Florida Sea Grant

LOCAL CONTROL OVER THE ONSHORE IMPACTS OF OFFSHORE ENERGY DEVELOPMENT IN FLORIDA

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INTRODUCTION

Conflict over energy related activity off the coast of the United States may cause a division between states and the federal government which could threaten both the nation's emerging energy policy and state attempts to protect the coastal environment. At the same time states are developing coastal zone management plans, the federal energy program continues to evolve. Energy activities in the coastal zone which are likely to cause conflict include oil and gas production, shipping and deepwater ports, and offshore power plants. Many states are already acting in these areas to protect their own interests.[1]

In Florida the clash between offshore energy activity and the coastal environment is expected to be great. The map illustrates potential areas of offshore development which could affect Florida. Most of Florida's population resides along the coast, and the economy is largely dependent on tourists who were attracted by the coastal environment. Although coastal management is necessary to protect native population, the environment, and the tourist-based economy, new sources of energy are needed for the state to support economic development. Florida imports in excess of ninety percent of all energy used in the state.[2] Since there are very few resources onshore, the state must look offshore for new sources.

Florida coastal policy is entering a new stage with the passage of the Coastal Zone Management Act of 1978.[3] Rather than enacting a comprehensive coastal policy, the legislature has chosen to rely on existing state and local laws to implement the coastal program. Part One of this paper presents existing state programs which can be utilized in encouraging,

discouraging or controlling offshore energy development and corresponding onshore energy activity. The potential for local action is emphasized because of the nature of Florida's new direction, which seems to give local governments a predominate role in coastal zone management.

Unfortunately, decisions affecting offshore activity are made at the federal and state level while local governments are often left with the problem of coping with onshore impact. This problem is usually handled on an ad hoc basis using reactive controls. Municipal and county officials usually have a poor idea of the range of options available to them in reacting to or planning for the effect offshore activity will have. Part Two describes the different offshore activities possible for Florida and the potential onshore facilities. The methods for encouraging, discouraging, or regulating this activity, within existing state and federal law, are suggested.

FOOTNOTES

[1]For example, Washington attempted to prohibit supertankers carrying oil from entering Puget Sound. Ray v. Atlantic Richfield Co. & Seatrain Lines, Inc., 435 U.S. 151 (1978). A group of New York counties and cities attempted to block an O.C.S. lease sale by challenging statement. County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2nd Cir. 1977); cert. denied 434 U.S. 1064 (1978).

[2]Florida Energy Office, Annual Report to the Legislature (1978).

[3]Fla. Laws, CH. 78-287 (1978).

PART ONE: ANALYSIS OF POWERS

An analysis of the onshore impact of offshore energy activity must consider the interaction of laws at the federal, state, and local level. For example, while much of offshore drilling may take place in areas of exclusive federal jurisdiction,[1] the associated onshore impacts, such as connecting pipelines, storage facilities and refineries, will be subject to state and local regulation. While Part One does not purport to be exhaustive of all relevant federal, state and local law, it is intended to give the reader an idea of how state and local governments may regulate and where the federal government is preeminent.

The supremacy clause of the United States Constitution provides the basis for federal preeminence in matters involving state and federal regulations.[2] This power is not absolute, however. Recent decisions indicate that before the Supreme Court will find a state law to be in conflict with a federal law regulating the same field, there must be specific Congressional preemptive intent.[3] In matters of defense and international affairs, federal policy is paramount, and no state may contravene federal activity in these areas. In other areas, the federal government may call for cooperation with the states in an attempt to regulate a specific matter. For example, the Federal Water Pollution Control Act, as amended in 1972, calls for cooperation with the states in the control and abatement of water pollution and accords the states authority to create water management plans.[4] After Askew v. American Waterway Operators the source of pollution, resulting from an oil spill or any other form of discharge entering state territorial waters, will be subject to concurrent state and federal jurisdiction for clean-up activities.[5]

The Coastal Zone Management Act provides for federal consistency, requiring federal agencies and activities to comply with state regulations under coastal zone management plans approved by the federal government.[6] The Deepwater Ports Act also provides for extensive state participation in the siting of deepwater ports off their coasts.[7]

In some areas, particularly environmental quality, the federal government has expanded the scope of its regulatory powers. The Clean Air Act of 1963[8] provided for federal assistance at state and local levels to encourage development of regulatory controls and emphasized that primary responsibility should be with the state and interstate authorities. The amendments of 1970, however, call for a tightening of federal controls and recognize air quality as more of a national problem, placing in the federal government primary responsibility for air pollution control.[9]

The discussion of the relative federal, state, and local authority in the coastal zone is divided into Coastal Zone Management, Comprehensive Planning, and Environmental Control.

FOOTNOTES

[1]See, Offshore Oil and Gas Drilling, Part Two, I, infra.

[2]Art. VI, cl. 2.

[3]Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 (1975).

[4]33 U.S.C. §1251 et seq.

[5]Askew v. American Waterways Operators, 411 US 324 (1973).

[6]16 U.S.C. §§1451-1464.

[7]33 U.S.C. §1501 et seq.

[8]42 U.S.C. §1857.

[9]Id.

I. COASTAL ZONE MANAGEMENT

A. Federal Law

Analysis of coastal zone management must begin with the question of ownership, that is, the extent of ownership of the coastal land and territorial waters by the state and federal governments. In 1947, the U.S. Supreme Court determined that the federal government was the sole owner of all lands below the low water mark.[1] This decision was partially supplanted by Congress with the enactment of the Submerged Lands Act of 1953.[2] The Submerged Lands Act gave all rights, title, and interest owned by the United States to the states with the exception of those powers reserved to the federal government. The state's interests were to be exerted over the water, the land under the water, and the natural resources in an area extending three miles seaward from the states' boundaries.[3] In contrast to this grant of power to the states, the Outer Continental Shelf Act, also enacted in 1953, limited state control by placing all submerged lands seaward of the three mile limit under federal control.[4] As a result of these two acts, states gained increased control, subject to certain powers, of a three mile strip off the coast, while the federal government asserted total control beyond the three mile limit.[5]

The federal government retained authority within the three mile limit for the purposes of navigation, flood control, and production of power.[6] The production of power clause is particularly important in the consideration of relative state and federal jurisdiction in the coastal zone. Yet there is a still broader reservation of powers in the Submerged Lands Act which the federal government could use to assert control in the coastal zone. Section 1314 states that:

> The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources. . .[7]

Thus a state's ownership in its coastal waters is subject to the strongest powers the federal government has, commerce and defense. Any application of these powers over coastal zone activity by the federal government could have a great impact on the states in either of two ways. First, the federal government could utilize its power to prevent development of shoreline areas designated by states for ports, energy facilities, private development, or public recreational improvements. Second, if the federal government is involved in outer continental shelf activity, deep water ports, or perhaps nuclear waste disposal, it could utilize its powers to authorize development of areas the states might desire to leave untouched. This federal power is not limited to offshore development, but extends to onshore support facilities if a denial of such facilities by a state would burden interstate commerce or national defense. An attempt to resolve this potential conflict came with the passage of the Coastal Zone Management Act and subsequent amendments.

B. Coastal Zone Management Act

The primary thrust of the Coastal Zone Management Act (CZMA)[8] is to establish a federal granting program to assist the states in developing and operating management programs for their coastal land and water resources. The CZMA does not require state participation nor define the coastal zone in affected states. Rather, the intent was to encourage states to undertake their own coastal programs using federal funds.

The CZMA can be separated into two stages. The first is concerned with

the development of sound management programs while the second is concerned with the implementation of these programs by the state.

If a state decides to participate, it will receive a planning grant to develop a management program. Under §305 of the Act, the federal government will pay two-thirds[9] of the cost of developing the program provided a few basic guidelines are met. These guidelines are: (1) the identification of the boundaries of the coastal zone;[10] (2) a definition of permissible land and water uses;[11] and (3) a designation of areas of particular concern.[12] A further requirement is the "identification of the means by which the state proposes to exert control over land and water uses."[13] Implicit in this requirement is the real substantive thrust of the Act. Land use controls have traditionally been within the province of the counties, municipalities, and townships. The CZMA was designed to encourage state governments to reclaim the predominant decision-making role. Hence the fundamental purpose of the Act is to broaden the focus of coastal zone decision-making so as to incorporate a statewide view.[14]

There are few restrictions placed on the states in the development phase. A state must demonstrate to the Secretary of Commerce that the grant money will be used to develop a management system consistent with the requirements of §306 covering implementation.[15] The state must also coordinate, cooperate, and consult with local governments and regional and federal agencies in making up its plan. Finally, the state must consider ". . .the national interest involved in the siting of facilities. . .which are other than local in nature."[16]

The implementation phase of the CZMA is also funded by the federal government.[17] In order to qualify for a grant at this stage, the plan developed in §305 must be approved by the Secretary of Commerce.[18] The requirements for approval are that the state plan provide for adequate notice to and full

participation of all relevant federal, state, and regional agencies, as well as local governments; an established and effective mechanism for continued cooperation with these parties; the authority to implement the program; and a mechanism for consideration of any national interest involved in siting facilities necessary to meet requirements which are other than local in nature.[19] The implementation phase dictates use of one of three techniques for controlling land use.[20] The last major requirement is that the plan include a method for assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude uses of regional benefit.[21]

There is another incentive for state development of an approved coastal zone management program, apart from the lure of administrative grants. The state can theoretically achieve significant control over federal activities within the coastal zone by securing management program approval. Section 307(c) of the CZMA provides that federal agencies shall conduct activities and undertake projects in a manner which is "to the maximum extent practicable, consistent with approved state management programs." Furthermore, applicants for federal licenses or permits must get state certification that the activity for which the approval is required is consistent with the approved state management program. For example, a dredge and fill permit from the Corps of Engineers would not be issued until certified as in compliance with an approved coastal zone management program. However, if a state does not act upon an applicant's certification within six months, it is conclusively presumed to be consistent with the state's plan.[22] If the state disagrees with the federal government's certification of a project, then the Secretary is required, after detailed comments from state and federal agencies, to make a finding of consistency with the objectives of the CZMA. If a proposed activity is found to be inconsistent with CZMA objectives, a permit can still be issued if it

is in the interest of national security or commerce.[23] This national security provision is untested, but could provide a means for federal activities to escape the theoretical state control provided in the Act.

The six month period for state approval of activities, plus the time involved to obtain an override of the refusal of certification,gives the states a useful tool in the development of the coastal zone. For example, the many licenses needed for OCS development and the "directly effecting" language of §307 would allow a state to delay such development for a long period of time.[24] Yet the language of §307(e) states that "nothing in this title can be construed to diminish either federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters. . ."[25] This clause plus the reserved federal powers under the Submerged Lands Act would prevent a state from indefinitely delaying energy activity through the powers of the CZMA. States can most advantageously use the approval process by constructive comments to modify projects rather than merely attempt to delay activity.

The Energy Amendments of 1976[26] have produced a number of changes in the original CZMA. In terms of federal funding, the amendments have raised the federal grant levels from two-thirds to eighty percent of the total costs of developing and implementing the plan.[27] The overall plan must now contain a process for the protection of and access to public beaches and areas of environmental, historical, and cultural value.[28] Another new requirement is a planning process for studying and evaluating the ways to control shoreline erosion.[29] The final addition to §305 requires the inclusion of a process for the planning of energy facilities likely to be located in, or significantly affecting, the coastal zone, and a process for managing the impacts of such facilities.[30]

There is but one major change in the consistancy provision of §307, which applies to any person submitting a plan for exploration, development or production from any area which has been leased under the OCS Act.[31] If this OCS activity affects the coastal zone, then the developer must describe, in detail, each activity that will be undertaken and certify that all will comply with the state plan. Once compliance is found, the developer is exempt from seeking state approval each time an activity in the development requires a federal license or permit. Therefore, a state is now prevented from using its certification procedure to delay OCS activity because state approval is now on a project to project basis rather than a permit to permit basis. A state must therefore object at the time of initial certification or be foreclosed to raise such issues in the future.

In order to have an effective mechanism for intergovernmental cooperation, a state must now notify the local government whenever it plans the implementation of a management program decision that would conflict with a local zoning ordinance, decision or action.[32] The state must suspend action for 30 days and consider any comments from local government before implementing its decision.[33] This would allow further control by local governments as to the effects of the state plan on their areas.

Another important amendment in relation to local government is the creation of a new section entitled the coastal energy impact program.[34] This program speaks to the disruptive economic effect on local communities that offshore energy development will have.[35] The impact program will provide aid to affected areas through grants computed under complicated formulas that use comparative OCS activity to determine the funds awarded.[36] The grants are to be used first to retire state and local bonds guaranteed by the federal government and, then, for the planning and carrying out of projects and programs made necessary

because of OCS activity.[37] Section 308(c) provides funding for the study of and the planning for consequences relating to new or expanding energy facilities in, or which affect, the coastal zone. Further assistance is provided for bond guarantees and loans to states and local governments to provide for new or improved public facilities.[38] When loans or bond guarantees are given to areas which have difficulty in meeting those obligations because OCS activities have not increased the local tax base enough to raise sufficient funds, help is available in the form of grants and other assistance.[39] Finally, grants are available to states which have suffered, are suffering, or will suffer an unavoidable loss of a valuable environmental or recreational resource.[40] This total package of financial aid is available to those states which have approved management programs or which, in the opinion of the Secretary, are making satisfactory progress towards developing an adequate management program.[41]

The state agency with §308 administrative powers is the Division of State Planning (DSP).[42] Applications have been made by the City of Jacksonville,[43] the Broward County Port Authority,[44] and others for the budget year of 1978-79.

Local governments should take advantage of this package by determining the potential consequences developing from offshore energy activity, including oil exploration, deepwater port siting, shipping, and offshore power production. Once potential problems are recognized, the local governments can request financial aid to study and plan accordingly for future development.

C. State Response

The Florida coastal zone management program is presently in a state of disarray. The legislature has enacted the Florida Coastal Zone Management Act of 1978,[45] which is a grant of authority to DER as the "lead agency" to compile a program based on existing statutes and rules.[46] The DER is requested to submit an application to NOAA in order to continue to receive administrative

funds under the CZMA of 1972.[47] It was the intent of the legislature not to amend existing statutes or provide any additional regulatory authority to any governmental agency.[48]

DER has been placed in a very difficult position. The application for federal approval under §306 of the CZMA will contain program policies that only reference existing statutes and existing implementing administrative rules.[49] DER will be forced to rely on the voluntary cooperation of other state agencies such as the Division of State Planning and the Department of Natural Resources, which have authority in areas relating to coastal zone management. This will prevent the formation of a unified coastal zone management plan which should be administered by a single agency or council of representative agency members.

The 1978 Act will have the DER exercising its authority in relation to (1) permits for air discharges, water discharges, and dredge and fill activities;[50] (2) permits for water treatment plans and projects;[51] (3) electrical power plant site certifications;[52] and (4) development of the state water plan.[53]

The Department of Natural Resources will continue to exercise its broad authority relating to planning, management, regulatory and development activities to assist in coastal zone control. Specific DNR activities will include: (1) the establishment and issuance of variances to the coastal construction setback line;[54] (2) the management of the aquatic preserve system;[55] (3) the management of the wilderness system;[56] (4) the lease and sale of state lands;[57] (5) the development of a state land plan;[58] (6) the development and acquisition of park and recreation areas;[59] (7) beach renourishment projects;[60] and (8) the management of mineral and living marine resources.[61]

The Division of State Planning in the Department of Administration will continue to act as the lead state planning agency. It will hopefully cooperate

in developing a unified coastal zone management policy by utilizing its planning and management authorities relating to: (1) the development of the regional impact process;[62] (2) the A-95 review process;[63] (3) the ten year site plan requirements;[64] (4) the review of the state budget;[65] (5) the state comprehensive plan;[66] and (6) its authority under §308 CZMA Amendments 1976 to administer the Coastal Energy Impact Program.[67]

The most pervasive problem of coastal zone management at the state level is the existing administrative system. There is at present no formalized communication link between state agencies or levels of government. The federal Coastal Zone Management Act requires substantial cooperation on the part of agencies in implementation of the state coastal zone management plan. The Act and regulations emphasize a process of coastal zone management, that is, the existence of conflict resolution mechanisms over the substantive authority of the state to regulate in the area. One of the main requirements of the CZMA is that the various agencies with primary roles in decision-making agree to incorporate the policies of the management plan in their operations and activities. There must be assurances that the coastal zone management plan will be implemented by the major environmental agencies of the state. Under Florida's 1978 Act, the agencies which have indirect coastal zone management authority are able to maintain a position which can prevent the development of a viable statewide coastal zone management plan.

