

C O M M E N T

A Comment on A Federal Act to Promote Integrated Water Management: Is the CZMA a Useful Model?

by Bradley M. Campbell

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I. Introduction

Fragmentation, calcified in the media-specific nature of federal and state statutes, in the silo-by-silo regulatory approach of environmental and natural resource agencies, and in the arbitrary jurisdictional fiefs that begin in the committee structure of the U.S. Congress and radiate out through the budgets and missions of agencies, has long been the bane of sound environmental policy. Professor Thompson, in *A Federal Act to Promote Integrated Water Management: Is the CZMA a Useful Model*,¹ persuasively reminds us that this remains of particular importance in water-resource management.

That said, I would question whether a new federal oversight role—whether in the form of Professor Thompson’s proposed “Sustainable Water Integrated Management Act,” with its appealing acronym (SWIM), or in some other form—would solve the current problem of fragmentation in water-resource policy, because I question a number of Professor Thompson’s fundamentals. First, “integration” in itself by no means assures optimal or even better planning and regulatory outcomes, whether one is concerned with under- or over-regulation, especially in the absence of meaningful standards. Second, the success and incentives of the largely hortatory Coastal Zone Management Act (CZMA)² have been limited in practice. Third, there is a mismatch between the core competencies of federal agencies and the most significant challenges to integrated

water-resource management, which mostly concern land use. Professor Thompson has too-limited a sense of integration progress at the state level, and overlooks the efficacy of existing federal mandates in driving that progress.

II. Integration: Process or Substance?

Professor Thompson’s concern is with fragmentation, “both substantive and geographic,”³ but his proposed solution seems devoid of meaningful substantive standards and indifferent to geography. Professor Thompson urges a voluntary, incentive-based process in which states would determine specific standards and any geographic variation, and would be given “significant freedom under SWIM in how they approach integrated management.”⁴ According to Professor Thompson: “Rather than dictating exactly what substantive issues must be included in integrated plans, SWIM would establish broad guidelines and minimum requirements,” making clear that the “minimum requirements” would dictate issues that must be addressed rather than standards that must be met.⁵

There is little reason to assume that a federal integration process would result in an improvement in substantive outcomes in water-resource regulation and management in the absence of substantive standards. Professor Thompson implicitly recognizes, and wisely avoids, the difficulty of incorporating specific standards into a federal integrated management model⁶—can Congress really articulate useful integration standards to suit the arid West and the wet Northeast alike? Still, it is hard to understand how, without meaningful standards, imposing an additional pro-

Author’s note: This response benefitted substantially from conversations with Anthony McDonald, director of Monmouth University’s Urban Coast Institute and former director of the Coastal States Organization. Any flaws remain my own.

1. Barton H. Thompson Jr., *A Federal Act to Promote Integrated Water Management: Is the CZMA a Useful Model?*, 42 ENVTL. L. 201 (2012).
2. Coastal Zone Management Act of 1972, 16 U.S.C. §§1451–1466 (2006).

3. Thompson, *supra* note 1, at 205.
4. Barton H. Thompson Jr., *A Federal Act to Promote Integrated Water Management: Is the CZMA a Useful Model*, 43 ELR 10682, 10685 (Aug. 2013).
5. *Id.* at 10685.
6. See, e.g., *id.*

cess hoop on state programs would improve the quality of water-resource decision-making or otherwise add significant value.

There are at least two possible answers to this criticism. First, Professor Thompson may simply be more of a process optimist than I, and, to be sure, there are other federal statutes—the National Environmental Policy Act (NEPA)⁷ being the landmark example—that share the premise that additional process can improve substantive outcomes. NEPA's history, of course, provides ample fodder for both process-optimists and process-pessimists.⁸ But it is not clear that SWIM even contemplates the robust public process that NEPA dictates for major federal actions, or that judicial review of SWIM program approvals or SWIM consistency determinations would be as available or as effective as it sometimes has been under NEPA.⁹ If CZMA were the model, one would have to conclude that judicial review is unlikely to provide the same discipline to SWIM decisions that it has brought to the environmental review process under NEPA.

