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PROTECTING OUR COASTAL INTERESTS: A POLICY PROPOSAL FOR COORDINATING COASTAL ZONE MANAGEMENT, NATIONAL DEFENSE, AND THE FEDERAL SUPREMACY DOCTRINE

By
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I. INTRODUCTION

No other region in our country is subject to so many urgent demands from powerful conflicting interests as the coastal area. More than 50 percent of the population of the United States currently lives within fifty miles of the ocean, the Gulf of Mexico, or the Great Lakes; it is estimated that by the year 2000, 80 percent of our population will inhabit those areas.¹ In addition to the residen-

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The views expressed herein represent those of the authors and do not purport to represent those of the Office of the General Counsel, Department of the Navy, or any other agency or department of the United States.

¹ See S. REP. No. 92-753, 92nd Cong., 2nd Sess., reprinted in [1972] U.S. CODE CONG. &

tial development made necessary by this rapid population growth, other pressures for development and utilization come from economic and political interests on behalf of energy production, commercial fishing, continental shelf mining, recreation, and shipping. Conservationist and preservationist forces advocate equally vigorous countermeasures to limit development efforts. The federal government also has a dual interest in the coastal area; it not only serves as arbitrator among competing non-federal claimants for coastal area control, but is itself a proprietor of coastal property and a primary user of coastal resources. Recognizing the national significance and unique problems of balancing these interests in the coastal zone, Congress passed the Coastal Zone Management Act of 1972 (CZMA).² This Act, as will be reviewed below, establishes a complex system of federal-state interaction for planning and management of the nation's coastal resources.

The complexity of regulating the varied and competing interests in the coastal zone is compounded further by the concept of federal supremacy.³ Certain of these interests clearly are governed by supremacy principles while others are much more amenable to state regulation. A prime example of an important coastal interest governed by federal supremacy doctrine is national defense. Obviously, many defense related activities and the siting of defense installations must take place within the coastal zone. The very nature of the majority of Navy and Coast Guard activities requires a coastal location. The coastline is also the site for a significant portion of Army, Air Force, Marine Corps, and NASA programs.

It is the thesis of this article, however, that no clear standard has emerged from the CZMA which adequately defines the weight to be given to national defense in balancing coastal zone interests and is at the same time consistent with the federal supremacy doctrine. Consequently, state coastal zone management programs generally offer no pragmatic guidelines for distinguishing between interests which are subject to federal supremacy and those which are not. The absence of such guidance, or at least unambiguous procedures for carrying out such balancing, has led to conflicting and often inadequate consideration of the national defense interests in state

AD. NEWS 4777.

² 16 U.S.C. §§ 1451-1464 (Supp. V, 1975); P.L. 92-583, 86 Stat. 1281, signed by the President October 27, 1972; Amended P.L. 94-370, 90 Stat. 1013 July 26, 1976; P.L. 95-372, 92 Stat. 630 September 18, 1978.

³ See section II, E *infra*.

and local coastal zone management programs.

In our opinion the CZMA does provide the framework for a policy that will balance national defense and other vital national interests in a manner that is both consistent with federal supremacy doctrine and compatible with the CZMA's goal of state coordination of coastal management. What is needed, however, is a coherent and uniform policy that provides greater deference to federal agencies' views in the initial development of the state and local coastal programs. Additionally, such a policy should be flexible enough to accommodate the often rapid changes in federal agency activities, particularly those related to national defense, resulting from changes in national and international circumstances.

This article will not attempt to examine comprehensively the substantive and procedural aspects of the CZMA or the National Oceanic and Atmospheric Administration (NOAA) regulations under which the Act is administered.⁴ Other commentators have done that proficiently.⁵ Rather, the focus here will be on the consideration of national interests and national security by the CZMA and its implementing regulations, the exclusion of federal lands from the coastal zone, and federal supremacy. This article will also examine the often problematic manner in which state and local coastal management programs have dealt with national security. Finally, policy recommendations will be made for dealing with the complicated and crucial problem of balancing interests in the coastal zone.

II. PROBLEMATIC ISSUES UNDER THE CZMA AND NOAA REGULATIONS

A. *General Framework of Federal-State Interaction*

The CZMA enumerates a number of competing interests and national goals in the coastal zone and fosters, through the incentives of federal grants and federal agency cooperation, the establishment of a system of individual state and local management programs.⁶

⁴ 15 C.F.R. §§ 920-920.61 (1979).

⁵ See Schoenbaum & Parker, *Federalism in the Coastal Zone: Three Models of State Jurisdiction*, 57 N.C. L. REV. 231 (1979); Finnell, *The Federal Regulatory Role in Coastal Land Management*, AM. B. FOUNDATION RESEARCH J. 169 (1978); Zile, *A Legislative-Political History of the Coastal Zone Management Act of 1972*, 1 COASTAL ZONE MANAGEMENT J. 235 (1974).

⁶ See S. REP. No. 92-753, 92nd Cong., 2nd Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4776.

These state and local programs comprehensively plan for and manage coastal resources in coordination with the federal government. Primary responsibility for administering and approving this inter-governmental system lies with the Secretary of Commerce and the Secretary's designee, the Associate Administrator for Coastal Zone Management of NOAA.⁷ The Act envisions the development of state management programs with federal financial assistance, followed by NOAA approval of these programs.⁸ States with approved programs may participate in further federal grants,⁹ and may, through the Act's consistency provisions, play an important part in federal agency decision making.

Federal agencies conducting activities within, or with impacts upon, the coastal zone are assigned specific responsibilities under the CZMA. The basic statutory language defining federal agency obligations sets forth four separate requirements.¹⁰ First, all federal agencies "conducting or supporting activities directly affecting the coastal zone" shall carry out such activities "to the maximum extent practicable, consistent with approved state management programs."¹¹ The term "directly affecting" is presently undefined by the Act and NOAA regulations. Second, federal agencies undertaking development projects in the coastal zone must insure that such projects are consistent "to the maximum extent practicable" with the approved state management program.¹² Third, in issuing a federal license, permit, or lease to conduct an activity affecting land or water uses in the coastal zone¹³ or in the outer continental shelf,¹⁴ the granting agency must await certification by the state of the consistency of the proposed license, permit, or lease with the state management program or a variance determination by the Secretary of Commerce.¹⁵ Fourth, federal agencies may not grant

⁷ See 15 C.F.R. § 923.2(b) (1979).

⁸ See 16 U.S.C.A. §§ 1453-1454 (West Supp. 1979); 15 C.F.R. § 923.2 (1979).

⁹ 16 U.S.C.A. § 1455 (West Supp. 1979).

¹⁰ 16 U.S.C.A. § 1456 (West Supp. 1979).

¹¹ *Id.* NOAA regulations currently define "consistency to the maximum extent practicable" to mean full consistency with the state management program except as prohibited by existing law applicable to the federal agency, or unless unforeseen circumstances arise. 15 C.F.R. § 930.32 (1979).

¹² 16 U.S.C.A. § 1456(c)(2) (West Supp. 1979).

¹³ 16 U.S.C.A. § 1456(c)(3)(A) (West Supp. 1979).

¹⁴ 16 U.S.C.A. § 1456(c)(3)(B) (West Supp. 1979).

¹⁵ An applicant for a federal license, permit, or lease to conduct any activity affecting land or water uses in the coastal zone must certify to a NOAA approved state management agency that the activity will be consistent with the state program. The federal agency which

assistance to state and local agencies for coastal projects that have not been approved by the state coastal management agency unless the Secretary of Commerce finds that the project is consistent with the purposes of the CZMA or "necessary in the interest of national security."¹⁶

Another section of the Act provides that nothing in the CZMA shall be construed "to diminish either federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters."¹⁷ This section also states that the Act does not modify or repeal existing laws applicable to federal agencies. In addition, the CZMA does not affect any obligations of federal agencies under the Federal Water Pollution Control Act or the Clean Air Act.¹⁸ Thus, while not relieved of responsibility or obligations under other laws, federal agencies are subject to consistency requirements in activities directly affecting the coastal zone, in development projects in the coastal zone, and in the granting of licenses, permits, leases, or assistance.¹⁹

Implementation of the statutory scheme of the CZMA is entrusted to the Secretary of Commerce, whose authority has been largely delegated to the Assistant Administrator for Coastal Zone Management of NOAA.²⁰ The Secretary or the Secretary's designee

is to grant the license, permit, or lease may not do so until the state has concurred with the applicant's certification or the Secretary of Commerce has concluded that the activity is consistent with the objectives of the CZMA or is "otherwise necessary in the interest of national security." See 16 U.S.C.A. § 1456(c)(3)(A) (West Supp. 1979). Although federal agencies which must obtain permits for their activities from another federal agency are not, themselves, considered "applicants" for federal licenses or permits for purposes of this section, private contractors working for those agencies would be subject to this provision. See 15 C.F.R. § 930.52 (1979). See also Schoenbaum & Parker, *supra* note 5, at 246.

¹⁶ 16 U.S.C.A. § 1456(d) (West Supp. 1979).

¹⁷ 16 U.S.C.A. § 1456(e) (West Supp. 1979).

¹⁸ 16 U.S.C.A. § 1456(f); Clean Air Act, see 42 U.S.C.A. §§ 7401-7642 (West Supp. 1979); Federal Water Pollution Control Act, see 33 U.S.C. §§ 1251-1376 (Supp. V, 1975).

¹⁹ See also Brewer, *Federal Consistency and State Expectations*, 2 COASTAL ZONE MANAGEMENT J. 315, 318-20 (1976); Schoenbaum & Parker, *supra* note 5, at 238-53.