Local governments have been requested to participate under Florida's Act of 1978.[68] The local governments affected, as defined by the Act,[69] shall develop a coastal zone protection element pursuant to Florida Statute §163.3177. Financial and technical assistance will be made available to those local governments affected. Under the Act of 1978, local participation in the coastal zone management scheme is voluntary.[70] The advantage for local governments who participate would be financial assistance to plan for local

development. Compliance with the undefined state policy might also aid in enforcement of local plans. The main disadvantage is the limited loss of control to a state agency once participation occurs.

The activities section has emphasized local options based upon existing state statutes and regulations. At the present time, existing law must serve as the main source of local powers in dealing with problems stemming from coastal zone development. The State of Florida has shifted from environmental concerns to economic development. Given the 1978 Act, it is now up to local governments to protect the limited resources of this state by adequately planning for future consequences stemming from both offshore and onshore development. Formal state and local planning mechanisms exist and must now be utilized to control potentially harmful development.

FOOTNOTES

[1]U.S. v. California, 332 U.S. 19 (1947). This decision was followed by rulings which rejected the claims of Texas and Louisiana to submerged lands off their coasts. U.S. v. Texas, 339 U.S. 707 (1950); U.S. v. Louisiana, 339 U.S. 699 (1950).

[2]43 U.S.C. §1301-1315.

[3]43 U.S.C. §1301(a), §1311(a).

[4]43 U.S.C. §1331(a), §1332(a).

[5]In 1960, Florida and Texas were granted extended jurisdiction off the Gulf Coast (to approximately nine miles) by reason of historical grants previously recognized by the United States. U.S. v. Louisiana, 363 U.S. 1 (1960), reh. den., 364 U.S. 856 (1960); U.S. v. Florida, 363 U.S. 121 (1960). Two 1975 cases, U.S. v. Maine, 420 U.S. 515, and U.S. v. Florida, 420 U.S. 531, reaffirmed the division of jurisdiction established in the Submerged Lands Act.

[6]43 U.S.C. §1311(d).

[7]43 U.S.C. §1314.

[8]16 U.S.C. §1451.

[9]Pub. L. No. 97-583, 86 Stat. 1280, §305 (1972). This was later changed to 80% seen in Pub. L. No. 94-370.

[10]Pub. L. No. 92-583, 86 Sat. 1280, §304a (1972).

[11]Id., §305(b)(2).

[12]Id., §305(b)(3).

[13]Id., §305(b)(4).

[14]S. Rep. No. 92-753, 92d Cong., 2d Sess. at 5 (1972).

[15]Pub. L. No. 92-583, 86 Stat. 1280, §305(c) (1972).

[16]Id., §306(c)(2)(B) and (c)(8).

[17]Id., §306(a).

[18]Id.

[19]Id., §306(c).

[20]Id., §306(e)(i) which states:

> (A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of

compliance;

(B) Direct state land and water use planning and regulation; or

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations. . .proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and on opportunity for hearings.

[21] Id., §306(e)(2).

[22] Id., §307(c)(3).

[23] Senate Comm. on Commerce, 92d Cong., 2d Sess., Rep. 92-753, 92 U.S. Cong. and Admin. News, Vol. 3, pp. 4792, 4793 (1976).

[24] Rubin, The Role of the Coastal Zone Management Act of 1972 in the Development of Oil and Gas From the Outer Continental Shelf, 9 Natural Resources Lawyer, pp. 399, 407.

[25] Pub. L. No. 92-583, 86 Stat. 1280, §307(e) (1972).

[26] Pub. L. No. 94-370, 86 Stat. 1280.

[27] Pub. L. No. 94-370, §305(c); Cong. Rec. H6687 (1976).

[28] Id., §305(a)(7).

[29] Id., §305(a)(9).

[30] Id., §305(a)(8).

[31] Id., §307(c)(3)(B).

[32] Id., §306(c)(2)(B).

[33] Id., §306(c)(2)(B).

[34] Id., §308.

[35] Senate Comm. on Commerce, 94th Cong., 2d Sess., Report 94-277, 94 U.S. Code Cong. & Admin. News, Vol. 3, p. 1805 (1976).

[36] Pub. L. No. 94-370, §308(b).

[37] Cong. Rec. H6688, §308(a)(1)(A), §308(b)(4), §308(d)(2) (1976).

[38] Id., §307(d)(1), §307(d)(2).

[39] Id., §308(d)(3).

[40] Id., §308(d)(4).

[41] Id., §308(g)(1). Florida falls in the latter category.

[42] Fla. Stat. Ch. 23 (1977).

[43]Interview with Wayne Voight, Assistant Director, Division of State Planning of Florida.

[44]Id.

[45]Fla. Laws, Ch. 78-287 (1978).

[46]Id., Sec. 7.

[47]16 U.S.C. §1451.

[48]Fla. Laws, Ch. 78-287 (1978).

[49]Id.

[50]Fla. Stat. Chs. 253, 373, 403 (1977).

[51]Fla. Stat. Ch. 403 (1977).

[52]Fla. Stat. Chs. 403, 506 (1977).

[53]Fla. Stat. Ch. 343 (1977).

[54]Fla. Stat. Ch. 161 (1977).

[55]Fla. Stat. Ch. 258 (1977).

[56]Id.

[57]Fla. Stat. Ch. 253 (1977).

[58]Id.

[59]Fla. Stat. Ch. 345 (1977).

[60]Fla. Stat. Ch. 161 (1977).

[61]Fla. Stat. Ch. 258 (1977).

[62]Fla. Stat. Ch. 380 (1977).

[63]Fla. Stat. Ch. 23 (1977).

[64]Id.

[65]Id.

[66]Id.

[67]Id.

[68]Fla. Laws, Ch. 78-287 (1978).

[69] Id.

[70] Id.

II. STATE COMPREHENSIVE PLANNING

The main statewide planning authority in Florida is found in the Division of State Planning (DSP) of the Department of Administration.[1] The Division administers all major state planning programs, as well as exercising more direct state control regarding developments of regional impact and areas of critical state concern.[2] By its very nature and the authority granted to it under the statutes, the Division must interact with other state agencies and other levels of government in the administration of its duties.

The DSP has five major duties: (1) to prepare and revise a state comprehensive plan; (2) to coordinate planning among federal, state, and regional governments; (3) to coordinate all state agency planning and programming, including oceanic and water resources, pollution and environmental health, and fish and wildlife; (4) to serve as the state planning clearinghouse and to designate regional clearinghouses; and (5) to make basic planning data available to all public and private agencies concerned with development within the state.[3] As part of the interagency comprehensive planning effort at the state level, each state agency is required to designate a person to serve as a planning officer for that agency.[4] These planning officers are responsible for the coordination of planning functions with the DSP and with other state agencies.[5]

A. State Comprehensive Plan

The state comprehensive planning effort is a continuing process. The DSP must prepare annual development programs to cover the forthcoming six years.[6] The comprehensive plan must be submitted to and approved by the Governor. Once approved, it is to be sent to both houses of the legislature for consideration at the next session.[7] Any part of the plan not authorized by law must gain legislative approval. Subsequent to this approval, state depart-

ment or agency budgets must be prepared and entered based upon and consistent with the comprehensive plan.[8]

At present, there are many conflicts (later discussed) in existing state statutes which cause confusion as to the practical effects of the state comprehensive plan on coastal zone management. This confusion cannot begin to be resolved until a process of formal communication is developed between competing state agencies.

As a whole, Part I of Chapter 23 establishes the framework for DSP development, revision, and implementation of the state comprehensive plan. Although Chapter 23 does not specifically mandate consideration of the problems of the coastal zone, it is clear that the environmental element of the state comprehensive plan must consider coastal zone management problems.

B. Interstate Cooperation

Part VI of Chapter 23 is intended to establish a system of cooperation among seventeen states within the southeastern United States in order to assist the states in meeting their own problems "by enhancing their abilities to recognize and analyze regional opportunities and take account of regional influences in planning and implementing their public policies."[9] The purposes of the agreement are to provide:[10] (1) improved facilities and procedures for study, analysis, and planning of governmental policies, programs, and activities of regional significance; (2) assistance in the prevention of interstate conflicts and the promotion of regional cooperation; (3) mechanisms for the coordination of state and local interest on a regional basis; (4) an agency to assist the state in the foregoing.[11]

The Act establishes the Southern Growth Policies Board consisting of the Governor, two members of the state legislature, and two state citizens appointed by the Governor.[12] The Board has the power to contract with public or private

agencies for investigations and research,[13] to prepare comprehensive land use plans in cooperation with other states,[14] and to participate and cooperate with the federal government in joint planning undertakings.[15] The main significance of this part of Chapter 23 is that it recognizes the interstate and regional nature of many development decisions and establishes a structure by which Florida may participate and cooperate with other states and the federal government in planning for these regional projects. This can be useful in the planning and development of deep water ports which can have a regional impact if located near the border of two states or in an adjoining area such as the Gulf of Mexico. As of yet, no results have been produced through activities of the Board in relation to coastal zone management. The Board's activities have so far dealt with general regional planning.

Chapter 23 preserves in local government the power to adopt their own comprehensive plan with the DSP acting in a supervisory capacity coordinating local plans with a unified state comprehensive plan. The DSP will only act directly where local governments have not exercised their powers to control future development under requirements set forth in Chapter 163.

C. Local Comprehensive Planning

The DSP is the state level administering agency for the local Government Comprehensive Planning Act.[16] Part II of the Act provides general enabling legislation for adoption and enforcement of zoning regulations, subdivision regulations, and building codes by counties and incorporated municipalities.[17] It sets forth minimum requirements for local exercise of these powers, but local governments may decide whether to exercise the authorized powers. A local government may establish a commission[18] charged with the development of a comprehensive plan, which is to become effective upon adoption by the governing body.[19] The comprehensive plan must include a land use element and may include

transportation, community facilities, long range financial improvement elements, and other elements deemed necessary.[20]

By giving local governments more power and responsibility, the Act is intended to encourage rational development of land and the protection of natural resources.[21] The Act requires all counties and municipalities in the state to prepare and adopt comprehensive plans by July 1, 1979.[22] It is relatively flexible in allowing unincorporated land outside a municipality to be included in a comprehensive plan and in providing that combinations of municipalities and counties may jointly establish such plans.[23] A procedure for the appointment of a local planning agency to prepare the plan is established.[24]

The required elements and optional elements to be included in the comprehensive plan are found in the body of the Act. The plan must contain several specific elements including a future land use plan, a traffic circulation element, a water and sewer element, a recreation and open space element, a housing element, and a "conservation element for the conservation, development, utilization and protection of natural resources in the area."[25]

The Act requires a coastal zone protection element for all local governments lying within the coastal zone, as defined under the Federal Coastal Zone Management Act.[26] The coastal zone element must be submitted to the Division of Resource Management of DNR for comment at least 60 days before its local adoption.[27]

Other regional elements of the comprehensive plan are an intergovernmental coordination element[28] and a utility element.[29] The Act also provides for a number of optional elements including a historical or scenic preservation element setting out plans and programs for those structures or lands in the area having historical or scenic significance.[30] This latter element could be coordinated with the natural resources and coastal zone elements. It is obvious that a significant degree of planning for and protection of the coastal

zone could be accomplished through the local planning process.

The Act establishes procedures for public participation[31] and for final adoption of the plan.[32] At least 60 days before local adoption, the plan must be submitted to the DSP and appropriate regional planning councils for written comment.[33] The DSP will then specify any objections and make recommendations for modification; however, this must be done primarily in the context of the relationship and effect of the local plan to the state comprehensive plan.[34] The local governing body must then reply to objections within four weeks and may not take any action to adopt the plan until two weeks after the date of the letter of reply.[35]

Once the comprehensive plan has been adopted, all local land development decisions must be consistant with it,[36] except to the extent that the plan may be amended.[37] Coastal zone management policies could be enforced once voluntary compliance is found by local governments if the coastal protection element is made an integral part of the state comprehensive plan.

As mentioned above, Part II of Chapter 163 also contains zoning, subdivision regulation, and building code enabling provisions. Preparation and adoption of a comprehensive plan empowers the governing body to enact and enforce a zoning ordinance after public hearing with due public notice. The governing body is required to divide the entire area into districts and to regulate the following elements: height, size, bulk, location, construction, repair, alteration and use of structures; use of land and water; size of yards, percentage occupation of lot; density of population; conditions for the continuance of non-conforming uses; performance standards for use of property and location of structures.[38] Procedures are set forth for establishing district boundaries,[39] adopting regulations,[40] and supplementing or amending the zoning ordinance.[41]

The enabling provision of Chapter 163 allows local government to adopt growth control regulation. The Local Government Comprehensive Planning Act requires local governments to anticipate potential onshore impacts of offshore energy production and begin to plan for them. Through the elements of the plan, local government can either encourage or discourage potential onshore activity.

D. Municipal Subdivisions

Municipalities are authorized to regulate the subdivision of lands.[42] In areas where a planning commission is established, the governing body may designate the commission as an accredited representative for approving subdivisions, plans, and plats.[43] The commission's approval of the plans or plats does not constitute an acceptance of the dedication of any street or other ground. The authority to accept dedications of land for whatever purpose is exercised exclusively by the governing body.[44] In addition, the governing body is authorized to order a reversion of acreage of all or any part of a subdivision within its jurisdiction.[45]

The counties and incorporated municipalities are authorized to adopt and enforce building codes after a public hearing with due notice.[46] The adoption and implementation of building codes has traditionally been a local government function and the only significant state legislation in this area does not alter this pattern. Chapter 553 provides for statewide minimum standards for plumbing,[47] electrical installation,[48] glass,[49] and factory-built housing.[50] Another part requires certain minimum specifications to accommodate handicapped persons.[51] Local governments have clear authority to require more stringent standards than those adopted under Chapter 553,[52] including special building standards for coastal areas.

E. Regional Planning Councils

Regional Planning Councils (RPC's) are authorized to act in an advisory capacity to the constituent local governments in regional, metropolitan, county and municipal planning matters involving land use, water resources, highways, recreational areas, sewage and garbage disposal, and other matters concerning the acquisition, planning, construction, development, financing, control, use, improvement or disposition of land, buildings, structures, facilities, goods or services in the interest of the public.[53] An RPC consists of two representatives from each participating local government appointed by the legislative body of that government.[54] RPC's are authorized to employ personnel, consultants, and technical and professional assistants as are necessary to perform its official duties.[55] Although RPC's are empowered only to advise, they play an important role by coordinating state and local efforts, and in providing an effective communication link between the DSP and local authorities.

F. Environmental Land and Water Management

The most direct authority exercised by the DSP over the land development decision-making process in the state was established by the Environmental Land and Water Management Act of 1972.[56] The purpose of the chapter is to guide the growth and development and facilitate orderly development which will preserve the quality of life of the state's residents. The state must establish land and water management policies to guide and coordinate local decisions relating to growth and development.[57] These policies are to be, where possible, implemented by local governments through existing processes.[58]

Florida provisions based upon the ALI Model Land Development Code[59] provide a three-step process for state participation in the control of areas of critical concern.[60] Designation of an area includes a recommendation by state

or local agencies subject to approval by the state, and implementation at the local level by existing governmental bodies.[61] Three types of areas may be designated as "having a significant impact upon environmental, historical, natural, or archaeological resources of regional or statewide importance."[62] Designation is subject to several limitations: no more than five percent of the area of the state may be designated as a critical area at any one time;[63] such designations must be mandated by a demonstrated need and must include an explanation of the reasons for and dangers and advantages of control under the Act;[64] and designation must delineate the principles of development or the designated area.[65]

Under Chapter 380, if an area is designated on Area of Critical State Concern, development regulations primarily designed to protect the area will hinder development so as to discourage offshore energy exploration and development. The DRI process insures a local government enough information to intelligently decide whether to sanction such development and under what conditions. The involvement of the state and regional planning agencies should insure that regional and statewide concerns are properly included in the local government's evaluation of the proposal.

