William & Mary Law Review

Volume 16 (1974-1975)
Issue 4 Symposium: Implementation of the Coastal Zone Management Act of 1972
Article 4

May 1975

Achieving Federal-State Coordination in Coastal Resources Management

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ACHIEVING FEDERAL-STATE COORDINATION IN COASTAL RESOURCES MANAGEMENT

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As the use of coastal resources increases,[1] conflict increases among users, between users and government, within government, and between different levels of government. The last of these types of conflict, that occurring between levels of government as to jurisdiction over particular resource allocations, is the concern of this Article. The leading questions relate to the level of government deciding resource issues pursuant to the Coastal Zone Management Act of 1972 (CZMA).[2] The issue of primary concern is the relationship between state and federal agencies.[3]

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Ed.—A portion of this Article was prepared while the author was a Visiting Professor at the Institute for Marine Studies, Division of Marine Resources, and Law School, University of Washington, Seattle. The author acknowledges the partial support of the Louisiana State University and University of Washington Sea Grant Programs (National Oceanic and Atmospheric Administration, United States Department of Commerce), the assistance of the Louisiana State Planning Office, and the research assistance of Ms. Elizabeth Williams.

1. *See* COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, OUR NATION AND THE SEA: A PLAN FOR NATIONAL ACTION (1969); U.S. DEP'T OF THE INTERIOR, NATIONAL ESTUARY STUDY, H.R. DOC. NOS. 274 & 286, 91st Cong., 2d Sess. (1971); THE WATER'S EDGE (B. Ketchum ed. 1972). For evidence of pressures to increase use of fishery, mineral, and transportation resources, see U.S. Dep't of Commerce, A Draft Outline for the National Fisheries Plan, August 1974, at 7-15; U.S. Dep't of the Interior, Proposed Outer Continental Shelf Planning Schedule, June 1975; U.S. Dep't of Transportation, Deepwater Ports: Notice of Proposed Rule Making, 40 Fed. Reg. 19,956-78 (1975).

The apparent inability of the Third Law of the Sea Convention to agree upon a comprehensive treaty to regulate use and conservation of ocean resources and ocean space may lead the Congress to extend United States jurisdiction for economic resource activity 200 miles from the coast. *See generally* S. 961, 94th Cong., 1st Sess. (1975) (200-mile fisheries zone); S. 1341, 94th Cong., 1st Sess. (1975) (200-mile marine pollution control zone). For discussion of the 200-mile limit see Alexander & Hodgson, *The Impact of the 200-Mile Economic Zone on the Law of the Sea*, 12 SAN DIEGO L. REV. 569 (1975).

2. 16 U.S.C. §§ 1451-64 (Supp. II, 1972). *See* 15 C.F.R. § 920 (1973) (coastal zone management program development regulations); 40 Fed. Reg. 1683-95 (1975) (program approval regulations); 40 Fed. Reg. 8546-48 (1975) (proposed federal-state cooperation regulations). *Cf.* Zile, *A Legislative-Political History of the Coastal Zone Management Act of 1972*, 1 COASTAL ZONE MGMT. J. 235 (1974).

3. Relations between other levels of government, such as a state's relationship with its local and regional entities, or a multistate regional body's relationship with state government are sufficiently important to warrant separate analysis. *See* Brewer, *The Concept of State and Local Relations Under the CZMA*, 16 WM. & MARY L. REV. 717 (1975); Koppelman, *Models*

Four major facility developments in the coastal zone will be addressed as examples of these problems of federal-state relations.[4] The Trident nuclear submarine base to be built in Bangor, Washington, on Puget Sound involves a substantial commitment of shoreline and portends increased impacts upon the population and character of a prime rural boating and fishing area. Opposition to the proposed lease-sale of outer continental shelf areas off Southern California for drilling oil and gas wells has resulted in a law suit, moratorium bills in the state legislature, and a strong energy element in the proposed California coastal plan. The deepwater port proposed for Louisiana generated debate concerning environmental protection efforts, the onshore secondary impacts, and the appropriate role for state government in site selection. Along the East Coast states have sought direct participation in the management of federal offshore leasing and a share of revenues or impact payments from oil and gas operations.

These four issues are chosen as examples of federal-state relationships for a variety of reasons. The primary reason is that each is a documented example of an alternative role for states in coastal resource decisionmaking formerly conducted almost exclusively at the federal level. The possibility of new aggressiveness[5] by the states

for Implementing the CZMA's Concept of State-Local Relations, 16 WM. & MARY L. REV. 731 (1975).

4. Key facility-development issues rather than smaller scale issues concerning marinas, second homes, and jetties were chosen to illustrate federal-state relations although the issues raised by large and small developments are similar. The larger issues tend to receive more attention, with the result that the issues are more carefully developed and articulated. Smaller scale issues are more numerous and more difficult to analyze because they are handled rapidly by local officials and reported in scattered records.

Fruitful research could be conducted on federal-state relations in smaller scale coastal issues. One hypothesis worth testing is that federal agencies are more likely to accommodate state and local preferences when the scale of the issue is small and its impact "local," despite clear federal jurisdiction. *See, e.g.*, 40 Fed. Reg. 19,768 (1975) (Corps of Engineers proposal, one of four alternatives, that a favorable state determination with respect to a particular class of permit requests be given "heavy" weight in favor of issuing a Corps permit, rather than being treated as only evidence of local public interest in the overall decisionmaking process). *See also* Hershman & Folkenroth, *Coastal Zone Management and Intergovernmental Coordination*, 54 ORE. L. REV. 13 (1975) (discussing primarily examples of the smaller scale dredge-and-fill projects).

5. One writer concluded, with respect to the involvement of states in federal outer continental shelf leasing: "They are mobilizing a united front on a state level, recruiting blocs of Members of Congress to support them, such as the New England Congressional Caucus, and seeking to make the case that without adequate planning and safeguards, OCS development in frontier areas could be an economic and environmental nightmare." Magida, *Environment Report/Coastal states seek changes in OCS leasing policy*, 7 NAT'L J. REPORTS 229, 239 (1975).

may have national policy implications for the allocation of natural resources, especially if there is a trend toward more state involvement and less federal presence in certain types of resource management programs.[6] The fact that states are beginning to obtain approval for coastal zone management programs pursuant to the Coastal Zone Management Act lends impetus to the creation of procedures that will assure effective federal-state coordination, and analysis of these four issues is helpful in identifying these procedures.

FEDERAL-STATE RELATIONS UNDER THE CZMA

The federal-state relations question arises from basic principles in the United States Constitution and from the need to accommodate national, state, and local needs in resource allocation. Two sovereign governments exercise powers over any particular geographical area, the government of the United States and the government of some state. The Constitution provides, however, that federal law is supreme, state statutes to the contrary notwithstanding.[7] Allocation of responsibility between the two sovereigns has been addressed often in statutes and court decisions. As to control of water quality, for example, this federal-state relationship is being more clearly defined[8] than it is regarding the control of dredge-and-fill activities.[9]

6. Although the Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857-58 (Supp. II, 1972), and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (Supp. II, 1972), significantly increased federal control in these two areas of environmental protection, the different degrees of state aggressiveness regarding the four major facility developments discussed in this Article suggest that state participation will vary with the type of resource issue. One possible cause for increased state involvement is the impact of the four proposed projects on socio-economic and land use factors, areas traditionally under state and local control. The identification of any reliable trends in relative degrees of federal-state influence in resource and environment issues, however, would require a much broader survey of recent legislative and judicial initiatives.