²⁰ The Secretary of Commerce, or the Secretary's representative in NOAA's Office of Coastal Zone Management (OCZM), acts somewhat as an intermediary between the federal agencies and the states. The CZMA gives the Secretary extensive approval, oversight, and mediatory responsibilities. Most importantly, the Secretary approves all state management programs. 16 U.S.C.A. § 1454(h) (West Supp. 1979). In so doing the Secretary must make sure that the state has complied with the requirements of the CZMA in developing its plan. Much of this is tied to the power to make administrative grants to the states. See 16 U.S.C.A. §§ 1454-1455 (West Supp. 1979). Additionally, the Secretary is required to "consult with, cooperate with, and to the maximum extent practicable, coordinate his activities

may not grant approval of a state program (and thereby trigger the federal consistency requirements mentioned above) unless the Secretary finds that the program has been developed "with the opportunity of full participation by relevant Federal agencies"²¹ or "unless the views of Federal agencies principally affected by such program have been adequately considered."²² NOAA's implementing regulations attempt to clarify the concept of "full participation" and "adequate consideration" of federal agency views. One such regulation identifies a number of federal agencies as being "relevant" to each state program and calls for contact between those federal agencies and the state.²³ Another section of the regulations provides for incorporation of federal agency input by the state during the development of the management program.²⁴ Thus

with other interested Federal agencies." 16 U.S.C.A. § 1456(a). Finally, the Secretary of Commerce is given responsibility for mediating disputes between the federal agencies and the states. 16 U.S.C.A. § 1456(h). *See also* S. REP., *supra* note 1, at [1972] U.S. CODE CONG. & AD. NEWS 4790, 4792.

²¹ 16 U.S.C.A. § 1455(c)(1) (West Supp. 1979).

²² 16 U.S.C.A. § 1456(b) (West Supp. 1979).

²³ 15 C.F.R. § 925 requires that each "relevant" federal agency be contacted by the state agency preparing the program, and that the federal agency advise the state agency "as to procedures to be followed in dealing with the Federal agency in relation to the development of the state program; and the state agencies shall comply with these procedures." 15 C.F.R. § 925.3(b) (1979). The regulation requires that the federal and state agencies maintain such relationships and communications during the development of the state program "as will enable each to be fully informed of the other's views in relation to the program as it is developed." 15 C.F.R. § 925.4 (1979).

²⁴ 15 C.F.R. § 923.51 specifically requires that the state agency contact each relevant federal agency, provide for federal agency input on a timely basis as the program is developed, maintain records of these contacts, and evaluate federal comments. When the state finds it appropriate it should "accommodate the substance of relevant comments in the management program" and indicate the nature of major comments by federal agencies, discussing any major differences or conflicts between the management program proposals and the federal views. 15 C.F.R. § 923.51(b)(4) (1979). Furthermore, states are required to consider and evaluate federal agency comments on management of coastal resources (including statements of national interest policies or claims related thereto), statements of national interests in the planning for or siting of facilities which are more than local in nature, uses which are subject to the management program, areas which are of particular concern to the management program, and federally developed or assisted plans that must be coordinated with the management program pursuant to the CZMA. 15 C.F.R. § 923.51(c) (1979). It is further provided that the Assistant Administrator "shall determine whether the State consideration of relevant Federal agency views during the program development has been adequate, based on the nature and reasonableness of a State's evaluation of and response to relevant Federal agency views that relate to substantive requirements of the Act, in particular those relating to boundaries, uses subject to management, areas of particular concern, legal authorities, guidelines on priorities of uses, organization, shore front planning process, energy facility planning process, the erosion planning process, and national interest considerations." 15 C.F.R. § 923.51(e) (1979).

the general framework of the CZMA and its implementing regulations call for a detailed system of division of responsibility as well as close cooperation between federal and state agencies.

B. National Interests

In addition to providing a federal-state division of responsibilities, the CZMA also envisions a distinction between "national" and "local" interests in the coastal zone. A primary goal of the CZMA is to assist the states in developing unified regional (including interstate regions and regions within a state) and state policies "for dealing with land and water use decisions of more than local significance."²⁵ Such policy should promote uniformity of policy within large geographical areas as well as uniformity in consideration of state-wide and national interests. Yet, although it clearly assumes that there is a separate "national interest" in the coastal zone, the CZMA does not define precisely what that interest is. The legislative history, however, indicates that some uses of the coastal zone, such as navigation and military activities, are solely federal responsibilities, while other uses, such as economic development, recreation, and conservation are concerns of both the federal government and the states.²⁶ But as the following discussion suggests, there is little in NOAA regulations that aids in applying such a distinction or defines the areas in which states must yield to "solely" federal responsibilities.

The state must provide in its program for adequate consideration of the national interests involved in "planning for, and in the siting of facilities . . . which are necessary to meet requirements which are other than local in nature."²⁷ This includes identifying the state's coastal zone boundaries under the management program²⁸ and providing definitions of permissible land uses.²⁹ The

²⁵ 16 U.S.C.A. § 1451(h) (West Supp. 1979).

²⁶ S. REP., *supra* note 1, at [1972] U.S. CODE CONG. & AD. NEWS 4778.

²⁷ 16 U.S.C.A. § 1455(c)(8) (West Supp. 1979).

²⁸ 16 U.S.C.A. § 1454(b)(1) (West Supp. 1979).

²⁹ 16 U.S.C.A. § 1454(b)(2) (West Supp. 1979). The regulations also require states, in establishing permitted uses, to "be cognizant of the requirements in subsection 306(c)(a) of the Act that the management program must provide 'for adequate consideration of the national interest in planning for, and the siting of, facilities (including energy facilities in, or which significantly affect, such states coastal zone) which are necessary to meet requirements which are other than local in nature.'" 15 C.F.R. § 920.12(b)(2) (1979). The regulation goes on to state, however, only that "states must have sufficient processes for providing such consideration." Part 920 also sets forth preliminary program approval criteria. It is

Secretary of Commerce is responsible for ensuring that the state makes these considerations.³⁰

The NOAA regulations explain that the primary purpose of requiring adequate consideration of national interests involved in the planning for and siting of facilities necessary to meet other than local requirements is "to assure that such facilities are considered in (1) the development of the State's management program, (2) the review and approval of the program by the Assistant Administrator, and (3) the implementation of the program as such facilities are proposed."³¹ The regulations identify, among the sources which specify the national interests to be considered during program development and implementation, the following: federal laws and legislation; policy statements from the President; statements from federal agencies regarding national interests specifically related to a state's coastal zone; and plans, reports, and studies from federal, state, and interstate agencies or groups.³²

therein required that each state demonstrate that "adequate steps have been or are being taken to meet requirements under section 306 or 307 of the Act, which involve Federal officials or agencies." 15 C.F.R. § 920.42(a)(4) (1979). Although the regulation expands somewhat on this requirement, the expansion is also in the most general terms, with no specific reference to any definition of the national interest. The regulation provides:

Pursuant to subsection 305(d)(2)(D) of the Act, [a] Coastal State is eligible to receive grants under this subsection if it has . . . [t]aken or is taking adequate steps to meet any requirement under Section 306 or 307 which involves any Federal official or agency. For purposes of this paragraph, the particular sections of 306 and 307 are: (i) Subsection 306(a)(1)—identification of excluded Federal lands; and (ii) Subsection 306(c)(1)—opportunity for full participation by relevant Federal agencies. This shall include advising Federal agencies (especially at the regional level) of the State's intent to apply for preliminary approval; (iii) Subsection 306(c)(8)—adequate consideration of the national interest involved in planning for, and in the siting of, facilities necessary to meet requirements which are other than local in nature; (iv) Subsection 307(c)—development of procedures for certifying Federal consistency with respect to Federal activities or development projects, and with respect to activities subject to Federal licenses or permits; (v) Subsection 307(d)—development of procedures for certifying Federal consistency with respect to Federal assistance to State and local governments; and (vi) Subsection 307(h)(1)—participation in mediation procedures, if appropriate. 15 C.F.R. § 920.42(b)(v)(c)(4).

³⁰ 16 U.S.C.A. § 1455(c)(8) (West Supp. 1979).

³¹ 15 C.F.R. § 923.52(a) (1979).

³² 15 C.F.R. § 923.52(g) (1979). States are advised, in considering the nature of natural interests associated with the planning for and siting of facilities that are more than local in nature, to "consult with Federal and other State agencies having responsibilities relating to these interests as well as with industries in other relevant entities to determine the potential demand for facilities in each State that are more than local in nature." 15 C.F.R. § 923.52(f) (1979). This regulation also advises the states to consult with federal and other state agencies involved in resources conservation and protection, and to weigh, in considering the national interest involved in such facility siting, "the configuration and size of a State's coastal

In the NOAA regulations there is a tabular summary of coastal uses and associated facilities which may involve the national interest in facilities planning or siting, and an identification of federal agencies which may be involved in such uses.³³ State plans must describe which national interests in facility siting were considered during program development, the sources relied upon, an indication of how and where these considerations are reflected in the substance of the management program, and a description of a process for continued consideration of identified national interests during program implementation.³⁴ In addition, where appropriate, the plan must include "[an] indication of when and where national interests in identified facilities may compete or conflict with other national interests in coastal resource conservation. In cases of such conflict, the program shall indicate how the conflict has been or can be weighed and resolved."³⁵

A final determination of the adequacy of a state plan's consideration of the national interests rests with the Assistant Administrator of NOAA.³⁶ In reaching this determination, the Assistant Administrator is required to "assess" the reasonableness of the claims of national interests made, the sources used to specify national interests, the consideration given in the management program to these national interests (including the weighing of competing interests), the responses of the state to major siting concerns raised by federal agencies or others, and adequacy of the procedure set forth in the plan for continuing consideration of national interests after the program has been approved.³⁷

NOAA has broad discretion to define, through the program approval process, what constitutes adequate consideration of the national interests under a state management program.³⁸ It might

zone; the quantity, quality and distribution of various coastal resources; and the coastal-dependent nature of those facilities."

