

NOS. 09-70269, 09-70442, 09-70477, 09-70770

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF OREGON, et al.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

**BRIEF OF *AMICUS CURIAE*
COASTAL STATES ORGANIZATION
IN SUPPORT OF PETITIONERS**

KRISTEN M. FLETCHER
Executive Director
Coastal States Organization
444 N Capitol St, Suite 322
Washington, DC 20001
(202) 508-3860

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* Coastal States Organization submits this corporate disclosure statement.

(a) Coastal States Organization does not have a parent company, and is not a publicly-held company with a 10% or greater ownership interest.

(b) Coastal States Organization is a nonprofit, non-partisan corporation, organized under section 501(c)(4) of the Internal Revenue Code. The Coastal States Organization represents the governors of the thirty-five coastal states and territories on legislative and policy issues relating to the sound management of coastal, Great Lakes, and ocean resources. Helping the states to maintain their leadership role in the development and implementation of national coastal and ocean policy is among the Coastal States Organization's most important functions and supports state efforts to maintain healthy coasts and strong coastal communities.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iv

STATEMENT OF INTEREST..... 1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....4

I. THE CZMA FEDERAL-STATE PARTNERSHIP AND
CONSISTENCY REVIEW ARE VITAL TOOLS IN
RESOURCE PROTECTION AND MANAGEMENT.....4

A. The CZMA represents a Unique and Necessary Federal-
State Partnership.....4

B. The Consistency Provision is Essential to the Execution
of the CZMA and Serves as a Valuable Tool for State
and Federal Coastal Management.....7

II. THE CLEAR LANGUAGE OF THE CZMA DIRECTS
THAT FERC CANNOT ISSUE A LICENSE UNTIL THE
APPLICANT RECEIVES CONSISTENCY CONCURRENCE
FROM THE ABUTTING COASTAL STATE OR STATES.....11

A. FERC’s Actions Violate the Plain Statutory
Language of the CZMA and Are Inconsistent with the
Precedent of this Court..... 11

B. The Issuance of Pre-Consistency Permits Has
Negative Impacts on Coastal Management and
Sustainable Development..... 14

C. FERC’s Actions in Bradwood Directly Conflict with CZMA Regulations.....	16
III. CZMA CONSISTENCY REVIEW SERVES THE NATIONAL INTEREST IN MAINTAINING HEALTHY AND PRODUCTIVE COASTS.....	21
A. CZMA Consistency Review Advances Sustainable Energy Projects.....	21
B. CZMA Consistency Protects and Advances State and Federal Interests.....	24
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF FILING AND SERVICE	

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council</i> , ___ F.3 rd . ___, 2009 WL 3416164 (1st Cir., Oct. 26, 2009).....	20
<i>City of Fall River v. FERC</i> , 507 F.3d 1, 6 (1st Cir. 2007).....	20
<i>High Country Resources v. FERC</i> , 255 F.3d 741, 742 (9th Cir. 2001).....	12
<i>Mountain Rhythm v. FERC</i> , 302 F.3d 958, 960 (9th Cir. 2002).....	12
<i>Phillips Petroleum Co. v. Mississippi</i> , 484 U.S. 469, 476 (1988).....	2
<i>Secretary of the Interior v. California</i> , 464 U.S. 312 (1983)	2

STATUTES

15 U.S.C. § 717b(d)	13
16 U.S.C. § 1452.....	6
16 U.S.C. § 1456(b)	25
16 U.S.C. § 1456(c)(3)(A)	4, 12, 17
16 U.S.C. § 1465.....	25
16 U.S.C. §§ 1361 - 1423.	5
16 U.S.C. §§ 1451 – 1466.....	6
16 U.S.C. §§ 1531 – 1599.....	5
33 U.S.C. §§ 1251 – 1387	5

42 U.S.C. §§ 4321 – 4370f	5
42 U.S.C. §§ 7401 – 7671q.....	5
43 U.S.C. §§ 1331 – 1356a.....	5

REGULATIONS

15 C.F.R. § 930.1	9
15 C.F.R. § 930.150	18
15 C.F.R. § 930.4	9
15 C.F.R. § 930.5	9
15 C.F.R. § 930.56	16
15 C.F.R. § 930.6	18
15 C.F.R. § 930.62(a).....	17
15 C.F.R. §§ 930.57(a) - 58	17
15 C.F.R. §§ 930.1, <i>et seq.</i>	17

OTHER AUTHORITIES

124 FERC ¶ 61,257 (slip. op. at 53)	17
126 FERC ¶ 61,035 (slip. op. at 14-15).....	11
128 FERC ¶ 61,216 - 61,217	15
65 Fed. Reg. 77124, 77128 (Dec. 8, 2000).....	19