The development of regional impact (DRI) is a development which, because of its character, magnitude or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county. Under the rules of the Department of Administration, certain developments are considered DRI's by their very nature, including electrical generating facilities and transmission lines, petroleum storage facilities, and port facilities.[66] The division of authority under the DRI process is similar to that of the areas of critical state concern. The DSP has adopted specific guidelines and standards for the designation of DRI's.[67] Each regional planning agency may

recommend to the DSP types of developments for designation as DRI's. The regional planning agency must solicit suggestions from the local governments within its jurisdiction regarding DRI's to be recommended.[68]

Where a developer wishes to undertake a DRI within a jurisdiction, the developer must file an application for development approval with the appropriate local government.[69] The local government must give notice and hold a hearing on the application in the same manner as for rezoning. The notice must be given to the state DSP, to the applicable regional planning agency, and to other persons designated by the DSP as entitled to receive such notice. The regional planning agency must determine whether the application for development approval contains sufficient information for the regional planning agency to discharge its responsibilities. If the application is insufficient, the agency must provide the local government and the applicant with a statement listing the additional information needs of the agency.[70] The regional planning agency must also prepare and submit to the local government a report and recommendations on the regional impact of the proposed development.[71] The application for development will be approved, denied or approved subject to conditions, restrictions, or limitations, depending on the local government determination of whether the development unreasonably interferes with the achievement of the objectives of an adopted state land development plan applicable to the area; development is consistent with the local land development regulations; and the development is consistent with the report and recommendations of the regional planning agency. Thus, under the DRI approval process, local governments retain the greatest measure of authority for review and approval.[72]

FOOTNOTES

[1] Fla. Stat. §23.012 (1977).

[2] Fla. Stat. Chs. 23, 163, 380 (1978).

[3] Fla. Stat. §23.12 (1977).

[4] Fla. Stat. §23.0113 (1977).

[5] Id.

[6] Fla. Stat. §23.014(1) (1977). The annual programs must contain: (a) the current posture of state development analyzing long range needs and opportunities in terms of present factors and activities; (b) specific policies to be undertaken with regard to economic, social, natural resource, transportation, local and regional development; (c) programs and quantified annual accomplishments to be achieved by each program over the next six years, and methods and requirements for effectuating and implementing the program including resource, manpower, fiscal, legislative or administrative requirements.

[7] Fla. Stat. §23.013(1) (1977).

[8] Fla. Stat. §23.013(3) (1977).

[9] Fla. Stat. §23.140 (1977).

[10] Fla. Stat. §23.140; Art. I (1977).

[11] Id.

[12] Id. at Art. II.

[13] Id. at Art. IV.

[14] Id. at Art. X.

[15] Id. at Art. XIII.

[16] Fla. Stat. §23.0112 (1977).

[17] Fla. Stat. §163.160 (1977).

[18] Fla. Stat. §163.185(2) (1977).

[19] Fla. Stat. §163.190(3) (1977).

[20] Fla. Stat. §163.190(1) (1977).

[21] Fla. Stat. §163.3161 (1977).

[22] Fla. Stat. §163.3167 (1977).

[23] Fla. Stat. §163.3171 (1977).

[24]Fla. Stat. §163.3174 (1977).

[25]Fla. Stat. §163.3177(6)(d) (1977).

[26]Fla. Stat. §163.3177(6)(g) (1977). This element must include surveys of existing vegetation types which need be preserved for natural control of dune and beach erosion and surveys of traditional patterns of public access and use of beach resources, setting out the policies for: (1) maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including but not limited to, its amenities and aesthetic values; (2) continued existence of optimum populations of all species of wildlife; (3) the orderly and balanced utilization and preservation, consistant with sound conservation principles, of all living and non-living coastal zone resources; (4) avoidance of irreversible and irretrievable commitments of coastal zone resources; (5) ecological planning principles and assumptions to be used in the determination of suitability and extent of permitted development; (6) proposed management and regulatory techniques.

[27]Id.

[28]Fla. Stat. §163.3177(6)(h) (1977).

[29]Fla. Stat. §163.3177(6)(i) (1977).

[30]Fla. Stat. §163.177(7)(i) (1977).

[31]Fla. Stat. §163.3181 (1977).

[32]Fla. Stat. §163.3184 (1977).

[33]Fla. Stat. §163.3184(1)(a) (1977).

[34]Fla. Stat. §163.3184(2) (1977).

[35]Id.

[36]Fla. Stat. §163.3194(1) (1977).

[37]Fla. Stat. §163.3187 (1977).

[38]Fla. Stat. §163.205(1) (1977). See Op. Atty. Gen. 074-242 (1974).

[39]Fla. Stat. §163.210 (1977).

[40]Id.

[41]Fla. Stat. §163.215 (1977). See, Metropolitan Dade County v. McGeary, 291 So.2d 28 (3rd D.C.A. Fla. 1974); Rural New Towns, Inc. v. Palm Beach County, 315 So.2d 478 (4th D.C.A. Fla. 1977).

[42]Fla. Stat. §163.260 (1977). See Op. Atty. Gen. 074-242 (1974).

[43]Fla. Stat. §163.265(1) (1977).

[44]Fla. Stat. §163.265(3) (1977).

[45]Fla. Stat. §163.280 (1977).

[46]Fla. Stat. §163.295 (1977).

[47]Fla. Stat. §553.01 (1977).

[48]Fla. Stat. §553.15 (1977).

[49]Fla. Stat. §553.24 (1977).

[50]Fla. Stat. §553.35 (1977).

[51]Fla. Stat. §553.45 (1977).

[52]Fla. Stat. §553.79(4) (1977).

[53]Fla. Stat. §160.02(10) (1977).

[54]Id.

[55]Fla. Stat. §160.02(4) (1977).

[56]Fla. Stat. Ch. 380 (1977).

[57]Fla. Stat. §380.021 (1977). Much of the following analysis and text was taken from the recent work by The Florida Law Revision Commission, Review of Existing State Land Use Regulation: An Overview, Fred Buggett, reporter (Feb. 20, 1976).

[58]Id.

[59]American Law Institute, Model Land Development Code, ten. Draft I (Philadelphia, Pa. 1968).

[60]Fla. Stat. §380.05 (1977).

[61]Id.

[62]Id.

[63]Fla. Stat. §380.05(1)(a) (1977).

[64]Fla. Stat. §380.05(1)(b) (1977).

[65]Id.

[66]Fla. Admin. Code §22F-2 (1977).

[67]Fla. Admin. Code 5-22F-1, 2 (1977).

[68]Fla. Stat. §380.06(3) (1977).

[69] Fla. Stat. §380.06(4) (1977).

[70] Fla. Stat. §380.06(7) (1977).

[71] Fla. Stat. §380.06(8) (1977).

[72] Fla. Stat. §380.06(11) (1977).

III. ENVIRONMENTAL CONTROL

A. Federal Law

Federal environmental quality legislation interrelates with virtually every area of coastal management and planning. The Coastal Zone Management Act makes environmental considerations a prime factor by mandating that all coastal zone management plans and activities under the Act comply specifically with the Federal Water Pollution Control Act (FWPCA) and the Clean Air Act.[1] These two Acts, as well as the National Environmental Policy Act (NEPA), are the main programs reflecting federal environmental regulation.

1. National Environmental Policy Act

NEPA requires preparation of a detailed environmental impact statement whenever major federal action is proposed which will significantly affect the quality of the human environment.[2] Under this provision, two questions arise: whether there is federal action and whether the action significantly affects the environment.[3] It is clear that federal action is involved when the project is directly undertaken by the federal government.[4] It is also likely that sufficient federal action exists where state, local, or private parties act, subject to federal approval.[5] For example, failure of the Corps of Engineers to evaluate the environmental impact of its permit to a power company for construction of a water intake and discharge facility was held to render the permit invalid.[6] However, in another case, no environmental impact statement was required where marinas and piers were being constructed in ocean and sound areas in North Carolina, with ninety percent construction above the mean high water line, because no federal funds were involved and the only federal involvement was review of the application for permit by the Corps of Engineers.[7] Note that major federal action does exist where federal money is involved, as in interstate highway construction.

Offshore energy exploration and production are covered by NEPA. In a case concerning leasing activities off the California coast, the court of appeals held that leasing decisions by the Secretary of the Interior must include environmental considerations as guided by NEPA provisions.[8] With respect to offshore power production, the size, complexity, and scope will certainly require the filing of an environmental impact statement. In one situation, permits issued without such a statement have been rendered invalid.[9] Deep water ports are also of such magnitude that they would also require an environmental impact statement under NEPA.

NEPA requires the acting federal agencies to consult with other appropriate federal agencies, as well as state and local officials, and to receive public comment. For example, in a case dealing with proposed offshore lease sales in the Atlantic, the Court found that sections of NEPA had not been complied with because no federal, state, or local agencies had been asked to comment or review the proposals.[10] Yet a 1975 decision by the United States Court of Appeals for the Fifth Circuit rules that an environmental impact statement, filed by the Department of the Interior, was sufficient even though many other groups such as state and local agencies objected to it.[11] The environmental impact statement plays a viable role in that it assures a detailed discussion of all issues relating to protection of the environmental quality. Local governments have been given an opportunity to comment on any proposed major federal action and can further use this procedure as a delaying tool allowing all issues to be examined adequately.

Preparation of environmental impact statements is covered by Environmental Protection Agency (EPA) regulations.[12] These regulations require that environmental impact statements be written in terms for "laymen understanding and response."[13] Another important requirement in the EPA regulations is that

particular attention be paid to statements showing impact on the environment of the coastal zone.

2. Federal Water Pollution Control Act

The Federal Water Pollution Control Act (FWPCA) is the latest revision of prior legislation on water pollution policy.[14] The Act has several goals, including elimination of discharge of pollutants in navigable waters by 1985, prohibition of discharge of toxic pollutants in toxic amounts, provision of financial assistance to construct publicly owned waste treatment plants, development and implementation of area-wide waste treatment management planning processes, and development of technology necessary to eliminate the discharge of pollutants into navigable waters through major research and demonstration efforts.[15]

The structure of the Act is based on a system of state water quality standards which are approved by the Environmental Protection Agency (EPA). The intent of the FWPCA is to place the primary responsibility for environmental protection in the state and local governments, which have authority to adopt and enforce protection statutes.[16] In one case, the United States Supreme Court held that by enacting the FWPCA, Congress did not preempt the field under the commerce clause. The Court upheld the constitutionality of Florida's Oil Spill Law which at the time imposed standards and obligations which were more stringent than those required under the federal enactment.[17]

The main question arising under the FWPCA is whether the federally adopted state water quality standards will apply to structures and activities located on the continental shelf outside of state boundaries. Under the Outer Continental Shelf Lands Act, state law applies to these areas as representing federal law.[18] EPA regulations are applicable to all interstate waters and require state certification of activities requiring a federal permit to ensure

that water quality standards are being met.[19] These provisions reflect the position that state standards do apply to continental shelf activities outside the state boundaries. The overall impact of the FWPCA is to provide for state and local control in implementing regulations concerning water quality in navigable waters.[20]

3. Clean Air Act

The Clean Air Act was substantially amended in 1970.[21] From legislation which dealt with federal assistance to state and local governments, the 1970 amendments reflected the federal government's conclusion that air quality was a national problem for which the federal government had primary responsibility.[22] The Clean Air Act will be critically important in state coastal zone management development because of a direct mandate of the Coastal Zone Management Act for specific compliance with the particulars of the Clean Air Act.[23] In addition, the breadth of the Act that controls ambient air standards in auto emissions applies without question to activities in the coastal zone, there being no such limitation as in the navigable water definitions under FWPCA.

The Secretary of HEW is authorized to make grants to inter-municipal or interstate air pollution control agencies for developing or improving regional air pollution programs. Authority is also established in governing bodies of municipalities to enforce measures against air pollution after preliminary finding of violations are made and state approval for action is obtained.[24] This program permits local governments to plan for possible air pollution from onshore development associated with offshore development.

B. State Law

1. Department of Environmental Regulation

The primary state agency vested with the responsibility and authority to protect the environment is the Department of Environmental Regulation (DER).

The DER was created and its authority granted by the Florida Environmental Reorganization Act of 1975.[25] DER is intended to be the principal permitting agency in the administration of the state's environmental laws.[26] Several departments existing before reorganization have been consolidated in order to carry out these functions.[27] The major administrative officer of DER is the secretary, who is appointed by the Governor with confirmation by the Senate. Since the secretary is the legal head of the agency, his decisions are considered to be final agency action.[28] Depending on the statutory authority, these decisions are appealable to the Environmental Regulation Commission (ERC) and/or to the Governor and Cabinet.[29] The Commission is composed of seven citizens of the state appointed by the Governor.[30]

The standard setting authority of the DER relating to air and water quality, noise and solid waste management is vested in the ERC.[31] The ERC is required to conduct a study of the economic and environmental impact of any proposed or existing standards which would be or are more stringent than ones which have been established by federal agencies pursuant to federal law.[32] The ERC initially adopts the standards,[33] with final decision made by the Governor and the Cabinet, who accept, reject, modify, or remand the standards for further proceedings.[34] The ERC has final approval on applications for and disbursements of federal grants.[35] It also acts in an adjudicatory capacity for final agency actions.

The Division of Environmental Programs in DER administers, coordinates, and supervises programs relating to planning, grants, air quality, and water quality and quantity, noise, and solid waste management.[36] The Division of Environmental Permitting processes applications for power plant site certificates.[37] The Division is required to establish uniform procedures and forms for the orderly determination of decisions relating to permits, licenses,

certificates, and exemptions.[38] The Division is authorized to supervise and direct all district operations and to provide the necessary legal technical support to carry out the functions of the DER.[39]

The Secretary of the DER is required to establish environmental districts which are to correspond with the state's existing water management districts to the maximum extent possible.[40] Each environmental district has a manager appointed by the Secretary of DER.[41] Under the supervision of the Division of Environmental Permitting, all field services and inspections required in support of the decisions of the DER relating to the issuance of permits, licenses, certificates or exemptions are to be accomplished, to the maximum extent possible, at the environmental district level.[42] The processing of all applications is also to be accomplished by the environmental district unless specifically assigned to the Division or assigned by interagency agreement.[43] However, where it is determined that a water management district has the financial and technical capacity to carry out the water quality functions of the DER, those powers, duties and functions may be contracted or delegated to the water management district.[44]

The water management districts were established under the Florida Water Resource Act of 1972[45] and given the power to accomplish the conservation, protection, management and control of the waters of the state. The duties and functions of the DNR relating to water management set forth in the 1972 Act were transferred to DER.[46] The DER is now responsible for the state water use plan which considers the control of the state's waters and the preservation and enhancement of the water quality of the state. The DER vests power in the governing boards of the water management districts, including administration, the determination, establishment, and control of the level of much of the state's waters, and the regulation of discharges into and withdrawals from these waters.[47] Generally, the DER has delegated a substantial portion

of environmental decision-making to the district level which allows for greater local control.

The counties and municipalities are authorized to establish and administer local pollution control programs. They must, however, comply with the Florida Air and Water Pollution Control Act.[48] The local programs must be approved by the DER as adequate to meet the requirements of the Act and must provide by ordinance, regulation, or local law, requirements compatible with, or stricter than those imposed by the DER.[49] The DER has exclusive permit authority, but may, if it finds it necessary to do so, delegate this authority to the local governments.

