Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency

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The value of swamps, marshes and other shallow water and periodically-inundated areas that are generally described as wetlands[1] to the vitality of coastal ecosystems is scarcely open to question. Wetlands furnish spawning and nursery areas for commercial and sport fish, act as natural cleansers of airborne and waterborne pollutants, provide recharge areas for water supplies, afford natural

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1. Legal definitions of "wetlands" vary. Compare the phraseology of the United States Army Corps of Engineers regulations with that of Executive Order No. 11990 on the Protection of Wetlands. [Italics have been added to indicate differences in language]:

> Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency *and duration* sufficient to support, and that under normal circumstances do support, a prevalence of vegetation *typically adapted* for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(c) (1977).

> Wetlands means those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does *or would* support a prevalence of vegetative *or aquatic life that requires* saturated *or seasonally saturated* soil conditions *for growth and reproduction*. Wetlands generally include swamps, marshes, bogs, and similar areas *such as sloughs, potholes, wet meadows, river overflows, and mud flats and natural ponds.*

Exec. Order No. 11990 § 7(c), 42 Fed. Reg. 26,961 (1977).

The operational definition currently employed by the United States Fish and Wildlife Service differs considerably from either of the above:

> Wetlands are those lands where the water table is at, near or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes.

DEP'T OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, CLASSIFICATION OF WETLAND AND DEEP-WATER HABITATS OF THE UNITED STATES (AN OPERATIONAL DRAFT) 4 (1977). For a description of the wetlands responsibilities of various federal agencies, *see* note 68 *infra*.

protection from hazardous floods, supply essential nesting and wintering areas for waterfowl and serve as high-yield food sources for aquatic animals.[2] Wetlands perform these functions without the economic costs of man-made solutions. Estimates of the dollar value per acre of wetlands range from $50,000 to $80,000.[3] Since the economic value of these critical environmental areas is not always recognized, however, and generally accrues to society as a whole rather than to individual landowners, pressures to fill wetlands for a variety of developmental purposes are strong.[4] Both the public and the private sectors have contributed to the attack on the Nation's wetland resources.[5]

The evolution of a significant federal role in the protection of wetlands, fueled in part by increasing public awareness of the destruction of irreplaceable wetland resources,[6] began with the

2. *See, e.g., Hearings Before the Senate Committee on Public Works on Section 404 of the Federal Water Pollution Control Act Amendments of 1972*, 94th Cong., 2d Sess. 415-23 (1976) (statements of Louis Clapper and Kenneth Kamlet) [hereinafter cited as *Senate § 404 Hearings*]. *See generally* J. CLARK, COASTAL ECOSYSTEM MANAGEMENT (1977); COUNCIL ON ENVIRONMENTAL QUALITY, OUR NATION'S WETLANDS (prepublication copy).

President Carter described wetlands as "vital natural resources of critical importance and catalogued their benefits as follows:

> Wetlands are areas of great natural productivity, hydrological utility, and environmental diversity, providing natural flood control, improved water quality, recharge of aquifers, flow stabilization of streams and rivers, and habitat for fish and wildlife resources. Wetlands contribute to the production of agricultural products and timber, and provide recreational, scientific, and aesthetic resources of national interest.

Statement of the President Accompanying Exec. Order No. 11990, ENVIR. L. REP. STAT. & REG. 45,030 (1977). For discussion of the implication of the Executive Order, *see* notes 111-17 and accompanying text *infra*.

3. *Senate § 404 Hearings*, *supra* note 2, at 422.

4. A poignant example is the State of California, where two-thirds of all coastal wetlands were filled during the 1950s and 1960s. *See* THE WATER'S EDGE: CRITICAL PROBLEMS OF THE COASTAL ZONE 11 (B. Ketchum ed. 1972).

5. For example, over a century of reclamation activities, encouraged in no small measure by federal statutes, resulted in the destruction of an estimated two-fifths of the nation's 120 million wetland acres. The Swamp Lands Act of 1849, 1850 and 1860 granted 15 public domain states nearly 65 million acres for "swamp reclamation." *See* DEP'T OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE CIRCULAR 39, WETLANDS OF THE UNITED STATES 5 (1956). *See also Senate § 404 Hearings*, *supra* note 2, at 42 (statement of Russell Train), 392 (statement of Louis Clapper).

6. Rising public concern with wetland destruction coincided with the Department of the Interior's completion of two multi-volume studies of estuarial degradation. *See* DEP'T OF THE INTERIOR, NATIONAL ESTUARINE POLLUTION STUDY (1969); DEP'T OF THE INTERIOR, NATIONAL ESTUARY STUDY (1970). For a critical evaluation of these studies, see Hedeman, *Federal Wetlands Law: An Examination*, in ENVIRONMENTAL PLANNING: LAW OF LAND AND NATURAL RESOURCES two-12-16 (A. Reitze ed. 1974).

enactment of section 404 of the Federal Water Pollution Control Act Amendments of 1972.[7] The provision authorized the U.S. Army Corps of Engineers to implement a permit program governing the discharge of material from dredging and filling operations, activities that can have devastating impacts on wetlands. By 1975 the section 404 permit program had become the principal federal means of wetlands protection.[8]

For those who sought an aggressive federal role in the use of section 404 to protect wetlands, the struggle did not culminate in 1975. The Corps of Engineers accepted its new environmental role with ambivalence. In addition, during 1975 and 1976 opponents of section 404 in the 94th Congress nearly succeeded in gutting the program by restricting its expansive coverage to waters considered navigable in the traditional sense.[9] Commitment to a strong program regulating the discharge of dredged spoil and fill material in wetlands was not secured until passage of the Clean Water Act Amendments of 1977,[10] in which Congress reaffirmed the basic structure and jurisdictional scope of the section 404 program.[11]

Increasingly, however, evidence suggests that attempts to weaken federal protection of wetland resources have not ceased but are

7. 13 U.S.C. § 1334 (1978).

8. The breadth and potential of § 404 was not firmly established until 1975 in National Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975), in which the Secretary of the Army was ordered to rescind a regulation that narrowed the Corps of Engineers' jurisdiction under § 404 and to propose regulations "clearly recognizing the full regulatory mandate" of the statute. *Id.* at 686.

9. Traditionally-navigable waters are those presently used or susceptible to use, either in their natural condition or after improvement, in interstate commerce transportation. The definition is based on judicial interpretation of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 540-633 (1976). In contrast, § 502(7) of the Federal Water Pollution Control Act, 33 U.S.C. § 1362(7) (1976) more broadly defines navigable waters as "waters of the United States." For discussion of the navigability definitions and analysis of the amendments that would have undercut the § 404 program, see Caplin, *Is Congress Protecting Our Water? The Controversy Over § 404, Federal Water Pollution Control Act Amendments of 1972*, 31 MIAMI L. REV. 445, 457-66 (1977).

10. 33 U.S.C.A. § 1344 (1978).

11. These amendments exempt from permit requirements both activities with minor effects on aquatic ecosystems and certain federal construction projects, and allow qualified states the opportunity to administer the permit program in waters other than traditionally navigable waters. *See* 33 U.S.C. § 1344(f) (minor activities), § 1344(r) (federal construction projects), § 1344(g) (state program administration) (1976).

For a review of the 1977 amendments to § 404 see Thompson, *Section 404, of the Federal Water Pollution Control Act Amendments of 1977: Hydrologic Modification, Wetlands Protection, and the Physical Integrity of the Nation's Waters*, 2 HARV. ENVT'L L. REV. 264 (1977).

merely seeking more subtle avenues of attack. Having failed to weaken measurably the internal structure of the section 404 program, its opponents appear to be wielding external threats. Like the litigant who "shops" for a friendly forum in which to plead his case, those seeking to undermine the section 404 program may have shifted their focus from the implementation of the Clean Water Act Amendments to more hospitable state programs funded under the Coastal Zone Management Act (CZMA).[12]

The possibility that planning under the CZMA may undermine wetlands protection illustrates the ease with which the federal-state partnership, a prerequisite to effective coastal resources management, can be misunderstood. In enacting the CZMA, Congress intended to restructure federal-state decision-making by requiring the accommodation of federal activities to state interests.[13] But such accommodation does not make coastal planning a device to be employed by states to waive or undercut federal permit requirements.

