



To: Kristen Grant, Maine Sea Grant

From: National Sea Grant Law Center<sup>1</sup>

Re: Submerged Lands Management and Coastal Development in Maine (NSGLC-20-04-09)<sup>2</sup>

Date: December 8, 2020, Revised January 15, 2021

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In September 2020, you submitted an advisory request on behalf of Friends of Frenchman Bay, a community association formed to advocate for the protection of Frenchman Bay. Friends of Frenchman Bay is pursuing the development of draft legislation, currently entitled “Maine Coastal Waters Mandatory Development and Conservation Act.” While the National Sea Grant Law Center is prohibited from engaging in advocacy work, we may provide background legal research to inform discussions. The advisory request contained four primary questions:

1. What is the intersectionality between the draft legislation and the jurisdiction of the Bureau of Parks and Lands and the Department of Marine Resources?
2. Does the Mandatory Shoreline Zoning Act provide a regulatory framework that could be considered as a model for the regulation of submerged lands?
3. How have other home rule states incentivized regional coordination?
4. Has submerged land zoning/SAMP been done in other states? Does the Saco River Corridor Commission or the Coastal and Lake Watershed Districts in Maine provide a regional framework that could be considered as a model for regional management of submerged lands?

The information below is intended as advisory research only and does not constitute legal representation of the Maine Sea Grant Program or its constituents. It represents our interpretations of the relevant laws and regulations.

## **I. Intersection between draft legislation and the jurisdiction of the Bureau of Parks and Lands and the Department of Marine Resources**

There are two provisions of the proposed Coastal Waters Conservation and Development Act (CWCDCA) that implicate the respective jurisdictions of the Bureau of Parks and Lands and the Department of Marine Resources. These two provisions, as found in the draft proposal for the legislation dated September 7, 2020, are:

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- Creating a Regional Commission that must review and approve all state-issued leasing, licensing, and permitting processes relevant to the Maine’s coastal waters; and
- Requiring all applications for coastal water development to undergo necessary reviews with approval as part of the pre-application phase, not during or after the process.

#### *Bureau of Parks and Lands*

The Bureau of Parks and Lands (Bureau) is a division of Maine’s Department of Agriculture, Conservation, and Forestry. The Bureau has authority over: 1) the Submerged Lands Leasing Program; 2) the sunken log salvage program; 3) overseeing boat access to and boating facilities along the coast; and 4) funding municipal harbor planning and public access improvements.

The Bureau is responsible for implementing Maine’s Submerged Lands Leasing Program (SLLP). The SLLP provides limited use leases and easements to structures, such as piers or aquaculture pens, situated on and over public submerged lands. A lease or easement from the Bureau is required for various kinds of structures located on public submerged lands. If enacted as written, the CWCDA would add an additional layer of review by a proposed Regional Commission to SLLP leases and easements. The CWCDA’s language suggests that it would give the Regional Commissions the authority to review and approve the leasing process, rather than individual leases. However, it is unclear as to whether the CWCDA’s language would extend the Commission’s authority to the review and approval of individual applications.

In addition to the administering SLLP, the Bureau issues authorizations to qualified companies and individuals to salvage sunken logs from publicly owned submerged lands. As participants in this program are merely applying for an authorization, rather than a permit,<sup>3</sup> it is unclear whether this program would fall within the scope of the proposed Regional Commission review. It is also unclear whether the sunken log salvage program would qualify as “coastal water development” for purposes of the CWCDA based on the available information.

#### *Department of Marine Resources*

The Department of Marine Resources (DMR) comprises four bureaus: the Bureau of Policy and Management; the Bureau of Public Health; the Bureau of Marine Patrol; and the Bureau of Marine Science.

The Bureau of Policy Management (BPM) is responsible for the licensing of aquaculture, commercial and recreational fishing, and the harvesting of lobster, crab, and other marine species found in Maine waters. Aquaculture and fishing activities may occur in either freshwater or marine waters. If enacted as written, the CWCDA would require a Regional Commission to review the processes for issuance of all fishing and aquaculture licenses issued by BPM.

The Bureau of Public Health (BPH) is responsible for municipal shellfish management and environmental permit review. BPH’s Environmental Permit Review Program coordinates and conducts environmental impact reviews for permits and federal consistency determinations for

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<sup>3</sup> *Sunken Log Salvage Application Process*, Sunken Log Salvage Program, Bureau of Public Lands <https://www.maine.gov/dacf/parks/docs/log-salvage-memo.pdf>.



projects in Maine’s coastal zone. The Program also handles environmental impact reviews for projects seeking leases of publicly owned submerged lands. BPH’s environmental permit reviews occur within broader permitting processes. BPH’s environmental permit reviews could be included within the purview of a Regional Commission’s review of permitting processes, depending on whether permit review would be considered part of the permitting process under the proposed legislation. Again, it is unclear from the draft CWCDAs text whether a Regional Commission’s review would be limited to systemic aspects of BPH’s environmental permit review processes, or extend to review of BPH’s decisions regarding individual permits or applications under consideration.