7. U.S. CONST. art. VI, cl. 2.

8. *See* California *ex rel.* State Water Resources Control Board v. Environmental Protection Agency, 511 F.2d 963 (9th Cir. 1975), *petition for cert. filed*, 43 U.S.L.W. 3615 (U.S. May 14, 1975) (No. 74-1435) (interpreting provisions of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (Supp. II, 1972), and holding that federal agencies must comply with substantive and procedural requirements of state water pollution control programs).

9. The basic authority for the issuance of permits by the Corps of Engineers for dredge-and-fill activities, 33 U.S.C. § 1344 (Supp. II, 1972), does not mention state and local government involvement in decisionmaking. In light of the pressures of state and local agencies for increased involvement and the requirements of new environmental legislation, the Corps uses state and local advice in its decisionmaking. *See* 33 C.F.R. § 209.120 (1974), *amendments proposed*, 40 Fed. Reg. 19,766-94 (1975), & authorities cited therein.

However Congress defines the relationship, courts frequently must determine whether a particular state action comports with the Constitution or the intent of Congress.[10]

Resource allocation is a fertile field for federal-state conflict. For example, interests in mineral-rich states have disputed the authority of the Federal Power Commission (FPC) to allocate natural gas when supplies are short.[11] East Coast states likewise have argued that the protection of recreational beaches and vacation homes requires state participation in any decision to accelerate development of oil and gas reserves on the outer continental shelf because of the risk of oil spills or unwanted commerce and industry.[12]

One commentator has suggested that interposing state government into resource management merely postpones a decision that ultimately must be made on the national level.[13] As resources dwindle, it is argued that perception of the national interest in these resources will grow, and the need for a national resource allocation program will be recognized as necessary to protect the environment.[14] According to this line of argument, the Coastal Zone Management Act, in its attempt to encourage state control of land and water uses in the coastal zone, is a stopgap which finally will yield to federal dominance as demands upon coastal resources intensify.

Federal dominance is inevitable, however, only if state and local governments are ineffective, and there is reason to believe that these

10. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (aircraft noise control under exclusive federal control); Askew v. American Waterway Operators, Inc., 411 U.S. 325 (1973) (state oil pollution control program may coexist with federal programs); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (city smoke abatement code applicable to federally licensed and inspected ship); Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) (radiation pollution control under exclusive federal control).

11. One aspect of this issue was decided in FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972) (upholding FPC jurisdiction to regulate direct-sales deliveries in times of natural gas shortage).

12. Magida, *supra* note 5, at 229.

13. Carver, *The Trend to State Protectionism in Natural Resource Management*, ROCKY MTN. MINERAL INST. 253, 265 (1972).

14. The issue is stated as follows:

> Can Maine, a "producing" state of the resource of unspoiled coast line, keep interstate commerce out of its borders? Obviously it can until the resource of access to water (at spoiled or unspoiled coast lines) becomes critically short. When the national interest is perceived in such critical terms, the choice will have to be made between Delaware Bays, figuratively speaking, which are already developed, and the undeveloped areas, and these will be hard choices.

Id.

governments can be at least as effective as federal decisionmakers. State and local governments have the capability to apportion resource use through the acquisition or regulation of land and other resources to balance competing state and local interests.[15] Further, state and local governments have an important resource-allocation function where resource conflicts have not yet become interstate issues. Moreover, the argument that all resource allocation must be performed at the federal level assumes that federal agents are the only officials competent to make decisions in the national interest, that the national interest cannot be considered adequately at a lower level of government, and that where there is no expressed national policy federal agencies will best fill the policy vacuum.[16] Likewise, it does not admit that a program for managing a particular resource may entail decisionmaking at different levels of government to reflect the concerns of different communities or groups. Finally, federal dominance is not inevitable so long as there exists the possibility that technology will relieve the pressure toward scarcity by providing alternative resources and resource uses.

Not only is federal dominance of resource allocation not inevitable, federal agencies may be less capable than the state to make the allocations. State governments have the legal competence, fiscal control, and political organization needed to manage resources, and they are developing these capabilities to provide new land use controls and coastal management programs.[17] Technical expertise needed to develop policies and programs is available to state governments from resource agencies and state universities. While the vital issues of environmental quality, resource conservation, and private property rights may be asserted with more immediacy in state structures and legislatures than in distant federal agencies, state decisionmakers also are insulated more adequately from the parochial interests that may dominate local governments.

15. Local governments traditionally have exercised the powers of land use control. *See* Brewer, *supra* note 3, at 722-23.

16. California has argued that the state need not accept further outer continental shelf oil and gas development until a comprehensive national energy study demonstrates the need for Southern California OCS development according to clearly defined national interests. *See* note 53 *infra* & accompanying text.

17. *See* F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control (1971); E. Bradley & J. Armstrong, A Description and Analysis of Coastal Zone and Shoreline Management Programs in the United States (Sea Grant Program, University of Michigan, Technical Report No. 20, 1972); Coastal Zone Management Institute, Coastal Zone Management: The Process of Program Development, app. A (1974).

The state thus has an essential role as an operative arm of national policy and as a focal point for the accommodation of national policy and local concerns.

This role is recognized in the manner in which the Coastal Zone Management Act addresses the allocation of coastal zone resources, the competence of different levels of government to make allocation decisions, and the procedures for coordinating the concerns of the different levels of government. The CZMA provides for state determination of the boundaries for the coastal zone, of the permissible land and water uses in the zone, and of guidelines for such uses in particular areas of the zone.[18] These determinations are to be included in a coastal management program implemented under state law[19] and created with the full cooperation, coordination, and prior review of federal agencies and local governments.[20] "[N]ational interest involved in the siting of facilities necessary to meet requirements which are other than local in nature" must be considered fully in the development of a state program.[21]

Once a state's program is approved by the Secretary of Commerce,[22] four "federal consistency" provisions of the Act become effective. The first requires that federal agencies "conducting or supporting" activities which directly affect the state's coastal zone must, to the maximum extent practicable, conduct or support those activities in a manner which is consistent with the state's approved coastal management program.[23] Second, federal development projects within the coastal zone of a particular state must be consistent with the state's program, to the maximum extent practicable.[24] Third, applicants for federal licenses or permits must obtain certification that the proposed action is consistent with a state's program.[25] Fourth, state and local government applicants for federal grants must show that proposed projects are consistent with the management program.[26]

18. 16 U.S.C. § 1454(b) (Supp. II, 1972).
19. *Id.* § 1455(c).
20. *Id.* §§ 1455(c)(2), 1456(a),(b).
21. *Id.* § 1455(c)(8). *Cf.* U.S. Dep't of Commerce, Adequate Consideration of the National Interest in Coastal Zone Management (undated memorandum provided as guidance to states for interpretation of the national-interest clause).
22. 16 U.S.C. § 1455(a) (Supp. II, 1972).
23. *Id.* § 1456(c)(1).
24. *Id.* § 1456(c)(2).
25. *Id.* § 1456(c)(3).
26. *Id.* § 1456(d).

The key provisions, then, for addressing federal-state relations concerning the coastal zone are the national-interest clause, which requires states to consider national interests in the establishment of their programs, the requirement that federal agencies review a state's program prior to its approval, and the federal-consistency provisions, which require federal agencies to act in a manner which is consistent with the state interests expressed in approved management programs. An examination of four major facility developments will indicate some problems in the effectuation of these provisions.

