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THE COASTAL ZONE MANAGEMENT ACT AND THE TAKINGS CLAUSE IN THE 1990'S: MAKING THE CASE FOR FEDERAL LAND USE TO PRESERVE COASTAL AREAS

LINDA A. MALONE*

In 1972, Congress passed the Coastal Zone Management Act (CZMA). The passage of the CZMA created a great sense of achievement in many different quarters because for the first time Congress had declared a national interest in land use decisions previously viewed as local in nature. The CZMA acknowledged that a rapidly growing population endangered the fragility and beauty of the coastal zone.1 Throughout its history, however, the strength of the CZMA has been threatened by inadequate funding and eroded by court decisions. As a result, the very existence of the CZMA, perhaps the most comprehensive effort to combine state and federal land use planning, was often threatened.2

The progression of coastal zone management law from 1972 until its most recent amendments in 1990 presents in stark relief the issues crucial to effective environmental preservation which have been avoided studiously by Congress, the courts, and the states during the brief history of the environmental movement. Is preservation of fragile resources possible without substantive land use restrictions imposed at the federal level? How is the balance of responsibility for the environment to be struck between the federal and state governments?

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2. Id. at 2.
When environmental values conflict with private property rights, which should prevail and how should that policy determination be incorporated into modern jurisprudence under the takings clause? When environmental preservation only can occur at the expense of other publicly held values, such as the need for cheap energy, what mechanisms can reconcile or balance the competing interests?

This article will utilize coastal zone management as a backdrop to these issues. It will also attempt to demonstrate that avoidance of these issues is at least partially responsible for the current state of crisis in coastal land and water resources. Such avoidance is responsible, in a broader sense, for the limited effectiveness of twenty years of environmental regulation. After a comprehensive review of current law regulating the coastal zone, including the CZMA and recent cases interpreting the CZMA, this article will focus on how these cases and other practical problems in administration of the CZMA have diminished the effectiveness of the Act. Many of these cases have involved conflicts between offshore leasing and state coastal protection and the extent to which a state can restrict private property interests without running afoul of the constitutional prohibition on taking of private property without just compensation. In conclusion this article evaluates coastal protection in the context of the broad and difficult issues of environmental policy still awaiting resolution.

I. ENVIRONMENTAL COASTAL LAND USE

The United States' coastal zone is rich in resources valued for transportation, food, water, dilution of waste, and aesthetics. The coastal zone acts as a buffer for dispersion of pollutants and sediments. The coasts offer attractive areas for homes and recreation and are often the site of major ports and industry. Approximately 70% of the total United States commercial fisheries catch consists of species that are dependent upon estuarine environments in their life cycle, and an even greater percentage of the recreational catch is dependent on estuaries.

These resource values of the coastal zone depend upon preservation of the various coastal zones' natural character. Yet nearly fifty-three percent of the United States' population lives in counties within 50 miles of the coastline or the Great Lakes. It was predicted that by

3. *Id.* at 38.
4. *Id.* at 73.
5. *Id.* at 45.
1990 this percentage will climb to 75%.\textsuperscript{7} In addition, the United States has jurisdiction and control over 1.8 million square miles of continental shelf and slope under which enormous amounts of energy resources exist.\textsuperscript{8} It has been estimated that at least 3.5 billion cubic feet of gas reserves are offshore.\textsuperscript{9} Development in the coastal zone could, however, result in toxic contamination, eutrophication, contamination by human pathogens, loss and alteration of habitats critical to living resources, and alterations to circulation and freshwater inflow.\textsuperscript{10} In addition, the so-called "greenhouse effect," a steady increase in carbon dioxide in the earth's atmosphere, threatens a rise in global sea level of one to three feet in the next 70 years from the accompanying global climate warming.\textsuperscript{11} As a result, the quality of the coastal environment is on the decline,\textsuperscript{12} while the CZMA, the primary source of environmental coastal protection, continues to be in jeopardy.

In the Environmental Protection Agency's Near Coastal Water Strategic Options Paper published in 1986, the EPA states:

Near coastal waters are becoming more and more degraded despite existing federal, state and local laws and regulations governing coastal and ocean pollution and land and water uses. The environmental quality of near coastal waters will continue to decline unless changes are made in the way land and water uses affecting them are managed.\textsuperscript{13}

It was precisely these concerns that triggered passage of the CZMA in 1972.\textsuperscript{14} In 1966 the Commission of Marine Science, Engineering and Resources,\textsuperscript{15} known as the Stratton Commission, released a study on the conflict between development of coastal resources and coastal preservation. In its final report,\textsuperscript{16} the Commission concluded that


\textsuperscript{8} Gross, \textit{Federal Offshore Leasing: States' Concerns Fall on Deaf Ears}, 2 FLA. ST. J. OF LAND USE & ENVTL. L. 249, 250 (1986).

\textsuperscript{9} Id.

\textsuperscript{10} Id. \textit{Hearing}, supra note 1, at 46-47.

\textsuperscript{11} Id. at 47.

\textsuperscript{12} Id. at 46.

\textsuperscript{13} Id.


\textsuperscript{15} Created by Pub. L. No. 89-454 (1966).

states were in the best position to manage coastal resources but that federal funds should be provided to help states bear the expenses of administration. These recommendations were essentially incorporated into the regulation of land and water uses in the CZMA.

Inadequate and sometimes nonexistent funding, case by case decisionmaking, state/federal conflicts, uncoordinated planning, pressure for development and energy, insufficient research information, splintered federal authority, and restrictive court decisions are a few of the problems that have plagued the CZMA. States have indicated that they are unable to assume the financial burdens of administering their management plans without federal funds. Only a few of the twenty-nine states with coastal zone management programs are willing to continue their present programs without federal assistance. Absent federal funding, the only remaining incentive for coastal states to continue their programs, until Congress intervened in 1990, was the requirement that federal actions be consistent with state programs. This incentive had been significantly undermined by the Supreme Court. At the same time, the Reagan administration significantly expanded the number and size of federal lease sales for Outer Continental Shelf (OCS) energy development. With the recent amendments to the CZMA in 1990, the next few years will be a crucial test for continuance of coastal zone management.

II. COASTAL ZONE MANAGEMENT LAW

The purpose of the CZMA is to preserve the unique values of coastal lands and waters by encouraging states to devise land and water use plans for coastal protection. The Act provides funds to states that develop programs for management of land and water uses consistent with the Act's standards. The Secretary of Commerce must

17. In 1987, for example, the Senate Appropriation Committee cut the coastal zone management budget from $40 million to $5 million. Hearing, supra note 1, at 44.
18. The only states that have indicated they would continue their current programs without financial assistance are California, Louisiana, New Jersey, Rhode Island, and South Carolina. E. Kaplan & A. Ritchard, Lessening the Scope of Federal Coastal Zone Management: What's at Stake? 1, 21 (June 1982) (Unpublished paper available at Department of Energy and Environment, Brookhaven National Laboratory).
19. See infra notes 137-147 and accompanying text.
20. See infra note 199.
22. Hearing, supra note 1, at 3.
approve state programs upon finding that they satisfy the requirements of sections 305 and 306 of the CZMA. After approval, the Secretary may award grants to the state for the costs of administration of the approved state management program. In addition to grants states obtain for having an approved program, states also benefit from the requirement that federal agencies, permittees, and licensees must show that their proposed developments, including certain oil and gas activities on the outer continental shelf, are consistent with the state's management program.

A. Definition of the Coastal Zone

The CZMA defines "coastal zones" as

the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, [which] includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches.

In 1990 the definition was amended to limit the seaward boundary to the extent of state ownership and title under the Submerged Lands Act. The zone now extends inland "to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise." To paraphrase, the coastal zone consists of the land affected by the waters and the waters affected by the land. The definition of the coastal zone is purposefully vague, giving states great discretion in setting their own jurisdiction. This discretion is necessary because different types of areas, developed and undeveloped, may exist within a single state's coastal zone.

Excluded from the definition of coastal zone is land "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." In Granite Rock Co. v. California Coastal Comm'n, a mining company sought to enjoin the coastal commission from requiring a state permit under

24. 16 U.S.C. §§ 1454-1455; see infra II(B).
25. § 1456(c); see infra II(c).
26. Id. § 1453(1).
29. Id.
the California Coastal Act, originally passed to implement the CZMA in California. The mining operation at issue was located on an unpatented mining claim on land owned by the federal government in a national forest. The district court held that the land on which the company was mining did not fall within the federal exclusion from the coastal zone. California's permit requirement was upheld on the grounds that the states have concurrent authority with the federal government over federal lands in the coastal zone, that the mining claim was not exclusively subject to federal jurisdiction, and that there was no federal preemption. The Ninth Circuit Court of Appeals reversed, finding that the state permit requirement was preempted. The court found that the Forest Service regulations governing mining in the national forests preempted the permit requirement. According to the court, the CZMA was not intended by Congress to change the status quo for allocation of federal and state power over lands within the coastal zone. The court relied on the First Iowa doctrine that federal law establishing a federal permit system for an activity preempts state law prohibiting the activity without a state permit, but only if the state permit requirements "intrude into the sphere of federal permit authority." In finding preemption, the court stated that the Forest Service regulations mandated that the power to prohibit mining for failure to abide by environmental requirements was to reside in the Forest Service, not the state.

The Supreme Court reversed in the Court's only decision to date strengthening the impact of the CZMA. According to Justice O'Connor's opinion, the test for preemption is the same as that used by the Court in other cases in which the Property Clause was not implicated: state law is preempted (1) if Congress has evidenced intent

31. 768 F.2d at 1079.
32. Id. It had also been held in another case that the federal land exclusion does not extend to effects on the surrounding non-federal coastal zone that may be caused by federal activities conducted on federal lands. Puerto Rico v. Muskie, 507 F. Supp. 1035 (D. P.R. 1981), vacated, Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981).
33. 768 F.2d at 1079.
34. Id. at 1083.
35. Id. at 1081.
37. 768 F.2d at 1082.
38. Id. at 1083. For further background on mining activity on federal lands, see Burling, Local Control of Mining Activities on Federal Lands, 21 LAND & WATER L. REV. 33 (1986).
40. O'Connor's opinion was joined by Chief Justice Rehnquist and Justices Brennan, Marshall, and Blackmun. 480 U.S. at 574.
41. "Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST., art. IV, § 3, cl. 2.
to occupy entirely the given field or, (2) where Congress has not displaced state regulation, (a) state law actually conflicts with federal law, (b) it is impossible to comply with both state and federal law, or (c) state law frustrates the purposes and objectives of Congress.\footnote{42}

As a facial challenge to the permit requirement, no particular conditions that the California Coastal Commission might impose in the permit were at issue.\footnote{43} According to the Court, the Forest Service regulations controlling unpatented mining claims in national forests were not only "devoid of any expression of intent to preempt state law, but rather appear[ed] to assume that those submitting plans of operation will comply with state laws."\footnote{44} Even assuming that the Federal Land Policy and Management Act\footnote{45} and National Forest Management Act\footnote{46} preempt the extension of state land use plans to unpatented mining claims in national forests, Congress did not intend to preempt "reasonable" state environmental regulation.\footnote{47} Justice O'Connor distinguished land use planning from environmental regulation, stating: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."\footnote{48} Finally, the federal exclusion from the definition of coastal zone in the CZMA\footnote{49} did not apply to Granite Rock's unpatented mining claim. Relying on the CZMA's non-derogation clause\footnote{50} and its legislative history, the Court concluded "that even if all federal lands are excluded from the CZMA definition of 'coastal zone,' the CZMA does not automatically preempt all state regulation of activities on federal lands."\footnote{51}

Justice Powell wrote a separate opinion, joined by Justice Stevens,

\begin{itemize}
\item \footnote{42} 480 U.S. at 582.
\item \footnote{43} Id. at 580-581.
\item \footnote{44} Id. at 583.
\item \footnote{45} 43 U.S.C. §§ 1701-1784 (1988).
\item \footnote{46} 16 U.S.C. §§ 1600 - 1614 (1988).
\item \footnote{47} 480 U.S. at 588-589.
\item \footnote{48} Id. at 587.
\item \footnote{49} 16 U.S.C. § 1453(1) (1985).
\item \footnote{50} Nothing in this chapter shall be construed—
\begin{enumerate}
\item 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; nor to displace, supersede, limit or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects. . . .
\end{enumerate}
\item \footnote{16 U.S.C. § 1456(e)(1) (1988).}
\item \footnote{51} 480 U.S. at 594. A consistency certification could not be required because the mining claim was an unlisted activity for which 30 days notice from California of intent to review had not been given. \textit{Id.} at 593.
\end{itemize}
Justice Powell agreed with the majority on the procedural issues raised prior to consideration of the merits, but disagreed with the majority's distinction between land use and environmental regulation. Failing to see a difference between environmental regulation and land use, Justice Powell concluded that Congress had entrusted the balancing of mineral development and environmental protection in the national forests to the Forest Service under the National Forest Management Act and Federal Land Policy and Management Act. He also criticized the majority for giving so little weight to the location of the mine in a national forest and the comprehensiveness of the federal statutes authorizing the mining permit, but expressed no view as to the Court's interpretation of the CZMA as not preempting state regulation in the case.

Justice Scalia and Justice White dissented on the merits, contending that the case should have been decided on narrower and simpler grounds than those advanced by the majority. Viewing California's permit requirement as a land use, not environmental, control, these Justices contended that preemption applied because state land use regulation of federal land is preempted by federal law. Justice Scalia referred to the California Coastal Act and concluded that the California Coastal Act and the CZMA are primarily land use regulations. Even assuming that California would use the permit requirement to enforce environmental laws, California could not do so unless it had land use authority over the federal land in question. California did not have land use authority over the mining claim in a national forest, according to Justice Scalia, because Congress intended for federal officials to have exclusive authority under NFMA and FLPMA, as well as the CZMA. Although Justice Scalia agreed with the majority that the CZMA did not change the status quo with regard to state authority over federal lands, he determined that the fed-

52. 480 U.S. at 594 (Powell, J., concurring and dissenting).
53. Id. at 594 (Powell, J., concurring and dissenting).
54. Id. at 602-603 n.5 (Powell, J., concurring and dissenting).
55. Id. at 605 n.6 (Powell, J., concurring and dissenting).
56. Id.
57. Id. at 607 (Scalia, J., dissenting).
58. Id.
60. 480 U.S. at 610 (Scalia, J., dissenting).
61. Justice Scalia believed that the evidence showed that California did have land use interests in addition to environmental concerns. Id. at 612-613 (Scalia, J., dissenting).
62. Id. at 612-613 (Scalia, J., dissenting). The dissenters point out that the argument that the land is not excluded from the CZMA was not "pressed" before the Court, and was rejected by both the lower courts. Id. (Scalia, J., dissenting).
eral lands exclusion and consistency review provisions demonstrate that the status quo was exclusive federal authority.\textsuperscript{63}

The importance of \textit{Granite Rock} goes beyond the limited context of mining claims on federal land in the coastal zone. The Court’s reliance on the non-derogation clause in the CZMA may have broad implications for federal preemption of state coastal regulation. However, the case does little to clarify the precise scope of state authority over federal land in the coastal zone or to clarify whether state power under the CZMA for private activity on federal land is limited to consistency review. Also, the Court failed to decide whether federal land was excluded from the coastal zone under section 304(a). In a more general context, one of the most important questions after \textit{Granite Rock} is whether the state can enforce its permit requirement through injunctive relief. It would seem from the opinion that so long as the state’s regulation is environmental, the state could seek injunctive relief to enforce the permit requirement. Thus, the most common issue as to state authority after \textit{Granite Rock} will be whether state coastal regulation is environmental or land use regulation.

The Court avoided the issue of whether a state could deny a permit or condition a permit on compliance, insofar as the case only involved a facial challenge to the permit requirement. The answer may depend upon whether the state’s requirements are unreasonable or so severe as to be a regulatory taking. It may also be that \textit{Granite Rock} applies only to state permit requirements, not to local or county permit requirements. Outside of the coastal zone context, \textit{Granite Rock} indicates that preemption issues involving federal land are the same as in other contexts not involving federal land. Given all the unanswered questions after \textit{Granite Rock}, however, states would be wise to continue involvement and input in federal land use planning, in addition to establishing their own permit systems.

