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VIRGINIA'S COASTAL ZONE MANAGEMENT PROGRAM: A LEGISLATIVE CRISIS

EDITOR'S NOTE: From time to time the *Journal* presents articles dealing with proposed legislative actions in order that the membership of the Association may be fully conversant with such proposals. The accompanying article by Profs. Whitney and Theberge discusses a matter which requires action by the Virginia legislature, and upon which the Association or its individual members may wish to take a position.

In 1972 the United States Congress enacted the Coastal Zone Management Act¹ to encourage the thirty coastal states and four offshore territories to devise management plans to cope with the increasing and competing demands upon the lands and waters of the coastal zone occasioned by population growth and economic development. Congress was specifically concerned to foster state planning programs capable of providing for the requirements of industry, commerce, residential development, recreation, the extraction of mineral resources and fossil fuels, transportation and navigation, harvesting of fish, shellfish, and other living resources and waste disposal without inflicting adverse impacts or permanent changes on our ecological systems. Congress was also concerned to preserve adequate space in the coastal area for public use and to protect cultural, scenic, historic and esthetic values which are essential to the well-being of all citizens.

Congress recognized that the key to more effective protection and use of the land and water resources of the coastal zone was to encourage the coastal states to devise planning and management programs in cooperation with local government which, while meeting federal standards and criteria, were tailored

to address each state's peculiar conditions. Originally, this program consisted of a grant program to assist in the development of the state management program² and upon approval of the state plan by the U. S. Secretary of Commerce, a grant program on an indefinite continuing basis to finance administration and implementation of the program.³ The 1976 amendments added, *inter alia*, a Coastal Energy Impact program to provide states with loans, guarantees for loans or outright grants to compensate for impacts on the coastal area resulting from Outer Continental Shelf energy activities.⁴

All coastal states in recognition of the need for management of coastal resources opted to participate in this program (which is totally voluntary in nature). The Virginia Office of the Secretary of Commerce and Resources (OSCR) is responsible for preparation of the Virginia plan. Virginia is presently nearing the end of its third year of plan preparation. OSCR recently published its second Draft Plan entitled "Proposals for Coastal Resources Management in Virginia" and public hearings have been held to obtain comments from the public and local and regional planning entities before completing the plan and submitting it

² Section 305 etc. This development period, originally 3 years in duration, and involving two-thirds federal—one-third state financing was amended in 1976 to provide for four years and eighty percent federal support.

³ These administrative grants would likewise consist of eighty percent federal funding. The Act requires that any proposed management program be coordinated with all federal agencies "principally affected by such program" and after approval, that such federal agencies "shall conduct or support their activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." Section 307 of the Act also provides for a grant program to acquire, develop and operate estuarine sanctuaries, create field laboratories, and to gather data in the estuaries to facilitate informed coastal planning.

⁴ *Id.* Sec. 308.

¹ P.L. 92-583. Congress in 1976 amended this Act in several important respects discussed herein. (P.L. 94-370).

to the U. S. Coastal Zone Management Agency and the U. S. Secretary of Commerce for approval.

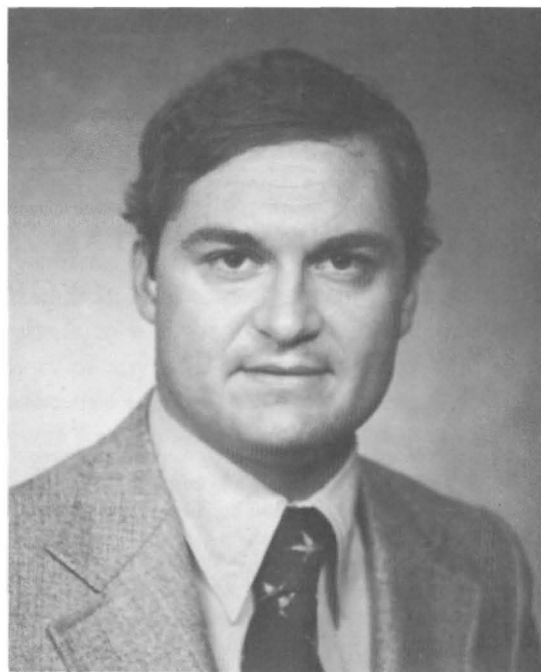
Virginia's OSCR plan presently faces two critical requirements—both of which involve a time factor. The ultimate requirement is, of course, to complete an approvable plan by February, 1979. The other near term requirement is to meet existing grant conditions in order to obtain fourth year funding (February, 1978-February, 1979).

