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Daniel R. Mandelker

Thea A. Sherry

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THE NATIONAL COASTAL ZONE MANAGEMENT ACT OF 1972

DANIEL R. MANDELKER*

THEA A. SHERRY**

National concern over developmental pressures on the ocean and Great Lakes shorelines led Congress, late in 1972, to enact comprehensive legislation that requires the thirty coastal states to develop a state-based program of management and control over their coastal areas.¹ More than 75% of the American population now lives within this coastal zone, and this proportion has been increasing.² While federal and state agencies have historically exercised jurisdiction over a variety of development activities in coastal waters,³ jurisdiction over

* Professor of Law, Washington University.

** Third year student, Washington University School of Law; A.B., University of California, Riverside, 1971.

1. National Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280, amending 33 U.S.C. §§ 1101 *et seq.* (1970) [hereinafter cited as CZMA]. There are as many as 101,100 statute miles of shoreline in the United States. For a detailed breakdown by area or by state see PANEL REPORTS OF THE COMM'N ON MARINE SCIENCE, ENGINEERING AND RESOURCES, vol. I, pt. III, at III-7 (1969) [hereinafter cited as PANEL REPORT]; U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 168-70 (1972).

2. Statement of the Honorable Walter J. Hickel, Secretary of the Interior, *Hearings on S. 2802 et al. Before the Subcomm. on Oceanography of the Senate Comm. on Commerce*, 91st Cong., 1st & 2d Sess., ser. 91-59, at 1106 (1970) [hereinafter cited as *Hearings on S. 2802 et al.*]. See also U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 6 (1972). For a statistical summary with tables of coastal zone population distribution see NEW ENGLAND RIVER BASINS COMM'N, A PRELIMINARY ANALYSIS OF THE DEMOGRAPHY OF THE COASTAL ZONE (June 1973).

3. See *THE WATER'S EDGE: CRITICAL PROBLEMS OF THE COASTAL ZONE* ch. 11 (B.H. Ketchum ed. 1972).

new land development along the water's edge has been left to the counties and municipal governments that line our shores. The National Coastal Zone Management Act of 1972 (CZMA)⁴ does not require the states to pre-empt local regulatory controls in coastal areas. But it does provide matching federal grants to enable the states to develop a coastal "management program," including some form of state review over uses and developments in coastal areas.⁵ The CZMA thus takes its place as the first federal legislation to deal directly, in a critical segment of our natural environment, with the re-allocation of development control authority between the states and their local governments.⁶ Although little publicized and scarcely noticed outside the official circle of those concerned with coastal problems, the CZMA is a significant congressional initiative in the emerging area of state-based controls over land and water uses.

This article will focus on those innovative sections of the Coastal Zone Management Act which provide for this expanded exercise of state-based review and regulation. The history of the CZMA will be traced, and the major elements of the state planning and land use regulation processes which the Act mandates will then be outlined. Special attention will be paid to those sections of the CZMA which present problems of implementation to state coastal zone administrators.⁷

4. 33 U.S.C. §§ 1101 *et seq.* (1970) [hereinafter, references to CZMA sections in this article will be to the section numbers as they appear in the session law].

5. Federal grants are limited to two-thirds of the cost of a state program. CZMA § 305(c). No penalties are attached to a failure to accept a federal grant, but the growing importance of coastal planning in the coastal states should make federal grants exceptionally attractive.

6. Congress is presently considering comprehensive national land use policy legislation that would require some form of state land use control on a state-wide basis. *See* S. 268, 93d Cong., 1st Sess. (1973), and text at notes 18, 30 *infra*.

7. Note that the CZMA leaves unspecified one of the more serious problems that has troubled land use control specialists: definition of the type of development which the state program must cover. Most zoning ordinances are based on a pre-regulation by the municipality of zoning uses. But the American Law Institute Code, from which the state regulatory techniques of CZMA were borrowed, contemplates a more direct control over "development" by state and local agencies. *See* ALI MODEL LAND DEV. CODE § 1-202 (Tent. Draft No. 2, 1970). While CZMA presumably contemplates the more direct control of development for which the ALI Code provides, this intent is nowhere spelled out in the Act. As a result, coordination of the state CZMA program with more conventional local zoning and similar regulations may prove difficult.

In addition, the failure to spell out the types of development to be covered

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I. THE STRATTON COMMISSION

Congressional concern over coastal zone development was first expressed in the mid-1960's when Senator Warren Magnuson of Washington sponsored legislation creating the Commission on Marine Sciences, Engineering and Resources (or the Stratton Commission, after the Chairman Julius Stratton).⁸ The history and character of the coastal zone legislation passed in 1972 has been very much influenced by the work of this Commission. Many of the ideas which found their way into the CZMA had their origins in the Stratton Commission Report, which was issued in 1969 under the title, *Our Nation and the Sea—A Plan for National Action*.⁹

The recommendations of the Commission must be evaluated in their historical context. In the mid-1960's, the age of environmental concern had not yet fully dawned—federal water pollution control was in an emergent state¹⁰ and federal control over coastal waters was primarily exercised through the existing control over river and harbor improvements delegated to the Army Corps of Engineers.¹¹ The Stratton Commission Report reviewed the extent to which local, state, and federal regulations existed in the coastal zone and, in one of its panel reports, made specific recommendations for what it called the “management” of coastal zone areas.¹² This Panel Report synthesized the planning and regulatory system which emerged in the 1972 coastal zone management legislation.