Because the Court did not have to decide whether federal land is excluded from the coastal zone under section 304(a), it also avoided the issue of when consistency review is required under section 307(c)(3)(A) for activities on federal land affecting the state’s coastal zone. The Supreme Court in \textit{Secretary of the Interior v. California},\textsuperscript{64} since modified by the 1990 amendments to the CZMA,\textsuperscript{65} indicated that for purposes of section 307(c)(1) consistency review, activities by federal agencies on federal land located within the coastal zone must

\textsuperscript{63} \textit{Id.} (Scalia, J., dissenting).
\textsuperscript{64} \textit{464 U.S. 312} (1984).
be reviewed for consistency if they affect the coastal zone, although this difference may be explained by the differing language in sections 307(c)(3)(A) and 307(c)(1). Nevertheless, in spirit the Court in Granite Rock seems less than certain about the reach of consistency review for activities on federal lands physically situated within a state coastal zone.

B. Overview of the Coastal Zone Management Act of 1972 and the Coastal Zone Management Improvement Act of 1980

Under the CZMA, coastal states are given grants for the development and administration of federally approved state management programs for coastal zones. As of 1989, 29 out of 35 states eligible under the CZMA had approved management programs. From 1974 to 1985, 187 million dollars was provided to coastal states in the form of grants. The 1990 amendments increased appropriations for the CZMA program for the years 1991 to 1995.

Approval of state programs is made through the Assistant Administrator of the Office of Coastal Zone Management (now known as the Office of Ocean and Coastal Resource Management) and is dependent upon satisfaction of four general requirements: (1) the program must provide for management of land and water uses having a direct and significant impact on coastal waters and take steps to assure appropriate protection of significant resources and areas, such as wetlands, beaches, dunes, and...
barrier islands, that make the states' coastal zone a unique, vulnerable, or valuable area; (2) the program must contain three broad classes of policies that are related to resource protection, management of coastal development, and simplification of governmental processes; (3) the policies must be appropriate to the nature and degree of management related to uses, areas, and resources identified as subject to the program; and (4) the policies, standards, objectives, criteria, and procedures by which program decisions will be made must provide a clear understanding of the content of the program, especially in identifying who will be affected by the program and how, as well as a clear sense of direction and predictability for decisionmakers who must take actions pursuant to or consistent with the management program.  

Under the second requirement the regulations require, among other things, inclusion of policies that provide the framework for various management techniques and authorities and policies that address uses of or impacts on wetlands and floodplains in accordance with Executive Order No. 11,990 for wetlands and Executive Order No. 11,988 for floodplains.

Additionally, every management program must satisfy the following substantive requirements: (1) identification of the boundaries of the coastal zone subject to the management program; (2) a definition of what constitutes permissible land and water uses that have a direct and significant impact on the coastal waters; (3) an inventory and designation of areas of particular concern; (4) identification of

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73. 15 C.F.R. § 923.3(b)(1) - (4) (1990).
74. Id. § 923.3(b)(2)(i) - (ii).
75. There are four elements to a state's boundary: "the inland boundary, the seaward boundary, areas excluded from the boundary, and in most cases, interstate boundaries." Id. § 923.30(b). The inland boundary must include: (1) those areas the management of which is necessary to control uses which have direct and significant impacts on coastal waters, designated areas of special concern, waters under saline influence, salt marshes and wetlands, beaches, transitional and intertidal areas, and islands. The inland boundary must be presented clearly enough to permit determination of whether property or an activity is located within the management area. The boundary may be defined in terms of political jurisdiction, but states must be able to advise interested parties within 30 days of receipt of an inquiry whether they are subject to the management program. Id. § 923.31(a). Beyond those areas required as above, states have the option of including within the coastal zone: watersheds, areas of tidal influence that extend further inland than waters under saline influence, and Indian lands not held in trust by the federal government. Id. § 923.31(b).
77. Id.
the means to exert control over land and water uses, including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions; (5) broad guidelines or priorities of uses in particular areas including specifically those of lowest priority; (6) a description of organizational structure proposed to implement the program, including the responsibilities and interrelationships of local, areawide, state, regional and interstate agencies in the management process; (7) 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, aesthetic, ecological, or cultural value; (8) a planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities; and (9) a planning process for assessing the effects of shoreline erosion and studying and evaluating ways to control, or lessen the impact of, such erosion and to restore areas adversely affected by such erosion. The regulations require that an environmental impact statement, prepared in accordance with the National Environmental Policy

78. The management program must contain a procedure for assessing public beaches and other public areas, there must be a definition of the term "beach" that is the broadest definition allowable under state law or constitutional provisions, as well as an identification of public areas meeting that definition, and an identification and description of enforceable policies, legal authorities, funding programs and other techniques that will be used to provide such shorefront access and protection that the state's planning process indicates is necessary. 15 C.F.R. § 923.24(c).

79. For a discussion of the Supreme Court decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), deciding the access issue in a taking context, see III, infra. The planning process required must include identification of energy facilities which are likely to locate in, or which may "significantly affect" a state's coastal zone. 16 U.S.C. § 1454(b)(8) (1988). States must consider at a minimum those facilities listed in § 304(5) (the definition of coastal energy activity in 16 U.S.C. § 1453(5) (1988)) of the Act, and, at a minimum "significantly affect" shall be defined in terms of substantial or potentially substantial changes in coastal zone resources which could be affected by a proposed energy facility, including changes in land, air, water, mineral, flora, fauna, noise, and objects of historic, cultural, archaeological or aesthetic significance. 15 C.F.R. § 923.13(b)(1) (1990). In addition, the process must include procedures for assessing the suitability of sites for energy facilities, articulation and identification of enforceable state policies, authorities and techniques for managing energy facilities and their impacts, and identification of how interested and affected public and private parties will be involved in the planning process. Id. § 923.13(b)(2)-(4).

For further discussion of the requirement of consistency as applicable to siting of energy facilities, see Kanouse, Achieving Federalism in the Regulation of Coastal Energy Facility Siting, 8 Ecology L.Q. 533 (1980); see generally Randle, Coastal Energy Dilemmas, 21 Nat. Resources J. 126 (1981).

80. Special management of erosion may be achieved either by designating erosion areas as "areas of particular concern" pursuant to 15 C.F.R. § 923.21 (1990), or as areas for "preservation or restoration" pursuant to 15 C.F.R. § 923.22 (1990). Id. § 923.25(b). There must be a method for assessing the effects of shoreline erosion and evaluating techniques for mitigating, controlling, or restoring areas adversely affected by erosion; and an identification of enforceable policies, legal authorities, funding techniques, and other techniques to manage the erosion as indicated to be necessary by the State's planning process. Id. § 923.25(c).

Act, accompany the state's management program. The regulations provide some guidance in defining permissible land and water uses that have a direct and significant impact on coastal waters under the second requirement listed above.

The CZMA provides for “management program development grants” under section 305 and “administrative grants” under section 306. Although the statutory language is confusing, grants are made under section 305 for a state to develop a final management program. When that program is approved by the OCRM, the state is eligible for further grants under section 306 to implement and administer the program.

Development grants may be made annually to any coastal state that demonstrates that the grant will be used to develop a management program satisfying the requirements of 16 U.S.C. § 1455 (section 306) for approved management programs. Annual grants of up to $200,000 are available on a four-to-one, federal-state matching fund basis for development of state management programs in fiscal years 1991, 1992, and 1993. No state may receive more than two grants. After a development grant is first approved for a coastal state, no subsequent grants may be made unless the state is “satisfactorily developing its management program.”

When a management program is completed by the state, approved by the Secretary of Commerce, and ready for full implementation, further grants are determined by the provisions of section 1455 (section 306 of the Act) for administrative grants. Grants for administration may be given to the state if the Secretary finds the substantive requirements of section 1455(d)(2) for management programs are met and approved the state’s management program. Prior to granting

82. 15 C.F.R. § 923.72(a) (1990). The requirements of the Clean Air Act and Clean Water Act must also be incorporated into the program and are the controlling pollution requirements. 16 U.S.C. § 1456(i) (1988). For a helpful case discussion of the interrelationship between coastal regulation and NEPA, see Citizens of Goleta Valley v. Santa Barbara, 52 Cal. 3d 553, 801 P.2d 1161, 276 Cal. Rptr. 410 (1990).
84. Id. § 1455(a) (West 1985 & Supp. 1991).
85. Id. § 1454(a) (West 1985 & Supp. 1991).
86. Id.
87. Id.
88. Id. § 1455.
89. Id. § 1455(b). Generally, the costs of administering a program include costs incurred in carrying out, in a manner consistent with the Act, projects and other activities that are necessary or appropriate to the implementation of the program.

Under the 1990 amendments, states with approved programs prior to enactment of the amendments are entitled to federal funding on a one-to-one ratio for any fiscal year. Id. § 1455(a)(1). For programs approved after enactment, states may receive federal funds on a four-to-one ratio of federal-
approval, the Secretary must also find that:

(1) the management program has been adopted in accordance with the applicable regulations after notice and with the opportunity of full participation by the relevant federal agencies,90 state agencies, local governments, regional organizations, port authorities, and other public and private interested parties;91

(2) the state has held public hearings in its development;92

(3) the management program and any changes have been reviewed and approved by the Governor;93

(4) the Governor of the state has designated a single agency to receive and administer the administrative grants;94

(5) the state is organized to implement the management program;95

(6) the state has the authority necessary to implement the program;96

(7) the management program provides for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) that are necessary to meet requirements that are not local in nature;97 and
to-state contributions for the first fiscal year, 2.3-to-1 for the second year, 1.5-to-1 for the third year and one-to-one thereafter. Id. § 1455(a)(2).

90. "[R]elevant Federal agencies" are those agencies with "programs, activities, projects, regulatory, financing, or other assistance responsibilities in the following fields which could impact or affect a State's coastal zone: (i) Energy production or transmission, (ii) Recreation of more than local nature, (iii) Transportation, (iv) Production of food and fiber, (v) Preservation of life and property, (vi) National defense, (vii) Historic, cultural, aesthetic, and conservation values, (viii) Mineral resources and extraction, and (ix) Pollution abatement and control." 15 C.F.R. § 923.2(d)(1) (1990). The regulations specifically define "relevant Federal agencies" to include the following departments: Agriculture; Commerce; Defense; Energy; Health; Education and Welfare; Housing and Urban Development; Interior; Transportation; the Environmental Protection Agency; the Federal Energy Regulatory Commission; the General Services Administration; and the Nuclear Regulatory Commission. Id. § 923.2(d)(2). "Relevant Federal agencies" and "Federal agencies" principally affected are given the same meaning under the regulations. Id. § 923.2(e).

92. Id. § 1455(d)(4).
93. Id. § 1455(d)(5).
94. Id. § 1455(d)(6).
95. Id. § 1455(d)(7).
96. Id. § 1455(d)(10). Authority for the management of the coastal zone in accordance with the management program includes the power to: (1) administer land and water use regulations, control development to ensure compliance with the management program, and resolve conflicts among competing uses; and (2) acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program. Id.
97. Id. § 1455(d)(8). Where energy facilities are necessary to meet requirements that are not
(8) the management program makes provision for procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, or aesthetic values.98

One troublesome aspect of these requirements is that the state must designate an agency to receive federal funds and an agency with the authority to implement the state program, but there is no indication that these two agencies need be the same agency.

In addition, for approval of a management program the state must have coordinated the program with local, area-wide, and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the management program is submitted to the Secretary.99 The state also must establish an "effective mechanism" for continuing consultation and coordination between the designated management agency and local governments, interstate agencies, regional agencies, and area-wide agencies within the coastal zone to assure the full participation of such governments and agencies.100

A mechanism for consultation shall not be considered "effective" unless three additional requirements will be met. First, the management agency for the state program is required "before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, [to] send a notice of such management program decision to any local government whose zoning authority is affected" thereby.101 Second, the notice must provide that such local government may, "within the thirty-day period commencing on the date of receipt of such notice, . . . submit to the management agency written comments on the management program decision, and any recommendation or alternatives," unless such local

98. Id. § 1455(d)(9).
100. Id. § 1455(d)(3)(b). In Barcelo v. Brown, 478 F. Supp. 646 (D. P.R. 1979), modified sub nom. Romero-Barcelo v. Brown, 643 F.2d 833 (1st Cir.), cert. denied, 454 U.S. 816 (1981), Puerto Rico sought to enjoin the United States Navy from carrying out naval training operations on the lands owned by the Territory. Puerto Rico argued that such exercises were inconsistent with the island's management program. The court avoided the issue of whether there was any exclusion of federal lands and did not apply any "directly affecting" threshold test (later in Brown v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981), modified sub nom. California v. Watt, 683 F.2d 1254 (9th Cir. 1982), rev'd sub nom. Secretary of the Interior v. California, 464 U.S. 312 (1984), the district court would focus first on whether the activity directly affected the coastal zone and, second, whether there was consistency). Instead the court focused on the second requirement that agency action be consistent "to the maximum extent practicable" with the territorial management program and concluded that adverse effects from the naval bombardments were de minimis.
government waives its right to comment. 102 Third, the management agency, if comments are submitted to it within the thirty-day period, is required to consider any such comments, is authorized in its discretion to hold a public hearing on such comments, and may not take any action within the thirty-day period to implement the management program decisions, whether or not modified on the basis of such comments. 103 A state may modify or amend an approved management plan so long as the original plan requirements are met. 104 Under the 1990 amendments, an approved management program may be amended if: (1) the state promptly notifies the Secretary of the change and submits it for approval with funding subject to suspension by the Secretary pending submission; (2) within 30 days of receiving the change, the Secretary notifies the state of approval or disapproval or that it is necessary to extend review up to 120 days from receipt of this change (an extension of the 120-day period only being available for meeting the National Environmental Policy Act); and (3) the state does not implement any change until after it has been approved by the Secretary. 105

Before granting approval, the Secretary must make a finding that the program provides for any one or a combination of designated general techniques for control of land and water uses within the coastal zones and for a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit. 106

The state is given a choice among three methods of regulation in its program. The designated techniques for control of land and water uses are: (1) state establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance; (2) direct state land and water use planning and regulation; and (3) state administrative review for consistency with the management program of all development plans, projects, or land and water regulations, including exceptions and variances thereto proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearing. 107

Approval of a management program is key to receiving the two

102. Id. § 1455(d)(3)(B)(ii).
103. Id. § 1455(d)(3)(B)(iii).
104. Id. § 1455(e).
105. Id.
106. Id. § 1455b(e). "Water use" is any "use, activity, or project conducted in or on waters within the coastal zone." Id. § 1453(18).
107. Id. § 1455(d)(11)(A) - (C).
incentives provided to coastal states in the Act—funding and federal consistency. Criticism has been leveled at the inherent assumption in the Act that policy requirements and standards are sufficient to protect an environmental resource. Yet, if the requirements for state programs were more specific, the CZMA would come close to the most controversial form of land control—federal land control. The passage of the CZMA was possible because the Act required state programs to implement federal policy rather than federal regulations. The state may still choose the mix of land and water uses in its program to achieve the CZMA’s objectives.

C. Additional Funding and Compliance Under the CZMA

In cases of “serious disagreement” between any federal agency and the coastal state in the development of a management program under section 1454 or in the administration of a final management program approved under section 1455, “the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences,” including public hearings conducted in the local area concerned.\(^\text{108}\) The procedure, however, is completely voluntary.\(^\text{109}\) The regulations indicate that judicial review may be sought by any party to a serious disagreement without first having exhausted the mediation process.\(^\text{110}\)

To ensure compliance, the Act requires the Secretary to conduct a continuing review of the performances of the coastal states.\(^\text{111}\) Each review must include a written evaluation with an assessment and detailed findings on the extent to which a state has implemented and enforced the program, addressed the coastal management needs identified in section 1452(2)(A)-(K), and complied with the terms of any

\(^\text{108}\) 16 U.S.C. § 1456(h) (1985). For a state's coastal zone management program that includes requirements as to shorelands also subject to any federally supported national land use program, the Secretary of Commerce must obtain concurrence to that part of the program by the Secretary of the Interior or such other designated federal administrator of the land use program prior to approval of the program. Id. § 1456(g).