BILIANA CICIN-SAIN AND ROBERT W. KNECHT, THE FUTURE OF U.S. OCEAN POLICY 112-114 (2000).....	24
---	----

CONGRESSIONAL RESEARCH SERVICE, COASTAL ZONE MANAGEMENT: BACKGROUND AND REAUTHORIZATION ISSUES at 6 (Apr. 30, 2008).....	21
E-mail from Abbey Mayer, Director, State of Hawaii Office of Planning to Kristen M. Fletcher, Executive Director, Coastal States Organization (Dec. 17, 2009, 4:22 PM EDT).....	10
E-mail from Kelly Samek, Office of General Counsel, Florida Department of Environmental Protection to Kristen M. Fletcher, Coastal States Organization (Jan. 5, 2010, 1:37 PM EDT).....	24
FEDERAL ENERGY REGULATORY COMMISSION, ISLANDER EAST PIPELINE PROJECT, FINAL ENVIRONMENTAL IMPACT STATEMENT (2002).....	15
FERC Order of January 15, 2009, 126 FERC ¶ 61,035 (slip. op. at 12).....	16
Florida Department of Environmental Protection, Natural Gas Pipeline Siting, <i>available at</i> http://www.dep.state.fl.us/siting/ natural_gas.htm (last visited Jan. 27, 2010)	23
<i>Islander East Pipeline Co.</i> , 2003 WL 245811, 102 F.E.R.C. ¶ 61,054, at 61,113-14 (2003).....	15
Kristen M. Fletcher, <i>Managing Coastal Development</i> , in OCEAN AND COASTAL LAW AND POLICY (Donald C. Baur et. al. eds., 2008).....	12
LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, at 14-15, <i>available at</i> http://www.archive.org/stream/ legislativehisto76unit#page/n1/mode/2up (last visited Jan. 5, 2010).....	7
Letter from Roger A. Ulveling, Hawaii Department of Planning and Economic Development, to Jeff Burt, President, Island Power Company (Dec. 29, 1986).....	23
Memorandum of Agreement Between the Minerals Management Service and the University of Alaska and the State of Alaska, <i>available at</i> http://www.mms.gov/regcompliance/MOU/ PDFs/MOUStateofAlaska.pdf (last visited Jan. 27, 2010).....	22

Memorandum of understanding Between the Federal Energy Regulatory Commission and the State of Oregon, <i>available at</i> http://www.ferc.gov/legal/maj-ord-reg/mou/ mou-or-final.pdf (last visited Jan. 27, 2010)	22
Memorandum of understanding Between the Federal Energy Regulatory Commission and the State of Washington, <i>available at</i> http://www.ferc.gov/legal/maj-ord-reg/mou/ mou-wa.pdf (last visited Jan. 27, 2010).....	23
NOAA Office of Ocean and Coastal Resource Management, <i>Appeals to the Secretary of Commerce Under the Coastal Zone Management Act (CZMA) – January 15, 2009, available at</i> http://coastalmanagement.noaa.gov/consistency/media/ appealsdecisionlist011509.pdf (last visited Jan. 22, 2010)	10
NOAA, Office of Ocean and Coastal Resource Management, <i>Federal Consistency Overview 5</i> (Feb. 20, 2009), <i>available at</i> http://coastalmanagement.noaa.gov/consistency/ media/FC_overview_022009.pdf (last visited Jan. 22, 2010).....	16
NOAA, Office of Ocean and Coastal Resource Management, <i>Ocean and Coastal Management in Washington, available at</i> http://coastalmanagement.noaa.gov/mystate/wa.html (last visited Jan. 22, 2010)	1
Rusty Russell, <i>Neither Out Far Nor In Deep: The Prospects for Utility-Scale Wind Power in the Coastal Zone,</i> 31 B.C. ENVTL AFF. L. REV. 221, at note 172 (2004).....	24
US GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE SUBCOMMITTEE ON OCEANS, ATMOSPHERE, FISHERIES, AND COAST GUARD, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, U.S. SENATE, COASTAL ZONE MANAGEMENT at 14 – 17 (Sept. 2008)	8
<i>Weaver's Cove Energy, LLC Mill River Pipeline, LLC,</i> 114 FERC ¶ 61058, 61165 (order of Jan. 23, 2006).....	20

BRIEF OF *AMICUS CURIAE*
COASTAL STATES ORGANIZATION
IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

Amicus curiae Coastal States Organization (CSO) was established in 1970 to represent the Governors of the nation's 35 coastal states, commonwealths and territories regarding legislative and policy issues relating to the sound management of coastal, Great Lakes and ocean resources.¹ CSO supports the shared vision of the coastal states, commonwealths and territories for the protection, conservation, responsible use and sustainable economic development of the nation's coastal, ocean and Great Lakes resources.

Amicus CSO has an interest in maintaining the states' consistency review authority as envisioned by Congress in the Coastal Zone Management Act (CZMA) and as practiced by states for over thirty years.² Thirty-four of the nation's thirty-five coastal states and territories have developed and received

¹ The 35 coastal states, commonwealths and territories consist of: Alabama, Alaska, American Samoa, California, Commonwealth of the Northern Mariana Islands, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Texas, U.S. Virgin Islands, Virginia, Washington, and Wisconsin.

² The first federally-approved Coastal Program was Washington State in 1976. *See* NOAA, Office of Ocean and Coastal Resource Management, *Ocean and Coastal Management in Washington*, available at <http://coastalmanagement.noaa.gov/mystate/wa.html> (last visited Jan. 28, 2010).

federal approval for their Coastal Zone Management Programs (CZM Programs). Economically, socially, and geographically, the coastal states and territories are as diverse as their individual coastlines, yet they share a commitment to common objectives in coastal and ocean management through the CZM Programs and to review activities that would affect their coastal zones. As sovereigns, states have a duty to their citizens to manage and protect the public trust in coastal and ocean ecosystems and the quality of life in coastal communities for the benefit of current and future generations.

