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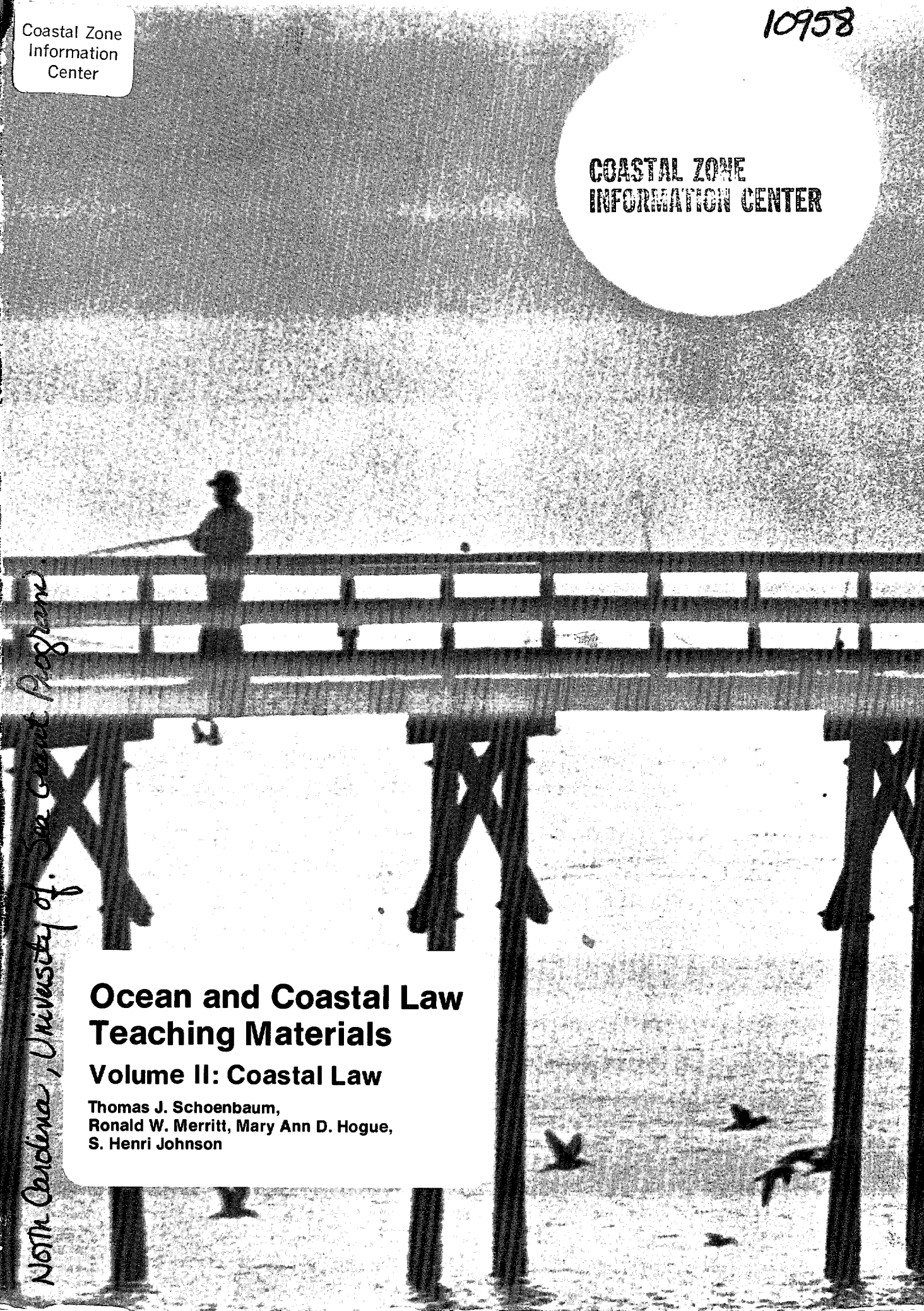

North Carolina, University of, Sea Grant Program

Ocean and Coastal Law Teaching Materials

Volume II: Coastal Law

Thomas J. Schoenbaum,
Ronald W. Merritt, Mary Ann D. Hogue,
S. Henri Johnson

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OCEAN AND COASTAL LAW
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VOLUME II-COASTAL LAW

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North Carolina, University of. Sea Grant Program.
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VOLUME II

TABLE OF CONTENTS

COASTAL ZONE INFORMATION CENTER

		Page
Chapter Five.	Public and Private Rights in Coastal Areas	1
Section 1.	The Public Trust Doctrine: Note	1
	Shively v. Bowlby	3
	Borax Consolidated Ltd. v. Los Angeles	10
	The Daniel Ball	14
	Marks v. Whitney	18
	Note (a): Determining the Boundary Between Public and Privately-Owned Lands	24
	Note (b): Tests of Navigability for Determining Title to the Beds of Waterways	25
Section 2.	Impact of the Public Trust	27
	Illinois Central Railroad v. Illinois	27
	International Paper Co. v. Mississippi State Highway Department	37
	City of Long Beach v. Mansell	41
	Borough of Nepture City v. Avon	45
	Wilbour v. Gallagher	50
	Parmele v. Eaton	57
Section 3.	Other Public Servitudes	61
	United States v. Chandler-Dunbar Co.	61
	State v. Twiford	68
	Capune v. Robbins	70
Section 4.	Changes in the Shoreline Area	73
	Hughes v. Washington	74
	Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.	77
	State v. Ashmore	83
Section 5.	Public Access to Beaches	86
	Seaway Co. v. Attorney General	86
	Gion v. City of Santa Cruz; Dietz v. King	92
	State ex rel Thornton v. Hay	98
	In re Opinion of the Justices	103
	Note: Beach Access	109
Chapter Six.	Government Developmental and Regulatory Activities in Coastal Areas	113
Section 1.	Governmental Conservation and Development	113
A.	Public Lands	113
	The Marine Sanctuaries Act of 1972	115
	Secretary of Commerce Marine Sanctuaries Guidelines	116

		Page
	B. The Corp of Engineers' Civil Works Activities	118
	Save Crystal Beach Association v. Callaway	120
	State of Minnesota, By Spannaus v. Hoffman	123
Section 2.	Regulatory Activities	127
	A. The Army Corps of Engineers	127
	(i) § 10 of the Rivers and Harbors Act: Note	127
	United States v. Moretti	128
	Sierra Club v. Leslie Salts Co.	135
	United States v. Sexton Cove	140
	(ii) § 404 of the Federal Water Pollution Control Act: Note	144
	The Federal Water Pollution Control Act	145
	United States v. Holland	146
	Conservation Council of North Carolina v. Costanzo	152
	Natural Resources Defense Council v. Callaway	160
	Corps of Engineers' Permit Guidelines	160
	(iii) Criteria for Permit Issuance	163
	Zabel v. Tabb	164
	Corps of Engineers Permit Guidelines	168
	(iv) Permit Variations: Note	173
	(v) Sanctions and Penalties: Note	174
	The Rivers and Harbors Act of 1899	175
	The Federal Water Pollution Control Act	175
	United States v. Sunset Cove	177
	(vi) State Interaction in the Federal Regulatory Scheme	178
	Corps of Engineers Permit Guidelines	179
	B. State Regulatory Activities	181
	North Carolina Dredge or Fill and Wetland Activities Control Statutes	182
	New York Freshwater Wetlands Act of 1975	185
	New York Tidal Wetlands Act of 1975	187
	Hamilton v. Diamond	190
	River Defense Committee v. Thierman	191
	C. Deepwater Ports	194
	The Deepwater Port Act of 1975	194
	Note: Deepwater Ports in State Waters	204
	Note: Onshore Effects of Deepwater Ports	204
Chapter Seven.	Comprehensive Coastal Planning	212
Section 1.	Federal Law	213
	Coastal Zone Management Act of 1972	213
Section 2.	State Law	231
	California Coastal Act	231
	North Carolina Coastal Area Management Act	265
	Note: Other State Programs	284
	Note: Criticism of Coastal Planning	289

Page

Section 3. Implementation of Coastal Planning 291
Ecological Determinants of Coastal Area Management 291
The Legal Implementation of Coastal Zone Management: The North Carolina Model 293
Section 4. Constitutional Issues 312
Just v. Marinette County 312
Note on the Taking Issue 318
J. M. Mills, Inc. v. Murphy 321
Golden v. Planning Board 330
Construction Industry Assoc. of Sonoma Co. v. City of Petaluma 342
Associated Home Builders of the Greater Eastbay, Inc. v. Livermore 346

FOREWORD

This book of materials is a response to the need for a teaching tool showing the interrelationship between the law of the sea and coastal legal problems. It is a reflection of the growing awareness that the contemporary emphasis on new and improved uses of the resources of the oceans will have a profound impact on the character of our coastal areas. Conversely, coastal planning decisions will affect our choices in the development of ocean resources.

The immediate stimulus for the compilation of these materials was to provide a ready set of readings for students enrolled in the Ocean and Coastal Law course at the University of North Carolina School of Law. This book is the product of second-and-third-year law students working under my supervision and direction. It is a totally volunteer effort, and its successful completion is due to the high degree of interest and hard work of the students involved. For my part, I have thoroughly enjoyed the association with them both on a professional and a personal level.

I want to express my gratitude as well to Dr. B. J. Copeland of the University of North Carolina Sea Grant Program for encouraging this project.

Thomas J. Schoenbaum

CHAPTER FIVE

PUBLIC AND PRIVATE RIGHTS IN COASTAL AREAS

SECTION 1. The Public Trust Doctrine

The development of the public trust doctrine has followed the variations in competing interests in the tidal area, including the demands for navigational use, fishing, recreation and raw materials. These demands vary with increases in population and commercial needs. When demands rise, private ownership and exclusive use conflict with the need for more widespread use and benefit by the public. The history of the public trust doctrine reflects how legal approaches have developed to cope with conflicts between these competing interests in coastal lands.

The Romans developed the "natural law" concept that use rights in coastal areas were rights belonging to the public and that these areas were "common to all".[1] This was necessary to protect their great dependence upon navigation for trade and communication, as well as fishing for food. Here the basis for the public trust was laid. The state held title to coastal areas and navigable rivers, but only as supervisor or trustee of the public rights of navigation and fishery, which included the right to make fast in ports and spread nets upon the beaches.

However, this concept of public rights, the jus publicum, waned somewhat during the early Middle Ages. As Europe retrogressed in terms of commerce and navigation, public rights were reduced by growing ownership of coastal areas by local powers and feudal lords. In a thinly populated England, the demand for public use was not strong enough to stem the increase of private ownership and control.

With the signing of the Magna Carta, the trend shifted back toward increased public rights — especially in the area of navigation and fishing. English common law greatly expanded public rights in response to changing economic and political influences. It became established as common law that title to lands over which the tides ebbed and flowed was in the King. Such lands were held by the King

1. For a complete discussion of relative Roman law, see Patrick Deveney, "Title, Jus Publicum, and the Public Trust: An Historical Analysis," 1 Sea Grant L. J. 13 (1976).

in jus publicum, in trust for the common use and benefit of the public. In other words, the King and any private owner held these lands subject to superceding rights in the public.

The concept of sovereign ownership of the tidelands and the related public trust doctrine became a part of American law at the formation of the Union. Title to such lands passed from the King to the original states. In this country also, the public trust doctrine has been influenced by the political and economic development of our nation. The doctrine has been modified and extended in its effect and application. In the cases which follow, notice the expansion of the application of the doctrine under the concept of "navigability". Also notice the uses of this common law doctrine to retrospectively determine ownership and use rights and to prospectively protect our finite resources in the face of growing demands.

The cases in Section 1 of this chapter illustrate the meaning of the public trust doctrine as adopted in this country. Section 2 includes cases adjudicating public and private rights as they have arisen in various fact situations under the impact of the public trust. The materials in Section 3 show how private rights have been affected by other public servitudes, while Section 4 examines the effects of physical changes in the shoreline area. Finally, Section 5 will illustrate the common law doctrines providing a public right to cross private lands to gain access to the beach area, as opposed to rights to use the lands in question.

SHIVELY V. BOWLBY

United States Supreme Court, 1894

152 U. S. 1

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

This case concerns the title in certain lands below high water mark in the Columbia River in the State of Oregon; the defendant below, now plaintiff in error, claiming under the United States, and the plaintiffs below, now defendants in error, claiming under the State of Oregon; and is in substance this: James M. Shively, being the owner, by title obtained by him from the United States under the act of Congress of September 27, 1850, c. 76, while Oregon was a Territory, of a tract of land in Astoria, bounded north by the Columbia River, made a plat of it, laying it out into blocks and streets, and including the adjoining lands below high water mark; and conveyed four of the blocks, one above and three below that mark, to persons who conveyed to the plaintiffs. The plaintiffs afterwards obtained from the State of Oregon deeds of conveyance of the tide lands in front of these blocks, and built and maintained a wharf upon part of them. The defendant, by counter-claim, asserted a title, under a subsequent conveyance from Shively, to some of the tide lands, not included in his former deeds, but included in the deeds from the State.

The counter-claim, therefore, depended upon the effect of the grant from the United States to Shively of land bounded by the Columbia River, and of the conveyance from Shively to the defendant, as against the deeds from the State to the plaintiffs. The Supreme Court of Oregon, affirming the judgment of a lower court of the State, held the counter-claim to be invalid, and thereupon, in accordance with the state practice, gave leave to the plaintiffs to dismiss their complaint, without prejudice. Hill's Code of Oregon, §§ 246, 393.

The only matter adjudged was upon the counter-claim. The judgment against its validity proceeded upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of

this court. Rev. Stat. § 709. That jurisdiction has been repeatedly exercised, without objection or doubt, in similar cases of writs of error to the state courts. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Packer* v. *Bird*, 137 U. S. 661; *Knight* v. *United States Land Association*, 142 U. S. 161.

It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: "All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away." *The Rebeckah*, 1 C. Rob. 227, 230. . . .

I. By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

The great authority in the law of England upon this subject is Lord Chief Justice Hale, whose authorship of the treatise *De Jure Maris*, sometimes questioned, has been put beyond doubt by recent researches. Moore on the Foreshore, (3d ed.) 318, 370, 413.

In that treatise, Lord Hale, speaking of "the King's right of propriety or ownership in the sea and soil thereof" within his jurisdiction, lays down the following propositions: "The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river." "But though the King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without

injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the King or some particular subject hath gained a propriety exclusive of that common liberty." "The shore is that ground that is between the ordinary high water and low water mark. This doth *prima facie* and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea." Hargrave's Law Tracts, 11, 12. And he afterwards explains: "Yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription or usage." "But though the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added, viz." "2d. That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances." "For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified." pp. 25, 36.

So in the second part, *De Portibus Maris*, Lord Hale says that "when a port is fixed or settled by" "the license or charter of the King, or that which presumes and supplies it, viz. custom and prescription;" "though the soil and franchise or dominion thereof *prima facie* be in the King, or by derivation from him in a subject; yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested, by reason of common commerce, trade and intercourse." "But the right that I am now speaking of is such a right that belongs to the King *jure prerogativæ*, and it is a distinct right from that of propriety; for, as before I have said, though the dominion either of franchise or propriety be lodged either by prescription or charter in a subject, yet it is charged or affected with that *jus publicum* that belongs to all men, and so it is charged or affected with that *jus regium*, or right of prerogative of the King, so far as the same is by law invested in the King." Hargrave's Law Tracts, 84, 89.

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; *Fitzwalter's Case*, 3 Keb. 242; *S. C.* 1 Mod. 105; 3 Shep. Ab. 97; Com. Dig. Navigation, A, B; Bac. Ab. Prerogative, B; *The King* v. *Smith*, 2 Doug. 441; *Attorney General* v. *Parmeter*, 10 Price, 378, 400, 401, 411, 412, 464; *Attorney General* v. *Chambers*, 4 D. M. & G. 206, and 4 D. & J. 55; *Malcomson* v. *O'Dea*, 10 H. L. Cas. 591, 618, 623; *Attorney General* v. *Emerson*, (1891) App. Cas. 649; and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing.

* * *

It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. . . .

By the law of England, also, every building or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. Lord Hale, in Hargrave's Law Tracts, 85; Mitf. Pl. (4th ed.) 145; *Blundell* v. *Catterall*, 5 B. & Ald. 268, 298, 305; . . .

II. The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and laws of the United States.

The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the King as the representative of and in trust for the nation; and all vacant lands, and the exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters. And upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States. . . .

The leading case in this court, as to the title and dominion of tide waters and of the lands under them, is *Martin* v. *Waddell*, (1842,) 16 Pet. 367. . . .

It was in giving the reasons for holding that the royal charters did not sever the soil under navigable waters, and the public right of fishing, from the powers of government, and in speaking of the effect which grants of the title in the sea shore to others than the owner of the upland might have, not upon any peculiar rights supposed to be incident to his ownership, but upon the public and common rights in, and the benefits and advantages of, the navigable waters, which the colonists enjoyed "for the same purposes, and to the same extent, that they had been used and enjoyed for centuries in England," and which every owner of the upland therefore had in common with all other persons, that Chief Justice Taney, in the passage relied on by the plaintiff in error, observed: "Indeed, it could not well have been otherwise; for the men who first formed English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the New World, and to people the banks of its bays

and rivers, if the land under the water at their very doors was liable to immediate appropriation by another, as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another." 16 Pet. 414. . . .

III. The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only. . . .

The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.

IV. The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions. . .

IX. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or *jus privatum*, of the King or his grantee was, in the phrase of Lord Hale, "charged with and subject to that *jus publicum* which belongs to the King's subjects," or, as he elsewhere puts it, "is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse." Hargrave's Law Tracts, 36, 84. In the words of Chief Justice Taney, "the country" discovered and settled by Englishmen "was held by the King in his public and regal character as the representative of the nation, and in trust for them;" and the title and the dominion of the tide waters and of the soil under them, in each colony, passed by the royal charter to the grantees as "a trust for the common use of the new community about to be established;" and, upon the American Revolution, vested absolutely in the people of each

State "for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin* v. *Waddell*, 16 Pet. 367, 409–411. As observed by Mr. Justice Curtis, "This soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights." *Smith* v. *Maryland*, 18 How. 71, 74. The title to the shore and lands under tide water, said Mr. Justice Bradley, "is regarded as incidental to the sovereignty of the State — a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery." *Hardin* v. *Jordan*, 140 U. S. 371, 381. And the Territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States, upon an equal footing with the original States in all respects; and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, "in trust for the future States." *Pollard* v. *Hagan*, 3 How. 212, 221, 222; *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65; *Knight* v. *United States Land Association*, 142 U. S. 161, 183.

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community. . . .

The conclusions from the considerations and authorities above stated may be summed up as follows:

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the

public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

The donation land claim, bounded by the Columbia River, upon which the plaintiff in error relies, includes no title or right in the land below high water mark; and the statutes of Oregon, under which the defendants in error hold, are a constitutional and legal exercise by the State of Oregon of its dominion over the lands under navigable waters.

Judgment affirmed.

BORAX CONSOLIDATED LTD. V. LOS ANGELES

United States Supreme Court, 1935

296 U.S. 10

Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer* v. *Bird,* 137 U. S. 661, 669, 670; *Brewer-Elliott Oil Co.* v. *United States,* 260 U. S. 77, 87; *United States* v. *Holt Bank,* 270 U. S. 49, 55, 56; *United States* v. *Utah,* 283 U. S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney* v. *Keokuk,* 94 U. S. 324, 338; *Shively* v. *Bowlby, supra,* p. 40; *Hardin* v. *Jordan,* 140 U. S. 371, 382; *Port of Seattle* v. *Oregon & Washington R. Co.,* 255 U. S. 56, 63.

The tideland extends to the high water mark. *Hardin* v. *Jordan, supra; Shively* v. *Bowlby, supra; McGilvra* v. *Ross,* 215 U. S. 70, 79. This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. Inst. lib. 2, tit. 1, § 3; Dig. lib. 50, tit. 16, § 112. But by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." *Blundell* v. *Catterall,* 5 B. & A. 268, 292. It is the land "between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails." *United States* v. *Pacheco,* 2 Wall. 587, 590.

The range of the tide at any given place varies from day to day, and the question is, how is the line of "ordinary" high water to be determined? The range of the

tide at times of new moon and full moon "is greater than the average," as "high water then rises higher and low water falls lower than usual." The tides at such times are called "spring tides." When the moon is in its first and third quarters, "the tide does not rise as high nor fall as low as on the average." At such times the tides are known as "neap tides." "Tidal Datum Plane," U. S. Coast and Geodetic Survey, Special Publication No. 135, p. 3.[2] The view that "neap tides" should be taken as the ordinary tides had its origin in the statement of Lord Hale. *De Jure Maris,* cap. VI; Hall on the Sea Shore, p. 10, App. XXIII, XXIV. In his classification, there are "three sorts of shores, or *littora marina,* according to the various tides," (1) "The high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoxials"; (2) "The spring tides, which happen twice every month at full and change of the moon"; and (3) "Ordinary tides, or nepe tides, which happen between the full and change of the moon." The last kind of shore, said Lord Hale, "is that which is properly *littus maris.*" He thus excluded the "spring tides" of the month, assigning as the reason that "for the most part the lands covered with these fluxes are dry and maniorable," that is, not reached by the tides.

The subject was thoroughly considered in the case of *Attorney General* v. *Chambers,* 4 De G. M. & G. 206. In that case Lord Chancellor Cranworth invited Mr. Baron Alderson and Mr. Justice Maule to assist in the determination of the question as to "the extent of the right of the Crown to the seashore." Those judges gave as their opinion that the average of the "medium tides in each quarter of a lunar revolution during the year" fixed the limit of the shore. Adverting to the statement of Lord Hale, they thought that the reason he gave would be a guide to the proper determination. "What," they asked, are "the lands which for the most part of the year are reached and covered by the tides?" They found that the same reason that excluded the highest tides of the month, the spring tides, also excluded the lowest high tides, the neaps, for "the highest or spring-tides and the lowest high tides (those at the neaps) happen as often as each other." Accordingly, the judges thought that "the medium tides of each quarter of the tidal period" afforded the best criterion. They said: "It is true of the limit of the shore reached by these tides that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short, and on one day it is reached. This point of the shore therefore is about four days in every week, *i. e.* for the most part of the year, reached and covered by the tides." *Id.,* p. 214.

Having received this opinion, the Lord Chancellor stated his own. He thought that the authorities had left the question "very much at large." Looking at "the principle of the rule which gives the shore to the Crown," and finding that principle to be that "it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil," the Lord Chancellor thus stated his conclusion: "Lord Hale gives as his reason for thinking that lands only covered by the high spring-tides do not belong to the Crown, that such lands are for the most part dry and maniorable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the Crown's right is limited to land which is for the most part not dry or maniorable. The learned Judges whose assistance I had in this very obscure question point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line." The Lord Chancellor therefore concurred with the opinion of the judges "in thinking that the medium line must be treated as bounding the right of the Crown." *Id.*, p. 217.[3]

This conclusion appears to have been approved in Massachusetts. *Commonwealth* v. *Roxbury*, 9 Gray 451, 483; *East Boston Co.* v. *Commonwealth*, 203 Mass. 68, 72; 89 N. E. 236. See, also, *New Jersey Zinc Co.* v. *Morris Canal Co.*, 44 N. J. Eq. 398, 401; 15 Atl. 227; Gould on Waters, p. 62.

In California, the Acts of 1911 and 1917, upon which the City of Los Angeles bases its claim, grant the "tidelands and submerged lands" situated "below the line of mean high tide of the Pacific Ocean."[4] Petitioners urge that "ordinary high water mark" has been defined by the state court as referring to the line of the neap tides.[5] We find it unnecessary to review the cases cited or to attempt to determine whether they record a final judgment as to the construction of the state statute, which, of course, is a question for the state courts.

In determining the limit of the federal grant, we perceive no justification for taking neap high tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which is actually covered by the tides most of the time. In order to include the land that is thus covered, it is necessary to take the mean high tide line which, as the Court of Appeals said, is neither the spring tide nor the neap tide, but a mean of all the high tides.

In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey,[6] that "Mean high water at any place is the average height of all the high waters at that place over a considerable period of time,"[7] and the further observation that "from theoretical considerations of an astronomical character" there should be a "a periodic variation in the rise of water above sea level having a period of 18.6 years,"[7] the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, "an average of 18.6 years should be determined as near as possible." We find no error in that instruction.

The decree of the Court of Appeals is

Affirmed.

THE DANIEL BALL

United States Supreme Court, 1870

77 U. S. 557

APPEAL from the Circuit Court for the Western District of Michigan, the case being thus:

The act of July 7th, 1838,* provides, in its second section, that it shall not be lawful for the owner, master, or captain of any vessel, propelled in whole or in part by steam, to transport any merchandise or passengers upon "the bays, lakes, rivers, or other navigable waters of the United States," after the 1st of October of that year, without having first obtained from the proper officer a license under existing laws; that for every violation of this enactment the owner or owners of the vessel shall forfeit and pay to the United States the sum of five hundred dollars; and that for this sum the vessel engaged shall be liable, and may be seized and proceeded against summarily by libel in the District Court of the United States.

The act of August 30th, 1852,† which is amendatory of the act of July 7th, 1838, provides for the inspection of vessels propelled in whole or in part by steam and carrying passengers, and the delivery to the collector of the district of a certificate of such inspection, before a license, register, or enrolment, under either of the acts, can be granted; and declares that if any vessel of this kind is navigated with passengers on board, without complying with the terms of the act, the owners and the vessel shall be subject to the penalties prescribed by the second section of the act of 1838.

In March, 1868, the Daniel Ball, a vessel propelled by steam, of one hundred and twenty-three tons burden, was engaged in navigating Grand River, in the State of Michigan, between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places, without having been inspected or licensed under the laws of the United States; and to recover the penalty, provided for want of such inspection and license, the United States filed a libel in the District Court for the Western District of Michigan.

The libel, as amended, described Grand River as a navigable water of the United States; and, in addition to the employment stated above, alleged that in such employment the steamer transported merchandise, shipped on board of her, destined for ports and places in States other than the State of Michigan, and was thus engaged in commerce between the States.

The answer of the owners, who appeared in the case, admitted substantially the employment of the steamer as alleged, but set up as a defence that Grand River was not a

navigable water of the United States, and that the steamer was engaged solely in domestic trade and commerce, and was not engaged in trade or commerce between two or more States, or in any trade by reason of which she was subject to the navigation laws of the United States, or was required to be inspected and licensed.

