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PUBLIC INVOLVEMENT

DELAWARE'S COASTAL ZONE MANAGEMENT PROGRAM

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AUTHORITIES AND ORGANIZATION

September 1977

Delaware Coastal Management Program

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OFFICE OF MANAGEMENT, BUDGET, AND PLANNING
530 South duPont Highway
Dover, Delaware 19901

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Delaware Coastal Management Program

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PREFACE

This is the sixth in a series of working papers which will be issued to interested citizens and governmental officials so that they may actively and effectively participate in the development of Delaware's Coastal Management Program. The papers will contain the major components of the management program now being developed under the direction of the Office of Management, Budget and Planning. Working papers will be issued on the following subjects:

1. Program Overview and Public Review Guidelines
2. Coastal Zone Boundaries
3. Geographic Areas of Particular Concern
4. Program Goals and Objectives
5. Federal-State Interaction and the National Interest
6. Authorities and Organization to Implement Program
7. Permissible Uses

WORKING PAPER NUMBER 6

AUTHORITIES AND ORGANIZATION

A. Authorities

This working paper presents a narrative synopsis of the means which will be used to implement the program. It addresses program elements related to: (1) the means of exerting State controls; (2) authorities to regulate land and water uses, control development and resolve conflicts; (3) authorities for property acquisition; (4) applicability of air/water pollution control regulations; and (5) local regulations on uses of regional benefit. The purpose of this paper is to demonstrate that the Coastal Management Program policies will be enforced. This paper also identifies the laws and other authorities which are expressly a part of the management program so that it is clear to which authorities the federal consistency provisions will be applied.

Space does not allow detailed descriptions of the statutes, regulations and caselaw. The interested reader is, therefore, referred to "Delaware and Outer Continental Shelf Development: Roles and Systems at Various Levels of Government," prepared by the Delaware Office of Management, Budget and Planning.

The Coastal Management Program will rely for the most part on direct State controls provided by State statutes. These statutes were enacted by the Delaware General Assembly, which derives its lawmaking authority from Article II, Section 1 of the State Constitution. This Section provides that "(t)he legislative power of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives." Article II, Section 1 was interpreted in State vs. Fountain, 22 Delaware 520,

69 A. 926 (Ct. Gen. Sess. 1908) to mean that the whole lawmaking power of the State is committed to the General Assembly.

State legislation provides ample nearshore authority to ensure CMP policies are enforceable. The Coastal Zone Act, the Beach Preservation Act, the Wetlands Act, and the Underwater Lands Act protect specific coastal resources at or near the land/water interface. In addition, the Environmental Protection Act applies to both the nearshore and inland areas of the coastal zone, i.e., the entire State.

There are three bills which the General Assembly is currently considering. If enacted, these will also contribute to implementation of the coastal management program. These bills include a sedimentation and erosion control statute, a land use planning statute, and a natural areas preservation statute. Each were drafted, in part, as a result of Coastal Management Program efforts and in response to Coastal Management Program needs.

In addition to legislation which protects air and water resources, the Coastal Management Program will rely, to a lesser extent, on a number of statutory provisions, detailed below, pertaining to the management of: fish, shellfish and wildlife; forests; agricultural lands; public lands and parks; archaeological and geological resources; etc.

1. The Coastal Zone Act

The Coastal Zone Act authorizes the Office of Management, Budget and Planning to exercise direct State control over the "coastal zone," an area approximately two miles wide along the State's shoreline. The Act gives the Office of Management, Budget and Planning rule-making authority, but the agency has not exercised the authority to any significant extent.

New heavy industrial uses, including oil refineries, petrochemical complexes, basic steel manufacturing plants and paper mills, are absolutely prohibited in the two mile strip. Also prohibited are offshore "bulk product transfer facilities." These include port or dock facilities attached to the shore which are used for the transfer of bulk quantities of any substance, such as oil, from vessels to onshore facilities and vice versa. An Attorney General Opinion (Inf. 77-33) concludes that the Act would not prohibit a pipeline which transits the coastal zone. The statute also expressly exempts the Port of Wilmington and any "docking facility or pier for a single industrial or manufacturing facility" from the bulk product transfer prohibition.

