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# CZM From the State Perspective: The New Jersey Experience

## INTRODUCTION

The State of New Jersey has managed its coastal resources since 1776, when the state became the owner and proprietor of all tide-flowed lands formerly owned by the King of England. During the past two centuries, the state's coastal policies and practices have reflected the concerns and perceptions of the times.

In the late 1800s and early 1900s, for example, the state sold extensive tide-flowed lands at bargain prices to railroad and land development companies to promote seashore and waterfront development. Beginning in 1869, the legislature entrusted the executive branch with the responsibility of selling tide-flowing lands.<sup>1</sup> In the early 1900s, the state began regulation of construction along tidal waterfronts.<sup>2</sup> Beginning in the 1940s, state government undertook various shore protection projects, funding the construction of groins, jetties, dredging activities, and beach nourishment projects in the Jersey Shore.<sup>3</sup> Enactment in 1970 of the Wetlands Act clearly signalled recognition of the need for a strong state role in the management of fragile coastal resources.<sup>4</sup> Finally the Coastal Area Facility Review Act (CAFRA) was enacted<sup>5</sup> in 1973, the year after passage of the federal Coastal Zone Management Act of 1972 (CZMA).<sup>6</sup>

CZMA provided the State of New Jersey and other coastal states and territories with new incentives and requirements for managing coastal resources. The pressures faced by New Jersey's coast of offshore oil and gas exploration, recreation, fisheries development, casino gambling, and many other activities, along with the opportunities provided by the CZMA, have further intensified and concentrated New Jersey's efforts to manage its coastal resources.

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1. N.J. STAT. ANN. §§ 12:3-2 to -9 (West 1979) (originally enacted as General Riparian Act, 1869 N.J. Laws 383).

2. *See, e.g.*, N.J. STAT. ANN. § 12:5-3 (West 1979) (original version at 1914 N.J. Laws 123).

3. *See, e.g.*, N.J. STAT. ANN. §§ 12:6A-1 to -5 (West 1979) (original version at 1940 N.J. Laws 52).

4. N.J. STAT. ANN. §§ 13:9A-1 to -10 (West 1979) (original version at 1970 N.J. Laws 272).

5. N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979) (original version at 1973 N.J. Laws 185).

6. Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451-64 (1982)).

## INCENTIVES OF THE CZMA FOR COASTAL STATES

CZMA offers a coastal state three incentives for participating in this national program of resource management and land use activities. The incentives are money, "federal consistency," and symbolism.

First, the CZMA offers a state three types of funding: planning money to develop a program that will meet federal program approval standards, money to carry out a program that has met the federal standards, and money to cope with the impacts of coastal energy activities. The money is neither inconsequential nor enormous for most states.

For New Jersey, the money has meant almost \$2 million in coastal planning (Section 305)<sup>7</sup> funding since New Jersey's first grant in 1977.<sup>8</sup> New Jersey also received \$6 million in program implementation (Section 306)<sup>9</sup> funding since approval of the Bay and Ocean Shore Segment of the New Jersey program in September 1978.<sup>10</sup> Additionally, New Jersey has received since 1978 about \$2 million in Coastal Energy Impact Program (CEIP) funds which have been used for various energy impact planning activities.<sup>11</sup>

Money is important because of the components it can fund such as staff, supplies, contracts, and grants to local governments. The funds also may be obtained and spent more quickly than funds obtained by state agencies through regular state governmental appropriations procedures. Federal funds may be passed through to local governments to assist in forging state-local government partnerships. Federal funds may be used to finance critical studies which have not been realized in the past, owing to lack of state funding, and to supplement limited state funds.

Second, the national coastal management program offers a novel incentive, a new form of "coastal federalism" as defined by Section 307 of the CZMA.<sup>12</sup> The initial premise was that the activities of the federal government must be "consistent" with state coastal policies as soon as state coastal management programs had been (1) developed in full consultation with federal agencies and a wide variety of other public bodies; (2) subjected to considerable public scrutiny, including the environmental impact statement process under the National Environmental Policy Act (NEPA); and (3) ultimately approved by the assistant administrator for

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7. 16 U.S.C. § 1454.

8. Reflects the personal experiences of the author as Chief of the Office of Coastal Zone Management (1975-79), Director of the Division of Coastal Resources (1979-82), and Director of the Planning Group (1982-83) in the New Jersey Department of Environmental Protection (NJDEP).

9. 16 U.S.C. § 1455 (1982).

10. OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, EVALUATION OF NEW JERSEY COASTAL MANAGEMENT PROGRAM FOR THE PERIOD FROM APRIL 1982 THROUGH MAY 1984 1 (1984) [hereinafter cited as EVALUATION].

11. See *supra* note 8.

12. 16 U.S.C. § 1456 (1982).

Coastal Zone Management of the National Oceanic and Atmospheric Administration (NOAA).<sup>13</sup>

Through the federal rulemaking process and negotiations among federal agencies, and with the federal Office of Management and Budget (OMB), the concept of "federal consistency" was ultimately watered down so that today it is essentially an exhortation that state and federal agency actions should strive to be consistent.<sup>14</sup> An important exception is the legal authority granted to states with approved coastal management programs by the 1976 amendments to the CZMA.<sup>15</sup> This authority relates to the consistency review and certification of Outer Continental Shelf (OCS) oil and gas exploration and development plans.

Finally, CZMA is an important symbol to coastal states. Coastal management is a nationwide effort in response to goals, policies, and standards established by Congress. This national, collective enterprise, involving national and regional groupings of states, has an important effect on the people involved directly in coastal management. The coastal ecosystems they attempt to manage—which do not recognize arbitrary political boundaries between states—also benefit from this national effort. The federal Office of Coastal Zone Management (OCZM),<sup>16</sup> through its regional internal organization, the Coastal States Organization<sup>17</sup> and regional, interstate efforts in all of the major coastal regions of the nation, have promoted a broad sense of identification with a truly national effort. Program manager meetings, sponsored by the federal coastal zone office, national conferences on such diverse topics as ports, estuarine systems, and federal coastal legislation—all bring together individuals from various walks of life, from throughout the nation, who gain new insights and a renewed commitment to their work from the realization that they are engaged in a national effort.

#### CONTENTS OF A STATE COASTAL MANAGEMENT PROGRAM

The CZMA of 1972<sup>18</sup> and its 1976<sup>19</sup> and 1980 amendments<sup>20</sup> describe the broad requirements which must be met before a state's coastal man-

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13. 15 C.F.R. § 923.72(e) (1984).

14. 15 C.F.R. § 930.1 (1984).

15. 16 U.S.C. § 1456(c)(3)(B) (1982).

16. The Office of Ocean and Coastal Zone Management has been renamed the Office of Coastal Resource Management (OCRM). See Wolf, *Accommodating Tensions in the Coastal Zone: An Introduction and Overview*, 25 NAT. RES. J. 7, 10 n. 19 (1985).

17. Timmerman, *Coastal States Organization: The Past and Future*, 1 COASTAL ZONE MGMT. J. 119, 119-22 (1973).

18. 16 U.S.C. §§ 1451-64 (1982).

19. Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013 (1976).

20. Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060 (1980).

agement program is approved. These requirements were made more specific in the Coastal Zone Management Program Development and Approval Regulations adopted by NOAA-OCZM which became effective April 30, 1979, after a more than five-year rulemaking process.<sup>21</sup> The 1980 amendments added further specificity and established new programs and requirements.<sup>22</sup>

In its simplest terms, CZMA requires that a state coastal management program have three elements. Like a tripod, all three legs must be firmly in place, otherwise the program cannot stand. First, there must be a boundary, defining the geographic scope of the program. Second, the program must have policies, as specific as possible, which indicate what is or is not acceptable and under what conditions activities should or should not take place in the defined coastal zone. Third, the program must define a process and structure for decisionmaking concerning activities within the coastal zone. This process must include the requisite legal authority, as well as an organizational structure for decisionmaking, including opportunities for the involvement of a wide variety of interest groups.

In discussing the contents of a state's coastal management program, it is important to recognize a distinction of perception and perspective. A state coastal management program may be much more than the activities and general statements described in an annual program implementation grant application submitted by a state to the OCZM.<sup>23</sup> For example, in 1980 the annual budget, approximately \$7 million,<sup>24</sup> of the Division of Coastal Resources in the New Jersey Department of Environmental Protection (NJDEP) financed diverse activities which all can be considered a part of the New Jersey Coastal Management Program. The fiscal year 1980 federal grant to New Jersey for coastal management purposes, however, was less than \$1 million<sup>25</sup> because that was the amount of available federal funding. Consequently, the state funds identified in the grant application amounted to only \$200,000 because only a 20 percent state matching share is required.