FOUR MAJOR FACILITY DEVELOPMENTS

Trident Submarine Base, Bangor, Washington

The first example of the handling of a federal-state controversy concerns the Trident Submarine Base proposed for Bangor, Washington, in Kitsap County.[27] This Navy "refit" complex, intended to support nuclear submarines patrolling in the Pacific, would use 6,929 acres of land and nearly four miles of shoreline. Located wholly on an existing federal installation which borders on Hood Canal, a prime recreational area in Puget Sound, it will entail extensive shoreline development for activities such as submarine docking, wetberthing, maintenance, and reprovisioning.[28] Increased

27. For a general description of the project and potential impacts, see Dep't of the Navy, Trident Support Site Final Environmental Impact Statement (July 1974). *See also* Comptroller General, Summary of GAO's Study of Factors Considered by the Navy in Selecting a Site for the Trident Support Complex, Nov. 14, 1973; Congressional Research Service, The Trident Program, Oct. 15, 1973. The author thanks David Schnapf for his assistance on Trident-related issues.

28. The Navy described the project as follows:

> The waterfront installations will include two Refit Piers, a Drydock and Service Pier, two Explosive Handling Piers, and a degaussing/deperming facility. The Refit Pier-Drydock area will service and maintain the submarines while the Explosive Handling Piers will serve the missiles. The proposed Refit Piers are 660-foot wharves, approximately 75-feet wide with a 90-foot wide berth. The Drydock will be 690-feet long and 100-feet wide, with a 60-foot deep, 90-foot wide berth. These piers will be located a minimum of 700 feet from the shoreline and will extend to a depth of approximately 110 feet of water. Drydock service facilities, storage buildings for hatch covers and a transit shed will be supplied for each pier. Serving both the Refit Piers and the Drydock are a SUBSAT (Submarine Supply Assistance Team) Building and a machine shop. In addition, a two-story industrial support facility will be located on the refit/drydock piers.
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> The two Explosive Handling Piers (EHP) are 630-foot long combined quays and piers with 460-foot long covers which will be approximately 120 feet high. Minimum required water depth at the berth is 43 feet. These covered berths

impacts are expected from shoreline construction and induced economic and population shifts in Kitsap County. Anticipating considerable Trident-related growth, local officials in Kitsap County campaigned for federal funds with which to meet planning and public facility needs.[29]

In late 1973 and early 1974 this campaign, involving local officials, Washington State Congressmen, and officials of the Navy and Department of Defense, had two results. First, the Secretary of Defense, as Chairman of the Inter-Agency Economic Adjustment Committee established to direct federal efforts to alleviate economic difficulties associated with military bases,[30] declared Kitsap County a Defense Impact Area.[31] He accordingly urged the Under Secretaries Group for Regional Operations,[32] which supervises and provides policy guidance to Federal Regional Councils,[33] to have the Seattle-based Federal Regional Council accord Trident-related impact studies and adjustment programs funding priority.[34] As a consequence, all federal funds expended through April 1975 on Trident-related projects came from existing federal agency channels.[35] Second, a section was added to the Military Construction Authorization Act of 1975[36] allowing the Secretary of Defense to use

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> have the capability for all-weather explosive handling operations—the on/off loading of missiles and other ordnance devices. There will be road access to the piers via a trestle. Also included is a Dockside Handling Building (DHB) with floor space of about 9,400 square feet, to handle the missiles, liners, and WEC hoist.
>
> The degaussing/deperming facility with their respective operations and support buildings will also be located at the waterfront. The Deperming Berth will be a 650-foot long pier with cable runs to the pier and to underwater instruments to monitor the ships.

Dep't of the Navy, *supra* note 27, at 11-12.

29. Telephone interview with John Hoursley, Kitsap County Planning Commission, Apr. 10, 1975. Early attempts to persuade the Navy consultants to use local government planning staffs to assist in assessing social, economic, and environmental impacts were unsuccessful. *Id.*

30. 9 WEEKLY COMP. PRES. DOC. 317-318 (1970).

31. Interview, *supra* note 29.

32. *See* Exec. Order No. 11,647, *as amended by* Exec. Order No. 11,731, 3 C.F.R. 335-37 (1974).

33. *Id. See generally* U.S. Office of Management and Budget, Circular No. A-95, Nov. 13, 1973.

34. Interview, *supra* note 29.

35. *Id.*

36. Pub. L. No. 93-552, § 608, 88 Stat. 1763, provides:

> Sec. 608. (a) The Secretary of Defense is authorized to assist communities located near the TRIDENT Support Site Bangor, Washington, in meeting the

Trident project development and construction funds to meet costs of increased municipal services and facilities for communities near the Trident support site, to the extent that funds were unavailable under other federal programs. These funds have not yet been used because existing federal funding has been adequate.[37]

These developments regarding the Trident base have come about through direct local-federal coordination with little resort to the Washington Shorelines Management Act,[38] the major component of the state coastal management program, despite the obvious impact of the base upon the state's coastal zone. A lack of statutory authority appears responsible for this bypassing of the Act. Because the Act neither lists federal agencies as "persons" subject to the Act[39] nor specifically excludes federal lands from its coverage,[40] local gov-

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costs of providing increased municipal services and facilities to the residents of such communities, if the Secretary determines that there is an immediate and substantial increase in the need for such services and facilities in such communities as a direct result of work being carried out in connection with the construction, installation, testing, and operation of the TRIDENT Weapon System and that an unfair and excessive financial burden will be incurred by such communities as a result of the increased need for such services and facilities.

(b) The Secretary of Defense shall carry out the provisions of this section through existing Federal programs. The Secretary is authorized to supplement funds made available under such Federal programs to the extent necessary to carry out the provisions of this section, and is authorized to provide financial assistance to communities described in subsection (a) of this section to help such communities pay their share of the costs under such programs. The heads of all departments and agencies concerned shall cooperate fully with the Secretary of Defense in carrying out the provisions of this section on a priority basis.

(c) In determining the amount of financial assistance to be made available under this section to any local community for any community service or facility, the Secretary of Defense shall consult with the head of the department or agency of the Federal Government concerned with the type of service or facility for which financial assistance is being made available and shall take into consideration (1) the time lag between the initial impact of increased population in any such community and any increase in the local tax base which will result from such increased population, (2) the possible temporary nature of the increased population and the long-range cost impact on the permanent residents of any such community, and (3) such other pertinent factors as the Secretary of Defense deems appropriate.

This language was taken almost verbatim from a provision in the Military Construction Authorization Act of 1971 dealing with communities affected by the Safeguard Anti-ballistic Missile System. Pub. L. No. 91-511, § 610, 84 Stat. 1224.

37. Interview, *supra* note 29.

38. WASH. REV. CODE ANN. § 90.58 (Supp. 1974); *cf.* Final Guidelines, Shoreline Management Act, WASH. ADMIN. CODE § 173-16 (1972).

39. *See* WASH. REV. CODE ANN. § 90.58.030(1)(d) (Supp. 1974).

40. *See id.* § 90.58.260 (requiring certain state agencies to represent the state's interests before appropriate federal agencies to protect state shoreline use policies).

ernments could include federally owned areas in their own coastal programs pursuant to the Act, but they would have no ability to enforce their plans through permit requirements.[41] Further, because local governments, rather than any statewide body, have the primary responsibility to plan, pursuant to state guidelines, for shorelines of significance to the state generally,[42] including Hood Canal from the mean high tide line seaward,[43] there appears to be no way to plan at the state level for the use of Hood Canal shorelands and submerged lands, except through local governments. Nonetheless, the state, rather than any locality, has the sole statutory authority to deal with federal agencies,[44] although the statute relies upon local coastal programs to incorporate statewide interests. Thus there appears to be both a lack of authority to control federal actions by local permit and a lack of authority to plan effectively at the state level for use of shorelines of statewide significance. Accordingly, the state management program in Washington seems legally incapable of playing an important role regarding the Trident facility.