\(^\text{110}\) Id. § 930.116. One court has required a corporation to exhaust its administrative remedies under the CZMA before resorting to the courts. Acme Fill Corp. v. San Francisco Bay Conservation & Dev. Comm’n, 187 Cal. App. 3d 1056, 232 Cal. Rptr. 348 (1986).

In Exxon Corp. v. Fischer, 807 F.2d 842, 844-47 (9th Cir. 1986), modified, 817 F.2d 1349 (9th Cir. 1987), the Ninth Circuit held that Exxon was estopped from challenging in court California’s finding of inconsistency when the Secretary of Commerce had already reviewed and affirmed California’s finding of inconsistency under 15 C.F.R. § 930.121. 807 F.2d 842, 844-41. The court did not decide whether Exxon was required to have submitted the issue to the Secretary first, or could have bypassed administrative review and challenged the finding in district court. Id. at 846.

grant, loan, or cooperative agreement funded under the Act. 112 In evaluating compliance, the Secretary must conduct public meetings and provide an opportunity for oral and written comments by the public, with the final report also being made available to the public. 113

The Secretary may suspend payments from between six and 36 months and may withdraw further payments if a state is failing to comply with its section 315 program for a national estuarine reserve, or a portion of the state’s approved management program, or the terms of any grant or cooperative agreement funded under the CZMA. 114 Before suspension the Secretary must provide the governor of the state with written specifications and a schedule for the actions that need to be taken and written specifications for how the suspended payments must be expended to take the necessary actions. 115 Suspension of funding can be made permanent by the Secretary if the state fails to take the necessary corrective actions. 116

112. Id.
113. Id. § 1458(b).
114. Id. § 1458(c).
115. Id. § 1458(c)(2).
116. Id. § 1458(d). It has been held that the CZMA is neither a jurisdictional grant nor a basis for stating a claim for relief. Town of North Hempstead v. Village of North Hills, 482 F. Supp. 900 (E.D.N.Y. 1979); see also Massachusetts v. Andrus, 594 F.2d 872, 880 & n.9 (1st Cir. 1979); but see Enos v. March, 616 F. Supp. 32 (D. Haw. 1984), aff’d, 769 F.2d 1363 (9th Cir. 1985). The only sanction for noncompliance with the formal requirements of the CZMA is termination or reduction of program funding. See Save Our Dunes v. Pegues, 642 F. Supp. 393, 401 (M.D. Ala. 1985) (citing 16 U.S.C. §§ 1455(g) and 1458(d) (1988), rev’d sub nom. Save our Dunes v. Alabama Dep’t of Envtl. Management, 834 F.2d 984 (11th Cir. 1987), vacated sub nom. Save Our Dunes v. Pegues, 691 F. Supp. 1338 (M.D. Ala. 1988)). CZMA requires under § 1458(d) “withdrawal of financial assistance only if the state’s deviation is unjustified and the state refuses to remedy the deviation.” 642 F. Supp. at 402. Under former section 1455(g), if a state amended or modified its approved program, no further section 1455(g) grants could be made to implement its approved program until the amendment or modification was approved. 16 U.S.C. § 1455(g) (1988). In Save Our Dunes, however, the court used its equitable powers and refused to remedy a violation of section 1455(g). 642 F. Supp. at 402.

A state also may impose penalties for violations under state law. In Government of the Virgin Islands, Dep’t of Conservation v. Virgin Islands Paving, 714 F.2d 283 (3d Cir. 1983), the standard for issuance of a preliminary injunction under the Virgin Islands Coastal Zone Management Act was questioned when an enforcement proceeding was brought in federal court. The defendants allegedly conducted quarry operations in the coastal zone without a permit, and the plaintiffs therefore sought preliminary and permanent injunctive relief, as well as civil penalties. The district court concluded that the standard for issuing a preliminary injunction was Federal Rule of Civil Procedure 65(a): threat of irreparable harm, likelihood of success on the merits, and lack of an adequate remedy at law. Id. at 285. The court of appeals refused to accept this test, or one proposed by the government that merely required a prima facie showing of a violation. The court of appeals said the district was sitting as a local court enforcing Virgin Islands law. Id. at 285-86. Although the Federal Rules applied, it was appropriate to consider local interests as expressed in the coastal law in evaluating irreparable harm and in balancing equities. Id. at 286.
D. Coastal Zone Enhancement Grants and the Coastal Nonpoint Pollution Control Program

The 1990 Amendments to the CZMA created the Coastal Zone Enhancement Grant (CZEG) program. These grants are to be provided to coastal states for the purpose of attaining any one or more of eight enumerated coastal zone enhancement objectives. These objectives are: 1) protection of existing coastal wetlands or creation of new coastal wetlands; 2) minimization or elimination of development in natural hazard areas in order to protect life and property; 3) increased public access to coastal areas having recreational, historical, aesthetic, ecological, or cultural value; 4) reduction of marine debris through increased management of uses and activities which contribute to the presence of such debris in the coastal and ocean environment; 5) development and adoption of procedures to control the cumulative and secondary impacts created by coastal growth and development; 6) preparation and implementation of special area management plans for important coastal areas; 7) planned use of ocean resources; and 8) adoption of enforceable procedures and policies regarding the siting of coastal energy and government facilities having greater than local significance.

Coastal states requesting a coastal zone enhancement grant must submit a proposal for funding to the Secretary, who will then rank the proposals based upon procedural criteria as well as upon the fiscal and technical needs of each state and the overall merit, in terms of public benefits, of the proposal. The procedural criteria must be adopted within twelve months of the enactment of the CZMA amendments, following the notice and comment requirements set out in section 317. The regulations so promulgated must include: 1) specific and detailed criteria to be addressed by a coastal state regarding implementation of the coastal zone enhancement objectives; 2) administrative and procedural rules to aid “the development and implementation of such objectives by coastal states”; and 3) any other funding award criteria necessary to ensure that grants are awarded on the basis of objective standards that can be applied “fairly and equitably” to all coastal states requesting grants.

119. Id. § 1456b(a).
120. Id. § 1456b(c).
121. Id. § 1456b(d).
122. Id. § 1456b(d)(1).
123. Id. § 1456b(d)(2).
proposals. 124

The primary benefit to coastal states under the CZEG program is that they are not required to contribute to the cost of any program funded under the grant. 125 There is, however, an annual cap of $10,000,000 to the amount that may be awarded to all proposals within a single fiscal year beginning with the 1991 fiscal year. 126 In addition, the Secretary may not grant less than 10% and no more than 20% of all funds appropriated to implement section 306 and 306A to fund the enhancement grants program. 127 Funded states are required to undertake the actions for which funding was provided under the CZEG program or else have their eligibility for further funding suspended by the Secretary for at least one year. 128

The 1990 amendments also require every state with a federally approved program to develop a program to implement coastal land use management measures for controlling nonpoint source pollution. 129 The Administrator of EPA must publish national guidelines on “management measures” to control coastal nonpoint sources. 130 “Management measures” are defined as “economically achievable measures” for the control of pollutants from new and existing nonpoint sources that reflect the “greatest degree of pollutant reduction achievable” through application of the best available nonpoint pollution control practices and other methods. 131 States must submit their programs to the Secretary and the Administrator of EPA within 30 months of publication of the national guidelines. 132 After approval, the state must implement the program through changes in the state plan for control of nonpoint source pollution approved under section 319 of the Clean Water Act 133 and through changes in the state's coastal zone management program. 134 If the state fails to submit an approved program, the Secretary may withhold a percentage of any section 306 grant under the CZMA, and EPA may withhold portions of any section 319 grant under the Clean Water Act. 135 Grants are

124. Id. § 1456b(d)(3).
125. Id. § 1456b(e).
126. Id. § 1456b(f).
127. Id.
128. Id. § 1456b(g).
131. Id. § 1455b(g)(5). A state's coastal zone boundaries may be modified to assure control of all land and water uses that have a significant impact on state coastal waters. Id. § 1455b(e).
132. Id. § 1455b(a)(1).
135. Id. § 1455b(e)(3) & (4).
available for up to 50% of the costs of developing these coastal nonpoint pollution control programs.136

E. Federal Participation and Consistency Review

A major incentive for states to have management programs is the requirement that certain federal activities be consistent with state management programs. The quid pro quo from states for the benefit of federal consistency with state programs is that states must adequately consider input from federal agencies in formulating state management programs. The Secretary may not approve any management program pursuant to section 306 unless the views of federal agencies principally affected by the program have been adequately considered.137 Each state must provide an opportunity for full participation by relevant federal agencies, local governments, and other interested parties.138

There are five categories of federal activities subject to consistency review: (1) activities conducted or supported by a federal agency "affecting any land or water use or natural resource of the coastal zone"; (2) federal development projects "in the coastal zone"; (3) federally licensed and permitted activities "affecting any land or water use or natural resource of the coastal zone"; (4) federally licensed or

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136. Id. § 1455b(f).
137. Id. § 1455(h). However, under 15 C.F.R. § 923.51(d) (1990), states have to include only those concerns that are "appropriate in the opinion of the State." Implementation of this vague requirement is as difficult as it sounds. In American Petroleum Inst. v. Knecht, 456 F. Supp. 889 (C.D. Cal. 1978), aff'd per curiam, 609 F.2d 1306 (9th Cir. 1979), the court upheld the Secretary's approval of California's coastal zone management program despite a challenge from the oil industry that the program inadequately considered the national interest in energy development. The court held that the primary concern of the CZMA is environmental protection and that energy needs are merely one of several factors to be balanced against environmental concerns. 456 F. Supp. at 922-927. The court also held that standard of judicial review for federal approval of a management program is the arbitrary and capricious standard. Id. at 904. The Court rejected having programs so specific as to inform persons conducting activities in the coastal zone of the rules and conditions of compliance, because the CZMA did not require "detailed criteria" for private developers. Id. at 919. See also id., 609 F.2d at 1312.

In the legislative history of the 1990 amendments, the House conference report emphasizes that none of the amendments made to the consistency provisions affects this last aspect of the Knecht holding:

It is not the intent of the conferees that this subsection be construed to overturn, in whole or in part, the judicial decision in American Petroleum Institute v. Knecht. Federal agencies and applicants are assured that they will not be subjected to policies which are not enforceable under state law. However, this provision is not intended as a guarantee that the provisions of a coastal program will be so specific that users of the coastal zone must be able to rely on its provisions as predictive devices for determining the fate of projects without interaction with the relevant state agencies. Individual projects must be reviewed on a case-specific basis and states may identify mitigation and other management measures which are not specifically detailed in the management program but which, if implemented, would allow the state to find projects consistent with the enforceable policies of the program.

permitted activities described in detail in OCS plans "affecting any land or water use or natural resource of the coastal zone"; and (5) federal assistance to state and local governments "affecting any land or water use or natural resource of the coastal zone."\(^{139}\)

Every federal agency conducting or financially supporting\(^ {140}\) activities in or outside the zone affecting the coastal zone and every federal agency undertaking any development project\(^ {141}\) in a state coastal zone must conduct the activities or project, "to the maximum extent practicable," consistent with the "enforceable policies"\(^ {142}\) of the state program. Federal agencies providing financial assistance to state and local governments also must do so consistently with the enforceable policies of approved state management programs.\(^ {143}\) Moreover, any applicant for a required federal license or permit to conduct an activity in or outside the zone affecting a state's coastal zone must "provide in the application 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."\(^ {144}\)

The requirements for consistency review, as well as when those requirements must be met, vary depending upon the type of federal activity at issue and whether it must affect or be conducted in the coastal zone.

In summary, consistency review is required for federal activities affecting the coastal zone under section 1456(c)(1), for federal development projects in the coastal zone under section 1456(c)(2), for applications for federal licenses or permits affecting the coastal zone under section 1456(c)(3)(A), for OCS post-lease sale activities affecting the coastal zone under section 1456(c)(3)(B), and for federal funding for state or local projects affecting the coastal zone under section 1456(d).

For federal licenses or permits, perhaps the most frequently occurring situation covered by the consistency provisions, the state or designated agency must receive a copy of the certification with all nec-

\(^{139}.\) Id. § 1456(c), (d).

\(^{140}.\) Id. § 1456(c)(1).

\(^{141}.\) Id. § 1456(c)(2).

\(^{142}.\) "Enforceable policy" is defined as "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." Id. § 1453(6a).

\(^{143}.\) Id. § 1456(d).

necessary information and data. At the earliest practicable time,” the state or designated agency must notify the federal agency concerned that it concurs with or objects to the certification. No federal license or permit can be granted without state concurrence, unless the Secretary (on his own initiative or upon appeal by the applicant) finds, after providing a reasonable opportunity for detailed comments from the federal agency and state involved, that the activity is consistent with the objectives of the Act or is otherwise necessary in the interest of national security.

F. Offshore Leasing Under the Outer Continental Shelf Lands Act and the CZMA

The most controversial consistency determinations have involved oil and gas lease activities in the outer continental shelf. Any plan for the exploration, development, or production in any area leased under the Outer Continental Shelf Lands Act (OCSLA) that affects any land or water use or natural resource of a coastal zone must have attached a certification that each activity detailed in the plan complies with the enforceable policies of a state's management program and will be carried out consistently with that program. No federal license or permit can be granted for any such activity until the state or

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146. Id. Failure of the state or designated agency to furnish this required notification within six months of receipt of the certification is conclusively presumed as concurrence by the state with the certification. Id.

147. Id.


149. 16 U.S.C. § 1456(c)(3)(B) (1988). There is also in the OCSLA a provision for an oil spill liability fund to pay to remove any oil spilled as a result of OCS development and to pay for any resulting damage. Administered by the Secretaries of the Treasury and Transportation, the Offshore Oil Pollution Compensation Fund is financed through a surtax per barrel on oil produced in the OCS and by fines, penalties, and reimbursement. Any United States resident, federal or state agency, or political subdivision may recover for economic losses or environmental damages and for, among other things, injuries to the use of property or natural resources including loss of profits. Owners and operators of vessels and offshore facilities are essentially responsible in limited strict liability for oil spills. 43 U.S.C. §§ 1812-1814 (1985). A district court refused to uphold the Secretary of the Interior's consistency certification for a lease sale despite similar aims and goals between state and federal regulatory schemes and significant future state participation. Its determination that the OCS lease sale directly affected the coastal zone is questionable in light of Secretary of the Interior v. California. Conserv. Law Found. v. Watt, 560 F. Supp. 561, 578 (D. Mass. 1983), aff'd sub nom., Committee of Mass. v. Watt, 716 F.2d 946 (1st Cir. 1983).

designated agency receives the certification, the plan, and any other necessary information and the state or designated agency concurs with the certification and so notifies the Secretaries of Commerce and the Interior.\textsuperscript{150} The state’s concurrence is conclusively presumed if there is no verification within six months of receipt of the certification.\textsuperscript{151} The state may provide the Secretary, the appropriate federal agency, and the applicant with a written statement on the status of review and the basis for further delay.\textsuperscript{152} If the state objects to the certification, the Secretary may nevertheless find that the activity is consistent with the objectives of the chapter or that it is otherwise necessary in the interest of national security.\textsuperscript{153} If a state objects and the Secretary fails to make such a finding or if the applicant fails to comply with the plan as submitted, the applicant must submit either an amended or a new plan to the Secretary of the Interior.\textsuperscript{154}

It has been estimated that as much as 60\% of this country’s undiscovered oil and gas resources are in the outer continental shelf.\textsuperscript{155} During the Reagan administration, efforts were made to increase federal leasing in the continental shelf while seeking to eliminate funding for many ocean and coastal programs.\textsuperscript{156} It is perhaps for these reasons that most litigation and scholarly articles have focused on the interrelationships between OCSLA leasing and the CZMA.\textsuperscript{157}

\begin{itemize}
  \item \textsuperscript{151} Id. § 1456(c)(3)(A).
  \item \textsuperscript{152} Id. § 1456(c)(3)(B)(ii).
  \item \textsuperscript{153} Id. § 1456(c)(3)(B)(iii).
  \item \textsuperscript{154} For the amended or new plan, state concurrence will be conclusively presumed after 3 months. Id. § 1456(c)(3)(B).
  \item \textsuperscript{155} General Accounting Office, Issues in Leasing Offshore Lanes for Oil and Gas Development EMD-81-59, at 1 (1981).
  \item \textsuperscript{156} See Dept’t of Health & Human Services, Proposed 5-Year OCS Oil and Gas Leasing Program, 46 Fed. Reg. 39,226 (1981); and Eliopoulos, Coastal Zone Management: Program at the Crossroads, 13 Env’t Rep. (BNA) Monograph No. 30 (September 17, 1982).
Under the Submerged Lands Act (SLA) passed in 1953, states were granted quitclaim title to the lands three miles seaward of the coastline. In 1947, the Supreme Court decision in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), indicated that the states' held title to the submerged lands of all navigable waters including those in the coastal zone.

