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Achieving Federalism in the Regulation of Coastal Energy Facility Siting*

Randele Kanouse**

I
INTRODUCTION

During the past decade, many states have adopted land use and environmental protection statutes designed to minimize the environmental harms associated with the siting and construction of large-scale energy facilities.1 These statutes may regulate the siting of power plants2 and other large-scale facilities3 or protect critical natural resources.4 This legislation reflects a growing recognition that govern-

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Throughout this Comment, "energy facility" denotes any large-scale development project associated with the extraction, production, conversion, transportation, or storage of energy resources. Examples are fossil fuel power plants, nuclear power plants, outer continental shelf (OCS) oil and gas extraction and production facilities, refineries, liquefied natural gas (LNG) facilities, pipelines, and electrical transmission lines. The distinguishing characteristics of these facilities are their large size and the significant environmental, visual, and social impacts associated with their construction and operation.


4. See id. at 53-78; Natural Resources Defense Council, supra note 1.
ment must take an active role in making such decisions if the adverse environmental consequences of land development are to be avoided. Although some federal statutes have implications for land use decision-making, only state and local governments have thus far adopted direct land use controls over nonfederal lands.

But during the past five years, policymaking on energy production, marketing, and consumption—apart from energy facility siting—has shifted from the private sector to the federal government. Federal controls on private sector energy projects are designed to facilitate the development of a coherent national energy policy that will assure adequate supplies of energy at a reasonable cost to consumers.

The federal interest in the siting of energy facilities that play a role in national energy policy often conflicts with state and local controls on the construction and operation of energy facilities. The growing scarcity of inexpensive energy resources, the interdependency between energy and land uses, and the uncertainties that plague governmental energy policy guarantee more frequent and serious federal-state disputes in the years to come.

The potential for such federal-state conflicts and the need for an effective and predictable mechanism to resolve disputes are particularly crucial in the coastal areas. The coastline not only contains desirable


10. See text accompanying notes 151-55 infra.
sites for many types of large-scale energy facilities, but is also subject to recreational and other resource demands.\textsuperscript{11} In addition, many fragile natural ecosystems along the coastline require governmental protection.

The recent Sohio Project controversy illustrates the complexity and sensitivity of federal-state policy conflicts in coastal energy facility siting. Standard Oil of Ohio (Sohio) proposed to ship crude oil from Valdez, Alaska, to Long Beach, California, and then to pipe the oil from Long Beach to Midland, Texas.\textsuperscript{12} Although the Federal Government generally supported the Sohio Project,\textsuperscript{13} several California governmental agencies were more cautious in their appraisals and questioned whether the project was truly in the national interest.\textsuperscript{14} Nonetheless, federal-state coordination in assessment of the Sohio Project was considered effective by some observers until mid-1978.\textsuperscript{15}

In March 1979, after expending fifty million dollars over a five-year period on reports and plans necessary to secure the approximately 700 federal, state, and local permits required for approval of its one billion dollar project,\textsuperscript{16} Sohio announced its intention to abandon the project\textsuperscript{17} at a time when there were rising fears in government and the public about the possibility of another oil supply crisis.\textsuperscript{18} Although Sohio claimed that its decision to abandon was the result of costly delays

\textsuperscript{11} See Congressional Research Service, Library of Congress, Energy Facility Siting in Coastal Areas 1-36 (Comm. Print 1975) [hereinafter cited as Energy Facility Siting in Coastal Areas]. This report points out that although coastal locations appeal to energy developers, they also interest the public for aesthetic and recreational reasons. See \textit{id.} at 1. Coastal areas also contain a disproportionately large share of the nation's population. \textit{id.} Yet, of the nation's petroleum refining capacity, 60\% is concentrated on or near the coastal areas of California, Louisiana, New Jersey, and Texas. \textit{id.} at 2. OCS oil and gas extraction and support facilities are planned for construction in coastal areas. \textit{id.} at 27. Moreover, the vast quantities of water needed for cooling in thermoelectric power plants are readily available along the coast. \textit{See \textit{id.} at 2, 12.}

\textsuperscript{12} See, \textit{e.g.}, Bureau of Land Management, Department of the Interior, Final Environmental Impact Statement, Crude Oil Transportation System: Valdez, Alaska to Midland, Texas at iii (1977) (as proposed by Sohio Transportation Company).

\textsuperscript{13} See note 24 \textit{infra} and accompanying text.

\textsuperscript{14} See, \textit{e.g.}, California Energy Resources Conservation & Development Commission, 4 California Energy Trends and Choices, 1977 Biennial Report of the State Energy Commission 9-12 (1977); California Coastal Commission, Staff Briefing on SOHIO Project, Permit Application No. 185-77 of the Port of Long Beach (Aug. 1977) (memorandum from Joseph E. Bodovitz, Executive Director, to State Coastal Commissioners).

\textsuperscript{15} See, \textit{e.g.}, Office of Transportation and Land Use Policy, Environmental Protection Agency, Environmental Management and Energy Facility Siting in the Coastal Zone 10 (Aug. 25, 1978) (Seton, Johnson & Odell, Inc. & Cogan & Associates under EPA contract 68-01-3955).


\textsuperscript{17} Wall St. J., Mar. 14, 1979, at 7, col. 1.

\textsuperscript{18} See, \textit{e.g.}, \textit{An Oil Crisis: True or False}, \textit{Time}, Apr. 23, 1979, at 60; \textit{The Oil Squeeze of '79}, \textit{Time}, Mar. 12, 1979, at 45.
caused by environmental regulatory agencies, at the time of Sohio's announcement, only two key permits remained to be secured from California, and both of these were expected to be issued "within days.

Following Sohio's announcement, a bitter debate ensued between federal and state officials over whether California's regulatory agencies caused Sohio to abandon the project. Federal and state agencies also voiced considerable disagreement over the reasonableness of the air quality offset policy that California imposed upon Sohio. Federal-state interaction deteriorated to the point where Secretary of Energy Schlesinger announced that he was "sympathetic" to federal legislation preempting state law. To head off this possibility, California officials promised enactment of a state measure that would require all lawsuits against the Sohio Project to be filed within thirty days of final agency action and provide for expedited judicial review of such suits.

During the next two months both federal and state agencies made efforts to save the pipeline project. Despite these efforts, on May 25, 1979, Sohio reaffirmed its decision to abandon the project, stating that five years of delay had made it no longer economically attractive, with estimated completion costs rising from an original $750 million to one billion dollars.

Under the Federal Coastal Zone Management Act of 1972 (CZMA), coastal states are charged with responsibility to protect the coastline. The CZMA is an effort to accommodate both federal and

20. Id.
22. The emission offset policy requires a developer wishing to build or expand its facility in an air quality nonattainment area to install the best available emission control equipment. In addition, the developer must take affirmative steps to reduce other pollutants so that there is a net improvement in the ambient air quality. See 44 Fed. Reg. 3,274 (1979) (to be codified in 40 C.F.R. pt. 51 app. S).
23. See, e.g., S.F. Chronicle, Mar. 28, 1979, at 20, col. 5.
26. Intending to speed pipeline construction, the House Commerce Committee approved H.R. 3243, empowering the President, subject to congressional approval, to recommend waivers of federal or state laws that would delay "timely construction or operation" of the project. [1979] 10 ENVIR. REP. (BNA) 14. The Federal Energy Regulatory Commission gave advance approval to a rate structure that would reflect the costs of installing the air pollution control equipment necessary to accomplish the required air pollution trade-off. 44 Fed. Reg. 25,346 (1979). State agencies produced "a flurry of last minute permitting decisions," according to Sohio, [1979] 10 ENVIR. REP. (BNA) 151, including a permit from the California South Coast Air Quality Management District based on the pollution trade-off plans. Id. at 13.
27. [1979] 10 ENVIR. REP. (BNA) 151.
state policies on coastal zone management in a single regulatory program. The CZMA provides, first, for the formulation of a state coastal zone management program that incorporates both state and federal policy, and second, for review of federally supported or conducted development projects to minimize conflicts with the state program. The latter provisions, referred to as the "consistency clause" in the remainder of this Comment, are an effort to assess and balance federal and state perspectives on particular coastal resource management decisions. The consistency clause includes language explicitly

30. The CZMA is aimed not solely at coastal energy facility siting, but rather at all development and uses that affect a state's coastal zone. See id. §§ 1454-1455.


32. The CZMA defines the term "coastal zone" as the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and including islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.


33. See id. § 1456(b); H.R. Rep. No. 1049, 92d Cong., 2d Sess. 20 (1972), reprinted in LEGISLATIVE HISTORY, supra note 31, at 323.

The Office of Coastal Zone Management (OCZM) within the Department of Commerce is responsible for implementing the CZMA and assisting states to develop coastal programs under the CZMA. See 15 U.S.C.A. § 1511 (West Supp. 1979) (creating the Associate Administrator for Coastal Zone Management, within the National Oceanic and Atmospheric Administration (NOAA)).

As of March 1979, OCZM reported that all 30 coastal states have participated in coastal programs, although three or four may soon withdraw. Presentation by Dallas Miner, OCZM Chief of External Relations, at the National Conference of the American Society for Public Administration, Baltimore, Md. (Apr. 4, 1979) [hereinafter cited as Miner Presentation]. As of October 1979, 19 states, comprising over 68% of the nation's shoreline, had approved management programs. By the end of September 1980, 27 states, comprising over 85% of the nation's shoreline, are expected to approve programs. Telephone conversation with Michael E. Shapiro, NOAA Assistant General Counsel for Coastal Zone Management (Oct. 30, 1979).


directed toward resolving federal-state conflicts over energy facility siting.\textsuperscript{36}

Without a specific congressional formula for sharing power between the states and Federal Government, a federal-state regulatory dispute is traditionally resolved by the preemption doctrine under the supremacy clause.\textsuperscript{37} Preserving the integrity of state land use programs while not impairing federal efforts to address the energy problem, however, requires a more carefully tailored balancing mechanism than litigation under the supremacy clause. The potential for conflict between state regulatory programs and federal energy programs necessitates a clear congressional formula for sharing power between the states and the Federal Government.

Funds for the CZMA will lapse in 1980,\textsuperscript{38} and Congress will either continue the CZMA with the consistency clause in substantially its present form or enact a new method of resolving federal-state coastal siting disputes within the general framework of the CZMA. Congress should assess the present consistency clause and enact provisions that will better accommodate the state and federal interests in energy facility siting.

Part II of this Comment describes the CZMA provisions on governmental regulation of energy facility siting and proceeds to a more detailed analysis of the consistency clause and its implementation. Although the CZMA, and particularly the consistency clause, were designed to give the states a primary role in coastal management deci-


\textsuperscript{37} The doctrine of preemption is grounded on art. VI, § 2 of the U.S. Constitution. The doctrine provides that when federal and state statutes conflict, the federal statutes prevail. The United States Supreme Court has held that a conflict for the purposes of federal preemption will be found "where compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See generally Engdahl, Preemptive Capability of Federal Power, 45 U. COLO. L. REV. 51 (1973); Wrede, Preemption and the Role of State Legislation in the Coastal Zone, 10 NAT. RES. L.AW. 237 (1977); Note, Federal-State Conflict in Energy Development: An Illustration, 53 DEN. L.J. 521 (1976).


NOAA, in response to a directive issued by the President in his August 2, 1979 Environmental Message to Congress, is reviewing federal programs that significantly affect coastal resources. As part of this review process, NOAA is charged with considering possible legislative improvements in the coastal management area. Public meetings concerning these issues were held in six major cities in February 1980. Memorandum from Michael Glazer, Assistant Adm'r for Coastal Zone Management, NOAA, \textit{re} Public Meetings to Be Held As Part of Federal Coastal Programs Review (Jan. 25, 1980).
sionmaking, including coastal energy facility siting, the statute in practice will not achieve the objective of federalism\textsuperscript{39} in siting policy.

Part III of this Comment examines two dispute resolution models upon which a replacement for the consistency clause could be based. The probable success of each of the two models is then assessed under five criteria—ability to achieve federalism, efficiency in resource allocation to those affected by a decision, efficacy in protecting coastal resources, political feasibility, and administrative workability. The Comment recommends that Congress replace the present CZMA consistency clause with the second model, in which federal-state disputes are resolved by a bargaining panel composed of representatives of the governmental and private interests.

