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# THE COASTAL ZONE MANAGEMENT ACT: REVERSE PRE-EMPTION OR CONTRACTUAL FEDERALISM ?

*John A. Duff\**

All along the coasts of the United States, as the lands give way to the sea, another transition takes place as well. Federal law washes over state law until at last, miles out to sea, federal law rules exclusively. The dynamic natural environment contributes to the fact that land-based activities affect the seas, and vice versa. As a result, federal law may not adequately protect federal interests and state laws may be insufficient to protect a state's coastal zone from activities that take place in distant federal waters. How can government fashion a system that serves both federal and state interests? The answer: cooperation through a partnership contract arrangement, an option that has been employed since 1972. In an era of increasing battles over the proper roles of federal and state power, the Coastal Zone Management Act<sup>1</sup> (CZMA) stands as a useful example of a vehicle that mutually benefits the federal and state governing authorities and the areas they govern. The CZMA achieves this result under a theory as close to contract as federalism. The CZMA provides federal funds to states to manage their coastal areas in accordance with a set of federal guidelines. The CZMA does not mandate state participation, but, rather, makes the states an offer. The benefits of this cooperative or contractual federalism relationship can be seen in the number of states that have accepted the offer and have adopted state coastal management programs,

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1. See 16 U.S.C. §§ 1451-65 (1994 & Supp. IV 1998).

which serve the dual purpose of protecting not only the coasts of the individual states, but the entire nation's coastal zone.<sup>2</sup>

One aspect of the CZMA, the consistency provision, allows states a voice in activities that are outside of the state territory, but which may affect the state's coastal zone. Critics of the CZMA argue that the federal government bargained badly in constructing the contractual nature of the relationship and that the CZMA, or at least certain features of the cooperative federalism relationship, including the consistency provision, ought to be abolished. In his article, *The Federal Consistency Requirements of the Coastal Zone Management Act: It's Time to Repeal This Fundamentally Flawed Legislation*,<sup>3</sup> Bruce Kuhse makes an impassioned plea to eradicate what he characterizes as a costly, burdensome, and ill-conceived instrument in the form of the consistency provision, due to what he claims are its reverse pre-emption effects on federal activity and authority. This brief article is designed to address some of the arguments made by Mr. Kuhse, to provide the reader with a different perspective on the CZMA federal-state relationship, and to posit the argument that the consistency provision is not a cession of federal authority, but, rather, even in its limited strength, a persuasive material element which attracts states to participate in the system.

### *The Federal Interest in State Coastal Waters*

Since the beginning of the Republic, the federal government has exercised a range of authorities over activities in the nation's coastal waters. The federal courts have plenary jurisdiction over admiralty and maritime matters.<sup>4</sup> The Commerce Clause of the Constitution<sup>5</sup> creates a navigation servitude which encumbers all navigable waters of the United States.<sup>6</sup> Moreover, a host of federal statutes govern the maintenance and

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2. See NOAA, *The Coastal Zone Management Program* (visited Nov. 12, 2000) <<http://www.ocrm.nos.noaa.gov/czm/>>. Currently, 33 of the 35 coastal states and territories that border the Atlantic and Pacific Oceans as well as the Gulf of Mexico and the Great Lakes have federally approved coastal management plans. See *id.* As a result, 95,331 national shoreline miles (99.9%) are managed under CZMA guidelines. Of the remaining 108 miles (0.1%), 45 lie within Indiana, which is in the process of program development; the rest lies within Illinois, which is not participating in the program. See *id.*

3. Bruce Kuhse, *The Federal Consistency Requirements of the Coastal Zone Management Act: It's Time to Repeal This Fundamentally Flawed Legislation*, 6 OCEAN & COASTAL L.J. 77 (2001).

4. U.S. CONST. art. III, § 2, cl.1.

5. U.S. CONST. art. I, § 8, cl.3.

6. See *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82, 87 (S. Ct. 1913) (stating that the federal "right to regulate the navigation of such waters is one of the greatest of the

protection of the condition and capacity of the nations's coastal waters.<sup>7</sup> Even in those circumstances where neither an express constitutional provision nor a federal statute conveys federal authority, the U.S. Supreme Court has recognized that rarest of judicial legal authority, federal common law, as a means of recognizing a federal interest in the nation's waters.<sup>8</sup> At the same time, there can be no doubt that the federal government recognizes substantial sovereign rights of each state related to their dry land, submerged lands, and coastal waters. The Submerged Lands Act<sup>9</sup> articulates the recognition of a state's title and right to coastal submerged land areas and also expressly reserves certain federal authorities deemed paramount.<sup>10</sup> While those water-borne paramount rights allow the federal government to pre-empt conflicting state law, that pre-emption authority decreases or disappears as the sea gives way to the shore. Given this regime of concurrent jurisdiction over coastal waters where federal law may reign supreme and the coastal land where state sovereignty constitutes greater strength, the question arises as to the best means of establishing a system that protects the entire nation's coastal zone, including both wet and dry areas.