Manufacturing uses are deemed less detrimental to the environment than heavy industrial uses. New manufacturing uses are allowed in the coastal strip by permit only. "Manufacturing" means transferring substances into new products. Manufacturing uses include garment factories, automobile assembly plants and jewelry and leather goods establishments.

Permit applications must include an environmental impact statement. The Director of the Office of Management, Budget and Planning's decision on the application must account for the proposed project's environmental impact; economic effect; aesthetic effect; number and type of supporting facilities required and the impact of such facilities; and the effect on neighboring land uses. Though it is impossible to pre-determine whether a given manufacturing use would be allowed by permit in a given area of the coastal strip, compliance with the Coastal Management Program policy requiring consideration of the aforementioned factors before issuing or

denying a permit is assured (Kreshtool vs. Delmarva Power and Light Company, Del. Super., 310 A. 2d 649).

The statute includes a method for resolving conflicts among competing interests in the event a developer, or other aggrieved party, feels the Act is being unfairly administered. The statute provides for appeals, first to the Coastal Zone Industrial Control Board and then to Superior Court.

The Coastal Zone Act does not authorize the acquisition of property because such authority is unnecessary, both for purposes of the Act and the Coastal Management Program.

2. The Beach Preservation Act

The Beach Preservation Act authorizes the Department of Natural Resources and Environmental Control to exercise direct State control over that portion of the shore of any body of water "which extends from the mean low watermark inland 1,000 feet, or to a roadway for automobiles, whichever is closer." Thus, the Act creates a regulatory buffer zone around all the State's tidal water.

The statute requires the Department of Natural Resources and Environmental Control to pass regulations to effectuate the purposes of the Act. The statute says "(t)he purposes of this Chapter are to enhance, preserve, and protect the public and private beaches of the State..." This broad directive, coupled with rule-making authority, gives the Department of Natural Resources and Environmental Control wide discretion.

Under the Act no substantial change in the existing characteristics of any beach may be made without prior written approval of the Department of Natural Resources and Environmental Control. The regulations require

such approval for the following activities on public beaches: (1) carrying away beach material; (2) changes which increase the potential for beach erosion; (3) operation of dune buggies, automobiles, or other machines; and (4) construction of any structure on the landward side of the primary dune (if such construction has a substantial effect on the dune, a permit is also required). Written approval is required for the following activities on private beaches: (1) construction of structures landward of the primary dune (a permit is required if the construction would have a substantial effect on the dune); (2) changes increasing the potential for beach erosion; and (3) conditions unreasonably dangerous to persons or property.

No construction is allowed on or seaward of the primary dune if the owner, public or private, has land on which to build behind the dune. When there is no alternative, a permit is required which will not be granted unless, inter alia, an adequate flood protection plan is presented. Permits are also required for the construction of groins, jetties, and bulkheads.

Factors considered in processing permits include: (1) the effect of the proposed project on beach erosion; (2) flooding and other potential damage to the subject property and to other properties; and (3) the feasibility of alternate protection from storm damage that may be available.

A method for resolving conflicts of interest is provided. Any person whose interest is substantially affected by any action of the Division of Soil and Water Conservation taken pursuant to the Act may appeal to the Secretary of the Department of Natural Resources and Environmental Control, who must then hold a public hearing prior to making a final ruling. Any person aggrieved by a final order of the Secretary may appeal to Superior Court.

The Department of Natural Resources and Environmental Control may acquire, through negotiation or condemnation, fee simple or lesser land interests whenever at least two-thirds of the owners of the property included in the project area along a private beach have agreed to allow DNREC to undertake any or all necessary works to enhance the beach and allow free public access, provided, however, that the agreeing property owners own at least two-thirds of the property included in the project area. Mandatory condemnation power for the purpose of beach enhancement and access is not deemed critical due to the effectiveness of regulatory control over private lands and the adequacy of existing points of public access.

3. The Wetlands Act

The Wetlands Act authorizes DNREC to exercise direct State control over all lands between the mean low water elevation and two feet above the local mean high water elevation upon which grows or may grow typical marsh plants listed in the Act.

The following activities are not regulated by the Wetlands Act or regulations issued pursuant thereto: (1) mosquito control activities authorized by DNREC under separate authority; (2) construction of directional aids to navigation, duck blinds, and foot bridges; (3) placement of boundary stakes; (4) building of wildlife nesting structures; (5) grazing of domestic animals; (6) haying; and (7) hunting, fishing and trapping.