Second, because policy integration inherently requires resource management for multiple and equally legitimate objectives and uses, establishing substantive accountability standards at the federal level may be nearly impossible. In considering an integrated management approach for a river basin, for example, is there an objective basis for preferring a plan that favors wilderness values over recreational uses? Or one that favors drinking water supply and industrial use over ecological uses? Once the SWIM process ensures that all the relevant objectives have been “integrated,” which likely means only that they have been considered, what would it really add?

Moreover, to the extent that a state's “integrated” approach leads to results that are incompatible with established federal objectives—for instance, fishable and swimmable waters under the Clean Water Act (CWA),¹⁰ or habitat protection under the Endangered Species Act (ESA)¹¹—what merit would there be in subordinating federal standards that honor these objectives in the name of “consistency,” as Professor Thompson would have us do to encourage state participation.¹²

III. The Limits of CZMA “Integration” and “Success”

The lack of meaningful substantive standards is, of course, a failing of the CZMA itself, and not a minor one. The statute has certainly been a “success” in the sense that it has moved states to have comprehensive coastal policies in place, but the quality and efficacy of those policies, which ought to be the true measure of success, vary widely. CZMA management for multiple objectives tends to preclude enforcement of any particular objective. The CZMA does have numerous, apparently stringent requirements for coastal zone management plan approval,¹³ such as the requirement that state plans and authorities include power “to administer land use and water use regulations to control development to ensure compliance with the management program, and to resolve conflicts among competing uses . . .”¹⁴ But the apparent stringency is belied by the fact that the plan need only be “adequate to carry out the purposes of this chapter . . . consistent with the policy declared” in the CZMA,¹⁵ and the stated policy is to “develop” as well as to “preserve” and “protect” coastal resources.¹⁶ This provides little basis on which to deny approval to a plan that strikes a balance in favor of excessive development, or one that strikes a balance too restrictive of development.

Not only does the CZMA lack “sticks” to ensure accountability, the “carrots” for better coastal planning tend to be weak in practice. While technical assistance and matching funds from NOAA under the CZMA may spur improvement in state programs at the margins—a proposition for which there seems scant evidence either way—both tend to be regarded as entitlements once a state has its initial CZMA approval in hand rather than resources that must be earned through continual improvement.

And under SWIM these incentives would be even more attenuated than under the CZMA. Recognizing current budget constraints, Professor Thompson assumes no new money will be available for SWIM, and offers “priority in the allocation” of existing funds as an alternate incentive.¹⁷ This seems unlikely to spur participation, especially since there will be “winner” and “loser” states in any reallocation of existing funding. In this regard, the experience of states in the National Estuary Program,¹⁸ under which state and federal agencies undertook extensive planning and priority-setting efforts well-integrated across program areas, but found that federal support for planning was not followed by “priority” in funds for implementation, will likely dampen enthusiasm for the SWIM model.

7. National Environmental Policy Act of 1969, 42 U.S.C. §§4321–4370h (2006).

8. See Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).

9. The CZMA does require public hearings on coastal plan development, 16 U.S.C. §1455(d)(4), arguably a minimal requirement when compared to the procedures of NEPA.

10. 33 U.S.C. §§1251–1387.

11. 16 U.S.C. §§1531–1544.

12. Thompson, *supra* note 1, at 203.

13. See generally 16 U.S.C. §1455(d).

14. *Id.* §1455(d)(10)(A).

15. *Id.* §1455(d)(1).

16. *Id.* §1452(1).

17. Thompson, *supra* note 1, at 235–36.

18. 33 U.S.C. §1330.

Nor would streamlined permitting and consistency seem likely to be significant incentives. Many states rely on the presence of often more stringent federal standards and review procedures in setting their own policies, so eliminating those standards and procedures will likely appeal only to states whose priority is project approval as opposed to better resource management.