OCS Oil and Gas off California

In the wake of the "energy crisis" and official announcements of accelerated outer continental shelf (OCS) oil and gas leasing off California and elsewhere,[45] Californians sought to assert influence over lease-sale decisions through litigation,[46] passing resolutions,[47]

41. Federal agencies argue that, although they will comply with substantive provisions of state environmental and land use laws, they should not be required to comply with administrative requirements such as permits. *See* Exec. Order No. 11,752, 3 C.F.R. 380, 381 (1974); Intergovernmental Cooperation Act, 42 U.S.C. § 4231(c) (1970) (federal aid consistent with state and local planning); U.S. Office of Management and Budget, Circular A-95, Part II (2)(a)(2), Nov. 13, 1973 (consistency of federal plans or projects with state, areawide, and local development plans and programs). *But see* note 8 *supra*.

42. WASH. ADMIN. CODE § 173-16-040(5) (1972).

43. WASH. REV. CODE §§ 90.58.030(2)(e)(ii),(iii) (Supp. 1974).

44. *Id.* § 90.58.260.

45. *See* FEDERAL ENERGY ADMINISTRATION, PROJECT INDEPENDENCE REPORT (1974).

46. California *ex rel.* Younger v. Morton, Civil No. 74-2374 (C.D. Cal., filed Aug. 15, 1974).

47. Five resolutions, including two from the California Assembly, two from the City of Santa Barbara, and one from the California Coastal Zone Conservation Commission are reprinted in SENATE COMM. ON COMMERCE, 93D CONG., 2D SESS., OUTER CONTINENTAL SHELF OIL AND GAS LEASING OFF SOUTHERN CALIFORNIA: ANALYSIS OF ISSUES, app. A (Comm. Print 1974).

legislation,[48] and administrative action.[49] The coastal plan[50] now being prepared by the state Coastal Zone Conservation Commissions,[51] may prove to be one method for regulating oil and gas development and for involving the state in the federal decision-making process.

The Preliminary Coastal Plan contains a lengthy and detailed energy element for energy conservation, alternative energy sources, power plants, petroleum development, refineries, tanker terminals, and liquified natural gas facilities.[52] Policies expressed in the energy element address both the need for offshore development and techniques for its control if a need is demonstrated. The Plan states that new state or federal OCS production should proceed only if shown to be necessary for the needs of California and the Southwest or if clearly identified as an integral part of a balanced national energy program with acceptable onshore impacts comporting with other elements of the Plan.[53] If drilling does occur on the outer continental shelf, the Plan suggests certain protective measures, including the following: submission of one-, five-, and ten-year plans to appropriate state agencies for exploration, production, and related onshore and offshore development if drilling is successful; maximum feasible consolidation of drilling, production, and other facilities to reduce the number of wells and support facilities; subsea completion of wells and submerged production systems where feasible; use of platforms rather than islands where safety conditions permit; disclosure of exploration and production data; revenue-sharing with California and other coastal states from outer continental shelf royalties; and designation of sanctuary areas where drilling would not

48. Assembly Bill 180, 1975-76 Cal. Legis. (1975) (prohibiting construction of oil and gas pipelines on or across submerged lands without permit until a coastal plan is adopted or Dec. 31, 1977, whichever occurs first). California Congressmen also have advocated national legislation designed to increase state control over oil and gas drilling. *See* S. 81, 94th Cong., 1st Sess. (1975); H.R. 1236, 94th Cong., 1st Sess. (1975).

49. A newly appointed three-member California Lands Commission disapproved several new oil drilling projects in the Santa Barbara Channel in January 1975. BNA, ENV. REP., CURRENT DEVELOPMENTS 1485 (1975). Governor Edmund G. Brown, Jr., has urged the California congressional delegation to insist that there be no national OCS leasing until there is congressional action to ensure state involvement or until the end of 1976 when the California legislature would have had time to adopt a state coastal management program. 6 COASTAL ZONE MANAGEMENT, No. 23, at 5 (1975).

50. California Coastal Zone Conservation Commissions, Preliminary Coastal Plan (Hearing Draft, March 1975) [hereinafter cited as *California Plan*].

51. *See* California Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE §§ 27000-27650 (West Supp. 1975).

52. *California Plan, supra* note 50, at 163-243.

53. *Id.* at 215, 216.

occur because of geologic hazards or high recreation and esthetic interests in adjacent shoreline communities.[54]

California thus has written a policy blueprint for control of OCS oil and gas development which can be advocated in negotiations with the Department of the Interior.[55] The energy element of the Plan, if adopted by the California legislature,[56] would be implemented in part by the coastal agency and in part by a newly created energy commission.[57] Accordingly the coastal management program appears likely to be important to the shaping of federal-state relations in the development of the state's outer continental shelf.

Louisiana Deepwater Port

Political and economic leaders in Louisiana first discussed seriously the need for a deepwater port in the Gulf of Merico when it became apparent that oil tankers were growing in length and draft, that imported oil was replacing domestically produced oil at an increasing rate, and that channels were not sufficiently deep in Louisiana to accommodate the larger tankers. In 1972 the Louisiana Superport Task Force recommended the establishment of a new agency to promote and regulate superport development in the state[58] based upon initial technical studies done by Louisiana State University.[59]

54. *Id.* at 216-223.

55. The debate between states and the federal government has been well documented. *See* OFFICE OF COASTAL ZONE MANAGEMENT, U.S. DEP'T OF COMMERCE, COASTAL MANAGEMENT ASPECTS OF OCS OIL AND GAS DEVELOPMENTS (January 1975) (containing substantial references, a directory of agencies and organizations, and a detailed outline of issues); SENATE COMM. ON COMMERCE, 93D CONG., 2D SESS., OUTER CONTINENTAL SHELF OIL AND GAS DEVELOPMENT AND THE COASTAL ZONE (Comm. Print 1974); SENATE COMM. ON COMMERCE, 93D CONG., 2D SESS., OUTER CONTINENTAL SHELF OIL AND GAS LEASING OFF SOUTHERN CALIFORNIA: ANALYSIS OF ISSUES (Comm. Print 1974); Magida, *supra* note 5; Kenworthy, *Oil-Lease Debate Heats Up*, N.Y. Times, Feb. 23, 1975, § 3, at 1, col. 1.

56. Unless the California legislature adopts the Plan and establishes new authorities and agencies by the end of the 1976 legislative session, current restrictions will expire. CAL. PUB. RES. CODE § 27650 (West Supp. 1975).

57. State Energy Resources Conservation and Development Commission, CAL. PUB. RES. CODE §§ 25000-25903 (West Supp. 1975). The Coastal Plan recommends extending the authority of the new energy commission to include all oil and gas production, processing and transmission facilities, and power plants, while allowing the coastal agency concurrent authority over the land use and environmental aspects of facilities located in whole or in part in the coastal zone. The coastal agency also would participate fully with the energy commission during initial planning stages. *California Plan, supra* note 50, at 200-01.

58. LOUISIANA SUPERPORT TASK FORCE, A SUPERPORT FOR LOUISIANA (1972).

59. Louisiana State University Center for Wetland Resources, Preliminary Recommendations and Data Analysis 1-10 (Louisiana Superport Studies Rep. No. 1, 1972).