This article is intended to help minimize potential conflicts in coastal planning and wetlands protection by outlining the functional differences between state coastal zone management (CZM) plans and federal section 404 permits. Part I surveys the basic similarities and distinctions of the two programs. Part II explores the impact of the CZMA's consistency provisions on regulatory activities under section 404. Part III explains how misinterpretation of the consistency provisions can weaken federal wetlands protection and points out why this approach, sometimes referred to as "positive consistency,"[14] is contrary to existing law and founded on impracticable

12. 16 U.S.C. §§ 1451-1464 (1976). That threats to § 404 should be hidden under the mantle of comprehensive planning for coastal zones has an ironic twist for those who believed that the enactment of the Coastal Zone Management Act (CZMA) in 1972 would foster the protection of estuaries and wetlands. *See* Zile, *A Legislative-Political History of the Coastal Zone Management Act of 1972*, 1 COASTAL ZONE MANAGEMENT J. 234, 241 (1974).

13. This accommodation is to be realized largely through the operation of § 307 of the CZMA, which requires that activities sponsored, supported or licensed by federal agencies be consistent with approved state management plans. 16 U.S.C. § 1456(c) (1976). For discussion of the operation and implication of the consistency provisions, *see* sources cited in note 32 *infra*.

14. The approach is denominated "positive consistency" in a program review memorandum prepared by the Office of Coastal Zone Management. *See* Dep't of Commerce, Office of Coastal Zone Management, Memorandum on the Gray's Harbor Management Plan (Mar. 21, 1978) (attached to the Washington State CZM Annual Program Review, June 30, 1978).

assumptions. Part IV demonstrates that the perils of positive consistency can be avoided through recognition in state coastal programs of federal wetlands protection standards, and argues that CZM programs failing to incorporate these criteria should not receive federal approval and funding. Part V, in conclusion, explains how those responsible for the design, review, implementation and oversight of coastal programs can ensure compatibility with national wetlands protection standards, and discusses the role of Congress in developing legislation that reflects the proper juxtaposition of the state and federal programs.

I. Interrelationships of CZM Programs and Section 404 Regulation

Grasp of the similarities and distinctions between state CZM programs and the section 404 program is essential to understanding that, although one program cannot be substituted for the other, each can complement the other if properly implemented. The most obvious difference between the programs is their coverage. Coastal programs are intended to address resource utilization comprehensively,[15] while the section 404 program is much more specific in its focus, being limited to controlling point source discharges of dredged or fill material.[16] The geographic scope of CZM programs, however, is more limited than that of the section 404 program,

15. The congressional declaration of policy supporting the statute notes that coastal zone management programs should give "full consideration to ecological, cultural, historic and esthetic values as well as to needs for economic development." 16 U.S.C. § 1452 (1976).

16. Dredged material is defined in the Corps of Engineers' regulations as "material that is excavated or dredged from waters of the United States." 42 Fed. Reg. 37, 415 (1977) (to be codified in 33 C.F.R. § 323.2(k)). The discharge of dredged material is defined as "the addition of dredged material to a specified disposal site located in waters of the United States, and the runoff or overflow from a contained land or water disposal area." 42 Fed. Reg. 37,415 (1977) (to be codified in 33 C.F.R. § 323.2(l)).

Fill material is defined by the Corps of Engineers as "any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a waterbody." *Id.* (to be codified in 33 C.F.R. § 323.2(m)). The discharge of fill material "means the addition of fill material into waters of the United States," including the placement of fill associated with the construction of a structure; site development fills; causeways or road fills; dams and dikes; artificial islands and reefs; property protection devices such as riprap, groins, seawalls, breakwaters and revetments; beach nourishment; levees; and fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines. *Id.* (to be codified in 33 C.F.R. § 323.2(n)).

which extends not just to coastal waters but to all waters of the United States.[17]

A more fundamental difference between the programs exists in their approaches to control. Section 404 established an enforceable regulatory program that is uniform in its application and specific in the activities it authorizes. Discharge permits are issued or denied case by case, according to prescribed national criteria and standards;[18] discharges without permits are unlawful and subject to administrative and judicial sanctions.[19] In contrast, coastal zone programs are broadbased and designed more to provide rational decision-making procedures for area-wide planning than to consider the merits of individual projects. There are few national standards, and federal review is confined largely to assessing the adequacy of state processes.[20] Consequently, the substance of CZM programs varies considerably from state to state. Furthermore, the programs are not required to incorporate enforcement mechanisms[21] and

17. The Environmental Protection Agency defines "waters of the United States" to include:

(1) All navigable waters of the United States;
(2) Tributaries of navigable waters of the United States;
(3) Interstate waters;
(4) Intrastate lakes, rivers and steams which are utilized by interstate travellers for recreational and other purposes;
(5) Intrastate lakes, rivers and streams from which fish or shellfish are taken and sold in interstate commerce;
(6) Intrastate lakes, rivers and streams which are utilized for industrial purposes by industries in interstate commerce.

40 C.F.R. § 125.1(p) (1977).

See also a more explicit definition recently proposed by the Environmental Protection Agency. 43 Fed. Reg. 37,090 (1978) (to be codified in 40 C.F.R. § 122.3(s)).

18. The Corps of Engineers' regulations governing the issuance of § 404 permits are codified in 33 C.F.R. §§ 320, 323, 325 (1977). In addition, all § 404 permits must apply and assure compliance with the § 404(b) guidelines issued by the Environmental Protection Agency in conjunction with the Corps of Engineers. These guidelines are codified in 40 C.F.R. § 230.1-.8 (1977).

19. A discharge of dredged or fill material without a § 404 permit is a violation of § 301 of the Clean Water Act, and as such, invokes the statute's range of sanctions under § 309. See 33 U.S.C.A. §§ 1311(a), 1319 (1978).

20. "The Secretary of Commerce . . . , in determining whether a coastal State has met the requirements, is restricted to evaluating the adequacy of that process." SENATE COMMERCE COMMITTEE, LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT, 94th Cong., 2d Sess. 760 (1976) [hereinafter cited as CZMA LEGISLATIVE HISTORY].

Even most of the specifically-enumerated program requirements are procedural in nature. For example, the management program must include a "planning process" for beach protection and energy facility siting. 16 U.S.C. § 1454(b) (1976).

21. 43 Fed. Reg. 8396 (1978) (to be codified in 15 C.F.R. § 923.3(a)(2)-(3)).

thus might attempt only to discourage wetlands development by general policy statements without specific use prohibitions.[22]

Finally, section 404 and CZM programs differ in their basic goals. The overriding objective of CZM programs is to strike a balance between preservation and development of both land and water resources.[23] The objectives of the section 404 program, though no less ambitious, are exclusively water-related: the preservation and restoration of the physical, chemical and biological integrity of the Nation's waters.[24]

The programs' fundamental differences should not, however, serve to obscure their similarities. Although neither program focuses exclusively on wetlands protection, both can affect wetlands resources significantly. The potential of section 404 in wetlands preservation is well-recognized.[25] State coastal programs under the CZMA, particularly in their land and water use classifications,[26] their designations of special management areas,[27] and their energy facilities siting[28] and erosion control planning,[29] can also exert a substantial influence on wetland resources. In fact, the statute's definition of "coastal zone" specifically includes transitional and intertidal areas, salt marshes and wetlands.[30]

22. *See* DEP'T OF COMMERCE, THE STATE OF WISCONSIN'S POLICY STATEMENT OF PROTECTING COASTAL WETLANDS, in STATE OF WISCONSIN COASTAL ZONE MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT 109 (1978).

23. 16 U.S.C. § 1451(a) (1976).

24. 33 U.S.C. § 1251(a) (1976).

25. *See* Abland & O'Neill, *Wetlands Protection and § 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 VT. L. REV. 51 (1976). *See also* Caplin, note 13 *supra*; Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503 (1977); Thompson, note 15 *supra*.

Emphasis on § 404's role in protecting the physical integrity of wetlands should not, however, overshadow its role in protecting the chemical integrity of water by controlling disposal of dredged spoils that may contain toxic sediments. *See Senate § 404 Hearings*, *supra* note 2, at 40 (statement of Russell Train), 324 (statement of Gus Speth).

26. 16 U.S.C. §§ 1454(b)(2), 1455(e)(2) (1976) (implemented by 15 C.F.R. §§ 923.10-.13 (1978)).