From the federal perspective, the New Jersey Coastal Management Program may consist of only those activities described in the program implementation grant application. From the state perspective, however, a much broader range of activities funded by state sources and supple-

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21. 15 C.F.R. § 923 (1984).

22. The 1980 amendments revised the Declaration of Policy, Pub. L. No. 96-464, § 303, 94 Stat. 2060, 2060-61 (1980), added a new program of Resource Management Improvement Grants, *Id.* § 306A, 94 Stat. 2063-64, and revised the Review of Performance provisions, *Id.* § 312, 94 Stat. 2065-66.

23. 16 U.S.C. § 1455 (1982).

24. *See supra* note 8.

25. *Id.*

mented by federal funds plays an active role in managing New Jersey's coastal resources.

This perception-perspective distinction is critical, given the role of the federal CZMA as a stimulus for state governments to change and improve the management of coastal resources. In 1972, all coastal states had some form of coastal management program with widely varying standards and extremely divergent capabilities.<sup>26</sup> One of the greatest achievements of CZMA is the provision of a set of standards against which the diverse efforts of states can be evaluated.

#### BRIEF HISTORY OF THE NEW JERSEY EXPERIENCE UNDER THE FEDERAL CZMA

In 1972, when Congress enacted CZMA, the CAFRA (the legislative keystone of New Jersey's coastal management efforts)<sup>27</sup> was under active legislative consideration. Enacted in June 1973, CAFRA took effect on September 19, 1973. The law provided 90 days for developers to scramble madly to begin development in order to qualify under the statute's grandfather clause. NJDEP then began reviewing and deciding on construction permit applications for major coastal facilities, mainly residential projects of 25 dwelling units or more, in a land area comprising 1,375 square miles or 17 percent of the state (see Figure 1).

A year earlier, NJDEP had begun to administer a construction permit program for activities proposed in coastal wetlands.<sup>28</sup> The wetlands subject to regulation had been delineated at a cost of more than \$1 million. The process involved individual written notice to each affected property owner and often tempestuous public hearings in the affected county.

CAFRA also directed NJDEP to begin a coastal planning program with three statutory requisites: submission to the governor and legislature of

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26. At the time of the enactment of the CZMA in October 1972, no state had comprehensive coastal zone management legislation. The voters of California did enact in November 1972, by initiative and referendum, the California Coastal Zone Conservation Act of 1972 (Proposition 20), CAL. PUB. RES. CODE §§ 27000-27650 (West 1983), which established six regional commissions and one statewide commission charged with comprehensive coastal planning and regulating development. In the early 1970s, several states, such as Oregon, Hawaii, and Florida, enacted state-level land use programs and began building coastal management programs on that basis. Numerous states had coastal wetlands protection laws, including Massachusetts, Delaware, New York, and New Jersey. All coastal states had some system for managing publicly-owned tidelands and submerged lands; Texas, Louisiana, and California managed extensive and valuable offshore oil and gas leases on these state lands. States with shoreline erosion and natural hazards problems, such as Florida and Hawaii, enacted shoreline setback laws in this period. Beginning in the mid-1970s, more and more coastal states, such as North Carolina, Hawaii, South Carolina, Alaska, and Louisiana, acting under the influence of the CZMA, enacted comprehensive state coastal management legislation or supplemented an existing network of statutes with laws focusing on a specific natural resource problem, such as bluff erosion or dune protection.

27. N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979).

28. N.J. STAT. ANN. §§ 13:9A-1 to -10 (West 1979).

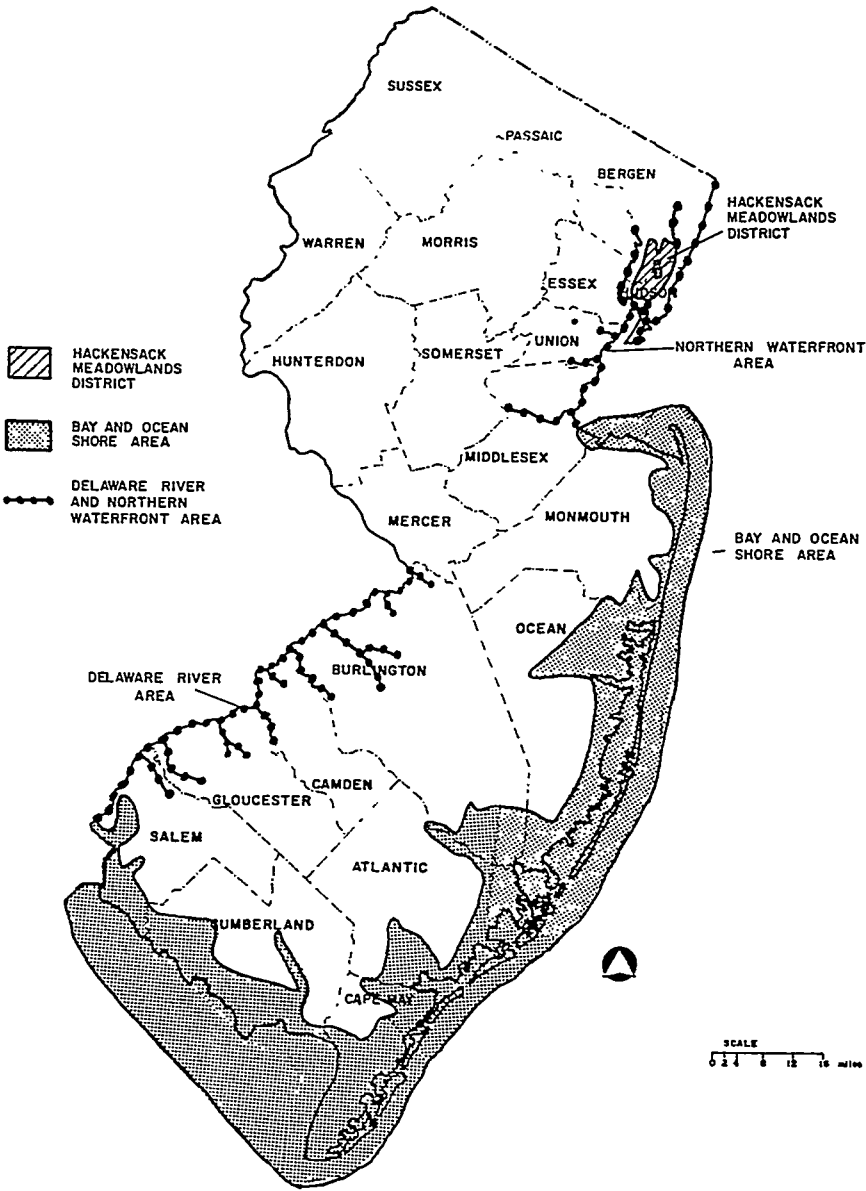


FIGURE 1  
NEW JERSEY COASTAL ZONE BOUNDARY

an inventory of coastal resources within two years, submission of alternative management strategies for the coast by the end of the third year, and selection by the Commissioner of Environmental Protection of the preferred coastal management strategy by the fourth year (or by September 19, 1977).<sup>29</sup> (See Figure 2.)

The net result of the New Jersey experience under CZMA is a firmly established, detailed, and working framework for coastal decisionmaking by state agencies, local governments, and the private sector on a wide variety of uses of coastal resources. It is difficult to isolate the activities that have taken place only because of CZMA, or to determine whether they would have taken place without the incentives offered under the Act. Nevertheless, the infusion of people, contracts, and energy made possible as a result of the federal law has resulted in changing the way the State of New Jersey makes coastal decisions. CZMA gave New Jersey incentives to manage its coastal resources. Now criteria will be discussed to evaluate the success or failure of New Jersey's efforts.

EVALUATING STATE COASTAL MANAGEMENT PROGRAMS:  
CRITERIA OF SUCCESS, MIXED SUCCESS/MIXED FAILURE,  
AND FAILURE

Measuring the success or failure of public policy efforts is a fuzzy process. The task is particularly complicated when the program subject to scrutiny has often conflicting multi-objectives. This is the case with CZMA, which establishes a national policy to preserve, protect, enhance, and develop the nation's coastal zone. Each of these four verbs conflicts with the others at one time or another. Indeed, given the statute's challenge to bring order and reason to the process of coastal decisionmaking, one should not expect to find clear successes or clear failures in the achievements of state coastal management programs. Rather, the achievements will lie somewhere on a continuum of success to failure; activities may be considered partial successes or partial failures, depending upon one's perspective.

At least a dozen criteria may be used to evaluate the program. Posed as questions, the criteria will be explained briefly and then used throughout the discussion of several cases in the New Jersey coastal management experience.