While not very explicit in detail, the Stratton Commission Panel Report recommended federal legislation to authorize a federal pro-

by state CZMA programs leaves open the question of how comprehensive the state program must be. May the state program leave subdivision control entirely to local government regulation, with the state program applying only to local zoning regulations? May the state program define the types of development included and leave out minor structural and developmental changes in coastal areas, or must even minor developments be included? May the CZMA program choose an arbitrary cutoff point on the size of developments included, leaving out, for example, all subdivisions of under 50 units? Guidance to answering these and similar questions is not provided in the CZMA.

8. The Act creating the Commission is the Marine Resources and Engineering Development Act of 1966, 33 U.S.C. §§ 1101-08 (1970).

9. REPORT OF THE COMM'N ON MARINE SCIENCE, ENGINEERING AND RESOURCES (Jan. 1969) [hereinafter cited as STRATTON COMM'N REPORT].

10. The Federal Water Quality Act, 33 U.S.C. §§ 1151, 1156-58, 1160, 1172 (1970), was not enacted until 1965.

11. Power to the Corps of Engineers was given by the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 (1970).

12. PANEL REPORT III-2.

gram that would set standards, review for compliance with federal guidelines, and make funds available for both planning and regulation at the state level. At the state level, the Report suggested that federal legislation should permit variety in state organizational structures, but recommended a state coastal authority possessing powers remarkably like those which finally emerged in the CZMA:

- To plan for multiple uses of the coastal and lakeshore waters and lands.
- To resolve conflicting actions through regulation, zoning, and/or acquisition.
- To maintain a continuing inventory of studies and to sponsor and conduct research as a contributing link in decision making processes.¹³

By placing control over coastal zone areas in a state agency, the Stratton Commission hoped to modify the fragmented pattern of control created by the diffusion of responsibility among counties, municipalities, and independent agencies.¹⁴ The state's mandate was broadly stated: "The guiding principles . . . should include the concept of fostering the widest possible variety of beneficial uses so as to maximize net social return."¹⁵ With this mandate, state control over coastal areas as envisioned by the Commission was not to be directed solely toward conservation and environmental protection. Nevertheless, the Commission's preference for an independently established state coastal authority would have inhibited the integration of a coastal zone program with land use control in the rest of the state. Insistence on an independent state coastal agency was dropped from the legislation as finally enacted.

13. *Id.* at III-148.

14. Intrastate responsibility is divided since counties and municipalities have primary control over land use regulation and solid waste disposal. Separate state agencies are responsible for administering programs for water and air pollution control, water use, highways, and the sale and lease of state-owned lands. See Ducsik, *The Crises in Shoreline Recreation Lands*, PAPERS ON NATIONAL LAND USE POLICY ISSUES PREPARED FOR THE UNITED STATES SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92d Cong., 1st Sess. 107, 128 (1971); Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. REV. 1, 21 (1972).

15. STRATTON COMM'N REPORT 57.

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II. HISTORY AND OUTLINE OF THE COASTAL ZONE MANAGEMENT ACT

Congress first considered coastal zone legislation in 1970 in a bill containing the outlines of what was later to become the CZMA.¹⁶ This bill provided minimal direction regarding methods for state regulation and did not receive floor consideration. When Congress again gave major attention to coastal zone legislation in its 1971 and 1972 sessions, a national land use policy bill¹⁷ had been introduced, requiring the exercise of a similar state agency control over land use in all the states.¹⁸ This land use bill was based on model legislation being prepared by the American Law Institute (ALI).¹⁹ While the precise method of state supervision in this legislation has varied,²⁰ the essence of both the ALI and national land use policy bill proposals is a method of state intervention in local land use control by regulating areas of critical environmental concern and developments of more than local significance. These developments would include major private residential and nonresidential projects as well as developments in the vicinity of highway interchanges, airports, and other major public facilities.

A similar method of state control over land uses within the coastal zone was incorporated in Senate Bill 582 (S. 582), the National

16. S. 3183, 91st Cong., 2d Sess. (1970). Under this bill, the state need only have assured "consistency" with the state plan.

17. S. 992, 92d Cong., 1st Sess. (1971); H.R. 4332, 92d Cong., 1st Sess. (1971). This bill is usually referred to by this title, although the actual phraseology has varied from time to time.