Over the last forty years, *Amicus* CSO has played a lead role in Congressional efforts to enact, amend and reauthorize the CZMA since its passage in 1972; CSO has participated extensively in congressional hearings on the Act, and assisted in the development of its regulations. In the past, the U.S. Supreme Court has looked to *Amicus* CSO as a reliable source of information and expertise regarding the coastal states and their sovereign rights.³

CSO respectfully submits this *amicus* brief in support of petitioners, states of Oregon and Washington. CSO's brief focuses on the vital balance of resource protection and management provided by the unique federal-state partnership of the CZMA. *Amicus* acknowledges the importance of the Clean Water Act section 401

³ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). Also, CSO submitted a brief in *Secretary of the Interior v. California*, 464 U.S. 312 (1983), on the issue of consistency that led Congress to amend the CZMA to restore states' consistency review authority over activities outside of the state coastal zone.

certification issue to the states; however, this brief will emphasize critical information regarding the CZMA and the practical impacts of the actions of the Federal Energy Regulatory Commission (FERC). The statutory language and history of the CZMA shows the clear intent to have states review activities that affect the coastal zone *before* federal agencies approve activities within the zone. This consistency review authority plays a vital role in fostering state and federal regulatory cooperation and efficiently managing the federal permit process. This brief explains the negative effects that the issuance of pre-consistency permits has on the state and federal ability to manage coastal resources including the ability of a state to shape the design or timing of a project, the ability of FERC and other federal agencies to integrate and enforce all relevant requirements and the ability of states and the federal governments to protect interests in the nation's coasts and ocean.

SUMMARY OF ARGUMENT

To advance the national interest in coastal resources, Congress adopted the CZMA as a federal-state partnership to manage and protect coastal areas. The federal consistency provision, which grants states authority to review federal activities, licenses and permits that have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone, is a key element of this comprehensive statute designed to protect the nation's coast and manage

conflicting uses. Any federal activity, license or permit must be consistent to the maximum extent practicable with the enforceable policies of a coastal state's federally-approved coastal management program. In establishing this authority, Congress recognized that federal interests and activities need to be balanced with the sovereign interests of states in protecting their coastal resources.

Consistency review has proven essential in the states' ability to balance development with the unique needs of coastal ecosystems and communities, especially related to the development of energy sources in coastal areas. The CZMA also provides that "[n]o license or permit shall be granted by [a] Federal agency until the state or its designated agency has concurred with the applicant's certification."⁴ FERC, against the plain language of the CZMA and intent of the Energy Policy Act, has improperly extended its authority under the National Gas Act to issue conditional permits without a consistency determination by the affected state.

ARGUMENT

I. THE CZMA FEDERAL-STATE PARTNERSHIP AND CONSISTENCY REVIEW ARE VITAL TOOLS IN RESOURCE PROTECTION AND MANAGEMENT

A. The CZMA represents a Unique and Necessary Federal-State Partnership

⁴ 16 U.S.C. § 1456(c)(3)(A).

The CZMA was enacted as an innovative partnership between the federal government and U.S. coastal states including Great Lake States, territories and commonwealths. The CZMA was enacted at a time when Congress was considering a national land use planning statute and enacting numerous sweeping environmental laws including the National Environmental Policy Act,⁵ Clean Water Act,⁶ Clean Air Act,⁷ Endangered Species Act⁸ and Marine Mammal Protection Act.⁹ While no comprehensive national land use statute followed, the CZMA became, and remains, central to protecting natural resources while fostering wise development in the coastal zone.

Under the CZMA, coastal states developed comprehensive programs to support responsible economic development and vibrant coastal communities, while conserving the coastal environment. Over the past three decades, federal funding, matched by state dollars, has assisted states in reducing environmental impacts of coastal developments, resolving significant conflicts between competing coastal uses, and providing critical assistance to local governments in coastal planning.

The major goals of the CZMA are to improve cooperation among federal agencies and the states on issues affecting the coastal zone and to preserve, protect,

⁵ 42 U.S.C. §§ 4321 – 4370f.

⁶ 33 U.S.C. §§ 1251 – 1387.

⁷ 42 U.S.C. §§ 7401 – 7671q.

⁸ 16 U.S.C. §§ 1531 – 1599.

⁹ 16 U.S.C. §§ 1361 - 1423.

develop, and where possible, to restore or enhance, the resources of the coastal zone for this and future generations.¹⁰ Each state coastal management program is unique so that it may address critical local and regional resource management issues; however, the programs also address the broad spectrum of coastal issues identified by Congress in the CZMA. Each program is implemented through state-level coastal programs because state governments, with local governments as their partners, can most effectively manage human activities through their roles as sovereigns and landowners and through their historical jurisdiction over land use of non-federal property.¹¹ The national impact of the CZM program is the result of many thousands of state and local decisions that balance development in the coastal area.

Indeed, when the Stratton Commission, a blue ribbon presidential commission created in 1966 to evaluate national needs and capabilities and recommend appropriate governmental structures, considered a more effective management system for the nation's coastal and marine resources, it found that "one of the first questions to be settled is the level of Government at which it operates. [The Commission's] second major conclusion was that the management task was primarily a State responsibility and that the Federal Government should

¹⁰ 16 U.S.C. §§ 1451 – 1466.

¹¹ 16 U.S.C. § 1452.

encourage the States to accept this responsibility.”¹² In his testimony before Congress, Dr. John Knauss, professor, oceanographer, and future Administrator of NOAA, revealed that “Even the most ardent federalists amongst us despaired of ever doing an effective job at the Federal level.... a strong State organization is essential to surmount special local interests, to assist local agencies in solving common problems, and to effect strong interstate cooperation.”¹³ Thus, to account for the myriad ecological, economic and social attributes of each coastal area, the CZMA emphasizes the primacy of state decision-making regarding the coastal zone.