In 1947, the Supreme Court ruled in United States v. California, 332 U.S. 19, 38-39 (1947), that the federal government had paramount rights over the continental shelf. See also United States v. Maine, 420 U.S. 515 (1975) (the United States has sovereign rights over the seabed and subsoil underlying the Atlantic Ocean lying more than three geographical miles seaward from the ordinary low water mark and extending seaward to the outer edge of the Continental Shelf).

In the early 1970's, Congress passed amendments that divided development into four stages: (1) development of a five year OCSLA leasing program; (2) lease sales; (3) exploration; and (4) development and production. To balance the need for energy against coastal state interests, § 19 and 25 of the OCSLA established procedures for coordination and consideration between the Department of the Interior and the governors of affected coastal states. Section 19 was designed to ensure that states would have an opportunity for input into decisionmaking on proposed lease sales which would affect their coastal Resources.

Data on oil and gas reserves are then compiled. A call for bids is published in the Federal Register. After reviewing bids, the Bureau selects individual tracts for leasing and prepares draft and then final environmental impact statements. See Note, The Seaweed Rebellion: Federal-State Conflicts Over Offshore Oil and Gas Development, supra note 157, at 538-39. Governors of affected coastal states may submit comments on the size, timing, and location of a proposed lease sale. 43 U.S.C. § 1345 (1988). The Secretary of the Interior may accept such recommendations if they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." Id. § 1345(c). Final notice of the sale is published in the Federal Register. Purchase of a lease gives the purchaser a right to conduct "preliminary activities" on the leased tract. Before actual exploration, plans must be submitted to and approved by the Secretary. Subsequently, another plan for development must also be submitted for approval and is subject to comments by the governors of affected states. When approved, only then can development and production commence. Id. §§ 1345(a) - (c), 1351.

158. See 43 U.S.C. §§ 1301-1315 (1988). In 1845, the Supreme Court decision in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), indicated that the states' held title to the submerged lands of all navigable waters including those in the coastal zone.

159. 43 U.S.C. §§ 1331-56, 1801-66 (1988). In 1947, the Supreme Court ruled in United States v. California, 332 U.S. 19, 38-39 (1947), that the federal government had paramount rights over the continental shelf. See also United States v. Maine, 420 U.S. 515 (1975) (the United States has sovereign rights over the seabed and subsoil underlying the Atlantic Ocean lying more than three geographical miles seaward from the ordinary low water mark and extending seaward to the outer edge of the Continental Shelf).

160. See generally, Special Message to the Congress on Energy Resources, 195 PUB. PAPERS 709 (June 4, 1971); Address to the Nation about Policies to Deal with the Energy Shortages, 323 PUB. PAPERS 916 (Nov. 7, 1973); Special Message to the Congress on the Energy Crises, 17 PUB. PAPERS 29 (Jan. 23, 1974).

161. Id.

162. 43 U.S.C. §§ 1344 (five year program), 1345 (lease sale), 1340 (exploration), 1351 (development and prediction) (1988). Only after the leases are awarded, do the lessees submit an exploratory plan to the Department for approval, Id. § 1340(c)(1), followed by a production and development plan prior to drilling. Id. § 1351(a)(1). Administration of the leasing is done by the Bureau of Land Management. The Bureau initially selects and schedules for leasing areas of the outer continental shelf. Data on oil and gas reserves are then compiled. A call for bids is published in the Federal Register. After reviewing bids, the Bureau selects individual tracts for leasing and prepares draft and then final environmental impact statements. See Note, The Seaweed Rebellion: Federal-State Conflicts Over Offshore Oil and Gas Development, supra note 157, at 538-39. Governors of affected coastal states may submit comments on the size, timing, and location of a proposed lease sale. 43 U.S.C. § 1345 (1988). The Secretary of the Interior may accept such recommendations if they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." Id. § 1345(c). Final notice of the sale is published in the Federal Register. Purchase of a lease gives the purchaser a right to conduct "preliminary activities" on the leased tract. Before actual exploration, plans must be submitted to and approved by the Secretary. Subsequently, another plan for development must also be submitted for approval and is subject to comments by the governors of affected states. When approved, only then can development and production commence. Id. §§ 1345(a) - (c), 1351.
coastal areas. In 1976, Congress amended the CZMA to address its interrelationship with the OCSLA. Also in 1976, Congress established the Coastal Energy Impact Program (CEIP) to provide funds to coastal states to compensate for their costs of coastal energy development. Secretarial mediation was provided for state and federal disagreement over consistency of a lease plan.

Most litigation has focused on § 18 of the OCSLA governing the five year leasing program and on the Secretary of the Interior's interpretation of "directly affecting" in § 307(c)(1) of the CZMA before the 1990 amendments. These provisions reveal the uneasy balance of federal and state power in the CZMA. In offshore energy development, the national interest in energy production frequently conflicts with states' environmental concerns. So far, states have been the losers in the battle.

1. Challenges to Formulation of a Five-Year Leasing Plan Under Section 18 of the OCSLA

The Secretary of the Interior is required under § 18 of the OCSLA to develop a five year leasing program to set the size, timing, and location of leasing activities to meet energy needs by considering a variety of factors and balancing energy potential, environmental ef-

166. Id. § 1456a. The program was eliminated in the 1990 amendments. See II(G), infra.
172. Under section 18(a)(2), there must be consideration of:
(A) existing information concerning the geographical, geological, and ecological characteristics of such regions;
(B) an equitable sharing of developmental benefits and environmental risks among the various regions;
(C) the location of such regions with respect to, and the relative needs of, regional and national energy markets;
(D) the location of such regions with respect to other uses of the sea and seabed, including fisheries, navigation, existing or proposed seafarers, potential sites of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf;
(E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination;
(F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration;
(G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and
(H) relevant environmental and predictive information for different areas of the outer Continental Shelf.
fects, and adverse impacts on the coastal zone. The first five year plan was approved by the Secretary of the Interior in June, 1980. In the following month the plan was challenged in court by Alaska, California, the North Slope Borough of Alaska, and the National Resources Defense Council on the grounds that § 18 had been violated. The District of Columbia Circuit Court of Appeals held that factual conclusions under the OCSLA would be upheld if supported by substantial evidence, policy decisions would be upheld if not arbitrary and capricious, and that questions of law would be reviewed de novo by the court. The court held that the Secretary of the Interior: (1) had not defined lease sales in the program "as precisely as possible"; (2) had not considered the equitable sharing of development benefits and environment risks among regions as required by § 18(a)(2)(B); (3) did not consider the relative environmental sensitivity and marine productivity of different areas as required by § 18(a)(2)(G); and (4) had not properly balanced the potential for energy discovery, environmental damage, and adverse coastal zone impacts in selecting the timing or location of lease sales as required by § 18(a)(3) due to his failure to consider adequately the § 18(a)(2) factors.

In July 1981, Secretary of Interior James Watt submitted to Congress a new five year leasing program. In October 1981, the D.C. Circuit Court of Appeals remanded the prior program back to the Department of the Interior with a schedule for compliance with its opinion. Accordingly, Watt's own program with an area to be leased 25

173. Id. § 1344(a)(3).
175. Id. at 1290.
176. Id. at 1301-1303.
177. Id. at 1303-1304. Section 17 requires the Secretary in the leasing schedule to demonstrate "as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval." 43 U.S.C. § 1344(a) (1988).
178. 668 F.2d at 1304-1308. The court stated environmental risks were not solely dependent upon the likelihood of an oil spill, but were dependent on both the probability and amount of damage. Id. at 1308.
179. 668 F.2d at 1311-1313. The Secretary had argued it would be impossible to do meaningful area comparisons as required. Id. at 1312. The Court held that speculative information might be utilized to make a good faith effort toward compliance. Id. at 1313.
180. Id. at 1318. Section 18(a)(3) requires that the Secretary select the "timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." 43 U.S.C. § 1344(a)(3) (1988).
182. 668 F.2d 1290.
times greater than the area leased throughout the entire history of the OCSLA program was revised and approved by Watt in July 1982.\textsuperscript{183} Alaska, California, Florida, Oregon, and Washington brought suit to challenge the program's validity,\textsuperscript{184} claiming that § 18 of the OCSLA, as well as the 1981 \textit{Watt I} decision, had been violated. Although claiming to utilize the standards of review set out in \textit{Watt I}, the Court in \textit{Watt II} characterized many of the issues as focusing on the inadequacy of the Secretary's analysis, which could only be set aside as arbitrary and capricious. Thus, despite similarities to several of the claims upheld in \textit{Watt I}, the Court held that Watt had complied with § 18 of the OCSLA.\textsuperscript{185}

Thus far, the only limitations on the five year leasing programs have been imposed by Congress. In 1983, President Reagan signed a Department of the Interior appropriations bill with a moratorium on certain leases through the fiscal year of 1984.\textsuperscript{186} The moratorium was continued through fiscal year 1985.\textsuperscript{187} Under Public Law Number 99-190, passed in 1985, the moratorium was again continued for areas in the North Atlantic, but the Department of the Interior and California were to negotiate a suitable agreement on moratoriums for lease areas off the coast of California.\textsuperscript{188} On June 26, 1990, President Bush cancelled five proposed oil and gas lease sales which included three sales off the coast of California, one off the Florida coast, and one in the North Atlantic, making most of the tracts unavailable for leasing consideration until after the year 2000. Eighty-seven tracts within the Santa Maria Basin and Santa Barbara channel would be available for leasing consideration after January 1, 1996, if studies demonstrate that drilling is environmentally sound.\textsuperscript{189}

\begin{footnotesize}
\textsuperscript{183} STAFF OF THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 98TH CONG., 1ST SESS., SECRETARY OF INTERIOR JAMES G. WATT'S FIVE YEAR OIL AND GAS LEASING PLAN FOR THE OUTER CONTINENTAL SHELF 6 (Comm. Print No. 4, 1983).

\textsuperscript{184} California v. Watt (\textit{Watt II}), 712 F.2d 584 (D.C. Cir. 1983). A companion suit was also brought by seven environmental groups. \textit{Id.} at 590. The plaintiffs claimed that the Secretary had: (1) failed to indicate the "size, timing, and location of leasing activity as precisely as possible"; (2) failed to choose his program on § 18(a)(2) factors; (3) violated § 18(a)(3) by arbitrary assumptions and erroneous procedures; (4) failed to assure the receipt of fair market value under § 18(a)(4); (5) failed to consider environmental impacts of the program under §§ 18(a)(1)-(3) and the National Environmental Policy Act; and (6) violated § 18(f) by failing to specify when a consistency determination had to be done. Fitzgerald, \textit{supra} note 157, at 11 n. 73.

\textsuperscript{185} 712 F.2d at 590.


\textsuperscript{189} [Current Developments] 21 Env't Rep. (BNA) 413 (Jun. 29, 1990).
\end{footnotesize}
The conflict between state control and federal power shows no signs of abating. The new five year leasing plan proposed for 1987 to 1992 met with immediate opposition from congressional representatives for coastal states.\textsuperscript{190} One bill was introduced to repeal legislatively the Supreme Court's decision in \textit{Secretary of the Interior v. California}\textsuperscript{191} restricting consistency review and to give the Environmental Protection Agency, rather than the Department of Interior, the authority to set air pollution standards for offshore drilling rigs.\textsuperscript{192} Also, a NOAA preliminary issue paper, written in response to the reauthorization of the CZMA in April of 1986, was attacked vigorously by state regulators and environmentalists, who claimed it would intrude even further into state control of coastal areas.\textsuperscript{193}

2. Sections 307(c)(1) and 307(c)(3)(B) of the CZMA and Consistency Review for OCSLA Lease Sales

Prior to the 1990 amendments, section 307(c)(1) of the CZMA required that federal activity "directly affecting" a state's coastal zone be done "in a manner which is, to the maximum extent practicable, consistent with approved state management programs."\textsuperscript{194} In July, 1980, the California Coastal Commission asked the Department of the Interior to submit a consistency determination at the time the Department published its proposed Notice of Sale for Lease off the coast of California.\textsuperscript{195} The Department of the Interior refused to submit a consistency determination because of its view that the proposed notice of sale did not "directly affect" the coastal zone and thus did not require a consistency determination under § 307(c)(1).\textsuperscript{196} Both the district court\textsuperscript{197} and the Ninth Circuit Court of Appeals\textsuperscript{198} rejected the Department's position that activities "directly affecting" the coastal zone

\begin{itemize}
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\end{itemize}
were only those activities that physically affected the coastal zones so that consistency review was limited to activities during the actual exploration, development, and production stages.

The Supreme Court in Secretary of the Interior v. California, however, upheld the Department’s position in a closely decided opinion on slightly different grounds than those argued by the Department. Justice O’Connor focused on the remaining lease sale in controversy—lease sale 53, which included the Santa Maria Basin, an important habitat of the sea otter. In holding that only federal activities within the coastal zone could directly affect the coastal zone, the court relied on the legislative history of the CZMA. Congress’s rejection of four proposals to extend the CZMA beyond three miles and of a specific proposal to make OCSLA leasing subject to consistency review demonstrated to the Court a congressional intent to exclude OCSLA leasing from review. In addition, the separation of OCSLA development into four stages was interpreted as a congressional decision to separate OCSLA lease sales from the later two stages of development for purposes of consistency review under § 307(c)(3)(B). According to Justice O’Connor, the purchase of an OCS lease entailed no right to explore for, develop, or produce oil or gas resources that would trigger § 307(c)(3)(B) consistency review. Section 307(c)(1) consistency review was not triggered because the phrase “directly affecting” was “aimed at including activities conducted or supported by federal agencies on federal lands physically situated in the coastal zone but excluded from the zone” as defined in the CZMA. Even if OCS lease sales were an activity conducted or supported by a federal agency under § 301(c)(1), lease sales would have no direct effect on the coastal zone because they authorized only very limited “preliminary activities” on the OCS.

In a strong dissent by Justice Stevens, California’s arguments before the Court were generally accepted. Justice Stevens found that the language and legislative history of the CZMA, as well as its purpose, did not support the majority’s position. He pointed out the savings clause in OCSLA, which specifically states that nothing in that Act is to be construed to interfere with the consistency procedure re-

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199. 464 U.S. 312 (1984). The decision, written by Justice O’Connor, was decided by a 5-4 vote.  
Id. at 318.  
200. Id. at 324-30.  
201. Id. at 330.  
202. Id. at 342.  
203. Id. at 330.  
204. Id. at 345 (Stevens, J., dissenting).
quirements of the CZMA. The express goal of the CZMA is to encourage coordination between states and federal agencies, a goal defeated by the majority's holding. According to the dissent, nothing in the language of the Act distinguished between in-zone and out-of-zone activities in determining whether there was a direct effect on the coastal zone under § 307(c)(1). If anything, the term "directly affecting" the coastal zone was intended to include within consistency review those activities which, in part, do not occur in coastal zones.