Separately, BPH oversees Maine’s Municipal Shellfish Management Program (MSMP). The MSMP provides municipalities in Maine with the authority to enact and enforce a shellfish conservation ordinance that regulates the harvesting, possession, and protection of shellfish in the waters under the municipalities’ respective jurisdictions, including their coastal waters. BPH is responsible for ensuring municipalities that take advantage of this program are managing their shellfish resources in a manner that is consistent with the state’s goal of balancing conservation and the use of these resources. However, the program does not involve BPH issuing any licenses or permits; instead, the agency provides oversight and technical expertise (e.g., Area Biologists and training for municipal enforcement) to the municipalities, which perform the actual decisionmaking. As such, this program could fall outside the proposed scope of Regional Commission review under the CWCDAs.

## **II. Mandatory Shoreline Zoning Act Regulatory Framework**

The Mandatory Shoreline Zoning Act (MSZ) requires municipalities to establish land use controls for activities within the MSZ boundaries. Generally, the purpose of the MSZ is to: maintain safe and healthy conditions; control water pollution; protect aquatic life, aquatic habitat, historic resources, fishing and maritime industries, and wetlands; control building sites; and respond to impacts of development in shoreland areas.<sup>4</sup>

It is important to note that Maine regulates submerged lands, coastal lands, and shorelands through different regulatory mechanisms. The Maine MSZ applies to all activities within 250 feet of ponds, rivers, freshwater, coastal wetlands, and tidal waters. The MSZ also applies to activities within 75 feet of streams.<sup>5</sup> The Maine Submerged Lands Act regulates all land seaward from the average low-water mark to the 3-mile state marine boundary.<sup>6</sup> Lands below some rivers and ponds may also be regulated by the Maine Submerged Lands Act. As noted above, the Bureau of Parks and Lands has authority to administer the Maine Submerged Lands Act.<sup>7</sup>

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<sup>4</sup> 06-096 ME. CODE REGS. Ch. 1000 (quotations omitted).

<sup>5</sup> ME. REV. STAT. tit. 38, § 435.

<sup>6</sup> ME. REV. STAT. tit. 12, § 1801(9).

<sup>7</sup> ME. REV. STAT. tit. 12, § 1802.

The federal Coastal Zone Management Act (CZMA) gives authority to states to develop coastal management plans.<sup>8</sup> Maine established a coastal management policy in accordance with the CZMA that applies to all coastal municipalities from the inland line of coastal town lines to the seaward 3-mile state marine boundary.<sup>9</sup> In some instances, the CZMA and MSZ regulatory authorities may overlap and a municipality may address MSZ and coastal management policy requirements in one planning program. However, when the MSZ was first implemented, the Maine Supreme Court determined that municipalities must implement MSZ ordinances even when there were already adopted comprehensive plans under other statutory authorities.<sup>10</sup>

To fulfill their responsibilities under the MSZ, municipalities or townships may adopt and enforce a shoreland zoning ordinance. If the municipality chooses to not adopt a shoreland zoning ordinance, then the state adopts a model ordinance for the locality.<sup>11</sup> The model ordinance provides minimum guidelines, and a municipality may enact stricter land use controls than the model ordinance.<sup>12</sup> A municipal ordinance may be completely different from the model ordinance as long as it is “equally or more effective at achieving the purposes of the [MSZ] Act.”<sup>13</sup> Approximately 60 out of 450 Maine municipalities have state-adopted ordinances. The Maine Department of Environmental Protection oversees the adoption and administration of MSZ ordinances and provides technical assistance to municipalities.

The MSZ regulates activities by dividing shoreline areas into seven zones: 1) Resource Protection District, 2) Limited Residential District, 3) Limited Commercial District, 4) General Development I District, 5) General Development II District, 6) Commercial Fisheries and Maritime Activities District, and 7) Stream Protection District.<sup>14</sup> For each zone, the model ordinance provides which activities are allowed with or without a permit.<sup>15</sup> All activities, even those not requiring a permit, must comply with the land use standards for each zone. Generally, municipalities use the model ordinance land use standards unless the standards are not compatible with the future desired amount of development. If not, then the municipality may adopt stricter activity use standards. The zones include the following activities:

- The Resource Protection District includes areas where development activities would adversely affect water quality, the environment, or natural values. Floodplains, some wetlands, and areas with a 20% or greater slope are included in the Resource Protection District.