That question was answered by Congress in 1972 when the CZMA became law.<sup>11</sup> Based upon recommendation of the Stratton Commission and with the knowledge that federal authority in the coastal zone dissipated at the water's edge, Congress enacted a law designed to persuade, rather than mandate, the states to protect the resources of the coastal zone.<sup>12</sup> At the outset of the CZMA, Congress states that there is a "national interest in the effective management, beneficial use, protection, and development of the coastal zone."<sup>13</sup>

By its very nature, the CZMA is contractual. The states need not enter into the partnership offered by the federal government.<sup>14</sup> Nor does the

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powers delegated to the United States by the power to regulate commerce").

7. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-87 (1994); Coastal Zone Management Act, 16 U.S.C. §§ 1451-65 (1994 & Supp. IV 1998); Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-82 (1994); Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h (1994); Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431-45b (1994 & Supp. IV 1998); Ocean Dumping Act, 33 U.S.C. §§ 1401-45 (1994).

8. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (citing *Texas v. Pankey*, 441 F.2d 236 (10<sup>th</sup> Cir. 1971)).

9. 43 U.S.C. §§ 1301-15.

10. See *id.* §§ 1311(a), 1356 (1994).

11. Coastal Zone Management Act, Pub. L. No. 92-583, 86 Stat. 1280.

12. See Kuhse, *supra* note 3 at 79.

13. 16 U.S.C. § 1451(a).

14. Dr. D. James Baker, *Testimony Before Subcomm. on Fisheries, Conservation,*

federal government have to enter into a relationship with a state if it deems the state's coastal management plan to be deficient.<sup>15</sup> The considerations exchanged in the contract are cash from the federal government to the state government *in exchange for* a state program designed to protect coastal zone in accordance with federal guidelines. Simply put, the effect of the contract is that the states get money and the federal government gets a national system of coastal management programs that meets its basic objectives.

*The Bargaining Chip—Giving the States a Voice in Federal Activities and Federal Territory*

A significant bargaining chip in the CZMA contract or partnership is the federal consistency provision.<sup>16</sup> In addition to the funding provided by the federal government, a state is effectively given a voice in federal activities via the consistency provision. Some commentators contend that the contractual nature of this cooperative federalism relationship, particularly the consistency provision, effectively produces a "reverse pre-emption" system whereby a state can effectively block the federal government from exercising its authority. In his article advocating the abolition of the consistency provision, Mr. Kuhse characterizes the measure as an ill-conceived cession of authority from the federal to the state government. The effect, contends Kuhse, amounts to a reverse pre-emption scenario, *i.e.*, rather than the federal government having the power to preempt state law, the state has authority to block what would otherwise be an allowable federal activity. Kuhse's recounting of circumstances where states have used the consistency provision as a means of influencing or impeding federal activity is constructed to illustrate the threat that this "negative pre-emption" poses not merely to the proposed activity at issue, but to the very nature of federal authority itself. One reading Mr. Kuhse's argument might be led to believe that a federal government activity or a permitting decision related to an activity that takes place outside state

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*Wildlife & Oceans* (visited Jan. 17, 2001) <<http://resourcescommittee.house.gov/resources/106cong/fishries/00mar28/baker.html>>. "[The]Coastal Zone Management Program was created under the Coastal Zone Management Act of 1972. The program is a voluntary partnership between the federal government and U.S. coastal states and territories that is intended to preserve, protect, develop, and where possible, restore and enhance the nation's coastal resources." *Id.*

15. See 16 U.S.C. § 1455 (explaining how the federal government reviews the state coastal program and conducts further reviews of any substantial changes or revisions to a state program).