27. 16 U.S.C. §§ 1454(b)(3), (5), (7), 1455(c)(9) (1976) (implemented by 15 C.F.R. §§ 923.20-.25 (1978)).

28. 16 U.S.C. § 1454(b)(8) (1977) (implemented by 15 C.F.R. § 923.14 (1978)).

29. 16 U.S.C. § 1454(b)(9) (1977) (implemented by 15 C.F.R. § 923.26 (1978)).

30. 16 U.S.C. § 1453(1) (1976). The legislative history of the CZMA is replete with evidence of congressional awareness of the need to develop decisionmaking processes capable of protecting valuable estuarine areas from the destructive effects of wetland fills. *See CZMA Legislative History*, *supra* note 20, at 26 (statement of

The basic differences between the programs preclude substitutions of one for the other. Nonetheless, prospects for rational resource allocation can be enhanced through development of a decisional framework that uses the strengths of both programs in a complementary manner. The CZMA's federal consistency provisions[31] provide a feasible basis for such a framework. Misinterpretation of the effect of these provisions could undermine section 404 regulation, a result neither intended by the drafters of the CZMA nor warranted by its terms.

II. THE EFFECTS OF FEDERAL CONSISTENCY ON SECTION 404 REGULATION

The stake that federal agencies have in the content of state coastal programs derives largely from the opportunity provided by section 307 of the CZMA to alter federal-state relations.[32] The provisions of this section promise states with CZM programs approved by the Department of Commerce[33] that all federal activities significantly affecting the coastal zone, including direct action, regulatory functions and grants of financial assistance, will be conducted in a manner consistent with their programs.[34] In effect, the federal consistency provisions impose restraints on all discretionary federal action.[35]

Walter Hickel), 135 (statement of J.F. McDonald), at 144 (statement of Robert White), 380 (statement of Rep. Keith (R. Mass.)).

31. 16 U.S.C. §§ 1456(c), (d) (1976).

32. *See, e.g.*, Blumm & Noble, *The Promise of Federal Consistency Under § 307 of the Coastal Zone Management Act*, 6 ENVIRON. L. REP. 50,047 (1976); Brewer, *Federal Consistency and State Expectations*, 2 COASTAL ZONE MANAGEMENT J. 315 (1976); Hershman, *Achieving Federal-State Coordination in Coastal Resources Management*, 16 WM. & MARY L. REV. 747 (1975); Hershman & Folkenroth, *Coastal Zone Management and Intergovernmental Coordination*, 54 ORE. L. REV. 13 (1975); Hildreth, *The Operation of the Federal Costal Zone Management Act As Amended*, 10 NAT. RESOURCES LAW. 211 (1977); Shaffer, *OCS Development and the Consistency Provisions of the Coastal Zone Management Act*, 4 OHIO N.L. REV. 595 (1977).

33. 16 U.S.C. § 1455(c) (1976).

34. 16 U.S.C. § 1456(c), (d) (1976). Because they offer leverage over federal actions, these provisions have proven an important incentive to state participation under the CZMA and have increased the interest of federal agencies in the development and content of state CZMA programs.

35. Satisfaction of the consistency provisions is a prerequisite to a federal agency's undertaking such actions as dredging a harbor, issuing a permit to fill wetlands or providing funding to construct a sewage treatment facility, where the agency may in its discretion modify, condition or refuse to undertake the action. *See* 15 C.F.R. §§ 930.32 (1978). The effect of the provision, therefore, is similar to the effect of the National Environmental Policy Act of 1970, 42 U.S.C. §§ 4331-4367 (1976). Both statutes broaden the mandates of federal agencies to ensure that, to the extent not incon-

The federal consistency provisions of section 307 apply to the issuance of a section 404 permit in a state with an approved CZM program when the program specifically subjects the permits to those provisions,[36] or when the state determines that a particular section 404 project will significantly affect its coastal zone.[37] Because the regulations implementing section 307 distinguish between federal and non-federal applicants and establish different procedures for each, however, the extent to which a state can control federal action varies with the nature of the permit applicant.[38]

The potential substantive effects of the consistency procedures as

sistent with other federal law, state interests expressed in approved programs are recognized. *Compare* Coastal Zone Management Act of 1972, 16 U.S.C. § 1456 (1976), *with* National Environmental Policy Act of 1970, 42 U.S.C. § 4332 (1976).

36. 43 Fed. Reg. 10,524 (1978) (to be codified in 15 C.F.R. § 930.53).

37. In the latter instance, the consistency provisions apply only if the Assistant Administrator of the National Oceanographic and Atmospheric Administration concurs. 43 Fed. Reg. 10,524 (to be codified in 15 C.F.R. § 930.54).

38. Federal agencies are considered "applicants" for purposes of § 404 regulation and are specifically subject to § 404 permit processing requirements. 43 Fed. Reg. 37,145-46 (1977) (to be codified in 33 C.F.R. § 323.3(d)). § 307 of the CZMA appears on its face to establish a uniform procedure for all § 404 permit applicants:

> . . . *any* applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone . . . shall provide . . . a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program.

16 U.S.C. § 1456(c)(3)(A) (1976) (emphasis supplied).

In the regulations, however, procedures for federal applicants are similar to those governing *direct* federal activities. 43 Fed. Reg. 10,523 (1978) (to be codified in 15 C.F.R. § 930.52) (federal applicants). *Compare* 43 Fed. Reg. 10,523-26 (1978) (to be codified in 15 C.F.R. §§ 930.30-.44) (direct federal activity). The effect is to leave the federal permit applicant responsible for the consistency determination, in contrast to the non-federal applicant, whose satisfaction of the consistency provisions is determined by the state.

Section 307(c)(3)(A) was modeled after the state certification requirements of the Federal Water Pollution Control Act of 1972. CZMA LEGISLATIVE HISTORY, *supra* note 20, at 254 (statement of Sen. Spong (D.Va.)). When the Supreme Court decisions of Hancock v. Train, 426 U.S. 167 (1976), and Environmental Protection Agency v. California ex rel. State Water Resources Control Bd., 426 U.S. 200 (1976), held federal facilities exempt from state procedural requirements under the Federal Water Pollution Control Act, Congress overruled the decisions by enacting § 61 of the Clean Water Act Amendments, amending §§ 313(a) and 401(a) of the Clean Water Act. 33 U.S.C.A. §§ 1323, 1341(a) (1978).

Once Congress has determined that federal activities can be undertaken only after the procedural and substantive requirements of the § 404 permit program have been met, there is no compelling basis for regulations that lower the consistency standards for federal permit applicants. When it considers reauthorization of the CZMA, Congress should consider whether the different regulations governing federal and non-federal permit applicants meet the mandate of the statute's consistency provisions.

applied to different applicants can be illustrated by example. A non-federal applicant wishing to fill wetlands to create a marina includes in its section 404 permit application to the Corps of Engineers a certification that the proposed activity complies with and will be conducted in a manner consistent with the state's approved CZM program.[39] The applicant also provides the responsible state CZM agency a copy of the certification and the supporting data and information necessary for the agency's review of the applicant's assertion of consistency.[40]

Within six months the state agency must provide public notice[41] and decide whether it considers the proposed activity consistent with its CZM program.[42] Unless the state agency concurs in the certification of consistency or its concurrence is conclusively presumed after six months of state inaction, the Corps of Engineers may not issue the permit.[43] If the state concurs in the consistency certification, the applicant must still satisfy the requirements of the Corps of Engineers for the issuance of a section 404 permit.[44] The Corps of Engineers, therefore, may deny the permit in spite of the state's concurrence.[45] If the state objects to the consistency certification, the permit may be issued only if the Secretary of Com-

39. 43 Fed. Reg. 10,525 (1978) (to be codified in 15 C.F.R. § 930.57). The Corps of Engineers' § 404 regulations also reflect this requirement. *See* 42 Fed. Reg. 37,138 (1977) (to be codified in 33 C.F.R. § 323.4(h)); 42 Fed. Reg. 37,151 (1977) (to be codified in 33 C.F.R. § 325.2(b)(2)(ii)).

40. 43 Fed. Reg. 10,525 (1978) (to be codified in 15 C.F.R. § 930.58).

41. As a practical matter, it is likely that state CZMA agencies will establish joint public notice procedures with the Corps of Engineers.