It was admitted, by stipulation of the parties, that the steamer was employed in the navigation of Grand River between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places; that she was not enrolled and licensed for the coasting trade; that some of the goods that she shipped at Grand Rapids and carried to Grand Haven were destined and marked for places in other States than Michigan, and that some of the goods which she shipped at Grand Haven came from other States and were destined for places within that State.

It was also admitted that the steamer was so constructed as to draw only two feet of water, and was incapable of navigating the waters of Lake Michigan; that she was a common carrier between the cities named, but did not run in connection with or in continuation of any line of steamers or vessels on the lake, or any line of railway in the State, although there were various lines of steamers and other vessels running from places in other States to Grand Haven carrying merchandise, and a line of railway was running from Detroit which touched at both of the cities named.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

Two questions are presented in this case for our determination.

First: Whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the acts of Congress; and,

Second: Whether those acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State.

Upon the first of these questions we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the

case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length.* A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.

That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. "The power to regulate commerce," this court said in *Gilman* v. *Philadelphia*,* "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress."

But it is contended that the steamer Daniel Ball was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented.

There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States," with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States.* In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

* * *

MARKS V. WHITNEY

Supreme Court of California, 1971

491 P. 2d 374

McCOMB, Justice.

This is a quiet title action to settle a boundary line dispute caused by overlapping and defective surveys and to enjoin defendants (herein "Whitney") from asserting any claim or right in or to the property of plaintiff Marks. The unique feature here is that a part of Marks' property is tidelands acquired under an 1874 patent issued pursuant to the Act of March 28, 1868 (Stats.1867–1868, c. 415, p. 507); a small portion of these tidelands adjoins almost the entire shoreline of Whitney's upland property. Marks asserted complete ownership of the tidelands and the right to fill and develop them. Whitney opposed on the ground that this would cut off his rights as a littoral owner and as a member of the public in these tidelands and the navigable waters covering them. He requested a declaration in the decree that Marks' title was burdened with a public trust easement; also that it was burdened with certain prescriptive rights claimed by Whitney.

The trial court settled the common boundary line to the satisfaction of the parties. However, it held that Whitney had no "standing" to raise the public trust issue and it refused to make a finding as to whether the tidelands are so burdened. It did find in Whitney's favor as to a prescriptive easement across the tidelands to maintain and use an existing seven-foot wide wharf but with the limitation that "Such rights shall be subject to the right of Marks to use, to fill and to develop" the tidelands and the seven-foot wide easement area so long as the Whitney "rights of access and ingress and egress to and from the deep waters of the Bay shall be preserved" over this strip. * * *

Questions: First. *Are these tidelands subject to the public trust; if so, should the judgment so declare?*

Yes. Regardless of the issue of Whitney's standing to raise this issue the court may take judicial notice of public trust burdens in quieting title to tidelands. This matter is of great public importance, particularly in view of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property. A present declaration that the title of Marks in these tidelands is burdened with a public easement may avoid needless future litigation.

Tidelands are properly those lands lying between the lines of mean high and low tide (City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 478, fn. 13, 91 Cal.Rptr. 23, 476 P.2d 423) covered and uncovered successively by the ebb and flow thereof (People ex rel. State Board of Harbor Com'rs v. Kerber (1908) 152 Cal. 731, 733, 93 P. 878). The trial court found that the portion of Marks' lands here under consideration constitutes a part of the Tidelands of Tomales Bay, that at all times it has been, and now is, subject to the daily ebb and flow of the tides in Tomales Bay, that the ordinary high tides in the bay overflow and submerge this portion of his lands, and that Tomales Bay is a navigable body of water and an arm of the Pacific Ocean.

This land was patented *as tidelands* to Marks' predecessor in title. The patent of May 15, 1874, recites that it was issued by the Governor of California "by virtue of authority in me vested" pursuant to "Statutes enacted from time to time" for the "Sale and Conveyance of the *Tide Lands belonging to the State by virtue of her sovereignty.*" (Emphasis added.)

The governing statute was the act of March 28, 1868, entitled "An Act to provide for the management and sale of the lands belonging to the State." By its terms it repealed all other laws relating to the sale of swamp and overflowed, salt-marsh and tidelands. These laws, including the Act of March 28, 1868, were codified in former Political Code sections 3440–3493½.

They were explicitly and expansively considered by this court entirely separate from the restrictions contained in Article 15, sections two and three, of the State Constitution (enacted in 1879)—In Forestier v. Johnson (1912) 164 Cal. 24, 127 P. 156 and People v. California Fish Co., supra, 166 Cal. 576, 589–598, 138 P. 79. Prior to the issuance of this patent it was held that a patent to tidelands conveyed no title (Kimball v. Macpherson (1873) 46 Cal. 103; People ex rel. Pierce v. Morrill (1864) 26 Cal. 336); or a voidable title (Taylor v. Underhill (1871) 40 Cal. 471). It was not until 1913 that this court decided in People v. California Fish Co., supra, 166 Cal. 576, 596, 138 P. 79, 87, that "The only practicable theory is to hold that all tideland is included, but that the public right was not intended to be divested or affected by a sale of tidelands under these general laws relating alike both to swamp land and tidelands. Our opinion is that * * * the buyer of land under these statutes receives the title to the soil, the *jus privatum,* subject to the public right of navigation, and in subordination to the right of the state to take possession and use and improve it for that purpose, as it may deem necessary. In this way the public right will be preserved, and the private right of the purchaser will be given as full effect as the public interests will permit."

The tidelands embraced in these statutes extend from the Oregon line to Mexico and include the shores of bays and navigable streams as far up as tide water goes and until it meets the lands made swampy by the overflow and seepage of fresh water streams. (People v. California Fish Co., supra, at pp. 591, 596, 138 P. 79.) No issue is here presented of swamp or overflowed lands. These are true tidelands within the meaning of these statutes, the patent of May 15, 1874, and the public trust doctrine. They are, therefore, subject to a reserved easement in the state for trust purposes.

Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. (See Bohn v. Albertson (1951) 107 Cal.App.2d 738, 238 P.2d 128; Forestier v. Johnson, supra, 164 Cal. 24, 127 P. 156; Munninghoff v. Wisconsin Conservation Comm. (1949) 255 Wis. 252, 38 N.W.2d 712; Jackvony v. Powel (1941) 67 R.I. 218, 21 A.2d 554; Nelson v. De Long (1942) 213 Minn. 425, 7 N.W.2d 342; Proctor v. Wells (1869) 103 Mass. 216.) The public has the same rights in and to tidelands.

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another (Colberg, Inc. v. State, 67 Cal.2d 408, 421–422, 62 Cal.Rptr. 401, 432 P.2d 3.) There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.

"[T]he state in its proper administration of the trust may find it necessary or advisable to cut off certain tidelands from water access and render them useless for trust purposes. In such a case the state through the Legislature may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When tidelands have been so freed from the trust—and if they are not subject to the constitutional prohibition forbidding alienation—they may be irrevocably conveyed into absolute private ownership." (City of Long Beach v. Mansell, supra, 3 Cal.3d 462, 482, 91 Cal.Rptr. 23, 37, 476 P.2d 423, 437.)

The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute (People v. California Fish Co., supra, 166 Cal. p. 597, 138 P. 79), except as limited by the paramount supervisory

power of the federal government over navigable waters (Colberg, Inc. v. State, supra, 67 Cal.2d 416–422, 62 Cal.Rptr. 401, 432 P.2d 3). We are not here presented with any action by the state or the federal government modifying, terminating, altering or relinquishing the *jus publicum* in these tidelands or in the navigable waters covering them. Neither sovereignty is a party to this action. This court takes judicial notice, however, that there has been no official act of either sovereignty to modify or extinguish the public trust servitude upon Marks' tidelands. The State Attorney General, as amicus curiae, has advised this court that no such action or determination has been made by the state.

We are confronted with the issue, however, whether the trial court may restrain or bar a private party, namely, Whitney, "from claiming or asserting any estate, right, title, interest in or claim or lien upon" the tidelands quieted in Marks. The injunction so made, without any limitation expressing the public servitude, is broad enough to prohibit Whitney from asserting or in any way exercising public trust uses in these tidelands and the navigable waters covering them in his capacity as a member of the public. This is beyond the jurisdiction of the court. It is within the province of the trier of fact to determine whether any particular use made or asserted by Whitney in or over these tidelands would constitute an infringement either upon the *jus privatum* of Marks or upon the *jus publicum* of the people. It is also within the province of the trier of fact to determine whether any particular use to which Marks wishes to devote his tidelands constitutes an unlawful infringement upon the *jus publicum* therein. It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished (see City of Long Beach v. Mansell, supra, 3 Cal.3d at p. 482, fn. 17, 91 Cal.Rptr. 23, 476 P.2d 423), and to take the necessary steps to free them from such burden. In the absence of state or federal action the court may not bar members of the public from lawfully asserting or exercising public trust rights on this privately owned tidelands.

There is absolutely no merit in Marks' contention that as the owner of the *jus privatum* under this patent he may fill and develop his property, whether for navigational purposes or not; nor in his contention that his past and present plan for development of these tidelands as a marina have caused the extinguishment of the public easement. Reclamation with or without prior authorization from the state does not *ipso facto* terminate the public trust nor render the issue moot. (Newcomb v. City of Newport Beach, 1936, 7 Cal.2d 393, 402, 60 P.2d 825; Atwood v. Hammond (1935) 4 Cal.2d 31, 40–41, 48 P.2d 20.)

A proper judgment for a patentee of tidelands was determined by this court in People v. California Fish Co., supra, 166 Cal. at pp. 598–599, 138 P. at p. 88, to be that he owns "the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust therefor, to enter upon and possess the same for the preservation and advancement of the public uses, and to make such changes and improvements as may be deemed advisable for those purposes."

Second: *Does Whitney have "standing" to request the court to recognize and declare the public trust easement on Marks' tidelands?*

Yes. The relief sought by Marks resulted in taking away from Whitney rights to which he is entitled as a member of the general public. It is immaterial that Marks asserted he was not seeking to enjoin the public. The decree as rendered does enjoin a member of the public.

Members of the public have been permitted *to bring* an action to enforce a public right to use a beach access route (Dietz v. King (1970) 2 Cal.3d 29, 84 Cal. Rptr. 162, 465 P.2d 50); *to bring* an action to quiet title to private and public easements in a public beach (Morse v. E. A. Robey and Co., Inc. (1963) 214 Cal.App.2d 464, 29 Cal.Rptr. 734); and *to bring* an action to restrain improper filling of a bay and secure a general declaration of the rights of the people to the waterways and wildlife areas of the bay (Alameda Conservation Association v. State of Cal. (9 Cir. 1971)

437 F.2d 1087, 1095–1098). Members of the public have been allowed *to defend* a quiet title action by asserting the right to use a public right of way through private property (The Diamond Match Co. v. Savercool (1933) 218 Cal. 665, 24 P.2d 783). They have been allowed to assert the public trust easement for hunting, fishing and navigation in privately owned tidelands *as a defense* in an action to enjoin such use (Forestier v. Johnson, supra, 164 Cal. 24, 127 P. 156), and to navigate on shallow navigable waters in small boats (Bohn v. Albertson (1951) 107 Cal.App.2d 738, 238 P.2d 128).

Whitney had standing to raise this issue. The court could have raised this issue on its own. "It is now well settled that the court may finally determine as between the parties in a quiet title action all of the conflicting claims regarding any estate or interest in the property." (Hendershott v. Shipman (1951) 37 Cal.2d 190, 194, 231 P.2d 481, 483.) Where the interest concerned is one that, as here, constitutes a public burden upon land to which title is quieted, and affects the defendant as a member of the public, that servitude should be explicitly declared.

Third: *Does Whitney have rights as a littoral owner which are improperly enjoined by the judgment appealed from?*

Yes. In its memorandum opinion the trial court expressed its views as to the private rights between these parties. It stated that it would find and adjudge that the littoral owner does not own a private right of access or fishery across all of the tidelands adjoining his property; that, however, he may own a reasonable right of access; that here it would be found that he had exercised such right and his right of access is therefore confined to the wharf area; and that as between Marks and Whitney this has ripened into an easement in that specific area only. The judgment quieted an easement by prescription in Whitney as against Marks "for access and ingress and egress to and from the deep waters of Tomales Bay for pedestrians, fisheries, navigation and other purposes. Such right shall be subject to the right of MARKS to use, to fill and to develop . . . (including those within the above defined area seven feet in width), so long as such rights of access . . . shall be preserved over and across said area seven feet in width and MARKS may use and convey the same for use, for all purposes which do not defeat or substantially interfere with use by WHITNEY of such area for the above stated purposes."

A littoral owner has a right in the foreshore adjacent to his property separate and distinct from that of the general public (Gould on Waters, 3d ed., § 149). This is a property right and is valuable, and although it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed. (Yates v. Milwaukee (1870) 77 U.S. 497, 504, 10 Wall. 497, 504, 19 L.Ed. 984.) A littoral owner can enjoin as a nuisance interference by a private person with this right. (San Francisco Sav. Union v. R. G. R. Petroleum & Mining Co. (1904) 144 Cal. 134, 135–139, 77 P. 823.) A littoral owner has been held to have the right to build a pier out to the line of navigability; a right to accretion;[7] a right to navigation (the latter right being held in common with the general public) (see 65 C.J.S. Navigable Waters §§ 61–69; 56 Am.Jur. Waters, § 233); and a right of access from every part of his frontage across the foreshore (see Coulson & Forbes on Waters (6th ed. 1952) pp. 69–70). This right of access extends to ordinary low tide both when the tide is in and when the tide is out. (San Francisco Sav. Union v. R. G. R. Petroleum & Mining Co., supra, 144 Cal. 134, 77 P. 823.)

This littoral right is of course burdened with a servitude in favor of the state in the exercise of its trust powers over navigable waters (Colberg, Inc. v. State, supra, 67 Cal.2d 408, 420, 62 Cal. Rptr. 401, 432 P.2d 3; City of Newport Beach v. Fager (1940) 39 Cal.App.2d 23, 102 P.2d 438). The state has not exercised its power in this instance. The effect of this judgment is to limit Whitney's right to bathe, sunbathe, fish, etc. to the pier area of the tidelands, to restrict his *lateral* use of the pier for boating, etc., and to debar him from the use of any part of his 344 foot frontage along these tidelands except for the seven-foot wide

pier area.

The quieting of a prescriptive easement in Whitney without a determination in the decree as to the effect thereof on the public rights in these tidelands, creates further confusion both as to the nature of Whitney's rights as littoral owner, apart from prescription, and as to the rights of the public

While the authority given Marks "to use, to fill and to develop" the tidelands, except as limited by the wharf easement, was not intended by the trial court to place any limitation upon the state or federal government, in the absence of a declaration of the rights of the public or of the state as trustee it is subject to misinterpretation, i. e., as giving a blanket and otherwise unqualified authorization to Marks to fill and develop.

Fourth: *Does the failure of the court to include the words "along the line of ordinary low water" in the metes and bounds description of the seaward boundary of the tidelands indicate that such line is fixed in location?*

No. However, Whitney has no standing to complain of this omission. As a littoral owner, as a member of the public entitled to exercise certain rights, and as the owner of a wharf easement, he can assert rights in and over the tidelands but only to the line of ordinary low water. The *seaward* boundary of the tidelands is not a common boundary as to him. The judgment in question omits the description of the natural monument "along the line of ordinary low water" but otherwise describes the courses and distances in almost identical[8] language with the descriptions contained in the original patent and in the official surveys.

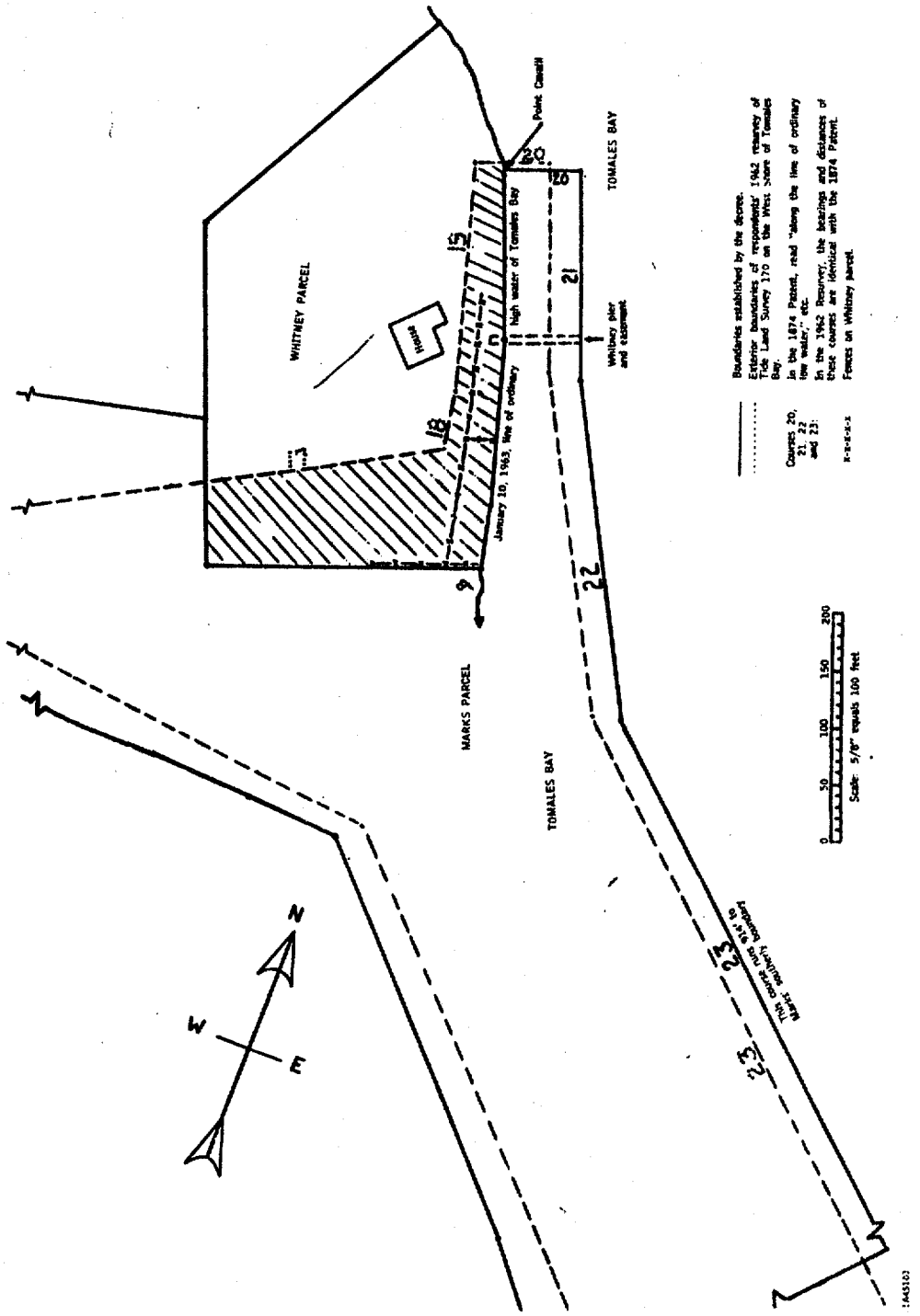
The courses and distances as given constitute a meander line which, for surveying convenience, depicts the line of ordinary low water. Where a meander line is used, the actual location of the line of ordinary low water and not the calls is controlling. (de Watson v. San Pedro, etc., R. R. Co. (1915) 169 Cal. 520, 521, 147 P. 140; People v. Ward Redwood Co. (1964) 225 Cal.App.2d 385, 389, 37 Cal.Rptr. 397; Den v. Spalding (1940) 39 Cal.App.2d 623, 627, 104 P.2d 81; McLeod v. Reyes (1935) 4 Cal.App.2d 143, 154, 40 P.2d 839.)

The retention of the words "along the line of ordinary low water" in the description in the decree would have been more explicit and would have avoided some of the problems encountered on the appeal. The failure to include these words however does not refute the fact that the judgment describes a natural monument, i. e., "the line of ordinary low water."

The seaward boundary is a common boundary line as between Marks and the state, owner of the adjoining submerged lands. Section 6463 of the Public Resources Code authorizes any person claiming title under a patent of tideland issued by the state to bring suit against the state, or against the state with others, to quiet title or otherwise determine the validity of such patent or establish boundaries. Section 6357 authorizes the State Lands Commission to establish ordinary low-water mark or ordinary high-water mark by agreement, arbitration or action to quiet title whenever it is deemed expedient or necessary. The state was not made a party hereto and no action has been taken by the State Lands Commission to change the seaward boundary of these tidelands from the description given in the original patent. Should there be any dispute as to where the actual line of low water lies which would make uncertain spatial limitations on the exercise by members of the public or littoral owners of rights across these tidelands, the commission has jurisdiction to take the necessary steps to define such limits and protect such rights, or litigation could be brought pursuant to section 6463 of the Public Resources Code.

Judgment is reversed and remanded for proceedings not inconsistent with this opinion.

WRIGHT, C. J., and PETERS, TOBRINER, MOSK, BURKE and SULLIVAN, JJ., concur.


WHITNEY PARCEL
House
MARKS PARCEL
TOMALES BAY
TOMALES BAY
Point Cowell
Whitney pier and catamaran
January 10, 1963, line of ordinary high water of Tomales Bay
Boundaries established by the decree.
Exterior boundaries of respondents' 1962 resurvey of Rancho Land Survey 170 on the West Shore of Tomales Bay.
Courses 20, 21, 22, and 23:
In the 1874 Patent, read "along the line of ordinary low water," etc.
In the 1962 Resurvey, the bearings and distances of these courses are identical with the 1874 Patent.
Fences on Whitney parcel.
Scale: 5/8" equals 100 feet
0
50
100
150
200
N
W
E

NOTE

(a) Determining the Boundary Between Public and Privately-Owned Lands

Determination of coastal boundaries is essential to the development of an effective coastal management program. Coastal boundaries have been generally defined by vertical datums, which are planes of reference for elevations based on the average rise and fall of the tide.[1] Since, in many areas, the shore has a very gradual slope, a small vertical change may cause a large horizontal movement of a boundary on the ground.

At common law, the sovereign owned the sea, the seabed and the foreshore, although prior to the 16th century, much of the foreshore was appropriated by private owners.[2] In the 17th century, Lord Hale, in his treatise De Jure Maris, claimed that lands beneath tidal waters and the foreshore could only be acquired by express grant from the sovereign. He distinguished between fresh water streams, which he argued should belong to the riparian owner and the seabed, which belonged to the sovereign and was incapable of private ownership. Lord Hale's position became established in the common law by the end of the 17th century and since that time, the "ordinary high water mark" has been the common law boundary between public and privately-owned coastal lands.[3]

However, confusion arose as to the exact meaning of the term "ordinary high water mark". Lord Hale described three varieties of tides in his De Jure Maris, and the courts struggled with the problem of deciding how to determine this boundary. One consideration was whether the land in question was dry enough of the time to be of use to the upland owner for improvement or cultivation. If so, the upland owner may argue that this was above the "ordinary high water line" and was properly his land.

The confusion carried over into the American courts until the Borax decision in 1892 (reprinted above). In that case, the "ordinary high tide mark" was construed as the "mean high tide line", as determined by the average of all high tides measured over an 18.6 year cycle, as determined by the Department of Commerce, Coast and Geodetic Survey. This has the effect of vesting ownership in the

[1]Maloney and Ausness, "The Use and Legal Significance of the Mean High Water Line In Coastal Boundary Mapping," 53 North Carolina L. Rev. 185, 195 (1974)

[2]Id. at 198.

[3]Id. at 200.

private hands of the upland owner of those lands above the reach of the tides the majority of the time. Consider how realistic this is in relation to existing use patterns in coastal areas.

Since the Borax decision involved the determination of the seaward boundary of a federal patent or grant, its applicability to other cases arising upon different facts is open to question. While that case represents a progressive solution, the law of each state must be examined to determine its acceptance or rejection of this federal common law concept.

(b) Tests of Navigability For Determining Title to the Beds of Waterways

Since a mean high tide line can, in theory, be found wherever tidal effects occur, the question arises as to whether that should be used to determine the boundaries in every such location. In other words, where should the state assert title to the beds of waterways, whatever the method of determining boundaries? The answer may depend upon the shape of the shoreline as well as the test applied by that state to determine "navigability" for title purposes. Where the coastline is relatively straight, the mean high tide line may be an appropriate boundary. However, where there are tidal basins or rivers which cause indentations in the shoreline, the question becomes what test will be used to determine the extent of public ownership. Similarly, what test is to be applied to inland waterways, to determine whether the state or federal governments have title or control of the bed of the waterway or the regulation of its use? Note that the concept of "navigability" has become a pluralistic legal concept. A watercourse may be navigable in a factual sense, for recreation or for commerce, but the term navigability may have a different significance when used in the context of a "navigable servitude" or in the case of a determination of title.

Two possible tests of navigability for title purposes are:

(1) The "ebb and flow" test: This test has been applied to assert state ownership of the beds of all waterways affected by the ebb and flow of the tides.

(2) The "navigability-in-fact" test: The physical requisites for navigability-in-fact may be defined by statute or the common law in a given state.

These tests may be combined so that any waterway which is subject to the ebb and flow of the tide is presumptively considered navigable for title purposes. Such a combined test would give a state the maximum extent of ownership; ie. those waterways in the

coastal area which are affected by the tides as well as inland waterways which are navigable-in-fact.

The federal test of navigability was announced in The Daniel Ball, 77 U.S. 557 (1870), but since that time the concept has been expanded in scope. One such expansive statement of the federal test of navigability is contained in United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), as follows:

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. "Natural and ordinary condition" refers to volume of water, the gradients, and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.
>
> . . . . .
>
> Although navigability to fix ownership of the river bed or riparian rights is determined . . . as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable. There has never been doubt that the navigability referred to in the (admiralty) cases was navigability despite the obstruction of falls, rapids, sandbars, carries or shifting currents. The plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence.

ILLINOIS CENTRAL RAILROAD V. ILLINOIS

146 U.S. 387 (1892)

MR. JUSTICE FIELD delivered the opinion of the court.