B. The Consistency Provision is Essential to the Execution of the CZMA and Serves as a Valuable Tool for State and Federal Coastal Management

Along with federal funding for coastal resource management, the federal consistency provision was a major incentive for states to join the national coastal management program. This unique tool for the states was acknowledged in the

¹² Statement of Dr. John A. Knauss, Provost for Marine Affairs, University of Rhode Island, and Former Chairman, Panel on Coastal Zone Management, Commission on Marine Science, Engineering, and Resources, LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, at 14-15, *available at* <http://www.archive.org/stream/legislativehisto76unit#page/n1/mode/2up> (last visited Jan. 5, 2010) (hereinafter CZMA LEGISLATIVE HISTORY). Dr. Knauss noted “It seems highly unlikely, even if it were considered desirable, to put together in a single agency all of the authority and functions related to the coastal zone that one now finds scattered throughout the Federal establishment.... Such [state] agencies should be strong enough to deal with the host of over-lapping and often competing jurisdictions of the various Federal agencies.” *Id.*

¹³ *Id.*

early years of the CZMA. Congressional testimony for reauthorization reveals that “many States recognize this "Federal consistency" provision to be of greater potential value than any [other] assistance program in the original act.”¹⁴ Covering 99% of the nation’s coastline under the national CZM Program, the states and territories have undertaken these programs with the legitimate expectation that they would exercise primary responsibility for management of the coastal zone and that federal agencies would act consistent with these programs. Given that federal funding has been capped for twenty-five years, generally at \$2 million per state but with many states receiving less, the consistency authority provides a valuable non-monetary incentive that maintains states involvement in the national program.¹⁵

The consistency provision, Section 307, is a powerful tool for states to manage coastal uses and resources and to facilitate cooperation and coordination with federal agencies and other coastal users. It is essential to maintain the statutory right of the coastal states under the CZMA, especially as the pressures for energy development on coastal and ocean areas increases and environmental challenges like climate change and sea level rise require innovative management and strong leadership.

¹⁴ Statement of Mr. DU Pont, CZMA LEGISLATIVE HISTORY, *supra* note 12, at 817.

¹⁵ For a discussion of the impact of the cap over the last twenty-five years, *see* US GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE SUBCOMMITTEE ON OCEANS, ATMOSPHERE, FISHERIES, AND COAST GUARD, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, U.S. SENATE, COASTAL ZONE MANAGEMENT at 14 – 17 (Sept. 2008).

One of the greatest strengths of the consistency tool is early consultation about projects, their design, environmental impacts, and timing. By applying consistency before a federal permit is issued, Congress ensured that the consistency review facilitates early discussion between states, federal agencies and permit applicants and averts disputes from arising after substantial commitments have been made by agencies and applicants. The consistency regulations expressly require the federal agency, state and applicant to confer early in the process to settle differences and ensure public participation as part and parcel of the federal permit process.¹⁶ FERC's delay and deferral of the state consistency review removes this vital process.

To avoid litigation and find the most suitable projects for coastal and marine areas, state and federal agencies invest time and effort into building and maintaining good working relationships so that each party, along with private users and permit applicants, can rely on an integrated management system. In many cases, the agencies and applicants have developed an understanding of the

¹⁶ Federal agencies, State agencies, and applicants should coordinate as early as possible in developing a proposed federal action, may mutually agree to intergovernmental coordination efforts to meet the requirements of these regulations, provided that public participation requirements are met and applicable State management program enforceable.” 15 C.F.R. § 930.1. *See also* 15 C.F.R. § 930.4 (requiring immediate notification to the state and applicant if the federal agency will not approve the conditions imposed by the state concurrence) and 15 C.F.R. § 930.5 (encouraging the use of remedial actions and mediation to resolve differences).

consistency requirements and process among the various agencies and work hand-in-hand. For example, the Hawaii Coastal Zone Management Program participates in various federal programs, such as the Federal-State Environmental Coordination Group, the Navy Integrated Natural Resources Management Plan Working Group, and regular hosts Navy environmental engineering interns as part of the Navy's internship program.¹⁷ In this way, state and federal agencies build on Congress' original vision to manage coastal resources via a federal-state partnership.

Used as a tool to find common ground between federal projects and the needs of the nation's coasts, the consistency provision has resulted in very few state consistency objections. Historically, states have concurred with about 95% of the federal actions they have been asked to certify. In 2005 and 2006, over 8,000 consistency reviews were conducted and only 60 objections were filed by the states: this is less than 1%. Of the less than 1% that is appealed to the Secretary of Commerce, 45% of these appeals are settled or withdrawn before review by the Secretary.¹⁸ Without these early reviews, there would be much more uncertainty,

¹⁷ E-mail from Abbey Mayer, Director, State of Hawaii Office of Planning to Kristen M. Fletcher, Executive Director, Coastal States Organization (Dec. 17, 2009, 4:22 PM EDT).

¹⁸ NOAA Office of Ocean and Coastal Resource Management, *Appeals to the Secretary of Commerce Under the Coastal Zone Management Act (CZMA) – January 15, 2009*, available at <http://coastalmanagement.noaa.gov/consistency/media/appealsdecisionlist011509.pdf> (last visited Jan. 22, 2010). The remaining appeals where either dismissed on procedural grounds (23%) or heard on the merits (32%).

litigation and calls for federal legislative intervention in actions in coastal communities.

II. THE CLEAR LANGUAGE OF THE CZMA DIRECTS THAT FERC CANNOT ISSUE A LICENSE UNTIL THE APPLICANT RECEIVES CONSISTENCY CONCURRENCE FROM THE ABUTTING COASTAL STATE OR STATES

In the current case, FERC's issuance of a license prior to Bradwood Landing, LLC (Bradwood) obtaining concurrence from the State of Oregon under its federally-approved CZM Program is in direct conflict with the statutory language,¹⁹ the congressional intent of the CZMA and federal regulations. This is incongruent with prior court decisions, creates negative implications for state and national coastal management, and will result in unnecessary future litigation.