In the same year the Louisiana Deep Draft Harbor and Terminal Authority, subsequently renamed the Offshore Terminal Authority, was created.[60] In addition to promoting offshore port development, it was given the task of preparing an Environmental Protection Plan within 18 months of the establishment of the Authority.[61] The Plan adopted by the Authority in January 1974[62] provides substantial policy and technical guidance with respect to distinct aspects of land and water impacts from port development: economic and environmental considerations in the selection of sites for the port and related facilities; criteria for the design of port-related facilities including consideration of multiple uses and growth containment; procedures for ensuring that port operations are safe and result in minimal environmental pollution; establishment of compensation charges and an environmental protection fund to offset any unavoidable environmental disturbances; and requirements for ongoing coordination with other federal and state agencies, especially the state agency responsible for creation of the Louisiana coastal zone management plan.[63]

While the state was preparing its Environmental Protection Plan, Louisiana Offshore Oil Port, Inc. (LOOP), initiated its own studies.[64] It argued that its concept and design for a single purpose crude oil importing facility, owned and operated by industry rather than a public authority, would be in the best interest of Louisiana and the nation.[65]

Partially as a result of such conflicting private and public efforts, Congress enacted the Deepwater Port Act of 1974,[66] under which proposed regulations were published in May 1975.[67] State participation in federal decisionmaking pursuant to the Act should be significant: state governors may veto the siting of a port;[68] states may charge fees to recover certain administrative and environmental

60. LA. REV. STAT. ANN. §§ 34:3101-16 (Supp. 1975).

61. *Id.* § 34:3113.

62. State of Louisiana Deep Draft Harbor and Terminal Authority, Superport Environmental Protection Plan, Jan. 26, 1974.

63. LOUISIANA ADVISORY COMMISSION ON COASTAL AND MARINE RESOURCES, LOUISIANA WETLANDS PROSPECTUS (1973).

64. *See* Louisiana Offshore Oil Port, Inc., Presentation to the Louisiana Deep Draft Harbor and Terminal Authority, New Orleans, Mar. 30, 1975, at 13.

65. *Id.* at 6-7.

66. Pub. L. No. 93-627, 88 Stat. 2126.

67. Deepwater Ports: Notice of Proposed Rule Making, 40 Fed. Reg. 19,956-78 (1975).

68. Pub. L. No. 93-627, § 9(b)(1), 88 Stat. 2137.

costs;[69] states may receive licenses on a priority basis;[70] adjacent states must have received a coastal management planning grant;[71] and a fund is established to compensate for damages from any oil spills.[72]

Thus, most federal-state relations questions in connection with deepwater port development will be handled within the context of the new federal law and guidelines, although the role of any state coastal management program still is undetermined. There are no specific requirements in the Act for relying upon coastal management programs, only generalizations about planning and coordination.[73] In Louisiana the effort to promote and regulate potential offshore ports has far outpaced creation of a coastal zone management plan, unlike the states of Washington and California where coastal zone management has begun to take form. One possibility yet to be explored fully in Louisiana is the use of the Environmental Protection Plan as an integral part of the management program for those coastal areas affected by deepwater port development.

OCS Oil and Gas off the East Coast

East Coast states currently are battling the Department of the Interior over accelerated outer continental shelf leasing proposals.[74] The issues resemble those in California, but the fact that no drilling has been conducted before in some eastern areas[75] creates concern that new classes of impacts will be felt onshore.[76] Having now lost

69. *Id.* § 5(h)(2).
70. *Id.* § 5(i)(2).
71. *Id.* § 9(c).
72. *Id.* § 18.
73. *Id.* § 9(c).
74. All East Coast states do not see the issues or solutions similarly. For example, Maine's Governor James B. Longley has taken a neutral position on the OCS issue. New Hampshire's new Governor Meldrin Thompson is fully behind accelerated OCS leasing. Both stand quite apart from other New England governors and governors of mid-Atlantic states. Telephone interview with Alan Kaufman, Conservation Law Foundation, Boston, Apr. 22, 1975. There are sufficient common elements of concern, however, to justify referring to an "East Coast" approach to OCS issues.
75. Previously untapped "frontier" areas off the East Coast include the Baltimore Canyon (extending from Long Island to North Carolina), Georges Bank (off New England), and the South Atlantic (from northern Florida to the Carolinas). Magida, *supra* note 5, at 236-37.
76. A number of studies have attempted or are attempting to determine the effects of OCS development. *See, e.g.*, D. KASH & I. WHITE, ENERGY UNDER THE OCEANS (1973); SENATE COMM. ON COMMERCE, 93D CONG., 2D SESS., NORTH SEA OIL AND GAS: IMPACT OF DEVELOPMENT ON THE COASTAL ZONE (Comm. Print 1974) (applying experience in Scotland to the East

their claim to ownership of resources beyond the three-mile limit,[77] the states are applying various collateral pressures upon the Department of the Interior.

Since the areas to be leased generally lie offshore of more than one East Coast state, there has been interest in interstate cooperation to increase state participation in OCS leasing matters. In New England, for example, two existing entities are involved in policy coordination and technical studies respectively: the New England Regional Commission and the New England River Basin Commission.[78] More recently a proposal has been circulating to establish a New England Energy Authority, an interstate organization which would buy and resell oil and gas rights to all of Georges Bank off New England, imposing appropriate environmental conditions and royalty payments on the resale.[79] Governors of mid-Atlantic states recently formed the Mid-Atlantic Governors' Coastal Resources Council to act as a collective staff for the conduct of joint studies to aid in presenting options and recommendations to the governors.[80] Several Atlantic governors have jointly requested a number of items such as formation of a comprehensive national energy policy, recognition of state environmental concerns, separation of exploration from production, creation of new institutions and financial arrangements for OCS exploration and development, and full implementation of the Coastal Zone Management Act.[81] Additionally, a proposal has surfaced to provide for complete consolidation of an oil and gas producing area, the Baltimore Canyon for example, by executing one lease to a consortium of oil companies that would buy shares in the region in order to increase state control over the pacing and siting of development.[82]

Coast); U.S. COUNCIL ON ENVIRONMENTAL QUALITY, OCS OIL AND GAS—AN ENVIRONMENTAL ASSESSMENT (1974); J. Goodman, Decisions for Delaware: Sea Grant Looks at OCS Development, University of Delaware, Sea Grant Program, February 1975.

77. *See* United States v. Maine, 95 S. Ct. 1155 (1975).

78. Telephone interview with Henry Lee, Director of Massachusetts Energy Office, May 2, 1975; Telephone interview with Richard Dowd, Planning Director, Connecticut Dep't of Environmental Protection, Apr. 25, 1975; Telephone interview with Alan Kaufman, Conservation Law Foundation, Boston, Apr. 22, 1975. Comments as to the effectiveness of these two organizations for bringing about regional cooperation were not optimistic.

79. R. Dowd & S. Weems, Controlling Georges Bank Oil and Gas Development: A Cooperative New England Energy Authority, Draft of Feb. 28, 1975.

80. Telephone interview with Edward F. Wilson, Coordinator for OCS Activities, Commonwealth of Virginia, Apr. 25, 1975.

81. Policy Position on Energy and the Atlantic Continental Shelf, Jan. 31, 1975.

82. Telephone interview with Henry Lee, *supra* note 78.

There have been two important federal responses to the initiatives by the East Coast states. First, the Department of Interior has indicated three areas in which it is willing to accept increased state participation in OCS leasing: a national policy advisory board, supplementing the existing technical advisory board, will be established in the Department, to represent state government and federal agencies, and to be organized into regional panels; there would be a "pause" provided in leasing arrangements after exploration and before production to allow close environmental review of actual development plans for a leased tract by both federal and state agencies; and the Interior Department would not object to a revenue-sharing arrangement with states if it is fair to all states.[83] Second, Congress is giving serious attention to various revenue-sharing and impact-compensation proposals, including the following: amendment of the Coastal Zone Managment Act to provide greater state control over oil and gas activities;[84] amendment of the Coastal Zone Management Act to provide greater state control of energy activities and a coastal impact fund to offset costs associated with energy-related impacts;[85] amendment of the Outer Continental Shelf Lands Act (OCSLA) to increase state involvement in decisionmaking;[86] amendment of OCSLA to establish a fund to compensate impacts from anticipated or actual oil and gas production;[87] amendment of OCSLA to provide a fund from which to pay damages from oil spills;[88] and an OCS-revenue-sharing bill providing preferential treatment to coastal states.[89] It is likely that the combined efforts of East and West Coast Congressmen will lead to enactment of legislation providing state participation in decisionmaking and revenue-sharing.