18. S. 992, 92d Cong., 1st Sess. (1971); H.R. 4332, 92d Cong., 1st Sess. (1970); S. 638, 92d Cong., 1st Sess. (1971); H.R. 9229, 92d Cong., 1st Sess. (1971).

19. ALI MODEL LAND DEV. CODE arts. 7, 8 (Tent. Draft No. 3, 1971). Articles 7 ("State Land Development Regulation") and 8 ("State Land Development Planning") authorize state governments to plan and control "development" when state or regional interests are paramount, allowing the states to supersede local regulation. See also STRATTON COMM'N REPORT 286; PANEL REPORT III-148-55; R. BABCOCK, *THE ZONING GAME* 166-72 (1966); Babcock, *Comments on the Model Land Development Code*, 1972 URBAN L. ANN. 59.

20. For example, Florida has focused its state control by participating in regulation of areas of critical state concern and developments of regional impact. FLA. STAT. ANN. §§ 380.05, 380.06 (Supp. 1973). The latter category combines two sections from the ALI MODEL LAND DEV. CODE (Tent. Draft No. 3, 1971): "Development of State or Regional Benefit" (*Id.* § 7-301 at 21) and "Large Scale Development" (*Id.* § 7-401 at 27). FLA. STAT. ANN. §§ 380.012-10 (Supp. 1973). The ALI has three techniques, the two above and an additional control over "key facilities." See also Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URBAN L. ANN. 103.

Coastal Zone Management Bill introduced in the Senate in 1971.²¹ S. 582 closely followed the ALI proposal for state control over land use, but limited state intervention to the coastal zone. The ALI model had been drafted for state legislative adoption, however, and takes the form of state legislation merely specifying the powers to be exercised by states and localities. As a consequence, when S. 582 followed this ALI proposal, it did not indicate how much initiative was to be exercised by local governments in the control of developments and areas of state significance, leaving this problem to be worked out in the administration of the law. This approach may be acceptable in state enabling legislation which specifies the delegation of regulatory authority. It is not as acceptable in federal legislation which delineates state and local roles in administration, especially since the Stratton Panel had emphasized the need for a local government role. In addition, S. 582 made no attempt to resolve potential conflicts between the state air and water pollution control agencies and the state coastal zone agencies. This omission was significant because water pollution had been one of the major coastal management problems reviewed by the Stratton Commission.²²

S. 582 was reported by the Senate Commerce Committee,²³ but was not debated on the floor. The Bill was again introduced in 1972 as Senate Bill 3507,²⁴ with changes made "to clear up conflicting matters of jurisdiction [primarily over control of water pollution], to place limitations on the coastal zone, and to broaden the participation of local governments, interstate agencies and areawide agencies in the preparation and operation of management programs."²⁵ A

21. 92d Cong., 1st Sess. (1971).

22. The Commission recommended that research on identifying specific pollutants be stressed through the assistance of the National Oceanic and Atmospheric Administration, Dep't of Commerce, and that the Rivers and Harbors Act of 1899 be amended to empower the Army Corps of Engineers to deny permits to prevent water pollution. STRATTON COMM'N REPORT 63, 74-78. Senator Kennedy offered an amendment to section 315 ("Authorization of Appropriations") to add funds for research emphasizing an investigation of offshore oil drilling. This amendment would have authorized NOAA to finance a detailed National Academy of Science study of this subject. It passed the floor of the Senate but was deleted by the conference committee. 118 CONG. REC. S.6661-72 (daily ed. April 25, 1972).

23. 117 CONG. REC. S.1652 (daily ed. Feb. 4, 1971).

24. 92d Cong., 2d Sess. (1972). For a discussion see 118 CONG. REC. S. 6654-72 (daily ed. April 25, 1972).

25. S. REP. No. 92-753, 92d Cong., 2d Sess. 7 (1972). S. 582 did not give local governments sufficient opportunity to fully participate. Furthermore, too much authority was given to the Secretary of Commerce, without opportunity

similar bill was introduced at the same time in the House of Representatives,²⁶ and this bill contained certain substantive modifications which were finally incorporated into the bill as passed.

One major difference between the Senate and House bills lay in the choice of federal agency to which administration of the bill was delegated. While the House bill placed administration in the Department of Interior, the Senate bill called for administration by the Department of Commerce, with a clear indication that actual administration of the law was to be carried out by its recently created National Oceanic and Atmospheric Administration (NOAA).²⁷ This difference in opinion over which federal agency should carry out the administration of coastal zone legislation had been intensified by introduction of the national land use policy bill in the same congressional session.²⁸ Senate sponsors viewed coastal zone legislation as an independent and necessary element of national land use control policy.²⁹ House sponsors tended to view coastal zone regulation as an extension of the more comprehensive regulation of land use by the states as provided by the national land use policy bill.³⁰ Sup-

for hearing and mediation at the local level. 118 CONG. REC. S.6655 (daily ed. April 25, 1972). Additionally, S. 582 defined "land and water use of regional benefit" but did not explicitly define "land use" or "water use." See note 66 and accompanying text *infra*.