This suit was commenced on the 1st of March, 1883, in a Circuit Court of Illinois, by an information or bill in equity, filed by the Attorney General of the State, in the name of its people against the Illinois Central Railroad Company, a corporation created under its laws, and against the city of Chicago. The United States were also named as a party defendant, but they never appeared in the suit, and it was impossible to bring them in as a party without their consent. The alleged grievances arose solely from the acts and claims of the railroad company, but the city of Chicago was made a defendant because of its interest in the subject of the litigation. The railroad company filed its answer in the state court at the first term after the commencement of the suit, and upon its petition the case was removed to the Circuit Court of the United States for the Northern District of Illinois. In May following the city appeared to the suit and filed its answer, admitting all the allegations of fact in the bill. A subsequent motion by the complainant to remand the case to the state court was denied. 16 Fed. Rep. 881. The pleadings were afterwards altered in various particulars. An amended information or bill was filed by the Attorney General, and the city filed a cross-bill for affirmative relief against the State and the company. The latter appeared to the cross-bill and answered it, as did the Attorney General for the State. Each party has prosecuted a separate appeal.

The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago River and Sixteenth street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers and other structures used by the railroad company in its business; and also of the title claimed by the company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the south line of the south pier near Chicago River extended eastwardly, and a line extended, in the same direction, from the south line of lot 21 near the company's round-house and machine shops. The determination of the title of the company will involve a consideration of its right to construct, for its own business, as well as for public convenience, wharves, piers and docks in the harbor.

We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels

of land claimed by the company. And the court, in its elaborate opinion, (33 Fed. Rep. 730,) for that purpose referred to the legislation of the United States and of the State, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed and are satisfied with its entire accuracy. It would, therefore, serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated. In what we may say of the rights of the railroad company, of the State, and of the city, remaining after the legislation and proceedings taken, we shall assume the correctness of that history.

The State of Illinois was admitted into the Union in 1818 on an equal footing with the original States in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio River, out of which the State was formed. But the equality prescribed would have existed if it had not been thus stipulated. There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits. The boundaries of the State were prescribed by Congress and accepted by the State in its original Constitution. They are given in the bill. It is sufficient for our purpose to observe that they include within their eastern line all that portion of Lake Michigan lying east of the main land of the State and the middle of the lake south of latitude forty-two degrees and thirty minutes.

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Weber* v. *Harbor Commissioners*, 18 Wall. 57.

The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. . . .

The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of States on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. Upon that theory we shall examine how far such dominion, sovereignty and proprietary right have been encroached upon by the railroad company, and how far that company had, at the time, the assent of the State to such encroachment, and also the validity of the claim which the company asserts of a right to make further encroachments thereon by virtue of a grant from the State in April, 1869. . . .

We do not deem it material, for the determination of any questions presented in this case, to describe in detail the extensive works of the railroad company under the permission given to locate its road within the city by the ordinance. It is sufficient to say that when this suit was commenced it had reclaimed from the waters of the lake a tract, two hundred feet in width, for the whole distance allowed for its entry within the city, and constructed thereon the tracks needed for its railway, with all the guards against danger in its approach and crossings as specified in the ordinance, and erected the designated breakwater beyond its tracks on the east, and the necessary works for the protection of the shore on the west. Its works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic. They were constructed under the authority of the law by the requirement of the city as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use.

The railroad company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated — the construction and operation of a railroad thereon with one or more tracks and works in connection with the road or in aid thereof. The act incorporating the company only granted to it a right of way over the public lands for its use and control, for the purpose contemplated, which was to enable it to survey, locate, and construct and operate a railroad. All lands, waters, materials and privileges belonging to the State were granted solely for that purpose. It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed.

We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, but at present we are speaking only of what rights it acquired from the reclamation of the tract upon which the railroad and the works in connection with it are built. The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incident to riparian ownership. They exist with such ownership and pass with the transfer of the land. And the land must not only be contiguous to the water, but in contact with it. Proximity without contact is insufficient. The riparian right attaches to land on the border of navigable water without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage. (See Gould on Waters, § 148, and authorities there cited.)

The riparian proprietor is entitled, among other rights, as held in *Yates* v. *Milwaukee*, 10 Wall. 497, 504, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. . . .

We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therein as it may deem proper for its interest and business. The claim is founded upon the third section of the act of the legislature of the State passed on the 16th of April, 1869, . .

The section in question has two objects in view: one was to confirm certain alleged rights of the railroad company under the grant from the State in its charter and under and "by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident" thereto, in and to the lands submerged or otherwise lying east of a line parallel with and four

hundred feet east of the west line of Michigan Avenue, in fractional sections ten and fifteen. The other object was to grant to the railroad company submerged lands in the harbor.

The confirmation made, whatever the operation claimed for it in other respects, cannot be invoked so as to extend the riparian right which the company possessed, from its ownership of lands in sections ten and fifteen on the shore of the lake. Whether the piers or docks constructed by it, after the passage of the act of 1869, extend beyond the point of navigability in the waters of the lake, must be the subject of judicial inquiry upon the execution of this decree in the court below. If it be ascertained upon such inquiry and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown, or for such other disposition of the extension as, upon the application of the State and the facts established, may be authorized by law.

As to the grant of the submerged lands, the act declares that all the right and title of the State in and to the submerged lands, constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot twenty-one, south of and near to the round-house and machine shops of the company "are granted in fee to the railroad company, its successors and assigns." The grant is accompanied with a proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor or impair the public right of navigation, or be construed to exempt the company from any act regulating the rates of wharfage and dockage to be charged in the harbor.

This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the State. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged.

With these limitations the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms, for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period and renew it at its pleasure. And the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the act, converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally. . . .

The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the

navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.

The area of the submerged lands proposed to be ceded by the act in question to the railroad company embraces some-

thing more than a thousand acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor but embracing adjoining submerged lands which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly if not quite equal to the pier area along the water front of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York, and are equal to those of New York and Boston combined. Chicago has nearly twenty-five per cent of the lake carrying trade as compared with the arrivals and clearings of all the leading ports of our great inland seas. In the year ending June 30, 1886, the joint arrivals and clearances of vessels at that port amounted to twenty-two thousand and ninety-six, with a tonnage of over seven millions; and in 1890 the tonnage of the vessels reached nearly nine millions. As stated by counsel, since the passage of the Lake Front Act, in 1869, the population of the city has increased nearly a million souls, and the increase of commerce has kept pace with it. It is hardly conceivable that the legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another State. It would not be listened to that the control and management of the harbor of that great city — a subject of concern to the whole people of the State — should thus be placed elsewhere than in the State itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated.

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such

property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney, in *Martin* v. *Waddell*, 16 Pet. 367, 410: "When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." In *Arnold* v. *Mundy*, 1 Halsted, 1, which is cited by this court in *Martin* v. *Waddell*, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made "with great deliberation and research," the Supreme Court of New Jersey comments upon the rights of the State in the bed of navigable waters, and, after observing that the power exercised by the State over the lands and waters is nothing more than what is called the *jus regium*, the right of regulating, improving and securing them for the benefit of every individual citizen, adds: "The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." Necessarily must the control of the waters of a State over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use. . . .

Except as modified in the particulars mentioned, the decree in each of the three cases on appeal must be affirmed, with costs against the railroad company; and it is so ordered.

MR. JUSTICE SHIRAS, with whom concurred MR. JUSTICE GRAY and MR. JUSTICE BROWN, dissenting.

That the ownership of a State in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the State, I have supposed to be well settled.

Thus it was said in *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65, that "upon the admission of California into the Union upon equal footing with the original States, absolute

property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, *with the consequent right to dispose of the title to any part of said soils* in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government." . . .

The opinion of the majority, if I rightly apprehend it, likewise concedes that a State does possess the power to grant the rights of property and possession in such lands to private parties, but the power is stated to be, in some way restricted to "small parcels, or where such parcels can be disposed of without detriment to the public interests in the lands and waters remaining." But it is difficult to see how the validity of the exercise of the power, if the power exists, can depend upon the size of the parcel granted, or how, if it be possible to imagine that the power is subject to such a limitation, the present case would be affected, as the grant in question, though doubtless a large and valuable one, is, relatively to the remaining soil and waters, if not insignificant, yet certainly, in view of the purposes to be effected, not unreasonable. It is matter of common knowledge that a great railroad system, like that of the Illinois Central Railroad Company, requires an extensive and constantly increasing territory for its terminal facilities.

It would seem to be plain that, if the State of Illinois has the power, by her legislature, to grant private rights and interests in parcels of soil under her navigable waters, the extent of such a grant and its effect upon the public interests in the lands and waters remaining are matters of legislative discretion. . . .

The able and interesting statement, in the opinion of the majority, of the rights of the public in the navigable waters, and of the limitation of the powers of the State to part with its control over them, is not dissented from. But its pertinency in the present discussion is not clearly seen. It will be time enough to invoke the doctrine of the inviolability of public rights when and if the railroad company shall attempt to disregard them.

Should the State of Illinois see, in the great and unforeseen growth of the city of Chicago and of the lake commerce, reason to doubt the prudence of her legislature in entering into the contract created by the passage and acceptance of the act of 1869, she can take the rights and property of the railroad company in these lands by a constitutional condemnation of them. So, freed from the shackles of an undesirable contract, she can make, as she expresses in her bill the desire to do, a "more advantageous sale or disposition to other parties," without offence to the law of the land. . . .

INTERNATIONAL PAPER COMPANY
V.
MISSISSIPPI STATE HIGHWAY DEPARTMENT

271 So. 2d 395 (1972)

PATTERSON, Justice:

This is an appeal by International Paper Company from a decree of the Chancery Court of Jackson County which sustained a general demurrer to the appellant's bill of complaint. The complainant sought an injunction against the State from entering upon certain lands located on Lowry Island in Jackson County and to cancel the State's claim of title thereto. We affirm the order of the lower court.

The lands in question are part of a large area located between the east and west branches of the Pascagoula River. In 1817 when Mississippi was admitted to the Union, this area was interspersed with islands and marshes and entirely subject to overflow from high tide of the Gulf of Mexico. Between 1817 and 1884 the elevation of the area increased due to natural accretion and portions of the area were no longer subject to overflow by high tide although on occasion it was inundated by the high waters of the Pascagoula River.

In 1884 the Mississippi Legislature at the insistence of then Governor Lowry, provided, by Chapter 17, Laws of 1884, for the swampland commissioner to have the area, which thereafter became known as Lowry Island, surveyed and sold.

J. M. T. Hamilton was commissioned to conduct this survey and his report indicates that Lowry Island was at that time mostly marsh and tidelands. . . .

The provisions of Chapter 17, Laws of 1884, were brought forward and appear in the Code of 1892 as Section 2580 as follows:

> Other lands; sale of and price fixed.—All lands fallen or falling to the state by escheat, or coming to it in any other manner; and all accretions of land not the subject of private ownership, and particularly those accretions near the mouth of the Pascagoula river, heretofore surveyed by the state; and all other lands within the borders of the state, and not belonging to the United States nor owned by another, are the property of the state, and are to be managed and disposed of through the land-office; and the land-commissioner may sell any of such lands at the same price as the swamp and overflow lands, subject to be fixed in the same manner and under like regulations. He may, in his discretion, rent out any public land which is improved or tillable, in the same manner and under like conditions as he may rent out improved or tillable tax-land.

The foregoing section was carried forward verbatim as Section 2919, Code of 1906, and now appears as Mississippi Code 1942 Annotated section 4123 (1956).

Subsequent to Hamilton's survey, much of the land called Lowry Island was sold by the State. The State issued patents to the lands involved here to complainant's predecessors in title in 1895, 1897 and 1917, and the titles then passed by mesne conveyances to the complainant. Since 1967 the complainant has had possession of the land and has paid taxes on it as have its predecessors. The area does not lend itself to the normal characteristics of possession inasmuch as it is marsh and swampland. The payment of taxes is the dominant evidentiary element of ownership or possession.

Title to Lowry Island lands has been the subject of dispute for many years. The State of Mississippi, as reflected by several advisory opinions issued through the Attorney General's office, has expressed the belief that title to Lowry Island lands remains vested in the sovereign.

When plans for the development and construction of Interstate 10 became known, the State disclosed its intention to traverse

a part of Lowry Island which is claimed by International Paper Company. Thereafter, the highway department entered upon the lands and marked the course across which the highway was to be constructed and the appellant brought this action to cancel the claim of the State of Mississippi and to enjoin the Mississippi State Highway Department from entering upon the property without first securing a right-of-way in conformity with the applicable statutes on eminent domain.

The chancellor below sustained a general demurrer of the State of Mississippi and International Paper has appealed from that decree.

Under the common law both the title and domain of the sea, rivers, and arms of the sea, where the tide ebbs and flows, and of all land below the high water mark, were vested within the King in trust for the public. Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1893). When the American Colonies achieved freedom following the Revolutionary War, "the ownership of, and dominion and sovereignty over, lands covered by tidewaters, and the fresh waters of the Great Lakes, within the limits of the several states, belonged to the respective states within which they were found, with the consequent right to use or dispose of any portion thereof, when that could be done without impairment of the interest of the public in the waters, subject to the right of Congress to control their navigation for the regulation of commerce." [Money v. Wood, 152 Miss. 17, 28, 118 So. 357, 359 (1928)].

In 1817 upon admission of Mississippi to the Union, the State became vested as trustee with "the title to all the land under tide-water, including the spaces between ordinary high and low water marks; this title of the state being held for public purposes, chief among which purposes is that of commerce and navigation, for which latter purposes the title of the state is subservient to such regulations as may be constitutionally made by the national government, in said matters of navigation and commerce." [Rouse v. Saucier's Heirs, 166 Miss. 704, 713, 146 So. 291, 292 (1933)].

The bill of complaint alleges that in 1817 the land in question was subject to the ebb and flow of high and low tides. There would seem to be little doubt that the land masses which thereafter arose through accretion and which was not contiguous to private property, belonged to the State. The bed of a bay is property of the state and all bodies of land arising from or upon such state-owned bay floor become and are property of the state. Where certain tracts are not in existence at the time of the land grant to the state and they are subsequently formed by deposits of silt, soil, etc., from a river, title vests in the state. Giles v. Basore, 154 Tex. 366, 278 S.W.2d 830 (1955). This case, however, does not draw a distinction between emerging contiguous lands and those which are noncontiguous. In Moore v. Kuljis, 207 So.2d 604 (Miss.1967), this Court held in following the precedents of Harrison County v. Guice, 244 Miss. 95, 140 So.2d 838 (1962); Skrmetta v. Moore, 227 Miss. 119, 86 So.2d 46 (1956); and Skrmetta v. Moore, 202 Miss. 585, 30 So.2d 53 (1947); that property owners adjacent to tidelands were entitled to the accretionary buildup thereto whether it resulted from man-made or natural accretion. We find no authority suggestive of title to noncontiguous emerging tidelands whose characteristics have changed from tidelands to fast dry lands.

In Hogue v. Bourgois, 71 N.W.2d 47, 54 A.L.R.2d 633 (N.D.1955), the North Dakota Supreme Court indicated that where an island or accumulation of land formed apart from the mainland by deposits of alluvial accretions in the bed of a navigable stream, but such accumulation or island of land had not become "fast dry land" at the time the State was admitted to the Union, title of such land or accumulation together with all additions thereto formed by the natural causes through the gradual process of accretion vested in the State.

From the bill of complaint we note that the appellant seeks cancellation of the State's claim to all of the lands described therein except the well defined navigable streams. It therefore claims title to the marshlands below mean high tide as well

as title to any lands that have emerged by accretion so that they are now fast dry lands. The issue before the Court is whether the legislature had the authority to convey in fee simple the marshlands as well as the accreted land on Lowry Island for private benefit.

The chancellor reasoned that such authority was not present, indicating "that the ownership of the state was and is as trustee for the use and benefit of all of the people of the state and it is not subject to conveyances to private individuals for private purposes." This Court in initially discussing the public trust by which title to tidelands is held by the State, held in *Money, supra,* that the sovereign could not convey in fee simple the title to submerged trust property to private owners for private purposes. In the case of Rouse v. Saucier's Heirs, 166 Miss. 704, 146 So. 291 (1933), we considered the issue of whether the State, and somewhat obliquely the Federal Government, could convey fee simple title to marshlands situated along the Wolf River which flows into the Bay of St. Louis to an individual for private purposes. Justice Griffith, speaking for the Court, stated:

> Neither the state nor the federal government can validly convey title in fee simple to an area such as above mentioned to private owners for private purposes. To what extent and what title may be conveyed for public purposes, and particularly for the purposes of commerce and navigation and fisheries, is not here before us, and an academic discussion will therefore not be undertaken upon that subject. (166 Miss. at 713, 146 So. at 292).

To the same effect *see* Parks v. Simpson, 242 Miss. 894, 137 So.2d 136 (1962); Giles v. City of Biloxi, 237 Miss. 65, 112 So.2d 815 (1959); Xidis v. City of Gulfport, 221 Miss. 79, 72 So.2d 153 (1954); Crary v. State Highway Commission, 219 Miss. 284, 68 So.2d 468 (1953); State ex rel. Rice v. Stewart, 184 Miss. 202, 185 So. 247 (1939); and State v. Stewart, 184 Miss. 202, 184 So. 44 (1938). We are of the opinion from these authorities that the chancellor below properly sustained the demurrer to the bill of complaint which challenged the State's title to those lands below the level of mean high tide.

The appellant contends, however, that the most recent pronouncement of this Court upon the subject, Treuting v. Bridge & Park Commission of City of Biloxi, 199 So.2d 627 (Miss.1967), eroded the rule announced in *Money, supra,* and the cases following it. In *Treuting* the principal issue was whether a conveyance by the State of filled-in tidelands was a valid exercise by it of its duty to the citizens of the state as trustee of the tidelands. We stated that the legislature had authority to provide for the sale of lands filled in above the ebb and flow of the tide by spoil derived from shoal waters to private owners when incident "to the overall public interest and purpose in accommodating an expanding population, commerce, tourism and recreation." We observe that this case is an exception to the general rule which prohibits the sale by a trustee to anyone for a private purpose. The case was restricted in its terms to the circumstances there existing which arose from special legislation directed to a particular area. We held this authority of sale valid only because a public purpose resulted which was clearly paramount to the private interest. The case is not authority for nor does it lend validity to the act of the legislature in 1884 which attempted to authorize the sale of the state's trust lands lying between the east and west branches of the Pascagoula River to private persons for private purposes.

Perhaps the more intricate and related question is whether the State was empowered to sell for private purposes at the time it attempted to sell the accreted lands not contiguous to private property that had arisen above mean high tide. While it is true that the character of the land, admitted by demurrer, has changed by accretion from the time it vested in the State until the time of the legislative enactment and that perhaps its paramount use for navigational purposes has diminished, nevertheless it is our opinion that these changing characteristics of the land did not displace the trust imposed upon the State for the public. In *Treuting, supra,* we noted the continuation of the common law trust in the following language:

> Under the particular facts of this case, the chancery court was warranted in concluding that the state could convey to the Park Commission fee simple title to the submerged lands in question, for public purposes and uses in the overall development of Deer Island. Moreover, the legislature was justified in authorizing sale of these lands, when filled in and developed, to private individuals as an incident to the overall public interest and purpose in accommodating an expanding population, commerce, tourism and recreation. There will be no substantial interference with the original purposes of the trust imposed upon the state in connection with these submerged lands, and the development as authorized by the statutes is consistent with the public trust. . . . (199 So.2d at 633).

The authorized development was held to be consistent with the public trust and in the public interest. Here the claim of title by the appellant is directed to a private interest, a distinction from *Treuting* of such significance that it does not control the present case involving a paramount private interest. We conclude that the decree of the lower court sustaining the demurrer should be affirmed.

The appellant next contends that the assessment and collection of taxes on these lands by the State for a period in excess of half a century, together with its failure to file suit to set aside the patent, should in equity estop the State from contending its patents to be invalid. It cites in support of this position the recent case of State v. Stockett, 249 So.2d 388 (Miss.1971). We are of the opinion this argument is not well founded since the facts in *Stockett, supra,* were substantially different from the admitted allegations of the present bill of complaint. We are of the opinion that this contention is unavailing and that the decision of the lower court should be affirmed.

Affirmed.

CITY OF LONG BEACH V. MANSELL

Supreme Court of California, In Bank, 1970

476 P. 2d 423

(A legislative settlement, including two agreements, was attempted to settle a title dispute over a large amount of land at the mouth of a river on the Pacific Ocean. As part of the first agreement, the city agreed to exchange 5 acres of public tidelands which had been previously filled by the city, for 8.5 acres of privately-owned riparian land. The city treasurer refused to sign the deeds on the grounds they violated the public trust.)

. . .

Petitioners also contend, on the basis of certain early decisions of this court, that the Legislature has the power to terminate the common law public trust as to tidelands which have ceased to be necessary or useful for purposes of navigation, commerce, and fisheries—and that tidelands so freed from the public trust may be alienated without violation of article XV, section 3. Apparently this argument accepts respondents' contention that "tidelands" within the meaning of article XV, section 3, are lands which were seaward of mean high tide in 1879 (see text preceding fn. 15, *ante*) but urges that such lands can be removed from the crucial category by legislative declaration.

An understanding of this argument requires a brief explanation of the common law trust [16] as it relates to questions of alienation. The state's "ownership" of public tidelands and submerged lands (see Civ.Code, § 670), which it assumed upon admission to the Union, is not of a proprietary nature. Rather, the state holds such lands in trust for public purposes, which have traditionally been delineated in terms of navigation, commerce, and fisheries. The powers of the state as trustee are implied and include everything necessary to the proper administration of the trust in view of its purposes—with certain express reservations such as article XV, section 3.

Although these powers include disposal of trust lands in such manner as the interests of navigation, commerce, and fisheries require, tidelands subject to the trust may not be alienated into absolute private ownership; attempted alienation of such tidelands passes only bare legal title, the lands remaining subject to the public easement. However, the state in its proper administration of the trust may find it necessary or advisable to cut off certain tidelands from water access and render them useless for trust purposes. In such a case the state through the Legislature may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When tidelands have been so freed from the trust—and if they are not subject to the constitutional prohibition forbidding alienation—they may be irrevocably conveyed into absolute private ownership.

The common law public trust here described is to be distinguished from the constitutional prohibition set forth in article XV, section 3. The former does not of itself forbid the alienation of tidelands but merely insures that when such lands are subject to the trust (i. e., have not been re-

moved therefrom by proper legislative determination), they remain so subject even after alienation. The constitutional provision, on the other hand, flatly forbids alienation of certain tidelands—i. e., tidelands within two miles of an incorporated city—*whether or not* they are trust lands at the time of alienation.

The cases upon which petitioners rely (Atwood v. Hammond (1935) 4 Cal.2d 31, 48 P.2d 20; People ex rel. State Board of Harbor Com'rs v. Kerber (1908) 152 Cal. 731, 93 P. 878; Boone v. Kingsbury (1928) 206 Cal. 148, 273 P. 797; see also City of Milwaukee v. State (1927) 193 Wis. 423, 214 N.W. 820) indicate that this distinction can be made to yield in some circumstances. Thus, in Atwood v. Hammond, *supra*, 4 Cal. 2d 31, 48 P.2d 20, the defendant city and county proposed to establish a civic center upon tidelands which had been conveyed to it for that purpose by the state. Plaintiff taxpayers contended that such a use was not permissible because the subject tract was part of a larger tract previously conveyed to the city subject to the public trust for navigation, commerce, and fisheries. This court held that the demurrer to the complaint was properly sustained without leave to amend.

We pointed out that a prior grant to the city for trust purposes was made upon condition that the city undertake harbor improvements on the granted property, and that in the course of making such improvements dredging occurred and the subject tract was filled with the resulting sand and debris, and a bulkhead was erected. Subsequent grants made after the subject tract had been reclaimed (1) declared that the tract had ceased to be tidelands and was free from the trusts and restrictions imposed by the prior grant and (2) conveyed the reclaimed land to the city for municipal purposes including that of a civic center. We held that, whereas the reclamation itself "did not *ipso facto* terminate the public trust for navigation and commerce * * *," nevertheless "it was competent for the state by legislative action [i. e., the subsequent grant] to terminate the public trust as to the 18-acre parcel, which constitutes but a small part of the area granted to the city." (4 Cal.2d at p. 41, 48 P.2d at p. 25.)

After this conclusion that it was permissible for the state to terminate the common law trust as to the reclaimed parcel, we turned to a consideration of the effect of constitutional provisions. We first pointed out that "there has been no attempt to alienate the 18-acre parcel which is the subject of this action from public ownership, but, rather, an effort to require that it be used only for purposes not connected directly with navigation or commerce, that is, for county and municipal buildings." (4 Cal.2d at p. 42, 48 P.2d at p. 25.) This fact, however, did not render relevant constitutional provisions wholly unworthy of consideration. "[I]n view of the manifest purpose of sections 2 [10] and 3, article 15, the prohibition against alienation necessarily implies a prohibition against freeing such tidelands from the trust for navigation and dedicating them to other uses while they remain tidelands. But said section cannot be interpreted to forbid the reclamation of lands which may be filled in as the result of a highly beneficial program of harbor development. It applies to tidelands, that is, to lands covered and uncovered by the flow and ebb of the tides, and, it has been held, to lands which are continuously submerged. It does not in terms apply to lands which, through reclamation, are no longer covered and uncovered by the tides, and have ceased to be tidelands. We are of the view that it was competent for the Legislature upon finding that the 18-acre tract was 'not longer required for navigation, commerce or fisheries,' to free it from the public easement for those purposes." (4 Cal.2d at pp. 42–43, 48 P.2d at p. 25.)

Finally, we emphasized that only a small portion of the original trust grant was being freed from the public trust. "Plaintiff does not allege what proportion of the total area lying shoreward of the bulkhead line or seawall this 18-acre parcel constitutes. But the inference is that it is only a very small part of the total acreage. * * We cannot interfere with the Legislature's decision that the public easement may be abrogated as to this relatively small parcel." (4 Cal.2d at p. 43, 48 P.2d at p. 26.)

The parties are in substantial dispute

as to the meaning and application of this case. As indicated above, petitioners find support therein for their contention that the prohibition of article XV, section 3, is inapplicable to tidelands which have been reclaimed "as the result of a highly beneficial program of harbor development" (4 Cal.2d at p. 42, 48 P.2d at p. 25) and have been declared by the Legislature to be no longer subject to the common law trust. Respondents, on the other hand, point out that the lands in *Atwood* were granted to a *public* rather than a *private* grantee so that, as the court recognized, the constitutional provisions were strictly inapplicable for that reason. Thus, respondents argue, any support to be found for petitioners' position in the court's language must rest upon mere dictum.