A. FERC's Actions Violate the Plain Statutory Language of the CZMA and Are Inconsistent with the Precedent of this Court

In granting states consistency authority when enacting the CZMA in 1972, Congress recognized that federal interests and activities must be balanced with the sovereign interests of states in managing coastal resources. The consistency provision ensures this balance by granting states authority to review federal activities, licenses and permits that have reasonably foreseeable effects on any land

¹⁹ In the interest of avoiding repetition, *Amicus* CSO will not reiterate Petitioners' argument that none of the cases relied up by FERC in its January Order involved the express requirements of the CZMA and the Natural Gas Act §3(d) to ensure federal consistency with state Coastal Plans. *See* 126 FERC ¶ 61,035 (slip. op. at 14-15).

or water use or natural resource of the coastal zone.²⁰ These activities, licenses and permits must be consistent to the maximum extent practicable with the enforceable policies of a coastal state's federally approved coastal management program.

Significantly, Section 307 also provides that “No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant’s certification” or until the concurrence is conclusively presumed by inaction or the Secretary finds the action consistent.²¹ In prior cases, this court has held that the requirement for federal permits to be consistent with a state’s coastal management plan acts as a limitation on the federal agency’s power to issue the license:

In the context of considering related requirements of the federal Clean Water Act, we have explained, “FERC's authority to provide such [hydroelectric power] licenses... is not unlimited.” In this case, we deal with federal and state law concerns for protecting and managing coastline *that Congress has declared to be limitations on FERC's power*. Specifically, the Coastal Zone Management Act (CZMA), provides that if a hydropower project is located in a state's coastal zone, then FERC cannot issue the license unless the state's applicable agency concurs that the proposed project is consistent with the state's Coastal Zone Management Program, or the state's concurrence is conclusively presumed based on the state's failure to act by timely objection, or the Secretary of Commerce, on his or her own initiative or on appeal by applicant, overrides a state objection by finding a planned activity consistent with objectives of the CZMA or otherwise necessary for national security.²²

²⁰ See generally, Kristen M. Fletcher, *Managing Coastal Development*, in OCEAN AND COASTAL LAW AND POLICY (Donald C. Baur et. al. eds., 2008).

²¹ 16 U.S.C. § 1456(c)(3)(A).

²² *Mountain Rhythm v. FERC*, 302 F.3d 958, 960 (9th Cir. 2002) (quoting *High Country Resources v. FERC*, 255 F.3d 741, 742 (9th Cir. 2001) (emphasis added, citation omitted)).

This court recognized the need for maintaining the federal-state partnership that Congress articulately clearly in the text of the CZMA.

Congress reiterated this interest in ensuring the federal-state partnership of federal consistency in reauthorization of the Natural Gas Act (NGA) which is heavily relied upon by FERC to justify its issuance of pre-consistency licenses in this case. In amending the NGA in the Energy Policy Act, Congress expressly preserved “the rights of States” under the CZMA, Clean Air Act and Clean Water Act. NGA § 3(d) now provides that “nothing” in the NGA “affects” those rights, “[e]xcept as specifically provided” in the NGA.²³ The NGA includes no language which provides that FERC may use its conditioning authority to alter states’ rights under these three statutes.

FERC not only exceeded its statutory authority in approving a license to Bradwood, but also undermined the well-established, and Congressionally-created, federal-state partnership that allows for effective, shared management of the nation’s coasts. Approval of FERC’s actions represents a major diversion from more than thirty years of Congressional intent under the CZMA and creates a perilous policy shift that damages state sovereignty and puts the nation’s coastal resources at risk.

²³ 15 U.S.C. § 717b(d).

B. The Issuance of Pre-Consistency Permits Has Negative Impacts on Coastal Management and Sustainable Development

When a federal permit or license is issued prior to the state review, the Congressionally-envisioned federal-state partnership is frustrated. By issuing a license, FERC impliedly encourages applicants to move forward with many aspects of a project, if not construction, which diminishes the relevancy of the state's concerns and can lead to the applicant designing the project that will ultimately not meet a state's CZM Program.

When a company proposed a natural gas pipeline and relied upon FERC's license prior to the state's consistency and water quality certification review, it led to unnecessary litigation when the project did not meet environmental certifications from surrounding states. This litigation was avoidable if the project had been originally designed to meet both FERC's and the state's requirements.

In this case, Islander East Pipeline Company, LLC, proposed to construct a natural gas pipeline that crossed Long Island Sound from Branford, Connecticut to Long Island, New York, using three sequential construction methodologies, each with a distinct set of environmental impacts. The affected area in Branford, the Thimble Islands, is valued for its high water quality, unique geological features, valuable shellfish habitat, and active shellfish industry. Having already received FERC's permit, Islander East challenged Connecticut's consistency review and water quality certification. The State of Connecticut Department of Environmental

Protection denied water quality certification and consistency with Connecticut's Coastal Program and requested a different pipeline route to reduce its environmental impact, especially on shellfish beds. Ironically, the route sought by the state was the environmentally-preferred option in the FERC environmental impact statement for the project.²⁴ Had FERC not yet issued a license, but rather required the applicant to meet state standards first, Islander could have incorporated alternatives into its project design rather than submit to litigation and, ultimately, an abandoned project.²⁵