26. H.R. 14146, 92d Cong., 2d Sess. (1972); see also 118 CONG. REC. H.7098 (daily ed. Aug. 2, 1972); H.R. REP. NO. 92-1049, 92d Cong., 2d Sess. 54 (1972).

27. Specific mention of NOAA was deleted in the final bill, but the Joint Explanatory Statement of the Committee of Conference states that "actual administration would be delegated to the Administrator of the National Oceanic and Atmospheric Administration." 118 CONG. REC. H.9325 (daily ed. Oct. 6, 1972).

28. S. 992, 92d Cong., 1st Sess. (1971); H.R. 4332, 92d Cong., 1st Sess. (1971).

29. S. REP. NO. 92-753, 92d Cong., 2d Sess. 10 (1972).

30. There were a number of congressmen who agreed with Congressman Kyl that the Department of the Interior should administer the national land use policy bill's program for comprehensive statewide planning, and that Interior would best be able to administer land use planning in the coastal zone. 118 CONG. REC. H.7101 (daily ed. Aug. 2, 1972). More importantly, responsibility was shifted to the Department of the Interior in H.R. 14146 on the theory that the CZMA was nothing more than a land use bill. For the debates on this issue in the House see 118 CONG. REC. H.7087-7114 (daily ed. Aug. 2, 1972). In addition, the Administration began to lean more toward sponsoring the national land use policy bill rather than two bills, one for the land and one for the coastal zone. See letters from Harrison Loesch, Assistant Secretary of the Interior, and William D. Ruckelshaus, Administrator of the Environmental Protection Agency, to Sen. Warren Magnuson, June 1, 1971, S. REP. NO. 92-526, 92d Cong., 1st Sess. 41, 43 (1971).

porters of national land use legislation in the House argued that if Congress could not defer consideration of the coastal zone bill while the national land use policy bill was pending, administration of the coastal zone bill should reside in the Department of Interior in order to avoid fragmentation of responsibility.³¹ Congressman Aspinall of Colorado even attempted to kill the coastal zone bill on the ground that it was unnecessary legislation.³² In this move he was supported by the Nixon Administration, which by then had lost interest in a coastal zone act and favored more comprehensive land use legislation.³³

These and other differences were ironed out in the conference committee which considered the CZMA.³⁴ The act as finally passed placed its administration in the Department of Commerce, with an added provision that concurrence in the coastal zone program would have to be obtained from the federal agency administering the national land use policy bill should that bill be enacted.³⁵ Nevertheless, coordination with the national land use policy bill remains a troublesome issue.³⁶

As enacted, and as it affects the control of coastal zone areas within a state, the CZMA provides both for "Management Program Development Grants" in section 305 and "Administrative Grants" in section 306. These federal grants are to be matched by the states on a one-third basis. While confusing on a first reading, the intent of the law is to provide federal funding to the states to develop what is more commonly known as a "plan" for the state's coastal areas, to be followed by an implementation program that requires state regulation

31. 118 CONG. REC. H.7094-98 (daily ed. Aug. 2, 1972).

32. 118 CONG. REC. H.7093 (daily ed. Aug. 2, 1972). Russell Train, then Chairman of the Council on Environmental Quality, also wished to avoid inconsistencies and duplication by placing administration with the Department of the Interior. He concurred, however, with those supporting administration by the Department of Commerce in the belief that NOAA was important to the administration of the coastal zone. Statement of Russell Train, *Hearings on S. 582 et al. Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-15, at 119-40 (1971).

33. See note 28 *supra*.

34. 118 CONG. REC. H.9799 (daily ed. Oct. 12, 1972); 118 CONG. REC. H.9325 (daily ed. Oct. 6, 1972).

35. CZMA § 307(g). This section is repealed by the Senate version of the national land use policy bill if that bill is enacted. See S. 268, 93d Cong., 1st Sess., § 610(b) (2) (1973).

36. See note 82 *infra*.

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of uses and development. The following section discusses the relationship of these two components of the coastal zone program in detail.

III. MAJOR ELEMENTS OF THE COASTAL ZONE MANAGEMENT PROGRAM

The major elements of the CZMA which determine the state's role in land use control are found in the two parts of the statute that deal with the management and implementation of programs in the coastal zones. While these two parts of the law are not as clearly differentiated as they might be, they deal generally with management planning and policy development for the coastal zones and with implementary measures necessary to carry out the management program. To understand the role of the management program and its implementation, however, it is first necessary to examine the definition of the coastal zone area which the CZMA subjects to state control.