However the language in *Atwood* may be characterized in terms of its value as precedent, we think that it represents a clear statement of this court that article XV, section 3, does not forbid alienation of lands within two miles of an incorporated city which have been reclaimed "as the result of a highly beneficial program of harbor development," are relatively small in area, and have been freed of the public trust by legislative act. One persuasive reason for this conclusion is that the court in *Atwood*, prior to the language above quoted, discussed and cited a number of cases involving public harbor development which entailed the granting of lands reclaimed in the course of development into private ownership.[20] Although these cases do not concern themselves with the application of article XV, section 3—that provision not being in existence at the time of the transfers there in question—the material which we have quoted proceeds in light of those cases and clearly indicates that article XV, section 3, would not have forbidden those transfers.

Secondly, we consider that the principle of the *Atwood* case is wholly consistent with the purposes of the framers of the Constitution. The debates at the Constitutional Convention, to which we have adverted above, reveal a general intention to retain tidelands within two miles of incorporated cities in order that such tidelands might be utilized in the public interest for navigational and related purposes rather than in the interest of private persons to whom they might be granted. Surely if in the course of, and for the purpose of carrying out, a comprehensive public program of harbor development certain portions of tidelands are filled under circumstances clearly showing that, in the light of the relatively minor area involved and the manner of reclamation in relation to the program as a whole, such reclamation is merely a reasonably necessary incident of the program and of the promotion of its public objective, and if thereafter such filled areas are declared by the Legislature to be of no value for navigational and related purposes, then we think that a sale and transfer into private ownership of such filled-in areas might be found to be entirely consistent with the intention and objective of the framers of the Constitution. But we emphasize that the circumstances under which this may occur are of necessity unique, that the conditions sanctioning its approval must be scrupulously observed and satisfied, and that generally speaking the reclaimed area alleged to be free from both the public trust and the constitutional restriction against alienation into private ownership must be, as it were, a residual product of the larger program—a "relatively small parcel" to use the language of *Atwood* (4 Cal.2d at p. 43, 48 P.2d 20;)—determined by the Legislature to have no further value for the purposes of the public easement.

To reiterate, we conclude that when lands within two miles of an incorporated city or town which were subject to the ebb and flow of the tide at the date of the adoption of the Constitution—and which therefore are "tidelands" within the meaning of article XV, section 3—(1) have been found and determined by the Legislature to be valueless for trust purposes and are freed from the public trust (see fn. 17, *ante*) and (2) have been or are to be reclaimed pursuant to and in the course of a highly beneficial public program of harbor development, such lands—if they constitute a relatively small parcel of the total acreage involved—thereupon cease to be "tidelands" within the meaning of the constitutional provision and are subject to alienation into absolute private ownership.

It remains that we determine the application of this principle to the case before us.

It is clear, we think, that those portions of the McGrath agreement which contemplate the exchange of certain reclaimed public tidelands for other lands owned by the McGrath trust are consistent with the principle we have enunciated. The public lands in question were reclaimed in the course of that public program of harbor development which resulted in the creation of Marine Stadium. Those lands are relatively minor in area (5 acres) and have been declared in chapter 1688 to be "no longer necessary or useful for commerce, fisheries and navigation." Moreover the exchange *itself* is sought to be made in furtherance of an existing and ongoing program of harbor development.

The situation is otherwise, however, with regard to the settled and subdivided lands described in section 2(a) of chapter 1688 which are the primary concern of the Belmont agreement. As we have indicated above, the filling of these lands by private developers began at about the turn of the century and was substantially completed when the Alamitos Bay area was annexed to the city in 1923. This filling proceeded in a rather haphazard manner, without significant regard for the uncertain boundaries in the area, and in one case—that of Steamshovel Channel (see text accompanying fn. 7, *ante*)—filling was undertaken upon lands whose public character was clear. It is manifest that the filling in question was not undertaken pursuant to and as an integral part of a public program of harbor development. Moreover, the contemplated disclaimer of public interest and quitclaim in favor of private parties is in no way related to the present public program of harbor development in the Alamitos Bay area. For these reasons it is apparent that the principle we have distilled from Atwood v. Hammond, *supra*, 4 Cal.2d 31, 48 P.2d 20, and related cases is not applicable to the section 2(a) lands dealt with in the Belmont agreement. It must therefore be concluded that those lands, to the extent they are in fact public "tidelands" within the meaning of article XV, section 3, of the California Constitution, have not been withdrawn from that category by proper legislative action and remain subject to the prohibition against alienation contained in that section.

. . . .

BOROUGH OF NEPTUNE CITY
V.
BOROUGH OF AVON-BY-THE-SEA

Supreme Court of New Jersey, 1972

294 A. 2d 47

HALL, J.

The question presented by this case is whether an oceanfront municipality may charge non-residents higher fees than residents for the use of its beach area. The Law Division sustained an amendatory ordinance of defendant Borough of Avon-By-The-Sea (Avon) so providing. 114 N.J.Super. 115, 274 A.2d 860 (1971). The challenge came from plaintiffs Borough of Neptune City, an adjacent inland municipality, and two of its residents. We granted plaintiffs' motion to certify their appeal to the Appellate Division before argument in that tribunal. R. 2:12-2. The question posed is of ever increasing importance in our metropolitan area.[1] We believe that the answer to it should turn on the application of what has become known as the public trust doctrine. . . .

Plaintiffs attacked the ordinance on several grounds, including the claim of a common law right of access to the ocean in all citizens of the state. This in essence amounts to reliance upon the public trust doctrine, although not denominated by plaintiffs as such. Avon, although inferentially recognizing some such right, defended its amendatory ordinance on the thesis, accepted by the trial court, that its property taxpayers should nevertheless not be called upon to bear the expense, above non-discriminating beach user fees received, of the cost of operating and maintaining the beachfront, claimed to result from use by non-residents and that consequently the discrimination in fees was not irrational or invidious. All recognized that an oceanfront municipality may not absolutely exclude non-residents from the use of its dedicated beach, including, of course, land seaward of the mean high water mark; a trial court decision, Brindley v. Lavallette, 33 N.J.Super. 344, 348-349, 110 A.2d 157 (Law Div.1954), had so held, although not by reliance upon the public trust doctrine. We approve that holding.

Avon's proofs, based on 1969 figures, sought to show a deficit of about $50,000 between user fees received in that year and the costs of operation and maintenance of the beach. The cost figures were derived from estimates of the portions of budgetary line items said to be attributable to the beach as well as from projections on an annual basis of expected future capital expenses. Plaintiffs urge that some of these allocations are unsound. Moreover, there was no showing that the same costs would not be incurred even if only residents (under the definition) used the beach, nor was it demonstrated that the 1970 discriminatory fee schedule closed the alleged financial gap.

We prefer, however, not to treat the case on this basis, but rather, as we indicated at the outset, to approach it from the more fundamental viewpoint of the modern meaning and application of the public trust doctrine. . . .

A succinct statement of the principle is found in the leading case of Illinois Central Railroad Company v. People of State of Illinois, 146 U.S. 387, 435, 13 S.Ct. 110, 111, 36 L.Ed. 1018, 1036 (1892):

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign

nations and among the states. This doctrine has been often announced by this court . . . .

The original purpose of the doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food. This is also well pointed up in *Illinois Central:*

> It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. (146 U.S. at 452, 13 S.Ct. at 118, 36 L.Ed. at 1042)

There is not the slightest doubt that New Jersey has always recognized the trust doctrine. The basic case is Arnold v. Mundy, 6 N.J.L. 1 (Sup.Ct.1821), where Chief Justice Kirkpatrick spoke as follows:

> Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become *private property.* Those things not divided among the individuals still belong to the nation, and are called *public property.* Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called "*the domain of the crown or of the republic*;" others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called *common property.* Of this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts. Vattel lib. i, 20. 2 Black.Com. 14. But inasmuch as the things which constitute this *common property* are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people. (6 N.J. L. at 71)
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> * * * * * *
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> And I am further of opinion, that, upon the Revolution, all these royal rights became vested in *the people* of New Jersey as the sovereign of the country, and are now in their hands; and that they, having, themselves, both the legal title and the usufruct, may make such disposition of them, and such regulation concerning them, as they may think fit; that this power of disposition and regulation must be exercised by them in their sovereign capacity; that the legislature is their rightful representative in this respect, and, therefore, that the legislature, in the exercise of this power, may lawfully erect ports, harbours, basins, docks, and wharves on the coasts of the sea and in the arms thereof, and in the navigable rivers; that they may bank off those waters and reclaim the land upon the

shores; that they may build dams, locks, and bridges for the improvement of the navigation and the ease of passage; that they may clear and improve fishing places, to increase the product of the fishery; that they may create, enlarge, and improve oyster beds, by planting oysters therein in order to procure a more ample supply; that they may do these things, themselves, at the public expense, or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments; but still this power, which may be thus exercised by the sovereignty of the state, is nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people. (6 N.J.L. at 78)

Similar expressions are found throughout our decisions down through the years. *See e. g.*, Cobb v. Davenport, 32 N.J.L. 369, 378–379 (Sup.Ct.1867); Ross v. Mayor and Council of Borough of Edgewater, 115 N.J.L. 477, 483, 180 A. 866 (Sup.Ct.1935), affirmed o. b. 116 N.J.L. 447, 184 A. 810 (E. & A.1936), cert. den. 299 U.S. 543, 57 S.Ct. 37, 81 L.Ed. 400 (1936); Bailey v. Driscoll, *supra* (19 N.J. at 367–368, 117 A. 2d 265); Baker v. Normanoch Ass'n, Inc., 25 N.J. 407, 414, 136 A.2d 645 (1957).

It is safe to say, however, that the scope and limitations of the doctrine in this state have never been defined with any great degree of precision. That it represents a deeply inherent right of the citizenry cannot be disputed. Two aspects should be particularly mentioned, one only tangentially involved in this case and the latter directly pertinent. The former relates to the lawful extent of the power of the legislature to alienate trust lands to private parties; the latter to the inclusion within the doctrine of public accessibility to and use of such lands for recreation and health, including bathing, boating and associated activities. Both are of prime importance in this day and age. Remaining tidal water resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance to the public welfare has become much more apparent. *Cf.* New Jersey Sports & Exposition Authority v. McCrane, 61 N.J. 1, at 55, 292 A.2d 545, at 579 (1972) (concurring and dissenting opinion of Hall, J.). All of these factors mandate more precise attention to the doctrine.

Here we are not directly concerned with the extent of legislative power to alienate tidal lands because the lands seaward of the mean high water line remain in state ownership, the municipality owns the bordering land, which is dedicated to park and beach purposes, and no problem of physical access by the public to the ocean exists. The matter of legislative alienation in this state should, nonetheless, be briefly adverted to since it has a tangential bearing. As the earlier quotations indicate, it has always been assumed that the State may convey or grant rights in some tidal lands to private persons where the use to be made thereof is consistent with and in furtherance of the purposes of the doctrine, *e. g.*, the improvement of commerce and navigation redounding to the benefit of the public. However, our cases rather early began to broadly say that the State's power to vacate or abridge public rights in tidal lands is absolute and unlimited, and our statutes dealing with state conveyances of such lands contain few, if any, limitations thereon. (The statutes are collected in Revised Statutes, Chapter 3, Riparian Lands, of Title 12, Commerce and Navigation, N.J. S.A. 12:3–1 et seq.). An early case so indicating is Stevens v. Paterson & Newark Railroad Co., 34 N.J.L. 532, 549–552 (E. & A.1870); a more recent example is Schultz v. Wilson, 44 N.J.Super. 591, 597, 131 A.2d 415 (App.Div.1957), certif. den. 24 N.J. 546, 133 A.2d 395 (1957). ***But see*** Borough of Wildwood Crest v. Masciarella, 51 N.J. 352, 358, 240 A.2d 665 (1968). *See also* Mayor and Council of City of Hoboken v. Pennsylvania Railroad Co., 124 U.S. 656,

688–691, 8 S.Ct. 643, 653–655, 31 L.Ed. 543, 551–552 (1888); Shively v. Bowlby, 152 U.S. 1, 21–23, 14 S.Ct. 548, 555–556, 38 L.Ed. 331, 339–340 (1894), purporting to summarize the New Jersey law to that date. *But compare* Illinois Central Railroad Company v. People of State of Illinois, *supra*, 146 U.S. at 453, 13 S.Ct. at 118, 36 L.Ed. at 1042, holding that a state may not completely abdicate its obligations with respect to such lands:

> The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

The observation to be made is that the statements in our cases of an unlimited power in the legislature to convey such trust lands to private persons may well be too broad. It may be that some such prior conveyances constituted an improper alienation of trust property or at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein. For example, the conveyance of tide-flowed lands bordered by an ocean dry sand area in private ownership to the owner thereof may well be subject to the right of the public to use the ocean waters. And, whether or not there was any such conveyance of tidal land, the problem of a means of public access to that land and the ocean exists. This case does not require resolution of such issues and we express no opinion on them. We mention this alienation aspect to indicate that, at least where the upland sand area is owned by a municipality—a political subdivision and creature of the state—and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.

We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit. The legislature appears to have had such an extension in mind in enacting N.J.S.A. 12:3-33, 34, previously mentioned. Those sections, generally speaking, authorize grants to governmental bodies of tide-flowed lands which front upon a public park extending to such lands, but only upon condition that any land so granted shall be maintained as a public park for public use, resort and recreation. *Cf.* Martin v. City of Asbury Park, 114 N.J.L. 298, 176 A. 172 (E. & A. 1935).

Other states have readily extended the doctrine, beyond the original purposes of navigation and fishing, to cover other public uses, and especially recreational uses. In Massachusetts, it was held many years ago that "it would be too strict a doctrine to hold that the trust for the public, under which the state holds and controls navigable tide waters and the land under them, beyond the line of private ownership, is for navigation alone. It is wider in its scope, and it includes all necessary and proper uses, in the interest of the public." Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124, 129 (1909). Wisconsin, where the doctrine covers all navigable waters, has long held that it extends to all public uses of water including pleasure boating, sailing, fishing, swimming, hunting, skating and enjoyment of scenic beauty. Representative modern cases are Hixon v. Public Service Commission, 32 Wis.2d 608, 146 N.W.2d 577, 582 (1966); Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514, 520 (1952), affirmed on rehearing 261 Wis. 492, 55 N.W. 2d 40 (1952). Courts in several other states have recently recognized the vital public interest in the use of the sea shore for recreational purposes and have, under various theories consistent with their own law, asserted the public rights in such land to

be superior to private or municipal interests. *See e. g.*, State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); Gion v. City of Santa Cruz, 2 Cal.3d 29, 84 Cal. Rptr. 162, 465 P.2d 50 (1970); Gewirtz v. City of Long Beach, 69 Misc.2d 763, 330 N.Y.S.2d 495 (Sup.Ct., Nassau Cty. 1972). Modern text writers and commentators assert that the trend of the law is, or should be, in the same direction. 1 Waters and Water Rights, *supra*, § 36.4(B), pp. 200–202; Sax, *supra*, 68 Mich.L.Rev. at 556, 565; Note, *supra*, 79 Yale L.J. at 777–778, 784–785; Note, Jaffee, *supra*, 25 Rutgers L. Rev., at 608 n. 226, 690, 701.

We are convinced it has to follow that, while municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and non-residents. The Avon amendatory ordinance of 1970 clearly does so by restricting the sale of season badges to residents, as defined in the ordinance, resulting in a lower fee to them. In addition the fee for daily badges, which would be utilized mostly by non-residents, may have been as well discriminatorily designed with respect to the amount of the charge. Since we cannot tell what fee schedule the municipality would have adopted when it passed this ordinance in 1970 if it had to do so on the basis of equal treatment for all, we see no other course but to set aside the entire amendatory enactment.

We recognize, however, that Avon has operated under the present schedule since 1970 and that the present beach season is about half over. Other oceanfront municipalities may well have similar enactments. Also Avon very likely has operated its budget and financial affairs on the basis of the beach user fees expected to be collected under the present schedule in reliance upon the trial court decision. To attempt now to turn the clock back to the non-discriminatory schedule (with considerably lower charges) specified in the pre-amendment ordinance would only create hopeless practical confusion and some unfairness to the municipality and its taxpayers. We therefore determine that the judgment to be entered pursuant to this opinion should operate prospectively only and become effective on January 1, 1973.

We ought also to say that we fully appreciate the burdens, financial and otherwise, resting upon our oceanfront municipalities' by reason of the attraction of the sea and their beaches in the summer season to large numbers of people not permanently resident in the community. The rationale behind N.J.S.A. 40:61–22.20 certainly is that such municipalities may properly pass on some or all of the financial burden, as they decide, by imposing reasonable beach user fees, which we have held here must be uniform for all. We think it quite appropriate that such municipalities may, in arriving at such fees, consider all additional costs legitimately attributable to the operation and maintenance of the beachfront, including direct beach operational expenses, additional personnel and services required in the entire community, debt service of outstanding obligations incurred for beach improvement and preservation, and a reasonable annual reserve designed to meet expected future capital expenses therefor. They may also, we think, very properly regulate and limit, on a first come, first served basis, the number of persons allowed on the beach at any one time in the interest of safety.

The judgment of the Law Division is reversed and the cause is remanded to that tribunal for the entry of a judgment consistent with this opinion. No costs.

For reversal: Chief Justice WEINTRAUB and Justices JACOBS, HALL and SCHETTINO—4.

For affirmance: Justices FRANCIS and MOUNTAIN—2.

WILBOUR V. GALLAGHER

Supreme Court of Washington, 1969

462 P. 2d 232

HILL, Judge.

We are here concerned with the uses to which privately owned land can be put, which for "thirty-five years"[1] has been submerged each year by waters of a navigable lake. The submergence at its maximum depth (3 to 15 feet)[2] was for approximately 3 months, June 15 to September 15 each year.

The circumstances and history which furnished the background for the presentation of this unusual problem must be explained in some detail.

Lake Chelan is a glacial gorge in Chelan County, approximately 55 miles in length, and with a width, generally speaking, of from 1 to 2 miles. Its navigability is conceded.[3] Prior to 1927, it lay in its natural state with the level of its waters at 1,079 feet above sea level. By 1891 the land involved in this action had passed into private ownership being included in the "Plat of the Town of Lake Park."[4] The platter dedicated and quitclaimed all streets and alleys therein to the use of the public forever. All of the platted property subsequently became a part of the town of Lakeside, and is now a part of the town of Chelan. The date of incorporation of Lakeside does not appeal from the record, but on May 2, 1927, by ordinance No. 24, the town vacated certain specifically described streets and alleys.

On the same day, the Chelan Electric Company and the Lake Chelan Box Factory, both Washington corporations, as parties of the first part (and apparently the owners of all of the property contiguous to the vacated streets and alleys and who acquired title thereto by virtue of the vacation) executed an instrument (duly recorded) which contained the following recitals and grant:

> THAT WHEREAS, the Town of Lakeside did by Ordinance passed May 2nd, 1927, and numbered 24, vacate those portions of the streets and alleys hereinafter named, in the Town of Lakeside; and,
>
> WHEREAS, the Chelan Electric Company, as a part of its power project, intends to impound the waters of Lake Chelan, and to raise the same to the elevation of 1100 feet, still water measurement, above mean sea level, and to inundate and overflow to said elevation, those portions of the streets and alleys described in said ordinance; and
>
> WHEREAS, the Town of Lakeside, party of the second part, desires, for itself and the public, to have the right of access over the lands and premises included within the boundaries of the portions of said streets and alleys described in said Ordinance, to Lake Chelan, at all stages of water, but not, however, to interfere with the impounding or storage of said waters as stated above, or the flow thereof.
>
> NOW, THEREFORE, the parties of the first part, in consideration of One Dollar ($1.00) and other valuable consideration to them in hand paid by the party of the second part, receipt of which is hereby acknowledged, do *convey and quit claim unto the part of the second part, in perpetuity, the right of access, for itself and the public, over the lands included within the boundaries of those portions of the vacated streets and alleys hereinafter described, to Lake Chelan, at all stages of water,* not however, interfering with the right of the first party, Chelan Electric Company, its successors and assigns, to impound the waters of Lake Chelan and *to raise the same to the elevation of 1100 feet, still water measurement above mean sea level, and to inundate and overflow to the said elevation, those portions of the vacated streets and alleys hereinafter described,* or the impounding or storage of the waters of

Lake Chelan as stated above, or the flow thereof; those portions of the said vacated streets and alleys, being more particularly described as follows, to-wit:

(Emphasis ours.) Then followed a listing of exactly the same streets and alleys which had been included in the vacation ordinance.

It should be noted that the public is the beneficiary of the grant in perpetuity of "* * * the right of access * * * over the lands included within the boundaries of those portions of the vacated streets and alleys hereinafter described, to Lake Chelan, at all stages of water * * *"

The Chelan Electric Company[6] constructed a dam, pursuant to a permit by the Federal Power Commission, which permitted the annual raising of the level of the lake to 1,100 feet above sea level, with the requirement that it reach that level by June 15 each year. Thereafter in May of each year the dam was closed and the waters gradually rose to the 1,100 foot level, presumably by June 15th. They are maintained at that level until September when the dam was opened and the waters gradually subsided to the natural 1,079 foot level.[7]

We come now to a consideration of the right claimed by the defendants, Norman G. Gallagher and Ruth I. Gallagher, his wife, to fill their land below the 1,100 foot level to a height 5 feet above that level, and thus prevent its being submerged and making it available for use at all times. (Certain fills have now been completed.)

The claimed right is challenged by the plaintiffs (Charles S. Wilbour and Harriet G. Wilbour, his wife; and Chester L. Green and Ruby Green, his wife) who brought a class action on behalf of themselves and the public asking that the fills be removed, and asking for damages to their own properties caused by the fills.

To assist in an understanding of the situation, we have prepared this drawing. It is not drawn to scale, neither is it an exhibit in the case and it has been prepared for illustrative purposes only. It is based primarily on exhibit 5, a large drawing by Mr. Gallagher showing the fills he has made. It shows also the approximate water line of Lake Chelan at both the 1,079 and 1,100 foot levels. The lots, blocks, streets and alleys are as shown in the plat of Lake Park, and State Highway 97 has been superimposed. Unfortunately, the block numbers, other than 2 and 3, were omitted, and they will be supplied in our narrative explanation of the drawing.

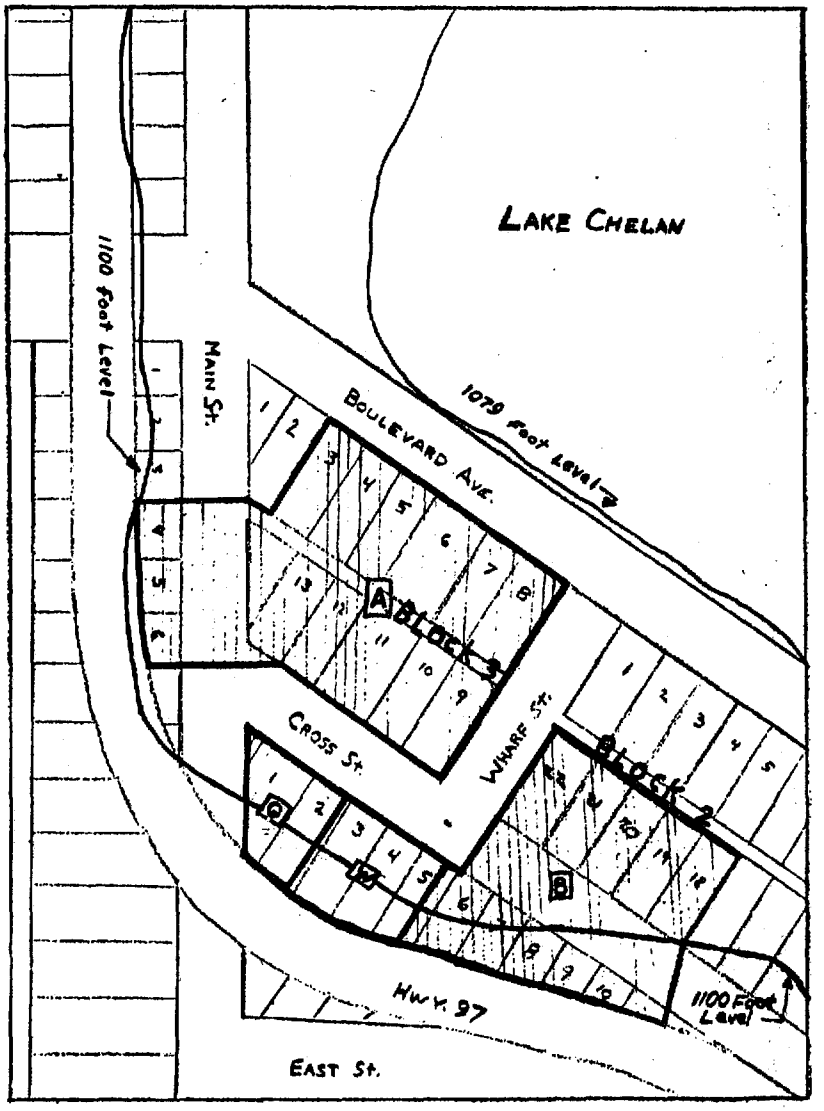
The shaded area has been divided into 4 lettered segments. G and W are the properties owned by the plaintiffs (the Greens and the Wilbours), improved with their respective homes, and lying partially above and below the 1,100 foot level (all of block 4, plat of Lake Park). A and B represent the two fills made by the defendants (the Gallaghers), both fills have access to Highway 97, and are now being used as trailer courts. A includes block 3, plat of Lake Park (except lots 1 and 2), including the alley in that block extending from vacated Wharf Street to vacated Main Street; a portion of block 6, plat of Lake Park, between the highway and vacated Main Street; also portions of vacated Main and Cross Streets. B includes a part of block 4, plat of Lake Park between the highway and vacated Cross Street; lots 18 to 22 inclusive, block 2, plat of Lake Park; and the portion of vacated Cross Street lying between the indicated portions of blocks 4 and 2. A portion of the intersection of vacated Cross and Wharf Streets also has been blockaded by a construction of the defendants, not shown on the drawing.