It is the purpose of this article to indicate, based on the most recent OSCR plan, some of the more significant inadequacies that must be resolved to achieve these goals within the short time that remains.

To be approved a plan must establish the boundaries of the Coastal Zone within which the plan will operate.⁵ The OSCR plan's handling of the western or "inland" boundary will not satisfy the federal requirement. The plan delineates two "inland" boundaries. In one portion of the plan, it defines the inland boundary as "the western boundaries of those political jurisdictions defined in the Code of Virginia as being in 'Tidewater Virginia.'"⁶

However, the OSCR plan wisely does not propose comprehensive regulatory activities in the entire Tidewater Area, but instead only addresses a critical belt of land called the "edges." The plan would leave the inland boundary of the edges to be "resolved on a case-by-case basis" by the local governments concerned.⁷ The Coastal Zone Act and the federal regulations require that at a minimum the plan must contain criteria for boundary setting sufficiently clear that it is possible to know precisely where the boundary will be and how it will be designated. Otherwise the plan would fail to give notice as to who would be affected and what area is subject to the plan.⁸ This inland boundary must be coordinated with the remainder of the plan and delineate with precision the actual area, in this case the edges, for which OSCR actually proposes detailed planning. This should not be a difficult deficiency in the OSCR Plan to correct.

A much more difficult deficiency to correct is that the plan after identifying a list of resources, uses and



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concerns to be addressed by the plan, fails to provide *specific* policies, standards and criteria for state or local decisionmakers to employ in the administration of the plan. The OSCR plan does address water resources, especially as to pollution and sedimentation, with adequate detail and specificity, but fails to do so with respect to geographic areas of particular concern, high hazard areas, protection of historic and cultural

⁵ *Id.* Sec. 305(b) (1).

⁶ OSCR Plan p. 131.

⁷ *Id.* pp. 133-134.

⁸ 42 Fed. Reg. 43552, 43563 (1977) (to be codified in 15 C.F.R. § 923.31(e)). This citation, as well as succeeding citations to the Federal Register, refers to the Proposed Coastal Zone Management Program Approval Regulations issued on August 29, 1977. These Regulations are currently being employed by the Office of Coastal Zone Management in evaluating the Virginia OSCR Plan.



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Professor Whitney has served as a member of the U.S. Coastal Zone Advisory Committee (1972-1976) which advises the Office of Coastal Zone Management and the U. S. Secretary of Commerce concerning *inter alia* approvals of state management programs.

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this lack of detailed planning for all but the water uses element violates the fundamental legal requirement of notice as to *how* entities within the boundaries of the Coastal Zone will be affected by the plan.¹⁰ The Plan must address *all* of the relevant elements in the coastal zone with the same detail it has addressed water-related elements. To remedy these deficiencies will not be easy given the limited remaining time.

Thirdly, because the inland boundary of the "edges" area is undetermined, and because the plan lacks the requisite comprehensive coverage of relevant coastal elements with the requisite degree of detail as to standards and criteria, it is not remarkable that the plan does not adequately specify what monitoring procedures will be adopted to provide the data essential to achieve adequate enforcement. Thus because basic elements of the plan are deficient—boundaries not established and guidelines for all but water-related elements too vague and general—the monitoring and enforcement provisions which depend on these basic elements necessarily lack requisite detail and specificity. As to monitoring, the plan calls for annual assessments and reports to the state by local governments.¹¹ This is patently inadequate. A wide variety of irretrievable and irreparable activities could be consummated between annual assessments and reports. To avoid this possibility it would appear that, as a minimum, quarterly reports supplemented by a system of random spot checks would be necessary for early detection of "patterns of inconsistency" with approved provisions of the coastal zone plan.