The DER may find that certain pollution problems can be handled effectively by only a regional area and that local control is unacceptable.[50] If DER has reason to believe that the local program is inadequate, it may conduct a hearing on the matter. If the program is found inadequate, DER can require that necessary corrective measures be taken within a reasonable time. If the county or municipality fails to act, DER's program supersedes that of the local government unit.[51]

This regulatory system provides direct state control over air and water pollution programs of the Federal Water Pollution Control Act and indirect control by the DER, by which it reviews and approves local plans and establishes standards and criteria with which local programs must comply.

DER issues permits relating to environmental standards. Commitments of sovereign lands for limited or restricted use, dredging to fill purchased sovereign land, extraction of fill, dredging trenches for purposes of installation of pipelines and utilities, rights of way for commerce and navigation projects, dredging for navigation and other purposes, permits required for piers and related types of structures, and permits for artificial reefs.[52]

Consequently, all offshore development will require some form of permit from the DER.

2. Department of Natural Resources

Another state department which has powers relating to environmental land and water management is the Department of Natural Resources (DNR). The powers of the trustees of the Internal Improvement Trust Fund relative to resources, including ownership of the submerged lands of the state were merged into the DNR through reorganization.[53] Thus sales and leasings of sovereign lands of the state are managed by the DNR. The DNR also promulgates regulations controlling the leases for oil and gas exploration. Ownership of state lands is vested in the Governor and Cabinet who have the authority to hear and decide appeals of DNR decisions.[54] While the DNR has authority to dispose of state lands, it must, prior to the transfer, make a determination as to the environmental impact of such a transfer.[55] After applications are received and proper notice is given, public hearings must be held.

The DNR has further authority relating to the placing or removal of onshore or offshore installations.[56] Requirements for permitting of work and activities including the filling of submerged lands are promulgated by the DNR. Private developers must obtain rights of way for any cables or pipelines which would be used in conjunction with any installation. Even after purchase of submerged lands, dredging activities including trench formation for installation of public utilities, pipelines, and similar uses, as well as other construction in submerged lands areas require a permit from the DER. The regulations of DNR and DER cover every aspect of work connected with the placing and development of installations in the navigable waters of the state, as well as installations in and under the submerged lands of the state.

The Division of Resource Management in DNR has control over oil and gas production for the purpose of securing efficient development, avoiding of waste, minimizing the impact on natural resources of the state, and preventing adverse environmental impacts from development.[57] This includes the fixing of locations of wells on the surface as well as regulation of activities such as equipping, drilling, operating, producing and storage of oil and gas.[58]

The DNR has a further responsibility to preserve and protect the beaches and shores of the state. The Beach and Shore Preservation Act,[59] is concerned with regulation of construction, reconstruction, and other physical activities in coastal areas which will have an adverse environmental effect on the beaches and shores. The Act establishes beach and shores preservation districts with the DNR delegating authority to the local Boards of County Commissioners who serve as the Beach and Shore Preservation Council.[60] In this capacity, the Board of Commissioners is given broad regulatory power over all physical work or activity along the county shoreline which is likely to have a material effect on coastal conditions or natural shore processes. County commissioners can issue bonds to obtain funds on a local level to meet the cost of their beach and shore preservation programs.[61]

FOOTNOTES

[1]16 U.S.C. §1456.

[2]42 U.S.C. §4231; 37 Fed. Reg. 2525(4)(a).

[3]Id.

[4]42 U.S.C. §4231.

[5]37 Fed. Reg. 2525(11)(c).

[6]Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696 (N.Y. 1972).

[7]Ruckner v. Wills, 484 F.2d 158 (1973).

[8]Union Oil Co. of California v. Morton, 512 F.2d 743, 749 (1975).

[9]Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696 (N.Y. 1972).

[10]County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2d Cir. 1977); Cert. Den. 434 U.S. 1064 (1978).

[11]Sierra Club v. Morton, 510 F.2d 813 (1975).

[12]40 C.F.R. 6; 40 Fed. Reg. 16814, April 14, 1975.

[13]Id.

[14]32 U.S.C. §1151, as amended by 33 U.S.C. §1251.

[15]33 U.S.C. §1251.

[16]People v. Ludlum, 348 N.Y.S. 2d 20 (1972).

[17]Askew v. American Waterways Operators, Inc., 412 U.S. 953 (1975).

[18]33 U.S.C. §1251.

[19]40 C.F.R. 120.

[20]See, infra, note 48.

[21]Clean Air Amendments of 1970, 42 U.S.C. §1857.

[22]Id.

[23]16 U.S.C. §1451(307)(f).

[24]42 U.S.C. §1857.

[25]Fla. Laws 1975, Ch. 75-22 (1975). The legislative sponsor of the FERA cited four major problems with the system as it existed before the Act. First, the process of environmental permitting had become exceedingly complex, and

the agencies with permitting responsibilities were taking inordinate amounts of time to evaluate and act on permit applications. Second, there was a great deal of duplication of effort among the various agencies involved in the process. At that time, the major agencies with environmental responsibility were the trustees of the Internal Improvement Trust Fund, the Department of Pollution Control, the Department of Natural Resources, the Game and Fresh Water Fish Commission, and the Division of Health. Third, because of the segmentation of decision-making, there was a startling lack of accountability for decisions made by various agencies. Finally, a pervasive problem was that citizens needing permits found it difficult to determine to which agency the application should be made. Barron, Environmental Reorganization Act -- The Legislative Perspective, 50 Fla. Bar J. 264 (1976).

[26] Id.

[27] Landers, Function of the Department of Environmental Regulation, 50 Fla. Bar J. 269, 270 (1976). The former Department of Pollution Control was abolished and its authority regarding air, water, and noise pollution, solid waste disposal, and power plant siting were transferred to DER. The permitting authority in navigable waters formerly exercised by the trustees of the Internal Improvement Trust Fund were also transferred to the Department. Certain functions of the Division of Health regarding drinking water supply regulation and all major voter management responsibility and permitting authority previously in the Department of Natural Resources under Chapters 373 and 298 were shifted to DER.

[28] Id. at 270.

[29] Id.

[30] Fla. Laws, Ch. 75-22, §4(7) (1977).

[31] Fla. Stat. §403.804(1) (1977).

[32] Fla. Stat. §403.804(2) (1977).

[33] Id.

[34] Id.

[35] Fla. Stat. §403.804 (1977).

[36] Fla. Stat. §413.807 (1977).

[37] Fla. Stat. §403.808(3) (1977).

[38] Fla. Stat. §403.808(3) (1977).

[39] Fla. Stat. §403.808(3)(4) (1977).

[40] Fla. Stat. §403.809(1) (1977).

[41] Fla. Stat. §403.809(2) (1977).

[42] Fla. Stat. §403.809 (3)(a) (1977).

[43] Fla. Stat. §403.809 (3)(6) (1977).

[44] Fla. Stat. §403.812 (1977).

[45] Fla. Stat. §373 (1977).

[46] Id.

[47] Fla. Stat. §373.103 (1977).

[48] Fla. Stat. §403.011-403.4152 (1977).

[49] Fla. Stat. §403.182 (1977).

[50] Fla. Stat. §403.182(3) (1977).

[51] Fla. Stat. §403.182(4) (1977).

[52] Fla. Admin. Code Ch. 18-2.

[53] Fla. Laws, Ch. 75-22 §15 (1977).

[54] Fla. Stat. §253.12 (1977).

[55] Fla. Stat. §253.12(2)(a) (1977).

[56] Fla. Stat. §253 (1977).

[57] Fla. Stat. §377.21 (1977).

[58] Fla. Stat. §377.22 (1977).

[59] Fla. Stat. §161 (1977).

[60] Fla. Stat. §161.25 (1977).

[61] Fla. Stat. §161.38 (1977).

PART TWO: ACTIVITIES

In Florida, there are three types of local governmental units which may be able to directly impact offshore energy development decisions. These are municipalities, counties, and port authorities. Each of these have different sources of authority and different jurisdictions. In analyzing potential methods of influence, it is important to keep in mind which unit or units have jurisdiction over the particular land or activity in question. For example, local land use control measures may not apply within the boundaries of a port authority. In contrast, county platting ordinances may apply to land within municipalities, for example, Broward County.

Municipalities derive their power from the state.[1] The jurisdiction of each municipality is established either in its charter or by special act of the legislature, and may extend to submerged land. For example, by special act of the legislature, Key West may extend its police powers and jurisdiction 300 feet into the tidal waters adjacent to the corporate limits for certain enumerated purposes.[2] It is impossible to make generalizations about municipal authority beyond the mean high tide line, due to the variety of special acts and charters which control. It should be recognized that many cities have boundaries well into the coastal waters.

The sources of power for counties include the Florida Constitution,[3] the Florida Statutes,[4] and any county charter adopted by the voters of the county. County boundaries are defined in Chapter 7, Florida Statutes. Many county boundaries extend to the three mile or three marine league limit. This jurisdictional extension may enable a county to directly influence or control activity off its shore.

Port authorities and port districts are quasi-governmental entities with a broad range of powers.[5] Port authorities may be autonomous bodies created

by special act of the state legislature,[6] with the authority and jurisdiction of the port and the degree of local control specified by law. Other port authorities[7] are created and controlled by local government. Again, the creating ordinance or statute must be looked to for the authority and jurisdiction of the port authority or district. The amount of control a local government can exert over a port authority or district can be extremely significant since much onshore activity associated with offshore oil and gas development will require port facilities. Chapter 315, Florida Statutes, enumerates the powers granted to any port district, port authority, county, or municipality regarding port facilities. This chapter is supplemental to powers conferred by general, special, or local laws.[8]

Part Two discusses offshore energy activity and the extent to which these local governments can control and plan for onshore impact. Activities are separated into Offshore Oil and Gas Development, Deepwater Ports and Shipping, and Offshore Power Plants.

FOOTNOTES

[1]Fla. Const., Art. VIII, §2(b); Fla. Stat. §166.021 (1977).

[2]Fla. Laws, Ch. 70-762 (1970).

[3]Fla. Const., Art. VIII, §1(f)(g).

[4]Fla. Stat. §125 (1977)

[5]Center for Governmental Responsibility, Analysis of Laws Relating to Florida Coastal Zone Management, 496 (1976).

[6]E.g., Port Everglades and Port Canaveral.

[7]E.g., Port of Pensacola and Port of Miami.

[8]Fla. Stat. §315.15 (1977).

I. OFFSHORE OIL AND GAS DEVELOPMENT

A. Offshore Leases

Local governments have little control over the federal government's decision to lease Outer Continental Shelf lands for oil and gas development, since no local permission is required prior to lease sales. However, local governments do have opportunities for expressing their feelings toward the proposed development. First, prior to any lease sale of OCS land, an Environmental Impact Statement is required under the National Environmental Policy Act.[1] Local governments may comment on the proposed leases during the preparation of the EIS. A second opportunity for local government comments has recently been provided in the new Continental Shelf Lands Act.[2] This Act requires that the Secretary of the Interior prepare a five year oil and gas leasing program, which includes a schedule of proposed lease sales,[3] and to approve a development and production plan accompanying offshore and onshore facilities.[4] Local governments may submit comments for the Secretary's consideration prior to the adoption of either of these plans.[5] However, the recommendations submitted by the executive of the affected local government must be submitted to the governor before it can be submitted to the Secretary.[6] One weakness of the program as it relates to Florida is that lessees in the Gulf of Mexico are not required to draft a development and production plan.[7] A third means by which local governments may gain some input into the lease sale is the consistency provision of the Coastal Zone Management Act.[8] Should Florida adopt a state Coastal Zone Management Plan which meets federal requirements, the state may attempt to block any lease sale which is inconsistent with the state's plan. In Florida, local participation in the Coastal Zone Management program is voluntary. However, under the Local Government Comprehensive Planning Act, local governments are required to complete a Coastal Zone Protection Element.[9] If the local plan is deemed

by the state Department of Environmental Regulation to be consistent with the state plan, the local government, as a participant in the state program, can then express its views on whether the state should attempt to block the lease sale. However, as a practical matter, the final decision on leasing OCS lands is made by the federal government. Local resistance is not likely to have a great impact on the federal decision.

If the proposed lease involves lands inside state waters,[10] local government may have a more direct impact. No oil and gas lease encumbering state lands within corporate limits may be granted without corporate consent.[11] Additionally, before lands in the tidal waters of the state abutting or immediately adjacent to the corporate limits of a municipality or lands within three miles of the limits seaward of the mean high tide line are leased, the municipality must consent by resolution.[12] The county commission must approve if the leased lands abut, are adjacent to, or lie seaward and within three miles of an improved beach located outside an incorporated town or municipality.[13] As a result, municipalities have a veto power over leases at least up to three miles offshore, and possibly further if the corporate limits extend beyond three miles offshore on the Gulf coast. Counties have a veto power only if the lease sale is adjacent to unincorporated land.

B. Development Activity

1. Description of Offshore and Onshore Development Activities

Once offshore leases are sold, development activity will occur both onshore and offshore. The primary offshore activities will involve exploratory rigs, construction of drilling platforms, and the construction of pipelines to transport oil and gas from the wells to onshore storage facilities. Major activities onshore may include pipeline landfalls and continuation; onshore terminal and storage facilities; onshore support and service facilities;

gas processing facilities; crude treatment sweetening plants; refineries; petro-chemical industry; and a platform construction industry. Each activity is briefly described below. While it is uncertain that all of these activities would occur in response to offshore drilling, it is important for local authorities to realize that such potential does exist.

Onshore Terminal and Storage Facilities

Due to the many variables involved, it is difficult to predict the type and size of onshore storage facilities. The size will vary depending on whether oil and gas is to be processed locally or shipped or pipelined elsewhere.[14] A 150,000 barrel pipeline shore terminal will typically require 40 acres of land and include a pump station, three 50,000 barrel tanks, pipeline connections (both from offshore to the facility and from the facility to a refinery storage area), and possibly an office and radio tower.[15] If oil is shipped elsewhere for production, more storage may be required, possibly up to several million barrels.[16] A nearby refinery would include its own storage area.

Onshore Support and Service Facilities

The typical support and service facility would require about 50 acres of land and include sufficiently deep channels[17] and berthing areas for large supply ships.[18] In addition to the marine facilities, a supply and support base would normally include a warehouse, a material storage area, a pipeline storage and marshalling area, loading docks, heliport, office space, parking area, crane service, railroad and highway connections, and a storage area for fuel and water to be used offshore.[19]

Gas Processing Facility

While limited processing may occur on the platform, gas is generally pressurized and piped onshore for processing. Requiring approximately 20 acres for building and an additional 30 to 55 acres for safety and other ancillary

uses[20] "[a] model gas processing plant is assumed to have a per day processing capacity ranging from 90 to 500 million cubic feet."[21] Additionally, storage tanks and facilities, transportation facilities, and pipeline connections to a distribution network may also be required. "Daily water and electrical requirements are estimated at 15,000 gallons of makeup water and approximately 1800 kilowatt hours of electrical energy."[22]

Crude Treatment Sweetening Plant

This type of special treatment facility might be necessary if the crude oil and natural gas discovered offshore contained greater than 0.5% of sulphur by weight.[23] While the basic processing unit has a capacity of 12,000 to 24,000 barrels per day, the optimum method of operation would be to combine enough units at a single site to generate a processing capacity of 100,000 to 200,000 barrels per day. Such a facility would require between 100 and 200 acres of land.[24]

Refineries

Since oil and gas can be pipelined or shipped elsewhere, offshore production of oil and gas will not automatically result in refinery construction. Should a refinery be built, it is likely to have a capacity of 100,000 to 300,000 barrels per day.[25] In addition to the actual refinery, it will be necessary to have storage facilities for five to ten days.[26] The minimum land requirement for a 200,000 barrel per day plant is between 1,200 and 1,400 acres.[27] Water consumption could range from nine to eighteen million gallons per day, although if the water is air cooled, the requirement could drop to two million gallons per day.[28] Also, large amounts of electrical power will be required. Potential estimates of this need range from 610,000 to 1,260,000 kilowatt hours per day.[29]

Petro-Chemical Industry

Since petro-chemicals are derived from refined products and natural gas liquids, development is most likely to occur near a refinery or where a petro-chemical industry already exists.[30] A typical complex can be estimated to require a minimum of 300 acres, 24 million gallons of water per day, and 600 million kilowatts per year of electricity.[31]

Platform Construction Industry

Since most shipyards are not designed for the construction of production platforms, platforms would probably be towed to drilling sites from existing platform fabricating facilities along the Gulf Coast of Texas, Louisiana, and Mississippi.[32] However, there exists the potential for the development of this type of industry.