The trial court found that for 35 years prior to the trial (July and September 1965) and except for the filling by the defendants, commenced in 1961, the waters of Lake Chelan

> covered the lands of Defendants in Blocks 2 and 3, Lake Park, including the streets and alleys in and adjacent to said Blocks 2 and 3 for a period each year from late spring through September, to a depth of three feet to fifteen feet.

And that for the same period

> the general public, including Plaintiffs and their respective predecessors in interest, have used the waters covering the portions of Blocks 2 and 3, Plat of Lake Park, now owned by the Defendants, as well as the water covering portions of



A - GALLAGHER FILL, BLOCKS 3 and 6, MAIN and CROSS STREETS
B - GALLAGHER FILL, BLOCKS 2 and 4, CROSS STREET
G - GREEN PROPERTY
W - WILBOUR PROPERTY

[A 306]

the streets and alleys adjacent thereto, for fishing, boating, swimming and for general recreational use and that said use was open adverse, notorious and uninterrupted for said period, during the period of each year when water covers the said portions of Block 2 and 3 and the adjacent streets and alleys.

The trial court ultimately concluded (based upon estoppel) that the defendants should not be compelled to remove their fills, but awarded the plaintiffs damages, finding that the value of the Wilbour property had been lessened $8,500, and the value of the Green property had been lessened $11,000 by reason of the fills established by the defendants. . . .

The plaintiffs have made an excellent case on the basis of prescriptive rights. The filling of the vacated streets and alleys by the defendants cannot be sustained on any basis, since they had acquired no title to them and, in any event, the public had the right of access over the lands in-

cluded within the boundaries of the vacated streets and alleys to Lake Chelan at all stages of water. Further, the obvious purpose of the contemporaneous vacation and the grant to the public of the right of access was to enable the Chelan Electric Company to acquire the right to submerge the streets and alleys and yet to preserve to the public the right of access over them to the lake "at all stages of water."

However, it is unnecessary to rely on prescriptive rights, or on the rights of the public to use the land within the vacated streets and alleys for access to the lake. We prefer to rest our decision on the proposition that the fills made by the defendants constitute an obstruction to navigation.

While this is a matter of first impression and no exactly comparable case has been found, our holding represents the logical extension of establish law in somewhat comparable situations.

There was no private ownership of the land under Lake Chelan in its natural state, and no right to obstruct navigation.

It is well settled that if the level of the lake had been raised to the 1,100 foot level and had been maintained constantly at that level for the prescriptive period, the 1,100 foot level would be considered the natural level of the lake with the submerged lands being converted into part of the lake bed and to state ownership. The public would have the right to use all of the water of the lake up to the 1,100 foot level. State v. Malmquist, 114 Vt. 96, 40 A.2d 534 (1944); Village of Pewaukee v. Savoy, 103 Wis. 271, 79 N.W. 436, 50 L. R.A. 836 (1899).

We have here, however, not only the raising of the lake level by artificial means, but the distinctive features that the level does not remain constant and that the owners of the land between the 1,079 and the 1,100 foot level can occupy their property during most of the year.

We find a somewhat comparable situation in those navigable lakes which have a natural or seasonal fluctuation in extent, and have a recognized high water line and low water line. However, in those cases the problems involved usually hinge on the rights accorded riparian owners (whose titles go to the low water mark) in the areas between the high and low water marks.

The law is quite clear that where the level of a navigable body of water fluctuates due to natural causes so that a riparian owner's property is submerged part of the year, the public has the right to use all the waters of the navigable lake or stream whether it be at the high water line, the low water line, or in between. Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393, 31 A.L.R. 969 (1923); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N. W. 816, Ann.Cas.1915C, 1148 (1914). In such situations the riparian owners whose lands are periodically submerged are said to have the right to prevent any trespass on their land between the high and the low marks when not submerged. However, title between those lines is qualified by the public right of navigation and the state may prevent any use of it that interferes with that right. Stewart v. Turney, 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960 (1923). *See* annotation, Right of public to use shore of inland navigable lakes between high and low water mark, following Stewart v. Turney, *supra,* and Doemel v. Jantz, *supra,* at 31 A.L.R. 960, 978 (1923). When the land is submerged, the owner has only a qualified fee subject to the right of the public to use the water over the lands consistent with navigational rights, primary and corollary. Doemel v. Jantz, *supra;* Diana Shooting Club v. Husting, *supra.*

Thus, in the situation of a naturally varying water level, the respective rights of the public and of the owners of the periodically submerged lands are dependent upon the level of the water. As the level rises, the rights of the public to use the water increase since the area of water increases; correspondingly, the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights. As the level and the area of the water decreases, the rights of the public decrease and the rights of the landowners increase as the waters drain off their land, again giving them the right to exclusive possession until their lands are again submerged. *See,* Doemel v. Jantz, *supra;*

Diana Shooting Club v. Husting, *supra*.

When the circumstance of an artificial raising of navigable waters to a temporary higher level is synthesized with the law dealing with navigable waters having a naturally fluctuating level, the logically resulting rule for the protection of the public interest is that, where the waters of a navigable body are periodically raised and lowered by artificial means, the artificial fluctuation should be considered the same as a natural fluctuation with the rights of the public being the same in both situations, *i. e.*, the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands.

As Chief Justice Cassoday of the Wisconsin Supreme Court suggested in Mendota Club v. Anderson, 101 Wis. 479, at 493, 78 N.W. 185, at 190 (1899):

> Certainly, persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam.

Following the reasoning of these cases we hold that when the level of Lake Chelan is raised to the 1,100 foot mark (or such level as submerges the defendants' land), that land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. Nelson v. DeLong, 213 Minn. 425, 7 N.W.2d 342 (1942). When the level of the lake is lowered so that the defendants' land is no longer submerged, then they are entitled to keep trespassers off their land, and may do with the land as they wish consistent with the right of navigation when it is submerged.

It follows that the defendants' fills, insofar as they obstruct the submergence of the land by navigable waters at or below the 1,100 foot level, must be removed.[13] The court cannot authorize or approve an obstruction to navigation.

We come now to a consideration of the damages awarded by the trial court in the event of an abatement.

We do not affirm as to damages because the award of $1,800 a year for each year from 1964 until the fills are abated seems excessive,[14] and because it was apparently predicated to a considerable extent on the loss of a prescriptive right of view.

Had the lake never been raised, the defendants, in the absence of zoning or building restrictions, might have built a high-rise apartment on block 3 and another on block 2, cutting off the view from the plaintiffs' properties. Even with the annual fluctuation, if it were practicable to do so and assuming that no zoning or building restrictions were violated, the defendants might erect temporary structures on their property each September and remove them each May, effectively cutting off the view of the plaintiffs during that period.

The plaintiffs have unquestionably sustained special damages as a result of defendants' wrongful activities, and of a character that sustains their right to maintain this action, Kemp v. Putnam, 47 Wash.2d 530, 288 P.2d 837 (1955); Dawson v. McMillan, 34 Wash. 269, 75 P. 807 (1904); Carl v. West Aberdeen Land and Improvement Co., 13 Wash. 616, 43 P. 890 (1896). However, we do not agree that there ever was a year-round right of view with which there could be no interference.

We set aside the judgment for damages, and remand with instructions to abate the fills made by the defendants insofar as they interfere with the rights of navigation, primary and corollary, when the water of Lake Chelan stands at any level up to the 1,100 foot level, and with instructions to reappraise such special damages as the plaintiffs may have sustained as a result of the defendants' wrongful interference with their rights of navigation, primary and corollary, and the effects of such wrongful interference upon their property.

FINLEY, ROSELLINI, HAMILTON, HALE and McGOVERN, JJ., concur.

NEILL, Judge (dissenting in part).

Defendants are owners of platted lots which originally abutted on Lake Chelan, a navigable waterway. In 1927, Chelan Electric Company obtained a permit to raise the water of the lake to a level 21 feet above its natural level. This permit was in connection with the construction of a dam for electrical power generation. The power company owned the subject lots at the time this permit was obtained. Subsequently, it conveyed them subject to its permit rights to seasonally flood the premises.

Accordingly, we are considering the right of defendants as littoral owners to raise the level of the land to create upland out of that which is, by reason of the flowage easement, seasonally foreshore land. We are not here considering foreshore lands of the natural lake. The distinction is determinative.

Against this asserted right of the defendants is the claim of plaintiffs that, as members of the public, they have the right of navigation, swimming, boating and recreation on the waters of navigable Lake Chelan, including the waters which seasonally submerged defendants' property. Plaintiffs further claim a right of view over defendants' lands. Plaintiffs are not littoral owners as to the natural lake.

The trial court based its judgment for plaintiffs on prescription. The court found that the public had seasonally used the waters overlying defendants' lots for fishing, boating, swimming and general recreational use for some 35 years, and that such use was open, adverse, notorious and uninterrupted for that period. Defendants do not challenge the finding as to the time period. Accordingly, I will assume that the use by the public was uninterrupted and continuous, though seasonal. However, defendants do challenge the finding that the use by the public was adverse.

To properly focus on the issue before us, it should be pointed out that we are not concerned with the public or plaintiffs' use of the waters of Lake Chelan which seasonally overflow defendants' premises. During such periods of flooding, the surface of the lake is thereby expanded and the public may well have the right to use the waters for all navigational uses. That is not the issue before us. Rather, the issue is whether the use of these expanded waters, while in existence, confers on the public the right to have such inundation of defendants' lands continued. It is in this connection that we must review the record for substantial evidence to support the trial court's finding that the use was adverse.

Was the use such as to put defendants on notice that a hostile claim was being exercised so that inaction on defendants' part would deprive them of the property? I think not. There would be no reason to object to the boating, fishing and swimming in these waters as defendants did not claim a right to the waters. They claim only the seasonally submerged land. The use of the lake surface was not, in itself, harmful to defendants' property rights. A protest would have been most unnatural as well as unneighborly.

We have long recognized a different rule for adverse possession of open, vacant and unoccupied lands from that applying to enclosures. Watson v. County Comm'rs of Adams County, 38 Wash. 662, 80 P. 201 (1905). In *Watson* we quoted with approval from O'Connell v. Chicago Terminal Transfer R. R. Co., 184 Ill. 308, 56 N.E. 355 (1900):

> "* * * where land is vacant and unoccupied and remains free to public use and travel until circumstances induce the owners to enclose it, the mere travel across it, without objection from the owners, does not enable the public to acquire a public road * * * [it] is regarded merely as a permissive use."

We then observed

> [I]n order to give a prescriptive right, the use must at least be such as to convey to the absent owner reasonable notice that a claim is made in hostility to his title. It seems to us that any other rule amounts to a practical confiscation of private property for public purposes.

This rule is with sound reason because to take property by user there must be the element of notice to the owner of the allegedly servient estate that the user is laying a claim by the use. To break an enclosure, use an occupied area, or use property in any manner which gives a reasonable person notice of a claim against his property will give rise to an inference that the use is adverse. Cuillier v. Coffin, 57 Wash. 2d 624, 358 P.2d 958 (1961).

Conversely, use of property which is open, vacant and unimproved creates no such notice. A reasonable person could not be expected to assume hostility solely from a use which is not interfering with his own use of his own land. It seems only reasonable that the rule applicable to open, vacant and unoccupied lands should apply to the instant case. In so applying the rule, I find no evidence at all to support a finding of hostile and adverse use.

I have reviewed the trial court's oral decision to determine the basis for his finding that plaintiffs' use was adverse. There is no discussion of the point. He discussed only the time and continuity elements. Thus, in my opinion, the finding of a prescriptive right must fall.

The majority opinion reaches the conclusion that the fill on defendants' lots is to be removed on the basis that this fill constitutes an obstruction to navigation. Analogizing from the rule that the public has the right to the use of navigable water at both high levels and low levels, subject to the right of littoral owners to reasonably obstruct them with "aids to navigation" such as docks, wharfs, etc. (*see* 31 A.L.R. 976 (1924)), the majority holds that fluctuations of water levels which are artificially created are no different than fluctuations created by nature.

The difficulty, as I view it, is that under the majority's holding there is a taking of defendants' property right for public use without just compensation. Defendants (through their antecedents in the chain of title) have a full fee title diminished *only* by the right of the power company to periodically inundate their lands to a specific elevation. I see no reason in law or equity for preventing such an owner from protecting his land against such inundation by raising the grade of the land.

The periodic flooding involved here is entirely different from a natural raising and lowering of the lake level by reason of rains, seasonal runoff, and drought. In the latter instance, the littoral owner's rights to the foreshore lands between high and low water, whatever these rights may be, are subject to the public's navigation rights. Here, the defendants' lots, *all of which lie above natural high water,* are not subject to public navigation rights unless there has been a voluntary conveyance, eminent domain proceedings, estoppel, or loss through prescription. Unless precluded by one of the aforementioned reasons, defendants have the right to use their lots, including the right to change the grade thereof, in order to make any lawful use thereof. Accordingly, I do not agree that the fill on defendants' lots is unlawful. They should not be required to remove it.

I am in accord with the majority's conclusion as to the vacated streets. Defendants' claim of ownership of the vacated streets, whatever it may be, is limited by the terms of the 1927 conveyance from Chelan Electric Company to the public. Accordingly, defendants do not have a right to raise the level of the street area and thereby deprive the public of the access and use of the water over the vacated streets. Any fill on these vacated streets should be abated. I also agree that the damages recoverable are limited to interference with rights of navigation.

I would remand with instructions to limit an abatement order to the area of the vacated streets and limit plaintiffs' proof of damages to their loss of navigation rights, primary and secondary, caused by the fill on the former street area.

HUNTER, C. J., and DONWORTH, J. pro tem., concur in this dissent.

PARMELE V. EATON

Supreme Court of North Carolina, 1954

83 S. E. 2d 93

Suit for specific performance submitted to judge and heard by consent on waiver of jury trial. G.S. §§ 1-184, 1-185, 1-218, 7-65.

The tract of land in suit is located along the northern extension of Wrightsville Beach in New Hanover County. It is shown within the dotted lines on the accompanying exhibits. At low tide the land is completely exposed, but at high tide it is covered by tidal waters from Banks Channel, shown on aerial photograph, Exhibit B. The plaintiff claims title through mesne conveyances from (1) the State of North Carolina and (2) the State Board of Education of North Carolina. The *locus in quo* constitutes about one-third of the lands involved in the previous action entitled Resort Development Company v. Parmele, the appeal from which was heard and determined in this Court at the Spring Term, 1952, and is reported in 235 N.C. 689, 71 S.E.2d 474. An examination of the statement of facts and opinion of the Court in that case will serve to point up material differences in the facts there agreed and those here developed and found.

The plaintiff, being under contract (dated November 1, 1953) to convey to the defendant the *locus in quo*, tendered deed sufficient in form to vest in defendant fee-simple title to the property. The defendant refused tender, alleging title offered to be defective on these grounds: (1) that the land is covered by navigable waters and therefore was not subject to grant by the State of North Carolina or to sale and conveyance by the State Board of Education; and (2) that the plaintiff is estopped by the decision of this Court in Resort Development Company v. Parmele, supra, to assert title to the property. . . .

From judgment entered directing that the defendant accept the plaintiff's tender of deed and comply with the terms of the contract, the defendant appealed, assigning errors.

JOHNSON, Justice.

Our study of the record leaves the impression that the judgment below should be upheld. We rest decision on the findings of fact which bring the conveyances made by the State Board of Education to the plaintiff's predecessors in title within the purview of the statutes authorizing and validating sales and conveyances of marsh or swamp lands. In this view of the case the question whether the Sneeden grant of 1841 is valid becomes moot.

By statute enacted prior to 1926, now codified as G.S. § 146-94, the State Board of Education was given sole authority to sell and convey all vacant unentered marsh and swamp lands of the State where, as limited by the provisions of G.S. § 146-1 et seq., the land is not covered by navigable waters and the quantity in any one marsh or swamp exceeds 2,000 acres. See Home Real Estate Loan & Insurance Company v. Parmele, 214 N.C. 63, at pages 69 and 70, 197 S.E. 714. See also Chapter 151, Public Laws of 1941, and Article IX, Sec. 9 (formerly § 10), Constitution of North Carolina.

By statute enacted prior to 1926, now codified as G.S. § 146-4, it is provided that the words "swamp lands" as used in G.S. § 146-94 "shall be construed to include all those lands which have been or may now be known and called * * * 'marsh' lands, 'pocosin bay,' 'briary bay,' and 'savanna,' * * *."

By Chapter 966, Session Laws of 1953, ratified April 23, 1953, applicable to the counties of New Hanover, Pender, and Onslow, it is provided in pertinent part that: "The titles to all marsh lands and all swamp lands which have heretofore been conveyed by * * * the State Board of Education of North Carolina * * * are hereby validated, ratified and confirmed, and the persons, firms or corporations to whom such marsh lands or swamp lands have been conveyed or granted or their successors in title are hereby declared to have such title thereto as was

purported to be conveyed or granted by any of the conveyances or grants hereinbefore referred to, as fully and as completely as said conveyances or grants purported to convey or grant the same; * * *."

It is manifest that the deeds made in 1926 and 1944 by the State Board of Education to the plaintiff's predecessors in title were made in contemplation that portions of a single tract of more than 2,000 acres of marsh lands were being conveyed.

The trial court found that when the *locus in quo* was conveyed by the State Board of Education to the plaintiff's predecessors in title in 1926 and in 1944, respectively, the land so conveyed was "marsh land and a portion of a tract of marsh land in excess of 2,000 acres." The lower court also found that no part of the *locus* is or was covered at any stage of the tide by waters which are navigable in fact. These are the crucial, determinative findings and conclusions. The defendant challenges the sufficiency of the evidence to support these findings. This brings into focus the testimony of the plaintiff and his witnesses.

The plaintiff testified that the *locus* "is a part of the marsh land which lies behind the banks at Wrightsville Beach and Shell Island. There are many more than 2,000 acres of marsh land in the area, perhaps 50,000 acres. It is a complete body of marsh land going right up to Pamlico Sound * * *."

Richard F. Meier, member of the Board of Aldermen of Wrightsville Beach, testified in part: "In 1926 Moore's Inlet was somewhere about Columbia Street. * * * south of the pier * * * shown (on the aerial photograph) going out into the ocean. * * * The land * * * to the west of and adjacent to the * * * Disposal Plant was marsh land. By marsh land I mean that it was land with grass growing on it. * * * At exceptionally high water the whole marsh was covered with approximately 6 inches of water over the marsh. * * * Sunset Lagoon which is shown on the exhibit was dredged out. * * * Hugh MacRae & Company dredged it out for the purpose of building more land. * * * There is no public terminus or any sort of terminus in Sunset Lagoon. There is no public dock * * * anywhere in that area. Commercial shrimp boats do not go up in that area as they can't get by the bridge. (See highway bridge on aerial photo, Exhibit B.) The bridge isn't high enough * * * and they wouldn't have water enough. * * * the area to the west of Wrightsville Beach, just before you get to the beach, is called Harbor Island. * * * I have never seen a boat navigate over the area on the map * * * shown in green. (the land involved in the case—shown on Exhibit A within the dotted lines) * * * at all times since 1926 up until the dredging took place in 1953 that area (referring to the *locus in quo*) was covered with marsh grass. * * * The land * * * was a part of a continuous tract of marsh land which ran in every direction. * * * between the banks and the mainland."

The witness Ernest Woolard testified he has lived in the vicinity of Wrightsville Beach for thirty years and is engaged in the business of boating—taking fishing parties out in the ocean. He said in part: "* * * Moore's Inlet in * * * 1926 was some distance back to the south from where it is presently located. * * * At that time the land to the north and northwest of Moore's Inlet was a continuous marsh from Stokeley's Channel which goes through here to the end of Harbor Island, except for two creeks which went through the marsh, one closer up here to the northwest and the other down toward the east. All the rest was marsh. There was one creek up close to the end of Harbor Island. It was just a creek. * * * It is not possible to navigate a boat into this marsh land. * * * After the inlet moved to the north the sand beat across it and wherever the sand beat across the marsh it killed the marsh grass. * * * Marsh grass won't grow on sand. * * * Marsh grass won't grow unless it's covered with salt water on high tide * * *. At an average high tide most of the marsh land would be covered by water a foot or a foot and a half. * * * The little channels which run through the marsh grass are called little guts. They are just little drains. It is not possible to navigate in those guts. * * * I don't think it is possible to navigate any kind of a boat over marsh grass at high tide. * * * you

could drag a row boat over it. * * * I am familiar with the area on Exhibit B shown in green (now in dotted lines) prior to its being filled. It was not possible to navigate a boat in it at any stage of the tide. It was marsh grass. * * * there was no kind of fishing that could be done with a small skiff in that area. You couldn't do nothing because the grass was out on high tide. It was impossible to use that for any sort of navigation."

D. B. George, whose business is fishing in the Wrightsville area, said Harbor Island was created by being "pumped up." He testified in part: "I worked on the dredge that pumped up Harbor Island in * * * 1917. * * * Captain Price carried this dredge around through Spring Landing Channel (shown on aerial-photo, Exhibit B) which goes in just below where the bridge is at Wrightsville. * * * This is the channel shown to the north end of Harbor Island which goes around to the Inland Waterway. * * * I had occasion to try to get through Spring Landing Channel last winter. I was in a boat which drew about two feet of water. The tide was about two hours ebb, that is two hours after high tide. * * * My son thought we could get through, so we went on and got about half way down the channel and found we couldn't get through. * * * Spring Landing Channel is not used for commercial boats of any kind. It's not used for nothing more than fellows going oystering and clamming. * * * Fishermen don't use Spring Landing Channel, they use Stokeley's Channel going out the Inland Waterway. * * * It is possible to get through Spring Landing Channel at high tide with a small boat which draws two feet of water."

Clyde Harrelson testified: "* * * The tide normally rises 3½ feet at Wrightsville Beach. * * * No commercial fishing boats fish in the area of Sunset Lagoon. * * * The area (in controversy) is a part of a tract of marsh land which is in excess of 2,000 acres that runs from the beach to the mainland."

The foregoing testimony and other evidence of like import supports the crucial findings of fact of the court below to the effect (1) that the land in question when conveyed by the State Board of Education was part of a tract of marsh land in excess of 2,000 acres and (2) that no part of the *locus* is or was covered by waters which are navigable in fact.

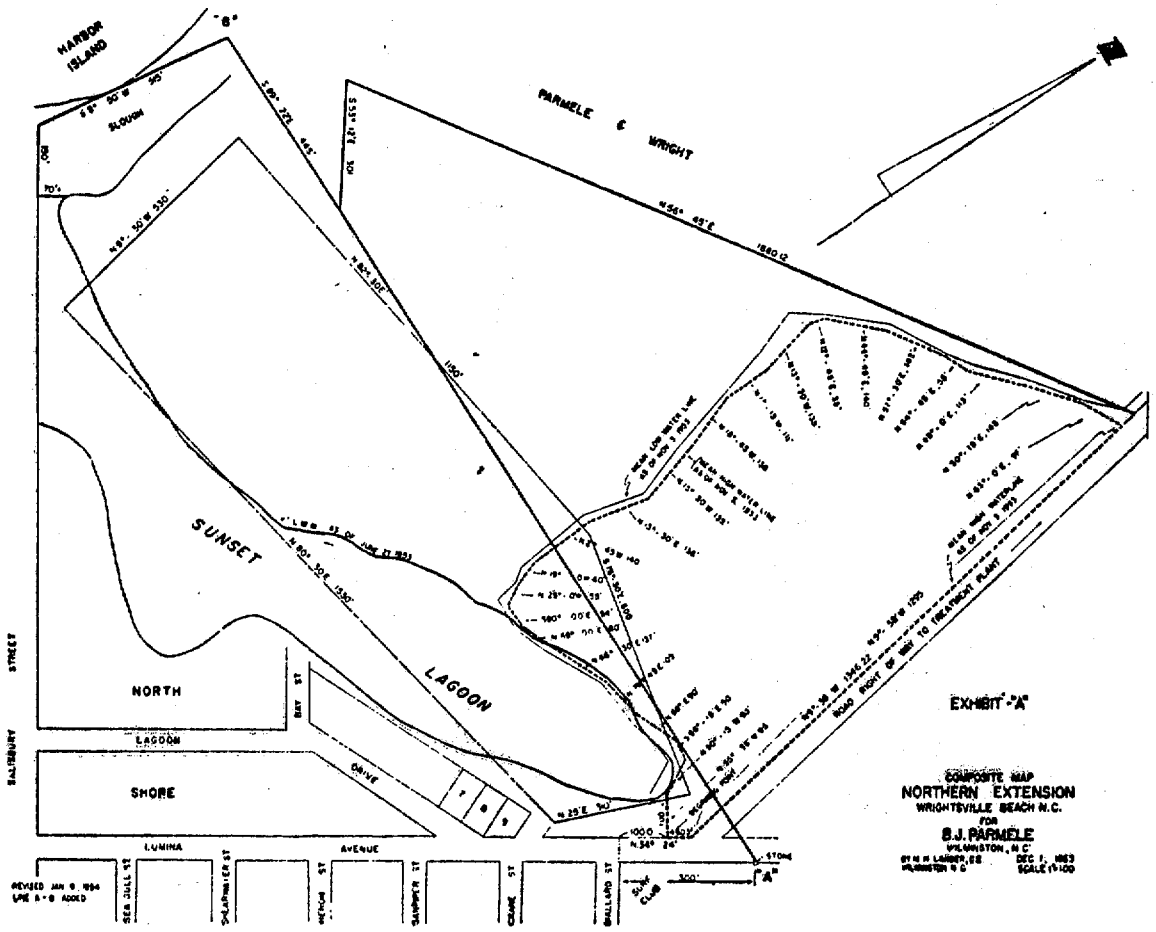
With us the ebb and flow of the tide is not the criterion for determining navigability. The more practical test is whether, in its ordinary state, a body of water has capacity and suitability for the usual purpose of navigation by vessels or boats such as are employed in the ordinary course of water commerce, trade, and travel. See 56 Am.Jur., Waters, Sec. 179; Home Real Estate Loan & Insurance Co. v. Parmele, supra, 214 N.C. 63, 197 S.E. 714. Briefly stated, the rule with us "is that all water courses are regarded as navigable in law that are navigable in fact." Resort Development Co. v. Parmele, supra, 235 N.C. 689, 71 S.E.2d 474, 475.

It is noted that the record here presents no question as to conflict between riparian and navigation rights.