II

OPERATION OF THE CZMA AND ENERGY FACILITY SITING

A. Consideration of the National Interest in State Programs

The major provisions of the CZMA\textsuperscript{40} governing state coastal program development and administration are sections 305, 306, and 307.\textsuperscript{41} Section 305 governs program development and sets forth the conditions that a state must meet in order to receive federal funding for developing a coastal program.\textsuperscript{42} Section 306 governs the approval and implementation of state coastal programs and sets forth the findings that the Office of Coastal Zone Management (OCZM) must make for a state to receive federal approval.\textsuperscript{43} Section 307 addresses federal-state relations, both in the development and administration of the program.\textsuperscript{44} Collectively, these three sections constitute constraints upon the program that a state can adopt. They are essentially procedural, requiring coastal programs to include certain management processes without imposing substantive standards.\textsuperscript{45} A possible exception to this generalization is the provision addressing the national interest in energy facility

\textsuperscript{39} The term "federalism" is vague and has a range of meanings, each of which conveys some sense of shared authority between the federal and state governments. In this Comment the term "federalism" is given a specific definition: a relationship in which neither the federal nor the state government can carry out a decision independently of the other. Both sides must agree before a proposed decision can become final.

The author believes that governmental regulation of coastal energy facility siting is a policy area in which both governments should fully participate. Federalism, in this sense, requires that federal-state conflicts be resolved by negotiation and mutual consent rather than by unilateral dictate.

\textsuperscript{40} See note 28 supra.


\textsuperscript{43} \textit{Id.} § 1455.


\textsuperscript{45} For example, the statute requires states to inventory and designate areas of particular concern within the coastal zone, 16 U.S.C. § 1454(b)(3) (1976), but it neither specifies
Within the procedural constraints set forth in sections 305, 306, and 307, a state has considerable latitude in adopting a coastal program. The Act's congressional findings are not specific and embrace several competing social goals, including industrial development, recreation, and environmental protection. States desiring either to restrict coastal development and protect the coastal environment or to promote development can readily find support in the congressional findings. Since the CZMA does not impose a uniform federal coastal program, it has been heralded as an achievement in federalism.

criteria for designating land nor sets the minimum or maximum amount of land be designated.

46. Id. §§ 1455(c)(8), 1456(a)-(b). These provisions are discussed separately in the text accompanying notes 53-62 infra.

47. 16 U.S.C. § 1451 (1976) provides:

The Congress finds that—

(a) There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone;

(b) The coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation;

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion;

(d) The coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations;

(e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost;

(f) Specific natural and scenic characteristics are being damaged by ill-planned development that threatens these values;

(g) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate;

(h) The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance;

(i) The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone.


49. See, e.g., Hershman, supra note 35; Hershman & Folkenroth, supra note 35; cf. Blumm & Noble, supra note 35 (noting difficulty in determining how federalism aspects of the Act will develop); Hildreth, supra note 35 (wait-and-see attitude on federalism aspects);
A major drawback of the CZMA, however, is that it fails to define clearly the role that federal agencies are to play in the development of state coastal programs. This has generated confusion over whether the CZMA requires a state to adopt the substantive recommendations of federal agencies into its coastal program as a condition to program approval, or whether it simply requires the state to listen to federal recommendations.  

Several provisions explicitly provide a procedural role for federal agencies in the development of state coastal programs. Section 306(c)(1) requires the state to have adopted "a management program . . . with the opportunity for full participation by relevant federal agencies" before the Secretary of Commerce can approve the program. Section 307(a) requires the Secretary to "consult with, cooperate with, and to the maximum extent practicable, coordinate with" other federal agencies in carrying out his duties under the CZMA. The express language in these two provisions leaves little room for any argument that federal agencies should play a substantive role in program development.

Federal involvement in state coastal programs is less clearly spelled out in sections 306(c)(8)(G) and 307(b), both of which require a state to provide adequate consideration of the national interest in the siting of energy facilities in its coastal program. The reference in section 306(c)(8) to energy facilities was added to meet concerns that as part of an aggressive coastal management program a state might unduly restrict the siting of energy facilities.

Rubin, supra note 35 (generally positive attitude toward balance between federal and state interests in the Act); Yahner, supra note 35 (neutral attitude on federalism in the Act).


52. Id. § 1456(a).
53. Id. § 1455(c)(8)(g).
54. Id. § 1456(b).
55. Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that:

The management program provides for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature. In the case of such energy facilities, the Secretary shall find that the state has given such consideration to any applicable interstate energy plan or program.

Id. § 1455(c) (emphasis added).

The Secretary shall not approve the management program submitted by a state pursuant to section 1455 of this title unless the views of Federal agencies principally affected by such program have been adequately considered.

Id. § 1456(b).

56. See S. REP. NO. 277, 94th Cong., 1st Sess. 34 (1975), reprinted in LEGISLATIVE HISTORY, supra note 31, at 760. The 1976 Amendments to CZMA, see note 28 supra, revealed
It is unclear from the language and legislative history of section 306(c)(8) whether the state program must permit the siting of particular facilities when a certain threshold federal interest exists, or whether it must provide a process for taking into account the national interest in energy facility siting. "[A]dequate consideration of the national interest" is sufficiently ambiguous to be read as either a procedural or substantive requirement.

The House Report on the 1972 Act explaining section 306(c)(8) may be read as implying a substantive requirement. But the Senate Report accompanying the 1976 amendments to the CZMA implies that 306(c)(8) is only a procedural requirement. Neither report is clear on this question.

The final regulations promulgated under section 306(c)(8) by the National Oceanic and Atmospheric Administration (NOAA) appear to require the states to show how the "national interest is reflected in the substance of the management program."

Section 307(b) also creates some ambiguity by providing that the Secretary can approve a state's coastal management program only after the views of the principally affected federal agencies have been "adequate consideration of the national interest in the generation and distribution of electric energy. . . or is construed as conflicting with any applicable statute, the Secretary may not approve the state program until it is amended to recognize those Federal rights, powers, and interests."


57. To the extent that a state program does not recognize these overall national interests, as well as the specific national interest in the generation and distribution of electric energy . . . or is construed as conflicting with any applicable statute, the Secretary may not approve the state program until it is amended to recognize those Federal rights, powers, and interests.

58. Concerning the § 305(b)(8) requirement of a planning process for coastal energy facilities, the Senate Report states:

The Secretary of Commerce (through NOAA) should provide guidance and assistance to States under this section 305(b)(8), and under section 306, to enable them to know what constitutes "adequate consideration of the national interest" in the siting of energy facilities necessary to meet the requirements other than local in nature. The Committee wishes to emphasize, consistently with the overall intent of the Act, that this new paragraph [305(b)](8) requires a State to develop, and maintain a planning process, but does not imply intercession in specific siting decisions. The Secretary of Commerce (through NOAA) in determining whether a coastal State has met the requirements, is restricted to evaluating the adequacy of the process.


60. States must:
   (1) Describe the national interest in the planning for and siting of facilities considered during program development . . . .
   (3) Indicate how and where the consideration of the national interest is reflected in the substance of the management program. 44 Fed. Reg. 18,608 (1979) (to be codified in 15 C.F.R. § 923.52(c)).
quately considered.” 61 Although this requirement appears to be procedural, it can be interpreted as mandating either procedural or substantive roles for federal agencies. Here again the legislative history is of little help. 62

If the provisions on federal participation are construed to require substantive accommodation of the national interest in a state coastal program, the policy of federalism embodied in the CZMA will be thwarted, since under certain circumstances an energy facility would be sited despite conflicting state interests. This would defeat the purpose of the consistency clause, which is to accommodate state and federal interests.

In American Petroleum Institute [API] v. Knecht, 63 API argued that the Act requires “affirmative accommodation” of national energy policy into coastal programs prior to federal approval under the CZMA, and that NOAA had acted improperly in approving California’s Coastal Program. 64 API brought similar lawsuits against NOAA concerning approval of the Wisconsin and Massachusetts coastal programs. 65 API relied heavily upon the language of the House Report accompanying the CZMA in 1972 66 in making its argument that the Act requires a state to make some substantive accommodation of the national interest. 67 The federal district court in California held that the CZMA requires a state to develop a process for giving adequate consideration to the national interest, but found no requirement that a state adopt substantive recommendations by federal agencies: “To the extent plaintiffs seek not guidance with respect to the way in which coastal resources will be managed but instead a ‘zoning map’ which would implicitly avoid the need to consult with the state regarding planned activities in or affecting its coastal zone, the Court rejects their

62. Subsection (b) provides that, prior to approving any state program, the Secretary must insure that the state, in developing those programs, has adequately considered the views of any federal agency, the activities of which would be affected by the state program. Should serious disagreement between a state and an agency persist, the Secretary will seek to resolve the disagreement, with the assistance of the Executive Office of the President, as might be appropriate. To the extent that the disagreement is not completely resolved, it could result in a decision by the Secretary not to approve the state program or, where appropriate circumstances existed, the Secretary could approve the program and the provisions of paragraphs 1 and 2 of subsection (c) [the consistency clause] would thereafter govern the federal agency actions.

66. See note 57 supra.
67. See note 64 supra.
position. 68

This debate over whether adequate consideration of the national interest requires only a process or both process and substantive standards will not be resolved without an appellate court ruling or congressional action. The ambiguity of these provisions on federal participation in state coastal program development unnecessarily complicates both coastal zone management generally and coastal energy facility siting decisions specifically. So long as there is some doubt concerning how state coastal programs must reflect federal interests, there will be litigation each time a state denies a proposal for siting of a coastal energy facility.

This confusion over the appropriate role of federal agencies in formulating state program content highlights a serious problem in using the consistency clause to resolve federal-state siting disputes. A federal agency or private developer cannot decide that a proposed energy facility, which it claims is in the national interest, is consistent with a state program if the state program contains only procedural provisions for considering the national interest. Such a construction of the statute would obviously allow a state broad discretion to define the national interest as it chooses in any particular siting decision.

Despite congressional intention that the consistency clause create a true federal-state partnership in coastal zone management, 69 it is not yet clear what impact the clause will have upon coastal energy facility siting. Close examination of the consistency clause reveals that it fails to delineate clearly the roles of state and federal governments or to ensure genuine intergovernmental cooperation in coastal zone siting.

B. Degree of Consistency Required

1. Direct Federal Activity v. Federally Supported Activity—Implications of Different Standards

The consistency clause applies only to those decisions that affect a state's coastal zone and in which the Federal Government has an interest. The operation of the clause differs, however, depending upon whether the activity is a direct federal activity or a federally supported activity. The term "federally supported activity" is used throughout this Comment to refer to those activities that are governed by sections 307(c)(3)(A), 307(c)(3)(B) and 307(d) of the Act. 70 Such activities include those undertaken by a nonfederal entity that require some type of federal approval or sanction in order to proceed. "Direct federal activities" are those undertaken by a federal agency. A confusion in termi-

69. See 16 U.S.C. § 1452(b)-(d) (1976); see note 100 infra.
ology results from the use in section 307(c)(1) of the phrase "each federal agency conducting or supporting activities" to define what are here referred to as direct federal activities.71

a. Direct federal activities

Sections 307(c)(1) and 307(c)(2) of the CZMA provide that direct federal activities directly affecting a state's coastal zone, or federal development projects undertaken in a state's coastal zone, must be consistent, "to the maximum extent practicable," with the state's coastal program.72 According to the NOAA regulations, federal agencies are responsible for determining which of their activities significantly affect the state's coastal zone.73 If the activity or development project will have a significant impact on or be located in the coastal zone, the agency is required to determine whether the activity is consistent with the state plan.74 Direct federal activities, including development projects, must be fully consistent with the state coastal program "unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations."75

The federal agency proposing the activity must provide the state with a consistency determination at the earliest practicable time, or at least ninety days before final federal approval of the action.76 Significantly, the federal agency is not required to halt or delay its proposed action; nor does the Act provide for an administrative appeal by the state agency if it disagrees with the consistency determination. If a serious disagreement should arise concerning a consistency determination by a federal agency, the parties may seek mediation by the Secretary of Commerce.77

The regulations encourage the federal and state agencies to resolve any disagreements informally before resorting to mediation.78 But the CZMA provides few incentives for federal agencies to negotiate. Their consistency determinations are not subject to review by state agencies.79 A state retains its right to seek judicial review of such a determination,80 but as the CZMA provides no standard, judicial review would

72. Id. § 1456(c)(1)-(2).
73. 15 C.F.R. § 930.33(a) (1979). Use of the phrase "significantly affecting" is a change from the statutory language of "directly affecting."
74. Id. § 930.34.
75. Id. § 930.32(a).
76. Id. § 930.34(b).
77. Id. §§ 930.36, .110, .112.
78. Id. § 930.111.
79. State agencies may disagree with the federal agency's consistency determination, id. § 930.42, but can only seek Secretarial mediation to resolve the disagreement. Id. § 930.43.
80. The availability of the mediation services provided in this subpart is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve
be limited to the "arbitrary or capricious" standard set forth in the Administrative Procedure Act.\textsuperscript{81} This allows federal agencies broad discretion.\textsuperscript{82} Thus, the consistency clause imposes a procedural requirement on federal agencies to consider the interests of a state before initiating a direct activity significantly affecting the coast, but it imposes no limits on the power of such agencies to proceed with their activities. A federal agency may initiate the consistency review, make the necessary findings, and proceed with its action— all without state concurrence.