*A. Does the program comply with the goals of the federal CZMA and with the rules adopted by the NOAA-OCZM?*

This is an obvious criterion which may be demonstrated by NOAA-OCZM approval of a state program. It is important to bear in mind the

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29. N.J. STAT. ANN. § 13:19-16 (West 1979).



FIGURE 2  
THE NEW JERSEY COASTAL PLANNING PROCESS:  
A CHRONOLOGY, 1970-1981

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November 1970	Wetlands Act <sup>30</sup> enacted; hearings on wetlands delineations held in 1972-73.
June 1973	Coastal Area Facility Review Act (CAFRA) <sup>31</sup> enacted effective September 19, 1973.
June 1974	New Jersey receives first Federal Coastal Management Program development (Section 305) grant.
February 1975	First public meetings held in coastal planning process.
September 1975	<i>An Inventory of the New Jersey Coastal Area</i> <sup>32</sup> submitted to the Governor and Legislature, as required by CAFRA.
June 1975- July 1976	<i>Interim Land Use and Density Guidelines for the Coastal Area</i> prepared. <sup>33</sup>
September 1976	<i>Alternatives for the Coast</i> <sup>34</sup> submitted to the Governor and Legislature, as required by CAFRA.
September 1977	<i>Coastal Management Strategy for New Jersey-CAFRA Area</i> <sup>35</sup> submitted to the governor and legislature as required by CAFRA.
November 1977	Beaches and Harbors Bond Issue approved by voters. <sup>36</sup>
March-April 1978	Prepublication draft and workshop on <i>New Jersey Coastal Management Program—Bay and Ocean Shore Segment and Draft Environmental Impact Statement</i> (NJCMP-BOSS and DEIS).
May-June 1978	Publication of NJCMP-BOSS and DEIS, <sup>37</sup> public hearings, workshops, and meetings.
August 1978	Publication of NJCMP-BOSS and Final Environmental Impact Statement. <sup>38</sup>
September 29, 1978	Federal approval of New Jersey Coastal Management Program—Bay and Ocean Shore Segment.
March 1979	<i>Options for the Developed Coast</i> <sup>39</sup> issued.

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30. N.J. STAT. ANN. §§ 13:9A-1 to -10 (West 1979).

31. N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979).

32. David J. Bardin, *An Inventory of the New Jersey Coastal Area: A Report to the Governor and Legislature* (Sept. 19, 1975).

33. NEW JERSEY DEP'T OF ENVTL. PROTECTION, *INTERIM LAND USE AND DENSITY GUIDELINES FOR THE COASTAL AREA OF NEW JERSEY* (1976).

34. NEW JERSEY DEP'T ENVTL. PROTECTION, *ALTERNATIVES FOR THE COAST* (1976).

35. NEW JERSEY DEP'T ENVTL. PROTECTION, *COASTAL MANAGEMENT STRATEGY FOR NEW JERSEY—CAFRA AREA* (1977) [hereinafter cited as CAFRA AREA].

36. Beaches and Harbors Bond Act of 1977, 1977 N.J. Laws 208.

37. NEW JERSEY DEP'T ENVTL. PROTECTION & U.S. DEP'T OF COMMERCE, *NEW JERSEY COASTAL MANAGEMENT PROGRAM BAY AND OCEAN SHORE SEGMENT AND DRAFT ENVIRONMENTAL IMPACT STATEMENT* (1978) [hereinafter cited as DRAFT SHORE SEGMENT].

38. NEW JERSEY DEP'T ENVTL. PROTECTION & U.S. DEP'T COMMERCE, *NEW JERSEY COASTAL MANAGEMENT PROGRAM BAY AND OCEAN SHORE SEGMENT AND FINAL ENVIRONMENTAL IMPACT STATEMENT* (1978) [hereinafter cited as OCEAN SHORE SEGMENT].

39. NEW JERSEY DEP'T ENVTL. PROTECTION, *OPTIONS FOR NEW JERSEY'S DEVELOPED COAST* (1979).

FIGURE 2 (continued)

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February 1980	Attorney General's Opinion on the Waterfront Development Permit Law jurisdiction. <sup>40</sup>
May-June 1980	<i>Proposed New Jersey Coastal Management Program and Draft Environmental Impact Statement</i> (PNJCMP and DEIS) <sup>41</sup> published, public hearings, workshops, and meetings held.
June-July 1980	Meetings and legislative hearings on the proposed Dune and Shorefront Protection Act (A-1825). <sup>42</sup>
August 1980	Publication of NJCMP and FEIS. <sup>43</sup>
September 1980	Federal approval of complete <i>New Jersey Coastal Management Program</i> .
September 1980	Draft Shore Protection Master Plan released. <sup>44</sup>
November-December 1980	Hearings and workshops on the Draft Shore Protection Master Plan.
October 1981	Shore Protection Master Plan adopted. <sup>45</sup>
August 1982	NJCMP evaluated and found to be adhering to federal terms. <sup>46</sup>
October 1982	Federal notice to accept wetlands Buffer Policy. <sup>47</sup>
January 1983	Wetlands Buffer Policy amended to the NJCMP. <sup>48</sup>

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concept of "creative flexibility," a phrase coined by OCZM senior staff in late 1976<sup>49</sup> to characterize the NOAA rules and a philosophy which recognized differences among states.

*B. Does the program respond fully to new issues, problems, and challenges facing coastal resources?*

One aim of the national program is to establish a firm framework for decisionmaking. A good program should be sufficiently flexible to remain up-to-date and to provide leadership as the coastal environment changes.

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40. 6 N.J. Op. Att'y Gen. (1980).

41. NEW JERSEY DEP'T ENVTL. PROTECTION & U.S. DEP'T COMMERCE, PROPOSED NEW JERSEY COASTAL MANAGEMENT PROGRAM AND DRAFT ENVIRONMENTAL IMPACT STATEMENT (1980).

42. Dune and Shorefront Protection Act, N.J. Gen. Assembly A-1825 (introduced June 9, 1980).

43. NEW JERSEY DEP'T ENVTL. PROTECTION & U.S. DEP'T COMMERCE, NEW JERSEY COASTAL MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT (1980) [hereinafter cited as COASTAL MANAGEMENT PROGRAM].

44. NEW JERSEY DEP'T ENVTL. PROTECTION & DAMES & MOORE, DRAFT NEW JERSEY SHORE PROTECTION MASTER PLAN (1980).

45. NEW JERSEY DEP'T ENVTL. PROTECTION & DAMES & MOORE, NEW JERSEY SHORE PROTECTION MASTER PLAN (1981).

46. Evaluation of Coastal Zone Management Program, 47 Fed. Reg. 38,380 (1982).

47. New Jersey Coastal Management Program, 47 Fed. Reg. 43, 759 (1982).

48. N.J. ADMIN. CODE § 7:7E-3.27 (1983).

49. Statement of William Matuszeski, at NOAA-OCZM State Coastal Program Managers Meeting, Airlie House, Virginia (Dec. 8, 1976).

*C. Does the program make significant changes or improvements in management of coastal resources?*

The premise of the federal law is that states and their local governments needed to change their methods of coastal decisionmaking. A successful program would make significant revisions. An unsuccessful program would, at best, maintain the status quo.

*D. Is the program creative and innovative?*

The degree of creativity evidenced by program activities helps identify actions which would not have occurred in the absence of the federal CZMA.

*E. How close are the links between and the syntheses among science, research, and policy formulation?*

Coastal management is truly a multi- and inter-disciplinary effort. Effective management requires an understanding and, ideally, a synthesis of natural sciences, social sciences, organizational techniques, and politics in order to understand the functioning of coastal economic, ecological, political, and social systems and to establish substantive policies and decisionmaking systems.

*F. Does a fairly cohesive policy consensus exist among federal, state, regional, county, and municipal government on coastal decisionmaking?*

A major aim of the federal CZMA is to establish a process for decisionmaking, including consultation and coordination among different levels of government which in the past have been working at cross purposes or in isolation from each other. These discussions should at least lead toward a consensus on some issues.

*G. Is the public aware of coastal problems and solutions?*

The functioning of a salt marsh and other scientific facts of the coastal ecosystem should be understood in order to appreciate the stresses placed on the coast, just as the importance of shelter and jobs must be understood to appreciate the importance of proper economic development. In policy areas where values often conflict, it is particularly important to have the widest possible public awareness and understanding of the policy issues.

*H. Does spontaneous and visible public support exist for coastal decisionmaking?*

This criterion is a corollary of public awareness because public awareness is but the first step toward both action and public and private sector support of proper coastal decisionmaking.