A. *Definition of the Coastal Zone*

Definition of the coastal zone area to which the coastal zone regulatory system applies has been a difficult problem both for those who have studied the coastal zone and for lawmakers. Coastal zone studies have emphasized that the planning and control of coastal zones is difficult to separate from the planning and control of adjacent land areas.³⁷ For example, the proper regulation of the coastal zone may often require the transfer of major development inland in order to avoid placement in the coastal area.³⁸ An appreciation of this kind of developmental trade-off is useful to planners but complicates the administration of a statute directed solely to coastal areas. The Stratton Commission Panel Report on coastal zone management had recognized that the coastal zone was a transitional region between two different environments, the land and sea,³⁹ and had defined the coastal zone as that part of the land affected by its proximity to the sea and that part of the ocean affected by its proximity to the land.⁴⁰ This definition is not very helpful to lawmakers. Nevertheless, the CZMA adopts this analysis and defines the coastal zone as the "coastal waters . . . and the adjacent shorelands . . . strongly influenced by each

37. *THE WATER'S EDGE*, *supra* note 3.

38. *Id.* at 192-93.

39. PANEL REPORT III-11.

40. *Id.*

other"⁴¹ Defining the seaward boundary was not troublesome; the CZMA extends it to the international boundary in the Great Lakes and to the outer limits of United States territorial jurisdiction in the oceans.⁴² Defining the inland boundary was more difficult; it was changed from an earlier and more rigid seven-mile limit⁴³ to the present CZMA definition which states: "The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters."⁴⁴

This change in definition was purposely adopted in order to give the states greater flexibility in the administration of the law,⁴⁵ a point emphasized by Russell Train, then Chairman of the Council on Environmental Quality, when testifying on behalf of the coastal zone. Train was asked whether entire islands, such as Long Island, could be designated as a coastal zone. He answered that such a designation was possible, stating that "this is one reason why we have left very great latitude to State administrative discretion rather than trying to solve all these questions by some kind of arbitrary statutory definition."⁴⁶ Train's statement echoes similar language used in the Stratton Commission Report.⁴⁷

The congressional intent that the states be permitted maximum flexibility in coastal zone designation is carried forward in NOAA guidelines for the administration of the CZMA.⁴⁸ These guidelines urge the states to recognize the many factors which may enter into the determination of the inland boundary, including existing local government boundaries, and also urge the states to anticipate coordination with the requirements of the national land use policy bill.⁴⁹

41. CZMA § 304(a).

42. *Id.*

43. S. 3460, 91st Cong., 2d Sess. (1970).

44. CZMA § 304(a).

45. *Hearings on S. 582 et al. Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-15, at 139 (1971).

46. *Id.* at 124.

47. Dr. John Knauss, a member of the Stratton Commission, stated: "We decided it was better to leave to the individual states the decision as to exactly how far inland they would define their coastal zone." *Hearings on S. 2802 et al.* 60.

48. 15 C.F.R. § 920.1 (1973).

49. *Id.*

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In addition, the states are encouraged to delimit a smaller coastal area for actual management within an apparently larger area which is to be studied for planning purposes.⁵⁰

In spite of the flexibility permitted by the CZMA, the designation of the coastal zone area remains troublesome. Problems may be simpler in some northeastern states, in which comparatively small local government units can be found along the coastline. Elsewhere, especially in the case of the large county units that line the West Coast, inclusion of an entire local government jurisdiction within the coastal zone is improbable. In these areas, integration of land use regulation within the coastal zone with regulation throughout the county will take considerable cooperation and coordination among state and local governments.

B. *The Management Program*

Central to the system of regulation contemplated by the CZMA is the management program. While the content of the management program has remained substantially unchanged since the legislation was first introduced, the program had originally been termed a "development" program.⁵¹ The change in terms was apparently made in order to avoid an implication that a static master plan was contemplated. Sydney Howe, President of the Conservation Foundation, suggested the change to indicate a more comprehensive program encompassing implementation as well as development.⁵² Shelley Mark, Director of the Hawaii Department of Planning and Economic Development, also called for a change from the master plan concept, which implies a "rigid one-shot type of effort," toward a "management plan and program."⁵³

Some confusion still persists in the legislation as finally enacted. In the Act's definition section, "management program" includes a "comprehensive statement" in words, maps, illustrations, or other media which set forth "objectives, policies, and standards" to guide public and private uses in the coastal zone.⁵⁴ While not requiring a formal plan, this definition does seem to require the adoption of

50. *Id.*

51. Statement of Sydney Howe, *Hearings on S. 2802 et al.* 973.

52. *Id.* at 971.

53. *Hearings on S. 2802 et al.* 1205.