\textit{b. Federally supported activities}

Sections 307(c)(3) and 307(d)\textsuperscript{83} govern federally supported activities. Section 307(c)(3)(A) provides that any activity affecting land or water uses in the state’s coastal zone and for which a federal license or permit\textsuperscript{84} is required must be “conducted in a manner consistent with” the state’s management program.\textsuperscript{85} The regulations further provide that these activities are governed by the consistency clause, even when the activity takes place outside of the state’s coastal zone, if the activity “significantly affects” the state’s coastal zone.\textsuperscript{86}

Section 307(c)(3)(B) provides that any plans submitted to the Secretary of the Interior under the Outer Continental Shelf Lands Act\textsuperscript{87} for the exploration, development, or production of areas leased under that Act are subject to the provisions of the consistency clause.\textsuperscript{88} The plans must include a description of the major activities to be undertaken in the OCS development project, including all specific activities
that require federal agency approval. Section 307(d) provides that activities of state and local governments for which any federal assistance—including grants, loan subsidies, guarantees, insurance, and contractual obligations—is requested must be consistent with the state coastal program before a federal agency can grant such assistance.

For each of the three types of federally supported activities—licenses, permits and grants—the private developer or state or local governmental agency makes the initial certification of consistency before seeking federal support or approval. This first certification is conducted according to the standard of the coastal program of the state in which the facility is to be located. If within designated time limits the state coastal agency fails to issue a determination that the proposed activity is not consistent with its coastal management program, a conclusive presumption arises that the state concurs in the applicant’s consistency certification.

If the designated state coastal management agency disagrees with the applicant’s initial certification, the regulations encourage informal resolution of their differences. If these informal negotiations fail to resolve the disagreement, the applicant may appeal to the Secretary of Commerce. Section 307 appears to grant the Secretary the authority to override a state’s decision regardless of the state’s findings. Sections 307(a), 307(c)(3)(A), and 307(c)(3)(B) provide that no federal approval or license shall be granted until the state concurs with the consistency certification, “unless the secretary . . . finds . . . that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.”

89. Id.; 15 C.F.R. § 930.76 (1979). Once the state concurs in the consistency determination the applicant need not submit additional consistency certifications when the federal applications are actually filed. Id.
92. Id. The regulations provide that for federally supported activities, the applicant must: (1) conduct an assessment of the probable coastal effects of the proposal; (2) prepare findings, derived from this assessment, that all aspects of the proposed activity are consistent with the mandatory policies of the state coastal program; and (3) prepare findings that state coastal policies have been adequately considered. 15 C.F.R. § 930.58(a)(3)-(4) (1979); see also id. § 930.77 (providing similar regulations for OCS plans).
93. The state coastal management agency has three months in which to evaluate the consistency certification made by the developer of a proposed OCS development plan. This time for evaluation was added to the CZMA by the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 504, 92 Stat. 693 (1978) (to be codified at 16 U.S.C. § 1456(c)(3)(B)(ii)). Prior to this amendment, the time period for OCS plans was six months—the same as for all other types of federally supported activities. See 16 U.S.C.A. § 1456(c)(3)(A) (West Supp. 1979).
95. 15 C.F.R. § 930.64(c) (1979).
96. Id. §§ 930.64(e), .85.
Neither the Act nor the legislative history explicitly addresses the relationship between the state's consistency determination and the Secretary's appellate authority. Although this omission may have been necessary to ensure passage of the Act in 1972, the implications of the silence are highly significant.

One might argue that the Secretary should, on review of applications, defer to the state's consistency determination. This position would advance the CZMA's policy of federalism in coastal zone management. But the language of the Act seems to allow the Secretary broad discretion to conduct an independent, de novo evaluation of the proposal on appeal. In addition, the NOAA regulations provide that an activity is "consistent with the objectives or purposes of the Act," if the Secretary finds that: (1) the activity furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the CZMA; (2) its adverse effects will not outweigh its contribution to the national interest; (3) it will not violate the Clean Air Act or the Federal Water Pollution Control Act; and (4) no reasonable alternative is available. These standards fail to limit the Secretary's discretion effectively. Even though state and federal agencies may submit detailed comments to the Secretary in response to an appeal, the Secretary is free to conduct an independent evaluation of the merits of a proposal. There is no requirement in the statute or the regulations that the Secretary even consider—let alone accept or incorporate—a state's findings concerning a proposed facility.

99. For the text of the section see note 47 supra.
100. 16 U.S.C. § 1452 (1976) provides:
The Congress finds and declares that it is the national policy (a) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations, (b) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, (c) for all Federal agencies engaged in programs affecting the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this chapter, and (d) to encourage the participation of the public, of Federal, state, and local governments and of regional agencies in the development of coastal zone management programs. With respect to implementation of such management programs, it is the national policy to encourage cooperation among the various state and regional agencies including establishment of interstate and regional agreements, cooperative procedures, and joint action particularly regarding environmental problems.
104. Id. § 930.126.
Here also, the "arbitrary and capricious" standard would be employed in judicial review,\textsuperscript{105} thus substantially limiting a state's chances of successfully challenging the Secretary's decision to override its consistency determination.\textsuperscript{106} The existence of two independent consistency determinations—the state's decision and the Secretary's appellate findings—could complicate judicial review of a consistency clause dispute. Because the Secretary's findings come later, courts may well defer to them as the final agency action under the Administrative Procedure Act.\textsuperscript{107}

The consistency provisions for federally supported activities differ from those controlling direct federal activities in four major respects: (1) the decision makers; (2) the degree of consistency required; (3) the threshold necessary to invoke state authority under the consistency clause; and (4) the scope of appellate review. A close examination reveals that the extent to which the consistency provisions for direct federal and federally supported activities promote federalism is highly imbalanced.

First, although each federal agency makes the initial consistency determination for its own proposed direct federal activities, the state agency makes the determination for federally supported activities. Both decisionmaking arrangements create the appearance of an improper conflict of interest by allowing self-serving consistency determinations. Federal agencies, committed to their own goals, cannot objectively and fairly assess whether their projects are consistent with state plans. Likewise, state control over the consistency determination will not ensure fair consideration of proposed federally supported projects in states whose primary objective is protecting coastal resources. This conflict will impair the objectivity of the state coastal agency and encourage applicants to seek review of state determinations by the Secretary of Commerce.

Second, direct federal activities need only be consistent with the state management program to the "maximum extent practicable."\textsuperscript{108} The federal agency proposing the activity may proceed if it demonstrates that federal law prohibits compliance with the state's coastal program.\textsuperscript{109} In contrast, federally supported activities must be "consistent" with a state coastal program in order to be approved.\textsuperscript{110} This undiluted standard of consistency, even if not defined further, is simply

\textsuperscript{105} See note 81 \textit{supra} and accompanying text.
\textsuperscript{106} See note 82 \textit{supra} and accompanying text.
\textsuperscript{108} 16 U.S.C. § 1456(c)(2) (1976); see also 15 C.F.R. § 930.32(a) (1979).
\textsuperscript{109} 15 C.F.R. § 930.32(a) (1979).
\textsuperscript{110} \textit{Id.} § 930.50.
more rigorous than the "consistent to the maximum extent practicable" standard.

Third, the consistency requirement applies to a direct federal activity only if it "directly affects" the state's coastal zone. By contrast, a federally supported activity is subject to state authority under the consistency clause if it "significantly affect[s]" the state's coastal zone. The Justice Department has suggested that the "significantly affects" standard is broader and encompasses more activities than the "directly affects" standard.

Fourth, the provisions for appellate review of consistency determinations differ substantially. Under the consistency clause, the state may either seek judicial review or seek the federal agency's consent to have the Secretary mediate the dispute concerning direct federal activities. For federally supported activities, the Secretary of Commerce will review state determinations that the proposed project is not consistent with the state management plan.

The language as well as the legislative history of the consistency clause reflect a significant disparity in treatment between direct federal activities and federally supported activities. The procedures for direct federal activities tend to promote federal over state interests; those for federally supported activities favor state interests. The decision process for direct federal activities does not further federalism in coastal zone management; thus federal agencies often may not make a serious attempt to accommodate state interests.


The legislative history of the CZMA suggests in general language that the consistency clause is intended to achieve improved federal-state coordination. But there is little congressional discussion of the exact significance and scope of the power shift that the clause was intended to achieve. Furthermore, section 307 contains several provisions that seem to contradict the notion that states were intended to

111. 16 U.S.C. § 1456(c)(1) (1976). The regulations, however, have substituted the term "significantly" for the term "directly." See 15 C.F.R. § 930.33 (1979). See also U.S. Dept of Justice, Opinion, Whether the Pre-leasing Activities of the Secretary of the Interior Relating to the Outer Continental Shelf are Subject to the Consistency Requirement of § 307(c)(1) of the Coastal Zone Management Act 13-14 (Apr. 20, 1979) (rendered at request of General Counsel, Dep't of Commerce, and Solicitor, Dep't of the Interior, the opinion claims that the substitution of terms is unjustified).


115. See notes 96-97 supra and accompanying text.

gain power at the expense of federal agencies. Consequently, the Secretary of Commerce and the courts have considerable latitude in interpreting Section 307 and deciding whether federal or state policies are to be given greater weight.

Section 307(e) is the most difficult provision to reconcile with the consistency clause. It provides: "Nothing in this chapter shall be construed—(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; . . . (2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies." This language explicitly limits the power of state coastal programs to override existing federal legislation.

The legislative history appears to support a construction of section 307(e) that limits the consistency clause. Although the Senate Report accompanying the 1972 Act suggests that 307(e) is simply boilerplate language not intended to limit the scope of the consistency clause, the House Report states explicitly that 307(e) was intentionally included to protect federal jurisdiction and responsibility. This latter

117. Section 307(a) requires the Secretary to "consult with, cooperate with, and, to the maximum extent practicable, coordinate" CZMA activities with the other interested federal agencies. 16 U.S.C. § 1456(a) (1976). This provision complements § 307(b), id. § 1456(b), which requires a state to give adequate consideration to the views of interested federal agencies before the Secretary can approve the state's program. The legislative history of the provisions indicates that state coastal programs should coordinate existing federal and state programs to avoid duplication of effort. H.R. Conf. Rep. 1544, 92d Cong., 2d Sess. 14 (1972), reprinted in Legislative History, supra note 31, at 457; H.R. Rep. No. 1049, 92d Cong., 2d Sess. 9, 19 (1972), reprinted in Legislative History, supra note 31, at 313, 322-23.


120. The committee does not intend to exempt Federal agencies automatically from the provisions of this act. Inasmuch as Federal agencies are given a full opportunity to participate in the planning process, the committee deems it essential that Federal agencies administer their programs, including developmental projects, consistently with the State's coastal zone management program.


121. [The State] must also recognize that there is no provision of this title which relinquishes any Federal rights in and powers of regulation of Federal lands, or of the paramount Federal interests in navigable waters, or of any of the constitutional powers of the Federal Government, including those relating to interstate and foreign commerce, navigation, national defense, and international affairs. To the ex-
interpretation would be consistent with the language of the consistency clause itself, giving broad discretion to the Secretary of Commerce to override state consistency determinations.

Regardless of which construction the Secretary adopts, the federal courts may narrowly construe the consistency clause. The supremacy clause of the Constitution supports only a limited consistency clause power for the states. A state cannot regulate or deny federal activities without a "clear congressional mandate." Given the lack of clarity in section 307 and its legislative history, federal courts will probably demand a clearer statement of purpose in the consistency clause before they will allow state coastal officials to control proposed federal energy development projects.

The Supreme Court's interpretation of the CZMA in Ray v. Atlantic Richfield Co. also suggests that future interpretation of the consistency clause will be narrow. In Ray, the Court held that the federal Ports and Waterways Safety Act of 1972 (PWSA) preempted Washington's Tanker Law. Although Washington did not invoke consistent that a State program does not recognize these overall national interests, as well as the specific national interest in the generation and distribution of electric energy, adequate transportation facilities, and other public services, or is construed as conflicting with any applicable statute, the Secretary may not approve the State program until it is amended to recognize those Federal rights, powers, and interests.