In order for a proposed project to be consistent with the enforceable policies of the CZM Program, applicable state authorizations must be obtained by the project applicant. In situations where the federal agency issues a permit prior to

²⁴ On August 21, 2002, FERC issued the Final Environmental Impact Statement (FEIS). FEDERAL ENERGY REGULATORY COMMISSION, ISLANDER EAST PIPELINE PROJECT, FINAL ENVIRONMENTAL IMPACT STATEMENT (2002); *see also Islander East Pipeline Co.*, 2003 WL 245811, 102 F.E.R.C. ¶ 61,054, at 61,113-14 (2003). The FEIS determined that the environmentally preferable alternative to Islander East's proposal, based on the Iroquois Pipeline's ELI Extension Project, had a shorter Long Island Sound crossing, avoided more shellfish leases, and would only have air quality and noise impacts onshore in Connecticut. *See* FEIS at ES-5. Nevertheless, the FEIS concluded that, if Islander East constructed the project as proposed and in accordance with the recommended mitigation measures, it would be an environmentally acceptable action. *Id.*

²⁵ The fact that environmental conditions significantly impaired the viability of the project, make it difficult to see how FERC could have concluded, as it has done in this case, that a project was in the public interest. In the instant case, FERC agreed that adequate environmental protection is necessary to find the project in the public interest, but disagreed that those projections will not be provided. 128 FERC ¶ 61216, 61217. Yet the agency failed to explain how those protections will be integrated into the permit.

the issuance of a consistency decision letter, the applicant may mistakenly assume the project may commence. Issuing the federal permit without consistency review also allows the applicant to become vested before CZM compliance is secured.

C. FERC's Actions in Bradwood Directly Conflict with CZMA Regulations

In its overview explaining the federal consistency provisions, NOAA expressly recognizes “[e]arly coordination and identification of applicable state [] enforceable policies is key to ensuring that Federal agencies and applicants address state policies and issues. Early coordination will also help determine what measures, if any, need to be taken so that the activity is consistent with the state policies.”²⁶ The FERC Order in this case asserts that issuance of the pre-consistency permit “does not impact any substantive determinations that need to be made by the states under these federal statutes. The Oregon and Washington state agencies retain full authority to grant or deny the specific requests.”²⁷ This statement by FERC ignores the fact that no coordination or integration of the 109 environmental conditions placed on the Bradwood permit (many pertaining to construction and operation) and the requirements of the state consistency

²⁶ NOAA, Office of Ocean and Coastal Resource Management, *Federal Consistency Overview 5* (February 20, 2009), available at http://coastalmanagement.noaa.gov/consistency/media/FC_overview_022009.pdf (last visited Jan. 22, 2010). See also 15 C.F.R. § 930.56. (any applicant for a federal license should obtain the views and assistance of the State agency to ensure that the proposed activity will be consistent with the management program).

²⁷ FERC Order of January 15, 2009, 126 FERC ¶ 61,035 (slip. op. at 12).

determination can occur, because FERC has prevented facilitation of early identification and coordination of state and federal permit requirements.

In addition to violating the plain language of the CZMA and impairing the state process of review, a federal agency's issuance of a pre-consistency permit or license can place the state and federal agencies in direct conflict with the CZMA regulations.²⁸ Under the Act and its implementing regulations, a project applicant must provide the state with a consistency certification within its application for a Federal license or permit and provide all the necessary information needed to evaluate the application.²⁹ Once the consistency certification and necessary data and information are received by a state, a state then has six months in which to review the project for consistency with its coastal management program.³⁰ State concurrence is presumed if the state does not meet this six-month time frame. If a state issues a conditional concurrence and the applicant does not amend its federal application to include a state's conditions, a state's conditional concurrence automatically becomes an objection. State conditions of concurrence are typically linked to the need to be consistent with specific state enforceable policies.

²⁸ 15 C.F.R. §§ 930.1, *et seq.*

²⁹ 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. §§ 930.57(a) - 58. FERC cannot deny that the September order actually issues a license and it explicitly authorizes the applicant to proceed with the project: "Bradwood Landing is authorized under section 3 of the NGA to site, construct, and operate its LNG terminal in Clatsop County, Oregon, as more fully described in this order and in the application." 124 FERC ¶ 61,257 (slip. op. at 53).

³⁰ *Id.*; 15 C.F.R. § 930.62(a).

A license issued prior to consistency determination prevents the creation of an integrated permit which negatively affects the efficacy and enforceability of state permit requirements. In its own regulations, NOAA notes that the CZMA provides predictability through the requirement that a state concur or object within a prescribed time period.³¹ The agency explains that “Once a State agency has concurred, even with conditions, the State agency retains no further consistency authority over the project... If a State agency objects, then the State agency retains its authority over the project; the Federal agency cannot issue the license or permit and a Federal agency may not be able to proceed with a Federal agency activity.”³² If an agency has issued a permit prior to consistency review, it precludes compliance with this section. It essentially removes the State’s option to negotiate the permit conditions or deny concurrence.

NOAA’s explanation of the consistency regulations note that “A discussion of whether the Federal agency can enforce the State's conditions should take place during the review period to help determine if a conditional concurrence is the best course of action.”³³ Pre-permit discussion and negotiation is critical to

³¹ See 15 C.F.R. § 930.6 (“State agency is required to uniformly and comprehensively apply the enforceable policies of the State’s management program); 15 C.F.R. § 930.150 (application of the federal consistency requirement to activities having interstate coastal effects provides agencies and public with a predictable framework for evaluating the consistency).