54. CZMA § 304(g).

standards and guidelines. The section authorizing *development* grants for "management programs" is more comprehensive than this definition would indicate. There are six elements: (1) an identification of coastal zone boundaries; (2) a definition of permissible land and water uses; (3) an "inventory and designation of areas of particular concern;" (4) an identification of the means by which the state proposes to exert control over land and water uses; (5) "broad guidelines on priority of uses;" and (6) a description of a proposed organizational structure.⁵⁵

One major difficulty with the statutory language is that the Statute fails to draw clear distinctions between that part of the management program which is included within the conventional planning process and that part of the management program which includes substantive implementation and regulation. An argument may be made, for example, that since the "definition" of permissible uses is required as part of the management program to be prepared under the development grant, the state must through some substantive legal means secure the regulation of those uses. This confusion is not clarified by the section of the Act dealing with *administrative* grants for management programs and containing the implementary provisions. That section of the Act provides that "Prior to granting approval of a management program . . . the Secretary [of Commerce] shall find that: (1) [t]he state has developed and adopted a management program . . ." ⁵⁶ Another difficulty is that the distinction between management as planning and management as implementation is not entirely clarified by NOAA guidelines, which combine the planning and implementation elements of the state's program into one part.⁵⁷ A studied reading of the Statute, however, would suggest that the parts of the law requiring substantive state regulation are found in the section that authorizes the administrative grants.⁵⁸ To distinguish this implementation function from the planning and inventory function, therefore, it is convenient to refer to the substantive and im-

55. *Id.* § 305(b)(1)-(6).

56. *Id.* § 306(c)(1). This sentence could mean that the states must "adopt" a definition of "permissible uses" as part of the administrative program which is supported by the administrative grant. But the failure to distinguish in this sentence between the planning and implementation phases of the management program is confusing.

57. 15 C.F.R. § 920.10-.16 (1973).

58. CZMA § 306(c)(1)-(9).

plementary requirements of the Statute as the implementation program.

C. *The Implementation Program*

Section 306 of the Statute, dealing with administrative grants for what has been termed the implementation program, first provides that the states, acting either through their own agencies, local governments, or areawide or similar agencies, must have the requisite legal authority "to administer land and water use regulations, control development . . . , and to resolve conflicts among competing uses." They must also have the legal authority to acquire any necessary interest in land "when necessary to achieve conformance with the management program."⁵⁹ This part of the Act explicitly provides for local government participation in the implementation program, overcoming this omission in earlier bills.⁶⁰ The local government role is also reinforced by provisions that require coordination of state regulation with local plans,⁶¹ and continuing state consultation with local governments.⁶² These provisions are drafted broadly to include regional, interstate, state and federal agencies as well, but the precise role of these agencies in the implementation process is not clarified.

More perplexing are the legal arrangements to be made for the sharing of implementation powers between state and local agencies. Departing somewhat from the recommendation of the Stratton Commission Panel Report, the CZMA requires designation of a single state agency to receive and administer federal grants,⁶³ but does not require creation of a separate coastal authority. The Statute also requires that the state adopt either one or a combination of three methods for the "control of land and water uses" within the coastal zone: (1) creation of state criteria and standards for local implementation subject to state administrative review; (2) direct state regulation; or

59. *Id.* § 306(d). In addition, a state need not implement its management program for the entire coastal zone at once. The Act authorizes "a management program [to be] . . . developed and adopted in segments so that immediate attention may be devoted to those areas within the coastal zone which most urgently need management programs . . ." *Id.* § 306(h). Coordination of the various segments of a management program into a unified program is required "as soon as is reasonably practicable." *Id.* See also NOAA Guidelines, 15 C.F.R. § 960.44 (1973).

60. *Id.* § 306(c)(1).

61. *Id.* § 306(c)(2)(A).

62. *Id.* § 306(c)(2)(B).

63. *Id.* § 306(c)(5).

(3) “[s]tate administrative review for consistency with the management program of state, local, or private plans, projects or land-use regulations, . . . with power to approve or disapprove after public notice and an opportunity for hearings.”⁶⁴ Although this provision is comprehensive, some interpretive problems remain. The most serious question is whether the three methods of state implementation authorized by the Act are commensurate. Note, for example, that state administrative review, the third option, must include the power to review such explicit local actions as plans and projects. If the state chooses instead to proceed by way of direct state regulation, must this regulation be equally as comprehensive? The third alternative also contemplates state review of public as well as private development, a widesweeping and comprehensive delegation of authority to the state coastal agency which could supersede the authority of other state development agencies in the coastal zone. Again, must direct regulation (or state standard setting) be equally as comprehensive?

Other sections of the law create further complications. One of these, as indicated above, concerns the coordination of regulatory programs between the state coastal zone agency and the state air and water pollution control agencies. This problem had not been dealt with in the bills introduced in the House and Senate in 1972, and the third alternative for state control, state administrative review, could make the implementation plans of state pollution control agencies subject to review by the coastal zone agency. In conference committee, however, provisions were added which saved the jurisdiction of state air and water pollution control agencies, thus apparently modifying the three control powers the state coastal agency may exercise.⁶⁵ This change was accomplished by adding a section that makes “requirements” established in federal and state air and water pollution control programs binding on the state’s coastal zone management program.⁶⁶ In addition, “water uses” are defined⁶⁷ to exclude the regulation of water pollutants.⁶⁸

64. *Id.* § 306(e) (1) (A)-(C).