Activities requiring a DNREC permit include dredging, draining, filling, bulkheading, excavation, drilling, and construction of any kind, including piers, jetties and boat ramps. Prior to issuing any wetlands

permit, DNREC must consider the proposed activity's environmental impact, economic impact, aesthetic effect, effect on neighboring land uses, and the number and type of public and private support facilities required, as well as the impact of such facilities.

Many of these activities are not allowed even by permit, absent certain specified conditions. For example, the regulations do not permit utilization of the wetlands for any activity unless water access or other use of water is a central purpose of the activity and there is no alternative on adjoining non-wetland property of the owner. Likewise, bulkheads are prohibited on wetlands unless they are no higher than the surface of the natural land. There are also several restrictions on dredging operations to ensure slope stabilization, maintenance of water quality, etc. Finally and most significantly, filling is not allowed except for the purpose of restoring or creating wetlands.

These strict prohibitions attempt to implement the express legislative and Coastal Management Program policy "to preserve and protect the productive public and private wetlands and to prevent their despoliation and destruction consistent with the historic right of private ownership of lands." The statute recognizes that preservation of wetlands may work at cross-purposes with private property rights and, accordingly, provides that if the Superior Court finds that an action pursuant to the Act constitutes a taking without just compensation, then DNREC shall have two years to acquire fee simple or any lesser interest in the wetlands in question by negotiation or condemnation. Thus, to the extent that the statute or regulations may not be enforceable due to constitutional problems, the

Coastal Management Program policies may be implemented with condemnation powers. It is important to note, however, that inherent in the CMP policy is flexibility to allow very minor development without exercising condemnation powers.

Aside from the final appeal right to the courts, a conflict resolution mechanism is provided in the way of a Wetlands Appeals Board which hears appeals from DNREC decisions. Any person "whose interest is substantially affected by any action" of DNREC has a right to appeal, first to the Appeals Board and then to court. DNREC itself may appeal an adverse decision from the Appeals Board and will do so in the event a CMP policy is otherwise frustrated.

4. The Underwaters Lands Act

The Underwaters Lands Act authorizes DNREC to exercise direct State control over State lands lying below mean high water. Most of the Act's provisions pertain to development of Delaware's submerged lands. The statute addresses problems related to: the right to drill for and remove minerals; royalties; liens; rentals; drilling record disclosures; bonds; cessation of production; and drilling and exploration operations.

DNREC regulations list five types of projects involving the use of public submerged lands which require approval: (1) the erection of any structure on such lands; (2) the dredging or filling of such lands; (3) the excavation of any channel, lagoon, turning basin, or ditch on public or private lands which will make connection with public submerged lands; (4) the filling of lands adjacent to public submerged lands; and (5) the laying of any pipeline, line for transmission of electricity, or telephone line in, on, over or under the beds of public submerged lands.

DNREC, with the Governor's approval, may lease public submerged lands in accordance with the Act. Avoidable pollution of the ocean and of the waters covering submerged lands, as well as avoidable contamination of the beaches and impairment with the enjoyment of bathing, boating, fishing, and navigation is prohibited. "Avoidable pollution" and "avoidable contamination" are defined to impose a high degree of care on the lessee. Upon completion of the lease, DNREC may require the lessee to restore any portion of works that is visible at extreme low tide to its original condition.

The importance of the Underwaters Lands Act to implementation of the CMP policies is that it creates a mechanism by which facilities important to the national, regional, State and local interest can be permitted in the coastal zone, provided specified environmental protections are in place. Oil and gas pipelines, offshore power plants, and transportation facilities are examples of uses which the Underwaters Lands Act can allow.

The Submerged Lands Act does not authorize the acquisition of property because such authority is unnecessary, both for purposes of the Act and the CMP.

5. The Environmental Protection Act

The Environmental Protection Act authorizes DNREC to exercise direct State control over specified activities related to air and water pollution which take place anywhere within the State. The statute satisfies federal program requirements established pursuant to the Federal Water Pollution Control Act (FWPCA) and the Clean Air Act (CAA). The FWPCA and CAA requirements are the minimum water and air pollution control requirements applicable to the CMP and are incorporated by reference.