The pressures exerted by the East Coast states generally tend toward the creation of new laws and institutions to address OCS-related problems; only a cautious optimism is expressed in those states that comprehensive coastal management programs will play

83. Statement of Darius W. Gaskins, OCS Program Coordinator, U.S. Dep't of the Interior, Third Annual Coastal Zone Management Conference, Asilomar, Cal., May 28, 1975.

84. S. 81, 94th Cong., 1st Sess. (1975); H.R. 1236, 94th Cong., 1st Sess. (1975).

85. S. 586, 94th Cong., 1st Sess. (1975); H.R. 3981, 94th Cong., 1st Sess. (1975).

86. H.R. 6218, 94th Cong., 1st Sess. (1975).

87. S. 521, 94th Cong., 1st Sess. (1975).

88. S. 426, 94th Cong., 1st Sess. (1975).

89. S. 130, 94th Cong., 1st Sess. (1975); H.R. 376, 94th Cong., 1st Sess. (1975).

a key role in the resolution of those problems.[90] A complicating factor is the history of coastal legislation on the East Coast where the presence of extensive marshes and beach dunes and the long-standing pressures for development of these coastal areas have resulted in the enactment of numerous special-purpose laws.[91] East Coast states may well deal with coastal management by coordinating these laws, as has been done in Maine which has four important coastal laws,[92] while leaving energy-related problems to new institutions.

EMERGING THEMES FOR ONGOING COORDINATION

Because of the potential usefulness of the CZMA's national-interest and federal-consistency provisions for dealing with federal-state relations questions in coastal resources issues,[93] it is appropriate to consider the role of state coastal zone management programs evolving from the experiences in Washington, California, Louisiana, and on the East Coast. Although these experiences have been too limited in both duration and number to allow conclusive assessment of the future role for coastal zone management,[94] some observations are possible.

First, states differ significantly in the degree to which emerging coastal management programs are used to assert influence over major facility developments. The State of Washington Shoreline Management Program has been all but ignored in the Trident nuclear submarine base controversy as direct local-federal coordination has displaced state participation, largely because of deficien-

90. Interviews with Henry Lee, Richard Dowd, Alan Kaufman, *supra* note 78. Telephone interview with James I. Jones, Chairman of Florida Outer Continental Shelf Committee, Apr. 25, 1975.

91. Partial compilations of state coastal laws include E. BRADLEY & J. ARMSTRONG, *supra* note 17; U.S. DEP'T OF COMMERCE, STATE COASTAL ZONE MANAGEMENT ACTIVITIES—1974 (1974); Ausness, *A Survey of State Regulation of Dredge and Fill Operations in Nonnavigable Waters*, 8 LAND & WATER L. REV. 65 (1973); Robbins & Hershman, *Boundaries of the Coastal Zone: A Survey of State Laws*, 1 COASTAL ZONE MGMT. J. 305 (1974).

92. *See* Wetlands, ME. REV. STAT. ANN. tit. 12, §§ 4701-09 (1974); Mandatory Zoning and Subdivision Control, ME. REV. STAT. ANN. tit. 12, §§ 481-14 (1974); Site Location of Development, ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1973); Oil Discharge Prevention and Pollution Control, ME. REV. STAT. ANN. tit. 38, §§ 541-57 (Supp. 1973).

93. *See* notes 18-26 *supra* & accompanying text.

94. The four case studies only illustrate key facility-development projects containing federal-state relations issues; they are not prototypes of all coastal zone developments. As coastal zone management programs evolve, conclusions as to their utility in solving federal-state relations problems can be assessed more accurately.

cies in the statutory basis for the shorelines program. Perhaps because the California Coastal Zone Conservation Commission was established as the result of an initiative in which oil-related issues were prominent,[95] that state's coastal management program is aggressively involved in articulating the state's view of OCS development and in framing the technical and policy issues that will be the subject of federal-state negotiations. The fact that deepwater port planning has outpaced general planning for coastal zone management in Louisiana undoubtedly reflects executive and legislative priorities in that state and suggests that the future of coastal zone management may depend upon the ability of the program to accommodate the existing Environmental Protection Plan and the impact-mitigation provisions of the Deepwater Ports Act. On the East Coast, the long history of special-purpose legislation for coastal areas and the current impetus for creation of new institutions for energy-related problems[96] creates only a cautious optimism about the likely role of coastal zone management programs.

These differences reflect an uncertainty that coastal management programs can deal adequately with such large developments. For example, it could be argued that coastal management programs are inappropriate vehicles for the review of major energy facilities since such facilities demand specialized attention because of their size and complexity, because of their impacts outside the coastal zone, and because of the involvement of issues, such as the effect of rate structure upon demand, that normally are beyond the scope of coastal zone management. The State of Washington apparently has accepted this argument since it has expressed a desire to shift authority for power plant siting to the newly created Thermal Power Plant Site Evaluation Council.[97] California, on the other hand, has suggested concurrent jurisdiction for its coastal management program and its new Energy Resources Conservation and Development Commission over environmental and land use aspects of coastal

95. *See* Healy, *Saving California's Coast: The Coastal Zone Initiative and Its Aftermath*, 1 COASTAL ZONE MGMT. J. 365, 365-67 (1974).

96. *See* CAL. PUB. RES. CODE §§ 25000-25903 (West Supp. 1975); DEL. CODE ANN. tit. 7, §§ 7001-13 (1974); LA. REV. STAT. ANN. §§ 34:3101-16 (Supp. 1975); N.J. STAT. ANN. §§ 13:19-1 to -21 (Supp. 1975); R.I. GEN. LAWS ANN. §§ 46-23-1 to -12 (Supp. 1972); WASH. REV. CODE ANN. § 80.50.030 (Supp. 1974).

97. State of Washington, Coastal Zone Management Program Application to the Secretary of Commerce for Approval Under Section 306 of the Coastal Zone Management Act of 1972, Feb. 14, 1975, at 54.

zone facilities.[98] The California approach of retaining within the coastal agency those aspects of a siting question that are important to the coastal management program generally, even though another agency might have equal or ultimate authority, appears to assure the comprehensiveness necessary to achieve objectives for the entire coastal zone.[99]

A second observation from the four state experiences concerns the emergence of some important themes for resolving federal-state issues. For example, it appears that the specificity and comprehensiveness of the statement of the issues may aid in their resolution. In contrast to the clear and complete articulation of state concerns in California and Louisiana, the East Coast states have not yet developed common goals for OCS development and the Shorelines Management program in Washington State lacks even the legal basis for confronting the Navy in order to define the relevant issues.

Another emerging theme concerns the state's organization to deal with federal-state issues. Having established a specific state agency that is solely responsible for deepwater port development, Louisiana thus has a single forum for clarifying federal-state relations as questions arise. Washington also has such an agency, but it lacks adequate statutory guidance. California has only a temporary agency under a coastal management plan that has yet to obtain final approval. While the East Coast states are developing new energy offices, the important interstate relationships have not yet developed sufficiently to permit clear delineation of objectives for federal-state relations.

Perhaps the most important theme for the resolution of federal-state relations concerns the competence, in terms of legal authority under law or in terms of technical capacity, of a particular agency or governmental level to decide an issue. Louisiana, for example, is authorized under its laws to deal with environmental impact questions affecting the routing of petroleum product pipelines within its

98. *California Plan, supra* note 50, at 200-01.