³² *Id.*

³³ 65 Fed. Reg. 77124, 77128 (Dec. 8, 2000).

development of conditions that the federal agency will enforce and apply to the project; a state cannot, through the CZMA, enforce its conditions after it has concurred. The state must request that the Federal agency take enforcement action or seek a court order against the applicant to enforce the permit conditions. The CZMA does not require a Federal agency to adopt a state's conditions of concurrence making the need for discussion and compromise critical to the integration of state concurrence conditions. The CZMA only requires that the Federal agency shall not grant its approval until the state agency has concurred, concurrence is conclusively presumed, or the Secretary overrides a state agency's objection. Also, if a state agency concurs with conditions and the Federal agency issues its approval consistent with the conditions, but the applicant later does not comply with the conditions, the Federal agency is not required to take an enforcement action.³⁴ Again, the negotiation and integration of the state and federal permits is critical to effective and coordinated enforcement of the permit conditions.

Without FERC first asking for state concurrence, FERC has essentially taken away the state's ability to negotiate the permit conditions or deny concurrence. Further, without these discussions, the likelihood of federal (discretionary) enforcement of state permit requirements becomes more tenuous. This

³⁴ *Id.*

tenuousness is increased by the fact that states are effectively preempted from creating additional conditions under NGA. An example of this dilemma is highlighted in the recent First Circuit case of *Weaver's Cove Energy v. Rhode Island Coastal Resources Management Council*,³⁵ where FERC issued a conditional license to the natural gas facility in 2005 which included some conditions related to dredging. Negotiations with the responsible state agency began before the FERC license was issued and communication between the parties became confused over the data necessary to provide state certification. FERC affirmed its conditional approval, *leaving intact the state consistency requirement*³⁶ but not resolving the dispute between the applicant and the affected states. Only after subsequent district and appellate court litigation was the issue of the state's authority to impose the conditions resolved, without the benefit of FERC or other federal agencies having provided an opinion as to need or appropriateness of the state's need for the data.³⁷ Because the state could not follow the normal path of

³⁵ ___ F.3rd ___, 2009 WL 3416164 (1st Cir., Oct. 26, 2009).

³⁶ *Weaver's Cove Energy, LLC Mill River Pipeline, LLC*, 114 FERC ¶ 61058, 61165 (order of January 23, 2006).

³⁷ Prior appeals to the permit were dismissed as moot, *City of Fall River v. FERC*, 507 F.3d 1, 6 (1st Cir. 2007). FERC, NOAA and the Secretary of Commerce claimed they did not have authority to resolve the dispute:

Over a year after its original application to CRMC, Weaver's Cove made separate filings to NOAA, FERC, and the Secretary of Commerce, requesting a determination that CRMC's concurrence be "conclusively presumed" because CRMC had failed to act on Weaver's Cove's application within the statutorily required six-month deadline. 16 U.S.C. §

providing consistency review to FERC, the state was conclusively deemed to have concurred with the application.³⁸ The September decision by FERC to issue this license leaves this issue of how and which state conditions would be integrated into the permit completely ambiguous and subject to further litigation and contention between the parties.

III. CZMA CONSISTENCY REVIEW SERVES THE NATIONAL INTEREST IN MAINTAINING HEALTHY AND PRODUCTIVE COASTS

A. CZMA Consistency Review Advances Sustainable Energy Projects

In 2008, the Congressional Research Service reported that “It is widely believed that the existence of the consistency requirement and the uncertainty of the outcome of an appeal have led applicants to negotiate with states and to modify proposed actions early on, thereby reducing the number of appeals.”³⁹ This is apparent in energy projects across the nation.

FERC submits that the importance of developing energy sources for the nation buttresses its position to issue a license prior to state review. This reliance

1456(c)(3)(A). NOAA took no action, FERC concluded it did not have authority to address the issue, and the Secretary of Commerce determined that he could not review the matter without an actual objection from CRMC.

Id., slip. op at 8.

³⁸ *Id.*, slip op. at 12.

³⁹ CONGRESSIONAL RESEARCH SERVICE, COASTAL ZONE MANAGEMENT: BACKGROUND AND REAUTHORIZATION ISSUES at 6 (Apr. 30, 2008). The Report notes that “there are no data on the number of proposed actions that have been altered because of the consistency process.” *Id.*

ignores the established practices, regulations and relationships developed over three decades between states and energy producers. During that time, to increase efficiency for states, federal agencies and applicants, many coastal states have created streamlined approaches to energy related activities. For example, Alaska uses a memorandum of agreement with the Minerals Management Service to facilitate reviews of outer continental shelf (OCS) activities.⁴⁰ North Carolina's coastal program facilitates review of energy projects by identifying information needs up front to avoid delays and increase predictability for industry. Texas developed a general concurrence for its review of OCS oil and gas exploration plans. Both Washington and Oregon have MOUs with FERC regarding hydrokinetic energy facility siting, but these memoranda do not deal with conditional licensing activities as the memoranda suggest a framework for early and comprehensive coordination between the states and FERC during the environmental review and license review period.⁴¹

⁴⁰ Memorandum of Agreement Between the Minerals Management Service and the University of Alaska and the State of Alaska, *available at* <http://www.mms.gov/regcompliance/MOU/PDFs/MOUStateofAlaska.pdf> (last visited Jan. 27, 2010).

⁴¹ Memorandum of Understanding Between the Federal Energy Regulatory Commission and the State of Oregon, *available at* <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-or-final.pdf> (last visited Jan. 27, 2010); Memorandum of Understanding Between the Federal Energy Regulatory Commission and the State of Washington, *available at* <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-wa.pdf> (last visited Jan. 27, 2010).