Several sets of regulations adopted by DNREC augment the agency's authority. These include regulations governing: the control of water pollution (effluent standards); water quality standards for streams; solid waste disposal; the installation and operation of septic tanks; the control of air pollution; and implementation plans for attainment and maintenance of national ambient air quality standards.

The statute is very broad. A DNREC permit could be required for any activity which might cause or contribute to air or water pollution, ground or surface water withdrawal, solid waste collection or disposal, and construction or operation of pipeline systems or storage tank systems or water wells. Technically, breathing could require a permit under the Act.

The regulations narrow the scope of the statute. Only stationary sources of air pollution require permits, although ships in port are subject to the visible violation emissions regulations. Before stationary facilities which will emit air pollutants may be built, a construction permit must be obtained. The applicant applies simultaneously for the construction permit and operating permit, which is issued separately.

The most important consideration in DNREC's decision to grant a permit is the effect on ambient air. Delaware is divided into two "air regions." New Castle County is a part of the Philadelphia Metropolitan Interstate Air Quality Region. Kent and Sussex Counties comprise the Southern Delaware Intrastate Air Quality Region. DNREC regulations control emissions from individual pollutant sources with the objective of attaining and maintaining ambient air quality standards - permissible levels of contamination - for specified pollutants, including sulphur dioxide, carbon monoxide, petrochemical oxidants, hydrocarbons, nitrogen dioxide and hydrogen sulfide.

Delaware imposes more stringent requirements than provided by the federal Clean Air Act in the following respects: (1) primary ambient air quality standards are slightly higher for solid suspended particles; (2) visible emission standards are more stringent for new electric furnaces and catalytic cracking units; (3) sulphur dioxide emission standards are generally more stringent; (4) Delaware has hydrogen sulphide emission standards, the national program does not; (5) Delaware standards apply to most existing emission sources, the national program applies to existing sources only if these emit hazardous contaminants; and (6) Delaware sets a maximum concentration value for carbon monoxide emissions, the national program does not.

DNREC water regulations implement the National Pollutant Discharge Elimination System permit program. Under the program, individual discharge permits are issued with specified effluent limitations for activities which contribute to discharge of pollutants into surface waters. Even if a permit applicant can demonstrate that his/her discharge is within the permissible effluent limitation levels, no permit may be issued if the water quality of the receiving waters is degraded beyond levels established by separate regulations for each Delaware stream.

Different levels are set for different streams, but the levels of enough streams are sufficiently high to guarantee that stream water quality will accommodate the uses - including boating, bathing, drinking, etc. - deemed desirable in the CMP policy section.

The methods by which the federal and State water control standards are expressed do not lend the requirements to ready comparison, but generally the State standards are more stringent than federal standards.

Any person whose interest is substantially affected by any DNREC action taken pursuant to the Act may appeal to the Environmental Appeals Board. The Board's decision may be appealed to Superior Court. The Act does not provide for property acquisition authority because such authority is unnecessary, both for purposes of the statute and the CMP.

6. The Erosion and Sediment Control Act

This proposed statute authorizes DNREC to establish statewide minimum standards for the control of erosion and sedimentation which, for the most part, will eventually be implemented by local government, subject to State administrative review and enforcement. The statute complements the water quality provisions of the Environmental Protection Act. That Act protects water quality from point sources of water pollution, the Sediment and Erosion and Control Act imposes non-point source controls.

The Act gives DNREC six months from the date it becomes effective to develop and coordinate a comprehensive State erosion and sediment control program. This program will develop erosion control techniques for different uses under various circumstances (e.g., construction activities and agricultural practices on different soil types, slopes, proximity to water). Within one year from State adoption of the program, soil conservation districts (Delaware political subdivisions) must develop programs consistent with the State program. The State develops the district programs for local implementation if the districts are unable or unwilling to do so.

Once the local programs are in place, land disturbing activities, except home landscaping and agricultural and forestry practices on lands of less than six percent slope, require approved erosion control plans before such

activities can be initiated. The Act defines "land disturbing activity" as "any land change which may result in soil erosion...including...filling, clearing, grading, excavating and filling of land..."

The Act requires periodic inspections to ensure the plans are being followed and provides for injunctive relief to correct deficiencies. Normally these responsibilities will be carried out at the local level, but DNREC is required to take over the functions if local districts fail in this respect.