65. The definition of “water use” in CZMA § 304(h) should be read in conjunction with CZMA § 307(f). See notes 66-68 and accompanying text *infra*.

66. CZMA § 307(f). The pre-emptive effect of this legislation is potentially far-reaching to the extent that state pollution abatement agencies are authorized to impose land use controls. See 42 U.S.C. § 1857c-5(a) (2) (B) (1970) (Clean Air Act).

67. CZMA § 304(h).

68. Land uses are also defined. *Id.* § 304(i).

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The effect of these changes is to diminish considerably the application of state CZMA programs to water uses, while at the same time raising an additional problem—the relative emphasis to be placed in state CZMA programs on “land use” as distinguished from “water use” management and control. Statements in the Stratton Commission Report⁶⁹ and in congressional hearings⁷⁰ had emphasized that effective coastal zone management requires both land and water use control. Vast differences exist, however, between regulatory systems in the coastal waters and on the adjacent shorelands. Even prior to the CZMA, many state and federal agencies exercised significant regulatory controls in water areas.⁷¹ The implication is that CZMA was passed to provide more effective coordination of water use regulation rather than new control mechanisms. On the other hand, regulation of land use and development on adjacent shorelands was usually in the hands of local government units, resulting in the fragmentation of effective control within the state. CZMA also seems directed toward a centralized supervision of shoreland uses that require state control.

These important questions involving the relative emphasis to be placed on land uses and water uses in coastal zone management had not been resolved in the congressional reports, and the addition of land and water use definitions in the law does not ease the problem. For example, water uses, defined as any activities “conducted in or on the water,” presumably include even such coastal activities as pleasure boating, surfing, and skin diving, subjecting them to regulation under a state CZMA program. Whether such intensive regulation of water activities was intended is problematic. The serious attention given to recreational and developmental activities along the coasts by the Stratton Commission Report⁷² and by congressional

69. STRATTON COMM'N REPORT 49-81. The discussion is on both seaward and landward effects.

70. From the beginning, general discussion of the coastal zone centered on discussion of the national land use policy bill as well as a coastal zone bill; the bills were not considered inconsistent. *See, e.g.*, Statement of Harrison Loesch, Assistant Secretary of the Interior, *Hearings on H.R. 2492 et al. Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., ser. 92-16, at 296 (1971); Statement of Russell Train, *Hearings on S. 2802 et al.* pt. 2, at 1127.

71. *See, e.g.*, The Water Quality Act, 33 U.S.C. §§ 1151, 1156-58, 1160, 1727 (1970); The Clean Air Act, 42 U.S.C. §§ 1857 *et seq.* (1970).

72. STRATTON COMM'N REPORT 70, 71, 215-17.

hearing witnesses indicates instead that a heavy emphasis on improved land use controls, as distinguished from water use controls, was intended as the primary contribution of state-based regulation under the CZMA.

Three other requirements in the CZMA that relate to controls over land use and development reinforce the conclusion that the Act is directed primarily toward improved land use regulation. These requirements, however, raise additional questions concerning the intended distribution of regulatory power between state and local governments. Recall for a moment that the coastal states are required by the CZMA to implement the management program by one of the following previously discussed methods—standard setting, direct regulation, or administrative review.⁷³ The three additional requirements provide for additional controls over development which further strengthen the state's role in land use control in coastal areas.

The first of these three additional development control requirements provides that the state CZMA program is to include a method of "assuring that local land and water use regulations . . . do not unreasonably restrict or exclude land and water uses of regional benefit."⁷⁴ Since this additional requirement immediately follows the provision specifying the methods of state implementation, the "assurance" concerning local regulation of uses of regional benefit arguably must be afforded through one of the authorized methods of implementation at the state level. This conclusion is, however, not inescapable. A state might argue that it has complied with the CZMA by determining to its satisfaction that local regulations as drafted and administered "assure" that developments of regional benefit will not be unreasonably restricted, even though the state does not retain the formal power to set aside or modify local regulations which affect such development.

The second additional development control requirement, which appears in that part of the Statute dealing with implementation but not in that part dealing with state regulatory and review methods,

73. CZMA § 306(e)(1)(A)-(C).

74. *Id.* § 306(e)(2). For a decision construing an analogous provision under the federal Clean Air Act of 1970 see *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973). The case suggests that the "assurances" of necessary state funding and authority required by the Clean Air Act may not actually require the enactment of substantive state statutes and the adoption of implementary state regulations.

also addresses the problem of development of more than local significance.⁷⁵ This provision, which appeared only in the House bill and was added in conference committee, requires that the state CZMA program provide "for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature."⁷⁶ The House Committee Report indicates that this section was inserted to clarify an intent that the state management program be concerned with coastal zone developments that affect national interests.⁷⁷ Although the facilities to which this provision applies are not identified, the provision was apparently inserted at the request of the electric utility industry, which was concerned that state programs might unreasonably exclude power plants and other facilities that serve the needs of more than one state.⁷⁸ Again, however, no method of providing for this "adequate assurance" is specifically indicated. Presumably, state approval of local ordinances and their method of enforcement may alone be sufficient even though no formal method of state administrative review or control is afforded.