Consistency reviews of proposed energy projects have resulted in more sustainable projects as well. Through consistency negotiations and conditions placed on a permit for a hydro-electric power facility on the Wailua River on the Island of Kauai, Hawaii ensured that biological and scenic qualities of the famous Wailua Falls were not adversely impacted.⁴² Consistency reviews will continue to be vital in the several renewable energy proposals across the national that will likely soon be submitted for consistency review.

Similarly, the objective of Florida's review of the Gulfstream Natural Gas Pipeline, proposed as a trans-Gulf pipeline to provide transportation service for up to 1.13 billion cubic feet of natural gas per day to Florida, was to ensure that environmental impacts were avoided and minimized where possible and unavoidable impacts were adequately mitigated.⁴³ Issuance of the relevant state permit and consistency findings followed many months of careful scientific and technical review of the project and extensive commitments by Gulfstream to avoid sensitive habitats (including important live-bottom fishery habitats in the Gulf of Mexico), revise construction methods to minimize environmental impacts and to mitigate where avoidance is not possible. This

⁴² Letter from Roger A. Ulveling, Hawaii Department of Planning and Economic Development, to Jeff Burt, President, Island Power Company (Dec. 29, 1986).

⁴³ See Florida Department of Environmental Protection, Natural Gas Pipeline Siting, available at http://www.dep.state.fl.us/siting/natural_gas.htm (last visited Jan. 27, 2010).

process offered an opportunity for extensive involvement from environmental organizations and public participation which assisted in reaching consensus and developing environmentally friendly construction methodologies and mitigation measures.⁴⁴

B. CZMA Consistency Protects and Advances State and Federal Interests

Section 307 of the CZMA is a perfect example of federalism.⁴⁵ In protecting the state interest, federal activities, licenses, and permits which may have a reasonably foreseeable effect on coastal resources or their use are required to be consistent to the maximum extent practicable with the federally approved enforceable policies of state CZM programs. Additionally, the federal interest is not only advanced, it is protected. Section 307(b) provides that the Secretary of Commerce shall not approve a state CZM program unless the views of federal agencies affected by the program have been adequately considered.⁴⁶ In addition to each state CZM program's requirement of receiving federal approval in order to

⁴⁴ E-mail from Kelly Samek, Senior Assistance General Counsel, Office of General Counsel, Florida Department of Environmental Protection to Kristen M. Fletcher, Executive Director, Coastal States Organization (Jan. 5, 2010, 1:37 PM EDT).

⁴⁵ See Rusty Russell, *Neither Out Far Nor In Deep: The Prospects for Utility-Scale Wind Power in the Coastal Zone*, 31 B.C. ENVTL. AFF. L. REV. 221, at note 172 (2004) (noting that the CZMA “encompasses one of Congress’s earliest (and still one of its few) expressions of full-fledged environmental federalism”). See also BILIANA CICIN-SAIN AND ROBERT W. KNECHT, *THE FUTURE OF U.S. OCEAN POLICY* 112-114 (2000).

⁴⁶ 16 U.S.C. § 1456(b).

exercise its consistency authority, each enforceable policy upon which the program relies must also receive federal approval.

Federal reviews, such as those conducted by the Minerals Management Service pursuant to the Outer Continental Shelf Lands Act, are done to ensure that an activity or permit meets federal requirements.⁴⁷ Consistency reviews ensure that activities and licenses meet with state requirements which take into account unique state, local and regional environmental conditions that may not be adequately addressed at the federal level. Finally, the final arbiter of whether a federal license or permit may be issued is the Secretary of Commerce, who reviews appeals of state consistency determinations.⁴⁸

Since the passage of the CZMA, Congress has shown its intent to provide states the authority to review activities that affect states' coastal zones – the nation's economically and resource-rich coastal areas. Under the CZMA, coastal states have developed comprehensive programs to support responsible economic development and vibrant coastal communities while conserving the coastal environment. The federal consistency provision has been a primary method of ensuring sustainable development of the nation's coasts and remains vital in planning for and reviewing proposed offshore activities, including oil and gas, liquefied natural gas and alternative energy sources. FERC's improper issuance of

⁴⁷ 43 U.S.C. § 1331 – 1356a.

⁴⁸ 16 U.S.C. § 1465.

a pre-consistency license not only deteriorates state and federal capacity to manage the nation's vital coastal resources but also has negative consequences for state and federal permit processes including compliance with federal regulations and enforcement of permit conditions.

CONCLUSION

For these reasons, as well as those set forth in the Petitioners' briefs, the Court should vacate FERC's *Order* and *Rehearing Order* and remand the matter back to the Commission to obtain Oregon's consistency determination prior to issuance of the federal license.

Respectfully submitted this 29th day of January, 2010,



Kristen M. Fletcher
Executive Director
Coastal States Organization

Kristen M. Fletcher (SC 012564)
Coastal States Organization
444 N Capitol St, Suite 322
Washington, DC 20001
Telephone: (202) 508-3861
Fax: (202) 508-3843

Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 29th day of January, 2010, I electronically filed this Brief of *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:


STEPHANIE M. PARENT
OREGON DEPARTMENT OF JUSTICE
1162 COURT STREET, NE
SALEM, OR 97301-4096

U.S. Mail
 Hand Delivered
 Overnight Express

CYNTHIA A. MARLETTE
FEDERAL ENERGY REGULATORY
COMMISSION
RM. 91-01
888 FIRST STREET, NE
WASHINGTON, DC 20426

U.S. Mail
 Hand Delivered
 Overnight Express

Dated: January 29, 2010



Counsel for Amicus Curiae