DNREC will administer the Act under a provision giving the agency interim authority to implement the statutory policy until local programs are adopted. The policy is to "extend and strengthen" erosion and sediment control programs "to conserve and protect land, water, air, and other resources of the State." DNREC's interim regulations will translate this broad mandate into specific operational standards and criteria.

Any person who suffers damage or is likely to suffer damage because of a violation or threatened violation of the statute may obtain judicial review. The Act provides no acquisition authority.

7. Land Use Planning Act

The proposed statute assures that local comprehensive plans do not unreasonably restrict or exclude land and water uses of regional benefit.

Article II, Section 25 of the Delaware Constitution empowers the General Assembly to enact laws under which municipalities and counties may adopt their own laws to regulate the nature and extent of land use within their respective jurisdictions. The Legislature exercised this authority in Title 22, Chapter 3 and Title 29, Chapters 26, 49 and 69 of the Delaware

Code. The eastern boundaries of Delaware's three counties are defined to extend to the Delaware Bay. Thus, the counties have considerable authority over what is permitted in the coastal zone. Although local zoning powers cannot permit facilities which would be excluded by the aforementioned State controls (e.g., an oil refinery near the beach), they might be used to exclude facilities which would be allowed by the State (e.g., a pipeline meeting the State environmental standards and permitting requirements). The Land Use Planning Act is a mechanism which assures that local comprehensive plans give consideration to needs of other than local concern.

Under the Act when a local unit of government proposes to amend a comprehensive plan it is required to notify OMBP. OMBP, in turn, must notify interested State, regional and federal agencies. These agencies may then submit comments pertaining to the economic, physical, fiscal and environmental impacts, as well as energy implications, of the proposed action.

OMBP transmits all such comments to the local decision-making agency. If the proposed action would significantly affect the interests of more than local concern, OMBP may ask the local agency to hold a hearing.

The local jurisdiction must consider all comments and provide a written rationale for its decision. The rationale must include a discussion of State comments and recommendations.

OMBP has the right to appeal the local decision to the Council on State Planning. The Council can reverse the decision only if it is unreasonable or fails to adequately consider State comments. Although the statute has not been reviewed judicially, Delaware courts have held that administrative agencies with discretionary powers cannot act arbitrarily or capriciously. (Kreshtool vs. Delmarva Power and Light Company, Del. Super., 310 A. 2d

649; Spear vs. Blackwell and Son, Incorporated, Del. Super., 221 A. 2d 52).

Local units of government have the right, under the Act, to comment on State agency actions impacting them, much in the same manner as described above.

8. Natural Areas Preservation System

The proposed statute authorizes DNREC to establish and maintain a registry of areas of unusual natural significance. It also provides a mechanism for State acquisition, management and preservation for such areas.

DNREC is responsible for: (1) formulating policies for the selection, acquisition, use, management, and protection of nature preserves; (2) encouraging dedication of private lands for natural preservation purposes; (3) surveying and recording unique natural areas within the State; (4) disseminating information pertaining to nature preserves within the State; (5) promoting restoration of natural areas; and (6) adopting regulations for the use and protection of natural areas.

Further, political subdivisions and other instrumentalities of the State, including schools and universities, are encouraged to dedicate suitable areas as nature preserves.

An area is dedicated as a nature preserve in the same manner as an interest in land is conveyed, i.e., by recordation with the County Recorder. Once land has been duly dedicated, it cannot be used for any purpose inconsistent with preservation unless; (1) a public hearing is held; (2) DNREC finds there exists an imperative and unavoidable public necessity for such use; (3) the Governor approves the use; and (4) the General Assembly, by legislative act, approves the use.

Although the Act does not attempt to preserve, in a regulatory manner, unique natural areas which are privately owned, it is an important device for acquiring such lands without infringing on private rights. It also enables the State to clothe short sighted decision-makers in a strait jacket of procedural knots, thereby making it difficult to undo the achievements of longer range and better conceived planning.