As to the defendant's plea of estoppel, it is enough to say that new facts alleged in the pleadings and developed at the trial relating to the *locus in quo*, showing that the instant case relates to only a small portion of the land involved in the former case, Resort Development Co. v. Parmele, supra, 235 N.C. 689, 71 S.E.2d 474, and that the land was purchased by the plaintiff after the passage of the Act, Chapter 966, Session Laws of 1953, validating titles to marsh land, prevent the plaintiff in this action from being estopped from asserting and proving marketable title to the *locus in quo*.

The judgment below will be upheld.

Affirmed.


HARBOR ISLAND
SLOUGH
PARMELE & WRIGHT
SUNSET
LAGOON
NORTH
SHORE
BAY ST
LAGOON DRIVE
LUMINA AVENUE
SEA GULL ST
SKIMMER ST
HERON ST
SANDPIPER ST
CRANE ST
BALLARD ST
SALISBURY STREET
EXHIBIT "A"
COMPOSITE MAP
NORTHERN EXTENSION
WRIGHTSVILLE BEACH N.C.
FOR
S.J. PARMELE
SCALE 1"=100'

UNITED STATES V. CHANDLER-DUNBAR CO.

United States Supreme Court, 1913

229 U.S. 53

(The Chandler-Dunbar Co. had erected a dam and was producing and selling power. Congress chose to destroy the water-power value in order to promote navigation.)

From the foregoing it will be seen that the controlling questions are, first, whether the Chandler-Dunbar Company has any private property in the water power capacity of the rapids and falls of the St. Marys River which has been "taken," and for which compensation must be made under the Fifth Amendment to the Constitution; and, second, if so, what is the extent of its water power right and how shall the compensation be measured?

That compensation must be made for the upland taken is not disputable. The measure of compensation may in a degree turn upon the relation of that species of property to the alleged water power rights claimed by the Chandler-Dunbar Company. We, therefore, pass for the present the errors assigned which concern the awards made for such upland.

The technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law. *Shively* v. *Bowlby*, 152 U. S. 1, 31; *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 624, 632; *Scott* v. *Lattig*, 227 U. S. 229. Upon the admission of the State of Michigan into the Union the bed of the St. Marys River passed to the State, and under the law of that State the conveyance of a tract of land upon a navigable river carries the title to the middle thread. *Webber* v. *The Pere Marquette &c.*, 62 Michigan, 626; *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447.

The technical title of the Chandler-Dunbar Company therefore, includes the bed of the river opposite its upland on the bank to the middle thread of the stream, being the boundary line at that point between the United States and the Dominion of Canada. Over this bed flows about two-thirds of the volume of water constituting the falls and rapids of the St. Marys River. By reason of that

fact, and the ownership of the shore, the company's claim is, that it is the owner of the river and of the inherent power in the falls and rapids, subject only to the public right of navigation. While not denying that this right of navigation is the dominating right, yet the claim is that the United States in the exercise of the power to regulate commerce, may not exclude the rights of riparian owners to construct in the river and upon their own submerged lands such appliances as are necessary to control and use the current for commercial purposes, provided only that such structures do not impede or hinder navigation and that the flow of the stream is not so diminished as to leave less than every possible requirement of navigation, present and future. This claim of a proprietary right in the bed of the river and in the flow of the stream over that bed to the extent that such flow is in excess of the wants of navigation constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the Fifth Amendment, compensation must be made.

This is the view which was entertained by Circuit Judge Denison in the court below, and is supported by most careful findings of fact and law and an elaborate and able opinion. The question is, therefore, one which from every standpoint deserves careful consideration.

This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. It is a title which inheres in the ownership of the shore and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the States and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution, are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and

upon such submerged land, are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which in its judgment is injurious to the dominant right of navigation. So, also, it may permit the construction and maintenance of tunnels under or bridges over the river, and may require the removal of every such structure placed there with or without its license, the element of contract out of the way, which it shall require to be removed or altered as an obstruction to navigation. In *Gilman* v. *Philadelphia*, 3 Wall. 713, 724, this court said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstructions to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.

"It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided."

In *Gibson* v. *United States*, 166 U. S. 269, it is said (p. 271):

"All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution."

Thus in *Scranton* v. *Wheeler*, *supra*, the Government constructed a long dyke or pier upon such submerged lands in the river here involved, for the purpose of aiding its navigation. This cut the riparian owner off from direct access to deep water, and he claimed that his rights had

been invaded and his property taken without compensation. This court held that the Government had not "taken" any property which was not primarily subject to the very use to which it had been put, and, therefore, denied his claim. Touching the nature and character of a riparian owner in the submerged lands in front of his upland bounding upon a public navigable river such as the St. Marys, this court said (p. 163):

"The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bounding on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such waters. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

In *Pennsylvania* v. *Wheeling Bridge Company*, 18 How. 421, 430, this court, upon the facts in evidence, held that a bridge over the Ohio River, constructed under an act of the State of Virginia, created an obstruction to navigation, and was a nuisance which should be removed. Before the decree was executed Congress declared the bridge a lawful structure and not an obstruction. This court thereupon refused to issue a mandate for carrying into effect its own decree, saying:

"Although it still may be an obstruction in fact, it is not so in the contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers

of both governments, State and Federal, which, if not sufficient, certainly none can be found in our system of government."

In *Philadelphia* v. *Stimson, supra,* and in *Union Bridge Company* v. *United States,* 204 U. S. 364, many of the cases are cited and reviewed and we need add nothing more to the discussion.

The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was "necessary for the purposes of navigation of said waters and the waters connected therewith," that determination was conclusive.

So much of the zone covered by this declaration as consisted of fast land upon the banks of the river, or in islands which were private property, is, of course, to be paid for. But the flow of the stream was in no sense private property, and there is no room for a judicial review of the judgment of Congress that the flow of the river is not in excess of any possible need of navigation, or for a determination that if in excess, the riparian owners had any private property right in such excess which must be paid for if they have been excluded from the use of the same. . . .

It is a little difficult to understand the basis for the claim that in appropriating the upland bordering upon this stretch of water, the Government not only takes the land but also the great water power which potentially exists in the river. The broad claim that the water power of the stream is appurtenant to the bank owned by it, and not dependent upon ownership of the soil over which the river flows has been advanced. But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river, is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable. . . .

Upon what principle can it be said that in requiring the removal of the development works which were in the river upon sufferance, Congress has taken private property for public use without compensation? In deciding that a necessity existed for absolute control of the river at the rapids, Congress has of course excluded, until it changes the law, every such construction as a hindrance to its plans and purposes for the betterment of navigation. The qualified title to the bed of the river affords no ground for any claim of a right to construct and maintain therein any structure which Congress has by the act of 1909 decided in effect to be an obstruction to navigation, and a hindrance to its plans for improvement. That title is absolutely subordinate to the right of navigation and no right of private property would have been invaded if such submerged lands were occupied by structures in aid of navigation or kept free from such obstructions in the interest of navigation. *Scranton* v. *Wheeler, supra; Hawkins Light House Case*, 39 Fed. Rep. 77, 83. We need not consider whether the entire flow of the river is necessary for the purposes of navigation, or whether there is a surplus which is to be paid for, if the Chandler-Dunbar Company is to be excluded from the commercial use of that surplus. The answer is found in the fact that Congress has determined that the stream from the upland taken to the international boundary is necessary for the purposes of navigation. That determination operates to exclude from the river forever the structures necessary for the commercial use of the water power. That it does not deprive the Chandler-Dunbar Company of private property rights follows from the considerations before stated.

It is said that the twelfth section of the act of 1909 authorizes the Secretary of War to lease upon terms agreed upon, any excess of water power which results from the conservation of the flow of the river, and the works which the Government may construct. This it is said is a taking of private property for commercial uses and not for the improvement of navigation. But aside from the exclusive public purpose declared by the eleventh section of the act, the twelfth section declares that the conservation of the flow of the river is "primarily for the benefit of navigation, and incidentally for the purpose of having the water power developed, either for the direct use of the United States, or by lease . . . . through the Secretary of War." If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government. The

practice is not unusual in respect to similar public works constructed by state governments. In *Kaukauna Co.* v. *Green Bay &c. Canal*, 142 U. S. 254, 273, respecting a Wisconsin act to which this objection was made, the court said:

"But, if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw—controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement."

It is at best not clear how the Chandler-Dunbar Company can be heard to object to the selling of any excess of water power which may result from the construction of such controlling or remedial works as shall be found advisable for the improvement of navigation, inasmuch as it had no property right in the river which has been "taken." It has, therefore, no interest whether the Government permit the excess of power to go to waste or made the means of producing some return upon the great expenditure.

The conclusion therefore is that the court below erred in awarding $550,000, or any other sum for the value of what is called "raw water," that is the present money value of the rapids and falls to the Chandler-Dunbar Company as riparian owners of the shore and appurtenant submerged land. . . .

The judgment of the court below must be reversed and the cases remanded with direction to enter a judgment in accordance with this opinion.

STATE V. TWIFORD ET AL.

Supreme Court of North Carolina, 1904

136 N.C. 603, 48 S.E. 586

CLARK, C. J. There was evidence on the part of the state tending to show that the waterway in question leads off from Currituck Sound, and is about 400 yards wide and 6 feet 10 inches deep in the channel at its mouth, and the following widths at these distances from its mouth: 500 yards wide at 1 mile, 400 yards wide at 1½ miles, and 60 yards at Shipyard, about 2 miles above; that the obstructions were placed in the stream at a point 350 yards from the mouth of the creek. At this point Jean Guide creek is about 350 yards wide, and boats drawing 5 or 6 feet of water could sail up to the point where the obstructions were placed, and 1½ miles above the mouth of the stream. The water course in question has been used by the public for 35 years "for fishing and harboring, and as a passway, and for landing purposes," and "as an harbor for protection in time of storms," and "as a thoroughfare by the public, as long as the witness could remember, and by persons coming in from the sound, who would go up to the head of the creek at Shipyard, leave their boats, and then go by land, and he has seen boats carrying freight land at the pier." Barges drawing 3½ feet of water and transporting timber can go to Shipyard, turn, and come out. This witness also testified that he had seen a sloop 200 yards above the point at which the obstructions were placed. There was also evidence tending to show that the land covered by the waters of Jean Guide creek is claimed by Hannah M. Lyons, of New Jersey, who acquired her alleged title through mesne conveyances from a grant from the state of North Carolina to one Hodges Gallop, dated May 30, 1872. It also appeared that the land on both sides of the creek belongs to Hannah M. Lyons, and that no public road leads from the creek, but only a private road for the use of the owner and her tenants. The defendants, Twiford and Tate, admitted that they, by the orders of said riparian owner, placed the obstructions in the creek in October, 1902. The stakes constituting the obstruction are strongly driven down, and their tops rise 3 or 4 feet above the surface of the water. They are 2½ feet apart. There is a gate near the center of the stream, used exclusively by the owner, which is kept locked, so as to prevent the general public from using the waterway.

The defendants excepted to the refusal of the court to charge (1) that, if the jury believed the evidence, the creek is not navigable, and they should find the defendants not guilty; (2) that as the obstructions were placed by the defendants under orders "of the owner of the land on both sides of the creek, and title to the stream belongs also to her, they should return a verdict of not guilty"; (3 and 4) that as the creek leads from the sound to the land of the employer of the defendants, and not to any public place, and there is no public road adjoining or touching the creek, and any one landing at any point on the creek must go over the land of said riparian owner, they should find the defendants not guilty; (5) that, if the evidence is believed, the creek is not navigable, and is owned by Hannah M. Lyons, and she had a right to place the posts in the creek, and the defendants, acting under her orders, were not guilty. The court charged the jury, among other things: "If this stream or bay is properly described and generally known as Jean Guide creek, and is wide enough and deep enough for navigation by boats ordinarily used for carrying traffic and commerce on the sound waters, and was required and used for such purposes by the necessities and conveniences of persons generally engaged in such traffic, it would be an indictable nuisance to obstruct it; and if the jury are satisfied beyond a reasonable doubt it was that character of stream, so used and required by public convenience, and that defendants put the obstructions in the stream, the defendants would be guilty, and you should so return your verdict." Defendants excepted. "If the stream is not navigable by vessels of the kind described, or if the stream was so shut in or is so situated that it was not used or required for traffic or commerce by the convenience of the public or persons generally engaged in traffic with vessels on the sound, then it would be no nuisance to obstruct it or shut it up, and the jury should acquit the defendants." The defendants again excepted. The question was submitted to the jury as one of fact under the above instructions. The rest of the charge, which fully set out the contentions of the parties and the law, was not excepted to. These are the only exceptions, and we find no error.

If a stream is "navigable in fact [as the jury found under the above instructions], it is navigable in law." Gould on Waters (3d Ed.) § 67. The capability of being used for purposes of trade and travel in the usual and ordinary modes is the test, and not the extent and manner of such use. State v. Eason, 114 N. C. 787, 19 S. E. 88, 23 L. R. A. 520, 41 Am. St. Rep. 811; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242; Ingram v. Threadgill, 14 N. C. 59; Wilson v. Forbes, 13 N. C. 30. The same ruling is maintained in United States Supreme Court. The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999; The Montello, 11 Wall. 411, 20 L. Ed. 191; Id., 20 Wall. 430, 22 L. Ed. 391. Navigability is a question of fact, dependent upon the depth of water and other circumstances, and was

properly submitted to the jury in the charge. Navigability cannot be affected by the conditions on the adjacent land, such as there being a large town or the shore, with numerous streets and wharves, or whether, as here, one riparian owner has a monopoly of the land, with no public road to the water, thus cutting off access by land. It is the navigability of the water that is the test, its accessibility by water, and not accessibility by land; else whether bays, estuaries, creeks, and rivers are publici juris would depend upon whether or not riparian owners have monopolized the ownership of the adjacent soil.

Land covered by navigable waters was not subject to entry at the date of the grant to Gallop, and is not now, and the grant of the land covered by Jean Guide creek is void. Batt. Rev. c. 41, § 1 (1); Code, § 2751 (1); Skinner v. Hettrick, 73 N. C. 53; State v. Spencer, 114 N. C. 777, 19 S. E. 93; Bond v. Wool, 107 N. C. 139, 12 S. E. 281; Wool v. Edenton, 115 N. C. 10, 20 S. E. 165; Holley v. Smith, 130 N. C. 85, 40 S. E. 847. Even if the grant passed a title to the land covered by the waters of the creek, the title became vested in the owner subject to the public easement—the right of navigation. Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633; Hodges v. Williams, 95 N. C. 331, 59 Am. Rep. 242; Gould on Waters (3d Ed.) § 87. The above test, the capacity for navigation, is laid down in State v. Narrows Island Club, 100 N. C. 477–481, 5 S. E. 411, 412, 6 Am. St. Rep. 618, as follows: "Navigable waters are natural highways, so recognized by government and the people; and hence it seems to be accepted as part of the common law of this country, arising out of public necessity, convenience, and common consent, that the public have the right to use rivers, lakes, sounds, and parts of them, though not strictly public waters, if they be navigable in fact, for the purposes of a highway and navigation, employed in travel, trade, or commerce. Such waters are treated as publici juris, in so far as they may be properly used for such purposes in their natural state." Mr. Justice Douglas in a more recent case (State v. Baum, 128 N. C. 600, 38 S. E. 900) says that in early days "the navigability of a stream depended more upon the temper of those living along its banks (Indians) than upon its natural features, * * * but that now the public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit of all water courses, whether tidal or inland, that are in their natural conditions capable of such use. The navigability of a water course is therefore largely a question of fact for the jury, and its best test is the extent to which it has been so used by the public, when unrestrained."

The evidence tends to show that Jean Guide creek has been used by the public for 35 years for the purposes of fishing, as a passway, and as a harbor for protection in time of storms. "These conditions constitute ample evidence of a navigable stream." State v. Baum, supra. The defendant's contention, that to make a waterway it must have a public termination, cannot be sustained. That may come later, but that will not make the stream deeper or more navigable when it comes. This stream is an arm or part of Currituck Sound, from which sound there is a passageway through the waters of Albemarle and Pamlico Sound, and up various rivers, to many towns in the state. The stream is in itself navigable in fact, and its navigation is certainly "in some degree required by the necessity or convenience of the public." The right to anchor is essential in navigation, and Jean Guide creek, according to the evidence in the case, has been used "as a harbor of protection in time of storms." In Gould on Waters (3d Ed.) § 95, it is said: "The right of navigation includes the right to anchor as incidental to its beneficial enjoyment." The whole matter is thus summed up by Shaw, C. J., in Attorney General v. Woods, 108 Mass. 436, 11 Am. Rep. 380: "If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation." It would be a serious detriment to the public if water, capable of such usefulness, as here, can be made private property by buying up the adjacent land. The control of such water belongs to the public, and is not appurtenant to the ownership of the shore. It is not a case "where the tail goes with the hide."

Nor is it material that the former riparian owner charged people one-fourth of the catch for fishing in the creek, and that some in their ignorance submitted to the exaction. This no more proves ownership of a navigable stream than the exaction of toll by feudal barons on the Rhine proves ownership of that great artery of commerce today by those who have succeeded them in the ownership of the lands on which their castles once stood. Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public, and are reserved for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet.

No error.

CAPUNE V. ROBBINS

Supreme Court of North Carolina, 1968

273 N.C. 581, 160 S.E. 2d 891

Plaintiff instituted this civil action August 17, 1965, to recover $7,500.00 compensatory damages and $25,000.00 punitive damages on account of an alleged wilful, wanton, intentional and malicious assault by defendant on plaintiff. An order was then entered for the arrest of defendant as provided in G.S. Chapter 1, Article 34, "Arrest and Bail," upon failure to give bail in the amount of $10,000.00.

Uncontroverted evidence tends to show the facts narrated below.

Plaintiff, then about 22, was attempting a trip from Seagate, Coney Island, New York, to Florida, on an eighteen-foot-long paddleboard, without mast or sail. Plaintiff testified: "I would paddle it with my hands and steer with my feet. Paddling, I placed my arms in front of me and pulled down alongside the board. The total length of the trip I had planned was approximately 1,154 miles, paddling all the way." He came "down the entire coast on the paddleboard."

The pier, which is "about 20 feet above the water," was operated "for the purpose of sport fishing only." Defendant charged fishermen a fee of $1.00 a day to fish from the pier. On August 15th, a Sunday, there were "approximately 90 to 100 fishermen on the pier." Defendant operated "a concession stand and tackle shop" on the shore end of the pier. Nearby, on the shore, there was a picnic area. To avoid interference with the fishermen, defendant did not permit surf casting or bathing on his premises and undertook to prohibit boating and surfboarding in the waters 150 feet each side of the center of the pier. A sign facing those approaching from the road was in these words: "No soliciting and boats allowed on these premises." There was posted on each side of the pier a sign in these words: "No fishing or swimming near the pier."

Plaintiff and defendant were strangers. According to plaintiff's testimony, plaintiff approached defendant's premises from the ocean by paddleboard, his only means of travel, and was unaware of defendant's attempted restrictions on the use of the ocean waters alongside defendant's pier. According to defendant's testimony, defendant had no knowledge of plaintiff's sporting and publicity venture and assumed the paddleboard had been brought to his premises by land transportation. . . .

BOBBITT, Justice.

We consider first whether defendant had a legal right to forbid and prohibit plaintiff from passing under the pier on his paddleboard.

The Federal Statute, 33 U.S.C.A. § 403, relating to the obstruction of navigable waters, required that defendant's predecessor, before constructing a pier, obtain permission to do so from the U. S. Corps of Engineers. Otherwise, the issuance of the permit did not enlarge or impair defendant's littoral rights.

Subject to the authority and rights of the United States respecting navigation, flood control and production of power, Congress, by enactment of the Submerged Land Act (1953), 43 U.S.C.A. § 1311 et seq., relinquished to the states the entire interest of the United States in all lands beneath navigable waters within state boundaries, inclusive of submerged lands within three geographical miles seaward from the coast of each state. See State ex rel. Bruton v. Flying "W" Enterprises, Inc., 273 N.C. 399, 160 S.E.2d 482.

Our statutes, prior to enactment of Chapter 683, Session Laws of 1959, relating to "Lands Subject to Grant," were codified as Chapter 146, Article 1, of the General Statutes, recompiled 1952. Based on the statutes brought forward and codified in 1952 as G.S. § 146-1 and G.S. § 146-6, it was held that lands covered by navigable waters were not the subject of entry with one exception, to wit: Riparian owners were given a right of entry for the restricted purpose of using such lands for

erecting wharves on the side of deep water in front of their shorelines. Atlantic & N. C. R. Co. v. Way, 172 N.C. 774, 90 S.E. 937; Land Co. v. Atlantic Hotel, 132 N.C. 517, 44 S.E. 39, 61 L.R.A. 937 and cases cited. Accord: Barfoot v. Willis, 178 N. C. 200, 100 S.E. 303. In Atlantic & N. C. R. Co. v. Way, supra, Walker, J., for the Court, said that the State "granted merely a privilege or easement in the land and waters covered thereby, for the single purpose of building wharves in aid of commerce and a better enjoyment of the shores of navigable waters." . . .

G.S. § 146–3, as now codified, provides that no submerged lands of the State may be conveyed in fee but that easements therein may be granted in the manner prescribed.

G.S. § 146–12 provides:

"The Department of Administration may grant, to adjoining riparian owners, easements in lands covered by navigable waters or by the waters of any lake owned by the State for such purposes and upon such conditions as it may deem proper, with the approval of the Governor and Council of State. The Department may, with the approval of the Governor and Council of State, revoke any such easement upon the violation by the grantee or his assigns of the conditions upon which it was granted.

"Every such easement shall include only the front of the tract owned by the riparian owner to whom the easement is granted, shall extend no further than the deep water, and shall in no respect obstruct or impair navigation.

"When any such easement is granted in front of the lands of any incorporated town, the governing body of the town shall regulate the line on deep water to which wharves may be built."

Nothing in the record indicates an easement in the submerged land was granted to defendant or to any of his predecessors by the State. Absent such grant, his rights depend solely upon his status as a littoral or riparian owner.

[2] In Bond v. Wool, 107 N.C. 139, 12 S.E. 281, involving a controversy between two riparian owners, neither had a grant for any of the property extending between the shoreline and the channel, and each relied upon his rights as riparian owner. This Court, in opinion by Avery, J., said: "In the absence of any specific legislation on the subject, a littoral proprietor and a riparian owner, as is universally conceded, have *a qualified property* in the water-frontage, belonging by nature to their land; the chief advantage growing out of the appurtenant estate in the submerged land being *the right of access* over an extension of their water fronts to navigable water, and the right to construct wharves, piers, or landings subject to such general rules and regulations as the legislature, in the exercise of its powers, may prescribe for the protection of public rights in rivers or navigable waters." (Our italics.) This statement is quoted with approval by Winborne, J. (later C. J.), in O'Neal v. Rollinson, 212 N.C. 83, 192 S.E. 688. Accord: Gaither v. Hospital, 235 N.C. 431, 70 S.E. 2d 680; Jones v. Turlington, 243 N.C. 681, 92 S.E.2d 75.

In Bell v. Smith, 171 N.C. 116, 118, 87 S.E. 987, 989, where it was held that "(n)o person has a several or exclusive right of fishery in any of the public navigable waters of the state," Clark, C. J., for the Court, said: "The right of fishing in the navigable waters of the state belongs to the people in common, to be exercised by them with due regard to the rights of each other, and cannot be reduced to exclusive or individual control either by grant or by long user by any one at a given point."

The question arises as to whether the right of a littoral proprietor to construct a pier and thereby provide access to ocean waters of greater depth authorizes him to exclude the public from the use of the waters of the ocean under and along such pier. Although no decision of this Court bearing directly on the question has come to our attention, decisions of the Court of Appeals of New York relating to "(t)he strip of land that lies between the high and low water marks and that is alternately wet and dry according to the flow of the tide," known as the "foreshore," (Black's Law Dictionary, Fourth Edition, p. 777) bears significantly upon the question.

In Barnes v. Midland Railroad Terminal Co., 218 N.Y. 91, 112 N.E. 926, the plaintiff sought to restrain the obstruction of part of the foreshore of Staten Island. On an earlier appeal, Barnes v. Midland R. R. Terminal Co., 193 N.Y. 378, 85 N.E. 1093, 127 Am.St.Rep. 962, the relative rights of the littoral owner on the one hand and of the public on the other were defined. It was held that the littoral owner had the right to construct a pier in order to provide a means of passage from the upland to the sea; that the public must submit to any necessary interference to their right of passage over the foreshore, but that unnecessary obstruction was an invasion of the public right. In the later decision, where an injunction granted by the lower court was modified and affirmed, the court, in opinion by Cardozo, J., said: "If passage under the pier is free and substantially unobstructed over the entire width of the foreshore, the plaintiffs are entitled to no more. The pier was not built for their use, and is not to be maintained for their convenience. Weems Steamboat Co. v. People's Steamboat Co., 214 U.S. 345, 29 S.Ct. 661, 53 L.Ed. 1024, 16 Am.Cas. 1222. But the passage under the pier must be free and substantially unobstructed over the entire width of the foreshore. This means that from high to low water mark it must be at such a height that the public will have no difficulty in walking under it when the tide is low or in going under it in boats when the tide is high." Accord: Town of Brookhaven v. Smith, 188 N.Y. 74, 80 N.E. 665, 9 L.R.A.(N.S.) 326; Aquino v. Riegelman, 104 Misc. 228, 171 N.Y.S. 716. It would seem the public would have equal rights to use without unnecessary obstruction the ocean waters seaward from the strip constituting the foreshore.

Conceding (1) defendant's ownership *of the pier* and *adjacent beach* and his right to prohibit the use *thereof* by others, and (2) that the use defendant was making of the pier and adjacent beach was lawful, it does not follow that defendant could lawfully prohibit the use of the ocean waters beneath the pier as a means of passage by water craft in a manner that involves no contact with the pier itself.

Here evidence fails to disclose any legal right of defendant to forbid and prohibit plaintiff from passing under defendant's pier on his paddleboard in continuation of his journey to the south.

* * *

Defendant having failed to show prejudicial error, the verdict and judgment of the court below will not be disturbed.

No error.

SECTION 4. Changes In the Shoreline Area

In most coastal states, boundaries along the shoreline are considered ambulatory; the actual location of the seaward boundary of an upland owner's land changes as a result of natural or artificial changes in the shoreline. Generally, where the shoreline is gradually changed, any boundary determined by the mean high water line (or whatever line chosen) changes in a like manner. However, sudden changes, such as those caused by a storm, may not affect the boundary in a legal sense.

