a)(2), 930.35(a).

\(^{189}\) 15 C.F.R. § 930.33(a)(3)(i).

\(^{190}\) 15 C.F.R. § 930.33(a)(3)(i) (*De minimis* activities shall only be excluded from State agency review if a Federal agency and State agency have agreed. The State agency shall provide for public participation under section 306(d)(14) of the [CZMA] when reviewing the Federal agency’s *de minimis* activity request.").
consistency review, and only if the state agrees can the Coast Guard avoid providing a consistency determination on this basis.\footnote{Id. ("If the State agency objects to the Federal agency’s de minimis finding then the Federal agency must provide the State agency with either a negative determination or a consistency determination pursuant to [15 C.F.R. pt. 930, subpart C].").}

NOAA’s regulations expound on the CZMA in two other ways. The first is that the regulations allow a federal activity to avoid consistency review if it is “environmentally beneficial,” i.e., if it “protects, preserves, or restores the natural resources of the coastal zone.”\footnote{15 C.F.R. § 930.33(a)(4).} This exclusion is also contingent on state and federal concurrence and public participation, like the \textit{de minimis} exclusion.\footnote{Id.} It is quite conceivable that an ACP could be considered a beneficial activity, because it provides for oil spill response or the clean up of environmentally damaging oil spills. In other words, an ACP may provide for the restoration of “the natural resources of the coastal zone.”\footnote{Id.}

Each of the two exclusions described above, \textit{de minimis} and beneficial activities, and possibly the third, exigent circumstances, seem to imply that case-by-case consideration of the ACP and its associated state policies is required. The final way that the regulations expound on the CZMA may be considered an exclusion for particular ACPs, because it allows for a general or national consistency determination.\footnote{15 C.F.R. § 930.33(a)(5) (“General consistency determinations, phased consistency determinations, and national or regional consistency determinations under § 930.36 are also available to facilitate federal-State coordination.”).} “A Federal agency may provide States with consistency determinations for Federal agency activities that are national or regional in scope (e.g., rulemaking, national plans), and that affect any coastal use or resource of more than one State.”\footnote{15 C.F.R. § 930.36(e)(1).} Either if one takes a liberal view of ACPs, that they are created pursuant to a national plan, the NCP, or a more restricted view, that each is not national in scope, but may impact more than one state, it may be possible to exclude a single ACP from consistency review for a particular state. This would also constitute a limited exemption from the consistency determination requirement under a reading of section 307 that a determination is
required if an activity must be consistent with state policies. It is not a full exclusion, however, because a determination is still required that would address the effects of an ACP or group of ACPs on "coastal effects and management issues" that are common to the multiple states included in the national or regional determination.197 Furthermore, the regulations emphasize that if a federal agency does not take advantage of this alternative, "it must issue consistency determinations to each State agency."198

VI. CONCLUSION

Either method of interpreting the phrase in section 307, "subject to paragraph (1),"199 literally or subject to the federal consistency requirement, leads to substantially the same result. If the literal approach is taken, ACPs must be accompanied by a consistency determination unless the elements of paragraph (1) are not present. Any respite from the determination requirement beyond that, applying the more liberal interpretation, comes only with state concurrence200 and only on a case-by-case basis.201 If the statutory language leaves any doubt, it is removed by the Conference Report for the Omnibus Budget Reconciliation Act of 1990, which amended the CZMA to include the current language found in section 307.202 The Report states, "the amendments . . . leave no doubt that all federal agency activities . . . are subject to the CZMA's consistency requirements . . . [and] no federal agency

197 Id. ("The Federal agency's national or regional consistency determination should, at a minimum, address the common denominator of these policies, i.e., the common coastal effects and management issues, and thereby address different States' policies with one discussion and determination.").
198 Id.
200 The regulations require the state to concur that a federal activity has de minimis impact on the coastal zone or is beneficial before allowing the activity to proceed without a consistency determination, and federal agencies are still subject to reporting requirements for exigent circumstances. 15 C.F.R. §§ 930.32(b), 930.33(a)(3)-(4). See also supra notes 176-88 and accompanying text.
201 Another method in section 307 exists by which, on a case-by-case basis, a federal activity may escape the requirement to be consistent with state CMPs. This is a Presidential exemption received on request from the Secretary of Commerce when the federal activity is "in the paramount interest of the United States." 16 U.S.C. § 1456(c)(1)(B).
activities are categorically excluded from the consistency provisions . . . .  

Although it may be too bold to assert that all ACPs must be accompanied by a consistency determination or that they all are subject to the federal consistency requirement, it is clear that ACPs are not, as a category of federal activity, exempt from the requirement for a consistency determination.

The current mode of operation in creating ACPs in California is probably consistent with the objectives of both OPA and CZMA, generally preservation of coastal resources through flexible and efficient cooperation between states and the federal government. 204 OCRM has even stated that, "state involvement in developing ACPs through the Area Committees may be the most effective way to ensure that oil spill response planning will address state concerns, [and] [t]he ACP process should provide a reasonable opportunity to apply state CMP policies and integrate them into the ACP." 205 The regulations provide that federal and state agencies "may mutually agree to intergovernmental coordination efforts to meet the requirements of these regulations." 206 If a breakdown in cooperation between the Coast Guard and state agencies occurs, however, the Coast Guard may be forced to deal with the reality of the clear statutory requirement of case-by-case or ACP-by-ACP consistency determinations across the nation.

\footnote{203} Id.

\footnote{204} See supra Part II.B; see also OCRM FEDERAL CONSISTENCY BULLETIN, Issue 2, supra note 159, at 7 ("The revised NCP and RCPs, and the ACPs recognize that the process of planning for and responding to an oil or hazardous substance spill is iterative and must involve the federal, state, and local community working together cooperatively.").

\footnote{205} OCRM FEDERAL CONSISTENCY BULLETIN, Issue 2, supra note 159, at 7.

\footnote{206} Federal Consistency with Approved Coastal Management Programs, 15 C.F.R. § 930.1(c) (2003).