42. 16 U.S.C. § 1456(c)(3)(A) (1976).

43. 42 Fed. Reg. 37,138 (1977) (to be codified in 33 C.F.R. § 320.4(h)); 42 Fed. Reg. 37,151 (1977) (to be codified in 33 C.F.R. § 325.2(b)(2)(ii)).

44. For a proposed wetlands fill, these requirements include findings that the activity satisfies the Corps of Engineers' "public interest review" procedures. 42 Fed. Reg. 37,138 (1977) (to be codified in 33 C.F.R. § 320.4(a)). *See* 42 Fed. Reg. 37,152 (1977) (to be codified in 33 C.F.R. § 325.3(b)(1)), which is consistent with its wetlands protection policy, 42 Fed. Reg. 37,136 (1977) (to be codified in 33 C.F.R. § 320.4(b)), and complies with guidelines governing discharges of dredged or fill material promulgated under § 404(b) of the Clean Water Act. 33 U.S.C. § 1413(b) (1976). *See also* 40 C.F.R. §§ 230.1-.8 (1977); 43 Fed. Reg. 37,147 (1977) (to be codified in 33 C.F.R. § 323.5(a); 43 Fed. Reg. 37,152 (1977) (to be codified in 33 C.F.R. § 325.3(b)(2)).

45. 43 Fed. Reg. 10,526 (1978) (to be codified in 15 C.F.R. § 930.63(c)). However, the Corps of Engineers' regulations do require that "due consideration" be given to the state's view as it may reflect local public interest factors. 42 Fed. Reg. 37,138 (1977) (to be codified in 33 C.F.R. § 320.4(j)(1)).

merce[46] overrides the objection on grounds that the activity is consistent with the purposes of the CZMA regardless of the state's program or is necessary in the interest of national security.[47]

When the section 404 permit applicant is a federal agency—for example, the Department of the Navy—no formal consistency certification and supporting materials to which the state may object are required. The Navy must merely determine that its proposed activity is consistent "to the maximum extent practicable" with the CZM program[48] and then notifies the state in any manner it chooses.[49] Furthermore, the consistency regulations impose no limits on the Corps of Engineers' issuance of a section 404 permit to the Navy. Thus the federal permit applicant—in this example, the Department of the Navy—appears to have the sole responsibility and authority to make the required consistency determination.

If the state disagrees with the Navy's consistency determination, it may request the mediation procedures provided for in the regulations.[50] The Navy may refuse to participate, however, and there is no requirement that the disagreement be resolved.[51] Furthermore, with or without mediation, the Navy may proceed with its project if the Corps of Engineers issues the section 404 permit in spite of continued state objections.[52] In such a situation the state's only recourse under the CZMA is a court challenge to the Navy's consistency determination.[53]

These examples demonstrate several points. First, the efficacy of the CZMA requirements depends upon the character of the section 404 permit applicant. The exemption of federal applicants from the procedures to which other permit applicants are subject denies states the ability to block the issuance of section 404 permits inconsistent with their CZM programs. In addition, the degree of consis-

46. The Secretary may act on his or her own motion or on appeal of the permit applicant. 16 U.S.C. § 1456(c)(3)(A) (1976).

47. Criteria and procedures for override of state consistency determinations are set forth at 43 Fed. Reg. 10,531-32 (1978) (to be codified in 15 C.F.R. §§ 930.120-.134).

48. 16 U.S.C. § 1456(c)(1)-(2) (1976).

49. The agency must notify the state "at the earliest practical time" but at least 90 days prior to undertaking the activity. 43 Fed. Reg. 10,522 (1978) (to be codified in 15 C.F.R. § 930.41(c)).

50. 43 Fed. Reg. 10,530-31 (1978) (to be codified in 15 C.F.R. §§ 930.110-.115).

51. 43 Fed. Reg. 10,531 (1978) (to be codified in 15 C.F.R. § 930.112(b)).

52. *See* note 48 and accompanying text *supra*.

53. 15 C.F.R. § 930.116.

tency required of federal applicants is less than that required of non-federal applicants.[54] According to the regulations, consistency is not required (a) when an agency's existing mandate limits its discretion to comply with CZM programs, or (b) when unforeseen circumstances arising after approval of a program present substantial obstacles to complete adherence to the program.[55] Because the consistency requirements are properly applicable only to discretionary agency actions,[56] the first exception does not create a large loophole for federal applicants for section 404 permits. The second exception is of uncertain magnitude, however, since the terms "unforeseen circumstances" and "substantial obstacles" are open to varying interpretations.

Finally, the examples suggest that a section 404 permit application determined to be consistent with a state CZM program must still comply with other section 404 permit requirements established under the Clean Water Act.[57] The peril to wetlands protection lies not in the possibility that a federal permit may be denied despite a state finding of consistency under section 307, but in attempts to expand the scope of that CZMA provision to authorize activities that are contrary to other federal law.

III. THE PERILS OF POSITIVE CONSISTENCY

The consistency provisions of section 307 superimpose consideration of state coastal management programs on the discharge permit process administered by the Corps of Engineers under section 404 of the Clean Water Act. Yet in some quarters the consistency requirements are viewed as a means of binding federal permit decision to the content of CZM programs, not merely as an additional factor in the permit process.[58] Such an interpretation would *guarantee* section 404 permits to applicants whose proposed activities were consistent with the applicable CZM program. This theory of

54. *See* note 48 and accompanying text *supra*.

55. The proposed activities of federal applicants need be consistent only "to the maximum extent practicable." 43 Fed. Reg. 10,520 (1978) (to be codified in 15 C.F.R. § 930.32).

56. *See* note 35 and accompanying text *supra*.

57. *See* note 73 and accompanying text *infra*.

58. *See* Dep't of Commerce, Office of Coastal Zone Management, Memorandum on the Gray's Harbor Management Plan 8, 12 (Mar. 21, 1978) (attached to the Washington State CZM Annual Program Review, June 30, 1978).

affirmative or positive consistency has grave implications for wetlands preservation.

The positive consistency theory assumes that since federal agencies are provided opportunities to participate fully in the development of CZM programs,[59] to have their opinions considered in the approval decision of the Secretary of Commerce,[60] and to review the programs once developed,[61] they should not be allowed to thwart proposed activites determined to be consistent with approved programs. In effect, the theory transfers the license and permit issuance responsibilities of federal agencies to the states in their planning processes. Although the theory may have appeal in an era in which the consolidation of permit processes is increasingly popular,[62] it is irreconcilable with the terms of the CZMA, the Clean Water Act and other federal laws. Moreover, it is founded on an erroneous conception of the proper roles of the state planning and federal permit issuance functions.

An example may illustrate the potential problems posed for wetlands protection by the positive consistency theory. Because virtually all of the state CZM programs that have received federal approval[63] will be implemented in large part by local or regional plans,[64] the example concerns a sub-state estuary management plan. Assume that this hypothetical estuary management plan identifies several areas of particular concern (APC's)[65] that include wet-

59. Notice and opportunity for full participation by relevant federal agencies is a prerequisite to approval of a state's CZM plan by the Secretary of Commerce. 16 U.S.C. § 1455(c)(1) (1976).

60. The Secretary of Commerce is required to include consultation, cooperation and coordination with other interested federal agencies in his assessment of CZM programs submitted for approval. 16 U.S.C. § 1456(a) (1976).

61. The Secretary of Commerce is required to conduct a continuing review of CZM programs. 16 U.S.C. § 1458(a) (1976).

62. *See Environmental Protection Agency, Office of Water and Hazardous Materials, Memorandum on Permit Integration* (Sept. 18, 1978), endorsing a proposed procedural integration of the permit systems established under the Clean Water Act (waste water and solid waste), the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1976) (hazardous wastes) and the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300g-5 (1976) (underground injection control).

63. Approved states and territories include Washington, Oregon, California, Wisconsin, Rhode Island, Massachusetts, Michigan, North Carolina, Maryland, Hawaii, Puerto Rico, Maine and New Jersey (segment). *See* [1978] 9 *Envir. Rep.* 1293 (BNA) (1978).

64. Sub-state implementation and enforcement of CZM programs are authorized by § 306(e)(1) of the statute. 16 U.S.C. § 1455(e)(1) (1976).