122. Other factors may influence the eventual construction of the Act. Coastal zone management is not a major responsibility of the Department of Commerce. With the exception of the programs within the National Oceanic and Atmospheric Administration, which include coastal zone management, the programs within the Department of Commerce are directed at encouraging and monitoring economic development. For this reason, supporters of coastal zone management opposed placing the program in the Department of Commerce. Zile, A Legislative-Political History of the Coastal Zone Management Act of 1972, 1 COASTAL ZONE MANAGEMENT J. 235, 271 (1974). The Office of Coastal Zone Management (OCZM) has been criticized for lobbying for the states and for neglecting federal agencies and their interests in the program approval process. PUBLIC SUPPORT, supra note 50, at 19-23. The Secretary of Commerce can be expected to be far more responsive than OCZM officials to the interests and input of other federal agencies. In a situation where the Secretary suspects that OCZM has approved a state's program even though federal agencies have not fully participated, the Secretary may narrowly interpret the consistency clause and scrutinize a state's consistency determination quite closely.

123. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954). Because of the fundamental importance of shielding federal activities, Congress will be held to authorize the states to regulate only to the extent that there is a "clear congressional mandate." Hancock v. Train, 426 U.S. 167, 179 (1976).

124. Cf. Hancock v. Train, 426 U.S. 167 (1976) (holding state permit requirements, under federally approved Clean Air Act implementation plans, inapplicable to federally owned or operated installations); EPA v. California, 426 U.S. 200 (1976) (holding that Federal Water Pollution Control Act Amendments of 1972 did not subject federal facilities to state permit requirements under National Pollutant Discharge Elimination System).


tency clause authority against the asserted federal preemption, it did argue that the enactment of the CZMA reflected a congressional policy of joint federal-state management of coastal resources and that preemption of the Tanker Law would be inconsistent with this congressional policy. The Court rejected this argument, holding that, despite the existence of the CZMA, the PWSA did not require cooperative federal-state regulation.

This narrow reading of the CZMA suggests that section 307 will be treated similarly. Ray could be read to indicate that the Court will allow joint federal-state regulation of coastal resources only to the extent that other federal statutes allow the state to participate. If either the courts or the Secretary of Commerce give significant weight to section 307(e) and the other provisions of the Act requiring extensive federal control over coastal management, a basic goal of the CZMA—shared state-federal responsibility in coastal zone management—will never be attained.

State authority to invoke the consistency clause process may be limited to fairly minor or inconsequential federal proposals. With respect to energy facility siting in particular, federal agencies often will be able to find statutory authority supporting a proposed energy project, especially since national energy policy has become a critically important issue both to government and the public.

3. Implications of Federalist Interpretations of the Consistency Clause

The ambiguity in the legislative history and language of section 307 could instead be construed in favor of the states. The Secretary and the courts might read the legislative history as indicating a congressional intent to encourage state governments to play a primary role in coastal management. The Senate Report implies that the language of section 307(e) is boilerplate, thus lending support to the position

128. There was some dispute as to whether the Tanker Law was included in the coastal management program description approved by OCZM in 1976. See M. Hershman & M. Condon, Implementing Federal Consistency Requirements in Washington State (1976-1978) 81 (Sept. 10, 1978) (report prepared for OCZM).

129. 435 U.S. at 178 n.28; see generally M. Hershman & M. Condon, supra note 128, at 77-78.

130. The Court stated:
   "We find no support for the appellants' position in the other federal environmental legislation they cite, i.e., . . . the Coastal Zone Management Act of 1972. . . . While those statutes contemplate cooperative state-federal regulatory efforts, they expressly state that intent, in contrast to the PWSA. Furthermore, none of them concerns the regulation of the design or size of oil tankers, an area in which there is a compelling need for uniformity of decisionmaking."

435 U.S. at 178 n.28.

131. See text accompanying notes 40-44, 118-21 supra.

132. See note 100 supra.

133. See notes 118-21 supra and accompanying text.
that it was not intended to limit the scope of the consistency clause. That section 307(e) does not expressly include federal "activities" in its list of federal rights that are not to be diminished by the CZMA, further supports this interpretation.

An expansive construction of the consistency clause would allow states with approved coastal programs to exercise a major influence over federal management of coastal resources. Once approved, a state program would serve as the yardstick for measuring the suitability of all coastal development proposals. This is not to suggest that such a construction of the consistency clause would render the Federal Government helpless in dealing with state coastal program officials. Federal agencies could still bring other pressures to bear—for example, threatening to cut off federal aid or scrutinizing a state's coastal program for exact compliance with the Act. A federal agency also may succeed on appeal to the Secretary. Nevertheless, a consistency clause broadly construed to give states greater authority might jeopardize the ability of federal agencies to carry out new development activities. Even in the case of direct federal activities, where federal agencies exercise the greatest autonomy under the consistency clause, they would probably have to seek state consent before proceeding with their activities.

State coastal programs contain few specific, substantive energy policies that reflect the program goals of federal energy agencies; those that are included are vague and noncontroversial. At best,

135. The only exceptions would be those proposals approved or rejected by the Secretary of Commerce on appeal. See notes 95-107 supra and accompanying text.
136. See text accompanying notes 72-82 supra.
138. For example, the Rhode Island program provides:
A. Facilities for the processing, transfer and storage of petroleum products and the production of electrical power provide services necessary to support and maintain the public welfare and the state's economy.
B. Such facilities, whether sited in the coastal region or elsewhere, have a high probability of affecting coastal resources and land uses because of their large size, environmental and aesthetic impacts, and impacts on surrounding land uses and broad development patterns.
coastal programs identify a few coastal areas that are labeled as gener-
ally unsuitable for large-scale facility siting because of the existence of
unique natural resources in such areas.\textsuperscript{139} Broad statements of energy
policy allow state officials vast discretion. A federalist interpretation of
the consistency clause coupled with vague wording in state coastal pro-

C. In order, therefore, to properly and effectively discharge legislatively dele-
gated responsibilities related to the location, construction, alteration and/or opera-
tion of such facilities, the Council finds a need to require in all instances a permit
for such location, construction, alteration and/or operation within the State of
Rhode Island where there is a reasonable probability of conflict with a Council
plan or program, or damage to the coastal environment.

Office of Coastal Zone Management, U.S. Dep't of Commerce, State of Rhode
Island Coastal Management Program and Final Environmental Impact State-
ment 219 (Mar. 1978); see also Office of Coastal Zone Management, U.S. Dep't of
Commerce, State of Maryland Coastal Management Program and Final Envi-
ronmental Impact Statement 242-43 (Aug. 1978) which provides:

1. It is the State's policy to ensure that adequate electric power is provided on
reasonable schedule, at reasonable costs and with the least possible deprecia-
tion of the quality of Maryland's environment. (Natural Resources Article,
Section 3-304).

2. In reviews of applications for certificates of public convenience and necessity,
the following criteria will be considered in evaluating power plant sites and
transmission lines. (Natural Resources Article, Section 3-304):
   a. The recommendations of local governments and state agencies;
   b. Present and future power demands;
   c. Impact upon system stability and reliability;
   d. Economic impact (including fiscal and employment impacts and
      impacts on public services); irretrievable commitments of
      resources;
   e. Environmental impact on air and water quality;
   f. Impact upon wetland areas;
   g. Impact upon fish and wildlife resources and habitats;
   h. Radiological impacts;
   i. Noise impacts;
   j. Aviation safety;
   k. Potential impacts on aesthetics and on historic and archeological
      sites;
   l. Potential impacts on public open space, recreational and natural
      areas; and
   m. Potential impacts on state critical areas.

3. Power plants shall be sited, constructed, and operated in a manner which mini-
mizes their impacts on tidal wetlands [sic], aquatic resources, terrestrial re-
sources, significant wildlife habitat, public open space, recreational, and
natural areas, air and water quality, and the public health, safety, and welfare.
(Natural Resources Article, Sections 1-302, 1-303, 3-301 \textit{et seq.}, 8-1402, 8-1405,

4. A certificate of public convenience and necessity will not be granted to any
facility which would violate federal or state air or water quality standards.
(Natural Resources Article, Sections 1-103, 3-304, 8-1413, Article 78, Section
54A, 54B, 57 Attorney General Opinions 439 (1972)).

5. The State will utilize its power plant monitoring and research programs to de-
determine how power plants affect human health and welfare and the vitality of
the State's natural resources. (Natural Resources Article, Section 3-303, 3-
304).

6. The State will identify, evaluate and acquire 4 to 8 power plant site [sic]. (Nat-
ural Resources Article, Section 3-305).

\textsuperscript{139} \textit{E.g.}, Office of Coastal Zone Management, U.S. Dep't of Commerce, State
of Maryland Coastal Management Program and Final Environmental Impact
Statement 294-304 (Aug. 1978); Massachusetts EIS, \textit{supra} note 137, at 41-44.
grams would receive considerable political support from the states and interests desirous of slowing coastal development. The Federal Government, however, would probably not tolerate this situation for long. Federal resource management agencies would seek greater federal participation in the formulation of, and greater specificity in, the substantive policies of the state coastal program.

The urgent national need for energy makes federal-state collaboration in producing coastal programs a particularly attractive idea. State coastal resource management, supported by a broad consistency clause authority, could significantly affect federal and private sector energy-related activities. OCS oil and gas recovery projects, marine tanker terminals for imported oil and gas, refineries, and thermo-electric power plants all depend heavily on coastal location for large quantities of cheap water.

Allowing each state to develop its coastal management program independently of federal agencies would result in thirty sub-national energy policies competing in part and overlapping in part with national energy policy. In such a situation, the uncertainty facing the project sponsor, the difficulty of getting financing, the time and money expended in agency proceedings and permits, and litigation costs would all increase. Federal agency efforts to plan and direct future energy production and marketing activities—efforts that recently have been criticized for their costs and ineffectiveness—would be futile, to the extent that federal agencies lacked the power to carry them out. The process of defining national energy policy would become more difficult.

The 1976 amendments to the Act reflect some change in congressional perspective, and the President and Congress have recently shown greater sensitivity to the economic costs of environmental regulation. The recent amendment of the Endangered Species Act is an example. The reaction of both Congress and the Executive Branch


142. See generally Energy Facility Siting in Coastal Areas, supra note 11, at 1-8.

143. The CZMA definition of coastal states, 16 U.S.C. § 1453(1) (1976), includes the Great Lake states, making 30 coastal states eligible for participation in the program. See note 32 supra.


to Sohio's decision to withdraw its proposal for a PACTEX oil pipeline further exemplifies current federal sensitivity to the costs imposed by regulation of energy projects deemed to be in the national interest. The President's Executive order to agencies to speed up and improve the federal regulation of energy facility siting also suggests that states will not be given extensive authority to protect their coasts from development of federal energy programs. Finally, the recent Presidential proposal for a national Energy Mobilization Board to expedite the siting of energy facilities is strong evidence that energy facility siting has become a very high priority with the White House.

These examples suggest that the Federal Government will not tolerate quasi-preemptive state power over federal agencies when state management plans only meagerly protect national energy needs. If the consistency clause is construed by the courts to give states broad authority, Congress will respond by amending the CZMA.


The term "national energy policy" is misleading because it suggests a set of coordinated, well defined objectives that can be rationally applied to produce a single solution. National energy policy simply does not lend itself to such a coherent and unified definition or application. Formally, it can be defined as the collective statements and ac-


148. See text accompanying notes 12-27 supra.

As proposed, the Board would be authorized to designate certain non-nuclear facilities as critical to achieving the nation's import reduction goals and to establish binding schedules for federal, state, and local decisionmaking. If a federal, state, or local agency should fail to act within a specified time, the Board would be empowered to make the decision in place of the agency, applying the appropriate federal, state, or local law. It also would have the authority to abrogate procedural requirements of federal, state, or local laws in order to expedite the development and construction of a critical energy facility. To avoid delays after the start of construction, the Board could also waive the application of new substantive or procedural requirements of law coming into effect after the construction of a project has commenced. These waivers would be granted on a case-by-case basis.