*I. Is the state coastal management program recognized nationally?*

Recognition by national public interest groups, federal agencies, peer groups of state organizations, invitations to conferences, publications, and career patterns of program staff all indicate the outside world's perception of that state's efforts.

*J. Does the state coastal management program provide for open, public decisionmaking?*

One of the key procedural goals of the federal CZMA is to encourage sincere public participation in decisionmaking. How open is the process to a wide variety of interests?

*K. Does the state program provide for predictable public decisionmaking?*

Predictability requires public commitment to limit administrative discretion and the confidence to define with precision the standards which will be employed in decisionmaking.

*L. Is the state program truly integrated and multi-faceted?*

A sound state coastal management program involves more than regulation of coastal development activities. Public awareness efforts, technical assistance efforts, financial assistance efforts, and other public and private activities are parts of the entire process of proper coastal management.

#### CASES IN MANAGING NEW JERSEY'S COASTAL RESOURCES

Experience in managing New Jersey's coastal resources with the assistance and impetus of the federal CZMA provides countless episodes, illustrations, and anecdotes which can be used to evaluate the success or failure of New Jersey's efforts. This section focuses on cases drawn from various policy areas and procedural aspects of the New Jersey coastal management effort and analyzes these case studies in light of the applicable evaluation criteria.

#### *Predictable Regulatory Decisionmaking*

In 1975, New Jersey had three state coastal permit laws with widely varying degrees of predictability in the regulatory process. The Waterfront Development Permit Law, passed in 1914, provided no substantive standards for the review of permit decisions.<sup>50</sup> Rather, a common law of administrative precedents developed over a period of 60 years.

The Wetlands Act of 1970<sup>51</sup> included no specific statutory standards,

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50. N.J. STAT. ANN. § 12:5-3 (West 1979).

51. N.J. STAT. ANN. §§ 13:9A-1 to -10 (West 1979).

although the DEP had adopted a wetlands order which established four basic standards of review of wetlands permit applications. The wetlands order, together with a public hearing in each coastal county, provided 12 additional considerations for evaluation by NJDEP staff in making wetlands permit decisions.

The CAFRA included 12 specific statutorily defined mandatory findings for permit approval.<sup>52</sup> The Act included mandatory findings such as "minimal practicable degradation of the . . . scenic and aesthetic attributes at the site and within its surrounding region,"<sup>53</sup> or "conforms with all applicable air, water, and radiation emission standards."<sup>54</sup> In addition, CAFRA authorized NJDEP to deny or conditionally approve permits as reasonably necessary to achieve a wide range of public purposes, including promoting the public health, safety and welfare, protecting public and private property, and preserving, protecting, and enhancing the natural environment. These three different sets of substantive standards allowed considerable administrative discretion in the coastal permit process.

In a 12-month period, from September 1977 through September 1978, NJDEP published three coastal policy documents which defined, with increasing specificity and legal standing, the substantive standards in coastal permit decisionmaking.<sup>55</sup> The coastal policies constitute a three-step method of decisionmaking with three types of policies. First, Location Policies analyze the use of a proposed site in terms of a detailed classification of the geography of the coastal zone into various Special Areas, Water Areas, Water's Edge Areas, and Land Areas.<sup>56</sup> For each type of area, DEP provides a definition, policy, and rationale. Second, Use Policies provide specific statements regarding certain types of coastal resources use, grouped in broad categories such as energy uses, housing uses, and industrial uses.<sup>57</sup> The third type of policy, known as Resource Policies, provides performance standards which must be met by acceptable uses of coastal resources.<sup>58</sup> Typical resource policy concerns include air quality, stormwater runoff, and historic preservation. Taken as a set, the three types of policies were dubbed the Coastal Location Acceptability Method (CLAM).

After extensive workshops, public hearings, written comment and written responses, NJDEP revised and adopted the policies as the Rules on Coastal Resource and Development Policies.<sup>59</sup> The policies provided for

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52. N.J. STAT. ANN. § 13:19-10 (West 1979).

53. *Id.* § 13:19-10.g.

54. *Id.* § 13:19-10.a.

55. See CAFRA AREA, *supra* note 35; DRAFT SHORE SEGMENT, *supra* note 37; OCEAN SHORE SEGMENT, *supra* note 38.

56. N.J. ADMIN. CODE §§ 7:7E-3 to -6 (1983).

57. *Id.* § 7:7E-7.

58. *Id.* § 7:7E-8.

59. *Id.* § 7:7E.

the first time in 64 years a set of substantive standards to guide waterfront development permit decisions. The policies also provided more specific and rigorous standards for coastal wetlands permit decisionmaking. The result was that in 1979 less than one acre of coastal wetlands was temporarily or permanently impaired through the permit process. The detailed, intricate, and extensive policies also increased the rigor and specificity of the CAFRA permit process. The net product was that administrative discretion was deliberately and effectively reduced.

While NJDEP took these steps to increase the predictability of permit decisionmaking through adoption of substantive standards, similar steps were taken to adopt procedural rules for the permit process. The chief innovation in the CAFRA permit procedural rules was the institutionalization of the "pre-application conference," a voluntary opportunity for a prospective applicant/developer to meet with permit staff to review a proposed project before the submission of the actual application.<sup>60</sup> Extensive use of the pre-application conference is labor intensive. When coupled with the input of experienced staff, however, the conference saves a developer time and money by assisting the design or redesign of projects in order to facilitate consistency with the adopted coastal policies. The pre-application conference process also discourages clearly unacceptable projects which would likely be denied if an application were submitted.

New Jersey has succeeded in increasing the predictability of its coastal regulatory decisionmaking. One testament to this success was offered during the state legislative process leading to the enactment of the Pinelands Protection Act in 1979.<sup>61</sup> As the boundaries were being drawn between the CAFRA area and the Pinelands area, many builders expressed a preference to change the lines so that their sites would be within the CAFRA area where they would be subject to the familiar state coastal permit requirements. Other evidence of success exists. The CLAM has attracted national attention as one of the most detailed sets of coastal policies of any approved state coastal management program.<sup>62</sup>

### *Organizing the State Coastal Agency: Creative Tension as a Management Technique*

When New Jersey received its first federal coastal planning grant in 1974, two different parts of the NJDEP were responsible for implementing the regulatory and planning mandates of the Coastal Area Facility Review

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60. For information on the "pre-application conference," see Kinsey, *The Coastal Development Review Process in New Jersey: Avoiding Disputes and Resolving Conflicts*, ENVTL. COMMENT, May 1977, at 19-20.

61. N.J. STAT. ANN. §§ 13:18A-1 to -29 (West Cum. Supp. 1984).

62. See, e.g., Severo, *Environmentalists Hail Passage of Act*, N.Y. Times, Oct. 5, 1980, at 64, col. 1.

Act: the Office of Environmental Analysis in the Office of the Commissioner, and a permit group in the Division of Marine Services, the same group responsible for the waterfront development permit program and coastal wetlands permit program. To assist his supervision of these two functions, the then deputy commissioner of the department hired a coastal area planning coordinator to direct the two functions. Upon the deputy commissioner's resignation in May 1975, the coastal area planning coordinator then assumed direct responsibility for coastal planning and continued in a loosely linked relationship to the CAFRA permit program until the formal creation, in November 1975, of the state's new office of CZM in the Division of Marine Services, Department of Environmental Protection.

This new office merged coastal planning and coastal regulation into one group. Each subgroup carried out its own mandate. To date, the Division of Coastal Resources has not suffered serious substantive reversal through the appeals process, either by an administrative appeals decision or a judicial decision on appeal.<sup>63</sup> Nevertheless, the open access to the appeals process will be maintained for applicants and third-party intervenors.

#### *Guiding the Growth of the Atlantic City Region in the Casino Era*

Passage of a constitutional referendum authorizing casino gambling in 1976,<sup>64</sup> followed by enactment of the Casino Control Act in 1977,<sup>65</sup> unleashed the enormous economic development forces of casino gambling on the tired oceanfront resort of Atlantic City and its surrounding suburban but still rural hinterland. The New Jersey Coastal Management Program has been a leading force in steering development toward appropriate locations. Also, the program has provided leadership in the intergovernmental and public and private sector planning process required to solve the myriad of problems associated with unprecedented growth. Indeed, the Casino Control Act requires that prospective casino operators demonstrate, as a condition of casino license approval, that they have met the requirements of the CAFRA.<sup>66</sup>

To appreciate the contribution of the state coastal agency in the Atlantic City region, it is important to underscore the limited professional planning capabilities which existed at the municipal level at the time the casino era began. Atlantic City operates under a city commissioner form of

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63. See, e.g., *In re Egg Harbor Assocs.*, 94 N.J. 358, 464 A.2d 1115 (1983) (upholding conditional approval of a development project where the condition was the construction of a certain number of low and moderate income housing units).