The third additional development control requirement, also in the House bill, and added in conference committee, requires procedures in the state program to designate areas "for the purpose of preserving or restoring them for their conservation, recreational, ecological, or aesthetic values."⁷⁹ This provision would appear to provide the regulatory authority to designate "areas of particular concern," which are to be identified as part of the inventory process of the management program. Once more, no indication is given concerning the extent of state supervisory or regulatory control required for implementation.

These three additional development control requirements all appear to reinforce the conclusion that the CZMA was intended primarily as a land use control measure, since all three provisions appear directed primarily toward land rather than water uses. The one exception appears in the provision dealing with water as well as land uses of regional benefit, although the impact of this provision on

75. CZMA § 306(c)(8).

76. *Id.*

77. H.R. REP. NO. 92-1049, 92d Cong., 2d Sess. 18 (1972).

78. Interview with Mr. John Husse, staff member, Subcommittee on Oceans and Atmosphere, Senate Committee on Commerce, June 14, 1973.

79. CZMA § 306(c)(9).

water areas is limited by the fact that most uses of regional benefit in the coastal zones will be located on the shoreland.⁸⁰ Areas to be selected for preservation and restoration might possibly include water areas, although in most cases the deterioration which has occurred in coastal waters is produced by recreational and similar uses on adjacent coastlines.⁸¹

CONCLUSION

Critics of the American land use control process have long argued for greater state involvement in the regulatory system and have called for greater assumption of state power over the land use decisions of local government. Though restricted in application to the coastal zones of the thirty coastal states, the Coastal Zone Management Act of 1972 represents the first national effort, through congressional initiative, to bring about a re-allocation of these land use control powers.

The CZMA, however, came as a response to pressures for legislative action from those concerned primarily with coastal preservation and enhancement. The driving force for the legislation was provided from that direction, and not by those who have historically been concerned with the larger problems of comprehensive planning and land use control and management. Although concepts developed by land use specialists were finally incorporated in the CZMA, the Act still stands as special-purpose legislation. Its position outside the structure of a more comprehensive land use control system presents one of the major problems of implementation.⁸² These problems may well be resolved by Congress when the national land use policy bill is finally enacted, but many states will face serious problems of implementation if they must meet the requirements of both federal statutes within their jurisdiction. As has been indicated, especially in the smaller coastal states, land use decisions made outside coastal areas by a different regulatory authority often have a significant effect on the development and preservation of the coastal zones.

80. *Id.* § 306(e)(2).

81. *Id.* § 307(c); *see, e.g.*, CAL. PUB. RES. CODE § 27000 *et seq.* (Deering Supp. 1973).

82. *See* S. 268, the latest national land use bill which passed the floor of the Senate on June 21, 1973; 119 CONG. REC. S.11663 (daily ed. June 21, 1973) The Senate sought to coordinate the land use bill with CZMA. The House has not yet sought this perspective. The issue is as yet unresolved.

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Despite these problems, the CZMA represents a valuable contribution to the development of American land use control systems. Although somewhat flawed by the pressures of congressional compromise, which are reflected in the Act's language and requirements, carefully developed coastal zone management programs can make a significant contribution to the enhancement and preservation of our coastal areas. How such a program might be implemented is indicated by a recently published review of the present status of state coastal zone legislation.⁸³ Most coastal laws currently in effect are either directed toward specific regulatory problems, such as the wetlands on the East Coast,⁸⁴ or limit their jurisdiction to narrowly defined coastal zone areas if they authorize more comprehensive land use controls.⁸⁵ In many areas of the country, the ecologically differentiated character of coastal areas will make this kind of limited functional control possible. Elsewhere, in the smaller coastal states (including Hawaii), the island territories, and Puerto Rico, the Coastal Zone Management Act of 1972 will undoubtedly provide an impetus to the further development of unified systems of statewide land use control.

83. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, UNITED STATES DEP'T OF COMMERCE, STATUS OF STATE COASTAL ZONE MANAGEMENT EFFORTS (preprint, May 1973). *See, e.g.*, N.J. STAT. ANN. ch. 185 (Supp. 1972).

84. For examples of East Coast wetlands statutes see MASS. ANN. LAWS ch. 130, § 104 (1972); ME. REV. STAT. ANN. tit. 12, §§ 4701-09 (1970); MD. ANN. CODE art. 66c, §§ 718-31 (Supp. 1970).

85. For an example of a comprehensive state statute see FLA. STAT. ANN. §§ 380.012-10 (Supp. 1973). *See also* Finnell, *supra* note 20.

NOTES