65. State programs must include "an inventory and designation of areas of par-

lands and designates some as areas for preservation or restoration and others for development.[66] Assume further that in a particular developmental APC "fill activities" are permissible.[67] Under the positive consistency approach, whether or not a proposed fill meets section 404 permit requirements is irrelevant as long as the activity is consistent with the estuary management plan. Because federal agencies with section 404 responsibilities[68] were afforded opportunities to participate in the estuary planning process, no proposed wetland fills can be denied section 404 permits in that APC after the plan is approved. The net result of positive consistency in the example is that the decision to permit wetland fills is made in the initial approval of the CZM plan. No provision of the CZMA, the Clean Water Act or any other law allows such a delegation of authority or waiver of federal regulatory functions.

The principal failure of positive consistency lies in its attempt to grant state CZM programs authority that Congress withheld from the states under the Clean Water Act. States may issue section 404 permits in traditionally non-navigable waters by enacting programs meeting the criteria of the Clean Water Act and its implementing regulations.[69] All section 404 permits issued by states, however,

ticular concern." 16 U.S.C. § 1454(b)(3) (1976). The regulations require that use priority guidelines be established for all APC's. 43 Fed. Reg. 8401 (1978) (to be codified in 15 C.F.R. §§ 923.21-.22).

66. State programs must include procedures for designating areas for preservation or restoration of their conservation, recreational, ecological or esthetic values. 16 U.S.C. § 1455(c)(9) (1976). The regulations make it clear that APC's may also be designated for development. 43 Fed. Reg. 8401 (1978) (to be codified in 15 C.F.R. § 123.21(d)(iv-vi)).

67. Procedures for designation of an APC for fill activities are contained in 43 Fed. Reg. 8398-99 (1978) (to be codified in 15 C.F.R. § 923-12).

68. In addition to Corps of Engineers, which issues § 404 permits, the Environmental Protection Agency develops (in conjunction with the Corps of Engineers) the national standards contained in the § 404(b) guidelines, has veto power over permits under § 404(c) and, under § 404(g) and (h), can approve state programs supplanting the Corps of Engineers program in traditionally non-navigable waters. The Fish and Wildlife Service and the National Marine Fisheries Service also have prominent § 404 roles. Consultation with the Fish and Wildlife Service is required prior to the issuance of all § 404 permits, in order to conserve Wildlife resources. Fish and Wildlife Coordination Act § 1(a), 16 U.S.C. § 662(a) (1976). When § 404 activities could affect migratory marine fish species, the Corps of Engineers implicitly recognizes that consultation with the National Marine Fisheries Service is appropriate. *See* Reorganization Plan No. 4 of 1970, 35 Fed. Reg. 15,627 (1970).

69. 33 U.S.C.A. § 1344(g) (1978). Criteria and procedures for the assumption by states of the § 404 program were proposed by the Environmental Protection Agency on Aug. 21, 1978. 43 Fed. Reg. 37,103 (1978) (proposed 40 C.F.R. § 123).

must "assure compliance" with the national standards of the section 404(b) guidelines.[70] The theory of positive consistency not only ignores these national permit standards but also appears to be an attempt to give states section 404 permit authority in waters specifically reserved to federal agencies by the Clean Water Act.[71]

Positive consistency also conflicts with section 307(e) of the CZMA, which provides that "[n]othing in [this section] shall be construed . . . as superseding, modifying or repealing existing laws applicable to the various Federal agencies. . . ."[72] The statute contemplates the applicability of the Clean Water Act requirements to the issuance of section 404 permits even when proposed section 404 activities are consistent with approved state CZM programs. In fact, the federal consistency regulations explicitly note that the CZMA is not to be interpreted as overriding federal permit standards that are more stringent than those of a state CZM program.[73]

In addition to its legal shortcomings, the positive consistency theory suffers from practical difficulties. First, since the CZMA lacks both a specific mandate and standards for wetlands protection,[74] it is likely that fulfilling the statute's directive to balance

70. 33 U.S.C.A. § 1344(h)(1)(A) (1978). This is true both of permits issued on a case by case basis and of general permits authorizing activities with minor individual and cumulative impacts. 33 U.S.C.A. § 1344(e) (1978).

71. The Clean Water Act reserves the following categories of waters for regulation under the Corps of Engineers' § 404 permit program: (1) waters presently used or susceptible to use in their natural condition or by reasonable improvement as a means for the transport of interstate or foreign commerce; (2) waters subject to tidal influence; (3) wetlands adjacent to each of the above. 33 U.S.C.A. 1344(g)(1) (1978).

72. 16 U.S.C. § 1456(e)(2) (1976). Any doubt about the applicability of § 307(e) to wetlands protection is resolved by the House Report on the CZMA:

> . . . In addition, [§ 307(e)] specifically provides that the coordinating requirements of [§ 307] shall not be construed as superceding, modifying, or repealing existing laws applicable to the various Federal agencies. These laws continue to apply, and the specific requirements as to their implementation must be taken into account in the development of the States' programs. The laws referred to would include, among others, the Federal Water Pollution Control Act. . . .

CZMA LEGISLATIVE HISTORY, *supra* note 20, at 324.

73. The regulations state that "[n]otwithstanding state agency concurrence with a consistency certification, the Federal permitting agency may deny approval of the Federal license or permit application . . . ." 15 C.F.R. § 930.63 (c) (1978). *See also* note 45 and accompanying text *supra*.

74. The absence of an explicit mandate for wetlands protection in the CZMA has led the Deputy Assistant Administrator of the National Oceanographic and Atmospheric Administration to suggest amendment of the statute to incorporate substan-

economic development and environmental protection[75] will result in a trade-off: certain wetland areas will be designated as suitable for filling, in exchange for the protection of others. Although this may in theory offer a balanced approach to the allocation of wetland resources, the fact is that once filled, a wetland is generally lost forever. Permit issuance under section 404, on the other hand, allows the accommodation of land use pressures according to the merits of the specific activity proposed at a particular time, rather than the permanent and premature commitment of a site to destruction by filling. The additional protection of the federal regulatory scheme under section 404 is essential as a counterweight to the potentially short-sighted balancing approach of the CZMA. Yet positive consistency condones reliance for wetlands protection on the CZMA alone.

A second practical shortcoming of positive consistency lies in its implicit assumption that federal agencies will participate actively in the development of CZM programs. Affected federal agencies may have a reasonable opportunity to participate in first generation CZM planning—the development of statewide programs.[76] However, federal participation in what might be called second generation CZM planning—the development of sub-state plans, such as estuary management plans, implementing specific parts of approved state programs—is another matter entirely. In the state programs approved thus far, local or regional plans are often critical for their translation of vague statewide policies and goals into site-specific plans and regulatory controls. But the sheer number of these local and regional plans—as many as 40 in the states of Washington and Oregon alone[77]—may preclude effective federal review.

tive wetlands protection standards. 9 *Coastal Zone Management Newsletter* No. 26, at 2 (1978). *See also* notes 106-10 and accompanying text *infra*.

75. 16 U.S.C. § 1452(b) (1976).

76. The CZMA provides for full participation of federal agencies in the planning. 16 U.S.C. § 1455(c)(1) (1976). In addition, states are required to give "adequate consideration" to agency views. 16 U.S.C. § 1456(b) (1976). Federal involvement is further encouraged by regulations requiring state programs submitted for federal approval to contain an "environmental impact assessment." 43 Fed. Reg. 8395 (1978) (to be codified in 15 C.F.R. § 923.62).

The actual effect of federal agency participation on the context of state programs remains unclear. *See* Comments of the Environmental Protection Agency on the Wisconsin CZM Program and Draft Environmental Impact Statement, and accompanying response in *Dep't of Commerce, State of Wisconsin Coastal Zone Management Program and Final Environmental Impact Statement*, Attachment II (1978).

77. Interview by author with Environmental Protection Agency Region 10 Coordinator Ronald Lee.

Moreover, many of the provisions that guarantee federal agencies the opportunity to participate in the development of statewide CZM programs are absent in the review and approval of local and regional plans.[78]

IV. Avoiding the Perils of Positive Consistency

The CZMA is intended to enhance sound allocation of scarce coastal resources by encouraging states to undertake comprehensive planning. The *designation* of areas for particular uses is a significant feature of the planning process,[79] but it should not be confused with the section 404 permit *authorization* required for actual discharge in wetland areas. Planning under the CZMA and its consistency provisions cannot override stricter federal standards.