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<sup>8</sup> 16 U.S.C. § 1455(d)(11).

<sup>9</sup> ME. REV. STAT. tit. 38, § 1802(2); *See* State of Maine Department of Marine Resources, Coastal Zone Map, available at <https://www.maine.gov/dmr/mcp/about/coastal-zone-map.htm>.

<sup>10</sup> *Enos v. Town of Stetson*, 665 A.2d 678 (ME 1995).

<sup>11</sup> Department of Environmental Protection, Chapter 1000: Guidelines for Municipal Shoreline Zoning [hereinafter Model MSZ Ordinance], available at <https://www.maine.gov/sos/cec/rules/06/096/096c1000.docx>.

<sup>12</sup> ME. REV. STAT. tit. 38, § 438-A.

<sup>13</sup> Model MSZ Ordinance, *supra* note 11, at 1.

<sup>14</sup> 06-096 ME CODE REGS Ch. 1000 § 9.

<sup>15</sup> The MSZ Model Ordinance lists the activity, zone, allowed activity, and whether a permit is needed. *See* Model MSZ Ordinance, *supra* note 11, at 14-15.

- The Limited Residential District includes areas suitable for recreational or residential development. Development in this district is less intensive than development activities permitted in the Limited Commercial District or General Development District. The Limited Residential District allows mixed commercial and residential uses but industrial uses are prohibited.
- The Limited Commercial District includes areas suitable for commercial development activities less intensive than the General Development I or II District.
- The General Development I District includes areas used for existing, intensive activities. Intensive commercial, industrial, or recreational activities, such as amusement parks, fairgrounds, retail trade, warehousing, manufacturing, are areas included within the General Development I District.
- The General Development II District includes similar uses as the General Development I District, except the General Development II District only applies to newly established Districts or not as intensively developed districts.
- The Commercial Fisheries and Maritime Activities District includes areas with fishing and aquaculture use and considers the water use, depth or water, available support facilities and compatibility with adjacent upland uses.
- Generally, the Stream Protection District includes all land areas within 75 feet of a stream or associated wetland.

The MSZ provides several other mechanisms for achieving proper management of shoreland areas. For example, the MSZ requires minimum lot area and minimum shore frontage for each district zone and type of activity structure. The MSZ also provides model construction standards for existing and future structures depending on location, so the land area and ecosystem are not disturbed in a way inconsistent with the zone use. Slope tables, vegetation removal guidance, and erosion and sedimentation control standards are also provided in the MSZ.

The passage of the MSZ was not without controversy, and there was litigation regarding boundary lines and definitions. With respect to district boundary lines, the Maine Supreme Court held the state official shoreland zoning map should be used when there are inconsistencies between municipal maps and guideline descriptions.<sup>16</sup> Additionally, there were some cases brought to determine definitional questions, such as the meaning of “structure” or “normal high water line of coastal waters.”<sup>17</sup> Therefore, when drafting new legislation, it may be helpful to provide a uniform map, clear definitional questions, or guidance on how the legislation should be implemented into existing municipal plans.

The Maine MSZ provides a comprehensive regulatory scheme for shoreline zones. Some of the key regulatory components of the MSZ include:

- A single state agency providing technical assistance and oversight of implementation of the regulatory program.

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<sup>16</sup> *Summerwind Cottage, LLC v. Town of Scarborough*, 61 A.3d 689 (ME 2013).

<sup>17</sup> *See, e.g., 21 Seabran, LLC v. Town of Naples*, 153 A.3d 113 (ME 2017); *Armstrong v. Town of Cape Elizabeth*, 2000 WL 33675370 (ME 2000).

- A model ordinance that outlines comprehensive minimum standards that municipalities must meet or exceed.
- A comprehensive scope governing all desired permitted activities in different zoning areas.

### III. Home Rule & Regional Planning

Generally, local governments fall under two types of governing authority: home rule or the Dillon rule. Home rule states authorize local governments to enact a wide range of their own laws to protect the health and safety of their citizens unless state law precludes them from doing so. In Dillon rule states, local governments may make laws only when specifically authorized by the state.