³³ 15 C.F.R. § 923.52 (Table 1) (1979). The treatment of national defense in this table is superficial in the extreme. Under the heading "Uses" is listed "National defense and aerospace"; the "Associated facilities" for such uses are "Military bases and installations; defense manufacturing facilities; and aerospace facilities." "Associated Federal agencies" are listed as "Department of Defense, National Aeronautics and Space Administration." No other specific guidance is given.

³⁴ 15 C.F.R. § 923.52(b) (1979).

³⁵ 15 C.F.R. § 923.52(b)(2) (1979).

³⁶ 15 C.F.R. §§ 923.2, 923.72 (1979).

³⁷ 15 C.F.R. § 923.53 (1979).

³⁸ *American Petroleum Institute v. Knecht*, 609 F.2d 1306, 1313 (9th Cir. 1979) (upholding NOAA's approval of the California Coastal Management Program).

have been expected that NOAA would have set forth, in its program approval regulations, its system or its priorities for balancing competing state and federal interests, and its expectations as to the manner in which states would conduct and demonstrate their own "consideration" of national interests. However, despite the detail of the above regulations, they do little more than compel the states to seek and read the comments of federal agencies, and require the Assistant Administrator of NOAA to review the state's compliance with this limited "seek and read" process.

As pointed out below, the federal supremacy doctrine is the Constitutional foundation for resolving conflicts between state and federal law, and nothing in the CZMA makes this doctrine inapplicable to the program approval process under the CZMA. Nevertheless, the NOAA program approval regulations do not discuss this doctrine or its application to NOAA review of state programs. Indeed, while the supremacy doctrine generally accords priority to federal law, several of the NOAA regulations referred to above appear to encourage states to second-guess, or even oppose, federal agency proposals. No distinction is drawn in the NOAA regulations between those agency projects and activities mandated by other federal laws and those which are developed or implemented at the discretion of the federal agency. Moreover, there is no standard provided in the NOAA regulations either for the states' determination of how competing or conflicting national interests are to be weighed³⁹ or for the assessment by the Administrator of the reasonableness of agency claims of national interests and a state's consideration of these national interests.⁴⁰ A process of formal mediation is provided for the resolution of "serious disagreements" between federal agencies and coastal states during the development or initial implementation of a management program,⁴¹ but no standards are given by which these serious disagreements can be resolved between the parties, short of formal mediation, on the basis of relatively specific guidelines which take federal supremacy into account and which can be applied by the disagreeing parties.

Thus, little guidance is provided by which the federal agencies might anticipate the manner in which their opinions of the na-

³⁹ See, e.g., 15 C.F.R. § 923.52(b)(2) (1979).

⁴⁰ 15 C.F.R. § 923.52(i)(1) and (2) (1979).

⁴¹ 15 C.F.R. § 923.54 (1979).

tional interests are to be reviewed, by a state and by NOAA, or the standards against which these opinions are to be measured. Such a deficiency in the regulations practically ensures that disagreements of any substance between state and federal agencies will be referred individually to the mediation process, and prevents state and federal agencies from reaching informal agreement at the lowest practicable levels of decision making through reasonable appraisals of likely NOAA decisions.

C. *National Defense*

Although the CZMA is somewhat vague in defining the national interest, the Act's legislative history indicates that Congress viewed the national defense interest as being of major importance in the coastal zone.⁴² Nonetheless, the regulations so far published give little guidance or direction to states or federal agencies for considering issues of national defense and security, and provide little or ambiguous insight into the standards to be employed by the Secretary or the Secretary's designee in balancing national security and defense against competing claims. The ambiguity of many of the provisions causes difficulty in precisely determining what the state's role in national security decisions should be under the CZMA.⁴³ As will be shown below, in the absence of clear statutory or administrative guidance, this question must be evaluated under the general principles of the federal supremacy doctrine.

The issue of national security is mentioned explicitly in the CZMA only in the context of variances for federal licensing and assistance.⁴⁴ In making the variance decision the Secretary of Commerce is aided by the regulation's definition of "necessary in the interest of national security."⁴⁵ The regulation, however, does not

⁴² See generally S. REP., *supra* note 1, at [1972] U.S. CODE CONG. & AD. NEWS 4777.

⁴³ See also Schoenbaum & Parker, *supra* note 5, at 249.

⁴⁴ The most explicit role for the Secretary of Commerce with respect to national security is the granting of an exception to or variance from consistency obligations to applicants for federal licenses, permits, leases or assistance when appropriate "in the interest of national security," in spite of state objections. 16 U.S.C.A. §§ 1456(c)(3)(A), (c)(3)(B), and 1456(d) (West Supp. 1979). In making such a determination the Secretary of Commerce may be aided by, but is not bound by, the recommendation of the Secretary of Defense. See S. REP., *supra* note 1, at [1972] U.S. CODE CONG. & AD. NEWS 4793; and 15 C.F.R. § 930.122 (1979).

⁴⁵ The term "necessary in the interest of national security" describes a Federal license or permit activity, or a Federal assistance activity which, although inconsistent with a State's management program, is found by the Secretary to be permissible because a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed. Secretarial review of national

define what a "national defense or other national security interest" is, in spite of the fact that not only the activities of the Department of Defense, but also the activities of the Department of Energy, Department of Transportation, National Aeronautics and Space Administration, and Department of Interior are intimately related in many respects to national security. No guidelines are provided as to the extent to which principles of federal preemption or supremacy will be applied, or the extent to which congressional authorization of a program may foreclose an independent review, by the Secretary of Commerce, of national security necessity.

In short, the NOAA regulations as a whole implement the statutory requirements of the CZMA with respect to national defense and national security by repeating and restating the relevant statutory language, rather than by adding clarity, detail, or interpretation. General guidance and statutory terms are repeated in a variety of contexts, but few definitions are provided, no standards are set forth, and little consideration is given to the extent to which Congress has already defined, in breadth and detail, the obligations of federal agencies or the scopes of their authorities. In such circumstances, state and federal agencies charged with responsibility, under the CZMA and applicable state law, for defining or considering national defense and national security in the development of state management programs, must treat each decision on an *ad hoc* basis. Any guidance from NOAA for setting standards to be applied in the field must be derived not from the regulations, but from observations of secretarial mediation, and from such precedential value as may inhere in decisions of the Assistant Administrator of NOAA in the approval or disapproval of state management programs. Such guidelines, as will be argued below, are both inadequate and inconsistent with other doctrines preserved in the CZMA.

D. *Excluded Lands*

The questions of how the national security determination is made and who should make it are affected significantly by the ex-

security issues shall be aided by information submitted by the Department of Defense or other interested Federal agencies. The views of such agencies, while not binding, shall be given considerable weight by the Secretary. The Secretary will seek information to determine whether the objected to activity directly supports national defense or other essential national security objectives.

15 C.F.R. § 923.122 (1979).

cluded lands clause of the CZMA, which states, "[e]xcluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents."⁴⁶ The phrase "subject solely to the discretion of . . . the Federal Government" led to a major controversy between certain federal agencies and the states. The agencies asserted that all lands owned by the United States were excluded from the coastal zone, while the states claimed that only land subject to "exclusive legislative jurisdiction"⁴⁷ was exempt.⁴⁸ NOAA originally adopted the states' view and requested an opinion from the U.S. Attorney General clarifying the issue. The Attorney General concluded, through an analysis of the legislative history of the CZMA, that the federal agencies' interpretation was correct.⁴⁹ NOAA subsequently adopted this interpretation and extended its definition of excluded lands to include leased lands. Consistency determinations are now required only for those federal agencies' activities on excluded lands which have spillover effects onto non-excluded lands.⁵⁰

The states have reluctantly adopted the Attorney General's interpretation and are required to incorporate it into their management programs.⁵¹ Some states, however, including California, re-

⁴⁶ 16 U.S.C. § 1453(1) (Supp. V, 1975). For detailed analysis of the debate over this provision see Brewer, *supra* note 13, at 320; and Williamson, *Federal Lands and Consistency: An Intergovernmental Planning Proposal for the Coastal Zone*, 4 COASTAL ZONE MANAGEMENT J. 435 (1978).

⁴⁷ Legislative jurisdiction refers to the authority of a governmental entity to exercise legislative control over an area. There are four categories of legislative jurisdiction under which the United States may hold land: exclusive, partial, concurrent, and proprietary. Exclusive jurisdiction derives from Article 1, Section 8, Clause 17 of the Constitution and creates a "Federal enclave" in which the states have ceded all legislative jurisdiction to the U.S. Concurrent jurisdiction gives coequal authority to the state and the federal government. Partial jurisdiction exists when the state has ceded to the U.S. legislative jurisdiction in some areas but retained it in others. Under proprietary jurisdiction the federal government has acquired some right of title to the land but has not been ceded any measure of the state's authority. U.S. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND THE CONGRESS, U.S. Govt. Printing Office, 1970.

⁴⁸ Letter from Antonin Scalia, Assistant Attorney General, to William C. Brewer, Jr., General Council to NOAA (August 20, 1976).