As of early February 1980, House and Senate conferees were considering issues concerning the board's powers. The conferees have agreed on allowing expedited judicial review of the board's decisions in the Temporary Emergency Court of Appeals. Review would encompass the constitutionality of the board's mandate and its regulatory powers. Wall St. J., Feb. 1, 1980, at 6, col. 4.
tions of federal institutions, most importantly Congress, the President, the Department of Energy, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, and the Department of the Interior. Yet many other institutions and circumstances significantly influence these federal entities and play a direct role in shaping national energy policy. The Organization of Petroleum Exporting Countries (OPEC) and its pricing decisions, the International Energy Agency (IEA) and its decisions concerning oil consumption, and the Council on Environmental Quality and Environmental Protection Agency and their decisions concerning pollution and natural resource exploitation are only a few examples of such influences on national energy policy. The impact of these secondary institutions is unsystematic, and their degree of influence varies. As a result of the interactions of these many institutions, federal policy statements on energy continue to be inconsistent and unpredictable.

More properly, then, the term "national energy policy" should be

151. These include: diplomatic relationships between the United States and other countries; the international economy; the stability of the dollar abroad; the Office of Management and Budget, the Federal Reserve Bank, and the Council on Wage and Price Stability and their decisions concerning the economy; private industry and its capital formation activities; state and local agencies' regulations of intrastate use of natural resources; public utilities and public utility commissions; residential and institutional consumers of energy and their preferences concerning energy use; and energy technology breakthroughs, including commercial availability of renewable sources. For discussion of four specific, nonconventional sources of energy that could influence national energy policy, see NATIONAL ENERGY PLAN, supra note 8, at 75-81.

152. See, e.g., Report of the Special Committee on Energy Law, 10 NAT. RES. LAW. 655, 691-95, 706-712 (1978).

153. For example, governmental predictions and planning concerning energy costs, marketing patterns, and alternative energy technologies have often become obsolete long before the time for their implementation. In 1974, Project Independence forecast 1985 oil consumption in this country based upon three possible price scenarios for OPEC oil: four, seven, and 11 dollars per barrel. Federal Energy Administration, Project Independence: A Summary 4, 7 (Nov. 1974).

There has been no consistent policy concerning the development of nuclear power. Although the Department of Energy and its predecessors have been consistent supporters of nuclear power, Corrigan, Lanouette & Samuelson, supra note 6, at 918-21, Congress has been more cautious. Events beyond the control of the Federal Government, such as the potentially catastrophic accident at the Three Mile Island nuclear power plant, have had a major impact on the implementation of the Federal Government's nuclear proposal. Wall St. J., Apr. 3, 1979, at 2, col. 2.

Coal policy is also in disarray. Because of the vast domestic supplies of coal and the anticipated shortage of natural gas, NATIONAL ENERGY PLAN, supra note 8, at 18, 63, the National Energy Plan advocated that industries and utilities switch from burning oil and natural gas to coal. Id. at xiii. As a result of Administration support, the Power Plant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (1978), was enacted, mandating such a shift. In November 1978, however, the Secretary of Energy announced that "in the short run" industries and utilities should burn gas rather than switching to coal. Finally, in January 1979, the Department of Energy ordered a Colorado utility not to continue to burn gas, but to shift to coal. In addition, the push to promote use of coal is indirectly opposed by the Environmental Protection Agency because of the serious degradation
understood to refer to a series of unconnected, loosely related, and often conflicting objectives proceeding from a variety of sources in the Federal Government, changing with events and the political balance. As such, "national energy policy" is not sufficiently certain, static, or defined to allow it to be incorporated into state management programs. The grossly unrealistic assumption that states can adequately crystallize and incorporate national energy policy into their programs is a major drawback of the CZMA. Land use and environmental programs such as coastal zone management significantly affect the energy policy of the Federal Government; yet national energy policy does not explicitly accommodate such state programs.

Delay is another problem inherent in attempting to meet national energy needs through state coastal management programs. Time lags between the original enactment of federal energy or natural resource management legislation, the articulation of a specific energy-related program by a federal agency, the incorporation of the energy program of air quality caused by the burning of some types of coal. Kirschten, *Coal War in the East—Putting a Wall Around Ohio*, 11 Nat'L J. 50, 50-53 (1979).

There is also considerable uncertainty concerning the national program to develop synthetic fuels and the extent to which the nation is willing and able to make a major switch to synthetic fuels in the near future. See Kirschten, *Gasoline from Coal—South Africa Proves That It Takes Time*, 11 Nat'L J. 1410 (1975).

In February 1979, as the Administration was proclaiming the gravity of the Iranian oil production cutoff, Wall St. J., Feb. 8, 1979, at 3, col. 1; id., Feb. 12, 1979, at 2, col. 2; id., Feb. 14, 1979, at 5, col. 1, and proposing emergency controls to deal adequately with major oil shortages predicted for the summer and winter of 1979, various groups were already forming in Congress, threatening to oppose or amend specific aspects of the Administration's proposal for managing the anticipated oil shortage. Wall St. J., Feb. 23, 1979, at 1, col. 6; id., Feb. 28, 1979, at 6, col. 2; id., Mar. 9, 1979, at 1, col. 5. About the same time, Department of Energy estimates of the oil import losses caused by the disruption were contradicted by a Library of Congress study and by members of Congress who claimed that the Department of Energy was overestimating the magnitude of the oil shortage. *Id.*, Mar. 2, 1979, at 2, col. 3.

There can be confusion even in the relatively simple situation where there is legislation on a particular energy issue. The energy legislation enacted by the 95th Congress in November 1978 was very different from the National Energy Plan that the President submitted to Congress as a blueprint for energy legislation 18 months earlier. Several provisions of the President's Plan were deleted by Congress and other provisions underwent substantial revisions before they were enacted. Compare Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978); Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (1978); National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978); Power Plant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289 (1978); and Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978) with National Energy Plan, supra note 8. Yet because the Executive Branch will promulgate regulations and guidelines to implement this legislation and act when issues unforeseen in the legislation arise it may be able to bring in through the back door what it could not get Congress to adopt outright.


into a state coastal program, and the invocation of these federal energy interests by the state, result in final decisions being based on policy judgments several years old. Thus the values associated with specific resources at the time the original federal policy decision was made may have changed by the time a coastal energy facility is proposed. For example, the costs associated with conventional energy resources continue to rise beyond control by the Federal Government. At the same time the value that the public attaches to the coastal resources has been growing steadily and will likely be even greater in the future as a result of educational efforts by coastal zone management agencies. Because societal values involved in these energy-environmental trade-offs change rapidly, an energy zoning map would soon become obsolete. Requiring states to incorporate into their coastal programs the national interest in energy as articulated in 1978 could seriously burden both the states and the national government as early as 1980. Requiring the states to revise their programs continually to conform to a changing energy policy likewise would be quite costly. Both the desirability and manageability of this task are doubtful.

In addition, incorporation of national energy policy into state coastal management programs is a nearly impossible task because state and federal officials must attempt to gauge and accommodate the current coastal use preferences and energy needs of all the people within their jurisdictions. The programs must reflect not only present preferences and needs but must also project for future needs. The vastness of this exercise makes it improbable that the preferences reflected in the state coastal program will accurately reflect the needs of the state’s diverse constituency at the time of adoption, let alone in the relatively distant future.

In an effort to foster a federal-state partnership, the Act allows the states considerable flexibility in adopting coastal management programs. States are free to choose between pro-environmental and pro-development programs. Some states have created new agencies to administer their programs; others have given coastal program responsibilities to existing agencies. Several states have coastal pro-

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156. See, e.g., Time, Mar. 12, 1979, at 44-51.
158. See, e.g., Public Support, supra note 50, at 26-29.
159. See, e.g., 16 U.S.C. § 1454(b)(5) (1976) (requiring only broad guidelines on priorities of uses); id. § 1454(b)(8) (allowing states to go beyond the minimum requirement for a process anticipating and managing impact facilities).
161. See, e.g., Massachusetts EIS, supra note 137, at 4-6.
grams that predate the federal Act.\textsuperscript{162} This diversity among the state coastal programs makes it more difficult for federal agencies to adopt a single policy for dealing with the states and to incorporate national energy policy into state coastal management programs efficiently and effectively.

Nonetheless, in as complex and fluctuating a policy area as coastal energy facility siting, regulatory legislation must allow the regulator flexibility in making its decisions. Such flexibility permits state coastal agencies to weigh state concerns far more heavily than federal concerns, even though the state program has included national considerations in its provisions. A reviewing body, however, cannot easily prove de facto disregard of the national interest because of the necessarily discretionary nature of state decisionmaking. This is particularly troublesome for the Secretary of Commerce who, in consistency clause appeal proceedings,\textsuperscript{163} would not know what weight to give a particular state agency's finding of inconsistency. Because of the highly factual nature of each decision, the Secretary would be caught between an inclination to rely upon the state's factual determination and the practical necessity of interpreting the CZMA so as to ensure uniform application across the nation.

To be successful, hybrid federal-state coastal programs must provide solutions to these problems. This requires mechanisms for extensive interaction between state officials and the federal energy and resource management agencies. Federal participation must begin early during coastal program development and continue during implementation. The programs will require regular amendment so that they continue to reflect current values on environmental protection of proposed coastal sites for energy development. Such coordination is difficult enough when there is a unitary, well established federal policy and some commonality of interests among the federal and state agencies. It is obviously more difficult in the present situation where there is neither a stable federal energy policy nor a commonality of interests.

Even if the CZMA is amended to require active federal involvement in program development as a condition of program approval, states would have few incentives to allow extensive federal agency involvement.\textsuperscript{164} State officials would recognize that keeping federal input

\textsuperscript{162} See, e.g., CALIFORNIA EIS, supra note 137, at 17-21.

\textsuperscript{163} See text accompanying notes 96-97 supra.

\textsuperscript{164} A state has the incentive to cooperate only to the minimal extent that if it fails to let federal agencies participate at all in the development of its program, it will not receive consistency authority and will be subject to federal preemption in the event of a regulatory conflict. Federal agencies similarly have some incentives to work with the states in developing the state coastal programs because failure to do so permits the states to exercise the consistency authority based on a coastal management program reflecting only state needs and possibly frustrating federal programs.
into their coastal program to a bare minimum increases state control over the future of the coast.

The current CZMA regulations provide for informal negotiations as a means of resolving federal-state disputes.\textsuperscript{165} These informal processes greatly enhance the likelihood of a voluntary resolution, which is almost always more strongly supported by the parties involved than externally imposed solutions.\textsuperscript{166} The key to the success of such informal mechanisms, including mediation, is the motivation of the participants. If each party sees it in its own interest to participate in good faith in such a forum, then it can work. If some parties believe they can do better for themselves by boycotting or sabotaging mediation, they will do so. Yet by including two alternative federal-state dispute resolution mechanisms, the CZMA weakens the incentives for achieving an informal, negotiated decision. Parties who participate in the mediation, which is required prior to formal secretarial consideration of a consistency determination appeal,\textsuperscript{167} recognize that if they become dissatisfied with the bargaining process, they can still invoke the consistency clause appeal process.\textsuperscript{168} The result is that no one has the incentive to make major concessions. This is particularly true because the consistency clause gives certain rights to the state, the federal agencies, and the developer. Each of these parties will seek broad interpretations of its rights in an effort to increase its power in the formal consistency clause process. This focuses the bargaining incentives on the consistency clause procedures instead of the informal negotiations.

Furthermore, even if an agency seeks to solve the dispute through informal negotiations, the possibility of using the formal adjudicatory process for resolving the dispute may result in accusations that in acting informally the agency has sold out its constituency. Governmental agencies might resist informal negotiations with private developers because of fear that the public would perceive the negotiations "behind closed doors" to be an indication of agency collusion with private industry.

Attempts to achieve CZMA goals by retaining an amended consistency clause as the mechanism for resolving federal-state coastal use disputes will probably fail. The fluctuations and ambiguities of national energy policy, the time lags involved, the multitude of land use preferences and energy needs, the varying state programs, and the lack of compelling incentives to cooperate, all dampen optimism about the current CZMA scheme. If Congress is determined to give states greater

\textsuperscript{165} 15 C.F.R. § 930.111 (1979).
\textsuperscript{166} See generally C. SCHULTZE, THE POLITICS AND ECONOMICS OF PUBLIC SPENDING 51-52, 103-06 (1968).
\textsuperscript{168} See notes 96-97 supra and accompanying text.
authority in coastal zone management while shaping an efficient and effective siting process, it must consider major changes in the federal-state provisions of the CZMA. Part III of this Comment examines two alternative major changes that Congress could adopt.