Maine is a home rule state—a 1969 amendment to the state constitution delegated broad home rule powers to the state’s local governments which the legislature later incorporated into state law.<sup>18</sup> In home rule states, the authority given to local governments can complicate regional coordination, as cities or counties have the authority to independently develop local plans and ordinances. However, even in home rule states, if a state legislature reserves the power to plan or zone, the state law would prevail. For example, the MSZ requires local municipalities to engage in shoreline zoning and provides for certain minimum standards that all jurisdictions must follow. A home rule state may require local governments to prepare a comprehensive plan. In addition, states may offer incentives, such as participation in grant programs, for local governments that participate in regional planning. Below are examples of two home rule states that engage in regional planning.

#### *Georgia*

Georgia is a home rule state that has implemented regional coordination. The state constitution enables cities to adopt plans and exercise zoning power but reserves the right of the General Assembly to establish procedures for local governments when exercising that power.<sup>19</sup> The state retains authority to regulate land use to protect the state’s natural resources, including “vital areas” of the state.<sup>20</sup>

The Georgia Planning Act of 1989 is intended to provide for the coordination of planning by state institutions.<sup>21</sup> Under the Act, the Department of Community Affairs (DCA) may partner with local governments and authorities, Regional Commissions, and other state agencies on a variety of planning, land use, and environmental programs. The DCA provides financial assistance to local governments through several grant funding and incentive programs. The Act

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<sup>18</sup> Me. Const. art. VIII, § 2; ME. REV. STAT. tit. 30-A, § 3001.

<sup>19</sup> Ga. Const. art. IX, § 2, p 4.

<sup>20</sup> *Id.* art. III, § 6, para. 2(a)(1)

<sup>21</sup> GA. CODE ANN. § 45-12-200, et seq., and § 50-8-1, et seq.



established twelve Regional Commissions to assist local governments on a regional basis and to assist with coordinated state-wide planning.<sup>22</sup>

Each year, the DCA contracts with the twelve Regional Commissions to help with local and regional planning and plan implementation.<sup>23</sup> The Regional Commissions aid local governments on a regional basis “to develop, promote and assist in establishing coordinated and comprehensive planning in the state.”<sup>24</sup> Under the Act, both local governments and Regional Commissions prepare comprehensive plans. The Regional Commissions develop a regional plan to guide the development of local comprehensive plans that must include: 1) “Regional Goals” for the future development of the region; 2) a list of “Regional Needs and Opportunities” identified for further action; and 3) an “Implementation Program” for achieving the regional vision and for addressing the identified Regional Needs and Opportunities.<sup>25</sup> The implementation program must include performance standards and a regional work program for implementing the plan.

The Georgia Planning Act authorizes DCA to establish review procedures for “Developments of Regional Impact” (DRIs), which are large-scale developments that have a regional impact. Population and development thresholds are used to determine whether a proposed development is a DRI. Local governments are encouraged to identify DRIs as part of their development review process and take findings of the Regional Commissions into account when deciding whether to permit the development of a DRI. Local governments are also encouraged to review DRIs in other localities and provide feedback. The Georgia Planning Act authorizes DCA to establish rules for Regional Commissions to identify Regionally Important Resources (RIRs) and recommend best practices for management.<sup>26</sup>

### *Florida*

In Florida, local governments have home rule authority through the state constitution and state law. The Florida Constitution provides, “Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise power for municipal purposes except as otherwise provided by law.”<sup>27</sup> State law also recognizes that municipalities have this power.<sup>28</sup> Under the Community Planning Act, incorporated local governments must adopt comprehensive plans.<sup>29</sup> Regional Planning Councils review local government comprehensive plans for consistency with the state plan and strategic regional policy plans.<sup>30</sup>

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<sup>22</sup> GA. CODE ANN. § 50-8-32.

<sup>23</sup> *Regional Commissions*, GA. DEP’T OF COMMTY. AFFAIRS, <https://www.dca.ga.gov/local-government-assistance/planning/regional-planning/regional-commissions>.

<sup>24</sup> GA. CODE ANN. § 50-8-32.

<sup>25</sup> GA. COMP. R. & REGS. 110-12-6-.01 et. seq.

<sup>26</sup> GA. CODE ANN. § 50-8-7; Ga. Comp. R. & Regs. 110-12-4.

<sup>27</sup> FL. CONST. art. VIII, § 2(b).

<sup>28</sup> FLA. STAT. ANN. § 166.021.

<sup>29</sup> *Id.* § 163.3167(1).

<sup>30</sup> *Id.* § 163.3184.