⁴⁹ *Id.* For legislative history on the excluded lands issue see S. REP., *supra* note 1, at [1972] U.S. CODE CONG. & AD. NEWS 4783; CONFERENCE REP. NO. 92-1544, 92nd Cong., 2nd Sess. (1972) reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4823.

⁵⁰ 15 C.F.R. § 923.33 (1979). Subparagraph (d) reminds the states that the CZMA "does not impair in any way any rights or authorities that it may have over federal lands that exist separate from this program."

⁵¹ 15 C.F.R. § 923.33(c) (1979) requires that the states describe or map lands or types of

serve the right to include federally-owned or leased land "in the event judicial, legislative, or administrative modification should occur."⁵² In an attempt to induce such a judicial modification, the State of Washington has brought suit against the United States and the Department of Commerce challenging the NOAA definition of excluded lands and seeking a declaration that only lands subject to exclusive federal legislative jurisdiction are excluded from the coastal zone.⁵³ The state maintains that the current NOAA interpretation undermines the consistency provisions of the CZMA. This case is currently pending.

The importance of the definition of excluded lands to national security activities in the coastal zone is fairly obvious. Since a large portion of Department of Defense and Coast Guard activities takes place on and affects only federally-owned land, the consistency provisions of the CZMA are not applicable to those actions. Subject to congressional requirements and oversight, the heads of the relevant agencies, rather than the Secretary of Commerce, make the final decisions in balancing other coastal interests with their national defense missions. By no means, however, does the excluded lands clause eliminate the federal agency's concern with requirements of the CZMA. All activities taking place on, spilling over onto, or otherwise directly affecting non-excluded areas in the coastal zone come under the Act.⁵⁴ Nevertheless, the excluded lands provision at least establishes a clear-cut rule that the applicable federal agency will determine what the national defense interest is on those excluded lands.

E. Federal Supremacy

A full understanding of the Attorney General's opinion on excluded lands, as well as the CZMA's general consideration of the national interest and national defense, requires an understanding

lands falling within the federal exclusion.

⁵² See, e.g., U.S. DEP'T OF COMMERCE, APPROVED STATE OF CALIFORNIA COASTAL MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT, Chapter 11, p. 87 (August, 1977). One commentator has made the argument that the states have authority to integrate management on federal coastal lands despite the Attorney General's opinion on excluded land. See Shapiro, *Coastal Zone Management and Excluded Federal Lands: The Viability of Continued Federalism in the Management of Federal Coastlands*, 7 *ECOLOGY* L.Q. 1011 (1979).

⁵³ *State of Washington Department of Ecology v. United States*, No. 78-223 (W.D. Wash.) (filed April 13, 1978).

⁵⁴ See generally 15 C.F.R., Part 930 (1979).

of the place of the Act in the overall scheme of federal-state relationships. The appropriate starting point for such an analysis is in the principle of federal supremacy.⁵⁵ The constitutional immunity of the federal government from state interference with its programs and activities was confirmed in *McCulloch v. Maryland*,⁵⁶ and has been reaffirmed, without substantial change, ever since.⁵⁷ Only Congress may oblige federal agencies to conform their activities to state laws or programs.⁵⁸ States may enforce such federal agency obligations only where the congressional intent is clear and unambiguous.⁵⁹

These principles of federal supremacy have been reflected and preserved in the CZMA. The Act provides that nothing in the CZMA shall be construed to diminish either federal or state jurisdiction in the "planning, development or control of water resources or navigable waters," and the Act does not modify or repeal any existing laws applicable to federal agencies.⁶⁰ The supremacy doctrine is also evident in the provisions for federal approval of state management programs in the federal consistency provisions of the Act. For example, before approving a management program, the Secretary of Commerce is required to find that the program has been developed "with the opportunity of full participation by relevant Federal agencies," and that the program "provides for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature."⁶¹ The program may not be approved "unless the views of Federal agencies principally affected by such programs have been adequately considered."⁶² Most importantly, with re-

⁵⁵ The supremacy clause is found in U.S. CONST. art. VI, Cl. 2.

⁵⁶ 17 U.S. (4 Wheat.) 316 (1819).

⁵⁷ See, e.g., *Hancock v. Train*, 426 U.S. 167 (1976); and *E.P.A. v. California Water Resources Control Board*, 426 U.S. 224 (1976).

⁵⁸ *Id.*

⁵⁹ In *Hancock*, note 57, *supra*, the State of Kentucky claimed the right under the Clean Air Act, to demand compliance by federal installations with state requirements for permits to operate air contaminant sources. The U.S. Supreme Court ruled against Kentucky's claim stating, "[b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the states, an authorization of state regulation is found only when and to the extent there is 'a clear Congressional mandate, or specific Congressional action' that makes authorization of state regulation clear and unambiguous." *Hancock v. Train*, 426 U.S. 167, 179 (1976) (Court's footnotes omitted).

⁶⁰ 16 U.S.C.A. § 1456(e) (West Supp. 1979).

⁶¹ 16 U.S.C.A. § 1455(c) (West Supp. 1979).

⁶² 16 U.S.C.A. § 1456(b) (West Supp. 1979).

spect to federal activities, the obligation of the federal agency is not compliance with the state plan, but only consistency "to the maximum extent practicable," and then only when those activities "directly" affect the coastal zone or are development projects in the coastal zone.⁶³ For federal agency activities on excluded lands or otherwise outside the coastal zone, where there is no spillover affect on the coastal zone, the CZMA imposes no limitations on the agencies' activity. Thus, the CZMA carves out a carefully drawn congressional requirement for maximum practicable consistency of agency planning (and execution of plans) with state regulations in the coastal zone when federal activities directly affect areas of state responsibility. The entire obligation imposed upon federal agencies by the CZMA comes from federal authority; there is no language, such as that in the Clear Air Act,⁶⁴ extending authority to the state to directly govern or constrain such activities of federal agencies. It must therefore be concluded that the only enforcement option available to the state, should secretarial mediation not prove effective, is to seek judicial review of the agencies' compliance with applicable federal law.

This general deference to federal agency authority under the CZMA should apply with special force to national defense activities. Such activities are perhaps the paradigm case for the application of federal supremacy. The power to declare war, and to raise, support, maintain, and direct the Army and Navy, has constitutionally been reserved to the federal government.⁶⁵ In the exercise of this power, Congress and the President have been accorded the widest latitude and greatest discretion in decision making,⁶⁶ and it follows that the scope of federal supremacy, and freedom from state interference, is correspondingly broad. "National defense" is a concept generally understood but rarely defined explicitly. Deriving from Congress' constitutionally mandated power to "provide for the common defense,"⁶⁷ national defense has been construed by numerous statutes to encompass a wide range of federal activities. Though primary responsibility lies with the Department of De-

⁶³ 16 U.S.C.A. § 1456(c) (West Supp. 1979).

⁶⁴ 42 U.S.C.A. § 7418 (West Supp. 1979).

⁶⁵ U.S. CONST. art. I, § 8, Clauses 11, 12, 13, 14, 15, 16; § 9; and art. II, § 2, Cl. 3.

⁶⁶ See, e.g., *Lichter v. United States*, 334 U.S. 742 (1947); *United States v. O'Brien*, 391 U.S. 367, *reh. den.* 89 S.Ct. 63 (1968); *Parker v. Levy*, 417 U.S. 733 (1974); *Cafeteria and Restaurant Workers Union Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, *reh. den.* 368 U.S. 869 (1961).

⁶⁷ U.S. CONST. art. I, § 8, cl. 1.

fense, numerous agencies, including NASA, the Department of Commerce, the Department of Transportation, the F.B.I., and the State Department, engage in defense related missions. Courts generally have defined "national defense" quite broadly.⁶⁸

It must thus be borne in mind that the national defense is, constitutionally, a responsibility exclusively of the federal government; state participation is expressly limited by the Constitution to specified activities, and then only when permitted by Congress. National defense is not an area of government responsibility like housing, transportation, and resources development, where federal, state, and local government agencies all have independent and sometimes overlapping authority and for which coordinated inter-governmental planning is essential and appropriate. National defense is a federal matter, and with the exception of environmental protection,⁶⁹ all regulation of the Armed Forces is accomplished exclusively and intimately by Congress, and the President. Nothing in the language of the CZMA suggests a change in this federal-state relationship with respect to national defense interests.

III. CONSIDERATION OF NATIONAL SECURITY INTERESTS BY STATE AND LOCAL COASTAL MANAGEMENT PROGRAMS

A. Introduction

Supremacy doctrine and excluded lands notwithstanding, state and local governments are granted a considerable degree of involvement in federal agency decision making under the CZMA. Not surprisingly, this authority has been differently exercised by different states. NOAA, in determining how much disparity should be permitted between different states' consideration of national interests, might properly have taken into account the different purposes and organizational structures of the federal agencies. For example, for the national defense agencies, with primarily national rather than local orientations and with extremely centralized patterns of planning and decision making, a uniform scheme of state consideration of national defense interests would vastly simplify and facilitate the federal consistency process. Nevertheless, neither the NOAA regulations nor the NOAA program approval process

⁶⁸ See, e.g., *United States v. Achtenberg*, 459 F.2d 91 (8th Cir. 1972) cert. denied 409 U.S. 932 (1972); *Gorin v. United States*, 111 F.2d 712, 721 (9th Cir. 1940) aff'd 312 U.S. 19 (1941); *United States v. McGee*, 432 F. Supp. 557, 561 (S.D. Ohio 1977).

⁶⁹ See, e.g., Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (West Supp. 1979).

have produced this result. Various state management programs give varying degrees of consideration, in policy statements and statutory language, to the issue of balancing national defense interests. Furthermore, even where the language of a program indicates careful attention to the defense question, there have often been substantial differences between that language and the practice of state and local coastal commissions.