16. 16 U.S.C. § 1456(c).

jurisdiction may be derailed by the whim of a state by the mere utterance of the term “inconsistent.” But in those circumstances where the federal activity may impact the state’s coastal zone, the state must do more than merely object; it must articulate some rational basis for doing so. In fact, in 1984, the U.S. Supreme Court ruled against a state for failure to state a consistency objection within the meaning of the CZMA. This decision led to a congressional strengthening of the state’s consistency scope.<sup>17</sup>

While there is no doubt that the states have effectively blocked some types of activity from occurring,<sup>18</sup> they have done so not in opposition to federal authority, but with the full understanding of the federal government and pursuant to a provision of a *federal law* which has been revisited and re-authorized by Congress numerous times over the last quarter century.<sup>19</sup> In some instances, the consistency provision has proven to be a NEPA-like tool that fosters sound and informed decision-making.<sup>20</sup>

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17. See *Secretary of The Interior v. California*, 464 U.S. 312 (S.Ct. 1984). See also Kuhse *supra* note 3 at 89.

18. See Kuhse *supra* note 3, at 96–98.

19. See, e.g., Coastal Zone Protection Act of 1996, Pub.L. No. 104-150 ; 110 Stat. 1380 (codified as amended in scattered sections of 16 U.S.C.); Oceans Act of 1992, Pub. L. 102-587, 106 Stat. 5039 (codified as amended in scattered sections of 16 U.S.C.); Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 95-372, 92 Stat. 629 (codified as amended in scattered sections of 16 U.S.C.); Outer Continental Shelf Lands Act of 1978, Pub. L. 95-342, 92 Stat. 629 (codified as amended in scattered sections of 16 U.S.C.); Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013 (codified as amended in scattered sections of 16 U.S.C.).

20. See 65 Fed. Reg. 31,492, at 31,593 (May 18, 2000). Notice of Final Rulemaking. “When the EPA wanted to designate an ocean dumping site, it consulted Louisiana: The 30-day comment period on EPA’s Final EIS closed on January 11, 1999. Only one comment letter, from the State of Louisiana, Department of Culture, Recreation and Tourism, Office of Cultural Development, was received on the Final EIS. The Louisiana Office of Cultural Development found the document to be thorough and well written, and concurred with the evaluation that there would be no effect on significant cultural resources, and as such, had no objections to the proposal. EPA’s NEPA review included coordination with the State of Louisiana under requirements of the Coastal Zone Management Act. The State of Louisiana concurred with EPA’s determination that final designation of the Atchafalaya River Bar Channel ODMDs is consistent, to the maximum extent practicable, with the Louisiana Coastal Resources Program. This final rulemaking document fills the same role as the Record of Decision required under regulations promulgated by the Council on Environmental Quality for agencies subject to NEPA.” *Id.*

### *Who's Trumping Whom?*

In issues of pre-emption, courts often characterize the exercise of a superior federal power as a right to “trump,” or override, a state law or decision. Kuhse’s notion of inverse pre-emption paints a picture of the federal government giving away this trump card to the states when it comes to matters that may affect the coastal zone of the nation. However, a more accurate card-playing portrayal of the federal-state partnership might be a picture of the federal government dealing a wild card to each state in exchange for each state anteing up with a coastal zone management program that enriches the dealer by effecting his objectives. And while each state may play that wild card from time to time in the form of a consistency objection, it is obvious that even that wild card may be trumped by any number of cards that the federal government retains.

### *The Trump Cards That Remain in the Federal Government's Hand*

While the state may hold a wild card in the form of an “inconsistency” claim, there remain a number of trump cards in the federal government’s hand.

#### **Exclusion**

The CZMA expressly excludes federal lands from being considered part of a state’s coastal zone.<sup>21</sup> As a result, activity on federal lands within the borders of a state’s coastal zone have a trump card characteristic to them. Mr. Kuhse indicates that the exclusion provision is weakened by the fact that a state may “claim inconsistency” for activity that takes place in an excluded area that might have an impact beyond the excluded area and in the state coastal zone.<sup>22</sup> He is correct, but that does not render the exclusion provision meaningless.<sup>23</sup>

#### **Presidential Exemptions for Federal Activities**

Another trump card exists even where a state plays its wild card in the form of a consistency objection to a federal activity. The President may

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21. See 16 U.S.C. § 1453(1). “Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.” *Id.*

22. See Kuhse *supra* note 3 at 99.

23. See *Puerto Rico v. Muskie*, 507 F. Supp. 1035 (D.P.R. 1981).

“exempt from compliance those elements of the federal agency activity . . . found . . . to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States.”<sup>24</sup>

### Secretary Override for Federal Permitting Decisions

The fact that the consistency provision can be trumped by the Secretary of Commerce is illustrated by the numerous instances in which the Secretary, contrary to a state claim of inconsistency, has ruled that a federal permit issuance was in fact “consistent” under the terms of the CZMA.<sup>25</sup>

### Ability to Amend, Revise, or Repeal the CZMA

The ultimate trump card that the federal government retains in its hand is its ongoing ability to amend, revise, or repeal the CZMA. Testimony countering the argument that the CZMA, or at least its consistency provision, constitutes an unwanted infringement on federal authority exists in the ongoing re-authorizations of the CZMA. Each and every time the CZMA has been re-authorized, its consistency provision has been left intact.<sup>26</sup>

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24. 16 U.S.C. § 1456(c)(1)(B) (stating that the President has this option upon a written request submitted by the Secretary of Commerce).