There are three possible grounds for the majority decision. The first and broadest is that oil and gas leases are not subject to consistency review under § 307(c)(1) because they are activities outside the coastal zone. Second, the Court may have simply found that lease sales were specifically excluded by Congress from consistency review under § 307(c)(3)(B). Third, the Court may have held that even if lease sales are covered by § 307(c)(1), they do not directly affect the coastal zone. It is the first and broadest interpretation that is the most troublesome—that federal activities under § 307(c)(1) must be conducted within the coastal zone to directly affect it and thus be subject to consistency review.

The opinion has been intensely criticized. In addition to the criticisms suggested in the dissent, it has been pointed out that the CZMA was enacted largely in response to the 1969 oil well blow-out and extensive damage in the Santa Barbara Channel on OCS lands outside of the California coastal zone. Also, in suggesting that the 1978 amendments to the OCSLA repealed any express or implied previous requirement of consistency review, Justice O'Connor essentially ignored the 1978 amendment which included a savings clause expressly preserving the provisions of the 1972 CZMA.

The majority's interpretation of § 307(c)(1) consistency review can be criticized as well from a policy perspective. Meaningful environmental decisionmaking can only be made at the point in decision-making when environmental values are not yet clearly outweighed by investment costs already expended toward a project. Although OCS lease sales only entitle lessees to priority in submission of development plans, this commitment entails significant expenditures and adminis-

207. Id. at 371 (Stevens, J., dissenting).
208. Id. at 345-47 (Stevens, J., dissenting).
209. Id. (Stevens, J., dissenting).
210. Id. at 355-64 (Stevens, J., dissenting).
211. See generally the articles in note 157 supra.
212. Grosso, supra note 8, at 272.
213. "Except as otherwise expressly provided in this chapter, nothing in this chapter shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972 . . . ." 43 U.S.C. § 1866(a) (1985).
trative action. 214 The further along in the process that consistency review is required, the less likely it is that a lessee will have to do anything more than file the necessary paperwork.

The second policy based criticism that can be leveled is a more general one regarding the very nature of environmental decisionmaking. The Supreme Court's decision in Secretary of the Interior v. California is consistent with the Court's recent propensity toward segmentation of consideration of environmental impacts, 215 combined with an unwillingness to impose additional procedures to ensure meaningful consideration. 216 Unfortunately, the environment is not as easily segmented. What occurs one mile within a coastal zone or one mile outside of it is a distinction without a difference. In collectively shared environments—air, water, and ocean—all relevant environmental impacts must be considered, regardless of the location of their source. 217 The CZMA was a significant step toward a realistic, encompassing view of environmental protection, a step forward from which the Supreme Court retreated. 218

In the 1990 amendments to the CZMA, section 307(c)(1) was amended to read in its entirety as follows:

(c)(1)(A) 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 policies of approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).

(B) After any final judgment, decree, or order of any Federal court that is appealable under section 1291 or 1292 of title 28,

214. Moreover, the Ninth Circuit Court of Appeals has held that the Secretary may not terminate a lease at will without compensating the lessee for substantial investments. Union Oil Co. of California v. Morton, 512 F.2d 743 (9th Cir. 1975).
217. The environmental impacts include the possibility of an oil spill, air pollution from hydrocarbon emissions from the loading of oil onto barges or tankers, aesthetic harm, noise pollution, and increased population and traffic in the fragile coastal area. Economic repercussions for the coastal state include major onshore development such as pipeline landfalls, harbor supply bases, refineries and deepwater ports, harm to tourism, increased population in the coastal area, and increased local governmental costs. See Grosso, supra note 8, at 274.
United States Code, or under any other applicable provision of Federal law, that a specific Federal agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) is not likely to result in such compliance, the President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States. No such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.

(C) Each Federal Agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated under section 1455(d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule.\(^{219}\)

The first subsection of this provision overturns *Secretary of the Interior v. California* by subjecting OCSLA oil and gas lease sales to the consistency requirements of section 307(c)(1). The second subsection is new and authorizes a Presidential exemption if the activity is in the paramount interest of the United States, a standard exemption provided in a number of other environmental statutes. Technical changes in the other consistency provisions of sections 307(c)(3)(A) and 307(d) coupled with the new section 307(c)(1) make it clear that any federal agency activity that affects any natural resources, land uses, or water uses in the coastal zone are subject to consistency review regardless of whether the activity is in or outside the coastal zone.\(^{220}\) The House conference report states that, in evaluating whether or not the federal agency activity may affect the coastal zone, consideration must be given to effects that the federal agency:

may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term “affecting” is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.\(^{221}\)


\(^{220}\) Id.

There have been recurring suggestions for reform of coastal zone management, mostly focusing on consistency review of OCSLA leasing. One such proposal is revenue sharing of OCSLA leasing revenues with states.\textsuperscript{222} Although this proposal perhaps would soften coastal states’ antagonism to offshore leasing, it would at best counterbalance cuts in federal funding for the CZMA grants and at worst undermine the objectives of environmental protection in the CZMA.\textsuperscript{223} Another suggestion is the use of a less biased mediation panel in place of the Secretary of Commerce to mediate disputes between the federal and state governments. An ad hoc panel would be formed of one representative each from the state coastal agency, the governor’s office, the Departments of the Interior and Commerce, and the petroleum industry.\textsuperscript{224} But not only would state representatives still be a minority, the new panel would do nothing to revise the reviewability or grounds for review of federal activities. Numerous proposals have also been made to amend the CZMA, frequently to overrule the Supreme Court’s decision in \textit{Secretary of the Interior v. California},\textsuperscript{225} as was done in the 1990 amendments. Yet all these measures are piecemeal attempts to give the CZMA, particularly in its relationship to the OCSLA, the strength originally envisioned for the Act in 1972. That strength was illusory from the beginning. States were given virtually unlimited discretion in the designation of coastal areas deserving of protection and were left to their own devices in specifying permissible land and water uses so long as the lofty but general objectives of the Act were satisfied. Only in 1980 was the Secretary even authorized to withhold funding from coastal states for failing to satisfy the Act’s requirements.\textsuperscript{226} Consistency review for offshore leasing suffers from a similar lack of guidance for the respective priorities to be given to energy development and to environmental preservation. As formulated, this


\textsuperscript{223} Grosso, supra note 8, at 283.

\textsuperscript{224} Note, Outer Continental Shelf Leasing Policy Prevails Over the California Coastal Commission, 24 NAT. RESOURCES J. 1133 (1984).

\textsuperscript{225} See, e.g., S. 2384, 98th Cong., 2d Sess. (1984); H.R. 4589, 98th Cong., 2d Sess. (1984); [Current Developments] Env’t Rep. (BNA) 734 (July 3, 1987). One frequent criticism of current coastal zone management is of the lack of funding for scientific research. The National Ocean Pollution Planning Act of 1978, 33 U.S.C. §§ 1701-1709 (1988), provides for the establishment of a comprehensive plan for the overall federal effort in ocean pollution research and development and monitoring, with the NOAA as the lead federal agency. The Secretary of Commerce is authorized to make grants to coastal states to acquire lands and waters as necessary to ensure the long term management of an area as a national estuarine reserve, to conduct educational activities, or to support research and monitoring within a national estuarine reserve. 16 U.S.C. § 1461 (1988).

necessary but difficult evaluation is avoided by a process that invites federal-state conflicts. With any environmentally controversial offshore leasing, the state will understandably be inclined to utilize its role in the consistency review process to elevate its own management program and localized environmental concerns over national energy needs. Similarly, by the time a private applicant pursues an OCS lease, the federal administration is substantially committed to such development through the Secretary of the Interior's designation of the area for offshore leasing as part and parcel of a national energy policy. The consistency process intensifies the adversarial positions of the involved state and federal agencies with no substantive criteria for resolution of the conflict. Indeed, the Secretary of Commerce, who serves as the ultimate arbitrator in cases of conflict, is only authorized to approve leasing that is consistent with the state program or necessary to national security. It is not surprising, therefore, that the Secretary's mediation is rarely utilized, as the difficult conflicts involve leasing that is ostensibly inconsistent with the state program and not necessary to national security, but that is, nevertheless, a potentially important source of energy resources.

G. The Coastal Energy Impact Program

Prior to 1990, states with approved coastal programs could receive financial assistance to fund public facilities and services and to remedy environmental consequences of energy development in the coastal zone. Under the Coastal Energy Impact Program as it was set out in section 308 of the CZMA, grants, loans, loan guarantees, and other financial assistance were to be provided to states to implement its provisions. The program was created in 1976 to ameliorate the effects of energy development on the coastal states and, in part, to obviate state delay of federal OCS leasing plans.

In October of 1990, when the 101st Congress passed the Coastal Zone Management Reauthorization Act amendments as part of the Omnibus Budget Reconciliation Act of 1990, one major change was the elimination of the Coastal Energy Impact Program which was replaced by a newly created, much more limited Coastal Zone Man-

227. Id. § 1456.
agement Fund.232

The Fund will consist of amounts received from the repayment of loans made to state and local governments under section 308(a) of the CZMA.233 These funds may then be used, at the discretion of the Secretary, to cover administrative expenses created by the Act in amounts up to specified limits for fiscal years 1991 through 1995.234 Following such allocation, funds may be used for:

a) projects addressing regional and inter-state coastal zone management issues,235
b) demonstration projects, particularly local level projects, having a high potential for improving coastal zone management,236
c) emergency grants to enable state coastal zone management agencies to respond to unforeseen or disaster-related circumstances,237
d) awards to recognize excellence in coastal zone management under section 314,238
e) program development grants pursuant to section 305239 and,
f) financial support to coastal states for use in implementing state coastal zone management programs which are approved under section 306 and which have investigated and applied the public trust doctrine in such implementation.240

Finally, the Secretary is required to provide Congress with an annual report detailing the balance of the Fund and an itemization of receipts and expenses on December 1 of each year.241

III. COASTAL REGULATION AND THE TAKING ISSUE

When a state regulates to protect its coastal zone, the protective regulation is almost inevitably a restriction on growth and development. After the 1978 Supreme Court decision in Penn Central Trans-

234. Id. § 1456a(b)(2)(A).
235. Id. § 1456a(b)(2)(B)(i).
236. Id. § 1456a(b)(2)(B)(ii).
237. Id. § 1456a(b)(2)(B)(iii).
238. Id. § 1456a(b)(2)(B)(iv).
239. Id. § 1456a(b)(2)(B)(v).
240. Id. § 1456a(b)(2)(B)(vi).
241. Id. § 1456a(b)(3).
port. Co. v. New York City, the legal possibility that a regulatory interference with private property could be an unconstitutional "taking" raised the spectre of litigation over coastal zone regulation. The disincentive to such litigation, however, was developed in a series of taking cases following Penn Central. According to these cases, the factors to be taken into consideration when determining if a regulation works a taking are "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations." Perhaps more importantly, the opinion in Penn Central suggested that for a taking to occur, the regulation must deprive a landowner of all or almost all reasonable economic return on the property.

In 1987, however, the Supreme Court markedly deviated from its established approach to the taking clause, casting a pall over innovative, and some traditional, forms of land use regulation. The three cases, Keystone Bituminous Coal Ass'n v. DeBenedictis, First English Evangelical Lutheran Church v. Los Angeles County, and Nollan v. California Coastal Comm'n, clearly signified a shift in the Court's interpretation of what constitutes a "regulatory taking."

Rehnquist's dissent in Penn Central, and the approach generally taken in the cases which followed, was to first determine which of the so-called "bundle of sticks" constituting property had been taken (for example, the right to exclude others) and then to determine how important that "stick" is to the use or economic value of the property. If that property right is of an as yet unspecified level of significance to the economic value or use of the property, then its deprivation alone may constitute a taking.

In sum, the nature of the property right taken becomes more important than what property rights remain. Thus, deprivation of a single property right, the right to exclude others, may be a taking without regard to the economic value of any remaining rights in the property. As such, it becomes more and more difficult to regulate coastal property, due to the fear of the regulation being classified as a "taking."

243. See discussion infra.
245. 438 U.S. at 149 n.13 (Rehnquist, J., dissenting) (quoting majority opinion).
249. See text accompanying notes 361-362 infra.
Implicit in the concept of land use regulation is the premise that property rights are not absolute. Of all the so-called property rights, a right to develop one’s property is the most likely source of conflict and, concomitantly, the right most likely to necessitate compromise. It is no longer reasonable to expect one’s property rights to extend “from the center usque ad coelum.”250 A theory of taking jurisprudence that reinstates the right to develop as fundamental or paramount fails to reflect the modern realities of land use regulation or the expectations of the property owner. Yet it is precisely this theory the Court embraced in a series of taking cases in the term.251

The 1987 harbinger of the new taking approach, although ostensibly rejecting it, was Keystone Bituminous Coal Ass’n v. DeBenedictis.252 In Keystone, a coal association, whose members owned substantial coal reserves under legislatively protected property, challenged Pennsylvania’s Bituminous Mine Subsidence and Land Conservation Act (Land Act) which prohibited coal mining that causes subsidence damage to pre-existing public buildings, dwellings, and cemeteries.253 The plaintiff filed suit alleging that Pennsylvania law recognized a separate “support estate” in land and that the Land Act was a regulatory taking of that interest in violation of the fifth and fourteenth amendments.254 Because no injury to specific pieces of property was alleged, the only challenge to the Land Act was a facial challenge.255 Yet the case squarely presented the difficulty of defining the unit of property allegedly “taken” by the regulation.

In rejecting the taking claim, the district court had distinguished Pennsylvania Coal v. Mahon on the grounds that the Land Act served valid public purposes not present in Pennsylvania Coal.256 On the taking issue itself, the district court found no taking because the destruction of the support estate was a strand in a “bundle” of property rights, some of which were not affected by the Land Act.257 The court of appeals affirmed, but with a different analysis. The court of appeals also found that the Land Act served legitimate purposes.258 However, the court did not rely on the support estate being a separate and distinct strand in a bundle of rights, but rather “considered the support estate as just one segment of a larger bundle of rights that invariably

251. See text accompanying notes 318-319, infra.
253. Id. at 476.
254. Id. at 478.
255. Id. at 493.
256. Id. at 479.
257. Id.
258. Id. at 480.
includes either the surface estate or the mineral estate." Thus, the
district court evaluated the support estate as one strand in a bundle of
property rights, and the Court of Appeals viewed it as inseparable
from the surface estate or the mineral estate. In both lower courts, by
following the *Penn Central* majority opinion, there was no taking by
virtue of the definition of the property unit taken. If either court had
accepted Rehnquist’s dissent in *Penn Central*, the taking of one dis­tinct property right, the support estate, would have been a regulatory
taking. The Supreme Court, therefore, was squarely presented with a
case in which the definition of the unit of property affected would be
outcome determinative of whether there was a taking.

Not surprisingly then, Justice Stevens wrote the majority opinion
joined by Justices Brennan, White, Marshall, and Blackmun, with a
dissent by Chief Justice Rehnquist, joined by Justices Powell,
O’Connor, and Scalia. Justice Stevens first had to address the simi­larity of *Keystone* to *Pennsylvania Coal*, in which Justice Holmes in
a very similar case had found a taking. Citing the Pennsylvania legis­lative determination that the Land Act was necessary to protect the
public interest in “safety, land conservation, preservation of affected
municipalities tax bases, and land development,” the majority found
that the “environmental concern” of the Land Act went far beyond
the purpose of the Kohler Act which was enacted merely to protect
individual private property. Acknowledging both the district
court’s and court of appeal’s opinions, the Court stated that the por­tion of *Pennsylvania Coal* addressed to the general validity of the
Kohler Act was an “advisory opinion” not required by the issues in
the case. Relying on *Penn Central*, the Court stated that land regu­lation can effectuate a taking if it “‘does not substantially advance
legitimate state interests . . . or denies an owner economically viable
use of his land.’” As for the public purpose of the Land Act, the
Court reiterated that the Land Act was to serve the public interest, not
private interests, because, unlike the Kohler Act, the Land Act had no
exception from its prohibition when the surface estate was owned by
the owner of the support estate.