The Florida Regional Planning Council Act states, “There is a need for regional planning agencies to assist local governments to resolve their common problems, engage in area-wide comprehensive and functional planning, administer certain federal and state grants-in-aid, and provide a regional focus in regard to multiple programs undertaken on an area wide basis.”<sup>31</sup> The Regional Planning Council is “the primary organization to address problems and plan solutions that are of greater-than-local concern or scope, and the Regional Planning Council shall be recognized by local governments as one of the means to provide input into state policy development.”<sup>32</sup> It coordinates intergovernmental solutions to growth-related problems and provides technical assistance to and addresses other needs of local governments, but it may not act as a permitting or regulatory entity.<sup>33</sup>

Regional Planning Councils must be created in each of the several comprehensive planning districts of the state.<sup>34</sup> The term “comprehensive planning districts” means the geographic areas within the state specified by rule by the Executive Office of the Governor.<sup>35</sup> The Act subdivides the state into geographic regions for regional comprehensive planning.<sup>36</sup> The Act does not mandate municipal government membership or participation in a Regional Planning Council; however, each county must be a member of the Regional Planning Council created within the comprehensive planning district encompassing the county.<sup>37</sup> The duties of the councils include but are not limited to:

- To accept and receive, in furtherance of its functions, funds, grants, and services from the Federal Government or its agencies; from departments, agencies, and instrumentalities of state, municipal, or local government; or from private or civic sources.
- To cooperate, in the exercise of its planning functions, with federal and state agencies in planning for emergency management as defined in s. 252.34.
- To acquire, own, hold in custody, operate, maintain, lease, or sell real or personal property or do dispose of any property acquired through the execution of an interlocal agreement under s. 163.01.
- To accept gifts, grants, assistance, funds, or bequests.
- To conduct studies of the resources of the region.
- To participate with other governmental agencies, educational institutions, and private organizations in the coordination or conduct of its activities.
- To provide technical assistance to local governments on growth management matters.
- To perform a coordinating function among other regional entities relating to preparation and assurance of regular review of the strategic regional policy plan, with the entities to be coordinated determined by the topics addressed in the strategic regional policy plan.<sup>38</sup>

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<sup>31</sup> *Id.* § 186.502(1)(b).

<sup>32</sup> *Id.* § 186.502(3).

<sup>33</sup> *Id.* § 186.502(4).

<sup>34</sup> *Id.* § 186.504(1).

<sup>35</sup> *Id.* § 186.503(1).

<sup>36</sup> *Id.* § 186.512(1).

<sup>37</sup> *Id.* § 186.504.

<sup>38</sup> *Id.* § 186.505.



Regional policy plans must contain, "... regional goals and policies that shall address affordable housing, economic development, emergency preparedness, natural resources of regional significance, and regional transportation, and that may address any other subject which relates to the particular needs and circumstances of the comprehensive planning district as determined by the Regional Planning Council. Regional plans shall identify and address significant regional resources and facilities. Regional plans shall be consistent with the state comprehensive plan."<sup>39</sup>

#### **IV. Potential Models**

When considering developing a framework for the regional management of offshore resources in Maine, there are a few models that could be informative. The Saco River Corridor and Coastal Lakes and Watersheds both provide an example of regional management in Maine. Further, both Rhode Island and Delaware have developed offshore Special Area Management Plans (SAMPs). Finally, the state of Washington has a coastal planning regime that contains both a regional and ocean management component.

##### **A. Existing Maine Programs**

Finding that "the Saco, Ossipee and Little Ossipee Rivers are largely unspoiled by intensive or poorly planned commercial, industrial or residential development," the Maine legislature in the 1970s passed the Saco River Corridor Act to protect the area's resources.<sup>40</sup> The Saco River Commission (Commission) manages the Saco River Corridor (Corridor) by regulating the Saco, Ossipee, and Little Ossipee Rivers, the Corridor's land uses in an attempt to protect the Corridor from "the detrimental impacts of incompatible development."<sup>41</sup>

Each municipality whose jurisdictional boundaries encompass either land or water of the Corridor appoints a member and an alternate to serve on the Commission.<sup>42</sup> The Saco River Corridor Act gives the Commission the authority to create a budget and request appropriations from the Maine Legislature.<sup>43</sup> The Commission operates under a Comprehensive Plan and creates three types of Land and Water Use Districts: Resource Protection, Limited Residential, and General Development.<sup>44</sup> There are then three types of use categories for each Land and Water District:

- Uses for which no permit from the commission is required;
- Uses allowed by permit; and
- Prohibited Uses.

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<sup>39</sup> *Id.* § 186.507.

<sup>40</sup> ME. REV. STAT. tit. 38, § 951, *available at* <http://www.mainelegislature.org/legis/statutes/38/title38ch6sec0.html>.

<sup>41</sup> *Main Page*, Saco River Corridor Commission, <http://srcc-maine.org/>.

<sup>42</sup> ME. REV. STAT. tit. 38, § 954.

<sup>43</sup> *Id.* § 954-B.