IV. Federal and State Competencies

As Professor Thompson acknowledges, one of the central, preeminent, and cross-cutting challenges in contemporary management of water resources is the planning, management, and regulation of land use and development.¹⁹ Both water supply and water quality are critically affected by the amount, location, and design of development and impervious cover; the design, type, and location of crops; the type, location, and management practices of farm, livestock, and forestry operations; and so on. These are inherently state and local decisions in which the federal government historically has disavowed any direct role, and for which federal agencies have little expertise. To be sure, SWIM does not anticipate direct federal authority to second-guess local land use decisions or to disapprove a state's water-resource management plans for failure adequately to control land use and its impacts on water quality. But absent such authority, what's the point?

There also is sufficient progress among states in using existing tools to integrate water-resource management, and take on the issue of land use, to cast doubt on whether additional federal intervention is necessary or salutary.

Professor Thompson lauds California for its Integrated Regional Water Management Planning Act (IRWM),²⁰ but a new statute specifically mandating integrated resource management is not the only means to achieve the integration Professor Thompson seeks. New York's landmark watershed agreement, under which federal and state agencies integrated land use, water quality, and water supply objectives, and in the process avoided billions of dollars in additional drinking-water treatment costs, emerged from collaborative work under existing authorities.²¹ Neighboring New Jersey established a comprehensive and integrated planning and regulatory regime to control land use and protect water supply and water quality in the state's Highlands watershed.²² New Jersey also revised both its storm water management program and its antidegradation policies under the Clean Water Act to integrate water supply

and habitat concerns by setting a no-net-loss-of-recharge standard and broadening stream buffer requirements to protect drinking water sources.²³ In Florida, the Everglades Restoration Plan integrates objectives from urban drinking water supply for Miami to rural agricultural runoff management, from habitat protection in the Everglades preserve to water quality improvement in Florida Bay; Congress later blessed this initiative in the Federal Water Resource Development Act.²⁴ The Bay Delta Restoration Plan, integrating water-resource management work among eight federal and state agencies in a comprehensive plan initiated outside the auspices of California's IRWM,²⁵ promises similar integration benefits for water resources and living resources of the Sacramento-San Joaquin ecosystem.²⁶

A statute of general applicability like SWIM would add little to these efforts focused on particular watersheds or resources. To the contrary, because the pressure of compliance with CWA or ESA mandates drives many of these efforts, and SWIM could attenuate the impact of those mandates, SWIM might retard rather than accelerate the progress of water-resource policy integration. Perhaps SWIM could make such efforts more prevalent, but it takes a leap of faith to conclude that the results for water-resource management would justify the costs in a time of scarce and diminishing resources for environmental and natural resource programs and enforcement. Devoting more resources to enforcement of the existing mandates that have driven integration success seems a better bet than SWIM.

Professor Thompson is closer to the mark when he suggests a stronger federal role or other mechanism to better integrate management, and to resolve conflicts, between and among states sharing common water resources. Here again, though, the CZMA and other existing models have proved deficient. Witness the longstanding dispute over deepening the Delaware River, in which New Jersey and Delaware unsuccessfully invoked their coastal policies under the CZMA to demand further review of a project long sought by Pennsylvania.²⁷ Witness the failure of states invoking their coastal policies under the CZMA to affect oil and gas development in neighboring states or in federal waters.²⁸

Nor are the basin commissions that Professor Thompson cites, like the Delaware River Basin Commission (DRBC),²⁹ exemplars of success in terms of resolving water-resource management conflicts between and among states. Faced with divergent views of states concerning the water-resource impacts of hydraulic fracturing, DRBC has

19. See Thompson, *supra* note 1, at 209-10; see also Craig Anthony (Tony) Arnold, *Introduction: Integrating Water Controls and Land Use Controls: New Ideas and Old Obstacles*, in WET GROWTH: SHOULD WATER LAW CONTROL LAND USE? 1, 1-55 (Craig Anthony (Tony) Arnold ed., 2005); Barton H. Thompson Jr., *Water Management and Land Use Planning: Is It Time for Closer Coordination?*, in WET GROWTH: SHOULD WATER LAW CONTROL LAND USE?, *supra*, at 95-118.