The processes of change have given rise to use of the following terms:

(1) Accretions are gradual additions to the land resulting from deposit of material by the action of the water.

(2) Erosion is the gradual wearing away of the land by the wind and water.

(3) Reliction occurs where land formally covered by water becomes dry because of the gradual recession of the water.

(4) Avulsion is a sudden change in the shoreline or the bed of a stream, as may be caused by storms or flooding.

While the courts often use these terms interchangeably, it is helpful to remember the basic processes involved. The cases which follow illustrate the legal solutions which have developed to settle disputes which arise when natural and artificial processes affect the rights of the state and upland owners.

HUGHES V. WASHINGTON

United States Supreme Court, 1967

389 U.S. 290

MR. JUSTICE BLACK delivered the opinion of the Court.

The question for decision is whether federal or state law controls the ownership of land, called accretion, gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. The circumstances that give rise to the question are these. Prior to 1889 all land in what is now the State of Washington was owned by the United States, except land that had been conveyed to private parties. At that time owners of property bordering the ocean, such as the predecessor in title of Mrs. Stella Hughes, the petitioner here, had under the common law a right to include within their lands any accretion gradually built up by the ocean.[1] Washington became a State in 1889, and Article 17 of the State's new constitution, as interpreted by its Supreme Court, denied the owners of ocean-front property in the State any further rights in accretion that might in the future be formed between their property and the ocean. This is a suit brought by Mrs. Hughes, the successor in title to the original federal grantee, against the State of Washington as owner of the tidelands to determine whether the right to future accretions which existed under federal law in 1889 was abolished by that provision of the Washington Constitution. The trial court upheld Mrs. Hughes' contention that the right to accretions remained subject to federal law, and that she was the owner of the accreted lands. The State Supreme Court reversed, holding that state law controlled and that the State owned these lands. 67 Wash. 2d 799, 410 P. 2d 20 (1966). We granted certiorari. 385 U. S. 1000 (1967). We hold that this question is governed by federal, not state, law and that under federal law Mrs. Hughes, who traces her title to a federal grant prior to statehood, is the owner of these accretions.

While the issue appears never to have been squarely presented to this Court before, we think the path to decision is indicated by our holding in *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10 (1935). In that case we dealt with the rights of a California property owner who held under a federal patent, and in that instance, unlike the present case, the patent was issued after statehood. We

held that

> "[t]he question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." 296 U. S., at 22.

No subsequent case in this Court has cast doubt on the principle announced in *Borax*. See also *United States* v. *Oregon*, 295 U. S. 1, 27–28 (1935). The State argues, and the court below held, however, that the *Borax* case should not be applied here because that case involved no question as to accretions. While this is true, the case did involve the question as to what rights were conveyed by the federal grant and decided that the extent of ownership under the federal grant is governed by federal law. This is as true whether doubt as to any boundary is based on a broad question as to the general definition of the shoreline or on a particularized problem relating to the ownership of accretion. See *United States* v. *Washington*, 294 F. 2d 830, 832 (C. A. 9th Cir. 1961), cert. denied, 369 U. S. 817 (1962). We therefore find no significant difference between *Borax* and the present case.

Recognizing the difficulty of distinguishing *Borax*, respondent urges us to reconsider it. *Borax* itself, as well as *United States* v. *Oregon, supra*, and many other cases, makes clear that a dispute over title to lands owned by the Federal Government is governed by federal law, although of course the Federal Government may, if it desires, choose to select a state rule as the federal rule. *Borax* holds that there has been no such choice in this area, and we have no difficulty in concluding that *Borax* was correctly decided. The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land."

This brings us to the question of what the federal rule is. The State has not attempted to argue that federal law gives it title to these accretions, and it seems clear to us that it could not. A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the

shore. In *Jones* v. *Johnston,* 18 How. 150 (1856), a dispute between two parties owning land along Lake Michigan over the ownership of soil that had gradually been deposited along the shore, this Court held that "[l]and gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining." 18 How., at 156. The Court has repeatedly reaffirmed this rule, *County of St. Clair* v. *Lovingston,* 23 Wall. 46 (1874); *Jefferis* v. *East Omaha Land Co.,* 134 U. S. 178 (1890),[2] and the soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines. While it is true that these riparian rights are to some extent insecure in any event, since they are subject to considerable control by the neighboring owner of the tideland,[3] this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interests of the tideland owner. See *Stevens* v. *Arnold,* 262 U. S. 266, 269–270 (1923). We therefore hold that petitioner is entitled to the accretion that has been gradually formed along her property by the ocean.

The judgment below is reversed, and the case is remanded to the Supreme Court of Washington for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

OREGON EX REL. STATE LAND BOARD
V.
CORVALLIS SAND AND GRAVEL COMPANY

United States Supreme Court, 1977

97 S. Ct. 582

Mr. Justice REHNQUIST delivered the opinion of the Court.

This lawsuit began when the State of Oregon sued Corvallis Sand and Gravel Company, an Oregon corporation, to settle the ownership of certain lands underlying the Willamette River. The Willamette is a navigable river, and this land is located near Corvallis, Oregon. The river is not an interstate boundary.

Corvallis Sand had been digging in the disputed part of the riverbed for 40 to 50 years without a lease from the State. The State brought an ejectment action against Corvallis Sand, seeking to recover 11 separate parcels of riverbed, as well as damages for the use of the parcels. The State's complaint alleged that by virtue of its sovereignty it was the owner in fee simple of the disputed portions of the riverbed, and that it was entitled to immediate possession and damages. Corvallis Sand denied the State's ownership of the bed.

Each party was partially successful in the Oregon courts,[1] and we granted cross petitions for certiorari, 423 U.S. 1048, 46 L.Ed.2d 636. Those courts understandably felt that our recent decision in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), required that they ascertain and apply principles of federal common law to the controversy. Twenty-six states have joined in three *amicus* briefs urging that we reconsider *Bonelli, supra*, because of what they assert is its significant departure from long established precedent in this Court.

I

The nature of the case and the contentions of the parties may be briefly stated. Title to two distinct portions of land has been at issue throughout. The first of these portions has apparently been within the bed of the Willamette River since Oregon's admission into the Union.

The other portion of the land underlies the river in an area known as Fischer Cut, which was not a part of the riverbed at the time Oregon was admitted to the Union. The trial court found that prior to a flood which occurred in November 1909, the Willamette flowed around a peninsula-like formation known as Fischer Island, but that by 1890 a clearly discernible overflow channel across the neck of the peninsula had developed. Before 1909 this channel carried the flow of the river only at its intermediate or high stages, and the main channel of the river continued to flow around Fischer Island. But in November 1909, a major flood, in the words of the Oregon trial court, "suddenly and with great force and violence converted Fischer Cut into the main channel of the river."

The trial court, sitting without a jury, awarded all parcels in dispute, except for the Fischer Cut lands, to the State. That court found that the State had acquired sovereign title to those lands upon admission into the Union, and that it had not conveyed that title. The State was also awarded damages to recompense it for Corvallis Sand's use of the lands.

With respect to the Fischer Cut lands, the trial court found that avulsion, rather than accretion, had caused the change in the channel of the river, and therefore the title to the lands remained in Corvallis Sand, the original owner of the land before it became riverbed.

The Oregon Court of Appeals affirmed. That court felt bound, under *Bonelli*, to apply federal common law to the resolution of this property dispute. In so doing, the court found that the trial court's award of Fischer Cut to Corvallis Sand was correct either under the theory of avulsion, or under the so-called exception to the accretion rule, announced in *Commissioners v. United States*, 270 F. 110 (CA8 1920).[2] The court, finding that preservation of the State's in-

terest in navigation, fishing and other related goals did not require that it acquire ownership of the new bed, rejected the argument that the State's sovereign title to a riverbed follows the course of the river as it moves.

II

In this Court, Oregon urges that we either modify *Bonelli* or expound "federal common law" in such a way that its title to all the land in question will be established. Corvallis Sand urges that we interpret "federal common law" in such a manner that it will prevail. *Amici* urge that we re-examine *Bonelli* because in their view that case represented a sharp break with well-established previous decisions of the Court.[3]

Our analysis today leads us to conclude that our decision to apply federal common law in *Bonelli* was incorrect. We first summarize the basis for this conclusion, and then elaborate in greater detail in Parts III and IV, *infra*.

The title to the land underlying the Colorado River at the time Arizona was admitted to the Union vested in the State as of that date under the rule of *Pollard's Lessee v. Hagan, supra.* Although federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law. *Wilcox v. Jackson,* 13 Pet. 498, 10 L.Ed. 264 (1839); *Weber v. Harbor Commissioners,* 18 Wall. 57, 21 L.Ed. 798 (1873).

Bonelli's thesis that the equal footing doctrine would require the effect of a movement of the river upon title to the riverbed to be resolved under federal common law was in error. Once the equal footing doctrine had vested title to the riverbed in Arizona as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have. Our error, as we now see it, was to view the equal footing doctrine enunciated in *Pollard's Lessee v. Hagan* as a basis upon which federal common law could supersede state law in the determination of land titles. Precisely the contrary is true; in *Pollard's Lessee* itself the equal footing doctrine resulted in the State's acquisition of title notwithstanding the efforts of the Federal Government to dispose of the lands in question in another way.

The equal footing doctrine did not, therefore, provide a basis for federal law to supersede the State's application of its own law in deciding title to the *Bonelli* land, and state law should have been applied unless there were present some other principle of federal law requiring state law to be displaced. The only other basis[4] for a colorable claim of federal right in *Bonelli* was that the Bonelli land had originally been patented to its predecessor by the United States, just as had most other land in the western States. But that land had long been in private ownership and, hence, under the great weight of precedent from this Court, subject to the general body of state property law. *Wilcox v. Jackson,* 13 Pet. 498, 517, 10 L.Ed. 264 (1839). Since the application of federal common law is required neither by the equal footing doctrine nor by any other claim of federal right, we now believe that title to the Bonelli land should have been governed by Arizona law, and that the disputed ownership of the lands in the bed of the Willamette River in this case should be decided solely as a matter of Oregon law.

III

Pollard's Lessee v. Hagan, supra, holds that the State receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union, and contains not the slightest suggestion that such title is "defeasible" in the technical sense of that term. The issue there was whether a federal patent, issued after the admission of Alabama to the Union, could validly convey lands that had underlain navigable waters upon Alabama's admission. The court had before it the following jury charge, given in the ejectment action below:

"That if [the jury] believed that the premises sued for were below usual high

water-mark, at the time Alabama was admitted into the union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiffs no title, whether the waters had receded by the labour of man only, or by alluvion . . ." 3 How., at 220.

The Court regarded the case as one of signal importance, and it observed that the decision was approached "with a just sense of its great importance to all the states of the union, and particularly to the new ones." *Ibid.* Mr. Justice Catron, in his dissenting opinion, commented that he deemed the case "the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds. . . . . ." *Id.*, at 235. The Court gave careful consideration to the role of the United States in holding the lands in question in trust for the new States, and to the recognition that the new States would be admitted "upon an equal-footing, in all respects whatever . . . . ." with the original States. *Id.*, at 224. Citing *Martin v. Waddell*, 16 Pet. 367, 10 L.Ed. 997 (1842), the Court noted that the original States held the "absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." 3 How., at 229. The Court then concluded:

> "First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy. . . . ." *Id.*, at 230.

In so holding, the Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union [5] nor a grant from Congress to a third party was capable of defeating.

Thus under *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned. For example, in *Weber v. Harbor Commissioners*, 18 Wall. 57, 65–66, 21 L.Ed. 798 (1873), the Court reaffirmed the doctrine of *Pollard's Lessee*:

> "Upon the admission of California into the Union upon equal footing with the original States, *absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper*, subject only to the paramount right of navigation over the waters . . . ." (Emphasis added.)

In *Barney v. Keokuk*, 94 U.S. 324, 338, 24 L.Ed. 224 (1876), the Court extended the doctrine to waters which were nontidal but nonetheless navigable, consistent with its earlier extension of admiralty jurisdiction to such waters in *The Genessee Chief*, 12 How. 443, 13 L.Ed. 1058 (1851). And in *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894), the Court recounted *in extenso* the many cases which had followed the doctrine of *Pollard's Lessee*. In summarizing its holding, 152 U.S., at 57–58, 14 S.Ct. at 569, the Court stated:

> "The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below the high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the constitution."

At the time of our decision in *Bonelli*, this line of authority stood side by side with, and wholly consistent with, other cases requiring the application of federal law to questions of land titles or boundaries. Where Mexico had patented tidal lands to a

private owner before ceding to the United States the territory which ultimately became the State of California, California did not succeed to the ownership of such lands upon her admission to the Union. *Knight v. United Land Association*, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974 (1891). If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary. See, *e. g., Nebraska v. Iowa*, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186 (1892); *Arkansas v. Tennessee*, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638 (1918). Congress possesses by virtue of its commerce power a "navigational servitude" with respect to navigable waters.

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the federal government by the constitution." *Gibson v. United States*, 166 U.S. 269, 271–272, 17 S.Ct. 578, 579, 41 L.Ed. 996 (1897).

In *Borax Consolidated, Ltd. v. Los Angeles, supra*, this Court also found a basis to apply federal law, but its rationale does not dictate a different result in this case. In *Borax*, the city of Los Angeles brought suit to quiet title in certain land in Los Angeles Harbor. Los Angeles claimed the land under a grant from the State of California, whereas Borax, Ltd. claimed the land as a successor in interest to a federal patentee. The federal patent had purported to convey a specified quantity of land, 18 and eighty-eight hundredths acres, according to a survey by the General Land Office. This Court recognized that if the patent purported to convey lands which were part of the tidelands, the patent would be invalid to that extent since the Federal Government has no power to convey lands which are rightfully the State's under the equal footing doctrine. *Id.*, at 17–19, 56 S.Ct., at 26–27. The Court affirmed the decision of the Court of Appeals to remand for a new trial to allow the city to attempt to prove that some portion of the lands described in the federal patent was in fact tideland.

The Court went on to hold that the boundary between the upland and tideland was to be determined by federal law. *Id.*, at 22, 56 S.Ct., at 29. This same principle would require that determination of the initial boundary between a riverbed, which the State acquired under the equal footing doctrine, and riparian fast lands likewise be decided as a matter of federal law rather than state law. But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the role of the equal footing doctrine is ended, and the land is subject to the laws of the State. The expressions in *Bonelli* suggesting a more expansive role for the equal footing doctrine are contrary to the line of cases following *Pollard's Lessee*.

For example, this Court has held that subsequent changes in the contour of the land, as well as subsequent transfers of the land, are governed by the state law. *Joy v. St. Louis*, 201 U.S. 332, 343, 26 S.Ct. 478, 481, 50 L.Ed. 776 (1906). Indeed the rule that lands once having passed from the Federal Government are subject to the laws of the State in which they lie antedates *Pollard's Lessee*. As long ago as 1839, the Court said:

> "We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation*; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." *Wilcox v. Jackson*, 13 Pet. 498, 517, 10 L.Ed. 264 (1839). (Emphasis added.)

The contrary approach would result in a perverse application of the equal footing

doctrine. An original State would be free to choose its own legal principles to resolve property disputes relating to land under its riverbeds; a subsequently admitted State would be *constrained* by the equal footing doctrine to apply the federal common law rule, which may result in property law determinations antithetical to the desires of that State. See, *Bonelli, supra,* 414 U.S., at 332–333, 94 S.Ct., at 529 (Stewart, J., dissenting).

Thus, if the lands at issue did pass under the equal footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions.[7]

IV

A similar result obtains in the case of riparian lands which did not pass under the equal footing doctrine. This Court has consistently held that state law governs issues relating to this property, like other real property, unless some other principle of federal law requires a different result.

Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse v. Bowles,* 321 U.S. 144, 155, 64 S.Ct. 474, 480, 88 L.Ed. 635 (1944). This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of *Swift v. Tyson,* 16 Pet. 1, 10 L.Ed. 865 (1842), an exception was carved out for the local law of real property. *Id.,* at 18. See *United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 591, 93 S.Ct. 2389, 2396, 37 L.Ed.2d 187 (1973).

This principle applies to the banks and shores of waterways, and we have consistently so held. *Barney v. Keokuk, supra,* involved an ejectment action by the plaintiff against the city involving certain land along the banks of the Mississippi River. After noting that the early state doctrines regarding the ownership of the soil of nontidal waters were based upon the then discarded English view that nontidal waters were presumed nonnavigable, the Court clearly articulated the rule that the States could formulate, and modify, rules of riparian ownership as they saw fit:

> "Whether, as rules of property, it would now be safe to change these doctrines [arising out of the confusion of the original classification of nontidal waters as nonnavigable] where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell,* 16 Pet. 367, 10 L.Ed. 997; *Pollard's Lessee v. Hagan,* 3 How. 212, 11 L.Ed. 565, and *Goodtitle v. Kibbe,* 9 *id.* 471, 13 L.Ed. 220. These cases related to tidewater, it is true; but they enunciate principles which are equally applicable to all navigable waters." *Id.,* at 338.

In *Shively v. Bowlby, supra,* the Court canvassed its previous decisions and emphasized that state law controls riparian ownership. The Court concluded that grants by Congress of land bordering navigable waters ". . . . leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States." 152 U.S., at 58, 14 S.Ct., at 570. As the Court again emphasized in *Packer v. Bird,* 137 U.S. 661, 669, 11 S.Ct. 210, 212, 34 L.Ed. 819 (1891):

> ". . . . [W]hatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee."

This doctrine was squarely applied to the case of a riparian proprietor in *Joy v. City of St. Louis, supra.* The land at issue had originally been granted to the patentee's predecessor by Spain, and Congress had confirmed the grant and issued letters patent. This Court held that the fact that a plaintiff claimed accretions to land patented to his predecessor by the Federal

Government did not confer federal question jurisdiction, and implicitly rejected any notion that "federal common law"[8] had any application to the resolution. Central to this result was the holding that:

> "As this land in controversy is not the land described in the letters patent or the acts of Congress, but, as is stated in the petition, is formed by accretions or gradu[illegible]its from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States." *Id.*, at 343, 26 S.Ct., at 481.

V

Upon full reconsideration of our decisio[illegible] *Bonelli*, we conclude that it was wrong in treating the equal footing doctrine as a source of federal common law after that doctrine had vested title to the riverbed in the State of Arizona as of the time of its admission to the Union. We also think there was no other basis in that case, nor is there any in this case, to support the application of federal common law to override state real property law. There are obviously institutional considerations which we must face in deciding whether for that reason to overrule *Bonelli* or to adhere to it, and those considerations cut both ways. Substantive rules governing the law of real property are peculiarly subject to the principle of *stare decisis*. See *United States v. Title Ins. Co.*, 265 U.S. 472, 44 S.Ct. 621, 68 L.Ed. 1110 (1924).

Here, however, we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States. In cases such as this, considerations of *stare decisis* play a less important role than they do in cases involving substantive property law. Cf. *The Passenger Cases*, 7 How. 283, 470, 12 L.Ed. 702 (1849) (Taney, C. J., dissenting); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–411, 52 S.Ct. 443, 446–449, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). Even if we were to focus on the effect of our decision upon rules of substantive property law, our concern for unsettling titles would lead us to overrule *Bonelli*, rather than to retain it. See *Minnesota Co. v. National Co.*, 3 Wall. 332, 334, 18 L.Ed. 42 (1865). Since one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years, a return to the former would more closely conform to the expectations of property owners than would adherence to the latter. We are also persuaded that, in large part because of the positions taken in the briefs presented to the Court in *Bonelli*, the *Bonelli* decision was not a deliberate repudiation of all the cases which had gone before. We there proceeded on the view, which we now think to have been mistaken, that *Borax, supra*, should be read so expansively as to in effect overrule *sub-silentio* the line of cases following *Pollard's Lessee*.

For all of these reasons, we have now decided that *Bonelli's* application of federal common law to cases such as this must be overruled.

The judgment under review is vacated, and the case remanded to the Supreme Court of Oregon for further proceedings not inconsistent with this opinion.

STATE V. ASHMORE

Supreme Court of Georgia, 1976

224 S.E. 2d 334

UNDERCOFLER, Presiding Justice.

The court wishes to acknowledge that the factual statement and Division I of this opinion were authored by Justice Gunter.

These two appeals involve claims to the foreshore and claims to land above the foreshore (above the high water mark) as the foreshore moves back and forth, outward toward the ocean and inward toward the land. The litigation began when the State of Georgia filed a complaint against parties who were asserting ownership of the land in question. The present appellees are successors to the earlier defending parties, and appellees assert ownership rights in the land in question in opposition to the claims of the State. . . .

Whatever rights the individual parties to this case may have in the foreshore must be determined under the 1902 Act.

III

THE EFFECT OF THE 1902 ACT

(Ga.L.1902, p. 108; Code §§ 85-1307, 85-1308, 85-1309)

Prior to the 1902 Act the title and ownership of the foreshore was in the State of Georgia. This was the common law and the law in Georgia. It was stated by this court on February 3, 1902, in *Johnson v. State*, 114 Ga. 790, 40 S.E. 807, a case involving an indictment for illegally taking oysters from an alleged private oyster bed. The oyster bed was located in tidal waters between the high and low water marks. *Johnson* held that title to the tidal water and underlying land was vested in the State of Georgia and was *public* land. Therefore, the defendant could not be convicted of taking oysters from a *private* oyster bed which was located on public land. The decision apparently discouraged "oystermen" because many oyster beds are located between the high and low water marks of tidal waters. Oyster beds are frequently planted and cared for at substantial cost. However, under *Johnson*, the land between the high and low water marks was public land and "oystermen" had no private rights in the oyster beds they may have located on public land. This made an investment in planting oyster beds hazardous and, it was argued, deterred the growth of the commercial oyster industry. Consequently, it is agreed by most scholars that the 1902 Act was adopted to meet the *Johnson* decision and give some rights to "oystermen" so that their beds would be protected. This is evident from the 1943-1944 Constitutional Commission's discussion surrounding the adoption of the 1945 constitutional provision ratifying the 1902 Act. There it was stated that the constitutionality of the 1902 Act was in question and that the provisions of the Act should be ratified by the Constitution. In proposing such ratification, it was stated, "The purpose [of the 1902 Act] was to give somebody *title* to the *oyster beds*. At that time the oyster beds had been depleted, and the idea was if the private property owner owned the oyster beds they could afford to replant them and patrol them and undertake to restore the oyster industry to the State of Georgia." (Emphasis supplied.)

This history is important because it has a bearing upon the proper interpretation of the intention of the 1902 Act. Primarily the purpose of the 1902 Act was to overcome this court's decision in *Johnson* and to give "oystermen" a property right in oyster beds, particularly oyster beds they had planted.

Also, the facts and the statements of this court in *Johnson* are important in ascertaining the intention of the legislature in the 1902 Act and in interpreting the meaning of the language used. In *Johnson* the defendant contended and this court concluded that the tide-water between high and low water marks and the underlying land was owned by the State. In opposition to this contention the State argued that Code § 85-1303 (then Civil Code § 3059) defining a naviga-

ble stream and Code § 85–1304 (then Civil Code § 3060) defining the adjacent owner's rights in navigable streams applied to tide-waters and the adjacent landowner's title extended to the low water mark. Code § 85–1303 defines a navigable stream. Code § 85–1304 states, "Rights of owner of lands adjacent to navigable streams. The rights of the owner of lands adjacent to navigable streams extend to low-water mark in the bed of the stream." Although this court in *Johnson* held these code sections referring to *streams* did not apply to *tide-waters* it is critical to read what the court said these code sections did provide. It is important because the 1902 Act was adopted to overcome the *Johnson* decision. In *Johnson*, this court said, "From all the light before us, we think it most reasonable to suppose that the intention of the law-making power, as expressed in sections 3059 and 3060 of the Civil Code, [now Code §§ 85–1303 and 85–1304], was not to change the common law with reference to the boundaries of landowners abutting on the sea or any of its inlets, *but, rather to insure to riparian proprietors the right to the river-bottoms upon their lands for agricultural purposes.*" (Emphasis supplied.)

Thus, this court said that Code § 85–1304 which provides, "The *rights* of the owner of lands adjacent to *navigable streams* extend to low-water mark in the *bed of the stream*" meant, ". . . the *right* to the *river bottoms upon their lands for agricultural purposes.*" (Emphasis supplied.)

To overcome the *Johnson* decision and its holdings, the legislature adopted the 1902 Act. What did the 1902 Act do?

The legislature distinguished between the non-navigable tide-waters and navigable tide-waters. A definition stating what is navigable is set out in Section 2 of the 1902 Act (Code § 85–1308). Basically it is the same definition contained in Code § 85–1303 for fresh water.

The tide-waters involved in the instant case are on the shores bordering the Atlantic Ocean. The Atlantic Ocean is a "sea." Section 2 of the 1902 Act (Code § 85–1308) declares "a sea" to be navigable tide-water provided it is used for purposes of navigation or is capable of bearing upon its *bosom* at mean low tide, boats loaded with freight in the regular course of trade. The Atlantic Ocean can bear upon its bosom freight boats and in fact does. Therefore, the tide-waters in the instant case are classified as navigable waters under the definition of the 1902 Act. The 1902 Act contemplates only two categories, non-navigable and navigable tide-waters.

Having determined that the tide-waters in the instant case are navigable, what did the 1902 Act provide? Section 1 of the 1902 Act need not be considered here because it deals with landowners adjacent to *non-navigable* tide-waters. Section 3 of the Act deals with landowners adjacent to *navigable* tide-waters. (Code § 85–1309).

It provides, "For all purposes, including among others the exclusive right to the oysters and clams (but not to include other fish) therein or thereon being, the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tidewaters, as defined in the preceding section, [definition of navigable tide-waters] shall extend to low-water mark in the bed of the water: Provided, however, ..."

Section 3 does not give the adjacent landowner title to anything. It grants "rights" and nothing more. The "rights" granted are similar rights this court said an adjacent landowner acquired in navigable fresh water streams under Code § 85–1303. In *Johnson* this court said the right acquired was "the right to the river-bottoms upon their lands for agricultural purposes." Using similar language in Section 3 of the 1902 Act, the legislature granted landowners adjacent to navigable tide-waters certain rights. Paraphrasing *Johnson*, we think it reasonable to suppose that the intention of the lawmaking power was to insure to riparian owners the right to the tide-waters for all purposes relating to the planting and cultivation of oysters and clams, and an exclusive right to harvest those crops as well as oysters and clams growing there naturally.