64. N.J. CONST. art. IV, § 7(2), para. D (1976).

65. 1977 N.J. Laws 110.

66. N.J. STAT. ANN. § 5:12-84(e) (West 1979).

government and did not have a fulltime planning director, an adopted master plan, or an up-to-date zoning ordinance. All New Jersey municipalities were in the process of updating or establishing for the first time a municipal master plan with a zoning ordinance based on the land use element of the master plan. Development of the municipal plans was in response to the Municipal Land Use Act of 1975.<sup>67</sup>

Atlantic City retained a master plan consultant team at a cost in excess of \$1 million, but the master plan process did poor or no work in a number of important areas. In particular, the master plan process ignored the importance of coastal wetlands, and the consulting contract specifically excluded air quality analysis from its responsibilities. This exclusion resulted in the neglect of the most formidable potential constraint to development. Air quality analysis is essential to proper transportation planning, particularly given the hordes of motor vehicles projected to bring gamblers and other visitors to Atlantic City.

The Atlantic City region has seen two waves of development proposals. The state coastal program has been involved both as a regulator and as a planning agency, by providing a visible framework for public decisionmaking with a longterm perspective in mind. Local officials looked only from a short term perspective. They ignored the regional connections, transcending municipal boundaries, which must be made for the proper development and redevelopment of the entire Atlantic City region.

Proposed hotel-casino construction, including renovations and additions to existing hotels, comprised the first wave of new development in the Atlantic City region. Between early 1978 and 1980, NJDEP approved CAFRA permits for a dozen hotel-casino projects.<sup>68</sup> Although the CAFRA statute does not explicitly refer to casino development, a permit is required under NJDEP's interpretation that hotels are qualifying residential facilities.

One of the earliest issues to arise in this effort was the need to protect coastal wetlands. Some casino developers sought locations away from the built-up Boardwalk area of Atlantic City on the approach roads, instead of along causeways leading from the mainland to the barrier island upon which Atlantic City is located. NJDEP employed its standard pre-application conference procedure, discouraging developers who proposed extensive filling and obliteration of wetland sites. Local labor leaders, eager to begin work on large construction projects, publicly lambasted state environmental officials for protecting coastal wetlands, calling for the resignation of the director of the Division of Marine Services.<sup>69</sup> At the

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67. N.J. STAT. ANN. §§ 44:55D-1 to -106 (West Supp. 1968-83).

68. See *supra* note 8.

69. *Union Leaders Call for the Ouster of State Official in Casino Dispute*, N.Y. Times, May 11, 1977, at B3.



same time, letters to newspaper editors and to the governor poured in supporting the NJDEP wetlands protection efforts.<sup>70</sup>

The state coastal agency's concern for air quality and proper transportation planning led to the imposition of an almost standard CAFRA permit condition for approved hotel-casinos. The permit conditions require air quality and traffic monitoring by hotel-casinos and reasonable financial contributions to the evolving regional transportation system. At the same time, NJDEP staff worked closely with the city traffic engineer, city engineer, and city planning department, as well as the County Division of Planning, State Department of Transportation, Casino Control Commission, Atlantic City Expressway Authority, and private sector groups to forge the appropriate regional transportation system needed to move the tremendous numbers of people projected for the 1980s and 1990s.

Housing development, with the necessary mix of dwelling types and costs, has been a less successful effort within Atlantic City, its barrier island suburbs, and on the mainland. The required state CAFRA permit is only a negative form of legal authority which can be used to block unacceptable projects and to urge or require the occurrence of other activities as conditions for project approval.

During this first wave of casino development, the state coastal agency was involved, a bit more successfully, in assuring that some aspects of the hotel-casino design respected the seashore-resort character of Atlantic City. Specifically, the Boardwalk is a nationally-known, splendid pedestrian space that in the past was lined with shops providing a wide variety of services and goods. Some of the initial hotel-casino designs ignored this tradition. Through the insistence of the NJDEP in the pre-application conference process, however, as well as the efforts of the local Fine Arts Commission, all hotel-casino designs submitted after late 1978 have included shops on the Boardwalk to ensure that the pedestrian tradition will continue.<sup>71</sup>

The second wave of development has seen large scale housing and mixed-use development proposals for sites in Atlantic City as well as on the mainland. The scale of some of the projects is truly staggering. State coastal policies covering areas such as required fair share housing are likely to be encountered. The coastal management program thus provides a framework not only for steering development to appropriate locations, but also for ensuring that some basic social needs, created by casinos, will be addressed.

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70. See, e.g., *DEP decision applauded*, Letter to the editor, Sunday Star-Ledger (Newark), from Gary B. Liss, Newark, May 15, 1977, at 1A.

71. See *supra* note 8.

### *Historic Preservation and Hotel-Casino Design*

When the casino gambling referendum passed in 1976, several of Atlantic City's older hotels were either on or eligible for inclusion in the National Register of Historic Places.<sup>72</sup> The original purpose of casino gambling in Atlantic City was to return the city to its previous status as a favored convention city. This objective required the construction of thousands of high class hotel rooms. The presence of these historic hotel structures provided an opportunity for relatively quick renovations to meet the standards of the Casino Control Act which called for a 500-hotel-room minimum in order to qualify as a casino. The renovation approach, however, potentially conflicted with the policy favoring new, large-scale, luxurious, resort-oriented convention hotel facilities and with the safety requirements of the construction code.

Because a CAFRA permit was required for new hotel construction, NJDEP determined that the demolition and clearance of a site, as a prerequisite for new construction, was also part of the development process which required a CAFRA permit. Some hotels were clearly not suitable for adaptive reuse because they could not meet the construction code's fire resistance requirements. Unfortunately, there was no responsible reason for delaying their demolition.

At least one hotel, the Blenheim, one of the earliest examples of the use of reinforced concrete, appeared to be a structure ideally suited for adaptive reuse, but the casino developer proposed to demolish the building. The state coastal agency retained an architect who prepared plans that called for turning the rotunda structure into a glorious main entry way for the hotel casino and turning its hotel rooms into luxurious condominium units. Unfortunately, structural engineers indicated that an on-site inspection of the structural members of the Blenheim rotunda revealed that the rotunda was unsafe. Although the pilings on which the rotunda rested were carefully preserved and quite sound, the decades of exposure to the salt air, with limited maintenance in recent years, had weakened the reinforcing rods and concrete superstructure. When these conclusions were confirmed independently by the structural engineer retained by the NJDEP, the fate of the Blenheim rotunda was sealed. The implosion of the Blenheim rotunda took place in January 1979. While mourned by historic preservationists, the move was entirely proper as a result of the state coastal agency's regulatory review process.<sup>73</sup>

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72. Kinsey, *Historic Preservation on the Jersey Shore*, PRESERVATION PERSPECTIVE NJ, July-Aug. 1984, at 1, 6.

73. Letter from James Biddle, President, National Trust for Historic Preservation, to Donald T. Graham, New Jersey Department of Environmental Protection (Dec. 28, 1978).

As a consequence of the consideration of historic preservation as part of the coastal environment in the CAFRA permit process, a number of structures have disappeared after being recorded under the standards of the Historic American Building Survey (HABS) program. Other structures, however, have been restored and adapted for new uses. While the process has been volatile, the results will preserve for the longterm some remembrances of the seashore resort architecture of the turn of the century.

### *Nuclear Energy and Coastal Land Use*

The four nuclear generating stations located in the coastal zone were either in operation or under construction by the effective date of the CAFRA.<sup>74</sup> Their presence challenged NJDEP to grapple with the difficult issue of establishing the appropriate land use in the vicinity of operating nuclear generating stations. This occurred well before the present national and international concern resulting from the Three Mile Island accident in March 1979.

In March 1976, three years before the Three Mile Island incident, a moratorium was placed on the issuance of CAFRA permits for residential facilities in the vicinity of the Oyster Creek Nuclear Generating Station in Lacey Township, Ocean County, and in the vicinity of the Salem Nuclear Generating Station on Artificial Island in Lower Alloways Creek Township, in Salem County.<sup>75</sup> The moratorium was in effect, pending the outcome of what became a six-part study of nuclear facilities and land use regulations.

The study had mixed results, demonstrating the difficulty of linking science and policy research with the political process. First, NJDEP commissioned a special engineering analysis of the accident probability at the Oyster Creek station, one of the oldest operating nuclear facilities in the nation.<sup>76</sup> The analysis showed that, with the addition of a minor engineering change, the reactor would be safer than the reactors of its type chosen for the NRC's reactor safety study. Second, the emergency response plan for major nuclear facilities, prepared in large part by DEP's Division of Environmental Quality, Bureau of Radiation Protection, was one of the first such state plans to receive the concurrence of the Nuclear Regulatory Commission.<sup>77</sup> Third, DEP commissioned a special analysis of the relationship of distance, weather condition, accident type, and radiation doses for incorporation into the DEP nuclear emergency response

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74. N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979).