<sup>44</sup> *Id.* §§ 956, 957.

Another potential model in Maine is the voluntary Coastal and Lake Watershed Districts (Districts).<sup>45</sup> Watershed districts can be formed:

to protect, restore and maintain the natural functions and values of coastal wetlands; freshwater wetlands; rivers, streams and great ponds; coastal harbors; bays; estuaries and marine waters and to manage and conserve the land and water resources of watersheds of those resources within the jurisdictions of these districts. The natural functions and values of those resources include water quality, water quality maintenance, aquatic and wildlife habitat, scenic quality and floodwater storage and conveyance.<sup>46</sup>

Unlike the Saco River Corridor, the creation of Districts is voluntary. The officers of a municipality can initiate formation of a District, or the residents can initiate one by referendum.<sup>47</sup> The Commissioner of the Department of Environmental Protection then convenes a joint meeting to discuss the application. An important aspect of Districts is that their formation does not limit the participating municipalities' home rule authority, as discussed above, but rather "provides an additional and alternative method for the formation of a watershed district and provides powers supplemental and additional to powers conferred by other laws."<sup>48</sup>

Additionally, again unlike the Saco River Corridor, Districts are not directly funded by the state legislature. Rather, the District must prepare a budget that the voters in the District approve.<sup>49</sup> Once a budget is approved, participating municipalities and unorganized districts pay for the budget proportionately.<sup>50</sup> Districts are tax exempt.<sup>51</sup>

Three to five trustees manage a formed District.<sup>52</sup> Districts are responsible for:

- Initiating and coordinating research and surveys for the purpose of gathering data on wetlands, water bodies, related shorelands and watersheds within the territory of the district;
- Planning natural resource restoration projects;
- Contacting and attempting to secure the cooperation of municipal officials and state agencies for the purpose of enacting and enforcing ordinances and regulations necessary to further the purposes of the district;
- Adopting and implementing natural resource protection, management and restoration plans;

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<sup>45</sup> ME. REV. STAT. tit. 38, §§ 2001-2014, *available at* <http://www.mainelegislature.org/legis/statutes/38/title38ch23sec0.html>.

<sup>46</sup> *Id.* § 2000.

<sup>47</sup> *Id.* § 2001.

<sup>48</sup> *Id.* § 2013.

<sup>49</sup> *Id.* § 2008.

<sup>50</sup> *Id.* § 2010.

<sup>51</sup> *Id.* § 2009.

<sup>52</sup> *Id.* § 2003.

- Adopting and implementing plans and programs to facilitate coordination of water level management and surface water use on great ponds within the territory of the district; and
- Entering into agreements with a municipality or group of municipalities that are wholly or partially within the district to administer the land use ordinances of that municipality or group of municipalities.<sup>53</sup>

The Districts can receive planning assistance from the Maine Department of Economic and Community Development, the Department of Environmental Protection, and other agencies in the state that have an expertise in watershed management. These agencies may develop guidance documents such as advisory guidelines. If resources allow, a District can also request assistance from these agencies to help them develop and implement its watershed management plan.<sup>54</sup>

### **B. Special Area Management Plans**

The federal Coastal Zone Management Act of 1972 authorizes states to develop and implement Special Area Management Plans (SAMPs) to address regional issues. According to the NOAA Coastal Smart Growth website, there are SAMPs in both Rhode Island and Delaware.<sup>55</sup> The Delaware SAMP deals with coastal management in the urban area of South Wilmington and focuses more on on-shore planning.<sup>56</sup>

The Rhode Island SAMP focuses on coastal issues throughout the state, from urban issues around Providence to the state's coastal salt ponds region. The Rhode Island SAMP separated the state's offshore waters by use zones, which were established through a process that involved research and planning using best available science and public input.<sup>57</sup> The Rhode Island Coastal Resources Management Council, local governments and community organizations work together to implement the SAMP.<sup>58</sup>

### **C. Coastal Zone Management Act: Interstate Consistency Provisions**

As stated above, the federal Coastal Zone Management Act (CZMA) gives authority to states to develop Coastal Zone Management Programs.<sup>59</sup> NOAA approved Maine's Coastal Zone Management Program in 1978. The Maine Coastal Program is a division of the Department of

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<sup>53</sup> *Id.* § 2007

<sup>54</sup> *Id.* § 2012.

<sup>55</sup> *Special Area Management Plans*, NOAA, <https://coastalsmartgrowth.noaa.gov/gettingstarted/samps.html>.