Mere recognition of the limits of the consistency provisions in forcing the accommodation of federal permit activity to state interests is insufficient, however. Without a specific requirement that states incorporate federal wetlands standards in their CZM plans, area use designations may contradict the section 404 permit standards that will nevertheless apply when actual discharge authorization is sought. Such an approach may create friction between state officials who develop CZM plans and federal officials responsible for the section 404 program, a patent conflict with the CZMA's policy of coordination and cooperation.[80] In addition, designation of wetland areas for uses that are unlikely to be realized may mislead the public. Finally, since federal monies underwrite the development and administration of CZM plans, in effect the federal right hand supports programs that appear to undercut standards and policies carried out by the federal left hand.[81]

78. For example, a sub-state plan is considered a "change" in a state program requiring approval of the Office of Coastal Zone Management. 43 Fed. Reg. 8395 (1978) (to be codified in 15 C.F.R. § 923.80(d)). However, the Office need not prepare an environmental impact statement unless it determines that the "change" constitutes an "amendment," and then only when the amendment would result in an environmental impact differing significantly from that of the approved state-wide program. 43 Fed. Reg. 8395 (1978) (to be codified in 15 C.F.R. § 923.81(c)).

If the Office of Coastal Zone Management determines that the change represented by a sub-state plan is minor, it need not consult other federal agencies before deciding not to prepare an environmental impact statement. 43 Fed. Reg. 8395 (1978) (to be codified in 15 C.F.R. § 923.82(c)). For discussion of proposed changes in this regulation, *see* notes 124-26 and accompanying text *infra*.

79. 16 U.S.C. § 1454(b) (1976).

80. 16 U.S.C. § 1452 (1976).

81. For a discussion of federal funding and water resource development programs that undercut federal water pollution control programs, see Tripp, *Tensions and Con-*

Properly understood, the interrelationships of the CZMA and the section 404 program will enable maximum protection of wetlands. Three main sources of law outline the proper federal-state roles and highlight the necessity for complementary implementation of the programs.

A. *Section 307(f) of the CZMA*

Section 307(f) of the CZMA accords special deference to the Clean Air and Clean Water Acts by exempting their "requirements" from the consistency provisions and by ordering the incorporation of such requirements into CZM programs.[82] The General Counsel of the Environmental Protection Agency[83] has defined "requirements" within section 307(f) as "any enforceable standard of duty" imposed by the Clean Air and Clean Water Acts.[84] The CZMA's implementing regulations clarify this definition for requirements of the Clean Air Act[85] but are less specific for Clean Water Act requirements. Both the language and legislative history of the CZMA, however, offer interpretative guidance.

Section 304(16) of the CZMA defines those water uses that may be regulated by state plans to exclude "the establishment of *any*

flicts in Federal Pollution Control and Water Resource Policy, 14 HARV. J. LEGIS. 225 (1977).

82. 16 U.S.C. § 1456(f) (1976). That provision states:

> Notwithstanding any other provisions of [the CZMA], nothing in [the CZMA] shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to [the CZMA] and shall be the water pollution control and air pollution control requirements applicable to such program.

See also Blumm & Noble, *supra* note 32, at 50,058.

83. The CZMA's program approval regulations vest the General Counsel with authority to develop the "requirements" definition. 43 Fed. Reg. 8395 (1978) (to be codified in 15 C.F.R. § 923.44(a)).

84. *U.S. Environmental Protection Agency, Office of the General Counsel, Memorandum on Coastal Zone Management Act Requirements* (Oct. 5, 1976). However, the CZMA regulations speak only to "enforceable standards" and ignore the term "duties." 43 Fed. Reg. 8395 (1978) (to be codified in 15 C.F.R. § 923.44(a)).

85. The list includes uniform, nation-wide requirements (such as national ambient air quality standards, motor vehicle emission standards, new source performance standards, and national emissions standards for hazardous pollutants) and non-uniform requirements (such as new source review, stricter-than-federal emission or air quality standards, prevention of significant deterioration, attainment and maintenance of national ambient air quality standards, and other attainment or maintenance measures). 43 Fed. Reg. 8395 (1978) (to be codified in 15 C.F.R. § 923.44(c)(2)).

water quality standard or criteria or the regulation of the discharge or runoff of pollutants except the standards, criteria or regulations which are incorporated by the provisions of [section 307(f)]."[86] (Emphasis added.) Further clarification was provided by the late Senator Hale Boggs, speaking for the Senate Public Works Committee, which offered both sections 304(16) (then section 304(h)) and 307(f) as amendments on the Senate floor:[87]

> . . . It is essential to avoid ambiguity on the question whether the Coastal Zone Management Act can, in any way, be interpreted as superceding [sic] or otherwise affecting requirements established pursuant to the Federal air and water pollution control acts.
>
> In both the Clean Air Act and the Federal Water Pollution Control Act authority is granted for *effluent and emission controls and land use regulations* necessary to contol air and water pollution. These must be adhered to and enforced . . . .[88] (Emphasis added.)

At a minimum, therefore, Clean Water Act "requirements" within the meaning of section 307(f) should embrace any standards or criteria established to regulate point source discharges of pollutants or runoff from nonpoint sources, including effluent limitations,[89] water quality standards[90] and land use regulations in approved water quality management plans.[91]

The General Counsel's definition of section 307(f) "requirements" to which deference must be given in state CZM plans does not include the discretionary act of section 404 permit issuance. Thus the actual issuance of a permit must satisfy the CZMA's consistency provision[92] even though the standards and criteria upon

86. 16 U.S.C. § 1453(16) (1976).

87. The Senate Commerce Committee initially reported the Senate version of the Coastal Zone Management Act.

88. *See* CZMA LEGISLATIVE HISTORY, *supra* note 20, at 279-80.

89. 33 U.S.C.A. § 1311 (1978) (municipal and industrial point source effluent limitations); 33 U.S.C. § 1316 (1976) (new source performance standards); 33 U.S.C.A. § 1317 (1978) (toxic and pre-treatment standards).

90. 33 U.S.C. § 1313 (1976).

91. 33 U.S.C.A. § 1314(f) (1978) (non-point source control from agricultural, silvacultural, mining and construction activities, and from salt water intrusion, waste disposal and subsurface excavations).

92. *See* notes 38-53 and accompanying text *supra*. *See also* 43 Fed. Reg. 37,102 (1978) (proposed 40 C.F.R. § 122.49(g)), which would subject wastewater discharge permits under § 402 of the Clean Water Act to the consistency requirements. 33 U.S.C.A. § 1342 (1978).

which the permit is based may be exempt from consistency.[93] Satisfaction of the consistency provisions in permit issuance, however, does not sanction disregard of the substantive standards of section 404. A recent Environmental Protection Agency memorandum[94] interprets the guidelines of section 404(b)[95] as Clean Water Act "requirements" within section 307(f) of the CZMA.[96] This interpretation not only exempts section 404(b) guidelines from the consistency provisions but also mandates their incorporation into all CZM programs.[97] In effect, therefore, this directive offers substantive standards with which to evaluate state programs and ensure the compatibility of coastal planning and wetlands protection.

The substantive standards of the section 404(b) guidelines require that each proposed wetland fill must satisfy a two-pronged test. First, either the activity associated with the discharge must be water-dependent, or other site or construction alternatives must be demonstrated to be impracticable.[98] Second, either the discharge must not permanently disrupt beneficial water uses of the affected aquatic ecosystem, or the activity must be shown to be part of an approved federal program protecting or enhancing wetlands.[99] A draft version of amended section 404(b) guidelines currently under

93. A memorandum of the Office of General Counsel illustrates the distinction with the following example:

> A state may not, through section 307 of the CZMA, object to EPA's issuance of a permit to an oil platform because it thinks particular effluent limitations are not sufficiently stringent. However, if the platform were proposed to be located in an area reserved for recreational use in the state's management plan, it could properly object to the issuance of the permit even if the discharges would comply with all applicable EPA effluent regulations and state water quality standards.

U.S. Environmental Protection Agency, Office of the General Counsel, Memorandum of E.P.A. Authority and Responsibility Under the Coastal Zone Management Act 7 (Nov. 25, 1975).

94. *U.S. Environmental Protection Agency, Office of Water Planning and Standards, Memorandum on § 404 and CZMA Interrelationships* (July 7, 1978).