Of the thirty-six states and territories located in the coastal zone, fifteen have had their management programs approved by NOAA.⁷⁰ These include all states along the Pacific Coast. In addition, some of these states are divided into regions for purposes of coastal management. California, for example, is divided into two regions—the San Francisco Bay Area and the remainder of the state. Two separate programs, the San Francisco Bay Area Conservation and Development Commission Program and the California Coastal Management Program, were approved by NOAA.⁷¹ Rather than attempting a comprehensive analysis of all the approved state programs, this article will focus on a few representative cases which demonstrate different state approaches to consideration of national defense interests. These are the State of Washington Coastal Zone Management Program, the Management Program for the San Francisco Bay, the California Coastal Management Program, and certain local programs in California. The high concentration of military facilities and activities in these areas makes consideration of the national defense question particularly significant.⁷²

B. State Management Programs

In 1976 the State of Washington's Coastal Zone Management Program (WCZMP) became the first NOAA approved state plan. The Program identifies forty-nine major military installations located on the Washington coast.⁷³ Though dissatisfied with the U.S.

⁷⁰ The fifteen states and territories which have approved coastal management programs as of August 1, 1979, in chronological order of approval, are: Washington, Oregon, California, Massachusetts, Wisconsin, Rhode Island, Michigan, North Carolina, Puerto Rico, Hawaii, Maine, Maryland, New Jersey, Virgin Islands, and Alaska. Alaska's program was approved on August 1, 1979. See CZM INFORMATION EXCHANGE, STATUS OF THE STATES (July 1, 1979).

⁷¹ The Management Program for San Francisco Bay received NOAA approval in February, 1977, six months prior to that of the California Coastal Management Program.

⁷² In the San Diego area alone are located more than one-fourth of all Navy personnel.

⁷³ U.S. DEP'T OF COMMERCE, STATE OF WASHINGTON COASTAL ZONE MANAGEMENT PRO-

Attorney General's opinion on excluded lands,⁷⁴ the WCZMP recognizes that "lands held by the U.S. Government for readily identifiable national security purposes will be excluded from the state's coastal zone."⁷⁵ The Program further states that Department of Defense bases, construction activities, and military maneuvers are generally excluded from direct state control.⁷⁶ Also, the WCZMP notes that "the primary mission of the U.S. Navy is national defense, which gives it high priority in competing for the land and water resources of the state's coastal zone."⁷⁷ These policy statements appear to indicate that the WCZMP responded to the comments it solicited from the Navy and other federal agencies and made "a positive declaration of the priority of national defense and the importance to the state of the Navy presence in the coastal zone."⁷⁸ However, Washington's consideration and inclusion of Navy comments at an early stage in the development of the WCZMP's policy statements so far have resulted in few conflicts between the state's coastal management agency and federal agencies concerned with national defense.⁷⁹

Other state management programs have been more problematic. The San Francisco Bay area developed a coastally-related management program even prior to the passage of the CZMA. The San Francisco Bay Area Conservation and Development Commission (BCDC) Plan of 1969 was the first of its type.⁸⁰ One aspect of that plan was the comprehensive regulation of development in the coastal areas around the Bay. Although quite detailed in many re-

GRAM, FINAL ENVIRONMENTAL IMPACT STATEMENT, V-46 (1975).

⁷⁴ See *State of Washington Department of Ecology v. United States*, 78-223 (W.D. Wash.) (filed April 13, 1978).

⁷⁵ STATE DEP'T OF ECOLOGY, WASHINGTON STATE COASTAL ZONE MANAGEMENT PROGRAM 118 (1976).

⁷⁶ *Id.* at 107.

⁷⁷ *Id.*

⁷⁸ U.S. DEP'T OF COMMERCE, *supra* note 73, at X-47.

⁷⁹ A case in point is the construction of the TRIDENT magnetic silencing pier at the submarine base in Bangor, Washington. Even though the pier facility did not conform to the State's coastal management policies of increased public access and recreation, the State Department of Ecology conceded that because of national defense interests there was no practical alternative to construction and thus the project was consistent to the maximum extent possible. See Memorandum of Compliance with State of Washington Coastal Zone Management Program from Officer in Charge of Construction, TRIDENT, to Army Corps of Engineers, Seattle, Washington (Sept. 10, 1976).

⁸⁰ SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, SAN FRANCISCO BAY PLAN (January 1969); see also the McAteer-Petris Act, CAL. GOV. CODE §§ 66600-66661 (West Supp. 1979).

spects, the BCDC Plan paid little attention to the question of national defense interests. Furthermore, the plan contained detailed maps designating proposed civilian uses on all military lands in the area.⁸¹

In 1976 the BCDC submitted its Management Program for the San Francisco Bay to NOAA for approval. Specific reference was made in the Program to the national defense interest.⁸² However, the maps from the 1969 Plan, designating proposed civilian uses on military lands, were also included. NOAA did not require that the federal land be excluded from the maps and they arguably thus became part of the approved coastal management program.⁸³ In addition, though the San Francisco Bay's coastal zone is statutorily limited to land within 100 feet of the shoreline,⁸⁴ many of the program's regulations purport to extend to land, including land of the federal government, which is much further landward.⁸⁵ These provisions of the NOAA approved program appear to conflict with the excluded lands clause of the CZMA, even though that clause is supposedly recognized by the BCDC.⁸⁶ Thus a federal agency is placed in the awkward and potentially troublesome position of evaluating its consistency obligations against conflicting mandates from a federally approved state program and a federal policy on excluded lands.

Shortly after certifying the San Francisco Bay program, NOAA approved the California Coastal Management Program (CCMP).⁸⁷ This program coordinates coastal activities for all of California, excluding the San Francisco Bay Area, and is administered by the California Coastal Commission (CCC). The language of the CCMP

⁸¹ See, e.g., Map 2—Proposed Major Uses of the Bay and Shoreline, in SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, *supra* note 80.

⁸² The MANAGEMENT PROGRAM FOR THE SAN FRANCISCO BAY (July 15, 1976), states at 23, "Use of the shoreline and adjacent waters of the Bay for national defense and security is of paramount importance."

⁸³ *Id.* at Appendix IV.

⁸⁴ CAL. GOV. CODE § 66610(b) (West Supp. 1979).

⁸⁵ See designated uses of land in the maps in SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, *supra* note 80.

⁸⁶ MANAGEMENT PROGRAM, *supra* note 82, at 13.

⁸⁷ U.S. DEP'T OF COMMERCE, *supra* note 45; see also CAL. PUB. RES. CODE §§ 30000-30174 (West Supp. 1979). California enacted a Coastal Zone Conservation Act in 1972, independent of the CZMA. The California Coastal Zone Conservation Commission was established to administer that act. The present California Coastal Act, declaring itself to be the California coastal zone management program for purposes of the CZMA, is a successor to the Coastal Zone Conservation Act of 1972, and the California Coastal Commission is the successor of the Coastal Zone Conservation Commission.

appears to recognize national defense as an important aspect of the national interest. The Program states:

[U]se of the coastal land area and adjacent waters for national defense and national security is of paramount importance and is among the highest priority [sic] in the management of the coastal zone. Many of the military installations located along the coast have defense missions requiring operational use of the coastal zone. In addition, military installations are important components in their local areas, and represent a stable and substantial contribution to the coast and state economy.⁸⁸

Recognition of defense interests in this particular area is particularly important as the California coastal area contains numerous Department of Defense and Coast Guard facilities. One fourth of the entire Navy fleet is home-ported in San Diego. In the California program, national defense and aerospace are also specifically recognized as components of the national interests in the siting of facilities.⁸⁹ In addition, the program acknowledges an exception from the general policy of joint local, regional, state, and federal agencies' determination of the national interest for "national defense and security needs as established by the President and Congress."⁹⁰ The CCMP makes specific mention of the Navy's cooperation and input in the development of the program, and acknowledges that the Navy is "the Federal agency most dependent on coastal installations for its continued operations."⁹¹ The Program also recognizes the Navy's policy of conducting activities "to the maximum extent practicable consistent with the CCMP so long as national defense objectives are met."⁹² Finally, the CCC somewhat reluctantly has adopted the U.S. Attorney General's interpretation that all lands owned or leased by the United States are excluded from the coastal zone.⁹³ Each of the above provisions appears facially to justify NOAA's decision that "adequate consideration" was given to federal agencies' views on national defense.⁹⁴

⁸⁸ U.S. DEP'T OF COMMERCE, *supra* note 45, at 82.

⁸⁹ *Id.* at 83 (Table I).

⁹⁰ *Id.* at 87.

⁹¹ *Id.*

⁹² *Id.*; See also OPNAV Instruction 11000.14 (Sept. 25, 1976).

⁹³ See U.S. DEP'T OF COMMERCE, *supra* note 45.

⁹⁴ Though it did not consider the question of national defense, the 9th Circuit did affirm the CCMP's consideration of the national interest in *A.P.I. v. Knecht*, 609 F.2d 1306 (9th Cir. 1979).