75. Memorandum from David J. Bardin, Commissioner, New Jersey Department of Environmental Protection, to Donald T. Graham, Director, Division of Marine Services, New Jersey Department of Environmental Protection (Mar. 22, 1976).

76. See *supra* note 8.

77. *Id.*

plan.<sup>78</sup> Fourth, DEP began a review of the effectiveness of sheltering the population in structures versus population evacuation in the event of a nuclear accident.<sup>79</sup> Fifth, a research team at Princeton University undertook an assessment, through a review of building permits and analysis of aerial photography, of actual changes in population density around the Oyster Creek Nuclear Generating Station.<sup>80</sup> The study concluded that the projected population growth rate, which provided part of the basis for the initial siting decision of the Oyster Creek facility in a "remote" area, had been exceeded. Sixth, the state coastal agency determined the maximum population increase which would be acceptable in the coastal zone within 10 miles of the Oyster Creek station.

Based on these findings, DEP's Commissioner O'Hern concluded, in 1979, that the land use moratorium in the vicinity of Oyster Creek and Salem I Nuclear Generating Stations was no longer required. In the future, decisions on proposed land uses near the reactors in New Jersey would be made on a case by case basis.<sup>81</sup> The moratorium was lifted in March 1979.<sup>82</sup> Commissioner O'Hern's directive stated that the Division of Marine Services was to process CAFRA permit applications using the applicable standards of law and the adopted Rules on Coastal Resource and Development Policies.<sup>83</sup> The Rules on Coastal Resource and Development Policies include a policy on Special Hazard Areas adopted effective September 1978, which discouraged development which would increase the potential of special hazard areas, absent appropriate mitigating measures.<sup>84</sup>

In May 1979, the Division of Marine Services issued the first CAFRA permit for a project within the four-mile former moratorium area around the Oyster Creek facility: the construction of a 102-room, three-story hotel about 1.2 miles northeast of the Oyster Creek facility.<sup>85</sup> The division evaluated the project under the special hazards area policy. The hotel project was in compliance because it was not likely to be intensively occupied year-round. Also relevant was the hotel's location on U.S. Route 9, a major evacuation route in case of emergency. In December 1979, the Division of Coastal Resources denied a CAFRA permit application for the construction of 448 units of clustered, single-family housing on a 280-acre site in Lacey Township between 1.3 and 2.3 miles from the

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78. *Id.*

79. *Id.*

80. *Id.*

81. Memorandum from Daniel J. O'Hern, Commissioner, to Donald T. Graham, Director, Division of Marine Services, New Jersey Department of Environmental Protection (Mar. 29, 1979).

82. *Id.*

83. N.J. ADMIN. CODE §§ 7:7E-1 to -8 (1983).

84. *Id.* § 7:7E-3.25.

85. Oyster Bay Motel, CAFRA permit no. 78-0250-5 (approved May 15, 1979).

Oyster Creek Nuclear Generating Station on several grounds, including lack of compliance with the special hazard areas policy.<sup>86</sup> The Division noted that additional population at the site would exacerbate the already difficult protective actions and emergency responses that might be necessary in that area. The proposed residential development would bring too many new residents too close to the reactor year-round, thereby unacceptably increasing the population density in proximity to the nuclear facility.<sup>87</sup>

Detailed land use guidelines have not yet been adopted by NJDEP for areas in proximity to nuclear generating facilities.<sup>88</sup> Proposed residential developments near nuclear facilities will be reviewed cautiously. NJDEP has been at the forefront of land use and coastal management agencies in making an explicit connection between nuclear energy and land use.

### *Beach Shuttle*

New Jersey's 127 miles of oceanfront beaches offer a wide variety of recreational experiences. Public access to the beach is facilitated and constrained by various public and private actions.<sup>89</sup> One constraint on access to Island Beach State Park is the carrying capacity of its two parking lots. When the 4,000 available parking spaces in the park are filled, the park closes, barring further access until a sufficient number of cars leave. Yet, the carrying capacity of the wide sandy beach is considerably more than the number of people who can be transported in 4,000 private automobiles. To remedy this constraint, NJDEP created the "beach shuttle," a special bus service making a 25-mile roundtrip from a special parking lot just off Exit 81 of the Garden State Parkway and guaranteeing access into Island Beach State Park. The same beach shuttle concept was then modified and used in the Atlantic City region as an employee shuttle system for some casinos.<sup>90</sup>

### *Shore Protection or Shoreline Processes Management*

For about 50 years, the state, often with the assistance of the Army Corps of Engineers, has assisted oceanfront and other shoreline munic-

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86. Brookdale at Lacey—CAFRA permit application no. 78-0268-5, CAFRA Opinion No. 68 (Dec. 27, 1979).

87. The applicant appealed the denial and, on procedural grounds, won a reversal of the decision.

88. New Jersey has a policy concerning special hazard areas and nuclear facilities are classified as special hazards. N.J. ADMIN. CODE § 7:7E (1983).

89. In *Matthews v. Bay Head Improvement Assoc.*, 95 N.J. 306, 471 A.2d 355 (1984), the Supreme Court of New Jersey held that the public had a right to cross private land in order to gain access to the Atlantic Ocean. The court also held that the public had the right to use the dry sand area owned by the Association. The court ruled that the Association's membership must be open to the public. To accomplish this, the court ruled that the Association must offer daily as well as seasonal membership to a reasonable number of nonresidents.

90. See *supra* note 8.

ipalities in protecting public and private shorefront property through the construction of seawalls, grouts, and jetties, as well as beach nourishment and dune creation stabilization projects. The federally funded coastal management program provided the first opportunity for the state to articulate explicitly its coastal engineering policies. The adopted preference for non-structural solutions was a major departure from previous policy, a change that will become visible only over the years.

In 1977, New Jersey voters approved a referendum authorizing a \$20 million bond issue for shore protection projects.<sup>91</sup> This bond issue and its implementing legislation, authorizing state aid to municipalities with a 50 percent local matching requirement, indicated that for the first time the state was fully in the business of undertaking shore protection projects.<sup>92</sup>

Before making major funding commitments under the bond program, the NJDEP and the Department of Treasury, Division of Building and Construction, retained an engineering consulting firm to undertake the first statewide shore protection master plan.<sup>93</sup> The state coastal agency staff became directly involved in the process after the awarding of the initial contract. The staff was able to amend the contract to ensure that the \$400,000 study would lead to a workable plan which would look comprehensively at the New Jersey shoreline and identify a range of alternative approaches with varying benefits and costs for shoreline protection. Simultaneously, the state coastal agency successfully urged the governor to support dune and shorefront protection legislation. Governor Byrne adopted the proposal as a legislative commitment in his 1979 and 1980 State of the State messages.<sup>94</sup>

The shore protection program includes technical assistance efforts to advise municipalities as to the adequacy of existing local dune protection ordinances. This effort resulted both from concern over the continuing pressure from developers for building on oceanfront lots and from concerns raised by the Federal Emergency Management Agency over the vigor of local enforcement of coastal flood hazard regulations. The new program also has a strong regulatory emphasis, although the state coastal agency's jurisdiction is limited as a result of the 25-dwelling unit threshold under the CAFRA. Finally, the program also involves efforts to raise public awareness of the importance of dunes and shoreline processes, in addition to adversarial efforts in support of enforcement of municipal ordinances. The success of these efforts was evidenced by the \$50 million

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91. 1977 N.J. Laws 208.

92. See *supra* note 8.

93. *Id.*

94. See State of the State Message, by Gov. Brendan Byrne, State House, Trenton, N.J. (Jan. 1979 & Jan. 1980).

Shore Protection Bond Issue approved by the voters in November 1983.<sup>95</sup>

These developments are taking place in the Shore Protection Program through the changes made possible by the federal CZMA. Especially relevant are different policies, types of staff, and a different commitment—a longer term commitment to the shorefront and to the natural recovery approach to post-storm actions.

#### CONCLUSION: NEW JERSEY AND THE NATIONAL COASTAL MANAGEMENT PROGRAM

##### *The New Jersey Experience in Review*

In the initial years of experience under the federal CZMA, the State of New Jersey has clearly complied with the law and its implementing rules. The New Jersey Coastal Management Program has responded fully to new challenges such as those posed by casino development in Atlantic City. The coast is different as a result of the coastal program. To cite two examples: 1) fewer high rises mar the coastal landscape in low rise areas, and 2) beach shuttles now operate. While staffed primarily by planners, and social and natural scientists, the state coastal agency has commissioned some applied scientific research and integrated that research into the policy formulation process.