99. The Director of the Office of Coastal Zone Management has indicated that his office actively will seek the participation of coastal zone management programs in future energy facility-siting and impact issues since to carve energy issues out of coastal zone management would undercut the comprehensiveness that is to be one of the strengths of coastal zone management. Closing remarks of Robert Knecht, Third National Coastal Zone Management Conference, Asilomar, Cal., May 30, 1975.

jurisdiction,[100] while federal legislation is unclear on the matter.[101] Likewise, through extensive and detailed environmental study,[102] Louisiana's Offshore Terminal Authority has acquired the technical capacity for pipeline routing. By contrast, legal authorization is unclear for the State of Washington to determine shoreline and submerged land uses involving federal installations: federal agencies are not required to obtain shoreline permits from the local governments or the state, and no statewide master plan for areas outside the competence of local governments is required.

This lack of legal authorization is particularly detrimental because technical capacity for different aspects of the Trident base is divided, the Navy having expertise concerning the requirements for nuclear submarine deployment while only state and local agencies and interests are competent to deal with such questions as the visual amenities of the shore, local environmental impacts, and recreation patterns. Technical capacity depends upon the information available at each level of government and the credibility regarding the motivation and perspective of each level: Kitsap County in Washington normally would not have the information needed to select an East or West Coast site for a nuclear submarine base, and any claim by the Navy to know local aesthetic and recreation preferences would lack credibility. Technical capacity also would vary according to the particular step in the decisionmaking process; federal or state agencies might have greater capabilities in particular areas such as gathering environmental information, soliciting public opinion, engaging experts, or formulating objectives.[103]

These three themes, clarity of issues, state organization, and decisionmaking competence, may indicate an approach to the proper allocation of responsibilities in federal-state relations. Delineation of the issues involved in a controversy such as that surrounding the Trident submarine base, identification of the structures available to

100. State of Louisiana Deep Draft Harbor and Terminal Authority, *supra* note 62, at 3-1, 4-1.

101. For example, the Office of Pipeline Safety in the Department of Transportation is in a dispute with the Federal Power Commission over regulation of interstate pipelines within the three-mile limit. L. Mallon, Offshore Oil Drilling and Onshore Impact: The Legal/Institutional Framework 9-10 (University of Miami Ocean and Coastal Law Program Rep. No. FY75-5, 1974).

102. *See, e.g.*, Stone & Robbins, Recommendations for the Environmental Protection Plan (Louisiana Superport Studies Rep. No. 3, 1973).

103. Robert F. Goodwin is responsible for noting that competency may differ according to the stage of the decisionmaking process. Personal communication to author.

resolve such issues, and an allocation of issues according to the legal and technical competence of the different structures could resolve at least some aspects of federal-state relations.

A third observation is that state coastal zone programs need procedures and techniques for utilizing these themes to resolve particular federal-state issues as they arise. At the heart of this need is the definition and operation of the national-interest and federal-consistency clauses of the Coastal Zone Management Act. Research is underway to find judicial precedent for interpreting the operative terms of these clauses, terms such as "consistency," "national interest," and "to the maximum extent practicable."[104] Moreover, the inevitable litigation that will arise from CZMA implementation ultimately will assist the resolution of federal-state relations. The need to initiate the state programs and effectuate the Act's requirement for coordination and cooperation among levels of government,[105] however, will preclude awaiting extensive judicial construction of the Act. The Act encourages state coordination with federal agencies through its requirement that the national interest be considered in coastal management,[106] and it encourages federal cooperation through the requirement that federal agency actions accord with state plans and through its provision for federal agency review of state programs prior to approval.[107] An ongoing coordination process will be necessary because the range of potential federal-state conflicts is too great for any proposed state program to address them all specifically. Accordingly the following factors should be integral to the federal-state coordination requirements of the Coastal Zone Management Act.

First, an *ongoing coordination process* should be developed by each state coastal management program as a visible subprogram under the direction of a responsible state official and staffed by at least one full-time employee. The coordination program should regularly consider both national-interest and federal-consistency ques-

104. Statement of William Brewer, General Counsel of the National Oceanic and Atmospheric Administration, Meeting of the Coastal Zone Management Advisory Committee, New Orleans, Mar. 7, 1975. The research is being conducted within the General Counsel's office. *Id.*

105. 16 U.S.C. §§ 1451(h), 1452(c), (d), 1454(b), (c), 1455(c)(1), (2), 1455(d), 1456(a)-(e) (Supp. II, 1972).

106. *Id.* §§ 1455(c)(8); 40 Fed. Reg. 1688 (1975).

107. 16 U.S.C. § 1456(b) (Supp. II, 1972); 40 Fed. Reg. 8546-48 (1975) (interim regulations for mediation of federal-state disputes).

tions and be sufficiently flexible to respond to federal-state problems at their earliest stage. It is important that the effort be ongoing to build experience and expertise for these special kinds of intergovernmental problems.

Second, the coordination process should be *housed outside the units of government making primary decisions* on coastal uses in order to minimize advocacy of particular views and enjoy maximum credibility for objective decisionmaking. Those units of government making primary decisions should be involved in the coordination but not be responsible for the overall coordination process. Thus, if local government makes the primary determination of permissible uses, the coordination process should be outside the local government. Similarly, if particular issues are handled by a special function agency such as a wetlands office, coordination should be outside of that particular resource agency.

Third, techniques for *early identification of the federal-consistency and national-interest problems* must be developed.[108] Identification of these problems should begin even before approval of the coastal management program. Once a particular federal-state problem has been identified, it should be brought to the attention of any affected parties. Early identification of problems would be facilitated by maintaining a list of potential federal agency actions and programs which would require federal consistency pursuant to the CZMA: those actions "conducted or supported" by federal agencies which might affect the coastal zone of the state and those federal development projects occurring within the coastal zone of the state.[109] Further the coordination office should have methods for learning of all state and local grant requests and applications for federal licenses and permits affecting the coastal zone.

Fourth, particular federal-state relations *issues should be divided into subparts*. Large development projects which raise federal-consistency and national-interest problems are not likely to be decided fully by one level of government; instead there are likely to be many levels of decision, many different issues to be decided, and

108. Reliance upon the A-95 review process may be unsatisfactory because it may provide notice of a proposed federal project only 60 days before the federal decision is made. *See* note 33 *supra*. The A-95 review process was established to facilitate the general coordination and consistency provisions in the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4231 (1970), and the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3334 (1970).

109. *See* notes 23-26 *supra* & accompanying text.

a lengthy decisionmaking process. Division of a major project into its elements, such as site selection, evaluation of particular environmental impacts, and development of the most appropriate design for components, allows each party to determine his interest in each subissue and facilitates factual evaluation of each subissue. Particularization of subissues also may reveal the relative significance and range of consequences flowing from certain decisions, thereby indicating the degree of national interest in them.

Fifth, the *legal and technical competence* of particular agencies to decide subissues must be the subject of a conference among the federal and state agencies. The legal competence should be addressed from the standpoint of clarifying law and regulations to find criteria for a decision[110] and to identify differences among the laws and policies of state and federal agencies. Such an issue-development conference also should address technical competence for particular subissues. These considerations of legal and technical competence between federal and state agencies may not in themselves solve problems, but they may encourage more objective and informed allocation of decisions among the various agencies.

Sixth, the *state should determine the subissues for which federal-consistency requirements should be stressed* if agreement is not possible inasmuch as the state controls the consistency procedures.[111] Drawing upon analysis of legal and technical competence, the state should develop guidelines for this determination. For example, if a particular subissue affects interests outside the state's jurisdiction and the legal and technical competence to decide the issue rests primarily with the federal agency, then the state should not press federal-consistency requirements but incorporate the federal view of that particular subissue into the coastal management program. Guidelines for specific sets of issues such as fishing, dredging, or pipeline routing, would of course be more useful in practice than generalized abstractions.