Close examination of the CCMP and subsequent California proposed regulations, however, reveals some current and potential problems. Excluded federal lands are identified in the Program by a 1974 General Services Administration list rather than by actual mapping.⁹⁵ Failure to provide detailed and clearly drawn boundaries can lead to excluded land being included within a local coastal program,⁹⁶ with serious potential for future conflicts between local coastal agencies attempting to enforce their approved plans and federal agencies refusing to acknowledge their applicability. While Navy and other military activities are generally recognized as important coastal-dependent activities in the CCMP, the California Program does not specifically include Navy functions as coastal-dependent development activities, nor is national defense listed as a permitted development activity.⁹⁷ Although most military activities would take place on excluded lands and not be subject to state development activity regulations, many national defense projects occur or spill over onto non-excluded lands. Furthermore, the CCMP does not specifically deal with the question of expansion of defense holdings. In the area of license and permit activities, federal agencies are not required to obtain CCC permits. However, the CCMP provides for requests for memoranda of understanding from those federal agencies for development projects, even though there is no authorization in the CZMA or the NOAA regulations for so doing.⁹⁸ Finally, the CCC has recently proposed regulations for reviewing federal agency consistency with the CCMP.⁹⁹ While these regulations have not yet been incorporated into the approved Program, they are indicative of the manner in which the CCC desires to implement its Program. The regulations give no hint of the manner in which the state will evaluate national defense considerations in determining what constitutes consistency "to the maximum extent practicable." As will be more fully described below, failure to clarify this standard can have adverse effects on local coastal programs.

⁹⁵ U.S. DEP'T OF COMMERCE, *supra* note 45, at D-18.

⁹⁶ See text accompanying note 112 *infra*.

⁹⁷ U.S. DEP'T OF COMMERCE, *supra* note 45, at J-24 (Department of Defense Comments).

⁹⁸ *Id.* at 92.

⁹⁹ Letter from William Boyd, Chief Staff Council of the California Coastal Commission, to the State Commission and Interested Parties (June 26, 1979).

C. California Local Coastal Programs

The CCMP establishes the general policies and framework for coastal zone management, but the local coastal programs (LCP's), established and formalized by municipalities or other local governmental entities, and approved by the CCC, contain the specific details. Once the LCP's are determined to be part of the state's "approved management program," federal consistency requirements may apply.¹⁰⁰ Within the jurisdiction of the CCC are sixty-eight LCP's.¹⁰¹ In addition, there are four port master plans.¹⁰² Instead of being submitted for NOAA approval as amendments to the CCMP, with extensive attendant formalities and procedural requirements,¹⁰³ the LCP's and the port master plans are to be certified by the CCC as refinements to the CCMP, thus eliminating much of the administrative burden associated with amendments.¹⁰⁴ During the certification process federal agencies and NOAA may comment on the local programs, but the state is not bound by these comments in its certification.¹⁰⁵ Nevertheless, NOAA must approve such refinements¹⁰⁶ to ensure that no LCP in fact constitutes an unapproved amendment to the CCMP. Once an LCP or port plan is certified and approved, the policies therein become factors in the federal consistency determination, although NOAA regulations appear to restrict the actual processing of consistency determinations to the CCC itself.¹⁰⁷ Though there has been considerable activity in drafting of LCP's, none have received certification. Two of the port master plans, Port Hueneme and Long Beach, have received provisional certification, but port authorities with certified port master plans may make consistency determinations under certain circumstances.¹⁰⁸ The CCMP also states, "[b]ecause local governments will participate in the state's imple-

¹⁰⁰ 16 U.S.C.A. § 1456(c) (West Supp. 1979).

¹⁰¹ There is an LCP for each of the fifteen counties and fifty-three cities and towns in the region.

¹⁰² The Port Master Plans are for the ports of Los Angeles, San Diego, Long Beach, and Port Hueneme. They are intended to furnish specific local coastal programs for these ports in the same manner as LCP's furnish coastal management programs for coastal communities.

¹⁰³ 15 C.F.R. § 923.81 (1979).

¹⁰⁴ 15 C.F.R. § 923.83.

¹⁰⁵ U.S. DEP'T OF COMMERCE, *supra* note 52, at 56-61.

¹⁰⁶ 15 C.F.R. § 923.82(a) (1979).

¹⁰⁷ 15 C.F.R. § 930.18 (1979).

¹⁰⁸ CAL. PUB. RES. CODE § 30715 (West Supp. 1979).

mentation of the Federal consistency provisions, LCPs can affect Federal actions; therefore, it is essential that the views of Federal agencies affected by the local program be considered in its development."¹⁰⁹ However, the practical difficulties for federal agencies—especially the smaller agencies such as the Coast Guard—of monitoring the development of sixty-eight different programs, and attempting consistency with their varying requirements, imply that the CCC's role in reviewing and approving these plans is crucial for insuring uniform national defense considerations in the LCP's. Challenging each LCP separately, especially when there is no clear, objective, or uniform state standard for consideration of the national defense interest, would be an unfair and overly burdensome requirement for the federal agencies.

The draft LCP's and port master plans, like the various state coastal management plans, have differed in their treatment of the national defense interest. The Port of Hueneme plan states that the port "has an obligation to meet national needs, expressed in terms of the requirements both of the U.S. Navy and for alternatives to the region's major port facilities in emergencies."¹¹⁰ It also recognizes that "[t]he U.S. Navy exercises control over the vast majority of the port land area. This Navy area is restricted from public access for reasons of military security."¹¹¹ Nevertheless, the plan has included some Navy land and some land outside of the coastal zone.¹¹² On the other hand, the other certified port master plan—Long Beach—has clearly recognized federally excluded lands in implementing its plan.¹¹³ LCP's also fail at times to fully recognize defense interests. One partially completed draft LCP that is particularly important to national defense interests is that of the City of Coronado in the San Diego area. Partially or wholly located within the city are three major Naval installations: North Island Naval Air Station, the Coronado Naval Amphibious Base, and the Imperial Beach Radio Facility. Yet despite the location of these military installations the LCP makes no mention of balancing national defense interests.¹¹⁴ Furthermore, the LCP has tenta-

¹⁰⁹ U.S. DEP'T OF COMMERCE, *supra* note 52, at 86.

¹¹⁰ MASTER DEVELOPMENT PLAN FOR THE PORT HUENEME, B-4 (July 1978).

¹¹¹ *Id.* at C-14.

¹¹² *See id.* at A-3.

¹¹³ FINAL MASTER PLAN, PORT OF LONG BEACH 18 (June 1978).

¹¹⁴ *See* CORONADO PLANNING COMMISSION, LCP POLICY GROUP REPORTS 103 & 104 (Jan. 9, 1979) & 105 (Jan. 23, 1979).

tively proposed using parts of the Air Station and Amphibious Base as beaches. While the Coronado LCP has not yet been certified by the state, and may be amended, it is illustrative of potential major conflicts with national defense interests. In addition, Coronado, Port Hueneme, and Long Beach show that there is no real uniformity in considering federally imposed requirements which affect national defense and other aspects of the national interest.

IV. POLICY RECOMMENDATIONS

A. *Introduction*

The above examination of local and state management programs, NOAA regulations, and the CZMA illustrates that each of these levels of government has grappled to some degree with the balancing of national defense in the coastal zone. This analysis also suggests, however, that the failure to express policy comprehensively and clearly at the national level can lead to inadequate consideration of the national interest at the state and local level. Flexibility to incorporate local desires is an important component of the CZMA framework; nevertheless, an equally if not more important goal of the CZMA is to ensure adequate consideration of the national interest and "unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance."¹¹⁵ The CZMA has laid the basic foundation for accomplishing these goals, but additional policy recommendations appear desirable to strengthen and clarify application of national interest concerns at the local level. Otherwise, vital national interests may become unnecessarily entangled in the "maze" of bureaucracy potentially created by the CZMA and its offspring.¹¹⁶

These considerations suggest the need for clarification of the permissible scope of state regulation of federal activities, particularly those relating to national defense, which are governed by the supremacy clause. Accordingly, this article suggests that such clarification will be facilitated by uniform state management program adoption of the following three policy proposals: (1) states and local coastal agencies should expressly adopt and adhere to the cur-

¹¹⁵ 16 U.S.C.A. § 1451(h) (West Supp. 1979).

¹¹⁶ See *A.P.I. v. Knecht*, 456 F. Supp. 880, 931 (C.D. Cal. 1978), *aff'd* 609 F.2d 1306 (9th Cir. 1979).

rent NOAA view of the excluded lands clause; (2) on non-excluded lands the consistency of federal activities with the state management program should be determined by the federal agency where that activity is "coastally dependent"; and (3) where the federal supremacy doctrine is applicable to an activity, states should defer to the federal agency's views in defining the national interest with respect to that activity. While these proposals would result in a major change in clarifying the state-federal division of responsibility, they nevertheless have their basis firmly fixed in the overall constitutional framework of the CZMA.

B. Uniform Adoption of the Current NOAA Position on Excluded Federal Lands

In light of the importance of federal land exclusion in the scheme of the CZMA, states and LCP's should unequivocally and uniformly implement the position of the U.S. Attorney General and NOAA on excluded federal lands. This would result in the relevant agencies' internal policies rather than the CZMA or state management programs governing all federal activities taking place on excluded land without direct spillover impacts in the coastal zone. In the case of national defense these activities include operational, coastal defense, research and development, maintenance, support, and training activities.

The Attorney General's office concluded in 1976 that all lands owned by the United States were excluded from the definition of the coastal zone under the CZMA.¹¹⁷ NOAA regulations have added federally leased lands to those exclusions.¹¹⁸ As explained above, some of the states have argued that only lands held by the federal government under exclusive legislative jurisdiction are within the statutory exclusion from the coastal zone, and that the U.S. Attorney General's view undermines the federal consistency provisions of the CZMA.¹¹⁹ However, the Attorney General's opinion shows that these arguments confuse the federal government's discretion to use land under the Property Clause of the Constitution with the power to exercise legislative jurisdiction.¹²⁰ The type of legislative jurisdiction under which federal land is held indicates

¹¹⁷ Scalia, *supra* note 48.