Although Justice Stevens suggested that the Land Act might fall
within the nuisance exception for a taking under the police power, he
went on to analyze whether the diminution in value was sufficient to constitute a taking. The Court seemed to carve out a potential exception to the taking clause for legislation to protect the public from a nuisance. Quoting *Mugler v. Kansas*, in which a Kansas constitutional amendment that prohibited the sale and manufacture of intoxicating liquors was challenged, the Court stated, "‘prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property...’" Nevertheless, the Court declined to rest its decision on that factor alone and turned to the Land Act's diminution of property value and investment-backed expectations.

On the taking issue specifically, Pennsylvania law is unique in that it recognizes three separate estates in land: the mineral estate, the surface estate, and the support estate. In *Pennsylvania Coal*, the Court had found that the Kohler Act had made mining of certain coal commercially impracticable. Emphasizing that the case presently before it was a facial challenge to the Land Act, the Court emphasized that it was not presented with particular surface mining operations or their effect on specific parcels of land. Noting that the plaintiff had not argued that the Land Act itself made mining commercially impractical, the Court pointed out that instead the plaintiff had sought to define narrowly the unit of property allegedly taken by focusing on specific tons of coal and, alternatively, the separate support estate.

Quoting from *Penn Central* that effects on the parcel of property as a whole must be considered, the Court rejected the plaintiff's arguments. The Court found that the 27 million tons of coal that could not be mined were not a "separate segment of property." The Court emphasized that otherwise a simple setback requirement for a building on a lot could be characterized as a taking. More troublesome, however, was whether the support estate recognized by Pennsylvania law was a property unit taken by the Land Act. The Court said that just as the air rights above Grand Central were a strand in a bundle of property rights, the support estate here considered was also

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266. 123 U.S. 623 (1887).
267. 480 U.S. at 489.
268. Id. at 500.
269. Id. at 493.
270. Id. at 496.
271. Id. at 496.
272. Id. at 497.
273. Id. at 498.
274. Id.
only one strand.\textsuperscript{275} The court of appeals under Pennsylvania law had recognized as a practical matter that the support estate is always owned by either the surface estate owner or the mineral estate owner.\textsuperscript{276} Because the support estate could not be used without either the mineral estate or the surface estate, the Court held that the support estate was "merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface."\textsuperscript{277}

If the majority had stopped at that point, \textit{Keystone} would have been a clear refutation of Justice Rehnquist's dissent in \textit{Penn Central}. The Court, however, qualified its definition of the property unit with an alternative holding. Even if the support estate were a distinct segment of property for taking purposes, the Court stated, there would still not be a taking. The record, according to Justice Stevens, was devoid of any evidence of what percentage of the support estates, either \textit{in the aggregate} or with respect to any individual estate, had been affected by the Land Act.\textsuperscript{278}

In an opinion echoing his disagreement in \textit{Penn Central}, Chief Justice Rehnquist dissented, finding \textit{Pennsylvania Coal} to be dispositive.\textsuperscript{279} In the process, however, the dissent emphasized that a public purpose is necessary to the government's exercise of its police power, but does not itself have any bearing on whether a regulation goes so far as to be a taking.\textsuperscript{280} Apparently contradicting his position in \textit{Penn Central}, Chief Justice Rehnquist rejected a broad nuisance exception to the taking clause, while accentuating that federal law, rather than state law, determines the legitimacy of the state's purpose.\textsuperscript{281} In keeping with his \textit{Penn Central} dissent, however, Chief Justice Rehnquist rejected the majority's definition of the property unit. It was the smallest possible segment of property in the case, the 27 million tons of coal affected, that the dissent recognized as the property unit, a "property" that could not be removed under the Land Act and thus was destroyed.\textsuperscript{282} The dissent stated that definition of the unit of property must be determined by state law.\textsuperscript{283} Quoting the same language in \textit{Penn Central} quoted above by the majority, the dissent again emphasized in a footnote that the Court in \textit{Penn Central} gave no guidance on how to define the property unit for purposes of taking

\begin{itemize}
  \item \textsuperscript{275} Id. at 500.
  \item \textsuperscript{276} Id.
  \item \textsuperscript{277} Id. at 501.
  \item \textsuperscript{278} Id.
  \item \textsuperscript{279} Id. at 507 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{280} Id. at 511 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{281} Id. at 512 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{282} Id. at 517 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{283} Id. at 518 (Rehnquist, C.J., dissenting).
\end{itemize}
Although *Keystone* is ostensibly a victory of the majority decision in *Penn Central*, that victory is qualified by the alternative holdings of the majority opinion in *Keystone*, and by the fact that in his dissent, Chief Justice Rehnquist gained the support of Justices Powell, O'Connor, and Scalia as adherents to his views in place of former Chief Justice Burger and Justice Stevens.\(^{285}\)

It is far from clear how Justice Stevens defined the "property" allegedly taken by the Pennsylvania statute in *Keystone*. It is clear that he rejects the 27 million tons of coal as constituting a separate segment of property for purposes of the takings clause and in doing so rejects Pennsylvania property law as determinative of the issue. At one point Justice Stevens concludes that as a practical matter the support estate has value only in conjunction with the surface rights or the mineral rights so that the property unit in question is either the bundle of rights in the combined surface/support estates or combined mineral/support estates.\(^{286}\) More controversial, however, is Justice Steven's statement that, even if the support estate were a separate segment of property, the petitioners held support estates for "a great deal of land" and "[t]he record is devoid of any evidence on what percentage of the purchased support estates, either in the aggregate or with respect to any individual estate" had been affected.\(^{287}\) The perplexing aspect of this language is the suggestion that the extent of interference with property rights can be measured with respect to the petitioners' holdings of support estates in the aggregate. This approach seems to be a measurement of the economic impact of the regulation on the property owner rather than on the property itself. Does this approach mean that the greater the holdings of the disgruntled landowner the less likely it is to be a taking? Could Justice Brennan in *Penn Central*, for example, have measured the economic interference of the landmark restrictions not just against the "parcel as a whole" but against all of Penn Central's property in the immediate vicinity (or perhaps those properties to which the TDR's could have been transferred)?

What also emerges from *Keystone* is that Rehnquist's approach to what constitutes a taking suffers from many of the definitional problems for which he criticized Justice Brennan's approach in *Penn

\(^{284}\) *Id.* at 517 (Rehnquist, C.J., dissenting).


\(^{286}\) 470 U.S. at 501.

\(^{287}\) *Id.*
Central and Justice Steven's approach in Keystone itself. Justice Rehnquist concluded with little explanation that the 27 million tons of coal are a separate property segment which had been taken.\textsuperscript{288} Apparently the amount of coal is irrelevant so that one ton of coal would be a separate property segment. But what makes the coal a separate property segment? Would a prohibition on use of one natural resource be a taking of a separate segment of property as well? For example, if a local ordinance prohibited drainage affecting certain wetlands, thereby precluding any use of water rights on a particular lot, would there be a taking even if other outside water sources were available and there was little or no economic impact on the value or use of the lot? Justice Rehnquist does at times equate the coal with the right to mine it, which is in turn equated with the support estate. Which of these is an identifiable segment of property the destruction of which would be a taking? Is any identifiable use of property a property right? Is the question determined solely by state law so that results would vary from state to state? If state law is not determinative, under Rehnquist's approach would there be a taking if the record demonstrated that the coal company's mining rights were extinguished but it retained other valuable uses of the support state? Justice Rehnquist simply puts a great deal of emphasis on the recognition under Pennsylvania law of the support estate as a separate estate and suggests no alternative framework to address beyond that context what is a separate segment of property for takings law purposes.

What role, if any, state law will play in defining property rights will be necessarily a recurring issue before the Court. The issue surfaced squarely in a case during the 1990 term in which the Court avoided resolution of the taking issue altogether. In Preseault v. Interstate Commerce Commission,\textsuperscript{289} the petitioners claimed a reversionary interest under state law in an unused railroad right-of-way. A 1983 amendment to the National Trails System Act\textsuperscript{290} provided for conversion of unused railroad rights-of-way to recreational trails subject to approval by the Interstate Commerce Commission (ICC).\textsuperscript{291} The interim recreational use under the statute cannot be treated for any purpose as abandonment of the right-of-way, thus permitting the ICC to approve conversion from "rails to trails" without regard to reversionary property interests under state law. The Second Circuit Court of Appeals had concluded that state property law was subject to the ICC's plenary authority to regulate so that no reversion could occur.

\textsuperscript{288} Id. at 517-18 (Rehnquist, C.J., dissenting).
\textsuperscript{289} 110 S. Ct. 914 (1990).
\textsuperscript{291} Id. § 1247(d).
under state law until the ICC had issued a certificate of abandonment. The majority opinion of the Supreme Court held that the taking claim was premature until the petitioners had pursued their remedies under the Tucker Act, expressing no opinion on this aspect of the ruling by the court of appeals.

However, Justice O'Connor, joined by Justices Scalia and Kennedy, concurred separately on the relevance of state law to the taking issue. To determine whether a taking has occurred, Justice O'Connor argued that the "basic axiom" is that "property interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law." The concurring opinion concluded that the Preseaults' property rights should be determined by state law without reference to the ICC's authority or actions.

Given the well established and plenary authority of the ICC in railroad regulation, the factual circumstances in Preseault presented a more compelling case for definition of property rights under federal law than would normally be the case when a takings challenge is presented. Yet three justices of the Court concurred separately to recognize the paramount importance of state law in defining property rights for purposes of the takings clause. In light of Chief Justice Rehnquist's dissent in Keystone, it would appear that at least four justices, and possibly five (given Justice Powell's participation in the Keystone dissent) would find state law to be dispositive in defining property rights.

The leeway given the state in Penn Central was further eroded by the Supreme Court's next decision under the takings clause. In First English Evangelical Lutheran Church v. Los Angeles County, the Supreme Court directly held, after years of avoiding the issue, that a damages remedy must be provided for regulatory "takings" under the fifth amendment as applicable to the states under the fourteenth amendment. In an earlier series of cases finding that there was clearly no taking or that the lower courts had not yet found a taking, the

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294. Id. at 922 (O'Connor, J., concurring) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984)).
295. Id. at 926-928 (O'Connor, J., concurring).
Supreme Court had refused to decide either the point at which a regulation so interferes with property rights that there is a *de facto* taking of the property without just compensation or what the appropriate remedies for such a taking might be. *Lutheran Church* was addressed to the second of these two issues, the appropriate remedy for a taking.

*Lutheran Church* involved property located in a watershed area, on which the church had operated a retreat center and recreational area for handicapped children. After a severe flood destroyed the buildings, Los Angeles county adopted an interim ordinance prohibiting the construction or reconstruction of any structure in an interim flood protection area, which included the church's land. In one of its claims, the church sought the remedy of inverse condemnation for the regulatory taking of the church's property. In holding against the plaintiff church, both the trial court and the California Court of Appeals relied upon the distinction set out by the California Supreme Court in *Agins v. Tiburon* between the appropriate remedy for a challenge to an ordinance that deprives a person of the total use of his lands, as opposed to the remedy for a physical taking. Because *Agins* ruled that the appropriate remedy for the former is declaratory relief or mandamus, the courts rejected the church's inverse condemnation cause of action.

Although several of the justifications utilized in earlier cases to deny review were arguably presented in the *Lutheran Church* case, the Supreme Court nevertheless stated in its opinion that mandamus and declaratory relief are inadequate remedies for a regulatory interference substantial enough to constitute a taking under the fifth and fourteenth amendments, and that such a taking requires just compensation (that is, damages for the losses resulting from deprivation of property use from the time that the interference occurs until the legislating entity either amends the offending regulation, withdraws the regulation, or pays compensation for a permanent deprivation of the property from the exercise of eminent domain).

Because the Court had to accept as true the allegation in the complaint that the Church had been denied *all* use of its property, the Court gave no further delineation of what degree of interference would

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299. 482 U.S. at 307.
300. Id.
301. Id.
303. 482 U.S. at 308-309.
304. Id. at 321-22.
amount to a taking.\textsuperscript{305} In the opinion written by Chief Justice Rehnquist, and joined by Justices Brennan, White, Marshall, Powell and Scalia, the Court emphasized that the takings clause "was not designed to limit governmental interference \textit{per se}, but rather to secure compensation in the event of a taking."\textsuperscript{306} As to the frequently asserted argument that providing damages compels eminent domain in derogation of any of the government's other options, the Court pointed out that after having to provide interim damages for the temporary taking, the government may still decide to amend the regulation, withdraw the regulation, or exercise eminent domain.\textsuperscript{307} The Court merely decided that "'temporary' takings which . . . deny a landowner all use of his property are not different in kind from permanent takings. . . ."\textsuperscript{308}

To some extent, the dissent's statement that the decision will "generate a great deal of litigation"\textsuperscript{309} exaggerates the true significance of the opinion. The majority, following the dissent in \textit{San Diego Gas & Electric Co. v. San Diego},\textsuperscript{310} merely restated the rule that a regulation can be a taking and that such regulatory takings are to be remedied by damages.\textsuperscript{311} Thus, the holding of the Court did not in and of itself open the floodgates of litigation. What may do so, however, is the dicta as to when a taking will occur. Because the lower courts had assumed that the floodplain statute denied the church \textit{all} use of its property, the Court did not question that the deprivation was anything less. Yet the majority suggested that an interference which, if permanent, would be a taking, constitutes a taking even if of a limited duration.\textsuperscript{312}

It is with this position that two of the dissenters, Justices Stevens and Blackmun, most strongly differ.\textsuperscript{313} They would find compensation appropriate only when the effects of a regulation are so severe that "invalidation or repeal will not mitigate the 'taking' label." The dissenters, joined by Justice O'Conner, also argued that the majority addressed a takings issue not presented to the Court and improperly applied federal constitutional law when California constitutional law was determinative.\textsuperscript{314}

\textsuperscript{305} Id.  
\textsuperscript{306} Id. at 315 (emphasis in original).  
\textsuperscript{307} Id. at 321.  
\textsuperscript{308} Id. at 318.  
\textsuperscript{309} Id. at 322 (Stevens, J., dissenting).  
\textsuperscript{311} 482 U.S. at 314-16.  
\textsuperscript{312} Id. at 318.  
\textsuperscript{313} Id. at 328 (Stevens, J., dissenting).  
\textsuperscript{314} Id. at 322-28, 335-39 (Stevens, J., dissenting).
The future delineation of what degree of regulatory interference constitutes a taking will determine whether the flood of litigation will be reduced to a trickle. Very few regulations deprive a landowner of all use of the regulated property. In fact, on remand the legislation in Lutheran Church was upheld.\textsuperscript{315}

Justice Brennan acknowledged for the majority in \textit{Penn Central} that the Supreme Court had been unable to develop any "set formula" for determining when economic injury caused by governmental action requires compensation and that each case necessitates "ad hoc, factual inquiries."\textsuperscript{316} The Court had little difficulty in determining that the diminution in value of the property did not in itself constitute a taking within the meaning of the fifth and fourteenth amendments, particularly in light of \textit{Penn Central}'s concession that the property was still capable of earning a reasonable return. In determining the diminution in value borne by \textit{Penn Central}, the Court refused to define the affected property as "air rights;" it focused instead on the economic effects on the parcel \textit{as a whole}, that is, the city tax block designated as the landmark site.\textsuperscript{317}

It is clear from Rehnquist's \textit{Penn Central} dissent that he views deprivation of property, for purposes of the taking clause, as the deprivation of a property right or rights, and not as the deprivation of a degree of economic return on some undefined physical unit of real property.\textsuperscript{318} \textit{Ruckelshaus v. Monsanto}\textsuperscript{319} arguably for the first time extended this reasoning to the conclusion that deprivation of a single property right, the right to exclude others, may be a taking without regard to the economic value of any remaining unaffected rights in the property.

