

C O M M E N T

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

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I. Introduction

In *A Federal Act to Promote Integrated Water Management: Is the CZMA a Useful Model?*, Prof. Barton Thompson addresses the significant challenge of substantive and geographic fragmentation in water management. He proposes using the characteristics of the Coastal Zone Management Act (CZMA) as a blueprint for greater integration of water management across the United States. This approach has promise; but the laws, interests, economics, politics, and practice surrounding freshwater are sufficiently dissimilar from those facing coastal management to raise questions as to its likelihood of success.

The CZMA established an offer to states: the federal government will support state coastal programs through financial and technical assistance, as well as compliance with state enforceable policies, if states develop and implement those programs. Since coastal-program development is optional, the CZMA's success depended in large part on the attractiveness of the offer to states: if a state did not like the offer, it would not "accept" it. Without substantial state participation, the law would accomplish little. Though it took forty years, all eligible states have now joined the National Coastal Management Program.¹

Professor Thompson's Sustainable Water Integrated Management Act (SWIM) likewise must attract states to be successful. Fortunately, like coastal management under the CZMA, many states support integrated water resource management and seek federal assistance with it.² But the

increased federal role in water management, specifically water quantity, in SWIM would deter at least some states. In addition, states may not find the two key incentives of the CZMA, federal consistency and financial support, as enticing under SWIM as under the CZMA. SWIM simply may not be as attractive to states as the CZMA has been, which would limit its potential impact.

II. The Federal Role

Under the CZMA, states develop their respective coastal plans, but with federal direction and review. For example, coastal management programs must contain nine elements, such as designating areas of particular concern; creating guidelines on use priorities in specific areas, particularly noting those uses of lowest priority; identifying how the state will exert control over land and water uses, including a list of judicial decisions, regulations, laws, and state constitutional provisions; developing a planning process for assessing the effects of, and ways to control and restore, shoreline erosion; and a description of the organizational structure for coastal-program implementation, "including the responsibilities and interrelationships of local, area-wide, State, regional, and interstate agencies in the management process."³ The National Oceanic and Atmospheric Administration (NOAA) decides whether the nine elements are adequately included in the coastal program applications.⁴ NOAA also decides whether to approve any proposed changes to existing state programs.⁵ Thus, the federal government has a significant role, and the instructions to states are rather detailed.

States, particularly those in the western United States, have strongly defended their historical authorities over

1. *Celebrating the 40th Anniversary of the Coastal Zone Management Act of 1972*, OFFICE OF OCEAN & COASTAL RESOURCE MGMT., <http://coastal-management.noaa.gov/about/czma40.html#timeline> (last visited Mar. 14, 2013). Illinois joined on January 31, 2012. *Id.* Alaska allowed its coastal program to sunset in 2011. *Id.* Thirty-five states and territories are eligible to participate. *Id.*

2. See, e.g., W. GOVERNORS' ASS'N, POLICY RESOLUTION 11-7, WATER RESOURCE MANAGEMENT IN THE WEST (2011), available at www.westgov.org/component/docman/doc_download/1441-11-7?Itemid.

3. 16 U.S.C. §1455(d) (2006).

4. *Id.*

5. 16 U.S.C. §1455(e).

water quantity management against federal involvement.⁶ Since water quantity is a critical component of integrated water resource management, federal direction and oversight like that in the CZMA likely would deter state participation in SWIM.

This is not to say that the federal government cannot play a role. To the contrary, as suggested by Professor Thompson, federal involvement is important, if not critical, to the success of integrated water resource management. The Western Governors appear to agree in their policy resolution regarding water resource management, but with the federal government assisting the states, not overseeing them.⁷ SWIM could include fewer instructions and less federal oversight than CZMA in order to reduce concern about federal influence on water quantity management and thus make the “offer” more attractive to states. But at some point SWIM would then be little more than a federal appropriation, reducing the value of a CZMA-like structure.