<sup>56</sup> South Wilmington SAMP Neighborhood Plan Work Group, South Wilmington Neighborhood Plan (2006), *available at* [http://www.wilmapco.org/Southbridge/files/SAMPFinalDraft\\_Jun06.pdf](http://www.wilmapco.org/Southbridge/files/SAMPFinalDraft_Jun06.pdf).

<sup>57</sup> *Rhode Island Ocean SAMP*, University of Rhode Island, [https://seagrant.gso.uri.edu/oceansamp/pdf/documents/doc\\_osamp\\_factsheet.pdf](https://seagrant.gso.uri.edu/oceansamp/pdf/documents/doc_osamp_factsheet.pdf).

<sup>58</sup> More information on the state's SAMP regions can be found at <http://www.crmc.ri.gov/samps.html>.

<sup>59</sup> 16 U.S.C. § 1455(d)(11).

Marine Resources, but the program involves multiple state agencies that work “in cooperation with local governments, nonprofit organizations, private businesses, and the public to improve management of coastal resources.”<sup>60</sup> Maine’s zone coastal zone extends from the inland line of coastal town lines to the seaward 3-mile state marine boundary.<sup>61</sup>

Under the CZMA, states with approved Coastal Zone Management Programs have a say in federal projects that affect their coastal zones.<sup>62</sup> Any federal projects that affect the coastal zone must be consistent with a state’s approved Coastal Zone Management Program.<sup>63</sup> Federally permitted projects, project activities conducted by or on behalf of a federal agency, permits issued under the Outer Continental Shelf Lands Act (OCSLA),<sup>64</sup> and federally funded projects must have a consistency determination from the state before proceeding.

The CZMA also contains Interstate Consistency provisions to address federal projects that will take place in one state’s coastal zone (State A) but also affect a neighboring state’s coastal zone (State B). These provisions allow State B to initiate a review process for the proposed federal activity with “interstate coastal effect,” which is defined as “any reasonably foreseeable effect resulting from a federal action occurring in one State...on any coastal use or resource of another State that has a federally approved management program.”<sup>65</sup> Interstate coastal effects can include both environmental effects and effects on uses of the coastal zone, as well as direct or indirect effects that are reasonably foreseeable. Indirect effects can include “effects which result from the activity and are later in time or farther removed in distance” and “effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions.”<sup>66</sup>

The CZMA Interstate Consistency provisions could be used as a model to create a similar program on an intrastate, regional scale. For instance, a regional program could be set up to allow neighboring towns (Town A) to initiate a review of activities that will take place in Town B, but will have an effect on the coastal zone of Town A. The CZMA Interstate Consistency provisions can be found at 15 C.F.R., Part 930, Subpart I.<sup>67</sup>

#### **D. Washington State Shoreline Management Act**

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<sup>60</sup> *Coastal Zone Management Programs*, OFFICE FOR COASTAL MGMT., NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://coast.noaa.gov/czm/mystate/#maine>.

<sup>61</sup> ME. REV. STAT. tit. 38, § 1802(2); *See* State of Maine Dep’t of Marine Resources, Coastal Zone Map, available at <https://www.maine.gov/dmr/mcp/about/coastal-zone-map.htm>.

<sup>62</sup> 16 U.S.C. § 1451 *et seq.*

<sup>63</sup> 16 U.S.C. § 1456(c)(1)(a).

<sup>64</sup> OCSLA codifies U.S. jurisdiction of submerged lands seaward of state lands and governs oil and gas development in federal waters. *See* 43 U.S.C. § 1331 *et seq.*

<sup>65</sup> 15 C.F.R. § 930.151.

<sup>66</sup> *Id.*

<sup>67</sup> 15 C.F.R. Part 930- Federal Consistency with Approved Coastal Management Programs, available at [https://coast.noaa.gov/data/czm/consistency/media/15CFRPart930\\_2007.pdf](https://coast.noaa.gov/data/czm/consistency/media/15CFRPart930_2007.pdf).

The Washington State Shoreline Management Act requires counties and towns in the state with shorelines to draft and implement Shoreline Management Programs.<sup>68</sup> The Act’s overarching goal is “to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.”<sup>69</sup> The Act sets up a program where counties and towns create plans that affect their own jurisdictions. However, as is discussed below, the Act does contain provisions for when regional plans can be created.

The Act specifically applies to the “shorelines of the state.”<sup>70</sup> This includes:

- All marine waters;
- Streams and rivers with greater than 20 cubic feet per second mean annual flow
- Lakes 20 acres or larger;
- Upland areas called shorelands that extend 200 feet landward from the edge of these waters;
- Biological wetlands and river deltas connected to these water bodies; and
- Some or all of the 100-year floodplain, including all wetlands.