2. Platforms

Once offshore land is leased for oil and gas development, there is little local governments can do to either encourage or discourage the construction of platforms, as this decision will be governed by the likelihood of economic success for the leaseholder. However, in those areas where local approval is required prior to issuance of a lease, municipal or county approval is required prior to the issuance by the state of a permit to drill a well.[33] Unless the platform is situated in an offshore area which is under local jurisdiction, there is no available means for a local government to control platform and drilling activities. Should a platform be located within a municipal or county boundary, the local government may adopt stricter air and water pollution control standards than the state standards which would be enforced by the state when licensing the platform.[34]

Local governments should be aware of some of the potential environmental, economic, and other impacts associated with an offshore platform. Environmen-

tally, the greatest dangers are a blowout during drilling or an oil spill during pumping, handling, transportation, storage or processing.[35] However, the cumulative effects of various discharges from many platforms may be a more severe problem. Certain by-products and chemicals are discharged into the sea during platform operations, including drill cuttings and mud, certain chemicals, water separated from gas and oil, and sand produced with the oil.[36] "Strict government regulations forbid dumping human sewage, solid wastes, or other pollutants and debris into the sea."[37]

Economically, the largest direct impact is the effect of the platform on commercial fishing. Since the platform may act as an artificial reef, fishing may improve. Jack up rigs or permanent platforms take up 2-5 acres of bottom land, while a semi-submersible occupies 325 acres of bottom land.[38] Even subsea completions present a hazard to fish nets. Of course, the secondary economic effects on the tourist industry caused by a blowout could be most significant. Other impacts are the potential hazard to navigation and the aesthetic effect of platforms within sight from land.

3. Pipelines

For the purposes of this paper, the pipeline network which would most likely be occasioned by offshore oil and gas development can be divided into three segments: the offshore pipelines, the pipeline landfall, and the on-shore pipelines. Each segment presents different possibilities for local governments to either affirmatively encourage, discourage, or prohibit construction, and regulate construction once the decision is made to build.

Pipelines - Offshore

The threshold question regarding the installation of pipelines is whether a private company has a right to lay pipeline over land offshore. The land within the state and territorial limits is presumably owned by Florida as sovereignty submerged land. While petroleum pipeline companies do not have

eminent domain rights to land owned or operated by the state or its political subdivisions, they do have rights to permits on those lands subject to reasonable regulations.[39]

Chapters 403 and 253, Florida Statutes, govern the issuance of state permits for oil and gas pipelines. Under Chapter 403, subaqueous transmission and distribution lines are exempted from the permit requirement if they are laid on or embedded in the bottom of waters of the state, other than in Class II (shellfish) waters.[40] "Embedded in" is defined as placement of lines into the bottoms of waters by minimal displacement of bottom material and without the creation of a trench or trough.[41]

Additionally, no Chapter 403 permit is required if the pipeline is entrenched in rights of way where entrenchment of similar scope and impact has occurred previously and where adequate turbidity controls are employed to meet state standards.[42] "Entrenched" is defined as the placement of lines by creation of a defined trench or trough, through the use of such devices as clamshells, dredges, trenching jets, or other devices producing similar results.[43] Even if no Chapter 403 permit is required in this situation, a permit under Chapter 253 would be required. A Chapter 253 permit is required for installing a subaqueous oil and gas transmission and distribution line entrenched in,[44] laid on, or embedded in the bottom waters of the state.[45]

Local governments may enact their own dredge and fill permit programs under their general police power. For the local program to have any effect, the local jurisdiction must extend beyond the mean high tide line. Absent this extended jurisdiction, there is little a local government can do to directly encourage, discourage, or regulate the offshore placement of a pipeline network. However, local governments can indirectly encourage or discourage the location of offshore pipelines through their onshore land use policies by either permitting or prohibiting the necessary attendant pumping and storage facilities.

Pipelines - Landfall

The most severe environmental impact of pipelines is likely to occur in the area of their landfall. Marshlands and estuaries are most susceptible to disruption by the activities associated with laying pipelines.[46]

Once again, the threshold question is the right of the pipeline company to lay their pipelines over a given piece of land. If the land is below the mean high water line, it is presumably owned by the state. However, Chapter 253 recognizes conveyances of sovereignty submerged lands made to private individuals. Land above the mean high water mark is susceptible to private ownership. Petroleum pipelines have no eminent domain right over public lands but permits over the land are available subject to reasonable regulation.[47] For any land owned by private individuals, petroleum pipeline companies do have the right of eminent domain.[48]

There is considerable regulatory jurisdictional overlap in the area where a pipeline comes ashore. State jurisdiction under Chapter 253 only extends inward to the mean high tide line, so no permit is required under that statute for any dredging and filling landward of this line. Chapter 403 jurisdiction extends landward to the vegetation line.[49] Landward of the mean high tide line, jurisdiction for a Chapter 403 permit includes submerged lands[50] and the transitional zone.[51] However, as mentioned in the previous section, many oil and gas pipelines are exempt from this Chapter 403 permit. To increase the confusion, since local jurisdiction will extend in some instances to the mean high water mark (either a municipal boundary or an unincorporated county boundary) local dredge and fill permits can be required. Furthermore, there is the not too remote possibility that the pipeline landfall will occur in the area of a port. Should this occur, the degree of local control over the port authority or the port district is extremely important. Should the port be

highly autonomous, local land use controls may not apply and a local dredge and fill permit may not be required.

Chapter 161, Florida Statutes, establishes a coastal construction setback line 50 feet shoreward of the mean high water line (except for vegetative-type non-sandy shores).[52] The Department of Natural Resources may grant a waiver or variance for pipelines extending outward from the shoreline unless it determines that construction would cause erosion of the beach in the area. Many local governments have adopted their own construction setback lines. Counties have the power to regulate and supervise all physical work or activity along the shoreline which is likely to have a material physical effect on existing coastal conditions or natural shore processes.[53] This includes the right to issue permits, but is subject to consent by DNR, any municipality, and any other political authority involved (presumably port authorities or port districts).

Local governments may be able to prevent certain lands from becoming pipeline landfalls through a mechanism which allows municipal and county government to borrow money from the state to purchase land for establishing and maintaining a public beach.[54] Recreation must be the prime purpose of the purchase. Public ownership of the beach would thus end the eminent domain rights of pipeline companies under Chapter 361. A similar option would be for a local government request of the state to create Historic Preservation Board of Trustees over a given area with requisite powers to prohibit pipeline landfalls.[55]

Local land use and zoning controls may also be used to prohibit pipelines on certain lands. Two questions arise here, however. First, if Chapter 361 gives pipeline companies a presumptive right to pipelines over government-owned lands subject to reasonable regulations, would a prohibitive land use or zoning regulation be considered reasonable? Second, if the jurisdiction

forbade all pipeline landfalls, would this violate the Federal Coastal Zone Management Act's mandate to consider regional energy needs?[56]

Pipelines - Onshore

Once a pipeline comes ashore, it can either terminate at a storage facility located in that jurisdiction or pass through the jurisdiction to a storage facility elsewhere. As a result, a land use policy prohibiting the necessary storage facilities will not automatically preclude pipelines from coming ashore or passing through a local jurisdiction. Obviously, local governments can encourage pipeline development by allowing the requisite storage facilities. Additionally, since the pipeline company needs land to lay the pipeline under or on, local governments may be able to encourage development by providing easements across public lands. Counties are permitted to grant licenses along county roads not in a municipality for laying utility lines.[57] Discouraging a pipeline may be more difficult since if the pipeline company does not get access to public lands, the company has eminent domain rights to private lands.[58] An additional means of discouraging pipelines is to prohibit their location in certain zoning districts, such as residential.[59]

Local governments also have some power to regulate pipelines once it is established that construction will occur in their jurisdiction. Certain performance standards can be enacted, including aesthetic standards. One potential standard which may discourage construction due to economic considerations would be a requirement that all pipelines be buried.

C. Potentials for Encouragement, Discouragement, and Control of Onshore Development Activity

This section will describe various methods which may be employed by local governments to encourage or discourage offshore oil and gas development through

the control of the development activities described in Section IIA. This discussion will include opportunities for encouraging or prohibiting onshore facilities as well as regulation of development.

1. Local Land Use Plans

The Local Government Comprehensive Planning Act requires local governments to adopt comprehensive plans by July 1, 1979.[60] All public and private development must be in conformity with the elements of the comprehensive plan.[61] Additionally, all development orders and land development regulations, which included zoning, subdivision, building and construction regulations,[62] must be consistent with the plan and its elements.[63] Through the adopted elements of their plan, local governments can decide whether to encourage or discourage onshore development activities. For example, a local government may or may not provide suitable land in their future land use element for refineries or supply bases. A local government may address the issues of pipelines and pipeline landfalls in their conservation, coastal zone, and public services and facilities elements. As a port facility is essential to an onshore supply base, a local government may encourage or discourage this type of activity through the port facilities element. A local government seeking to encourage industrial development can further express this policy through its economic element. The position of a local government regarding onshore development activity reflected in the plan is important since all development orders and land development regulations must be consistent with the adopted plan.[64]

A local government may not be able to totally prohibit onshore development activities through its plan. Local plans should be compatible with the state comprehensive plan[65] and, if the local government participates in the program, the

state coastal zone management plan. Under the Coastal Zone Management Act,[66] if a state participates in the program, local controls cannot unreasonably restrict uses of regional benefit. If there is a regional need for certain onshore development facilities, it would seem that provision must be made for those facilities in some local jurisdiction's plan.

2. Land Development Regulations

Zoning

Zoning regulations adopted by municipalities and counties[67] can affect onshore facilities in three distinct ways. First, by defining the uses which will be permitted or prohibited in the zoning districts in the jurisdiction, local governments can either encourage or discourage onshore facilities. For example, a local government may prohibit refineries from all zoning districts.[68] Conversely, pipelines or storage tanks can be permitted in certain districts.

A second way that zoning ordinances can be used to encourage or discourage onshore facilities is through their definitions of the uses permitted on individual parcels of land. Generally, the entire jurisdiction is divided into zoning districts with uses assigned to each district. A local government could, in order to discourage the building of refineries, permit refineries in industrial districts but then not assign any land to these districts. To encourage development, a local government may zone land suited for onshore facilities in an appropriate district.

A third impact of zoning regulations is not directed to permitting or prohibiting onshore facilities but rather to regulating them once their use is permitted. The traditional example of this type of zoning regulations is the height, size, and setback requirements of individual zoning districts. Another method is the adoption of performance standards for either a given district or a given industry. Under this approach, standards are developed for factors

such as air pollution, water pollution, noise, noxious odors, hazardous materials, glare, safety, and aesthetics. If a proposed onshore facility meets the industry or district performance standards for the selected categories, it is then permitted.[69] Another method of regulation which gives the local government more flexibility is the adoption of a Planned Industrial District. A zoning ordinance may also include aesthetic standards and safety requirements for specified uses which would regulate the facility.

Subdivision Regulations

The threshold requirement for the application of subdivision regulations[70] can be either the division of land into individual lots or a development proposal surpassing standards for size, height, activity, or impact.[71] Subdivision regulations may emphasize on-site development requirements. In that instance, the regulations would address issues such as minimum lot sizes and maximum lot coverage, setbacks, open space dedications, sewage trunk lines, land drainage and utility lines.[72] Subdivision regulations may also address themselves to the externalities of the proposed development. Here, "the developer must prepare a plan showing the impact of his project on activities, such as schools, traffic, taxes, growth, vegetation, ecology, land use relationships, historical sites, water, sewage and flood areas."[73] A local government could combine these two approaches to regulate the impact of such on-shore facilities as refineries, storage areas, supply bases, and other potential developments.

Platting Regulations

Local governments may develop platting requirements for industrially used lands, enabling local regulatory input at an earlier stage in the development process.[74] Platting regulations can address both the land and the externalities of a proposed development. For example, Broward County provides that the

County Commission adopts a development order either approving the plat, denying the plat, or approving the plat with conditions.[75] All improvements to the land must be either installed and completed or financially guaranteed.[76] Other conditions which may be imposed in platting requirements include dedication of land or payment of impact fees.

Building and Construction Codes

Counties and municipalities may adopt and enforce building, plumbing, electrical, gas, fire, safety, and sanitary codes.[77] Local governments can adopt regulations specifically applicable to the types of development activity described previously.[78] For example, Monroe and Dade Counties require that oil and petroleum storage tanks be underground,[79] and Fernandina Beach mandates that underground storage tanks be secured to prevent floating.[80]

3. Developments of Regional Impact

Under the Development of Regional Impact process,[81] petroleum storage facilities are presumed to be DRI's if the facility is either located within 1,000 feet of any navigable water and has a storage capacity of over 50,000 barrels or the storage facility has a capacity of over 200,000 barrels regardless of the location.[82] Any industrial, manufacturing, or processing plant under common ownership occupying a site greater than one square mile (640 acres) is presumed to be a development of regional impact.[83] Refineries generally require 1,200-1,400 acres,[84] but other activities may not exceed this size threshold. However, the First District Court of Appeals has held that these threshold figures are only a presumption, and the Division of State Planning must ultimately decide if the magnitude, character, or location of the proposed development is such that it should be classified a development of regional impact.[85]

Once a project is declared a DRI, the local government in whose jurisdiction the project is located has 90 days to adopt zoning or subdivision regulations if none already exist. Once the area is covered by regulations, the developer must submit an application to the local government or government having jurisdiction, with copies to the regional planning agency and the Division of State Planning.[86] The regional planning agency determines the sufficiency of information contained in the application[87] and may demand additional information from the developer.[88] The regional planning agency must then prepare a report and recommendations on the regional impact of the proposed development for the local government.[89] The local government then holds a development of regional impact public hearing[90] prior to entering a development order either approving the development, approving the development subject to conditions, or denying the development.[91] The development order may be appealed to the Florida Land and Water Adjudicating Commission.[92]

While the DRI process is not applicable to all development activities, when applicable, the process ensures a local government of enough information to intelligently decide whether to approve or deny a development and, through the development order issued on approval, allows a local government to place conditions on the proposed development.

4. Economic Encouragements and Prohibitions

Tax Incentives

In Florida, the major tax levied by local governments is the ad valorem tax. Under Florida law, a local government cannot give an ad valorem tax incentive to lure onshore development activity on privately owned land due to three main prohibitions. First, all ad valorem taxation must be at a uniform rate within each taxing unit.[93] This provision would bar a local government from offering a lower millage rate to the developer of an onshore facility.

Second, all property must be assessed at a just valuation for ad valorem taxation.[94] The property appraiser must consider the present cash value of the property along with the highest and best use of the property.[95] The Florida Supreme Court has interpreted these provisions to require that all property be assessed at 100% of full fair market value.[96] Therefore, local governments are prohibited from offering a lower property appraisal to the developer of an onshore facility. Third, the only ad valorem taxation exemptions for privately owned property authorized by the constitution are for property used predominantly for educational, literary, scientific, religious, or charitable purposes.[97] Since onshore facilities do not fit into these categories, local governments cannot exempt onshore facilities constructed on privately owned land from ad valorem taxation.

However, the Florida Constitution exempts property owned by a municipality and used exclusively for municipal or public purposes.[98] This exemption raises the possibility of local governments or port districts leasing governmentally owned lands for the development of onshore facilities. Leasehold interests in governmentally owned property are subject to ad valorem taxation[99] unless ". . .the lessee serves or performs a governmental, municipal, or public purpose or function,"[100] which is defined as functions or purposes ". . .which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds."[101] Thus, the nature of the use becomes the key issue. Private profit is permitted as long as the predominant use of the property is a public one.[102] As the Coastal Zone Management Act mandates consideration of the national interest in siting energy facilities,[103] it may be contended that the types of onshore development activities described in Section IIA are uses of a public purpose, and thus any leasehold interest would be entitled to an ad valorem tax exemption.