III. Financial Support

Federal funding has been one of the most attractive aspects of the CZMA “offer” for states.⁸ This likely would be true for SWIM as well. States have called for greater federal investment in data collection, drought response, and infrastructure development.⁹ But the question arises as to how much money would be enough to support the states in implementing integrated water management plans. Professor Thompson notes that California has offered in excess of \$350 million in matching grants for implementation of its Integrated Regional Water Management program. By comparison, in FY2010, Congress provided a total of \$68.1 million for all three CZMA grant programs nationwide: to implement coastal programs (Section 306), to address four specific topics (Section 306A), and for nine specified enhancement areas (Section 309).¹⁰ Add to this disparity Professor Thompson’s suggested incentive of federal technical assistance, which primarily would be a matter of

increased funding for data-collection programs through the U.S. Geological Survey, National Aeronautics and Space Administration, and other agencies, potentially with a very large price tag in order to provide sufficient information for informed planning. Thus, the financial incentives of SWIM may need to be much more significant than those of the CZMA to be as attractive to states.

IV. Federal Consistency

Federal consistency is the other significant incentive of the CZMA “offer” for states.¹¹ Around the time of CZMA authorization, the federal government was undertaking many construction projects on coastal lands. States did not necessarily have much say in these activities. The incentive of federal consistency was deference to state enforceable policies regarding the what, where, when, and how of planning, developing, and operating these federal facilities, as well as in conducting permitting and other federal actions. Although the federal government retained an override option,¹² this incentive was, and for the most part still is, significant.

As Professor Thompson himself notes, federal consistency likely would not be as enticing to states in SWIM as it has been under the CZMA. He cites the de facto consistency with which the federal government already operates relative to state water laws and policies. Under the CZMA, the “state enforceable policies,” with which federal agencies and activities must be consistent, primarily protect the environment and human uses of the coastal zone. But in freshwater management, much of the friction between federal and state authorities actually stems from the inverse: the application of federal environmental laws to state and private activities. Hence, Professor Thompson suggests upping the ante in SWIM by using as incentives streamlined federal permitting and even delegation of federal regulatory authorities under the Clean Water Act and Endangered Species Act. These two incentives may begin to provide the type of “consistency” that states desire in the freshwater context, but they would need to be very enticing to states to compensate for the other aforementioned differences between the CZMA and SWIM “offers.”

V. Conclusion

Professor Thompson has advanced the conversation regarding integrated water resource management in the United States. If this concept is ever going to be fostered by the federal government, a CZMA-like approach may be the most rational means. But the value to states of the “offer” in SWIM likely would need to be increased since the law

6. See, e.g., David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3 (2001); W. STATES WATER COUNCIL, RESOLUTION OF THE WESTERN STATES WATER COUNCIL REGARDING PREEMPTION OF STATE LAW IN FEDERAL LEGISLATION (July 29, 2011), available at <http://www.westgov.org/wswcl-331%20resolution%20re%20preemption%20of%20state%20law%20in%20federal%20legislation%202011july29.pdf>.

7. See, e.g., W. GOVERNORS' ASS'N, *supra* note 2.

8. HAROLD F. UPTON, COASTAL ZONE MANAGEMENT: BACKGROUND AND REAUTHORIZATION ISSUES, RL34339 2–3 (2010), available at <http://crs.ncseonline.org/nle/crsreports/10Oct/RL34339.pdf>.

9. See, e.g., Letter from Ryan Mueller, Chairman, Interstate Council on Water Policy et al., to Congressmen Simpson and Moran (Feb. 4, 2013), <http://www.icwp.org/2012/legpol/StreamgageLtrsFeb2013.pdf>; Policies, W. STATES WATER COUNCIL, <http://www.westernstateswater.org/policies-2> (last visited Mar. 14, 2013) (documents stating positions of the Western States Water Council).

10. UPTON, *supra* note 8, at 4–5.

11. *Id.* at 2–3.

12. See 16 U.S.C. §1456(c) (2006).

cannot be effective without voluntary state participation. Yet, state participation is only the first step. The full test of the law is in its accomplishment of its outlined objectives, in the case of SWIM, integration of land and water governance and ultimately improved water security. Thus, one

cannot completely sacrifice the substantive content of the law in the name of attracting participation. It is a delicate balance. Forty years after passage of the CZMA, and with all states having joined, the outcome of that law's approach is still inconclusive.¹³

13. See, e.g., UPTON, *supra* note 8, at 18 ("After more than 30 years of effort and numerous studies, the magnitude or dimensions of the impact that the federal program or any of the participants' programs have had on either the rate and pattern of coastal development, or on protection of important coastal resources, is still uncertain.").