9. Other Authorities

a. Resource Conservation Measures:

Title 7 of the Delaware Code provides additional resource conservation measures which, along with all other laws referenced in the Legal Authorities and Organization Section, may be incorporated in the CMP. Part I protects and regulates activities affecting wildlife, game and fish. Part II does the same for shellfish, including oysters, crabs, clams and lobsters. Part III regulates actions affecting forests. Part IV establishes tax drainage ditches and encourages other agricultural and soil conservation measures. Part V authorizes DNREC to supervise and control public lands. Part VI appropriates State money to acquire public lands for park, recreation, and conservation purposes. It also protects and encourages the preservation of archaeological sites and objects of significance within the State. Finally, Title 7, Chapter 64 creates a Delaware Solid Waste Authority to plan, finance, and manage solid waste disposal facilities.

b. Navigation and Transportation Authority:

Title 23 of the Delaware Code establishes a Board of Pilot Commissioners which: grants licenses to persons to act as pilots in the Delaware Bay and River; decides differences which may arise between masters, owners

and pilots; and enforces remedies and collects money penalties for pilotage rule violations. The same title regulates potential obstructions to navigation (e.g., casting of ballast, dams, and anchorage), controls motorboat operations, describes salvage and other vessel property rules, regulates wharf lines and bulkheads, and provides additional restrictions on dredging activities.

Title 2 requires the State Department of Highways and Transportation to establish a State airways system and otherwise regulate State aeronautics. It also authorizes the Department to develop a State Comprehensive Plan for mass transportation. Title 17 requires the Department to build and maintain State roads. Title 26 gives the State control over new installation of pipes, conduits and wires above or beneath public roads.

Corporations organized for the transportation and storage of oil may take lands, easements and rights-of-way for locating, constructing, maintaining and operating its tanks, pumps, and pipes. They must, of course, meet all applicable environmental standards, discussed above, and restore portions of road surfaces disturbed by laying the pipe to their original condition. For pipelines beneath public roads, the corporations also need a franchise and a construction permit from the Utilities Section of the Department of Transportation and Highways.

c. Public Utility Regulation:

Title 26 authorizes the State Public Service Commission (PSC) to regulate public utilities with respect to utility rates, property rights, equipment and facilities. Among its other powers, PSC may require public utilities operating within the State to extend its facilities and services.

This authority will be exercised, if necessary, to ensure that energy demands can be satisfied.

B. Organizational Structure

Article III, Sections 1 and 17, provide, respectively, that "(t)he supreme executive powers of the State shall be vested in a Governor" and "(h)e (the Governor) shall take care that the laws be faithfully executed."

Aside from the Department of Justice (Attorney General's Office) and the local soil conservation districts, the agencies responsible for administering the CMP answer directly to the Governor. The Attorney General is a constitutional officer whose duty it is to represent the State and its departments in litigation and to advise the executive and other State officers and agencies when called on for legal advice. (In re Opinions of the Justices, 47 Del. 117, 88 A. 2d 128 (Sup. Ct. 1952)). Thus, the Attorney General has a constitutional duty to assist the Governor if and when enforcement of the law (CMP policies) depends on litigation.

Ultimate responsibility for CMP implementation obviously rests with the State Executive Branch of government. Within this branch, DNREC has the prominent role. It administers all but one of the environmental laws. It adopts, and has the authority to amend, regulations which carry the force of law. DNREC's current regulations conform with and guarantee enforcement of the CMP policies. The possibility of amending the regulations in a manner inconsistent with the CMP, along with other CMP organizational structure needs may give birth to an Executive Order.

This Executive Order would require: (1) all State agencies to enforce the CMP policies to the maximum extent possible; (2) all State agencies to

review the CMP when it is approved and notify the lead agency of any proposed change in regulations which has the potential for interfering with CMP policies; (3) DNREC to notify the lead agency of all proposed changes in regulations; (4) the lead agency to review proposed rule changes and, if the lead agency determines such changes have the potential for interfering with the enforcement of CMP policies, to consult with Office of Coastal Zone Management to determine whether the change (if it takes effect) will require an amendment to the CMP; (5) the lead agency to take whatever action is necessary and sufficient to amend the CMP and thereby maintain consistency between the programs and State authorities; and (6) the lead agency to submit, pursuant to the land use planning act, comments addressing CMP concerns to local land use decision-makers.

Another Executive Order would require the lead agency to monitor and evaluate the performance of the agencies with CMP management responsibilities. The same Order would also require the agencies to cooperate with the lead agency to achieve that end. It has not been determined what State agency will be the lead agency during program implementation.