\textsuperscript{315} On remand from the Supreme Court decision, the California Court of Appeals held that the floodplain ordinance was not a taking regardless of whether the appropriate test is that suggested in \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980) (requiring compensation if a landowner is denied all uses of the property) or that of \textit{First English} (not requiring compensation for deprivation of all uses so long as the deprivation promotes a substantial governmental interest). In attempting to reconcile the two tests the court concluded:

It would not be remarkable at all to allow government to deny a private owner "all uses" of his property where there is no use of that property which does not threaten lives and health. So it makes perfect sense to deny compensation for the denial of "all uses" where health and safety are at stake but require compensation for the denial of all uses where the land use regulation advances lesser public purposes.

\textit{First Evangelical Lutheran Church v. Los Angeles}, 210 Cal. App. 3d 893, 258 Cal. Rptr. 893, 901 (1989). The church retained some use of the property because the ordinance only prohibited reconstruction of structures damaged or demolished by floods and did not affect eight acres of the landowner's twenty-acre parcel.

\textsuperscript{316} \textit{Penn Central}, 438 U.S. at 124.
\textsuperscript{317} Id. at 131.
\textsuperscript{318} Id. at 142-43 (Rehnquist, C.J., dissenting).
\textsuperscript{319} 467 U.S. 986 (1984).
If Chief Justice Rehnquist's approach in *Penn Central* is adopted in the future, it will be much easier to demonstrate a taking. Plaintiffs will need only to show deprivation of one cognizable property right (for example, the right to develop). Under Brennan's approach, as illustrated by the majority opinion in *Penn Central*, however, the economic impact on the property as a whole will be evaluated to determine whether the regulatory interference goes so far as to be a taking without just compensation. If Chief Justice Rehnquist's view prevails, the floodgates *will* be opened because deprivation of a single cognizable property right may be viewed as a taking necessitating a remedy of damages.

The crowning blow to traditional takings jurisprudence after *Penn Central* came with a decision involving coastal zone management, *Nollan v. California Coastal Comm'n*. If Chief Justice Rehnquist's approach in *Penn Central* is adopted in the future, it will be much easier to demonstrate a taking. Plaintiffs will need only to show deprivation of one cognizable property right (for example, the right to develop). Under Brennan's approach, as illustrated by the majority opinion in *Penn Central*, however, the economic impact on the property as a whole will be evaluated to determine whether the regulatory interference goes so far as to be a taking without just compensation. If Chief Justice Rehnquist's view prevails, the floodgates will be opened because deprivation of a single cognizable property right may be viewed as a taking necessitating a remedy of damages.

The crowning blow to traditional takings jurisprudence after *Penn Central* came with a decision involving coastal zone management, *Nollan v. California Coastal Comm'n*. In *Nollan*, the California Coastal Commission granted a permit to replace a bungalow on a beachfront lot located between two public beaches, with the condition that the owners allow public easement across their beach. The California Court of Appeals had found that there was no taking because the condition did not deprive the landowner of all reasonable use of their property. In an opinion written by Justice Scalia, joined by Justices White, Powell, O'Connor, and Chief Justice Rehnquist, the Supreme Court equated the condition for the permit with a permanent physical occupation of the property and stated that "the 'right to exclude [others] is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" The Court declined to phrase the issue in terms of rights of access to navigable waters under California law. Instead the Court relied upon *Monsanto* and stated that the "right to build on one's own property" is not a "governmental benefit" easily erased by a governmental pronouncement.

In stating the test for a taking, Justice Scalia used the same test Justice Stevens used in the majority opinion in *Keystone*: a regulation is not a taking if it " 'substantially advances legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " The majority accepted as legitimate the public purposes stated by the California Commission for the conditional permit: “pro-

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320. *Id.* at 825 (1987).
321. *Id.* at 827-29.
322. *Id.* at 830.
323. *Id.* at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).
324. *Id.* at 833-34 n.2.
325. *Id.* at 834 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).
tecting the public's ability to see the beach, assisting the public in over­
coming the 'psychological barrier' to using the beach created by a
developed shorefront, and preventing congestion on the public
beaches.'

If the Commission had denied the permit altogether, there would
have been no taking regardless of which of the two measurements for a
taking in *Keystone* was utilized. On the other hand, if the Commission
had simply demanded that the Nollans provide lateral access to the
beach, the requirement of physical access would have been a per se
taking. The question then becomes whether conditioning the permit
on a grant of lateral access amounted to a taking. To evaluate that
question, Justice Scalia found it necessary to address the complex area
of unconstitutional conditions—that a state cannot impose an unconsti­
tutional requirement as a condition for granting a privilege. He
accepted, “for purposes of discussion,” the Commission’s proposed test
that the condition must be reasonably related to the public need or
burden created or exacerbated by the Nollan's proposed development,
and concluded that the Commission's own test had not been met:

> It is quite impossible to understand how a requirement that people
> already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the
> new house. It is also impossible to understand how it lowers any
> "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construc­
tion of the Nollans' new house.

Justice Scalia emphasized that the proposed public access would run
parallel to the coast and have no relationship to remedying reduced
visual access from construction of the larger house.

In a dissenting opinion, Justice Brennan, joined by Justice Mar­
shall, sharply criticized the majority's limitation of a state's discretion in
exercising its police power, a limitation "discredited for the better part of this century." Even accepting the restrictive requirement
that the regulation "substantially advance legitimate state interests,"
the dissent argued that the condition could still be upheld. Finally,
under the more traditional taking analysis, these dissenting Justices
concluded no taking had occurred.

In criticizing the Court's interpretation of the police power, Just­
ice Brennan referred to a long line of cases requiring only that the

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326. *Id.* at 835.
327. *Id.* at 838-39.
328. *Id.* at 842 (Brennan, J., dissenting).
329. *Id.* (Brennan, J., dissenting).
330. *Id.* at 849 (Brennan, J., dissenting).
exercise of the state police power have a rational basis.\textsuperscript{331} Ironically, Justice Brennan noted, if the Commission had denied the permit altogether, there would have been no taking because the property would still have been economically viable.\textsuperscript{332} As to the purported lack of a substantial link between the Commission's purposes and the condition, Brennan countered that the "proposed development would reduce public access by restricting visual access to the beach, by contributing to an increased need for community facilities, and by moving private development closer to beach property."\textsuperscript{333} While emphasizing the reasonableness of the condition, Justice Brennan remarked: "The Commission is charged by both the state constitution and legislature to preserve overall public access to the California coastline. Furthermore, by virtue of its participation in the Coastal Zone Management Act program, the State must 'exercise effectively [its] responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone,' \textsuperscript{16} U.S.C. § 1452(2), so as to provide for, \textit{inter alia}, 'public access to the coas[tl] for recreation purposes.'"\textsuperscript{334} Given the purposes of the CZMA, the dissenters took issue with the majority's conclusion that the Commission had only a "non-land use justification."\textsuperscript{335} The purpose of the Commission, they said, was to preserve physical access as well as visual access.\textsuperscript{336} According to the dissent, requiring an unduly restrictive purpose/means test rather than the traditional rational relation standard "could hamper innovative efforts to preserve an increasingly fragile natural resource."\textsuperscript{337} Beyond the question of the state's interest, there could be no taking because the Nollans retained economically viable use of the land.\textsuperscript{338}

Taking challenges to coastal regulation and to land use regulation in general stand a much better chance of success after \textit{Keystone, Lutheran Church}, and \textit{Nollan}. The Court seems well on its way toward recognizing complete deprivation of a right to develop property as a taking. Although this trend may be detrimental to innovative land use planning, it is certainly beneficial to the property owner challenging regulation. It is unclear how far deprivation must go to be a taking, and the current trend is toward protection of individual property

\textsuperscript{331} Id. at 843-48 n.1 (Brennan, J., dissenting).
\textsuperscript{332} Id. at 844-45 (Brennan, J., dissenting).
\textsuperscript{333} Id. at 845 (Brennan, J., dissenting).
\textsuperscript{334} Id. at 846-47 (Brennan, J., dissenting).
\textsuperscript{335} Id. at 848 (Brennan, J., dissenting).
\textsuperscript{336} Id. (Brennan, J., dissenting).
\textsuperscript{337} Id. (Brennan, J., dissenting).
\textsuperscript{338} Id. at 855-60 (Brennan, J., dissenting).
rights at the expense of preservation and other rights in the public as a whole. In the coastal context, protection of public access, absent assertions of public trust or a navigational servitude, seems less likely to withstand a taking challenge. Under Nollan, many such restrictions may be treated as physical interference with property rights and thus be extremely susceptible to invalidation under the fifth and fourteenth amendments. Moreover, it is now clear that such a constitutional violation must be remedied by damages for the period of the restriction. Restrictive regulation, such as restrictions to preserve open space, also seem more vulnerable to attack. For example, in Paoli v. California Coastal Commission, the California Court of Appeals stated that a property owner had neither a vested right to develop property in a particular way nor a vested right to a coastal development permit. Accordingly, the CCC's issuance of a permit conditioned on open space preservation was upheld as rationally based. After Nollan, a property owner such as the one in Paoli would have an alternative challenge as an unconstitutional taking. One remaining possible distinction between open space restrictions (and other similar restrictions) and access conditions is that open space requirements do not require physical interference, which is still the type of interference most susceptible to a taking challenge.

It remains to be seen whether Nollan may be subject to a narrower interpretation. Commentators have suggested Nollan establishes that a state may physically interfere with private property as a condition to granting a development permit only if the strict means/purpose fit is demonstrated. This interpretation is predicated on viewing Nollan as an exception or modification of the rule in Loretto v. Teleprompter Manhattan CATV Corp. that permanent physical occupation of property by the government is a taking per se. If the Commission had simply required the Nollans to turn over an easement to the Commission there unquestionably would have been a taking. On the other hand, if the Commission had denied the permit outright, there would have been no taking. In that sense, Nollan represents an intermediate approach by which physical occupation as a permit condition would be subject to stricter scrutiny than most regulatory takings, but to lesser scrutiny than that mandated by Loretto. This

340. Id.
interpretation of *Nollan* also reconciles the case with established state land use exaction cases. In such cases, state courts have upheld exactions for public amenities from developers in exchange for permits for increased development creating the need for such amenities.343

The criticism leveled by Justice Rehnquist at Justice Brennan's approach in *Penn Central* remains: if a taking is judged by the diminution in value of the property as a whole, what is the appropriate property unit in any given case?

Although the deluge of litigation direly predicted by Justice Stevens in his *First English* dissent has not yet materialized, the Supreme court trilogy of cases is having an impact on takings cases in the lower courts. According to one commentator, from June of 1987 to October 1, 1989, there were 111 state and federal cases reported in which land use regulation was challenged as a taking.344 Of these, only fourteen of the sixty-two cases decided on the merits held that there had been a taking—five federal cases and nine state cases.345 Since *First English*, as of December 31, 1990, there have been seven cases awarding damages for a taking against the federal government.346

By any measurement these cases hardly represent a groundswell of litigation threatening to paralyze land use regulation. To understand fully their significance, however, it is necessary to recall that

343. Note, supra note 341, at 467-68.


345. *Id.* at 60. In one of the more significant state cases, Seawall Assocs. v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, cert. denied, 110 S.Ct. 500 (1989), owners of a single-room occupancy housing challenged the constitutionality of a municipal law that established a five-year moratorium on conversion, alteration, or demolition of single-room occupancy housing and obligated owners to restore all units to habitable condition and lease them at controlled rents for an indefinite period. The owners of the properties challenged the law as an unconstitutional taking of private property without just compensation.

The court held that the loss of possessory interest that occurs when owners are forced to accept occupation of their properties by persons not already in residence results in deprivation of rights in those properties sufficient to constitute a *per se* physical taking. *Id.* at 103, 542 N.E.2d at 1063, 544 N.Y.S.2d at 546. Further, the court noted that the law was also a regulatory taking because the moratorium and anti-warehousing provisions denied the owners economically viable use of their properties. *Id.* at 107, 542 N.E.2d at 1065-66, 544 N.Y.S.2d at 549. The nexus between the burden of the property owners and the alleviation of the social problem of homelessness was tenuous and failed the "means-end" test. *Id.* at 112, 542 N.E.2d at 1069, 544 N.Y.S.2d at 552. The law's buy-out, replacement, and hardship exceptions did not mitigate the unconstitutional nature of the law. *Id.* at 113-15, 542 N.E.2d at 1069-70, 544 N.Y.S.2d at 552-54.

takings challenges were rarely successful as a matter of federal constitutional law after *Penn Central*. Therefore, even limited success in these challenges, particularly against the federal government, is a significant departure from the trend in prior litigation and enough to engender caution on the part of land use planners when contemplating regulatory options. It seems only reasonable to assume that these cases will continue to proliferate as the full repercussions of the Supreme Court trilogy become apparent in the lower courts. In the seven federal cases in which a taking has been found, the United States Claims Court and Federal Circuit Court of Appeals have found it necessary to address not only how far regulatory interference must go to be a taking, but also how to measure the damages once a taking has been found.

In *Florida Rock Industries v. United States,*\(^{347}\) the Court of Claims, the primary forum for determination of taking claims under section 404 of the Clean Water Act,\(^{348}\) ruled that a permit denial for limestone mining was a taking.\(^{349}\) On appeal,\(^{350}\) the Court of Appeals for the Federal Circuit reversed the Claims Court's holding that only current uses and not future ones could be considered in determining whether economically viable uses of the property remained, and thus the court remanded the case for evaluation of the remaining value of the property.\(^{351}\)

On remand, the United States Claims Court ruled that the value of the property should be determined by examining a market of inves-

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[^349]: Id. at 179.

[^351]: Id. at 905. One commentator has suggested that *Florida Rock* was a "strong candidate" for a taking determination:

The plaintiff bought the property in 1972 for the specific purpose of mining limestone when there were no applicable federal statutes that required a permit. The Corps' jurisdiction was based on the need to temporarily deposit excavated material onto wetlands. The environmental values were not substantial. Most importantly, the permit denial deprived plaintiff of the only current economically viable use of the property.

tors speculating on the property who were aware of the regulatory limits on the use of that property. The court therefore awarded damages for the full fair market value of the property.

After concluding that the plaintiff’s limestone mining on 98 acres of a 1,560 acre tract did not fall within the nuisance exception to the taking prohibition, the court’s opinion focused on valuation of the property before and after the permit denial. Upon finding that no comparable sales were available, the court determined a value of $10,500 per acre based on adjustments to the property’s acquisition cost to reflect “pre-permit-denial fair market value.” As to post-denial value the Claims Court asserted that it would be “patently unreasonable to require plaintiff to prove the total absence of any value, and more relevant . . . , the absence of a market for the property.” As the finder of fact the court had to “discount proposed uses that [did] not meet a ‘showing of reasonable probability that the land [was] both physically adaptable for such use and that there is a demand for such use in the reasonably near future.’” The court concluded that the proposed use of speculation was neither practicable nor reasonably probable, so that the post-denial value of the property was $500 per acre for “future recreational/water management” purposes rather than $4,000 per acre for investment purposes. This 95% reduction in value and the fact that the plaintiff had purchased the property solely for the purpose of limestone mining was sufficient to demonstrate to the court that there had been a permanent taking.

Although the property had retained a residential value of $500 an acre, the court ordered payment of the full fair market value at the time of the taking, plus interest.