25. This has happened on at least eight occasions. *See e.g., In the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska*, 1990 NOAA LEXIS 49; *In the Consistency Appeal of Texaco, Inc. from an Objection by the California Coastal Commission*, 1989 NOAA LEXIS 32; *In the Consistency Appeal of the Korea Drilling Company, Ltd. from an Objection by the California Coastal Commission*, 1989 NOAA LEXIS 34; *In the Consistency Appeal of Long Island Lighting Company from an Objection by the New York Department of State*, 1988 NOAA LEXIS 32; *In the Consistency Appeal of Gulf Oil Corporation from an Objection before the Secretary of Commerce*, 1985 NOAA LEXIS 1; *In the Consistency Appeal of Southern Pacific Transportation Company to an Objection by the California Coastal Commission*, 1985 NOAA LEXIS 73; *In the Consistency Appeal of Union Oil Company Company to an Objection by the California Coastal Commission*, 1984 NOAA LEXIS 16; *In the Consistency Appeal of Chevron U.S.A., Inc., from an Objection by the State of Florida*, 1993 NOAA LEXIS 2.

26. *See* Pub. L. No. 89-454, Title III, § 307, as added Pub. L. No. 92-583, Oct. 27, 1972, 86 Stat. 1285 and amended Pub. L. No. 94-370, § 6, July 26, 1976, 90 Stat. 1018; Pub. L. No. 95-372, Title V, § 504, Sept. 18, 1978, 92 Stat. 693; Pub. L. No. 101-508, Title VI, § 6208, Nov. 5, 1990, 104 Stat. 1388-307; Pub. L. No. 102-587, Title II, § 2205(b)(13), (14) Nov. 4, 1992, 106 Stat. 5051.



### Upping the Ante

In addition to the trump cards that the federal government holds, re-authorizations since 1990 illustrate that the federal government is intent on upping the ante in terms of the conditions it is seeking to exact from the states. Section 6217 of the Coastal Zone Act Reauthorization Amendments<sup>27</sup> (CZARA) requires states and territories with coastal zone management programs that have received approval under section 306 of the CZMA to develop and implement coastal nonpoint source pollution control programs.<sup>28</sup> Coastal states and territories were required to submit their coastal nonpoint programs to the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) for approval by July 1995. Fulfilling their part of the contract, a number of states and territories have submitted coastal nonpoint programs satisfying the requirement.<sup>29</sup>

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27. Section 6217 of the Coastal Zone Act Reauthorization Amendments are codified under 16 U.S.C. § 1455b. 16 U.S.C. § 1455b was enacted as part of the Coastal Zone Act Reauthorization Amendments of 1990, and not as part of the Coastal Zone Management Act of 1972.

28. See 16 U.S.C. § 1455b. "Not later than 30 months after the date of the publication of final guidance under subsection (g) of this section, each State for which a management program has been approved pursuant to section 306 of the Coastal Zone Management Act of 1972 [16 USC § 1455] shall prepare and submit to the Secretary and the Administrator a Coastal Nonpoint Pollution Control Program for approval pursuant to this section. The purpose of the program shall be to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities." *Id.* at 1455b(a)(1).

29. See *e.g.*, Coastal Nonpoint Pollution Control Program: Approval Decision on Puerto Rico Coastal Nonpoint Pollution Control Program, 65 Fed. Reg. 53,703 (9/5/2000). "Notice is hereby given of the intent to fully approve the Puerto Rico Coastal Nonpoint Pollution Control Program (coastal nonpoint program) and of the availability of the draft Approval Decisions on conditions for the Puerto Rico coastal nonpoint program . . . NOAA and EPA conditionally approved the Puerto Rico coastal nonpoint program on November 18, 1997. NOAA and EPA have drafted approval decisions describing how Puerto Rico has satisfied the conditions placed on its program and therefore has a fully approved coastal nonpoint program." *Id.*; Coastal Nonpoint Pollution Control Program: Approval Decision on California Coastal Nonpoint Pollution Control Program, 65 Fed. Reg. 25,311 (5/1/2000). "Notice is hereby given of the intent to fully approve the California Coastal Nonpoint Pollution Control Program (coastal nonpoint program) and of the availability of the draft Approval Decisions on conditions for the California coastal nonpoint program . . . NOAA and EPA have drafted approval decisions describing how California has satisfied the conditions placed on its program and therefore has a fully approved coastal nonpoint program." *Id.*; Coastal Nonpoint Pollution Control Program: Approval Decision on Rhode Island Coastal Nonpoint Pollution Control Program, 65 Fed. Reg. 14,543 (3/17/2000). "Notice is hereby given of the intent to fully approve the Rhode Island Coastal Nonpoint Pollution Control Program (coastal nonpoint program) and of the availability of the draft