A further tax incentive can be given by local governments in the structure of their Public Utility Service Tax Rate. Certain onshore facilities require large amounts of water and electricity. A local government may adjust the tax rate on these items to either encourage or discourage development.[104]

Bonds for Facility Development

While local governments are prohibited from using their taxing power or credit to aid any corporation, association, partnership, or person,[105] counties, municipalities, and special destricts may issue revenue bonds to finance or refinance the cost of capital projects for ports[106] and for industrial and manufacturing plants[107] as long as the revenue bonds are payable solely from revenue derived from the sale, operation, or leasing of the projects.[108] If any portions of such projects are operated or occupied by a private corporation, association, partnership, or person, the property interest created by the sale or lease is subject to ad valorem taxation.[109] However, the same public purpose standard described above applies.[110] To economize the siting of onshore facilities in their jurisdiction, local governmental units can issue revenue bonds to construct any of the facilities described in Section IIA.

Local Land Acquisition and Preparation

Local governments may insure that suitable land is made available for the construction of onshore facilities through purchase of property. For example, the Manatee Industrial Development Authority is authorized to purchase property to promote industry.[111] Cities by their charter[112] and counties[113] may acquire property by eminent domain. Lee County has authorized the use of the taxing and bonding power to drain lands to increase their usability.[114] By acquiring and preparing suitable lands, local government can encourage the location of onshore facilities within their jurisdication.

Direct Expenditure of Public Funds to Construct Facilities

In addition to constructing facilities through the issuance of revenue bonds, local governments may be able to directly expend public funds for the construction of certain facilities. Nassau County has attempted to use this approach by granting power to their Port Authority to acquire, construct, and equip an "oil refinery and related facilities to be leased to a private corporation," with public funds.[115]

Public Utility Water and Electric Rates

Many onshore facilities require large amounts of water and electricity. If a county or city provides water and/or if a municipality supplies electricity, the rate structure may be used to either encourage or discourage the location of those facilities within the service area.

Economic Effect of Other Regulations

A secondary effect of certain police power regulations may make the cost of onshore facilities prohibitive. For example, certain air and water pollution requirements may have the effect of forcing development elsewhere. The Monroe County requirement that oil and petroleum product storage tanks be underground[116] creates a prohibitive cost due to the coral rocks and high water table.

5. Local Pollution Regulations

Each county and municipality may establish and administer a local air and water pollution program[117] Any local program must be either comparable with or more stringent than the state requirements.[118] While the State Department of Environmental Regulation has exclusive permit authority, it may delegate this authority to local government.[119] In addition to air and water quality standards, local governments can regulate or prohibit noise and odor pollution.

As many of the onshore development activities present potential pollution problems, a strict local program of pollution control could serve to further regulate or discourage certain activities.

6. Harbor and Port Controls

Harbors and ports may be administered by various governmental units. Independent port authorities or port districts may be established by special act of the legislature, or port authorities may be established and operated by local authorities [see "Ports" in Local Jurisdiction Section]. Certain administrative units, such as the Santa Rosa Island Authority, have jurisdiction over ports within their boundaries.[120] The type of governmental unit and the specifics of its enabling legislation dictate the types of controls that may be exercised.

Florida Statute §315.03 enumerates certain powers granted to counties, port districts, port authorities, and municipalities, including "powers necessary to build, repair, and improve ports and port facilities."[121] These powers are supplemental to powers conferred by general, special, or local laws.[122]

Activities at the port may be controlled by port regulations or tariffs. These may grant the port manager extensive discretionary powers in the day to day administration of the port, including the right to accept or reject cargo such as flammable or dangerous materials.[123] Thus, offshore oil and gas may be prohibited from entering the port.

If the port authority or port district is autonomous, local land use controls may not apply. A port may choose to develop onshore facilities even though the municipality or county within which the port is located opposes this type of development.

Port tariffs can require the application of Coast Guard rules to the handling and storage of flammable materials and to the discharge of petroleum

products into port waters.[124] Dyking sufficient to hold the entire capacity of the tank may be required around petroleum storage tanks.[125] Port districts may impose additional permit requirements in the interest of safety. For example, Port Everglades requires a cutting and welding permit from the Port Authority prior to using torches within the Port's jurisdiction. Liability insurance is a prerequisite to obtaining a permit.[126]

Strict fire regulations may be imposed within the Port's jurisdiction. Port Everglades maintains its own fire department trained in combatting petroleum fires, supported by mutual aid contracts with the surrounding municipalities.[127] Additionally, all tugs operating out of Port Everglades must have foam and dispersal capacity on board.

Potential oil spills can be planned for. Along with the safety measures previously mentioned, ports may assess the cost of cleanup plus a penalty to those responsible for the spill.[128] Port Everglades has established a spillage committee and each member contributes to a spillage fund.[129]

Development of onshore facilities within port districts and port authorities may also be aided by the bonding powers of the port, the exemption from local taxation of port facilities, and any taxing power conferred on the port by general or special tax.[130]

7. Historic Preservation Districts

Historic preservation districts may be created within the Department of State,[131] or may be established by local governments.[132] These districts may help protect certain historic areas from the impact of onshore development activity. For example, a waterfront historic preservation district may prevent a pipeline landfall in that area. The district may be able to acquire property, thus giving the local government further protection.

8. Area of Critical State Concern Designation

Up to five percent of the land in the state may be designated as areas of critical state concern.[133] Area may be designated if the area contains an impact on environmental, historical, natural, or archaeological resources of regional or statewide importance.[134] Local governments can recommend study areas through their regional planning council or themselves if there is no planning council.[135] Once an area is designated, detailed development regulations must be developed in one year.[136] As the development regulations will primarily be designed to protect the area, development of onshore facilities will be difficult. The Florida Supreme Court has held that the provision in Chapter 380 allowing the governor and cabinet to designate areas of critical state concern is unconstitutional.[137] The legislature is expected to re-examine the process next session.

9. Interlocal Agreements

Because of the multiplicity of governmental units, a decision by one local government to either encourage or discourage construction of onshore facilities will impact on other local governments and may conflict with the decisions made by neighboring jurisdictions. For example, a port district may issue revenue bonds to construct a petroleum storage terminal within the port district while the municipality or county encompassing or adjoining the port may be adamantly opposed to any onshore development activity. The Local Government Comprehensive Planning Act process is designed to identify policy conflicts between different government units.[138]

Local governmental units may jointly exercise power through a contract called an interlocal agreement[139] or formation of a Council of Local Public Officials.[140] Through either process, local governments particularly affected by offshore development can control the onshore impacts on an area-wide basis.

10. Secondary Impacts

Any offshore oil and gas development and attendant onshore facilities will have many secondary impacts on the local governments in the area. This secondary impact would include traffic, housing, schools, parks, police and fire protection, and community facilities. However, these impacts are not unique to offshore oil and gas development. It is beyond the scope of this article to discuss these secondary effects.[141]

FOOTNOTES

[1]42 U.S.C.: Union Oil Co. of California v. Morton 484 F.7d.

[2]Pub. L. No. 95-372, September 18, 1978.

[3]Id. §208, new §18.

[4]Id. §208, new §25.

[5]Id. §208, new §19.

[6]Id.

[7]Id. §208, new §25.

[8]Pub. L. 92-583, 86 Stat. 1280, §307C (1972), 749 (1975).

[9]Fla. Stat. §163.3177(6)(g) (1977).

[10]To three miles from mean low water mark on the Atlantic Coast and to three marine leagues on the Gulf coast.

[11]Fla. Stat. §253.61(1)(a) (1977).

[12]Fla. Stat. §253.61(1)(b) (1977).

[13]Fla. Stat. §253.61(1)(c) (1977).

[14]A. Pearman and J. Stafford, Florida Coastal Policy Study: Impact of Offshore Oil Development. [hereinafter cited as Pearman & Stafford].

[15]Id. at 95.

[16]Id. at 60.

[17]About 15 feet. Conversation with Ray Siuta, Bureau of Coastal Zone Planning.

[18]Pearman & Stafford, supra note 14, at 62.

[19]Id. at 62 and 93.

[20]New England River Basins Commission, Factbook, Onshore Facilities Related to Offshore Oil and Gas Development, 5.13 (1976). [Hereinafter cited as Factbook].

[21]Pearman & Stafford, supra note 14, at 63.

[22]Id.

[23]Id. at 66.

[24]Id.

[25]Id. at 68.

[26]Id.

[27]Id.

[28]Id. at 68-69.

[29]Id. at 69.

[30]Id. at 72.

[31]Id.

[32]Id. at 56-58.

[33]Fla. Stat. §377.24 (1977).

[34]Fla. Stat. §403.182 (1977).

[35]Pearman & Stafford, supra note 14, at 134.

[36]Id. at 134-135.

[37]Id. at 134.

[38]Id. at 136.

[39]Fla. Stat. §361.06 (1977).

[40]Fla. Admin. Code, Ch. 17-4.04(1)(q).

[41]Fla. Admin. Code, Ch. 17-4.02(14).

[42]Fla. Admin. Code, Ch. 17-4.04(10)(9).

[43]Fla. Admin. Code, Ch. 17-4.02(15).

[44]But not exceeding 10,000 cubic yards of dredging.

[45]Fla. Admin. Code, Ch. 17-4.29(3)(f).

[46]Factbook, supra note 20.

[47]Fla. Stat. §361.06 (1977).

[48]Id.

[49]Fla. Admin. Code, Ch. 17-4.

[50]Fla. Admin. Code, Ch. 17-4.02(17).

[51]Fla. Admin. Code, Ch. 17-4.02(19).

[52]Fla. Stat. §161.052(1) and (5) (1977).

[53]Fla. Stat. §161.35(1) (1977). See, Part One, III, text accompanying notes 67-69, supra.

[54]Fla. Stat. §375.065 (1977).

[55]Fla. Stat. §266 (1977).

[56]See, Part One, I, supra.

[57]Fla. Stat. §125.42 (1977).

[58]Fla. Stat. §361.06 (1977).

[59]See, text accompanying notes 67-69, infra.

[60]Fla. Stat. §163, Pt. 2 (1977).

[61]Fla. Stat. §163.3161(5) (1977).

[62]Fla. Stat. §163.3194(2)(b) (1977).

[63]Fla. Stat. §163.3194(1) (1977).

[64]The types of land development regulations and development orders affected are discussed in the text accompanying notes 67-80, infra.

[65]Fla. Stat. §163.3177(4), §163.3184, (6) (1977).

[66]16 U.S.C. §§1451-1464, §1455.

[67]Fla. Stat. §163.205 (1977) enables municipalities and counties to adopt zoning ordinances.

[68]As Key Colony Beach does, Ordinance No. 66 as amended (1976); Center for Governmental Responsibility, Analysis of Laws Relating to Florida Coastal Zone Management 375 (1976). [Hereinafter cited as Analysis].

[69]This approach is permitted by Fla. Stat. §163.205(1)(h) (1977).

[70]Fla. Stat. §163.260-.299 (1977) enables counties and municipalities to adopt subdivision regulations.

[71]Analysis, supra note 68, at 72.

[72]Id. at 473.

[73]Id. at 473.

[74]Fla. Stat., Part I, establishes minimum platting requirements. Chapter 177.011 allows additional regulations by local government.

[75]Broward County Ordinance 77-43 §302 (1977).

[76]Id. §502.

[77]Fla. Stat. §163.295 enables counties and municipalities to adopt and enforce building, plumbing, electrical, gas, fire, safety and sanitary codes.

[78]See, Section IIA.

[79]Analysis, supra note 68, at 376.

[80]Id.

[81]Fla. Stat. §380 (1977).

[82]Fla. Admin. Code, Ch. 22F-2.08.

[83]Fla. Admin. Code, Ch. 22F-2.05.

[84]See text accompanying notes 25-29, supra.

[85]General Development Corp. v. Division of State Planning, 353 So.2d 1199 (1st DCA Fla. 1977).

[86]Fla. Stat. §380.06(6) (1977) and Fla. Admin. Code, Ch. 22F-1.20(3).

[87]Fla. Admin. Code, Ch. 22F-1.20(5).

[88]Fla. Admin. Code, Ch. 22F-1.20(5)(b).

[89]Fla. Stat. §380.06(8) (1977).

[90]Fla. Stat. §380.06(7) (1977).

[91]Fla. Admin. Code, Ch. 22F-1.23(1) and (3)(b), (c), (d).

[92]Fla. Stat. §380.07(5) (1977).

[93]Fla. Const. Art. VII §2.

[94]Fla. Const. Art. VII §4.

[95]Fla. Stat. §193.011(1) and (2) (1977).

[96]Spooner v. Askew, 345 So.2d 1056 (Fla. 1976).

[97]Fla. Const. Art. VII §3.

[98]Id.

[99]Fla. Stat. §196.001(2) (1977).

[100]Fla. Stat. §196.199(2)(a) (1977).

[101]Fla. Stat. §196.012(5) (1977).

[102]Dade County v. Pan American World Airways, Inc., 275 So2d. 505 (Fla. 1973), Walden v. Hertz, 320 So.2d 385 (Fla. 1975), aff'd. 299 So.2d 121 (2d D.C.A. Fla. 1974).

[103]16 U.S.C. §1455(c)(8).

[104]For example, Fort Lauderdale taxed at a rate of 10% for the first $100 of the bill and 3% for the amount of the bill over $100. Ordinance No. C-72-80 (1972) amended Ord. No. C-77-139 (1977).

[105]Fla. Const. Art. VII §10.

[106]Fla. Const. Art. VII §10(c)(1).

[107]Fla. Const. Art. VII §10(c)(2).

[108]Fla. Const. Art. VII §10(c).

[109]Id.

[110]Walden v. Hertz, 320 So.2d 385 (Fla. 1975), aff'd. 299 So.2d 121 (2d D.C.A. Fla. 1974).

[111] Manatee County Code §16 (1974).

[112] E.g., Analysis, supra note 68, at 559.

[113] Fla. Stat. §127 (1977).

[114] Lee County Code, Ch. 12 (1973).

[115] Nassau County Code, Ch. 19, Art. III (1970); Center for Governmental Responsibility, Compilation of Laws Relating to Florida Coastal Zone Management 300 (1976).

[116] Analysis, supra note 68, at 376.

[117] Fla. Stat. §403.182(1) (1977).

[118] Fla. Stat. §403.182(1)(b) (1977).

[119] Fla. Stat. §403.182(2) (1977).

[120] Analysis, supra note 68, at 492.

[121] Id. at 494.

[122] Fla. Stat. §315.15 (1977).

[123] Analysis, supra note 68, at 494.

[124] Id. at 495.

[125] Port Everglades, Security Regulations §3 (1975).

[126] Interview with Fire Chief Maner, June 15, 1978.

[127] Id.

[128] Port Canaveral, Tariff No. 3, Item 240 (1968).

[129] Interview with Martin A. Mets, Assistant to the Director of Operation, Port Everglades, June 15, 1978.

[130] Fla. Stat. §§315.01-315.16 (1977).

[131] Fla. Stat. §266 (1977).

[132] See, e.g., Pensacola, Charter, §247.

[133] Fla. Stat. §380.05(17) (1977).

[134] Fla. Stat. §380.05(2)(a) (1977).

[135] Fla. Stat. §380.05(3) (1977).

[136] Fla. Stat. §380.05(12) (1977).

[137]Askew v. Cross Keys Waterways, Fla. Law Weekly, 11/24/78, p. 546. The court upheld a challenge to the designation of virtually all of the Florida Keys as an area of critical state concern. The court held that Section 380.05(2)(1) and (b), Fla. Stat., which attempted to provide standards for the Administrative Commission in designating areas as being of critical state concern were inadequate to support this delegation of legislative power and therefore was violative of Article II, Section 3 of the Florida Constitution.

[138]Fla. Stat. §163, Pt. 2 (1977). See text accompanying notes 60-66, supra.

[139]Fla. Stat. §163.01(5) (1977).

[140]Fla. Stat. §163.02(1) (1977).

[141]Pearman & Stafford, supra note 14.