In addition to the Florida Rock case discussed above, the Claims Court in a companion case ruled that the Corps’ denial of another section 404 permit was a taking and awarded just compensation. In Loveladies Harbor, Inc. v. United States, the Corps denied a permit to develop residential housing on 11.5 acres of wetlands in a 250 acre parcel, most of which had already been developed. On a summary judgment motion, the court refused to measure the economic impact

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353. Id.
354. Id. at 170.
355. Id. at 172 (emphasis in original) (quoting United States v. 341.45 Acres of Land, 633 F.2d 108, 111 (8th Cir. 1980), cert. denied, 451 U.S. 938 (1981)).
356. Id.
357. Id. at 175-76.
358. Id. at 176.
by the diminution in value of the entire 250 acres. Following the same method of analysis as in Florida Rock, the Claims Court in determining the property's pre-denial value found that the highest and best use was as a 40-lot residential development with a projected fair market value of $2,658,000. The court held that there was no economically viable use of the property without a permit, even though the post-denial value for the property of $1,000 per acre was based on the remaining conservation and recreational uses of the property. The United States asserted that the property could be adapted for use for hunting, agriculture, a mitigation site, or a marina. The court found these contentions "unsupported" and without any evidence establishing a market for such uses. Similarly, the court found no evidence to demonstrate a market for the one acre of uplands the government claimed could be developed and sold for up to $40,000. The 99% diminution in value, coupled with the court's earlier determination of no countervailing substantial state interest, led the court to find a taking. As in Florida Rock, the court ordered payment of the property's full market value at the time of the taking plus interest despite its residual value of $12,500 after the taking.

Both courts emphasized in their opinions that no economically viable use of the property in question remained after regulation, often despite apparent conservation, agricultural, and recreational uses for the property. The courts also appear to be utilizing the "before and after" fair market value of the highest and best use of the property to determine damages, an approach that results in higher damages than many alternative formulations such as measuring damages to immediate use values. Although admittedly a very small sampling, these cases suggest that landowners may well be succeeding with takings challenges by showing that no development use remains in the property and then may recover for damage done to the potential developmental value rather than to the immediate use value of the property. The Supreme Court decisions under the taking clause, if nothing else, have created sufficient ambiguity in the area to encourage taking claims when uses of property are substantially restricted.

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360. Id. at 154.
361. Id. at 157.
362. Id. at 158.
363. Id. at 158-59.
364. Id. at 159.
365. Id. at 160.
366. Id. at 161.
IV. The Role of the Federal Government and Judiciary in Environmental Preservation as Land Use Regulators

What might otherwise appear to be an unjustifiable failure by Congress to give teeth to the CZMA can only be understood in the historical context of the environmental movement and federal involvement in land use control in the United States. As a field, environmental law has just reached its twentieth year. The modern era of environmental law is generally traced to the passage of the National Environmental Policy Act (NEPA) of 1969. NEPA was followed by a succession of landmark environmental statutes in the 1970's regulating air pollution, water pollution, solid and hazardous waste, endangered species, and drinking water, among other environmental concerns. Environmental destruction was addressed in this period by legislation specifically directed to the environment, which either set up a process for environmental evaluation, as in NEPA, or imposed controls on pollution sources, as in the Clear Air and Clean Water Acts. In this heyday of environmental preservation, there was inestimable faith in the command-and-control regulatory approach to environmental problems. In part this approach was predicated on a naive assessment of environmental processes. If there was too much carbon monoxide or sulfur dioxide in the atmosphere, Congress's response was to require compliance with a technology-based standard for the offensive pollutant or to create a health-based ambient quality standard with the intricacies of implementation left to the overburdened Environmental Protection Agency.

The roots of the command-and-control approach to environmental regulation, however, went much deeper. Throughout the 1970's, Congress repeatedly confronted and rejected any measures that even approximated what could be considered federal land use controls. From 1970 to 1975, approximately forty national land use bills that would have established planning procedures for states supported by federal funding were rejected by one or both houses of Congress, even though the proposals would have left the actual planning process to the states. The entrenched political resistance to "federal zoning" ignored the fact that the federal government had been involved in land use regulation since the 1700's. Even while efforts for a national

369. R. HYMAN, NATIONAL LAND USE POLICY LEGISLATION: A BIBLIOGRAPHY (1979); see generally Johnson, Land Use Planning and Control by the Federal Government, in NO LAND IS AN
land use policy were failing in Congress, federal legislation was creating what Donald Hagman referred to as the "quiet federalization of land use controls." 370 To avoid the appearance of federal zoning, even the most expansive federal programs affecting land use (like the CZMA in 1972 and the CBRA in 1982) were limited to funding of state or local programs for land use regulation in accordance with federal standards 371 or withdrawal of federal funding for environmentally destructive activities.

By the late 1970s, a well-worn pattern for environmental regulation had been set. If an environmental problem could be addressed through imposition of technological standards, Congress would mandate that approach. For environmental problems that seemingly had to be addressed through land use controls, such as preservation of floodplains and coastal zones, federal standards would set criteria for voluntary state and local land use programs, with the incentive of federal funding for qualifying programs. 372

A new era of environmental regulation was ushered in with the 1980s. Ten years of technology-based standards had failed to produce clean air and clean water or to rectify other environmental problems such as contamination of groundwater with toxic waste. Economists criticized the command-and-control approach to environmental preservation and succeeded in their call for increased use of cost/benefit analysis and economic incentives in environmental decisionmaking. The Reagan administration emphasized an expanded role for state and local governments while decreasing federal funding for state and local environmental programs. 373

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372. The different ways in which federal programs affect or dictate land use have been characterized as follows:
   1. They directly regulate the use that may be made of land;
   2. They fund state or local programs of land use regulations;
   3. They require the preparation of plans to guide future land uses;
   4. They construct, or pay for the construction of, facilities that use land and that may strongly influence surrounding land uses; and
   5. They provide a variety of stimulants and depressants to various segments of the economy that influence the way private users of land behave.
373. "States will be encouraged to assume more responsibility for administering federal environmental laws through a combination of increased leeway to conduct environmental programs and offers of grant assistance, according to a policy statement signed by Environmental Protection Agency Administrator William D. Ruckelshaus April 4." EPA Policy Encourages Greater State Role, Funding Viewed as Key By Bipartisan Caucus, [Current Developments] ENV'T REP. (BNA) 14 (Apr. 6, 1984).
The modern era of state and local government involvement in land use can be traced to the issuance in 1922 by the United States Department of Commerce of the Standard State Zoning Enabling Act as a model for state delegation of zoning powers and the 1926 decision of the Supreme Court in *Village of Euclid v. Ambler Realty Co.*, upholding the constitutionality of comprehensive zoning. These two events would lead to virtually exclusive control of land use by local governments for nearly fifty years. The counter-revolution in land use was first recognized in 1971 in a seminal book entitled "The Quiet Revolution in Land Use Control." In that book, the authors illuminated a growing trend in which state legislatures were reallocating land use authority from local governments to regional and statewide entities. This trend was reflected in the American Law Institute’s Model Land Development Code. Adopted in 1975, the Code was the result of a twelve-year study of the Standard Zoning Enabling Act, the Standard City Planning Enabling Act, and state legislation based upon the acts. Article seven of the Model Code provides for an expanded state role in land use regulation through state review of local decisionmaking in critical areas and for major developments. Although the United States Senate would pass the Land Use Policy and Planning Assistance Act of 1973, based roughly on article seven of the Code, the legislation did not pass in the House of Representatives. The Act would have provided federal funding to states regulating areas of critical state concern, developments of regional benefit, large-scale development, and areas impacted by key facilities such as major airports and highway interchanges.

Undeniably the dissatisfaction with local regulation was in part due to social problems created by fragmented, uncoordinated growth controls. Yet it is questionable whether this quiet revolution would have taken place without the environmental awareness of the late 1960s and 1970s. The growing sophistication in the science of ecology in this period directly led to an understanding of the need for regional and state controls to protect an entire ecosystem. The shift in the concept of property-as-commodity to property-as-resource necessitated a fundamental rethinking of the ultimate goals of all land use regulation.

375. 272 U.S. 365 (1926).
To their credit, states as well as local governments began to experiment with innovative land use techniques. A number of states adopted legislation based on article seven of the Model Code to protect critical areas and regulate developments of regional impact or benefit. State and regional regulation in most states did not usurp local zoning powers so much as create an additional layer of regulation or oversight for local decisionmaking in accordance with the Model Code approach. Within such a framework, local governments increasingly utilized methods such as planned unit developments, open space zoning, and transferable development rights to preserve natural resources and protect environmental values.

State and local governments in the late 1980's have also taken the initiative in environmental regulation that was thought to be the exclusive province of the federal government in the 1970's. With respect to pollution controls, states have taken advantage of provisions in the Clean Air Act and Clean Water Act that allow states to impose stricter controls than the federal acts require. Freed from the restraints of preemption, the states have responded with such stringent controls that industries confronted with varying state standards are lobbying for federal preemption. Local governments have aggressively become involved in regulation to equalize the burdens from environmental risks, for example, enacting right-to-know ordinances requiring disclosure of risks from hazardous waste and land use ordinances to regulate (or prohibit) hazardous waste facilities contaminating groundwater within their jurisdiction. Despite fears of local protectionism, local environmental regulation has proliferated to fill in the gaps of federal environmental regulation, most notably through the mechanism of land use regulation so ardently avoided at the federal level. Nowhere is this new state environmentalism better represented than in coastal zone management, although state efforts have been hampered by inadequate funding. In addition to the problem of inadequate funding, state-imposed land use controls increasingly have fallen victim to the spectre of the takings clause which has loomed large over land use regulation since a shift in takings jurisprudence in the late 1980's.

Ironically, the so-called quiet revolutions in allocation of land use
authority and environmental regulation coincided with a not-so-quiet revolution in takings jurisprudence from the Supreme Court. The trilogy of cases in the 1987 term created even greater uncertainty as to what constitutes a taking than had been the case in the 1970s. If anything clearly emerged from these opinions, it was that a new coalition was forming on the Court which appeared more predisposed to find a taking by restrictive land use regulation. The coalition had not coalesced, however, to the point of agreement on what degree of economic deprivation constitutes a taking. Yet, while state and local governments were moving away from the concept of property-as-commodity to property-as-resource, a tenuous majority of the Court seemed inclined to evaluate land use regulation solely for its interference with the developmental value of property.

Not surprisingly under these circumstances, the "psychological" impact of the Court's decisions has far exceeded their scope as a matter of law. Any intrusive, non-traditional land use regulation is likely to be confronted with threats of litigation from landowners. It is surprising under these circumstances that state and local governments have continued to experiment with land use techniques and to pursue environmental preservation of the coasts with the vigor that they have demonstrated in recent years. Yet the impact of the Supreme Court trilogy is undeniable. In short, state governments are stuck between a rock and a hard place when it comes to any environmental regulation of land use. On the one hand, they confront the public pressures for a better environment, expanding federal requirements for environmental programs, and the need for experimentation with regional, statewide, and interstate land use controls. On the other hand, they are confronted with decreased federal funding, resistance from private landowners to growth restrictions, and the inestimable risk of monetary damages for a regulatory taking. The outcome of this conflict in coastal zone management and in the more general context of environmental management will depend on two essential variables—further refinement by the Supreme Court of the takings clause and the priority to be given federal funding of state and local environmental programs in Congress.

At this juncture, there is no indication that the need for environmental regulation through land use will somehow diminish, particularly for the coasts. Since the Stratton Commission report in 1969, the


energy crisis has occurred, the environmental movement has arisen and proliferated, and centuries of the law of the sea has undergone dramatic changes. If anything, renewed commitment to the CZMA is more important to strike a balance between development and preservation in the coastal zone than it was when the Act was passed. It is unrealistic to assume that states alone, in the guise of “states’ rights,” should bear the financial responsibility for management of coastal areas of national significance.

There is no question that the 1990 amendments to the CZMA were intended by Congress to give new strength to the Act, but in the all too familiar ways. The two incentives for state programs—federal funding and consistency review for federal activities—were increased and broadened respectively. The Coastal Energy Impact Fund, never adequately funded to serve its purposes, was abandoned for the much more limited Coastal Zone Management Fund which covers any special, designated costs of administration that states may incur with a program. Rather than redefine with more precision the substantive land use requirements for state programs to address the most pressing problems of coastal protection, Congress created two new grant programs for nonpoint source pollution and for eight identified areas needing “enhancements” in state programs.

In creating these two programs, Congress did take one small step away from vague policy directives toward more substantive federal regulation. After two years of extensive federal involvement in land use, it is time the taboo on federal land use was acknowledged as a myth not worth preserving. Substantive federal standards for designation of coastal zones and acceptable land uses within them do limit state and local land use authority, but do not by any means completely usurp their authority. Given the states’ expanding role as guardians of the environment, political resistance to such an innovation may be overestimated in any event.

From a public policy perspective, land use decisionmaking with a local or regional impact should remain the prerogative of state and local governments. Zoning decisions between competing commercial and residential uses, for example, are best resolved in a forum in which the parties concerned and affected by the decision may make their views known and, ultimately, express their approval or disapproval of official action in the electoral process. On the other hand, it is un-

386. The House conference report on the amendments states that the section on the findings and purposes of the amendments were meant to emphasize “the ever increasing pressures on coastal zone resources and the need to improve state management programs to meet those challenges.” H.R. CONF. REP. NO. 964, 101st Cong., 2d Sess. 969, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 2374, 2674.
thinkable that preservation of environmental quality would be left to state and local governments. The American public in recent years has been made well aware of the necessity for environmental regulation at the federal level and has come to accept its pervasiveness as the only way in which environmental values may be preserved. The problem simply put is that there is no talismanic distinction between environmental and land use regulation with respect to preservation of critical environmental resources such as wetlands, coastal zones, and floodplains. Once this artificial distinction between the two types of regulation is recognized, we are free to examine whether in a given case the original justifications for reserving land use to state and local governments hold true.

It is unrealistic to expect that coastal zones will be protected adequately as an interrelated ecosystem without substantive, minimum federal standards any more than suitable air quality could ever have been achieved or maintained by the federally funded state programs prior to passage of the Clean Air Act in 1970. When preservation of a critical environmental ecosystem is at stake, there is a need for federal intervention that transcends state and local prerogatives, because the parties affected by the decisionmaking (and thus the forum in which those decisions should be made) are no longer limited to those persons living in the immediate vicinity of the resource. In that sense, controlling development that will impair the environmental values of coastal resources is better characterized as "environmental regulation" to be addressed at the federal level than "land use" regulation reserved to state and local governments. The consistency review process could benefit from federally imposed exclusions of particularly fragile coastal areas, such as wildlife refuges and habitats for endangered species, from the leasing process, a limited reform that Congress has imposed already on a case-by-case basis. In all other cases, the mediation authority of the Secretary should be clearly delineated as to when and how conflicts between environmental values and energy needs should be resolved. Admittedly, such standards are difficult to formulate, but the present system leaves the states and federal agencies to make these determinations without the benefit of Congress' evaluation of national priorities.

The Supreme Court's taking jurisprudence, of course, is not susceptible to such reforms. When the Court does formulate a test for the degree of economic interference necessary for a taking, hopefully its judgment will be informed by the modern notion of property-as-resource. The Court's most recent taking decisions do nothing to foster that hope, however, nor do many of its other environmental decisions.
For example, the Supreme Court decisions under the CZMA are consistent with the Court's approach under NEPA, which delays consideration of environmental factors in a way that precludes meaningful evaluation of projects that impact on the environment. Congress can intervene, however, to overrule the Court's interpretation of the CZMA as it did with Secretary of the Interior v. California.

Renewed commitment to the CZMA is particularly crucial in the near future. The newly claimed exclusive economic zone extending 200 miles seaward from the coast will require planning and balanced development, which cannot be done without cooperation between state and federal governments. Management of the coastal zone necessitates federal cooperation in addressing issues such as ocean incineration and dumping, ocean mining, and extended fishing rights. Coastal protection is on the verge of slipping into a sea of budget cuts and political battles over state and federal power that ignore the deficiencies of the Act itself. Without a renewed commitment to coastal regulation, what progress has been made in the delicate balance of state and federal cooperation and coastal development and preservation will be irreparably destroyed.

387. In Kleppe v. Sierra Club, 427 U.S. 390 (1976), the Supreme Court held that a federal study of the northern Great Plains region for resource development was not yet a "proposal" for federal action triggering the requirement of an environmental impact statement, although the study clearly was prepared in preparation for development of the area.