As to enforcement, the OSCR plan is basically voluntary. The state simply encourages local governments to conform their decisionmaking as to land and water uses to the OSCR policies, standards and criteria. However, whenever the state finds there has been a "consistent pattern" of local actions which have contributed to the loss or degradation of marine resources, if the local government persists in actions which contribute to or cause the degradation or loss of marine resources "at the expense of public benefit, health, and welfare, the Secretary of Commerce and Resources *may* seek legal action against the governing body."¹² The burden of proof is on the state to show that marine resources have been or reasonably could be damaged or destroyed, that there has been a consistent pattern of noncompliance by the locality, and

¹⁰ 42 Fed. Reg. 43552, 43558 (1977) (to be codified in 15 C.F.R. § 923.3(a)(2)).

¹¹ OSCR Plan p. 142.

¹² OSCR Plan p. 142 (emphasis added).

resources, protection of sand dunes and others. The plan simply indicates as to all these important elements that it will "encourage" localities to undertake sufficiently specific standards and criteria but provides no adequate guidelines for their direction.⁹ Once again

⁹ OSCR Plan pp. 61-124; 139-185.

that the state has offered all reasonable forms of assistance and guidance.¹³

This does not appear to be a workable enforcement system. First, because the Secretary has the discretion rather than a duty to sue when the circumstances warrant. Moreover, there is serious doubt whether in a voluntary program such discretionary authority amounts to legal standing to sue. In addition, the burden of proof seems both unduly burdensome and vague, e.g., what constitutes "all reasonable forms of assistance and guidance."

In order to satisfy OCZM standards it would appear that the state must be committed to bring suit against localities whenever there is shown to be a "consistent pattern of non-compliance."

The foregoing analysis addresses some of the more significant elements of what the plan must ultimately contain to be approved by OCZM and by the Secretary of Commerce by February, 1979. A much more pressing, time-critical matter is compliance with existing grant conditions which must be accomplished before OCZM will authorize fourth year federal funding. Specifically, the terms of the third year grant include an express requirement that new legislation required to produce an approvable plan must be drafted in bill form and introduced in the Virginia State legislature when it opens in January, 1978.¹⁴

The present OSCR plan, with limited exceptions, does not as yet contain specific drafts of the legislation necessary to produce an approvable plan.¹⁵ At a minimum, OSCR thus faces the necessity of drafting specific bills for introduction in the State Legislature in January, 1978 as to the following matters:

1. A bill providing basic authority to the Managing Agency to administer and enforce the plan

and to require consistency of action from other state agencies. This bill should also include authorization of state power over local government decisions affecting coastal resources and the siting of major facilities (such as ports, refineries, power plants, pipelines and the like) not only within the "edges" area but elsewhere in the broader coastal zone;

2. A bill providing basic authority to exercise effective oversight of local government management of geographical areas of particular concern (such as sand dunes, beach erosion and the like), high hazard areas, and shoreline permitting.

In conclusion, the OSCR Plan properly states that "the Commonwealth's coastal, estuarine and marine environments are extremely valuable, productive, and fragile, and therefore require careful and protective stewardship by all Virginians."¹⁶ As of 1974 nearly 3 million people or 61 percent of Virginia's population and 50 percent of the industrial manufacturing were located in Tidewater.¹⁷ Agriculture in Tidewater produces approximately one-half of the value of crops produced by the entire state.¹⁸ Population, industry and agriculture have been growing rapidly in Tidewater. Therefore, it is apparent that the highest priority should be assigned to achieving a legally approvable Coastal Resources Management Plan within the limited time that remains. To do so, the OSCR must (1) draft at a minimum the specific legislation noted above and have it introduced in the Virginia State legislature by mid-January, 1978 in order to obtain fourth year Federal funding; and (2) correct all existing deficiencies in the plan as presently articulated to produce a federally approvable plan by February, 1979.

¹³ Id. p. 143.

¹⁴ U. S. Dept. of Commerce, NOAA Grant No. 04-7-158-44041 Sec. E(5) and (6).

¹⁵ OSCR Plan pp. 195-201.

¹⁶ Id. p. 1.

¹⁷ Id. p. 12.

¹⁸ OSCR Plan p. 18.