The Act also creates “shorelines of statewide significance”, where “the interest of all of the people shall be paramount” in their management.<sup>71</sup> The Act gives the following uses preference on shorelines of statewide significance:

- Recognize and protect the statewide interest over local interest;
- Preserve the natural character of the shoreline;
- Result in long term over short term benefit;
- Protect the resources and ecology of the shoreline;
- Increase public access to publicly owned areas of the shorelines;
- Increase recreational opportunities for the public in the shoreline;
- Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.<sup>72</sup>

Counties and towns adopt Shoreline Master Programs (SMP), which are guidelines that translate the broad policies of the state Shoreline Management Act into standards for regulating shoreline uses.<sup>73</sup> The Department of Ecology provides technical assistance to counties and towns as they draft their SMPs. Other tools available in the state include a Handbook<sup>74</sup> and Shoreline Planners

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<sup>68</sup> Washington State Shoreline Management Act, available at <https://apps.leg.wa.gov/RCW/default.aspx?cite=90.58>.

<sup>69</sup> WASH. STAT. § 90.58.020.

<sup>70</sup> *Id.* § 90.58.030.

<sup>71</sup> *Id.* § 90.58.020.

<sup>72</sup> *Id.*

<sup>73</sup> *Shoreline Mast Program Guidelines*, Washington Department of Ecology, <https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Shoreline-coastal-planning/Shoreline-laws-rules-and-cases/Shoreline-Master-Program-guidelines> .

<sup>74</sup> *Shoreline Mast Program Handbook*, Washington Department of Ecology, <https://ecology.wa.gov/Regulations-Permits/Guidance-technical-assistance/Shoreline-Master-Plan-handbook>.

Toolbox.<sup>75</sup> The Washington State Shoreline Management Act shares some similarities with the Maine MSZ, discussed above. Both laws regulate similar shoreland areas and allow municipalities to establish management plans with assistance from a state agency. Unlike the Washington State Shoreland Management Act, however, the Maine MSZ does not authorize the creation of regional plans that include multiple municipalities.

The Act authorizes the creation of regional plans. Two or more adjacent counties or towns can cooperatively develop a joint SMP. Alternatively, the Director of the Department of Ecology can designate these areas and direct the appropriate counties and towns to develop a regional plan. Regional plans can be adopted in segments “so that immediate attention may be given to those areas of the shorelines of the state in most need of a use regulation.”<sup>76</sup>

Finally, the SMP Guidelines contain provisions for Ocean Management.<sup>77</sup> The guidelines “are intended to clarify state shoreline management policy regarding use of coastal resources, address evolving interest in ocean development and prepare state and local agencies for new ocean developments and activities.”<sup>78</sup> The guidelines define ocean uses as “renewable and/or nonrenewable resources ... and includes their associated offshore, near shore, inland marine, shoreland, and upland facilities and the supply, service, and distribution activities...”<sup>79</sup> Under this definition, renewable resources include “fishing, aquaculture, recreation, shellfish harvesting, and pleasure craft activity,” while nonrenewable resources include the “extraction of oil, gas and minerals, energy production, disposal of waste products, and salvage.”<sup>80</sup> Further, the SMP Guidelines also intend a regional management approach to allow for the “consistent approach for the management of ocean uses.”<sup>81</sup> Furthermore:

*While local governments may have need to vary their programs to accommodate local circumstances, local governments should attempt and the department will review local programs for compliance with these guidelines and chapter 173-26 WAC: Shoreline Management Act guidelines for development of master programs. It is recognized that further amendments to the master programs may be required to address new information on critical and sensitive habitats and environmental impacts of ocean uses or to address future activities, such as oil development. In addition to the criteria in RCW 43.143.030, these guidelines apply to ocean uses until local master program amendments are adopted. The amended master program shall be the basis for review of an action that is either*

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<sup>75</sup> *Shoreline Planners Toolbox*, Washington Department of Ecology, <https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Shoreline-coastal-planning/Shoreline-planners-toolbox>.

<sup>76</sup> WASH. STAT. § 90.58.110.

<sup>77</sup> WASH. ADMIN. CODE § 173-26-360, available at <https://apps.leg.wa.gov/WAC/default.aspx?cite=173-26-360&pdf=true>.

<sup>78</sup> *Id.* § 173-26-360(1).

<sup>79</sup> *Id.* § 173-26-360(5).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*



*located exclusively in, or its environmental impacts confined to, one county. Where a proposal clearly involves more than one local jurisdiction, the guidelines shall be applied and remain in effect in addition to the provisions of the local master programs.<sup>82</sup>*

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<sup>82</sup> *Id.*