Because the New Jersey program supplements municipal decision-making, it should not be surprising that an explicit consensus does not exist between state and local decisionmakers. Although other state coastal programs may have received greater national attention, the New Jersey Coastal Management Program and its results have been presented and discussed at various national conferences, in professional journals, and national fora.<sup>96</sup> The decisionmaking process in the program is open. Predictability, one of the hallmarks of the program, has decreased administrative discretion. The program is far more than a permit process; it is a multi-faceted program for managing resources.

##### *Four Key Questions on the CZMA*

Congress enacted the CZMA in the wake of congressional rejection of national land use policy initiatives in the early 1970s. CZMA established an artful set of incentives and procedural and substantive policies to prod states and their local governments to improve their management of the nation's diverse coastal zone. The New Jersey experience under the fed-

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95. See EVALUATION, *supra* note 10, at 5.

96. In fact, the New York Times once reported that "California, North Carolina and New Jersey are regarded as having the best [coastal management] plans." Severo, *Environmentalists Hail Passage of Act*, N.Y. Times, Oct. 5, 1980, at 64, col. 1.

eral Act has provided insights on key aspects of this national voluntary program of environmental resource management.

Four key questions must be posed and answered in light of this experience to examine whether this national legislation achieves its objectives or whether the legislation should be amended:

1. Is "federal consistency" a significant incentive?
2. Are regional and national interests in the coastal zone adequately considered as a result of the CZMA?
3. Is there a viable constituency for coastal zone management?
4. What is the proper federal role in coastal zone management?

### *1. Federal consistency as an incentive*

The theory of the "federal consistency" provision of Section 307 of the federal CZMA differs from its practice.<sup>97</sup> Initially, many coastal states were led by NOAA-OCZM to believe that federal consistency would be a significant inducement to participation in the program because consistency between federal agency actions and state coastal policies would be required. In practice, however, this concept has been less significant. "Federal consistency" has proven only a negative control which could block a federal agency action rather than a positive control which could require a federal agency to act affirmatively in a manner desired by a coastal state. The lure of federal consistency was a useful selling point during the years of program development when state coastal planners solicited attention and support for a coastal management program.

There are two areas of federal agency activity in which the federal CZMA's provisions provide the states with new legal authority, or at least influence, over federal agency actions. In the case of direct development activities by a federal agency, such as the U.S. Navy, the federal consistency provision provides a lever or forum for a direct state review of proposed federal activities which would otherwise probably be preempted under the supremacy clause of the U.S. Constitution. In New Jersey's experience, "federal consistency" provided the vehicle for the state coastal agency to review a major proposal by the Navy to expand the Naval ammunition station at Earle on Raritan Bay. This project involved construction of a major pier for loading ammunition in ships, extensive dredging, construction of fuel storage tanks along the shoreline, and disposal of the dredged material. The state initially decided to declare the project inconsistent with the approved Coastal Management Program due to lack of specificity in the information provided on aspects of the project. The state then prodded the Navy to undertake further analysis.

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97. 16 U.S.C. § 1456(a)-(h) (1982).



The Navy was forced to define the project with greater detail and to submit a revised consistency certificate in the form of a final Environmental Impact Statement with which the state coastal agency then concurred.

The 1976 amendments to the federal CZMA also authorized reviews by states with approved coastal programs consisting of outer continental shelf oil and gas exploration and development plans.<sup>98</sup> While the oil and gas industry frequently argued that the approval requirement would cause unconscionable and costly delays in meeting the nation's energy needs, the New Jersey experience provides proof to the contrary.<sup>99</sup>

Because most outer continental shelf *exploration* activity occurs far from the immediate shoreline of the state, the federal consistency process is relatively swift as the environmental concerns of New Jersey are less pronounced. The "federal consistency" review of outer continental shelf *development* plans, however, will be a significant new tool in the arsenal of coastal resource management. States will be provided a real opportunity to influence the pace, scale, and location of onshore activities necessary to support offshore development. States will be afforded an opportunity to review comprehensively the full set of projected positive and negative impacts on the coastal environment. This is an area where federal consistency is, at least for New Jersey, a tool the potential of which has not yet been realized.

## 2. Regional and national interests in the coastal zone

A major objective of the federal CZMA is to improve the consideration of various national interests in the coastal zone. The extent to which coastal states have adequately considered the national interest, as well as various regional interests, depends upon a state's perceptions and definitions of those interests. This is due in part to the imprecisions in definitions of key NOAA-OCRM terms and concepts.

A systematic consideration of the national interest in terms of the substantive coastal policies is difficult, if not impossible, because the concept of the national interest is so elusive. Indeed, there is not a single national interest, but rather, numerous different and often conflicting national interests. The federal government has thrown the challenge to the states to define those interests on behalf of federal agencies, and then to "consider" those interests. One illustration from the New Jersey ex-

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98. *Id.* § 1456(c)(3)(B).

99. Indeed, New Jersey expedited its determination to concur with the certificate of consistency for the Tenneco Oil Company's exploration plan for OCS Block 495 in the Wilmington Canyon. The well was spudded in by the Zapata Uglund Drilling vessel 45 minutes after the U.S. Geological Survey issued its permit, an action which could not have taken place until the state coastal agency had acted.

perience should suffice to show the difficulty in such consideration: New Jersey currently has four major operating oil refineries and one mothballed refinery. In total, those facilities provide for more than one-third of the East Coast refining capacity of the nation. Therefore, what further consideration, if any, should New Jersey give in its coastal management program for the siting or expansion of refineries?

Despite these definitional difficulties, the substantive policies included in the federal CZMA have prodded states to take actions which have resulted in more protection and greater clarity in coastal resource management policies. Complementary and, indeed, coordinated state coastal policies have been achieved on regional and national bases through the friendly policy of plagiarism among states, owing to extensive sharing of state coastal management program documents, planning studies, enabling legislation, and reports. Unsurprisingly, this learning process has resulted in greater protection of beaches, dunes, wetlands areas, hazard areas, and other clearly coastal concerns.

Regional groupings of coastal states have also provided regular fora to discuss common concerns and to present a united front in dealing with others, usually with the federal government. For example, the threat of offshore oil and gas exploration in the mid-Atlantic in the early 1970s prompted the creation of the Mid-Atlantic Governors Coastal Resources Council (MAGCRC), an extremely loose coalition of governors and state agencies from New York to Virginia. The New England River Basins Commission provided an umbrella for a New England Coastal Task Force of state coastal management agencies. The Great Lakes Regional Commission has served a similar purpose.

In short, a wide variety of regional and national interests in the coastal zone are being considered more explicitly and with greater results than before enactment of the federal Coastal Zone Management Act. While the U.S. OCRM has generally opted for a quantitative rather than a qualitative approach in approving state coastal management programs, the net result of several years of coastal management since 1972 has been extremely positive. Much more effective activity, however, can and will be undertaken now that a framework has been established.

### *3. A Constituency for Coastal Zone Management*

Coastal zone management means multiple-use management of a complex built, natural, social, and economic environment. A key question is whether anyone cares. Stated more eloquently: is there a viable constituency for coastal zone management? Tension among interest groups and a recognition that more focused management was required in the coastal zone led to enactment of the CZMA. Because of that inherent tension and the primary role of the coastal management program to resolve con-

flicts, the establishment and maintenance of a strong traditional constituency is difficult.

As part of the process of continuing public involvement in coastal management in New Jersey, the state coastal agency meets periodically with three loosely structured but somewhat formal advisory groups. Each has varying attitudes toward the state coastal agency. The Marine Advisory Group, composed of marina operators, begrudgingly accepts the state coastal agency as its advocate within state government for marina operator's concerns such as dredging, boat registration, boat titling, and coastal regulatory concerns. The Builders Advisory Group hesitatingly accepts the state coastal agency as a regulator, and occasionally views the state coastal agency as an advocate whose actions can promote more reasonable local governmental regulation of the building industry. The Environmental Advisory Group hopes that the state coastal agency will serve as its advocate to protect the coastal environment. The advisory group, however, is composed of members who often are divided, but are mostly unified in their views of the coastal management program as a forum to ensure the termination of inappropriate coastal zone development. The oil and gas industry, port authorities, local governments, and other interest groups meet and correspond with the state coastal agency periodically, usually at the agency's invitation, in order to maintain open channels and communication primarily between the regulated and the regulators.