20. Thompson, *supra* note 1, at 213-18.

21. See NYC Watershed Memorandum of Agreement, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/region2/water/nycshed/nycmoa.htm> (last updated Apr. 5, 2011) (collecting materials).

22. See N.J. STAT. ANN. §13:20-1-35 (West 2013).

23. N.J. ADMIN. CODE §§7:8, 7:9:B (2013).

24. Water Resources Development Act of 2000, §601, 114 Stat. 2572 (2000) (codified at 33 U.S.C. §892a). See Lake Tahoe Restoration Act of 2011, Pub. L. No. 106-506, 114 Stat. 2351 (2000); see generally THE COMPREHENSIVE EVERGLADES RESTORATION PLAN, www.evergladesplan.org (last visited Apr. 4, 2013).

25. CAL. WATER CODE §10531(b) (West 2008).

26. See generally BDCP News and Events, BAY DELTA CONSERVATION PLAN, www.baydeltaconservationplan.com (last visited Apr. 6, 2013).

27. Delaware Dep't of Nat. Res. & Envtl. Control v. United States Army Corps of Eng'rs, 685 F.3d 259, 286-87 (3d Cir. 2012).

28. E.g., California v. Norton, 311 F.3d 1162 (9th Cir. 2002).

29. Thompson, *supra* note 1, at 233.

been paralyzed on the issue for over two years, without the votes either to approve regulations or to make permanent a provisional ban on hydraulic fracturing in the basin.³⁰ By contrast, the Susquehanna River Basin Commission largely ducked the challenge of policy integration altogether when it came to “fracing,” by limiting its scrutiny of such operations to the impact of water withdrawals rather than taking on a the broader—“integrated”—approach of considering water-quality impacts (including water-quality impacts of land use) as well.³¹

These examples suggest that if there is to be a federal initiative to improve integration of water-resource management policy, it would be better focused on more effective standards and processes for the management and resolution of water-resource disputes between jurisdictions, and on an effort to get the objectives of water-resource management “integrated” into the missions of federal agencies that are not natural resource managers but nonetheless have enormous impact on the success or failure of water-resource policy at every level, such as the Department of Transportation and the Department of Agriculture. The federal agencies might get their own house in order first,

before trying to “solve” state and local water-resource management problems that may not be especially significant.

V. Conclusion

The need for better integration of water-resource management, both substantively and geographically, is as compelling as Professor Thompson suggests. But state- and regionally-oriented integration programs, tailored both to the resources under management and to the institutional, cultural, and political features that bear on water-resource management decisions, appear to have greater promise and momentum in terms of on-the-ground change and political feasibility than an additional federal mandate or program of general applicability like SWIM. Existing federal mandates under the CWA, the ESA, and other federal laws are in many cases already the forcing mechanism for integration of water-resource policies at the regional and state level. Strengthened enforcement of those mandates, coupled with greater support for the collaborations that result and better mechanisms to resolve interstate conflicts, would accelerate the trend.

30. See *Natural Gas Drilling Index Page*, DELAWARE RIVER BASIN COMM’N, <http://www.state.nj.us/drbc/programs/natural> (last modified Oct. 24, 2012).

31. See SUSQUEHANNA RIVER BASIN COMM’N, NATURAL GAS WELL DEVELOPMENT IN THE SUSQUEHANNA RIVER BASIN (2010), available at http://www.srbc.net/programs/docs/ProjectReviewMarcellusShale%28NEW%29%281_2010%29.pdf.