The fact that the federal government continues to play the game and raise the stakes suggests that it is willing to leave its own contribution, vis-a-vis the consistency provision, intact. In light of its growing reliance on states to develop more extensive coastal management programs with increasing responsibilities, it is unlikely that the federal government wishes to eliminate its allowance for states to have a voice in federal activities and permitting decisions that may affect their coasts

### *Conclusion*

When the notion of reverse pre-emption, as posited by Mr. Kuhse, is considered in the context of the CZMA, it is important to remember that the federal government cannot be absolutely bound by the states in any real ongoing way. In the CZMA contractual federalism card game, the federal government convened the game, wrote the rules, holds a number of trump cards, and has the ability to end the game when it wishes. The consistency provision that gives states a voice that they would otherwise not have does not threaten federal authority. In its worst manifestation it amounts to nothing more than a wild card that might be played by the state. The fact that on some occasions the federal government allows the state's wild card to go untrumped does not mean that the federal government is powerless. Rather in those circumstances, it may be better characterized that the federal government allows a state to benefit from the bargain struck in the CZMA federal-state contract partnership. There is likely no doubt that in some of the situations Mr. Kuhse cites, certain individuals have borne a greater burden than may have been anticipated. However, a distinction should be drawn between the limited situations in which these arguable inequities occur and the overall nature of contractual federalism embodied in the CZMA regime. There may be remedies to addressing the seemingly unfair circumstances that may result under a state's claim of "inconsistency."<sup>30</sup> But a balancing of the bargaining chips seems to indicate that states might drop out of the bargain if one of the biggest chips is taken out

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Approval Decisions on conditions for the Rhode Island coastal nonpoint program. NOAA and EPA conditionally approved the Rhode Island coastal nonpoint program on September 27, 1997. NOAA and EPA have drafted approval decisions describing how Rhode Island has satisfied the conditions placed on its program and therefore has a fully approved coastal nonpoint program." *Id.*

30. A recent Supreme Court decision indicates that the U.S. federal government may have to increase its financial contribution to the CZMA process in the form of payments back to prospective federal permittees whose development proposals have been thwarted by, among other things, state CZMA consistency objections. *See Mobil Oil Exploration & Producing Southeast, Inc. v. U.S.*, 120 S. Ct. 2423 (2000).

of the pot. And in light of recent efforts of Congress to raise the stakes in the game, by requiring, for example that states implement non-point source pollution control management systems, it seems even more inequitable for the federal government to reduce its contribution to the partnership. While the 106<sup>th</sup> Congress struggled to construct budgets to fund federal programs, it became clear that the legislative and executive branches agreed that the CZMA ought to continue to receive substantial federal financial support to assist states in administering their respective coastal management programs.<sup>31</sup>

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31. See Act of November 29, 1999, Pub. L. No. 106-113, (113 Stat. 1501). CONSOLIDATED APPROPRIATIONS ACT, 2000: An Act Making consolidated appropriations for the fiscal year ending September 30, 2000, and for other purposes; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION OPERATIONS, RESEARCH, AND FACILITIES (INCLUDING TRANSFERS OF FUNDS) : grants to States pursuant to sections 306 and 306A of the Coastal Zone Management Act of 1972, as amended, shall not exceed \$2,000,000; COASTAL ZONE MANAGEMENT FUND: Of amounts collected pursuant to section 308 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1456(a), not to exceed \$4,000,000, for the purposes set forth in sections 308(b)(2)(A), 308(b)(2)(B)(v), and 315(e) of such Act. *Id.* See also Act of December 21, 2000, Pub. L. No. 106-553, (114 Stat. 2762) (H.R. 4942). "That of the funds provided under this heading for ocean and coastal conservation programs, \$10,000,000 is available for implementation of State nonpoint pollution control plans established pursuant to section 6217 of the Coastal Zone Management act of 1972, as amended by P.L. No. 101-508." *Id.* at 167.