95. 40 C.F.R. §§ 230.1-.8 (1978) codifies guidelines for the implementation of the Clean Water Act § 404(b), 33 U.S.C. § 1413(b) (1976).

96. Since the § 404(b) guidelines constitute the principal substantive standards for regulation of point source discharges of dredged or fill material, they are analogous to the technology-based effluent limitations that must be satisfied for issuance of a waste water discharge permit under § 402. *See* 33 U.S.C.A. §§ 1311(b), 1412 (1978). The logic, therefore, of the Agency's interpretation is sound.

97. *See* note 82 and accompanying text *supra*.

98. 40 C.F.R. § 230.5(b)(8)(ii)(a) (1978).

99. 40 C.F.R. § 230.5(b)(8)(ii)(b) (1978).

review[100] would add a third prong to the test by requiring that proposed discharges include all practicable measures to minimize adverse impacts.[101]

The regulations do not address adequately the manner in which the section 404(b) guidelines and other section 307(f) "requirements" are to be included in CZM programs. The regulations permit incorporation by reference of Clear Air Act and Clean Water Act requirements in coastal plans and merely suggest consideration of these requirements in use determinations and designation of special management areas.[102] Whether so little satisfies section 307(f) is questionable, but in any case, a plan that implicitly undercuts the policies of the section 404(b) guidelines through its use determinations and area designations clearly violates section 307(f).

An example may best illustrate the inadequacy of the CZMA's regulations. A proposed estuary management plan designed to implement part of the CZM program of the State of Washington purports to authorize 250 acres of wetland fills.[103] The CZMA, however, contains no provision authorizing wetland fills.[104] In fact, it preserves existing section 404 permit requirements.[105] Furthermore, because the state plan under which the estuary plan was developed recites the incorporation of Clean Water Act requirements, this sub-state attempt to authorize wetland fills contradicts both the state program and section 307(f) of the federal statute.

The vulnerability of the estuary plan might have been avoided by greater clarity in the regulations and a mandate to the states to employ Clean Air Act and Clean Water Act requirements as "essential baselines" in the development of CZA programs.[106] The guidelines of section 404(b) can serve as such essential baselines if their fundamental requirements are employed by coastal planners in use determinations and in designation of special management

100. *U.S. Environmental Protection Agency, Office of Water and Hazardous Materials, Draft Revisions to 40 C.F.R.* pt. 230 (Sept. 7, 1978).

101. 40 C.F.R. § 230.10(d) (1978). The draft clarifies the intended application and use of the guidelines and essentially preserves the existing tests for wetland fills.

102. 43 Fed. Reg. 8395 (1978) (to be codified in 15 C.F.R. § 923.44(c)(1)).

103. State of Washington, Preliminary Draft of Gray's Harbor Estuary Management Plan 46-48 (Mar., 1978).

104. *See* note 79 and accompanying text *supra*.

105. *See* note 72 and accompanying text *supra*.

106. This interpretation of § 307(f) was part of an earlier draft of the regulations. *See* 40 Fed. Reg. 1693 (1975) (to have been codified in 15 C.F.R. § 923.44).

areas. In the hypothetical estuary management plan, for example, the guidelines would require that designation of a wetland area as suitable for filling for a use that is not water-dependent be coupled with a demonstration that no practicable alternative sites exist.[107] Furthermore, each proposed fill would have to be evaluated individually to ensure that no unacceptable disruption of existing water uses would occur[108] and that all practicable measures to minimize adverse impacts would be adopted.[109]

Use of the section 404(b) guidelines as essential baselines eliminates the prospect of CZM plans being interpreted as authorizing large-scale wetland fills. In addition, incorporation of the guidelines may streamline the section 404 permit process by curtailing duplicative decisions.[110]

B. *The Wetlands Executive Order*

Incorporation of section 307(f) requirements, such as the section 404(b) guidelines, is mandatory under the CZMA. State plans that do not reflect the policies contained in the guidelines cannot receive federal approval, and coastal programs that were approved without section 307(f) compliance cannot continue to receive federal funding. The Wetlands Executive Order,[111] issued on May 24, 1977, reinforces the statutory directives and may help avert the perils of positive consistency by compelling the compatibility of coastal planning and wetlands protection.

The Wetlands Order in part requires federal agencies to "provide leadership and . . . take action to minimize the destruction, loss or degradation of wetlands" in carrying out their respon-

107. *See* note 98 and accompanying text *supra*.

108. *See* note 99 and accompanying text *supra*.

109. *See* note 101 and accompanying text *supra*.

110. *See U.S. Environmental Protection Agency, Office of Water Planning and Standards, Memorandum on § 404 and CZMA Interrelationships* 4 (1978):

> The successful application of the guidelines in the formulations stage of CZM programs can also help to streamline the 404 permit process, particularly where the CZM program has developed information necessary to make 404 permit determinations . . . . For example, where the 404(b)(1) guidelines require a consideration of practicable alternatives to proposed discharges of dredged or fill material [*see* 40 C.F.R. § 230.5(b)(8)(ii)(a) (1977)], and alternative discharge sites have been evaluated and documented in a CZM program which successfully applied the policies of the guidelines, it should be possible to defer to the CZM program when making that portion of the alternatives determination required by the guidelines that involves the evaluation of alternative sites.

111. Exec. Order No. 11990, 42 Fed. Reg. 26,961 (1977).

sibilities for "conducting Federal activities and programs affecting land use including but not limited to water and related land resources planning, regulatory, and licensing activities."[112] Approval and funding of state and sub-state CZM programs fall within these terms. Agency failure to require that state plans follow federal wetlands policies as expressed in the section 404(b) guidelines is inconsistent with this portion of the directive.

Agency steps to ensure that CZM plans satisfy section 307(f) by complete and detailed incorporation of the section 404(b) guidelines is, however, the best means of compliance with the executive directive. The policies expressed in the section 404(b) guidelines are strikingly similar to the requirements of the Executive Order, which directs all federal agencies

> . . . [to] avoid . . . providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands . . .[113]

Because the approval and funding of state and sub-state programs may not fall within the meaning of "providing assistance for new construction," these requirements may not be explicitly applicable to CZM plans. The Wetlands Order nonetheless indicates the approach that federal agencies are expected to adopt. Furthermore, approval or funding of a CZM program that includes large-scale wetland fill designations may have the practical effect of "providing assistance for new construction" and should be governed, therefore, by the Executive Order.

The state program approval regulations of the Office of Coastal Zone Management attempt to incorporate the thrust of the Executive Order by stipulating only that CZM programs will be reviewed to ensure that they address appropriate wetland uses and impacts.[114] Whether this reflects the kind of "leadership" and "action" contemplated by the instruction that federal agencies amend their procedures to minimize destruction and provide for the preservation of wetlands is questionable.[115] An explicit regulation requiring all coastal programs to include the wetland safeguards of

112. Exec. Order No. 11990, § 1(a), 42 Fed. Reg. 26,961 (1977).

113. Exec. Order No. 11990, § 2(a), 42 Fed. Reg. 26,961 at 26,962 (1977).

114. *See* 43 Fed. Reg. 8408-09 (1978) (to be codified in 15 C.F.R. §§ 923.42(c)(5), (7)).

115. Exec. Order No. 11990, § 6, 42 Fed. Reg. 26,961 at 26,963 (1977).

the section 404(b) guidelines would be more responsive both to the intent of the Executive Order and to the mandates of section 307(f) of the CZMA.

The Executive Order should be read to require scrutiny of previously-approved CZM programs for compliance with its policies. Continued federal funding of a state program that adopted the hypothetical estuary management plan described above, designating significant wetland areas as suitable for filling, would violate the Order. In such a situation the Office of Coastal Zone Management either must insist that the state assume the administrative burden for land and water use control pending revision of the estuary management plan[116] or must withdraw federal approval and terminate federal funding for the entire state program.[117]

C. *The National Environmental Policy Act*

Establishing that both section 307(f) of the CZMA and the Wetlands Executive Order compel state programs to incorporate specific wetlands protection devices does not provide the procedural mechanism needed to ensure the compatibility of myriad local and regional programs with state-wide wetlands policies. Citizen suits challenging federal approval or requesting rescission of approval and termination of program funding may remedy deficiencies in existing programs.[118] Given the sheer number of potential sub-state programs, the length of time required for suit and possible inconsistency of results, however, reliance on judicial intervention is inadequate.