II. DEEPWATER PORTS AND SHIPPING

Because of the continued United States' dependence on foreign sources of oil, the shipment of oil through the Florida straits and the possibility of a deepwater port adjacent to Florida presents a real and growing threat to local communities in the state. Unfortunately, while the impacts on a local government could be great, methods for exerting local control over these activities are not. All the primary activities occur offshore, and regulation of these has, for the most part, been preempted by federal and state law. However, the secondary growth impacts onshore following construction of a deepwater port and the potential environmental and economic damage which would result from a large scale oil spill are matters which could completely alter the characteristics of a community. A brief description of these activities will serve to illustrate the potential problems.

A. Deepwater Ports - Facilities and Impacts

Deepwater ports require water approximately 100 feet in depth.[1] The 100 foot contour off the Florida coast in only close to shore from Palm Beach to Key West (in some places within the state's three miles jurisdiction) and in the Pensacola-Panama City (13 to 24 miles off shore).[2] This does not preclude development in other areas, as proposals have been made to construct a deepwater port 30 miles off the Gulf coast of Manatee County in 100 feet of water and another 12 miles off the Atlantic coast of Fort Pierce.[3]

One of four basic types of facilities are likely. Single buoy mooring, or monobuoy, consists of a buoy anchored by chains to submerged piles.[4] This system allows the ship to drift, thus aligning itself with the wind,

waves, and current. A freely rotating floating hose carries oil from the middle of the ship to the buoy. Once oil reaches the buoy, the oil passes by submarine hoses to a submerged pipeline and then to shore.[5]

A second type of facility, called conventional buoy mooring, locks the tanker in a fixed heading by mooring it to several buoys.[6] Oil is pumped from the tanker directly to submarine lines and then to shore. These lines remain submerged when not in use and are marked by hose marker buoys, permitting their recovery when needed.[7]

The third alternative is called a single pile mooring. While similar to the monobuoy in that the tanker is free to drift, the system replaces the monobuoy and submarine hoses with a tower attached to the sea bottom.[8] A floating boom is used rather than floating hoses to unload the tanker.[9]

A fourth possibility is the construction of an artifical island with a sea island berth. The island could also contain a tank farm,[10] and act as a transshipment point. As this is the most expensive alternative, its construction off the Florida coast is least likely.[11]

The descriptions of the types of unloading facilities have assumed oil would be piped onshore for storage. However, it is possible that the storage facilities could be located offshore. Should this be the case, oil could eventually reach shore either through pipelines, barges, or smaller ships.

Specific onshore impacts will include support facilities, pipelines, storage facilities, refineries, and petrochemical industries.[12] As with offshore oil and gas development, the types and magnitude of onshore impacts are dependent on the amount of oil to reach shore. However, the amount of oil to reach shore is potentially much greater as a result of a deepwater port. For example, in a scenario developed to study onshore impacts of

of offshore oil and gas development for Manatee County a total of 77 lease tracts were aggregated, projecting a peak daily production of 136,000 barrels of oil per day.[13] In contrast, the proposed Seadock deepwater port off the Texas coast would import four millions barrels per day.[14] So while the types of onshore facilities would be similar, the actual onshore impacts of a deepwater port can be much more severe.

B. Shipping - Volume and Impacts

The primary motivation for the construction of deepwater ports is to utilize supertankers, which because of economies of scale, transport oil at a much lower per barrel cost than conventional tankers. Supertankers, or very large crude carriers (VLCC's) can carry between 100,000 and 500,000 deadweight tons (dwt) of crude oil. Currently, conventional tankers used to ship oil to the United States range from 30,000 dwt to 50,000 dwt.[15] As is readily apparent, the potential danger from an oil spill is much greater when VLCC's are used.

While supertankers would be attracted to a Florida deepwater port, they pose a threat to Florida even absent a deepwater port off its coast. Two deepwater ports have been proposed in the Gulf of Mexico - Louisiana Offshore Oil Project, Inc. (LOOP) off the coast of Louisiana and Seadock, Inc. off the coast of Texas. LOOP projects 675 tanker visits per year, with between 55 and 200 of the loaded passages through the Florida Straits.[16] It is likely that a majority of the ballast laden tankers will exit by way of the Florida Straits, thus adding further congestion to this narrow passage.[17] The coastal impact area from these trips has been defined as the area from Fort Pierce to the Dry Tortugas on the Atlantic and the Dry Tortugas to Everglades City on the Gulf.[18] Using assumed tanker routes, a spill is possible anywhere along the coast from

from the Dry Tortugas to Miami.[19] The environmental and economic effects of a spill in this area can be devastating, since the area contains many small islands, beaches, bays, coral reefs, seagrass beds, estuaries, extensive coastal marshes, and many tourist facilities and fishing areas.

The danger to the state posed by the size of the ships and the number of passages through the narrow Florida Straits is further compounded by the 20 year life cycle of tankers. Since nearly the entire present generation of supertankers was launched between 1966 and 1975, the dangers of structural failure will increase dramatically in the 1980's.[20]

C. Local Control of Deepwater Ports

The types of onshore facilities associated with a deepwater port will be similar to the facilities accompanying offshore oil and gas development, although the volume and thus actual onshore impacts associated with a deepwater port could be much greater. Since the types of onshore facilities are so similar, the methods of local control which were discussed in the offshore oil and development section apply equally here. Therefore, this discussion will only be concerned with possible methods of local control of the offshore facilities described in Section A.

The construction of any facilities off the coast of the United States and beyond the territorial sea[21] will be governed by the Deepwater Ports Act of 1974.[22] The territorial sea of the United States encompasses the area within three miles of the coastline, so presumably any deepwater port constructed beyond this three mile limit, which is under state ownership by virtue of the Submerged Lands Act of 1953,[23] is subject to a combination of state and federal controls. However, the effect of Florida's three marine league boundary in the Gulf of Mexico and the definition of territorial sea is unclear. While the state may have a certain amount

of input through either adjacent coastal state status[24] or through the consistency provision of the Coastal Zone Management Act,[25] a local government has no direct input under the Deepwater Ports Act and may be limited to commenting on the Environmental Impact Statement which must be prepared.

If a deepwater port is constructed within the state boundary (three miles on the Atlantic, three marine leagues on the Gulf), a combination of state and federal control will be exercised. The state would require registration of the terminal facility under the Pollutant Spill Prevention and Control Act.[26] This Act imposes strict liability for any damage incurred by the state or private persons as a result of an oil spill in Florida's territorial waters, with a limit of $14 million or $100 per gross registered ton of the vessel.[27] If the discharge resulted from gross negligence or willful misconduct, the liability is unlimited.[28] This provision corresponds to the limits of liability in the Federal Water Quality Improvement Act of 1970.[29] This no-fault liability covers both the terminal and any ship destined for or leaving the terminal. The Supreme Court has held that the Federal Water Quality Improvement Act of 1970[30] as amended by the Federal Water Pollution Control Act Amendments of 1972,[31] which requires reimbursement to the federal government, does not preempt the field and the Florida Act is in harmony with the federal acts.[32] The Florida Act allows counties and municipalities to exercise their police powers as long as their exercise is not in direct conflict with the Florida Act, or rules, regulations, or orders of the Department of Natural Resources under the authority of Chapter 376.[33] However, the counties and municipalities can not adopt similar programs of licensing and fees as are adopted by the state Act.[34] The key to exercising any power is the local government's jurisdiction over its offshore area. As mentioned in the Offshore Oil and Gas Development

portion of this paper, county or municipal jurisdiction over the site of the port may allow the local government to adopt stricter air and water pollution control standards than the state standards. These stricter standards would be enforced by the state when permitting the deepwater port.[35]

One additional method of local control may be available to counties. Where the county jurisdiction extends to the state boundary off-shore, the DRI process may apply to a deepwater port located within the county limits. The proposed construction of any water port is presumed to be a DRI.[36] It is presently unclear whether the DRI process could be applied to offshore areas, but if applicable, deepwater ports off the southeast Atlantic coast may fall within local jurisdiction.

D. Local Control of Shipping

There are three main areas of regulation to control supertankers. These are safety requirements which regulate or prohibit passage of supertankers within a local jurisdiction; safety requirements in construction, equipment, and design of supertankers; and liability for oil spills. Opportunities for local control of these areas is minimal.

Neither the state nor any local government would have jurisdiction over a supertanker outside the territorial waters of the state. Once a tanker came within the boundaries of the state, local influence would still be limited by the extent of local jurisdiction. Unless a municipality's jurisdiction extended beyond the mean high tide line, no local control is possible. Counties whose jurisdiction extends to the state boundary can at least argue a jurisdictional basis for regulation. Even assuming a supertanker would sail through a local jurisdiction, another serious barrier to local control would be the doctrine of preemption, both on a federal and

state level. The Supreme Court has held that the Ports and Waterways Safety Act of 1972[37] authorizes the federal government "to establish vessel size and speed limitations"[38] and. . ."by permitting the state to impose higher equipment or safety standards 'for structures only', impliedly forbids higher state standards for vessels."[39] This holding invalidated a Washington state law excluding from Puget Sound any tanker in excess of 125,000 dwt. The court further supported this holding by citing a House Report on the bill which discussed amending the bill to make "clear that State regulation of vessels is not contemplated."[40] In the same case, the Supreme Court also invalidated a Washington state law requiring certain design standard safety features, holding that Title II of the Ports and Waterways Safety Act of 1972 "intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements."[41] Thus it would seem there is little potential for local or even state control over the first two areas of regulation.

There may be an opportunity for some local input in the area of liability for oil spills. However, it should be noted that unlike the first two categories of regulation which were designed to prevent oil spills, this area involves after-the-fact assessment of costs. The Federal Water Quality Improvement Act of 1970[42] prohibits the discharge "of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."[43] This Act establishes liability for the costs incurred by the federal government in cleaning up the pollution. However, the Act still holds the owner or operator of a vessel liable "under any provision of law for damages to any publicly owned or privately owned property resulting from the discharge. . .or. . .removal of any such oil".[44]

The Act specifically does not preempt any requirement or liability for discharge of oil into state waters imposed by any state or its political subdivisions[45] and allows any "state or local law not in conflict with this section".[46]

Florida enacted the Florida Oil Spill Prevention and Pollution Control Act[47] which allows the state to recover its costs in cleaning up oil spills and provides a remedy for public and private property owners against the party responsible for the spill.[48] The Florida Act allows any county or municipality to adopt similar liability provisions as long as it does not directly conflict with the state law and as long as it does not adopt a similar program of licensing or fees as established by the state Act.[49]

The Florida Act only imposes strict liability for damages incurred "as a result of an oil spill in the state's territorial waters from any waterfront facility. . .and from any ship destined for or leaving such facility".[50] Thus, the Florida Act does not cover supertankers passing by the state and not using any terminal facility. Therefore, it would seem that a local government may enact a law allowing it to recover its costs in cleaning up the oil spill and providing for a strict liability remedy for public and private property owners against the party responsible for the bill.

Some potential problems with this approach should be addressed. First, the federal Act allows states to impose liability for the discharge of oil into any waters within such state.[51] It is not clear whether this means the actual discharge must occur in the state's waters or if the discharge must merely reach state waters. Estimated shipping routes would bring crude carriers in the vicinity of 25 miles off the Florida coast.[52] Oil would thus not be discharged directly into state waters, but would likely drift into the state's jurisdiction.

Another potential problem is that, if the discharge must occur in state waters for state jurisdiction to apply, presumably the discharge would have to occur within the jurisdiction of whatever unit of local government sought to impose liability. A third problem is that the Federal Limited Liability Act[53] extends to damages occurring on shore caused by oil spills. The Act limits liability of the vessel's owner to the "value of such vessels and freight pending".[54] The court in the Askew case specifically withheld judgment on whether that limitation applies or whether the limits of liability specified in the federal Act applies.[55] It is clear from that case that unlimited liability has been preempted by the federal Act.[56] Therefore, any local act may be restricted by the Limited Liability Act.

FOOTNOTES

[1]A. Pearman and J. Stafford, Florida Coastal Policy Study: Impact of Offshore Oil Development 217 [Hereinafter cited as Pearman & Stafford].

[2]Id.

[3]Id. at 219-220.

[4]Id. at 195.

[5]Id.

[6]Id.

[7]Id. at 196.

[8]Id.

[9]Id.

[10]Senate Committee on Interior and Insular Affairs, Deepwater Port Policy Issues 58, 93d Cong., 2d Sess., Ser. No. 93-42 (1974).

[11]The description of the types of unloading facilities have assumed oil would be piped onshore for storage. However, it is possible that the storage facilities could be located offshore. Should this be the case, oil could eventually reach shore either through pipelines, barges, or smaller ships.

[12]For specific discussion of these potential impacts and available means of local control, see Section I, Offshore Oil and Gas Development.

[13]Pearman and Stafford, supra note 1, at 83-84.

[14]U.S. Department of Commerce, Deepwater Ports Project Office, Analysis of the Risk of Damage to the States of Florida and Texas from the Seadock, Inc. Proposed Deepwater Port, 12 (March 25, 1976). [hereinafter cited as Seadock Analysis].

[15]Pearman and Stafford, supra note 1, at 194.

[16]U.S. Department of Commerce, Deepwater Ports Project Office, Analysis of the Risk of Damage to the States of Florida and Louisiana from the LOOP, Inc. Proposed Deepwater Port, 9, 24-27 (March 25, 1978). [hereinafter cited as LOOP Analysis].

[17]Seadock Analysis at C-1.

[18]LOOP Analysis at 9, 24-27

[19]Id.

[20]Carter, Amoco Cody Incident Points Up the Elusive Goal of Tanker Safety, 200 Science 514 (1978).

[21]As defined in the Convention on the Territorial Sea and the Contiguous Zone, Geneva, April 29, 1958.

[22]33 U.S.C. §1501 et seq. (1974).

[23]43 U.S.C. §1301-1315 (1953).

[24]33 U.S.C. §1502(1) and 33 U.S.C. §1508 (1974).

[25]See notes 12 and 13, supra.

[26]Fla. Stat. §376.06(1) (1977).

[27]Fla. Stat. §376.12(1) (1977).

[28]Id.

[29]33 U.S.C. §1161 et seq. §1161(f)(1).

[30]33 U.S.C. §1161 et seq.

[31]33 U.S.C. §§1251-1376.

[32]Askew v. Americal Waterways Operators, 411 U.S. 325 (1973).

[33]Fla. Stat. §376.19 (1977).

[34]Id.

[35]Fla. Stat. §403.182(6) (1977).

[36]Fla. Admin. Code 22F-2.19.

[37]33 U.S.C. §1221 et seq. (1972).

[38]33 U.S.C. §1331(3)(iii).

[39]Ray v. Atlantic Richfield Company and Seatrain Lines, Inc., 435 U.S. 151, 174 (1978).

[40]Id. at 174.

[41]Id. at 163.

[42]33 U.S.C. §1161 et seq.

[43]33 U.S.C. §1161(e)(1).

[44]33 U.S.C. §1161(o)(1).

[45]33 U.S.C. §1161(o)(2).

[46]33 U.S.C. §1161(o)(3).

[47]Fla. Stat. §376.011 et seq. (1977).

[48]The Supreme Court has held that these provisions of the Florida act do not conflict with the federal act, so there is no preemption. Askew v. American Waterways Operators, 411 U.S. 325 (1973).

[49]Fla. Stat. §376.19 (1977).

[50]Askew v. American Waterways Operators, 411 U.S. 325, 327 (1973).

[51]33 U.S.C. §1161(o)(2).

[52]Stipulation of Settlement and Voluntary Dismissal of Askew v. Coleman, Item 9, letter from Attorney General Shevin to Secretary of Transportation Coleman, December 9, 1976.

[53]46 U.S.C. §§181-189.

[54]Id. at §189.

[55]Amount can't exceed $100.00 per gross ton of such vessel, or $14,000,000, whichever is less. 33 U.S.C. §1161(f)(1). Askew v. American Waterways Operators, 411 U.S. 325, 332 (1973).

[56]Askew v. American Waterways Operators, 411 U.S. 325,327 (1973).