III
RECONCILING FEDERAL AND STATE INTERESTS IN COASTAL SITING DECISIONS

Unless renewed, funding for the CZMA will expire in 1980. Consequently, Congress has the opportunity to make necessary improvements in the Act to achieve its central goal—federal-state collaboration in comprehensive coastal management. Specifically, Congress must ensure that both the national perspective on energy policy and state interests are adequately considered.

This section sets forth two models as alternatives to the present CZMA mechanisms for achieving federalism in coastal energy facility siting regulation. Model I embodies the current provisions of the CZMA with a single major change: the national interest in energy facilities is incorporated into an energy facility zoning map, which would be required as part of each state's coastal program, and is to be the basis for energy facility siting decisions. The consistency clause is retained to give states a significant role in the siting process. Although Model I shares most of the problems of the present consistency provisions, it deserves further analysis because Congress is considering it as a possible amendment to the CZMA in 1980.

Model II is a more radical departure from the current provisions of the CZMA. It aims at vesting in the state substantial, yet reasonable, power over coastal energy facility siting. Under Model II, each state program reflects only the interests and objectives of that state; it does not incorporate or consider the national interest in energy facilities. The model uses an ad hoc five-person bargaining panel to resolve

169. See note 38 supra.
170. The underlying premise of this analysis is that the CZMA should continue to be a serious congressional effort to achieve a partnership between the Federal Government and the states in the area of coastal zone management. There is no evidence suggesting that Congress has changed its attitude on this matter, even though it had the opportunity to depart from this stance in 1976 when it amended the CZMA, Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, §§ 4-6, 8, 90 Stat. 1013, 1015, 1017-1019, 1028-1031 (codified at 16 U.S.C.A. §§ 1451-1464 (West 1974 & Supp. 1979)) and in 1978 when it enacted the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 504, 92 Stat. 693 (codified at 16 U.S.C.A. § 1456 (West 1974 & Supp. 1979)).
171. Telephone conversation with Michael Leary, member of the National Coastal Zone Management Steering Committee, American Petroleum Institute (Sept. 28, 1978).
172. Bargaining as a mechanism for resolving energy facility siting disputes has been suggested in at least two earlier studies: O'Hare, Not on My Block, You Don't: Facility Siting and the Strategic Importance of Compensation, 25 Pub. Pol'y 407, 438-56 (1977); J. Rough-
federal-state disputes. The bargaining panel would be responsible for determining both whether the national gains from the facility would outweigh state burdens and how to site, design, and operate the facility to meet the concerns of all parties.

This section describes, analyzes, and compares the two models with each other and with the present CZMA provisions to measure their efficiency, efficacy, administrative workability, political feasibility, and success in achieving federalism. On the basis of this analysis, the Comment concludes that Congress should adopt Model II.

A. The Models

1. Model I

Model I requires state coastal programs to include an energy facility zoning map, reflecting collaboration of federal and state officials on energy development and uses of the state's coast. The map is to be the product of efforts by federal and state officials, thus eliminating state officials' broad discretion to define the national interest in energy facilities. Model I retains broad state authority under the consistency clause to ensure that federal agencies do not disrupt state coastal management efforts after adoption of the coastal energy facility zoning map.

Each federal agency with an energy development program is to submit to the state proposed zoning maps detailing current programs and future plans for energy production. The state, in turn, is to submit its own proposals to those federal agencies. After negotiating with the federal agencies, the state would adopt a zoning map reflecting both

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173. After losing three suits in which it argued that energy zoning was an appropriate method to accommodate federal interests under the CZMA, see notes 63-68 supra and accompanying text, the API now seeks a congressional amendment to the CZMA that adopts its position on energy zoning. Telephone conversation with Michael Leary, supra note 171. At the same time, the Office of Coastal Zone Management has admitted the seriousness of the problems associated with the vague "national interest" provisions of § 306 of the Act, and is planning to propose congressional clarification of this language as well as of the federal-state interaction language in § 307. Miner Presentation, supra note 33. Thus, there is a real possibility that after such amendments states will have to adopt energy facility zoning similar to that in Model I to increase the specificity of their coastal zone management pro-
federal and state interests in the coastal program.

Coastal areas that are unique or too ecologically sensitive to accommodate energy facilities would be zoned as unavailable for development of new energy facilities. Areas zoned for development would be available to a developer on condition that the proposed facility meet specified "output criteria" identifying the impact of the facility on the coastal environment. If the output, including pollutant emissions, transmission of heat, and appearance, exceeded the limits set forth in the coastal program, the building permit would be denied. If the proposed facility met the output criteria, the developer would receive a permit to build the facility.

2. Model II

In contrast to Model I's assumption that the state coastal program can accommodate both state and federal interests, Model II assumes that the accommodation will not succeed. Because of the multitude and complexity of energy-related environmental and economic state interests, Model II assumes that state coastal programs should reflect only these interests. Model II seeks to achieve federalism in coastal energy facility siting by creating procedural incentives for state and federal officials to reach mutual accommodation in specific development proposals affecting the national interest.

If either the private firm or federal agency proposing the facility believes that the national benefits of its project would be substantial, it would file a request with a "coastal site bargaining panel." The panel would include one representative each from the developer, the state coastal agency, the governor's executive office, the Executive Office of the President, and the Federal Department of Energy. The authority to manage the activities of the panel could be vested in the office of one of the four governmental entities. This five-member bargaining panel would operate under the following five basic rules of decision.

The Rule of Three—When a developer believes its proposal would result in substantial national benefits, the panel determines whether prima facie there are such benefits. Three affirmative votes would send the proposal to bargaining. Thus, assuming both state officials oppose the proposal, the developer must win the votes of both federal officials. The developer has no recourse if it fails at this point. If it succeeds in

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getting three votes, however, the bargaining panel will then be committed to approving some version of the proposal, although coastal zone siting is not guaranteed.

The Rule of Four—Once a proposal goes to bargaining, the five parties bargain on its exact terms. The proposal must receive four votes to be approved; no final decision can be reached unless at least one of the two state representatives agrees to it. This encourages good faith bargaining since the members will seek to incorporate the concerns of their constituencies. Attempts by a single member to sabotage the bargaining will be avoided because a decision can be reached even if one member dissents or abstains. The Rule of Two, explained below, addresses the problem of deadlock among the panel members.

The Rule of Five—Once a proposal is before a bargaining panel, the members may vote to exclude the proposed facility from the coastal zone, allowing it instead to be sited at an inland location. All five members must agree to this in order to give the developer assurances from the two representatives of the chief executives that some other site will be approved in exchange for the coastal site.

The Rule of Two—If the panel reaches no decision on the proposal after five months of bargaining, the two representatives of the chief executives will make the decision. They must agree to a decision within one month of the invocation of the Rule of Two. Because even at this stage the state shares equally with the Federal Government responsibility for the siting decision, Model II embodies a strong federalist policy.

The Rule of One—If the two representatives of the chief executives cannot reach agreement after one month of deliberation, then the President is to make the decision. A controversial proposal that eludes agreement through five months of negotiating requires direct action at the highest level of government.

This bargaining panel would not displace or alter the states' internal procedures for evaluating and approving proposed coastal facilities. Each state retains its authority to allow local governments, business groups, citizen organizations, environmental groups, and other interest groups to participate in the state regulatory evaluation. Only after the state has evaluated a proposal and rejected it does the possibility of forming a bargaining panel arise. At that point, the project developer must assess the chances of receiving sufficient support from the federal representatives on the panel to meet the Rule of Three and go to bargaining.

It is proper that state officials have the final say if a proposed energy facility produces energy only for a single state with a relatively insignificant impact on national energy policies. But if federal officials believe a proposal will have significant effects outside the state, then the
final decision should be reached through collaboration between both levels of government.

Model II specifically protects important federal environmental statutes, such as the Clean Air Act and the Clean Water Act, from being compromised by the bargaining process. Other energy and environmental statutes are subject to compromise, but only if the Rule of Five is met. By unanimous vote, the bargaining panel has the authority to reach agreement containing provisions that are either more or less stringent than the regulatory standards of unprotected statutes.

Final decisions of bargaining panels would be subject only to limited judicial review. On review the courts must ascertain whether any fraud occurred during the bargaining process, whether the panel failed to comply with the procedural rules for bargaining, and whether a final decision of the panel violates the protected statutes. If not, the courts would enforce final decisions of the panel. The courts are given no other authority to review or revise the specific terms of any panel decision. Judicial review would not provide a forum for a party to rewrite substantive terms of the panel's agreement.

B. Analysis of the Two Models

In evaluating Models I and II, this section asks whether they promote five goals: federalism, efficiency, efficacy, political feasibility, and administrative workability. Since the consistency clause was designed specifically to improve federalism in coastal zone management, the criterion of federalism is of central importance. A particular model promotes federalism to the extent that the federal and state governments collaborate in deciding whether or not to approve a proposed energy facility.

The criterion of efficiency assesses the ability of each model to allocate coastal resources between energy and nonenergy uses so as to reflect the cumulative preferences of those persons affected by the final siting decision. This definition of the term "efficiency" represents its economic rather than its colloquial meaning. Efficient allocation of coastal resources requires a model in which decisionmakers compare the values of a particular site for energy and nonenergy uses.

177. See, for example, statutes cited in note 202 infra.
178. This is in contrast to the President's proposal for the Energy Mobilization Board, see note 150 supra, which would allow any statutory requirements to be waived.
179. It is within the authority of Congress to limit judicial review. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).
180. See text accompanying notes 28-35 supra.
181. In order to allocate resources, a market value must be placed on each parcel of coastline for several energy uses, e.g., for LNG terminals, power plants, OCS exploration...
A model promotes efficacy if it achieves the basic goals of the CZMA—protection of unique and valued natural resources and appropriate development for other coastal resources. The CZMA was enacted in large part because of the failure of private developers to pay for the long-term environmental costs they imposed upon society in developing coastal land and disturbing the marine ecology along the coast. By adopting the CZMA, the nation proclaimed that many, but certainly not all, coastal areas are worth more to society when unspoiled than when developed. State coastal management programs and the dispute resolution mechanism should therefore ensure that each parcel within the coastal zone is put to its highest and best societal use. This may preclude development in some coastal areas.

The criterion of administrative workability focuses on the ability of each model to achieve its goals within existing institutional constraints. This requires an examination of existing incentives in governmental energy and environmental protection programs.

A model is politically feasible if it has sufficient support from the various interests involved. Significant and persistent opposition to a state management program by key interest groups can dilute the program or prevent renewed funding. The extent to which the concerns of any of these groups are adequately met determines the extent to which they will support the state coastal program.

To highlight the problems of federal-state accommodation in coastal policy, the two models for coastal energy facility siting are evaluated on the assumption that state coastal programs should aggressively protect the natural coastal environment. Coastal states with weak programs designed to promote, or at least not to inhibit, energy facility siting in the coastal zone will rarely need a dispute-resolving mechanism. A coastal program designed to deter energy facility development in the coastal zone increases the complexity, costs, and difficulty of cooperative decisionmaking, thus requiring an efficient method to reach a compromise reflecting both state and federal interests.

Support stations, as well as for its natural resources. A difficulty that arises in valuing alternative uses is that enactment of the federal CZMA and state coastal legislation has resulted in the coastline being declared a public, or at least a quasi-public, good. In theory, areas of the coast are considered public goods only if they have some value to society as a whole or are in limited supply. This includes areas of high biological productivity, such as estuaries and marshes, as well as recreational and scenic areas. These typically have a market value less than their social value; the value an individual places on this land may be much less than the value society places on preservation of the land. See generally C. Schultze, supra note 166, at 55-76, 83-86.

182. See notes 47 & 100 supra.
183. Key interest groups include federal agencies with energy responsibilities, resource management agencies, state governments, the energy industry, and environmental groups. Each of these groups comprises a larger number of subgroups, often with quite different perspectives on the CZMA and coastal energy facility siting.
I. Analysis of Model I

a. Federalism

Model I will fall short of achieving cooperative federal-state management of coastal energy facility siting. As described above, it creates a single state regulatory process limited by the requirement that states allow the Federal Government to play a major role in shaping these controls. Under this model a state will attempt to limit federal involvement in its program development, incorporating the fewest number of federal demands into its energy zoning map. Conversely, the model encourages federal agencies to maximize their authority by not cooperating with state coastal agencies and by imposing their own energy zoning maps upon the states. These incentives for both the state and federal agencies to subvert federal-state cooperation would make program development, approval, and amendment difficult, time-consuming, and highly litigious.

b. Efficiency

Model I is also a poor mechanism for arriving at an efficient allocation of coastal resources between energy and non-energy uses because it creates "conditionally yes" areas zoned for energy development and "conditionally no" areas zoned for no energy development. Such coastal zone boundaries would be arbitrary because valuable natural coastal areas generally do not end abruptly. A zoning program might avoid arbitrary zones by making most zones into "maybe" zones for potential siting. To the extent that a zoning program reflects the complexity involved in coastal issues by using a highly sophisticated overlay of maps, it becomes less appealing to the energy industry because the certainty of site availability is diminished. This type of complex zoning would be difficult to administer because the fine tuning would probably require much closer interaction between state and federal agencies in program design, application, and review. The larger the number of variables considered in the zoning process, the greater is the room for disagreement or confusion among the federal, state, and local governments involved.