The National Environmental Policy Act (NEPA)[119] offers a preventive, rather than a reactive, procedure for assuring the compatibility of state coastal programs and wetlands protection. Pursuant to NEPA, environmental impact statements[120] were prepared and publicly distributed for all thirteen state and territorial CZM

116. 43 Fed. Reg. 8408-09 (1978) (to be codified in 15 C.F.R. §§ 923.42(c)(5), (7)).

117. 43 Fed. Reg. 8428-29 (1978) (to be codified in 15 C.F.R. § 923.83).

118. While there are no express citizen suit provisions in the CZMA, the Wetlands Executive Order or NEPA, judicial enforceability is generally assumed in the absence of a specific congressional directive. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336 (1965).

119. 42 U.S.C. §§ 4331-4367 (1976).

120. National Environmental Policy Act, 42 U.S.C. § 4332(c) (1976), requires a statement of the environmental impact and adverse effects of and alternatives to "major Federal actions significantly affecting the quality of the human environment . . . ."

programs approved by the end of fiscal year 1978.[121] In addition to requiring examination of the anticipated effects and available alternatives to federal projects in CZM plans, these program-based statements are valuable for allowing public comment and comparison of the resource policies and institutional arrangements of proposed programs with CZMA mandates. The environmental impact statement process, consequently, provides an ideal procedure for wetlands monitoring by the public and interested federal agencies.

Although some uncertainties about the application of environmental impact statement requirements to approval of sub-state coastal programs have recently been clarified, others remain. According to existing program approval regulations, an impact statement is required when approval of a sub-state program will produce "changes in techniques (for achieving goals, objectives or policies) that result in an environmental impact significantly different from previously approved techniques.[122] New regulations promulgated under NEPA by the Council on Environmental Quality include actions affecting critical ecological areas, such as wetlands, among those activating the environmental impact statement requirements.[123] Approval of any sub-state program designating fill activity as a permissible wetland use, therefore, should require an impact statement.

Recently proposed changes in the regulations governing program approval would clarify the circumstances triggering the environmental impact statement provisions by requiring federal approval of all local and regional plans designed to implement portions of state CZM plans.[124] The proposed regulations contain potential loopholes, however, that might undercut the value of the environmental impact statement requirements. First, they delete the portion of the existing regulations requiring impact statement preparation when a change in implementation techniques results in a "significantly different" environmental impact.[125] Second, they eliminate

121. For a list of the states and territories with approved programs, *see* note 63 *supra*.

122. 43 Fed. Reg. 8427 (1978) (to be codified in 15 C.F.R. § 923.81(b)(2)). Presumably, an environmental impact statement is also required when a change in basic program goals, objectives and policies themselves would produce a significantly different environmental impact. *See id.*, (to be codified in 15 C.F.R. § 923.81(b)(1)).

123. 43 Fed. Reg. 56,006 (1978) (to be codified in 40 C.F.R. § 1508.27(b)(3)).

124. 43 Fed. Reg. 60,951 (1978) (proposed 15 C.F.R. § 932.82(c)).

125. *See* note 122 and accompanying text *supra*.

the need for federal approval of changes in sub-state plans if federal agencies and the public were afforded opportunities to participate in the development of and comment upon the changes.[126] Once a sub-state plan receives initial federal approval, therefore, under the proposed regulations it may be amended without the assessment of impacts and available alternatives mandated by NEPA. Adequate protection of critical areas such as coastal wetlands demands more than the procedures contained in the proposed regulations.

The environmental impact statement process can serve as a valuable tool to ensure the compatibility of coastal planning and wetlands protection by providing widespread review of sub-state CZM programs, assessment of potential impacts and scrutiny of available alternatives. An environmental impact statement must show that the program complies with section 307(f) by incorporating the policies of the section 404(b) guidelines, and must demonstrate that approval follows the directives of the Wetlands Executive Order. Finally, when no environmental impact statement is prepared for a sub-state program amendment that purports to authorize wetlands fills, NEPA may provide the basis for a challenge to the program.[127]

V. CONCLUSION

Despite a leading judicial interpretation of the CZMA as "first and foremost a statute directed to and solicitous of environmental concern,"[128] present tendencies in coastal programs, particularly local and regional plans, may have a serious detrimental effect on wetlands. Through the theory of positive consistency, coastal planning may undercut the principal federal program protecting these critical environmental areas. This article has argued that the theory is impractical and conflicts with both the spirit and the letter of the CZMA and the Clean Water Act. By virtue of section 307(f) of the CZMA and the Wetlands Executive Order, coastal programs must reflect the wetlands standards developed pursuant to section 404 of

126. 43 Fed. Reg. 60,950 (1978) (proposed 15 C.F.R. § 923.80(d)).

127. *See* 43 Fed. Reg. 56,005 (1978) (to be codified in 40 C.F.R. § 1508.18), which explicitly includes federal funding programs within the definition of "major federal actions" requiring the preparation of environmental impact statements under NEPA. Federal funding of sub-state CZM programs, therefore should require an environmental impact statement.

128. American Petroleum Institute v. Krecht, ___ F. Supp. ___, 12 E.R.C. 1193, 1215 (C.D. Cal. 1978). *See* 9 *Coastal Zone Management Newsletter* No. 53 (1978); [1978] 9 ENVIR. REP. (BNA) 909.

the Clean Water Act. Finally, the environmental impact statement process of NEPA provides an essential mechanism for ensuring the compatibility of local and regional coastal programs with national wetlands standards.

The aim of this account has been to demonstrate that the federal accommodation to state interests envisioned by the consistency provisions of the CZMA does not enable states to relax federal permit standards. The goal of the analysis is not to undermine the coastal planning process but to increase the prospects for rational decision-making in both the federal and state programs. By incorporation of the section 404(b) guidelines into the coastal planning process, the area-wide strengths of the CZMA's resource evaluation can be combined with the site-specific strengths of section 404's assessment of particular activities. In addition, section 404 permit decisions can be expedited by deferring to CZM site evaluations when coastal programs reflect the policies of the section 404 guidelines.[129]

Full assurance of compatibility of coastal planning and wetlands protection requires certain steps. First, CZMA program approval regulations must state explicitly that the section 404(b) guidelines are Clean Water Act "requirements" within the meaning of section 307(f) of the CZMA that must, therefore, be included in coastal programs.[130] The regulations thus will ensure simultaneous compliance with section 307(f) and with the Wetlands Executive Order.[131] The program approval regulations must further state that the requirements of NEPA apply to *any* coastal program, including a local or regional plan, that could significantly affect wetlands.[132]

Second, state and local coastal planners must formulate their programs around national wetlands standards. Federal agencies responsible for wetlands protection must ensure that coastal programs failing to embody these standards do not receive approval and funding. Citizens may seek judicial intervention if the federal and state administrative processes do not satisfy the mandates of section 307(f), the Wetlands Executive Order and NEPA.

Third, Congress must make explicit the wetlands protection af-

129. *See* note 110 and accompanying text *supra*. *See also* 40 C.F.R. § 230.7 (1978), which allows information developed in coastal zone programs to be used in evaluating permit applications.

130. *See* notes 86-110 and accompanying text *supra*.

131. *See* notes 112-17 and accompanying text *supra*.

132. *See* notes 119-27 and accompanying text *supra*.

forded implicitly in section 307(f). Reauthorization of the CZMA in 1979 should include clarification of the federal consistency provisions and rejection of the positive consistency theory.

The compatibility of coastal programs and efforts to preserve the Nation's endangered wetland resources is essential. If "the 'essence' of the [CZMA] . . . is sensitivity to environmental concerns in establishing standards for utilization of the coastal zone,"[133] the national goals of encouraging states to adopt and implement comprehensive coastal management programs[134] and of preserving and restoring the physical integrity of the Nation's waters[135] must exist in harmony.

133. American Petroleum Institute v. Krecht, ___ F. Supp. ___, 12 E.R.C. 1193, 1224 (C.D. Cal. 1978).

134. Coastal Zone Management Act of 1972, § 301(h), 16 U.S.C.A. 1452(h) (1976).

135. Clean Water Act § 101(a), 33 U.S.C.A. § 1251(a) (1976).