Seventh, the *coordination process should be described and*

110. The point to be developed is which law, state or federal, provides the best tools to solve the problem, not which is paramount in the hierarchy of laws. The question of federal supremacy or federal consistency need only be addressed when there is clear conflict on a discrete subissue.

111. Although the Secretary of Commerce has the authority to permit actions that the state would disallow, the state can control the procedures for determining consistency, and it decides whether a proposed action is consistent with its plan. 16 U.S.C. § 1456(c)(3) (Supp. II, 1972).

reported for future reference as a precedent for handling similar issues. An analysis of coordination "cases" may be a source of guidelines for determining where federal consistency should be demanded, or it may aid in refining the concepts of national and state interests in resource allocation. Further, it is part of the "learning process" of coastal zone management through which programs can be amended to incorporate the lessons learned.[112]

Neither of the state programs thus far submitted to the federal Office of Coastal Zone Management, one from Washington[113] and one from Maine,[114] has included these or similar elements. Although these programs are likely to serve as prototypes for other states, the Washington program already having received preliminary approval,[115] they do not provide adequate mechanisms for federal-state coordination, perhaps because of the paucity of guidance available when the programs were drafted.[116]

Neither state application provides adequate methods for coordinating federal and state interests despite the fact that both states characterized federal-state coordination as an ongoing process in order to justify not resolving specific substantive problems prior to approval of the program.[117] Neither state clearly assigns specific

112. *Id.* § 1455(g).

113. State of Washington, Coastal Zone Management Program Application to the Secretary of Commerce for Approval Under Section 306 of the Coastal Zone Management Act of 1972, Feb. 14, 1975 [hereinafter cited as *Washington Application*]; U.S. Dep't of Commerce, Draft Environmental Impact Statement: Proposed Federal Approval of the Coastal Zone Management Program, State of Washington, Mar. 21, 1975.

114. State of Maine, Revised Preliminary Application for Program Approval In Accordance with Section 306 of the Coastal Zone Management Act of 1972, Apr. 4, 1975 [hereinafter cited as *Maine Application*]; U.S. Dep't of Commerce, Proposed Federal Approval of the Coastal Zone Management Program, Mid-Coast Segment, State of Maine, Mar. 28, 1975.

115. 40 Fed. Reg. 23,778 (1975).

116. Federal guidance is only beginning to become available. *See* U.S. Dep't of Commerce, Adequate Consideration of the National Interest in Coastal Zone Management (undated memorandum provided as guidance for interpretation of the national-interest clause); 40 Fed. Reg. 8546-48 (1975) (proposed regulations for preapproval coordination with federal agencies). Guidance on interpretation of the federal-consistency provisions has not yet been provided.

117. For example, Washington argued that the numerous federal-state relations questions best could be handled on a case-by-case basis once the state's program is operational. Statement by Murray Walsh, Washington Dep't of Ecology, Meeting between federal and state officials, Seattle, Apr. 18, 1975. "Our approach has been to underplay this whole area [of potential federal-state conflict]. We intend no reversals of authority and prefer to end conflicts by discussion." *Washington Application, supra* note 113, at 83. Maine traced its recent history of ongoing coordination with federal agencies. *Maine Application, supra* note 114, at 59-60.

federal-state issues or the responsibility for federal-state coordination to particular offices.[118] Neither adequately describes the ongoing process of federal-state coordination, each relying generally upon the A-95 review procedure.[119] Despite the utility of the A-95 procedure for identifying potentially conflicting federal actions, it neither establishes a mechanism for resolving conflicts nor addresses specifically the consistency requirements peculiar to the Coastal Zone Management Act.[120]

The extent to which the area of potential federal-state conflicts was underplayed by Washington may be indicated by the fact that the state attempted to demonstrate its compliance with the requirement for consideration of national interests in the drafting of its plan by noting that the Washington coastal zone provides significant resources to the nation, that many federal agency activities already are located in the zone, and that no facilities now are excluded from the zone. *Washington Application, supra* note 113, at 53, 54. It does acknowledge that exclusion may become necessary in the future and that consideration of national and regional needs has only just begun since they can be considered during federal agency review of local master programs. *Id.*

Coordination between federal agencies and the state prior to preliminary approval included the establishment of an advisory committee, a survey of plans and needs of federal agencies, and consultation between local governments and federal agencies. *Id.* at 75, 77, 81, 82, app. A; *see* WASH. REV. CODE ANN. § 90.58.100 (Supp. 1974). Federal officials indicated dissatisfaction with the consideration given to the interests of federal installations in local master programs and with the general communication between local governments and federal agencies. Meeting between federal and state officials, Seattle, Apr. 8, 1975.

118. Washington provides only that local program managers incorporate federal views in their plans, *Washington Application, supra* note 113, at 77, and that the state Department of Ecology issue certifications of federal consistency, *id.* at 83. A need for federal agencies to obtain state permits "is not contemplated at all." *Id.*

Maine has assigned the consideration of national and regional interests to a variety of offices, including the Governor's Task Force on Energy and Heavy Industry, the New England River Basin Commission (NERBC), the state Board of Environmental Protection, the Commission on Maine's Future, and the Acadia National Park Coordinating Committee. *Maine Application, supra* note 114, at 21-22. Federal coordination and consistency issues are assigned to regional planning commissions (the agencies designed to coordinate technical services and A-95 review), the executive department of the state, and NERBC. *Id.* at 58-60.

119. According to Washington's application, upon receipt of notices of proposed federal actions under the A-95 review process "[the Department of Ecology] can quickly determine the substance of the federal action, check with the local government and issue a statement of certification or lack thereof in response to the A-95." *Washington Application, supra* note 113, at 65. Washington also relies upon the water quality certification procedure already established by law. *See* 33 U.S.C. § 1341 (Supp. II, 1972).

Maine's application provides that "[t]he A-95 clearinghouse function can provide the methods through which state policies and plans can be brought to bear on local and regional agencies, the individual state agencies, as well as the federal establishment." *Maine Application, supra* note 114, at 58.

120. *See* notes 33, 108 *supra*.

CONCLUSION

Tension between state and federal government over allocation of coastal zone resources is inevitable inasmuch as both levels of government have sovereign power over the same land and water areas. By means of its national-interest and federal-consistency provisions the Coastal Zone Management Act attempts to capitalize upon this shared concern for the coastal zone by allowing state government to be an operative arm of national policy for allocating use of this important resource. Experience in Washington State, California, Louisiana, and on the East Coast suggests that effective accommodation of national and state interests has not always been provided by state coastal management programs; it also suggests, however, that federal-state coordination can be enhanced by articulating issues clearly, by providing a flexible state structure specifically directed toward federal-state coordination, and by determining the legal and technical competence of the federal and state agencies to decide the various subissues of any major resource allocation. The absence of adequate measures for ongoing federal-state coordination in the applications thus far submitted to the federal Office of Coastal Zone Management is particularly ominous because those applications are likely to be prototypes for other state programs.

Because the range of potential conflicts between state and federal agencies is incalculable, reliance upon the incorporation of an ongoing coordination process into state coastal management programs is more feasible than any attempt to resolve all conflicts before the programs receive federal approval. Because the federal agencies will have the burden of demonstrating the consistency of their projects with those programs after approval, however, it is incumbent upon the federal agencies to ensure that the coordination process will be adequate to accommodate the conflicting interests. If federal agencies do review state programs carefully from such a perspective prior to approval, states are likely to find that expeditious approval of their programs will be dependent upon a clear articulation of specific coordination measures. Both federal agencies and states therefore would be aided by early promulgation of regulations regarding the CZMA's federal-consistency provisions by the Office of Coastal Zone Management.