¹¹⁸ 15 C.F.R. § 923.33 (1979).

¹¹⁹ See *State of Washington Department of Ecology v. United States*, No. 78-223 (W.D. Wash.) (filed April 13, 1978).

¹²⁰ Scalia, *supra* note 48.

the degree to which the federal government can exercise legislative, executive, and judicial functions on that land. For example, where the federal land is held under exclusive legislative jurisdiction, only federal legislation governs criminal activity on that land.¹²¹ But the degree of legislative jurisdiction does not imply a particular land use activity and has no relationship to coastal resources. The Navy's policy is that if legislative jurisdiction is necessary, "the degree of jurisdiction sought should be limited to the minimum degree of jurisdiction required."¹²² Lack of connection between type of legislative jurisdiction and the nature of the federal activity is illustrated by the fact that different parcels on a single base are sometimes held under different types of jurisdiction. An example is Sewells Point Naval Base in Norfolk, Virginia; part of which is held under exclusive jurisdiction, part under concurrent jurisdiction, and part under proprietary jurisdiction.¹²³ The interpretation advanced by some of the states would result in part of the Base being in and part out of the coastal zone.

In addition to the irrelevance of the type of legislative jurisdiction to the exclusion issue, there are other arguments supporting the U.S. Attorney General's view. The federal government has plenary powers to regulate its land under the Supremacy and Property Clauses of the Constitution.¹²⁴ When those plenary powers are applicable, federal use of land held by the United States under even proprietary jurisdiction cannot be limited by the states.¹²⁵ The argument that the Attorney General's interpretation of the excluded lands provision undermines the federal consistency provisions of the CZMA fails to take account of the Act's deliberate preservation of federal supremacy principles.¹²⁶ NOAA regulations also reflect these principles in requiring consistency determinations only for direct spillover effects from federal activities on excluded lands, and as to such spillover effects, federal agencies must be

¹²¹ See note 47 *supra*.

¹²² NAVAL FACILITIES ENGINEERING COMMAND, REAL ESTATE PROCEDURE MANUAL P-73 at 26-3 (June 1976). In this sense exclusive jurisdiction is the maximum degree while proprietorial is the minimum.

¹²³ Scalia, *supra* note 48.

¹²⁴ Supremacy Clause—U.S. CONST., art. VI, cl. 2; Property Clause—U.S. CONST., art. IV, § 3, cl. 2.

¹²⁵ See generally *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Alabama v. Texas*, 347 U.S. 272 (1954). See also Shapiro, *supra* note 52, at 1017.

¹²⁶ See note 60 *supra*.

consistent only to the "maximum extent practicable."¹²⁷ One commentator has aptly noted that consistency "escape" clauses¹²⁸ and the Act's provisions for mediation, are inconsistent with any interpretation of the Act which would subject all federal agency action to state control by including federal land within the coastal zone.¹²⁹ The states' fear of inconsistent federal activity on excluded land should be mitigated by NOAA regulations and the agencies' own policies.¹³⁰ Thus statutory analysis and constitutional doctrine indicate that the U.S. Attorney General's and NOAA's interpretation is correct. Accordingly, this interpretation of the excluded lands provision should be explicitly noted and implemented in all state and local management programs.

C. *Consistency Determinations for "Coastally-Dependant" Activities*

Clarification of the excluded lands issue will alleviate some, but not all, of the federal-state controversy over the national interests and national defense issues. Balancing defense against other interests in the coastal zone will still take place and consistency determinations will still have to be made for spillover effects of activities onto non-excluded land. Under the second policy proposal, whether an activity on non-excluded land is consistent with the state or local plan would be determined solely by the federal agency responsible for carrying out such activities when the following three conditions are met. First, the activity should be one subject to the federal supremacy doctrine. Although this distinction is not always clear-cut, certain types of activities, such as national defense, clearly fall within the supremacy doctrine.¹³¹ Second, the activity must be carried out pursuant to and in conformity with federal law (apart from the CZMA). Third, any activity or spillover effect on non-excluded land should be "coastally dependent." In these circumstances, the federal agency's decision as to whether an activity is coastally dependent and whether there is consistency to the maximum extent practicable with the state's coastal plan

¹²⁷ 15 C.F.R. § 923.33 (1979).

¹²⁸ See 16 U.S.C.A. § 1456(c)(3) and (d) (West Supp. 1979).

¹²⁹ Williamson, *supra* note 46, at 441.

¹³⁰ See, e.g., Chief of Naval Operations Instruction 11000.14 (Sept. 25, 1976) setting out specific guidelines for Naval activities' consistency with state and local coastal management programs.

¹³¹ See note 26 *supra*.

should be conclusive, as long as the federal agency has not arbitrarily and capriciously abused its discretion.¹³²

In the case of national defense, whether an activity is coastally dependent is easily determined. Any function requiring access to the oceans, including but not limited to Navy ship activities, ocean surveillance, air base locations, and missile retrieval, clearly fits into this category. In addition, any activity which is necessary to support a coastally dependent excluded land facility would be coastally dependent. Thus a military commissary or laundry, or a base service obtained through a contract or concession, required by a coastally dependent or excluded facility must also be recognized as part of the national defense interest in the coastal zone. In determining whether a support activity is, in fact, "necessary" to support an excluded facility, deference should be given to the commander of the relevant facility. Since these activities are essentially tied to national defense, the supremacy doctrine implies that review of the military commander's discretion in this area be limited to an "arbitrary and capricious abuse of discretion" standard. The same standard should apply to other activities governed by federal supremacy such as energy conservation or aids to navigation.

D. Deference to Federal Agencies' Definition of the National Interest

The third policy proposal would require the state and local management programs to adopt relevant federal agencies' definitions of national interests where those interests demand federal agency action under the supremacy doctrine. The states would be required to defer to the federal agencies' views unless an agency's determination constitutes an arbitrary and capricious abuse of discretion. Review of such an abuse could be made by the Secretary of Commerce with appeal available in federal court.¹³³ The CZMA and NOAA regulations currently require the states to give adequate consideration to federal agency viewpoints.¹³⁴ This proposal would help to clarify "adequate consideration" in a manner consistent with the supremacy doctrine.

¹³² For an analogous application of the arbitrary and capricious standard to federal agency discretion see Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976).

¹³³ Such review is consistent with the overall framework of the CZMA. See note 20 *supra*.

¹³⁴ See notes 21-24 *supra*.

Two threshold terms must be defined in applying this proposal: "activities subject to the supremacy doctrine" and "the relevant federal agency." The CZMA itself, and some recent court decisions, shed some light on when the supremacy doctrine applies to federal activities. The Act establishes a system of "cooperative federalism" where the states and the federal government share authority in the coastal zone.¹³⁵ The legislative history of the Act, however, demonstrates that certain interests and activities such as navigation and military uses are direct and exclusive federal responsibilities, while other interests, including economic development, recreation, and conservation, are shared by the federal government and the states.¹³⁶ Two cases involving state regulation of activities along the coast, *Askew v. American Water Way Operators, Inc.*¹³⁷ and *Ray v. Atlantic Richfield Company*,¹³⁸ suggest an approach to balancing state and federal interests which is cautious, though somewhat favorable to the states.¹³⁹ In *Askew* the Court upheld Florida's imposition of strict liability under the state's Oil Spill Prevention and Pollution Control Act against an assertion of federal preemption. *Ray* invalidated a part of the State of Washington's Tanker Law, but upheld the remainder of that law as not violative of federal preemption doctrines. These cases appear to hold that a state's exercise of its police power in areas where federal law also applies will not be invalidated unless there is direct conflict with federal law or with explicit Congressional policy calling for national conformity in an area.¹⁴⁰ The courts have yet to rule on a conflict between national defense and state coastal zone regulations. However, the legislative history of the CZMA¹⁴¹ and a clear policy of national conformity in the defense area¹⁴² suggests that the national defense interest should prevail in any serious conflict with the state management program. Similarly, except in

¹³⁵ See Williamson, *supra* note 46, at 441-42; See also Schoenbaum & Parker, *supra* note 5.

¹³⁶ S. REP., *supra* note 1, at [1972] U.S. CODE CONG. & AD. NEWS 4778.

¹³⁷ 411 U.S. 325 (1973).

¹³⁸ 435 U.S. 151 (1978).

¹³⁹ See Schoenbaum & Parker, *supra* note 5, at 155-59; Finnell, *supra* note 5, at 257-58, 287; Wrede, *Preemption and the Role of State Legislation in the Coastal Zone*, 10 NATURAL RESOURCES LAWYER 237 (1976).

¹⁴⁰ See *Ray v. Atlantic Richfield Company*, 435 U.S. 151, 157 (1978); *Askew v. American Waterway Operators, Inc.*, 411 U.S. 325, 341 (1979).

¹⁴¹ See text accompanying note 136 *supra*.

¹⁴² S. REP., *supra* note 1, at [1972] U.S. CODE CONG. & AD. NEWS 4778.

extraordinary circumstances, the federal agency's view of what that national interest is should be incorporated into the state's management program.

The "relevant federal agency" for purposes of defining the national interests would be the agency primarily responsible for carrying out that interest in the particular coastal zone. Usually it will be clear from federal legislation or customary practice which agency has primary responsibility. Occasionally, however, agencies may have overlapping duties in a coastal area and their views of the national interest may differ with respect to a particular activity. Resolution of such a conflict between federal agencies is a political decision to be made either by Congress or the President. The same is true if various national interests subject to the supremacy clause overlap.