Environmental groups are possible constituencies for coastal management. They view the state coastal agency as a moderator between developers and the interests environmentalists seek to protect. Environmental advocates use the state coastal permit process and its liberal administrative appeals provisions to block inappropriate development. Occasionally the environmental groups "win" by leaving a developer with a choice of either extensive delay through litigation or settlement. In New Jersey, the state government created a Department of the Public Advocate with a Division of Public Interest Advocacy.<sup>100</sup> Therefore, a cadre of attorneys exists to represent environmental and public interest groups in administrative proceedings against other state agencies, including the state coastal agency. In this adversarial process, the state coastal agency and the coastal management program become simply the forum for resolution of conflicts between environmental groups and developers. If the environmental groups believe that the "balance" struck by a coastal regulatory decision by the agency is inappropriate, then an appeal moves the decision into a different forum where the possibilities of delay work to the advantage of the environmental groups. The environmental groups clearly care for coastal

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100. N.J. STAT. ANN. §§ 52:27E-1 to -47 (West Cum. Supp. 1984-85).

zone management procedure because it does provide a forum for the environmentalists to pursue their objectives. The coastal management program also, particularly in its adversarial role, carries out directly many of the objectives of these groups who believe they lack the power.

Local governments often selectively use the coastal management program for assistance in achieving objectives they cannot or choose not to achieve at their own levels of government. For example, it is not unusual for a local government to urge the state coastal agency to reject a development proposal that has been approved at the local level. As a higher level of government, more distant from pressures, and perhaps with broader legal authority, the coastal management program can be in a position to reject locally approved projects. Local governments, however, are hardly willing to organize and state publicly that systematic deference to a state coastal agency is their preferred management approach. In short, local governments can hardly provide a continuing constituency for a state coastal management program.

As a result of hard work to develop and implement a detailed and predictable coastal regulatory program staffed with competent professionals, the New Jersey Coastal Management Program has been perceived by state legislators, local officials, and developers as the least of several evils in two key legislative debates in the late 1970s and early 1980s.<sup>101</sup> One reason for this perception was that the state coastal agency was a known commodity with established procedures and a proven pattern of predictable decisionmaking. Fear of the unknown and general skepticism over new governmental initiatives prompted much of the praise for the state coastal agency. This praise, however, could not be expected to be translated necessarily into continued constituency support if proposals were advanced to abolish the state coastal agency.

Some observers and participants in the national coastal management program have argued that there is or, at least, should be a constituency for "improved or better management."<sup>102</sup> This is wishful thinking. In an era of proposals for legislative review of administrative agency rulemaking, general anti-regulation sentiment, and persistent belief in the wisdom of local control, it is extremely difficult to expect a constituency to be created to support government for its own sake. It is the purpose of government to identify and solve problems. It is the responsibility of

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101. In the 1970s comparison between the state coastal agency and its fellow agency, the Pinelands Commission, led some legislators to propose that the presumably more reasonable state coastal agency be responsible for the regulation of the Pinelands Protection Program.

In the 1980s an Atlantic Regional Commission was proposed. The legislators debated the necessity of creating a new agency when the state coastal agency was performing adequately.

102. See O'Connell, *Florida's Experience with the Coastal Management Act*, 25 NAT. RES. J. 61 (1985).

government to improve or better its management of resources. In the American system, public decisions are made through an adversarial process of consideration of multiple interests.<sup>103</sup>

The concept of a constituency for coastal management raises the age-old question of who speaks for the public interest. In the arena of coastal management, it is the state's role to define the public interest and then to act accordingly.

#### 4. *The proper federal role in the coastal zone*

The federal government can and does play a wide variety of roles in managing the nation's coastal resources. Is the proper role beyond technical assistance and funding assistance to states?

First, the technical assistance provided by the federal coastal bureaucracy is extremely important and should be greatly expanded. The Atlas of East Coast Resources, prepared by OCZM and the Council of Environmental Quality, is an excellent initiative, entirely appropriate for a federal agency. The Atlas identifies resources and presents them in a fashion which can be used by a wide variety of public and private sector decisionmakers. The federal government should undertake additional initiatives in the area of technical assistance to states, local governments, the private sector, and citizens.

Second, the financial assistance to and through states to local governments under the CZMA is crucial. It provides concrete evidence of the national commitment to implement the national interests in proper coastal management. The funding has been properly linked to implementation of plans. Zealous efforts have been successful in preventing the coastal zone management program from becoming a program of ineffective paper plans clogging planners' shelves. Federal CZM implementation funds have been used for an incredibly wide variety of purposes from buying offshore patrol boats in Puerto Rico to buying handcuffs for the New Jersey Marine Police. More significantly, the funds have been used for unleashing the energy of thousands of individuals, agencies, and organizations to identify problems, assemble the facts, propose solutions,

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103. As Marc Hershman, a prominent observer of the national coastal zone management program stated:

A constituency for multiple use management by itself unlikely because in compromise between different interest groups everyone sees themselves as losing something. In addition, a constituency for the management process itself is likely to be small, fragmented and limited to "good" government groups. Thus, a constituency for CZM seems illusive and unrealistic.

Marc O. Hershman & Nan Evans, *Building Support for Coastal Zone Management Without an Interest Group Constituency*, 3 COASTAL ZONE MGMT. J. 157 (1979).

resolve conflicts, and make decisions on how to use coastal resources. Disagreements on outcomes have been widespread, but, at least, decisions have been made.

The federal government has properly required and induced, through the review and approval process of state coastal management programs, significant substantive coastal management policies. The nation's wetlands, beaches, dunes, and natural coastal hazard areas are far better protected as a result of the federal efforts at coastal management *through* the actions of states in the 1970s. The federal role, however, does require a politically realistic analysis of what may be obtained in a state. This way, the net advantages to the nation of a particular state's coastal program are obtained, even if a state may not be able to reach the ideal level of substantive policy compliance in every aspect of its program. For example, in both 1978 and 1980, NOAA-OCZM approved the New Jersey Coastal Management Program despite the threshold (or loophole, depending upon one's perspective) of 25 dwelling units before a developer was required to obtain a CAFRA permit for a residential project.<sup>104</sup> This loophole led to the proliferation of 24-unit projects, some of which have led to dune destruction. To cite another example, NOAA-OCZM recognized, in both New Jersey and California, that settings created in the 1960s by pre-existing coastal resource management efforts by regional entities—Hackensack Meadowlands Development Commission and the San Francisco Bay Conservation and Development Commission—provided adequate management of coastal resources. NOAA-OCZM properly found that CZMA standards have been met, even though the degree of wetlands protection (in the Hackensack Meadowlands case) may not have been ideal by the late 1970s standards of implementation of the CZMA.

The federal CZMA also furnished an important agenda for coastal states by providing a general framework of policies and procedures to be addressed in managing the coast. At least the New Jersey experience confirms that this agenda-setting approach is the proper federal role in coastal zone management. A more sweeping and direct federal role simply would be unworkable and would destroy the coastal states' significant accomplishments in the 1970s.

### *The New Jersey Coastal Agenda for the 1980s*

With the firm establishment of the New Jersey Coastal Management Program, the 1980s have been a period of consolidation, refinement, and full implementation. The Division of Coastal Resources was reorganized

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104. N.J. STAT. ANN. 13:19-3.c.(5).

in July 1979.<sup>105</sup> Policies have been in effect for the full coastal zone since late September 1980.

Still much remains to be done in the coastal zone.<sup>106</sup> An OCRM review of the New Jersey Coastal Management Program dated July 25, 1984 concluded that "the state of New Jersey is doing a creditable job in implementing the Provisions of the NJCMP, and is adhering to its approved program."<sup>107</sup> The remainder of the decade will be a period of continuing challenges. Strong state governmental agency actions should respond and lead with indispensable financial assistance and agenda-setting provided under the federal coastal management program.<sup>108</sup>

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105. Daniel J. O'Hern, Commissioner of the New Jersey Department of Environmental Protection, Administrative Order No. 17, June 22, 1979, effective July 1, 1979.

106. EVALUATION, *supra* note 10, at 12.

107. For example, suggestions for strengthening the program included maintaining "the integrity of the Hackensack Meadowland District's master plan as approved by the U.S. Department of Commerce in 1980 and research to more adequately define the Wetlands Buffer Policy. EVALUATION, *supra* note 10, at 11.

108. This article emphasizes the New Jersey coastal management experience only through 1981. Subsequent events have modified some of the judgments above. For example, further experience with the "federal consistency" provisions of the CZMA demonstrated the increased importance of this negotiating tool between state and federal interests. Also, the state coastal agency suffered a judicial setback in *Crema v. DEP*, 94 N.J. 286 (1983) for its failure to adopt procedural rules on conceptual approvals under CAFRA. Finally, the agency actively promoted low and moderate income housing in the Atlantic City region.