III. OFFSHORE POWER PLANTS

A. Introduction

Three major types of offshore electrical generating activity will be addressed - floating conventional power plants, floating nuclear power plants, and ocean thermal energy conversion (OTEC). Section B will describe the elements which would compromise each of these generating systems. Section C then analyzes the legal methodologies available for local governments to exercise control over those activities.

B. Activities

1. Floating Power Plants

As with oil and gas development, the basic activities associated with offshore power generating systems include offshore structures, undersea transmission cables, and onshore support and service facilities.

Floating Power Plant Structure

A floating power plant would generally be located atop a barge-like platform which would float inside a protective breakwater. The breakwater must be designed to withstand both hurricane force winds and storm surges, and collisions with ships. Different types of breakwater designs exist, including perforated concrete caissons and rubble mounds supported by concrete dolos. The entire structural system would occupy about 100 acres of sea bottom. To keep the cost of construction of the breakwater to a reasonable level, the maximum sea depth should be 70 feet.[1] It is estimated that the effect of the breakwater on current patterns should not be important beyond about one mile from shore. There should not be an observable effect on the shoreline if the plant is located more than two miles offshore.[2] Additionally, it has been estimated that there should be no detectable shoreline changes directly attributable

to the breakwater as long as the structure is located several breakwater widths from the shoreline, although the effects of accretion may be greater if the structure is located opposite an estuary mouth.[3] A major environmental concern with any floating power plant is thermal pollution. One of the major advantages to an offshore location is the availability of sea water for cooling. Most designs utilizing sea water call for a once-through cooling system. This results in a high discharge of heat into the ocean. Heat is considered a pollutant under the Federal Water Pollution Control Act.[4]

Undersea Transmission Cables

Electrical transmission lines from the floating power plant to shore could be either overhead or beneath the sea floor. In all likelihood, the cables will be buried undersea, since this method provides safety, reliability, and aesthetic advantages.[5] Undersea cable should be buried at least ten feet deep and would probably be continuous cables laid in trenches created by narrow jets.[6] Corridor width will vary, whether the lines are overhead or underground, depending on the number of cables and separation distance required. For example, a two unit nuclear power plant would require 15 cables with a corridor of between 600 and 1200 feet.[7] The width of alteration in a seagrass area or marshland area may exceed the construction area width by a factor of 5 or 6.[8]

Onshore Support and Service Facilities

During the construction phase, a shore support facility would be necessary both as a depot for construction materials and supplies and as a personnel transportation base. The facility would probably be comprised of offices, storage areas, parking lots, and a loading dock. In addition, a casting yard for the production of caissons, dolosse, and other cement shapes may be required.[9]

During the operational phase, three main facilities would be required. First, a shore support facility would be required for the transportation of operating and maintenance personnel and materials to the offshore power plant. This support facility would probably be in the same location as the construction support facility and would require about four acres of land.[10] Transmission facilities would be needed to carry the electricity from the landfall of the transmission lines to the switchyard. The transmission lines may be underground, overhead, or a combination of both.[11] If underground lines are used, the lines may be enclosed inside a pipe with oil under pressure acting as an insulator.[12] Should this method be used, two pumping stations will be required to circulate the oil through the system. These stations, one located near the landfall and the other at the switchyard, would occupy about 7500 sq. ft. and require about an acre of land.[13] A 100 foot right of way for burying the lines would require about 12 acres per mile.[14] In the alternative, overhead transmission lines require 350 foot right of way or 42 acres per mile.[15] The switchyard should require approximately ten acres of land.[16]

Fuel Requirements

A conventional power plant would be fueled by either coal or oil. Should coal be used, barges would most likely be used to deliver the coal to the power plant. Some type of storage arrangement would be necessary at the power generating facility, such as secure anchorages within the breakwater for barges. Additionally, more land may be required for the onshore support facility to ensure an adequate supply of coal. The

resultant ash would also have to be shipped ashore and disposed. Oil would probably be delivered to the floating power plant by tanker. This would necessitate an unloading facility and storage area inside the breakwater. Another alternative would be to pipe oil to the power plant from an onshore storage facility. This option would require land for oil storage, a pump station, and the laying of submerged cable from the storage area to the offshore site.[17]

A nuclear power plant requires the delivery of 30 metric tons of fresh nuclear fuel annually. In addition, 30 metric tons of spent nuclear fuel and several hundred 55 gallon sealed steel drums of solid radioactive wastes must be removed from the power plant yearly.[18] It is anticipated that these wastes would be shipped by barge to a shore facility or transfer point, where they would then be sent by truck or rail to a fuel processing plant or waste disposal facility.[19]

2. Ocean Thermal Energy Conversion (O.T.E.C.)

The theoretical principal behind Ocean Thermal Energy Conversion is that "warm seawater from the ocean's surface and the cold deep water below are pumped through a heat exchanger that employs a working fluid, such as ammonia, propane, or freon, in a classical closed cycle. The warm water vaporizes the working fluid which turns a turbine."[20] While the processing systems will be contained on a platform, the electricity generated by the turbine can either be transmitted to shore or used to manufacture an intermediate high energy product such as hydrogen, methanol or ammonia at the OTEC site.[21] This product would then be shipped to shore. Should the electricity be transmitted to shore, undersea transmission cables would run from the platform to an onshore switchyard and substation.[22]

In addition, a dock and warehouse base to service the plant would be constructed.

C. Legal Controls

1. Florida Electrical Power Plant Siting Act

Many of the activities which would comprise an offshore power system are governed by the Electrical Power Plant Siting Act,[23] which to a large extent, preempts local control. The Act provides for a one-stop site certification process, replacing most of the permits that would normally be required from the state or local governments. "Site" is defined to include offshore sites within the state's jurisdiction.[24] Thus any electric power plant constructed up to three miles beyond the mean low water mark into the Atlantic Ocean or up to three marine leagues into the Gulf of Mexico would be covered by the Act. Conversely, any power plant constructed beyond the state's jurisdiction would not be covered by the Act. "Electric Power Plant" is broadly defined to "include any steam or solar electrical generating facility using any process or fuel, including nuclear materials, and shall include associated facilities and those directly associated transmission lines required to connect the electrical power plant to an existing transmission network. . ."[25] The Act establishes the process to be followed in certifying a site and delineates the responsibilities of the state agencies and local government involved. The underlying rationale of the Act is that the decision to certify a site should only be made after the need for electricity is balanced against any adverse environmental impacts occasioned by the new power plant.[26] The Department of Environmental Regulation is the lead state agency and is responsible for evaluating the environmental impacts.[27] The Public Service Commission determines the need for the power to be supplied by the new power plant.[28]

Procedurally, the Act provides for the appointment of a hearing officer;[29] a determination by DER of the completeness of the application;[30] a land use hearing in the county of the proposed site, solely to determine if the proposed site is consistent with existing land use plans and zoning ordinances;[31] a certification hearing;[32] the submission of a recommended order by the hearing officer to the Board (the Governor and Cabinet);[33] and the issuance of a written order by the Board either approving the application, approving the application with modifications or conditions, or denying the application.[34]

There are two main stages at which local participation is invited - the land use hearing and the certification hearing. The sole issue addressed at the land use hearing is the consistency and compliance of the proposed site with the local land use plans and zoning ordinances. If the board finds that the site does conform, the Act prohibits the local government from thereafter changing the land use plan or the zoning.[35] If the board holds that the site does not conform, the applicant must apply to the local government for a change in the land use plan or the zoning.[36] Local governments may deny the application, but their decision is not final. The Act allows the applicant to appeal a denial by the local government to the board, and the board is empowered to grant a variance to the local land use plan or zoning ordinance.[37] Should the board not grant a variance, no further action is taken on the application until the proposed site conforms with the local land use plan or zoning ordinance.[38]

By filing notice of intent to be a party at least 15 days prior to the land use hearing, any county or municipality in whose jurisdiction the proposed plant is located can become a party to the certification proceedings.[39] This would provide the local government an opportunity

to participate in a review of the application on its merits.

The Electrical Power Plant Siting Act preempts state and local laws which conflict with the Act.[40] However, the act specifically allows local governments to charge fees and to require that construction be in compliance with local building codes, standards, and regulations.[41] These provisions provide a significant opportunity for local control over power plants.

2. Local Controls

While the Power Plant Siting Act preempts local control to a certain degree, there are two main categories of activities which are not addressed by the Act, and therefore are open to local control. First, if an offshore power plant is located beyond the state's offshore jurisdiction, the provisions of the Act do not apply. While the actual facility would not come under local control (since local jurisdiction cannot exceed the state's), the attendant offshore and onshore activities which would normally be covered by the Act would now be governed by the law of the jurisdiction within which the activity is located. The major activity which would be open to local control is the offshore and onshore transmission lines from the plant to the switchyard.

The second type of activities are those which would not be preempted by the Power Plant Siting Act even if the power plant is located within the state's jurisdiction. Included within this category are the onshore support and service facilities and the onshore activities associated with the various fuel alternatives.

Transmission Line Controls

Transmission lines from power plants located beyond the state's jurisdiction would be susceptible to the same types of controls as oil

and gas pipelines.[42] Specifically, state and possibly county dredge and fill and pollution control permits would be required for submerged pipelines.

Local Land Use Plans

Local governments can encourage or discourage the location of switchyards and onshore support and supply bases by providing or not providing suitable land for such activities in their comprehensive plans. For a more detailed discussion of the local Government Comprehensive Planning Act and its application, see Section II C, Part One.

Land Development Regulations

The major land development regulations available to local governments are zoning, subdivision regulations, platting regulations, and building and construction codes. While this section will identify some potential applications of each of these regulations, a more detailed description of each may be found in Offshore Oil and Gas Development Section.

The Power Plant Siting Act requires that the site be in conformance with local zoning ordinances. Theoretically, counties, whose jurisdiction extends to the state boundary offshore, and any municipality with extended jurisdiction, could enact zoning ordinances which would govern offshore power plants. However, this method of control is somewhat illusory, since the Power Plant Siting Act allows the Governor and Cabinet to grant a variance to local zoning ordinances.[43] This preemptive power does not extend to the onshore support and service facilities; thus these facilities are subject to local zoning controls.

Subdivision regulations, platting regulations, and building and construction codes would also apply to the onshore support and service facilities. Additionally, building and construction codes are specifically not preempted by the Power Plant Siting Act,[44] so these would also apply to any power plant on transmission lines constructed within a local jurisdiction.

Harbor and Port Controls

Another important method of local control is the regulation of ports. As mentioned in the activities section, the onshore support base would require a loading dock for equipment barges and ships. Of particular concern would be the shipment of fuel and return of fuel by-products. Specifically, should the power plant be fueled by coal, large amounts of coal would have to be barged out to the power plant and return shipment of ash would be received. If the power plant is nuclear, radioactive fuel must be shipped to the plant and used fuel and radioactive wastes would be unloaded at the facility. Local government, either under their police power or through port authorities may desire to either enforce special controls or prohibit these shipments altogether.

FOOTNOTES

[1]Office of Nuclear Reactor Regulation, United States Nuclear Regulatory Commission, Final Environmental Statement, Manufacturer of Floating Nuclear Vol. I (1976). [hereinafter cited as Offshore Power Systems].

[2]Id. at 6-79.

[3]Id. at 6-80.

[4]33 U.S.C. 1251 et seq., §1362(b).

[5]Offshore Power Systems, supra note 1, at 3-27.

[6]Id. at 5-8 and 3-27.

[7]Id. at 3-27.

[8]Id. at page 9-1.

[9]Id. at 3-24.

[10]Although more land may be required for coal storage. Id. at 3-24 and 6-1.

[11]Id. at 3-27.

[12]Id.

[13]Id.

[14]Id.

[15]Id.

[16]Id.

[17]For methods of local control of these activities, see Part II, Section I.B.3 supra.

[18]Offshore Power Systems, supra, note 1, at 6-84.

[19]Id.

[20]H. Knight, J. Nyhart, R. Stein, Ocean Thermal Energy Conversion, VII (1977).

[21]Id. at 3.

[22]Id. at 183.

[23]Fla. Stat. §403.501-.517 (1977).

[24]Fla. Stat. §403.503(5) (1977).

[25]Fla. Stat. §403.503(7) (1977).

[26]B. Johnson, A Model Approach to Decision-Making: The Power Plant Siting Act, 52 Fla. B. J. 334, 338 (1978).

[27]Fla. Stat. §403.504 and §403.507(2)(h) (1977).

[28]Fla. Stat. §403.507(1)(b) (1977).

[29]Fla. Stat. §403.5065(2) (1977).

[30]Fla. Stat. §403.5065(2) (1977).

[31]Fla. Stat. §403.508(1) and (2) (1977).

[32]Fla. Stat. §403.508(3) (1977).

[33]Id.

[34]Fla. Stat. §403.509(1) (1977).

[35]Fla. Stat. §403.508(2) (1977).

[36]Id.

[37]Id.

[38]Id.

[39]Fla. Stat. §403.508(4)(b)1 (1977).

[40]Fla. Stat. §403.510(1) (1977).

[41]Fla. Stat. §403.511(4) (1977).

[42]See Part Two, Section I.B.3, supra.

[43]Fla. Stat. §403.508(2) (1977).

[44]Fla. Stat. §403.511(4) (1977).

CONCLUSION

The Florida coastal zone management program is presently in a state of disarray. The legislature has enacted the Florida Coastal Zone Management Act of 1978,[1] which is a grant of authority to the Department of Environmental Regulation as the "lead agency" to compile a program based on existing statutes and rules.[2] It was the intent of the legislature not to amend existing statutes or provide any additional regulatory authority to any governmental agency.[3]

The Department of Environmental Regulation has been placed in a very difficult position. The application for federal approval under §306 of the Coastal Zone Management Act will contain program policies that only reference existing statutes and existing implementing administrative rules. DER will be forced to rely on the voluntary cooperation of other state agencies such as the Division of State Planning and the Department of Natural Resources, which have authority in areas relating to coastal zone management. This will prevent the formation of a unified coastal zone management plan administered by a single agency or council of representative agency members.

Alternatively, local governments are left to cope with potential onshore impacts of offshore energy activity. However, as the legislature perhaps recognized, there are many existing state laws which provide local governments an opportunity to prepare for onshore impacts. Local governments may also choose to participate in the coastal zone management program.[4]

Local governments should become aware of the potential problems and utilize existing authority to prepare themselves. However, since local governments have no control over the actual energy activity outside their jurisdiction, they will have to depend upon existing state and federal

authority to control that activity. While local governments can provide significant protection to Florida citizens, only a combination of federal, state and local powers can provide total protection.

FOOTNOTES

[1]Fla. Laws, Ch. 78-287 (1978).

[2]Id., Sec. 7. The DER is required to submit an application to NOAA as basis to continue to receive administrative funds under the CZMA of 1972.

[3]The 1978 Act will have the DER exercising its authority in relation to (1) permits for air discharges, water discharges, and dredge and fill activities; (2) permits for water treatment plans and projects; (3) electrical power plant site certifications; and (4) development of the state water plan.

The Department of Natural Resources will continue to exercise its broad authority relating to planning, management, regulatory and development activities to assist in coastal zone control. Specific DNR activities will include: (1) the establishment and issuance of variances to the coastal construction setback line; (2) the management of the aquatic preserve system; (3) the management of the wilderness system; (4) the lease and sale of state lands; (5) the development of a state land plan; (6) the development and acquisition of park and recreation areas; (7) beach renourishment projects; and (8) the management of mineral and living marine resources.

The Division of State Planning in the Department of Administration will continue to act as the lead state planning agency. It will hopefully cooperate in developing a unified coastal zone management policy by utilizing its planning and management authorities relating to: (1) the development of the regional impact process; (2) the A-95 review process; (3) the ten year site plan requirements; (4) the review of the state budget; (5) the state comprehensive plan; and (6) its authority under §308 CZMA Amendments of 1976 to administer the Coastal Energy Impact Program.

[4]The local governments may develop a coastal zone protection element pursuant to Florida Statute §163.3177. Financial and technical assistance will be made available to those local governments affected. Fla. Laws Ch. 78-287 (1978).