Furthermore, the problems associated with delay under the current provisions of the Act would be worsened by Model I. Changes in the values that citizens place on environmental and energy resources should be reflected in the energy facility zoning map, but amending the zoning map inevitably involves delay. Zoning decisions will therefore often be made in accordance with an outdated zoning map that no

184. See text accompanying notes 173-74 supra.
longer reflects citizens' values, resulting in inefficient energy siting decisions.

c. Efficacy

Model I will be only minimally efficacious in fulfilling the CZMA goal of protecting coastal natural resources by accurately identifying areas deemed inappropriate for coastal development. States may underzone for energy use in order to keep maximum control over their coastlines. The more area zoned for energy use, the more difficult it becomes for the state to deny a proposal to build an energy facility. Additionally, since the causal relationship between development and complex coastal environmental phenomena is complicated, state coastal programs will probably err in the direction of preserving the natural environment rather than allowing energy facility development. Because states must cooperate with federal agencies, they will only succeed in underzoning parts of the entire coast.

Overinclusion of sites zoned for energy development may also occur because federal agencies will attempt to protect themselves in advance from future use of the consistency provisions after the zoning map is approved. Since the zoning map is a significant factor in the final decision on a proposed facility, the more coastline zoned for energy use, the easier it becomes for the Federal Government to gain approval of proposed facilities. The more successful the Federal Government is in securing areas for potential energy uses, the more probable it becomes that fragile natural resources will be included in these energy zones.

The over- and underinclusiveness of this coastal zoning map will not be easily remedied. When a site designated as unavailable for development is subsequently shown to be suitable for a proposed energy facility, attempts to gain a variance from the zoning would probably face serious legal obstacles. Efforts to rezone could also trigger political opposition and charges that state officials have given in to the energy industry. States will also have difficulty denying a proposal in an area zoned for energy use that proves to be inappropriate for development. Attempts by states to deny applications through various bu-

188. Since planned unit development zoning does not provide a developer with a vested right to build, the state would not necessarily face legal difficulties in denying a proposal if the developer did not meet all the performance standards set forth in the zoning plan. If the developer met these standards, the state could have serious problems retroactively rezoning the area for non-energy uses. Although the courts weigh many factors in deciding whether
reaucratic tactics are an unsatisfactory and unreliable means of promoting environmentally sound siting decisions.\textsuperscript{189}

d. Political feasibility

Model I probably would evoke mixed political support among interest groups because its most prominent features—energy facility zoning coupled with broad consistency power for states—serve different interests. Zoning limits state discretion in conducting coastal management programs, while broad consistency provisions strengthen state control over the program. Despite the advantages of combining these two features in one regulatory scheme, the political ambivalence of Model I will likely prevent this model from gaining the strong political support it needs to succeed.

Energy zoning receives its most visible support from the oil companies and electric utilities, based in part on a belief that zoning creates greater certainty in the regulatory process, and in part on the hope that zoning will result in siting decisions more favorable for industry.\textsuperscript{190} On the other hand, the energy industry has been a vocal opponent of the consistency provisions\textsuperscript{191} because of fears that some states would use this authority narrowly.\textsuperscript{192} Consequently, though the energy industry would probably support adoption of Model I, this support would be a cautious rather than an overwhelming endorsement.

Federal agencies with energy-related programs, including the Department of Energy (DOE), would also probably be ambivalent toward Model I.\textsuperscript{193} Energy zoning would make certain the substance of a state's coastal program, but would at the same time force federal agencies to make specific projections about their activities. This specificity or not to hold a governmental entity estopped from changing a zoning decision, ambiguity as to the legality of the rezoning, good faith reliance by a developer, plus substantial expenditures in reliance would weigh heavily in favor of estoppel. D. HAGMAN, \textit{supra} note 186, at 180-82. In either case, the developer could mount a media campaign and political attack upon the state for denying the right to build in an area zoned for energy use. Such nonlegal attacks could be more troublesome to the state coastal zone program than legal attacks.

\textsuperscript{189} A simple and powerful tactic is to use environmental impact statements to delay development. \textit{See}, e.g., Bardach & Pugliaresi, \textit{The Environmental Impact Statement vs. The Real World}, 49 PUB. INTEREST 22, 23 (1979).

\textsuperscript{190} \textit{See}, e.g., Brief for Plaintiff, \textit{supra} note 64, at 46-52, 60-63.

\textsuperscript{191} \textit{See}, e.g., \textit{id.} at 27-31.

\textsuperscript{192} \textit{id.}

\textsuperscript{193} Fear that the current provisions of the CZMA could be read to give the states power to frustrate federal energy programs led DOE to propose an amendment to the CZMA as part of the draft "Nuclear Siting and Licensing Act of 1977" in October 1977. This proposal would have given the Secretary of Energy authority to approve or deny provisions of state coastal programs affecting energy development in coastal or inland areas. \textit{See} Coastal Zone Management Newsletter, Oct. 26, 1977, at 3. While this draft was being circulated within DOE, it was leaked and then dropped after public criticism that the Carter Administration was gutting state coastal management before giving it a chance to operate.
could prove to be difficult and embarrassing to agencies if actual program activities were to turn out differently from the plans as originally approved.\textsuperscript{194}

The coastal states would probably welcome the additional power inherent in broad consistency provisions, but because they would resist a requirement to zone their coasts for energy use, they would also probably not support Model I strongly. First, zoning an area for energy uses would give opposing local groups or environmental organizations early notice to marshal their forces for challenges in agency and judicial proceedings, as well as in state and local legislative proceedings.\textsuperscript{195} The prospect of several simultaneous disputes over specific proposed energy developments is a disincentive for states to support energy zoning. Second, this zoning requirement would broaden the role of federal agencies\textsuperscript{196} in coastal management and frustrate the desires of the coastal states to play the dominant role in this planning.\textsuperscript{197} The states could no longer use vague and ambiguous language that appears to satisfy federal agencies and yet preserves much of the state’s discretion.\textsuperscript{198} The zoning map would make specific the areas of disagreement between the two levels of government, making it difficult for both sides to sidestep the tough questions. Consequently, these zoning disputes would probably prevent early program approval. Third, and perhaps most importantly, adequately zoning the coast requires extensive environmental data, which is costly and time-consuming to gather and analyze.\textsuperscript{199} Officials of state coastal programs would be reluctant to zone the entire coast without first obtaining sufficient information; frequently the large budgets required for basic coastal research are not available.\textsuperscript{200}

Environmental groups can be expected to exhibit only cautious and limited support for Model I because of their opposition to zoning and support of strong consistency provisions. They would oppose zoning because of fears that federal agency pressures might make the zones


\textsuperscript{195} Various strategies for citizen challenges to zoning are discussed in W. Rodgers, \textit{Handbook on Environmental Law} 75-89 (1977); N. Rosenbaum, \textit{Citizen Involvement in Land Use Governance}, 64-70 (1976); cf. Case & Schoenbrod, \textit{Electricity or the Environment: A Study of Public Regulation Without Public Control}, \textit{61} CALIF. L. REV. 996, 996-1001 (1973) (few public or private institutions around which to rally opposition to development-oriented organizations).

\textsuperscript{196} Model II also arguably broadens the role of federal agencies.

\textsuperscript{197} See generally S. REP. NO. 753, 92d Cong., 2d Sess. (1972), reprinted in \textit{Legislative History, supra} note 31, at 193.

\textsuperscript{198} See note 138 supra.


\textsuperscript{200} See \textit{Public Support, supra} note 50, at 26.
overinclusive. At the same time, these groups would support the consistency provisions of Model I, because they are another weapon in the battle against the siting of energy facilities along the coast.

e. Administrative workability

The increasingly visible costs associated with governmental regulation of the environment and land use are coming under attack.\(^{201}\) There are approximately twenty major pieces of federal legislation, administered by a variety of federal agencies, that regulate natural resource use.\(^{202}\) These are in addition to state statutes that seek to regulate the same natural resource uses.\(^{203}\) Industry in general, and the energy industry in particular, argue that no single governmental entity is attempting to reconcile the differences between agencies' requirements, and that this haphazard regulation leads to increased costs to consumers.\(^{204}\) Since the costs of energy\(^{205}\) have been rising over the last several years, it is difficult to separate those costs associated with the relative scarcity of fossil fuel and OPEC price increases from those associated with regulatory redundancy.\(^{206}\) As energy costs continue to

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201. See, e.g., Mossberg, A Hollow Victory? Energy Bill Complexity Could Stall Plan to Cut Oil Imports, Critics Say, Wall St. J., Oct. 27, 1978, at 1, col. 6. These costs include the delays in construction, higher capitalization costs because of increased uncertainty that a development will be built, environmental studies, participation in agency proceedings, compliance with governmental conditions for construction, and litigation.


203. See note 1 supra.

204. See, e.g., Letter from Carl Bagge, President of the National Coal Association, to President Carter (Jan. 12, 1978).

205. Some of these costs are borne by the investors in the project, but over the long run many are transferred to society at large. F. ANDERSON, A. KNEESE, P. REED, S. TAYLOR & R. STEVENSON, ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES 3-9 (1977); Frieden, The New Housing-Cost Problem, 49 PUB. INTEREST 70, 81-88 (1970).

206. A major problem in environmental regulation today might be labeled "regulatory redundancy"—the existence of many different governmental agencies with overlapping and often conflicting authority over the same activity. Aside from the problem of conflicting standards of compliance, each regulatory entity has different enabling statutes, rules, traditions, leadership, and perspectives on the same activity. Regulatory redundancy increases the time and expense of making a decision on a proposed facility. See, e.g., F. BosseLMAN,
rise and the energy industry continues to make this argument, public pressure could limit regulation of natural resource use. As the costs associated with the current regulatory process continue to grow, political support for Model I and the current regulatory process under the consistency clause can be expected to wane.

The focus that Model I places upon specificity of program content spells doom for its administrative workability. Once again, this characteristic accentuates a basic flaw in the current provisions of the CZMA. National energy policy is far too complex and dynamic to be translated into a zoning map to plot the future of coastal energy facility siting.

2. Analysis of Model II

a. Federalism

Model II promotes federalism in coastal siting decisions. Federal and state perspectives are balanced by assigning to the panel two members from each level of government. No proposed energy facility can be approved for construction at a coastal site without state concurrence in the decision under the Rule of Four. Model II relieves states from having to define and accommodate national energy policy as required by Model I. Each state is free to develop a program that reflects its goals concerning environmental protection and energy growth. Model II also shifts the locus of decisionmaking power from an appeals process to a collaborative forum that gives states a major role in formulating decisions. This eliminates the veil covering the decision processes of the Secretary of Commerce under Model I. If a stalemate develops on the panel, thus triggering the Rule of Two, the state representative is one of two officials who must agree to a decision. The developer and the federal representatives cannot impose a coastal facility upon the state. Even if the facility is a direct federal activity, in which case three of the five panel members will represent the Federal Government, at least one state official must agree to the outcome.

On the other hand, the Rule of One helps to ensure that state officials will bargain in good faith rather than seek to kill a proposal through a deadlock on the bargaining panel. The Rule protects federal interests and provides a counterweight to the ability of a state to prevent a decision by refusing to bargain.

Since each member of the panel needs the cooperation of three other members to approve a facility, all parties have tremendous incentives to bargain and cooperate. No one gains from a delay because the two representatives of the chief executives can make the decision under

the Rule of Two. With state and national populations as their constituencies, both of these individuals will be inclined to adopt a more moderate solution than the other three panel representatives might advocate. The other three members would see the Rule of Two as vesting control entirely in the chief executives' representatives and thus would prefer to negotiate. Additionally, if the Rule of Two were invoked, it would be difficult for the three excluded panel members to argue that they were not given a chance to negotiate.

Model II does not require that the bargaining parties put aside all differences of opinion. Rather, it assumes that the five members can aggressively advocate their own interests and yet reach some accommodation. To refuse to negotiate would be to risk alienating the other four members of the panel and being excluded from their decision.