The overall importance of national defense to national self-preservation is clear. However, in certain areas, traditionally defined national defense functions appear to overlap with other national interests. For example, with the current world oil situation, it could be argued that energy production in the coastal zone is actually part of the national defense. In such a case the establishment and ranking of priorities should be accomplished by Congress. A distinction also could be made depending on the nature of the interest in question. Energy, commerce, and conservation interests often have priorities as important as defense. On the other hand, recreation and public access generally are, and should be, subordinated to the above interests. Thus, in determining the relevant federal agency, legal arguments may at times be subordinated to political considerations.

Once it is determined that a federal activity is governed by the supremacy doctrine and that a specific agency is responsible, deference should be given to the agency's views in defining that national interest. The federal agency will be in the best position to define the practical limitations of comprehensive coastal management with respect to its activities. Not all federal activities would impose the same degree of limitations on state planning. For example, the defense agencies, perhaps to a greater degree than most other federal agencies, must be able to respond quickly and flexibly to accommodate changes in mission, in operational requirements, and in the need for and utilization of facilities. The Armed Forces must be responsive to rapidly changing technological and political circumstances; and to a far greater degree than most other govern-

mental agencies, they have special needs for physical and informational security. Therefore, potential expansion of defense activities and flexibility for urgent actions must be recognized in all state programs. Not every activity conducted by a defense agency is vital to the national defense and therefore subject to identical supremacy considerations. However, since the line distinguishing such activities is often very fine, and a mistake in the direction of limiting defense capabilities would be extremely costly, deference should be given to the federal agency's views unless an abuse of discretion can be shown.¹⁴³

The initial development of the state and local program is the most appropriate time to solicit and incorporate the federal agencies' views as to what the national interests are. The states with final programs already approved by NOAA could argue that this policy proposal would be too radical a change.¹⁴⁴ However, this potential opposition to the policy proposal has little practical or legal merit. First, the requirement to incorporate the federal agency's definition of national interest only applies to those federal activities subject to supremacy principles. Moreover, the state can challenge such a definition by showing a federal agency's arbitrary and capricious abuse of discretion. In addition, radical deletion of wording in existing state plans would rarely occur since little specific attention has been given to such national interests.

For federal agencies such as the Department of Defense, consistency with coastal management programs is just one of many, often competing, congressional mandates. Resolution of these conflicting mandates should be made by the Department of Defense decision makers who are in the best position to evaluate all of their competing responsibilities. It should be noted, moreover, that many of the states' objections to defense activities in the coastal zone are remedied by other federal legislation and regulations. The expansion and limitation of public access to the coast, as illustrated in the discussion of the Coronado LCP above, are potentially troublesome areas of conflict between local programs and national defense interests. Safety problems and the often classified nature of the defense activity make access to military lands impractical in many cases. Nevertheless, Department of Defense reg-

¹⁴³ See note 132 *supra*.

¹⁴⁴ See, e.g., DEPARTMENT OF COMMERCE RESPONSE TO PROPOSED AMENDMENTS TO THE CZMA AMENDMENTS OF 1980, § 307 at 6 (January 29, 1980).

ulations require consultation with state, local, and other federal agencies in planning facilities and development projects, whether or not located in the coastal zone,¹⁴⁵ and in this process, public access and any other state concerns can be raised and addressed. Other federal laws mandate public access in certain areas.¹⁴⁶ Environmental interests are also protected by other statutes. The CZMA states that it shall not affect in any way the requirements of the Federal Water Pollution Control Act or the Clean Air Act.¹⁴⁷ Court interpretations of national security and the National Environmental Policy Act (NEPA) suggest that military activities have only a partial exemption and are judged on a case by case basis.¹⁴⁸ Thus accomodation of defense activities with respect to various coastal interests is mandated by other federal regulations. Deference to federal agencies in defining the national interest would therefore not result in as great a change as some states seem to fear.

E. Policy Proposal Overview

These three policy proposals provide a more comprehensive basis than the current NOAA regulations for division of state and federal responsibility under the CZMA. Specifically, the proposals permit increased flexibility in state programs for accomodating national defense needs, and for determining whether an activity is "necessary in the interest of national security." The proposed policies will deal with most potential national defense activities, not just the variance procedures specified in the CZMA. After all, a state program which truly incorporates national interest considerations should structure its stated priorities in such a way that an activity which is indeed necessary in the interest of national defense is, by virtue of that fact alone, consistent with the overall program objectives. Such policies should be clearly incorporated into NOAA's regulations, state management programs, and LCP's. In addition, they should constitute the framework for the Secretary of Commerce's variance determination. There may be the ex-

¹⁴⁵ 32 C.F.R. § 243 (1978).

¹⁴⁶ See, e.g., 16 U.S.C.A. §§ 470 & 670(f) (West Supp. 1979); 10 U.S.C.A. § 2671 (West Supp. 1979).

¹⁴⁷ 16 U.S.C.A. § 1456(f) (West Supp. 1979).

¹⁴⁸ See *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (1972); *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971).

treme case where these policies are overinclusive. However, this is outweighed by the advantage of clear rules consistent with federal supremacy doctrine and the adequate protection of the national defense.

These proposals would also serve to clarify the federal agencies' requirement to be "consistent to the maximum extent practicable." It was noted above that NOAA's regulations interpret this to mean full consistency with the state management program except as prohibited by existing law applicable to the federal agency, or unless unforeseen circumstances arise.¹⁴⁹ Such consistency is required for federal agency activities "directly affecting the coastal zone"¹⁵⁰ or for development projects "in the coastal zone."¹⁵¹ Although these subsections do not mention national defense explicitly, the same policy considerations should apply. Otherwise supporting activities for coastally dependent or excluded military bases could be subject to a different standard of consistency than the rest of the base.

The proposals are actually compatible with a broad reading of the NOAA regulations.¹⁵² Moreover, most potential conflicts can be avoided if adequate consideration is given to federal agency views in developing the state program.¹⁵³ However, a more narrow reading could make the standard of consistency "to the maximum extent practicable" an impractical burden on agencies responsible for the national defense and other vital national interests.

V. CONCLUSION

In its 1977 report to Congress on Coastal Zone Management, the National Oceanic and Atmospheric Administration recognized the absence of legal guidance to address matters of national significance in the coastal zone and stated: "it is clear that uniform national guidance and financial assistance is needed before all coastal

¹⁴⁹ 15 C.F.R. § 930.32 (1979); see note 11 *supra*.

¹⁵⁰ 16 U.S.C.A. § 1456(c)(1) (West Supp. 1979).

¹⁵¹ 16 U.S.C.A. § 1456(c)(2) (West Supp. 1979).

¹⁵² Such compatibility is evident in the comments of Robert W. Knecht, Assistant Administrator of NOAA for Coastal Zone Management, on the drafting of the WCZMP, "[W]e will suggest that the WCZMP demonstrate that its policies do not arbitrarily exclude or unreasonably restrict existing national security missions of the Navy and provide sufficient flexibility to deal with future national security contingencies should they arise." U.S. DEP'T OF COMMERCE, *supra* note 73, at X-53.

¹⁵³ See, e.g., Washington State's treatment of TRIDENT Nuclear Submarine Facility, discussed at note 79 *supra*.

States will respond to these needs through a comprehensive coastal zone management."¹⁵⁴ As this article has pointed out, this is particularly true in the area of national defense. One commentator has suggested that a "second coastal zone for planning and consistency" be created.¹⁵⁵ Depending on the significance and location of the activity, consistency in this new coastal zone would be required whether it is a federal function or not. Close examination of the Coastal Zone Management Act and other applicable statutes demonstrates, however, that this second coastal zone is both unnecessary and inconsistent with the CZMA's treatment of federal supremacy doctrine.

Though somewhat ambiguous, the Coastal Zone Management Act provides the basis for adequate consideration of the national interests. What is needed is a clarification of certain policies and provisions that will ensure uniform implementation at the state and local levels. In order to avoid the potential bureaucratic nightmare of federal agency conflict with numerous local coastal programs, it is crucial that state coastal commissions take an active role in informing the local agencies and in ensuring that the policies are included explicitly in the local programs. Also of vital importance is the "adequate consideration" of relevant federal agencies' views in the development of the state and local plans. Clear adherence to the U.S. Attorney General's position on excluded lands, recognition of the coastal dependency of various federal activities, and deference to federal agencies' views where federal supremacy is involved would go a long way towards insuring that such consideration is in fact "adequate." Such consideration does not imply capitulation to every desire of the federal agency, but if a national interest is involved the federal policy should be recognized. Specifically in the area of national defense, where federal supremacy doctrine applies, the responsible federal agency should be allowed to define the national defense interest unless an abuse of discretion can be shown.

The processes described in the foregoing paragraph will allow many minor conflicts to be ironed out in advance. State fears of major federal agency inconsistency should be alleviated by the internal agency policies of compliance to the maximum extent prac-

¹⁵⁴ U.S. DEP'T OF COMMERCE, REPORT TO THE CONGRESS ON COASTAL ZONE MANAGEMENT, PUBLIC LAW 92-583, TRANSITION QUARTER AND FISCAL YEAR 1977, at 93.

¹⁵⁵ Williamson, *supra* note 46, at 443-53.

licable, and by federal agency obligations under the intergovernmental coordination process.

Greater formalization of the process by which federal agencies' views are considered will be a benefit to all parties concerned. National defense and coastal zone management are much too important issues to be subject to a Tower of Babel breakdown in communication. Prompt action in adopting the proposed policies will help pave the way for the smooth certification of local coastal programs. Properly balancing the national defense interest in the coastal zone is a major step in the development and management of this vital part of the nation.