By formalizing the bargaining process, Model II ensures that the five entities represented on the panel participate equally, much as in collective bargaining in labor disputes. Bargaining takes place in executive session without public participation. Under Model II, the developer must comply with the state's regulatory process until the state denies the proposal. Public input should occur when the state was considering the proposal prior to the convocation of a bargaining panel. Large scale energy facility siting decisions are sufficiently controversial\textsuperscript{207} that one can expect the press to follow the progress of the bargaining sessions. Nonetheless, the panel members could engage in full and frank discussion of the issues.

b. Efficiency

Model II is an efficient mechanism for siting facilities because the five panel members each represent a separate interest, and at least four of them must agree to reach a final decision. This contrasts with Model I, which creates an adversary process in which the Secretary of Commerce retains sole authority to adjudicate the federal-state conflict. Although representation on the panel of every group having some interest in the decision would be more representative of the cumulative preferences of those affected, the gains in efficiency would be more than offset by the problems of managing such a large and unwieldy gathering. The smaller panel proposed in Model II ensures a variety of viewpoints while avoiding the problems of larger groups.

Model II is more efficient than Model I primarily because decisions reached under Model II are based on the five members' contemporaneous valuations of the coastal site for the proposed use rather than on a zoning map prepared sometime in the past. Under Model I, an inevitable delay results between the time coastal site valuations are

\textsuperscript{207} See, e.g., U.S. Ocean Policy, supra note 157, at IV-71-80.
translated into zoning and a specific proposal is filed for an energy facility. Model II also avoids the problems of over- and underinclusiveness in energy zoning that result from Model I. Unlike energy facility zoning, under which states must commit some areas to siting and others to preservation, bargaining remains flexible, encouraging each panel member to make the best possible arguments in an effort to persuade the other four members.

c. Efficacy

Model II is also desirable because of its efficacy. It allows states to protect valuable natural resources along the coast without unnecessarily complicating the process of coastal energy facility siting. If a state prefers greater industrial development of its coastline, it can simply approve more energy facility siting proposals. A state that is seriously committed to slowing down development on its coast can approve fewer siting proposals. The bargaining process continues to permit each state to choose its degree of commitment to environmental protection. This flexibility contrasts sharply to Model I, which reduces the standards of all coastal programs to the lowest common denominator. Although a requirement that the energy zoning components of state coastal programs adopt federal energy program standards would result in uniformity among state programs, it would defeat the federalist aims of the CZMA.

Under Model II, if a state has an aggressive coastal program, a developer cannot circumvent state decisions by appealing to federal agencies. The Federal Government will honor states’ preferences for a more stringent standard in siting coastal facilities. If the developer cannot support its claim of substantial national interest and secure three votes on the panel, it cannot proceed with the proposal. Even if a proposal reaches the full bargaining stage, state environmental concerns will be incorporated into the decision to some extent. Under the Rule of Two, the state still has half of the votes and would maintain its input.

On the other hand, excluding the public from bargaining and limiting judicial review may impair the efficacy of the panel’s decisions. To the extent that public interest groups do not help shape decisions, the public may not appreciate the environmental values protected in the panel’s decisions. Limiting judicial review to procedural matters.

208. See discussion of over- and under-inclusive energy zoning, p. 570 supra.
209. The developer could circumvent state decisions if the federal officials had a strong interest in project approval and were willing to begin bargaining with no intention of compromising. After six months the President would make the decision under the Rule of One. This would constitute bad faith on the part of federal officials and should be a rare occurrence.
might result in decisions that seem unreasonable to those whose interests are not represented on the bargaining panel. This potential problem is less serious than the difficulties encountered in projects such as Sohio.\textsuperscript{210} This problem may lead to legislation similar to the amendments to the Endangered Species Act\textsuperscript{211} or the proposed Energy Mobilization Board,\textsuperscript{212} both of which allow less public participation and judicial review than Model II.

d. Political feasibility

The major obstacle to congressional adoption of Model II in 1980 is its complete departure from the existing mechanisms for resolving federal-state conflicts—federal preemption and the consistency clause.\textsuperscript{213} Bargaining as a mechanism for achieving conflict resolution, however, is not a completely untested or radical proposal; labor-management relations, commercial contracting, and the legislative process each use bargaining successfully.\textsuperscript{214} Additionally, regulatory agencies are involved in much informal bargaining. Model II formalizes bargaining and keeps it manageable by limiting participation to the key interest groups.

It is difficult to predict whether the energy industry will support or oppose Model II. Some within the industry will be skeptical as to whether Model II is an improvement over Model I; under Model II, states could exercise greater power over some siting decisions than under the current CZMA. Nonetheless, the energy industry will probably support Model II because of the direct role it allows the developer in the decisionmaking process. Bargaining is an activity with which developers are usually familiar. Once developers convince two other panel members that there is a substantial federal interest in the proposed facility, they know their facilities will be sited somewhere.\textsuperscript{215}

Federal agency support for Model II also will probably be mixed. Criticism may come from those agencies with licensing responsibilities over energy facilities\textsuperscript{216} since they would be excluded from the bargaining panel. These agencies would have to rely on DOE and the President's representative to represent their viewpoints adequately. Since the White House representative would probably solicit technical advice

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\textsuperscript{210} See text accompanying notes 12-27 \textit{supra}.

\textsuperscript{211} See note 147 \textit{supra}.

\textsuperscript{212} See note 150 \textit{supra}.

\textsuperscript{213} The consistency clause itself was a novel and untested mechanism for resolving federal-state disputes when it was adopted as part of the CZMA in 1972. \textit{See Public Support, supra} note 50, at 29.

\textsuperscript{214} \textit{See, e.g.}, A. WILDAVSKY, \textit{THE POLITICS OF THE BUDGETARY PROCESS} 63-100 (1964) (bargaining in legislative appropriations process).

\textsuperscript{215} \textit{See discussion of Rule of Four, supra} p. 566.

\textsuperscript{216} See the examples listed in note 84 \textit{supra}.
from these same federal agencies, they would have some input into the bargaining panel. Furthermore, when a direct federal activity is the subject of bargaining, the federal agency proposing the activity, in the role of the developer, would be represented on the panel.

Apart from this, some federal officials will prefer Model II because, unlike Model I, it relieves them from having to cajole the states into cooperating. In addition, federal agencies no longer will have to attempt to define the national interest in specific terms for application to future energy facilities along the state's coast.

States can be expected to support Model II because it creates a true partnership in coastal siting policy and increases the ability of each state to choose the level of environmental protection it wants. Many environmental groups may resist Model II because it does not offer a direct role for such groups. But although environmental groups will not have adequate representation in those states with weak coastal programs, they should usually be able to influence the bargaining through a sympathetic coastal program representative or through lobbying during the bargaining. In any case, representation for such groups would be no less than under Model I.

Other interest groups not included on the bargaining panel can be expected to be hostile to Model II. Local government, organized labor, some business groups, consumer associations, and others with a stake in coastal siting decisions must make their views known before a proposal goes to bargaining. Although state procedures for evaluating a proposal, including public input, are not affected by the existence of the bargaining panel, these unrepresented groups probably would want direct participation on the bargaining panel and may oppose Model II for that reason.

e. Administrative workability

Despite this probable opposition, the chances for congressional adoption of Model II may improve because of the growing criticism of traditional regulatory methods. Public pressure is mounting on the Federal Government to reduce regulatory duplication and its associated costs. The recently created bargaining panel to administer the Endangered Species Act, the Federal Government's reaction to Sohio's

218. See note 21 supra and accompanying text.
219. See note 147 supra. The amendments create an Endangered Species Committee whose structure and function, in several respects, parallels Model II. This Endangered Species Committee is composed of the Secretaries of Agriculture, the Army, and the Interior, the Administrator of NOAA, the Chairman of the Council on Environmental Quality, and the governor of the state in which the proposed action is to occur. The Committee by four votes can exempt a proposed federal activity from the Act's requirements that federal activities not adversely affect endangered species. Congress adopted this exemption procedure
abandonment of its proposed PACTEX oil pipeline, the creation of an interagency Regulatory Committee by President Carter, and the Administration's proposal for an Energy Mobilization Board to speed up the energy facility siting process demonstrate that the Federal Government intends to attack the problem of regulatory costs. Because Model II improves the current regulatory process, the Administration and Congress may support it.

Model II creates incentives to negotiate, cooperate, and compromise. The five member panel is small enough to be manageable while assuring representation of the major interests. Most of the members have strong incentives to strive for agreement, rather than to delay a decision. The developer will tailor its proposals to the perceived desires of other panel members since obviously unacceptable proposals would result in a delayed, costlier project.

Of the five members, the representative of the state coastal agency has the least incentive to compromise. This person will usually have the closest ties to environmental groups. To the extent that these groups exert pressure for a more environmentally benign facility than the developer is willing to construct, its representative may have disincentives to compromise. But the Rule of Four, allowing final decisions to be reached without consent of the state coastal agency representatives, should counter these disincentives. The state coastal agency representative will participate in negotiations both to ensure that the agency's concerns are reflected in the final decision and to maintain credibility with the governor and the state legislature, upon whom the agency relies for funding.

None of the five members would gain by intentionally delaying the bargaining process. The developer, the coastal agency representative, and the DOE representative have the most to lose from delay because their direct role in shaping the decision is eliminated if no decision is reached in five months. Since the governor's representative and the President's representative must both agree to a decision under the Rule of Two, one of the other three members of the panel would intentionally delay bargaining only if both the governor's and the President's representatives were likely to adopt his position. The representative of the Department of Energy would also want the proposal...
approved quickly to avoid disruptions in its plans for energy resource
development.

Model II does not entail the lengthy and costly litigation that can
be expected from Model I. Legal challenges to zoning decisions, zon-
ing amendments, approvals of proposed facilities, and appeals to the
Secretary of Commerce can all be expected under Model I. Model II,
by excluding from judicial review the substantive decisions of the
panel, reduces the opportunity for litigation.

IV
CONCLUSION

Congress must act soon because authorization for CZMA appro-
priations expires in 1980. To extend the Act with its present serious
ambiguities would be a mistake. There must be some modification of
the consistency clause: the real issue is how much.

This Comment has argued that a bargaining panel, when evalu-
ated by the criteria of federalism, efficiency, efficacy, and administra-
tive workability, is preferable to the current Act and to attempts to
achieve greater coastal program specificity through energy zoning. The
political feasibility of the bargaining model remains in doubt, however.
The limitations on judicial review of decisions of the panel and the lack
of direct public participation in the bargaining process are the major
shortcomings of Model II. But the political climate in Washington, as
evidenced by the strong congressional support for the proposed Energy
Mobilization Board, may be such in 1980 that support among public
interest groups for Model II will grow.

With the Federal Government taking an active role in the man-
agement of energy production and marketing activities, federal-state
conflicts in coastal energy facility siting policy will continue. These
should not be resolved exclusively by either the federal or state govern-
ments. To the extent that the consistency clause is construed to be little
more than surplus language, the Federal Government will effectively
control coastal energy facility siting policy.

224. The President's recent proposal of an Energy Mobilization Board (EMB), supra
note 150, although not an explicit modification of the consistency clause, could override its
operation in coastal siting controversies. As proposed, the Board parallels Model II to the
extent that it is to balance the factors involved in an energy siting proposal. Additionally,
both the EMB and Model II propose to limit direct public participation in the decision
process, to override of certain legislation, and to limit judicial review of the final decision.

On the other hand, the composition of the decisionmaking body, the types of legislation
that can be overridden, the effort to encourage trade-offs among the parties, the time limits
on the bargaining process, the effort to structure a balanced federal-state process, and the
direct participation by the developer, all distinguish Model II from the EMB proposal.
225. See note 150 supra.
Federalism will suffer if Model I is adopted or the current CZMA retained. Model II differs from Model I primarily in its effort to replace the traditional quasi-judicial approach with a consensual partnership arrangement. Model II does not oust either federal or state government from this crucial policy area, nor does it entail lengthy litigation over the terms and conditions of the state coastal program. Rather, both federal and state authorities are encouraged to develop a position on a proposed energy facility and reach a compromise decision.

The CZMA is an effort to create mutuality, not hierarchy, in the management of coastal resources. The success of the CZMA can be gauged not by the degree to which state programs conform to the federal will, but rather by diversity among state coastal programs. Amendment of the Act as suggested in this Comment will go a long way toward achieving the lofty goal of federalism in coastal energy siting.