We note further that the Code of 1933 which has been enacted into law inserted the following caption to Section 3 of the 1902 Act: "*Rights* of owners of land adjacent to navigable tide-waters." Apparently both the codifiers and the legislature inter-

preted this section as dealing only with "rights."

We are not concerned here with Section 1 of the 1902 Act (Code § 85-1307). That section deals with *title* to the *beds* of *non-navigable* tide-waters. The instant case is concerned with *rights* in *navigable* tide-waters provided for in Section 3 of the 1902 Act. Section 1 of the 1902 Act has a bearing on the instant case only because it speaks of "title to the beds." Whether this relates to the oyster beds, bottoms, or land is not decided here. What is important is that some sort of title is dealt with. In Section 3 of the 1902 Act, which governs the instant case, no mention is made of any sort of title. Section 3 only refers to *rights*. Obviously the legislature in Section 3 was granting something less than title. In our opinion nothing but the right to plant, cultivate and harvest oysters and clams was granted. Such a grant solved the problem of the oystermen. They had the exclusive right to the oysters in the tidal waters next to their adjacent land. In our opinion it is a privilege or a license. See Acts 1968, p. 202 (Code Ann. § 45-905.1) et seq. providing a uniform law relating to the zoning of tidal waters and the taking of seafood therefrom.

This conclusion comports with the general principle that a public grant is construed strictly against the grantee and nothing is taken by implication. *McLeod v. Burroughs*, 9 Ga. 213, 221(3) (1851); *McLeod v. Savannah, A&GR Co.*, 25 Ga. 445, 457 (1858).

The extension of boundaries referred to in Section 3 (Code § 85-1309) does no more than establish the extent of the rights. It conveys no title to the underlying land. See *Johnson & Co. v. Arnold*, 91 Ga. 659, 668, 18 S.E. 370 (1893).

We note that the rights granted by Section 3 of the 1902 Act are subject to certain provisions contained therein such as the reservation of other fish and the rights of public passage.

In our opinion the State has fee simple title to the foreshore in all navigable tide-waters.

Division 2 of *Rauers v. Persons*, 144 Ga. 23, 86 S.E. 244 (1915) cannot be accepted as an authoritative construction of the 1902 Act. A review of the record in that case shows that the application of the 1902 Act in Division 2 was not challenged, was not considered by the trial court, and actually was not in issue in the case. Division 2 appears to be an aberration because the trial court's denial of an injunction was affirmed despite the holding in Division 2 that an injunction should have been granted. Division 2 is dicta, is unsound, and will not be followed.

IV

ACCRETED LAND

(The "dry sand" area)

"According to the better authorities, the bounding of a tract by the edge or margin of a road will pass the fee to the middle line of the road when the vendor owns the fee on both sides. Upon the like reason, if he owns the fee on one side only, and the whole road is upon the margin of his tract, the proprietor on the opposite side not having any interest in its ownership, a conveyance of the tract as bounded by the margin of the road should, and we think would, pass the fee in the whole road." *Johnson & Co. v. Arnold*, 91 Ga. 659, 667, 18 S.E. 370, 372 (1893). Gradual accretions of land from navigable tide-waters accrue to the adjacent land owner. Therefore, the accreted land in dispute here accrued to the owners of the lots in the East End Subdivision bounded on the east by Beach Drive. *Jones v. Turlington*, 243 N.C. 681, 92 S.E.2d 75 (1956). There are issues of fact remaining to be resolved by the trial court as to whether the accreted land has been dedicated to public use or become subject to prescriptive rights.

Judgment reversed.

SECTION 5. PUBLIC ACCESS TO BEACHES

SEAWAY COMPANY V. ATTORNEY GENERAL

Texas Court of Civil Appeals, 1964

375 S. W. 2d 923

BELL, Chief Justice.

This case involves the question as to whether the people of Texas have an easement on, over, along and across a portion of the beach along the Gulf of Mexico on Galveston Island giving them access to the State-owned seashore and waters of the Gulf. The easement asserted in appellees' petition, found by the jury's verdict, and established by the court's judgment based on the jury verdict, encompassed an easement in the public to use the area of the land adjoining the waters of the Gulf of Mexico from the line of mean low tide to the seaward side of the line of vegetation for travel and camping and to make use of the area so the members of the public could fully pursue their rights to swim, fish and boat in and on the Gulf waters.

The 56th Legislature of Texas at its Second Called Session of 1959, enacted what is popularly known as the "Open Beaches Bill." Acts 56th Legislature of Texas 1959, 2nd Called Session, Chapter 19, p. 108. This Act is carried in Vernon's Annotated Civil Statutes as Article 5415d and will hereafter be referred to in this opinion as Article 5415d. This Article, among other things, declared it to be the public policy of this State that the people of the State should have the free and unrestricted right of ingress and egress to and from the *State-owned* beaches bordering on the seaward shore of the Gulf of Mexico or such larger area extending from the line of mean low tide to the line of vegetation *in the event the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of continued right in the public.* The Article made it an offense against such public policy for anyone to obstruct the way of ingress and egress or the use of the beaches. The Attorney General of Texas, a County, District, or Criminal District Attorney were given authority to bring suits on behalf of the people of Texas, and it was made their duty to do so, to require removal of any obstructions that may interfere with such right of ingress and egress.

While the above is not all of the Act, it is all that need be noticed at this time.

Pursuant to the authority conferred and the duty enjoined the then Attorney General of Texas, the Honorable Will Wilson, and the Criminal District Attorney of Galveston County, the Honorable Jules Damiani, filed suit against appellant, asserting it had owned, controlled and was maintaining barriers from the line of vegetation seaward beyond the line of mean high tide at three defined positions, two being on projections of specified lot lines of the West Beach Addition and one being a projection of the east line of Sea Island Addition. Both additions are in Section 12 of the Jones & Hall Grant in Galveston County. Prayer was that appellant be required to remove the barriers and be enjoined from erecting others seaward of the seaward side of the vegetation line which would interfere with the use by the public of the area seaward of the line of vegetation.

The petition asserted that appellant was claiming ownership of the surface of the area where the barriers were located, but that whatever rights it had were subordinate and subject to the right of use of the people as a means of access to and the full use and enjoyment of the sovereign-owned shore and waters of the Gulf of Mexico for swimming, fishing, boating, camping and as a public way for vehicular and pedestrian travel between the City of Galveston and the west end of Galveston Island. . . .

The effect of appellees' petition is to assert an easement in the public covering the area between mean high tide and the seaward side of the vegetation line based on dedication, prescription and continuous right in the public.

The appellant's answer contained, in addition to pleas in abatement and exceptions not here necessary to notice, a general denial, special denials, and affirmative claims that title to the land on which the barriers were located had passed out of the State over 100 years ago and the barriers were on land belonging to it, and it also pled the 3, 5, 10 and 25 year statutes of limitation.

The court's charge defined the "beach" as the "area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico." It defined the "Line of vegetation" as "the extreme seaward boundary of natural vegetation which spreads continuously inland." This is essentially the definition given in Article 5415d. . . .

One theory of recovery of the easement by the appellees, and which is one basis of the court's judgment, is that traditionally the sovereign has held the seashore as trustee for the use of the people and any conveyance made by the State would be subject to the right of the people to use the seashore and this includes the right of ingress and egress. Too, it was found by the jury, and such finding is supported by sufficient evidence, that the Republic of Texas, prior to and at the time of the grant, had dedicated the beach for use by the public. However, even if this be true the Republic of Texas at the time of the grant was, as sovereign, owner of the beach and as such owner had authority to convey fee simple title. Mayor, etc., of City of Galveston v. Menard, 23 Tex. 349. There was no law with which we are familiar which restricted the power of the President of the Republic who signed the patent to convey fee simple title to the line of mean high tide. In addition to the patent, there was the confirmatory Act which confirmed title in the patentee and its successors in title. Act of February 8, 1854, IV Gammell's Laws of Texas, pp. 125-126. It would no doubt have been good policy for the Republic to have reserved the right of ingress and egress so the people could more effectively enjoy the State-owned seashore and waters, but the plain language of the grant shows the Republic of Texas did not do so. We may not imply such a reservation in the face of the language of the grant even though there is evidence that there was a road down the beach at the time of the grant. The grant as made by the sovereign must be upheld just the same as if it were a controversy between two persons. The sovereign must fully honor its valid conveyances and contracts.

We do not know that we clearly comprehend the appellees' position that the judgment can be upheld on the theory that the use of the beach by the public has become a part of our tradition and common law and the easement exists by reason of continuous right in the public. We suppose they seek to have us hold that the seashore is held in trust by the sovereign at common law for the people and to enjoy it there must be a means of egress and ingress to enable them to enjoy such use and therefore the sovereign has no power to cut off convenient access. We know of no such rule of law. In our extensive research we have found no cases so holding nor have any been cited us. In some cases the expression is used that the sovereign holds the seashore for use by the members of the public. We think this is true but this is far from holding that grants by the sovereign of land above the seashore are impressed by implication with a reserved easement in favor of the public to furnish access by land to the shore. Nor is there in such cases such holding of the want of power in the sovereign to pass a fee simple title to the upland above the line of mean high tide.

The appellant takes the position that since their predecessors whose interest they own obtained fee simple title, Article 5415d is unconstitutional. It says the Article violates the Texas and United States Constitutions because it violates the obligations of a contract, seeks to take private property for public purposes without just compensation and deprives it of property without due process of law. Too, it says the Act denies it equal protection of the laws and acts retroactively to deny it established defenses. We take it the last two assertions are aimed at Section 2 of the Act that creates a prima facie presumption that where property is shown to be between the line of vegetation and mean low tide the title of the littoral

owners does not include the right of the owner to exclude the public from using the area for access to the sea and "there has been imposed upon the area subject to proof of easement a prescriptive right or easement in favor of the public for ingress and egress to the sea."

We find it unnecessary to pass on the assertions of unconstitutionality because in this case the appellees have resorted to the statute only insofar as it places in them the authority to bring the suit on behalf of the people and insofar as it defines the terms "beach" and "line of vegetation" as above stated. There has been no reliance on the prima facie presumption created by the Act. Apart from the presumption we think the only effect of the Act is to declare it to be the policy of the State that the public shall have the unrestricted right of ingress and egress to the State-owned beaches or such larger area extending from the line of mean low tide to the seaward side of the line of vegetation as defined in the Act *in the event* the public has acquired an easement by dedication, prescription or has retained a right by virtue or continuous right in the public. There is nothing in the Act which seeks to take rights from an owner of land. Apart from the presumption, it merely furnishes a means by which the members of the public may enforce such collective rights as they may have legally acquired by reason of dedication, prescription or which they may have retained by continuous right. It makes persons in appellees' positions representatives for the people to bring suit. In the case of State v. Markle et al, 363 S.W.2d 332, (C.C.A.) we, on cursory examination of the Act, stated the above in substance. A further examination of the Act leaves us with the same view. Even if Section 2 be invalid, a matter on which we express no opinion, it would not affect the balance of the Act.

In this case the State also seeks to uphold the judgment on a basis of dedication by appellant's predecessors in title, prescription and estoppel, estoppel being based on the act of the owners in allowing expenditures of public funds in maintenance of the beach.

We are of the view that the jury's finding that the beach had been dedicated by appellant's predecessors in title is supported by sufficient evidence. . . .

We hold that under all the evidence an implied common law dedication by appellant's predecessors in title is shown of the area seaward from the seaward side of the line of vegetation to the line of mean high tide.

It is well established in this State that there may be a dedication of land to public use. Implied dedication need not be shown by deed nor need public use be shown for any particular length of time. It is sufficient if the record shows unequivocal acts or declarations of the land owner, dedicating the same to public use, and where others act on the faith of such dedication, the land owner will be estopped to deny the dedication, or make any future use of the property inconsistent with any purpose for which the land was dedicated. It is of course necessary that there should be an appropriation of the land by the owner to public use. By this last statement is meant the land owner must be shown to intend to dedicate the land to public use. In the case of implied dedication this intent is not, or at least need not be, manifested by an expression to that effect, but may be manifested, and usually is, by some act or course of conduct. Oswald v. Grenet, 22 Tex. 94; Owens v. Hockett, 151 Tex. 503, 251 S.W.2d 957 (S.Ct.); Dunn v. Deussen, 268 S.W.2d 266 (C.C.A.), ref., n. r. e.; O'Connor v. Gragg, 161 Tex. 273, 339 S.W.2d 878 (S.Ct.); Compton v. Waco Bridge Co., 62 Tex. 715; Chambers County v. Frost, 356 S.W.2d 470 (C. C.A.), ref., n. r. e. The intent on the part of the owner, however, is not a secret intent, but is that expressed by visible conduct and open acts of the owner. If the open and known acts are of such a nature as to induce the belief that the owner intended to dedicate the way to the public and individuals act on such conduct, proceed as if there had been in fact a dedication and acquire rights that would be lost if the owner were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent. The act of throwing open property to the public use, without any other formality, is sufficient to establish the fact of dedication to the public; and if individuals, in con-

sequence of this act, become interested to have it continue so, the owner cannot resume it. Owens v. Hockett, supra.

The evidence we have detailed shows the owners, beginning with the original ones, have thrown open the beach to public use and it has remained open for over a hundred years. There is absolutely no evidence of closing it to public use until the erection of the barriers complained of in this case. They were erected in 1958. There is the evidence of one fence, which we spoke of above, that was there from about 1911 to 1915, down the beach some distance from appellant's property. However, it had an unlocked gate permitting passage by users. While the exact location of the fences lateral to the beach is shrouded in some uncertainty, it seems clear that they are up above the seaward side of the line of vegetation at Section 12 most of the time. Appellant's explanation of this is they were there to prevent destruction from high waters. This is a possible and likely explanation. However, if the various prior owners did not intend to dedicate the beach, they could easily have done as has been done in the erection of the present barriers. They could have erected barriers of such construction that at most they would have been damaged or destroyed by storms and then repaired or replaced at relatively small expense. Such would have been evidence of the absence of intent to dedicate. Or, as has been true in some decided cases, they could have erected signs showing use by the public was purely permissive. Rather than any such conduct, however, successive owners have, without any protest, allowed members of the public generally to use the beach each year. While it is true there were few who used it during the winter months, the thing of significance is that whoever wanted to use it did so continuously for these many years when they wished to do so without asking permission and without protest from the land owners. Too, the County expended funds on the beaches, including West Beach, from 1929 to the erection of the barriers, keeping debris cleared so the beach could be used by the public. It was so open the owners must have known of it. Too, the patrolling of the beach by law enforcement officers was carried on openly and for such length of time the owners should have known of it, and it is the duty and right of officers to patrol only public roads in the enforcement of the law. In this connection, it is interesting to note that in the case of Brown v. State, 163 Tex. Cr.R. 170, 289 S.W.2d 942, our Court of Criminal Appeals, on much less evidence, found West Beach to be a public road. This maintenance and patrolling is some evidence of intent to dedicate. Chambers County v. Frost, 356 S.W.2d 470 (C.C.A.), ref., n. r. e.

Appellant urges that the owners also used the beach. This alone is not fatal to a finding on implied dedication. O'Connor v. Gragg, supra. It would seem to us this would be but evidentiary and the weight to be given such use by the owner would depend on its nature, extent and all surrounding circumstances. The use by owners shown is small as compared to use made by the public without permission from the owners. Too, the members of the public were not confined to residents of the community. Hunting shown to have been done was on the Bay side, not on the Gulf side. When their cattle were let out so they could get away from mosquitoes, they were not confined within their owner's land because there were no fences to confine them within the limits of their owner's lands, but they could wander at will up and down the beach on others' lands. It was like turning them out on a "Common". Too, the owners, when they used their part of the beach to drive cattle, were using it as only a link in the beach road that led to the City of Galveston. They could be said to be using it, not in exercise of a right of ownership, but as a member of the public.

For there to be a dedication there must be acceptance by the public. The evidence above detailed shows acceptance by the public. Compton v. Waco Bridge Co., supra; City of Tyler v. Smith County, 151 Tex. 80, 246 S.W.2d 601 (S.Ct.).

Appellant urges there can be no dedication because there has been no acceptance by Galveston County as required by Article 6626, V.A.T.S.

Article 6626 applies to express dedication only. It has been held that for there to be an implied dedication acceptance by public authority is not necessary. User by the public generally suffices.

We are also of the view that the jury's finding of an easement by prescription finds evidence to support it and such evidence is sufficient.

An easement by prescription may be created by user. Such user must be adverse to the owner, must be continuous and must be for at least 10 years. Expressed otherwise, the user must be under a claim of right in the users and not a permissive use under the owner and must continue for the requisite period of time. We think the above facts clearly show continuous user for the purposes above discussed for far more than the 10 year period required.

Appellant, while contending there was not even sufficient user, particularly contends the user was not adverse because the owner used the property at the same time it was being used by members of the public. As we understand the law, use by the owners and others at the same time raises the presumption that user by others is permissive only but there may be present in a given case sufficient evidence to show user by the others under a claim of right. Mere joint use is not determinative. If the nature of the use is such, as to show to the owner that the users are claiming under a right independent of any permission from him, there is the requisite adverseness. The jury found there was not permissive use. Chambers County v. Frost, supra; Fowler v. Matthews, 204 S.W.2d 80 (C.C.A.), no writ hist. In this connection we will not notice all cases cited by appellant, but we do note two Supreme Court decisions. O'Connor v. Gragg, supra, and Othen v. Rosier, 148 Tex. 485, 226 S.W.2d 622. In these cases the Court held that under all facts there was not shown to be an adverse use and one of those facts was joint use by the owner and his neighbors in the community of a strip of the owner's land lying wholly within the boundaries of his ownership. As stated by the Court in the O'Connor v. Gragg case there was there no evidence tending to show a claim of right by Gragg or the public to use the road to the exclusion of the owner. This statement leads us to the conclusion that the mere joint use is not destructive of a conclusion of adverseness if there are other facts present to show use by others is under a claim of right in themselves. In the cited cases and others relied on by appellant, and others we have read, the land on which the easement was claimed lay wholly within the owner's boundaries. Here appellant's property is but a small link in a road used by the public generally. It was not a strip by itself forming the entire road traveled from the claimant's property solely across appellant's property to reach a public road. It was but one link in a way also used across other persons' lands to go to and fro from the 13 Mile Road and in many instances on to the City of Galveston and San Luis. It could under such circumstances be said the owner's use was not in his right as owner but as a member of the public. Use for a road has been going on, as shown by the evidence, ever since before the time of the patent. The use by appellant's predecessors in title in turning their cattle out on the beach is of the same character as use of the road. It can reasonably be said, under the facts of this case, they were turned out into a commons and use in this fashion by the owner was not in assertion of rights of ownership, but in assertion of a right as a member of the public to use the beach. When the cattle were on the beach they were not confined to the owner's land but could roam at will up and down the beach. Further in this case the persons who used the beach were not merely neighbors of the owners, nor were they merely persons in the community, as was true in the cases relied on by appellant. As shown by the evidence, the persons who have used the beach from the beginning have been residents of Galveston and elsewhere in the State. Many witnesses who testified were from Houston. Thousands of people were shown to have used the beach, not only for a drive but for camping and in connection with fishing, boating and swimming. Evidence shows they used it at will without asking permission and there is no evidence of any objection by owners. By public laws routes for travel along the beach were, as above shown, established. Too, public advertising showed the availability of the beach to the public. In addition, patrol of the beach by law enforcement officers is shown. Further, whatever maintenance of the beach has been necessary, since 1929, has been done by employees of Galveston County and public funds have

been expended for the purpose. All of these facts, we think sufficient to show the adverse nature of the use by the public.

Appellant also asserts in effect the evidence does not show what part of the beach was used and to establish an easement by prescription the same route, in case of a road, must be used. We think the evidence shows, as we have above detailed, the whole of the beach from the line of mean low tide to the sand dunes has been used for actual travel and in between the dunes to the vegetation line has been used in connection with travel such as for parking vehicles and for camping and in connection with fishing and swimming done by those who traveled. As above noticed, this has not been a desultory use as is the case in those cases relied on by appellant. It has not been a use across an open prairie where one travels helter-skelter. Nor has it been travel where for some time one travels on a given route and later travels another route distantly removed from the first route. The physical nature of the beach and the use made definitely define the route. The line of vegetation and the line of low tide mark the route. Since the high tides are daily throughout the year, it means that anyone making use of the beach at high tide must use that part near the vegetation line. Evidence shows daily systematic use of the whole area. This requirement of a definite route is required so the owner may have notice of not only the fact of adverse claim but the extent of it. The nature of the terrain and the use made gave sufficient notice to the owner of the extent and location of the route claimed. The case of Hall v. City of Austin, 20 Tex.Civ.App. 59, 48 S.W. 53 (C.C.A.), certified on other points, 93 Tex. 591, 57 S.W. 563, is very much in point. There the pass through the hills defined the route. Here the line of mean low tide and the line of vegetation, two of nature's monuments, effectively mark the route used.

Appellant also contends the beach has changed and there has been erosion so different land has been used from time to time. There is evidence to that effect. There is sufficient evidence to the contrary to support the jury's finding of no net erosion and the beach is the same as ever. Too, though under appellant's evidence the beach is narrower, we think the evidence clearly shows the line of vegetation has remained the same for at least 200 years. Experts testified the beach and the line of vegetation are stable ones.

We affirm the judgment of the trial court on the ground that an easement has been established as found by the jury, by dedication by appellant's predecessors in title and prescription.

GION V. CITY OF SANTA CRUZ

DIETZ V. KING

Supreme Court of California, 1970

2 C. 3d 29; 84 Cal. Rptr. 162, 465 P2d 50

PER CURIAM.

We consider these two cases together because both raise the question of determining when an implied dedication of land has been made.

Gion v. City of Santa Cruz concerns three parcels of land on the southern or seaward side of West Cliff Drive, between Woodrow and Columbia Streets in Santa Cruz. The three lots contain a shoreline of approximately 480 feet and extend from the road into the sea a distance varying from approximately 70 feet to approximately 160 feet. Two of the three lots are contiguous; the third is separated from the first two by approximately 50 feet. Each lot has some area adjoining and level with the road (30 to 40 feet above the sea level) on which vehicles have parked for the last 60 years. This parking area extends as far as 60 feet from the road on one parcel, but on all three parcels there is a sharp cliff-like drop beyond the level area onto a shelf area and then another drop into the sea. The land is subject to continuous, severe erosion. Two roads previously built by the city have been slowly eroded by the sea. To prevent future erosion the city has filled in small amounts of the land and placed supporting riprap in weak areas. The city also put an emergency alarm system on the land and in the early 1960's paved the parking area. No other permanent structures have ever been built on this land.

Since 1880, the City of Santa Cruz has had fee title to a road at some location near the present road. Also since 1880, there has been an area south or seaward of the road area that has been in private hands. As the area south of the road eroded, the city moved its road a short distance to the north. In 1932, after moving the road to its present location, the city gave a quitclaim deed for the land previously covered by the road, but no longer used as a road, to G. H. Normand, the owner and developer of the surrounding property. The area presently under dispute, therefore, includes an old roadbed. Most of the area, however, has never been used for anything but the pleasure of the public.

Since at least 1900 various members of the public have parked vehicles on the level area, and proceeded toward the sea to fish, swim, picnic, and view the ocean. Such activities have proceeded without any significant objection by the fee owners of the property. M. P. Bettencourt, who acquired most of the property in dispute in 1941 and sold it to Gion in 1958 and 1961, testified that during his 20 years of ownership he had occasionally posted signs that the property was privately owned. He conceded, however, that the signs quickly blew away or were torn down, that he never told anyone to leave the property, and that he always granted permission on the few occasions when visitors requested permission to go on it. In 1957 he asked a neighbor to refrain from dumping refuse on the land.[1] The persons who owned the land prior to Bettencourt paid even less attention to it than did Bettencourt. Every witness who testified about the use of the land before 1941 stated that the public went upon the land freely without any thought as to whether it was public or privately owned. In fact, counsel for Gion offered to stipulate at trial that since 1900 the public has fished on the property and that no one ever asked or told anyone to leave it.

The City of Santa Cruz has taken a growing interest in this property over the years and has acted to facilitate the public's use of the land. In the early 1900's, for instance, the Santa Cruz school system sent all the grammar and high school students to this area to plant ice plant, to

beautify the area and keep it from eroding. In the 1920's, the city posted signs to warn fishermen of the dangers from eroding cliffs. In the 1940's the city filled in holes and built an embankment on the top level area to prevent cars from driving into the sea. At that time, the city also installed an emergency alarm system that connected a switch near the cliff to an alarm in the firehouse and police station. The city replaced a washed out guardrail and oiled the parking area in the 1950's, and in 1960–61 the city spent $500,000 to prevent erosion in the general area. On the specific property now in dispute, the city filled in collapsing tunnels and placed boulders in weak areas to counter the eroding action of the waves. In 1963, the city paved all of the level area on the property, and in recent years the sanitation department has maintained trash recepticles thereon and cleaned it after weekends of heavy use.

The superior court for the county of Santa Cruz concluded that the Gions were the fee owners of the property in dispute but that their fee title was "subject to an easement in defendant, City of Santa Cruz, a Municipal corporation, for itself and on behalf of the public, in, on, over and across said property for public recreation purposes, and uses incidental thereto, including, but not limited to, parking, fishing, picnicking, general viewing, public protection and policing, and erosion control, but not including the right of the City or the public to build any permanent structures thereon." This conclusion was based on the following findings of fact:

"The public, without having asked or received permission, has made continuous and uninterrupted use of the said property for a period of time in excess of five (5) years preceding the commencement of this action, for public recreation purposes.

"The City of Santa Cruz, through its agents and employees, has continuously for a period in excess of five (5) years preceding the commencement of this action, exercised continuous and uninterrupted dominion and control over the said property, by performing thereon, grading and paving work, clean-up work, erosion control work, and by maintaining a planting program, and by placing and maintaining safety devices and barriers for the protection of the public using said property.

"Plaintiffs and plaintiffs' predecessors in title had full knowledge of the dominion and control exercised over said property by the City of Santa Cruz, and of the public user of said property throughout the period of said public user, for a period of time in excess of five (5) years preceding the commencement of this action."

In Dietz v. King, plaintiffs, as representatives of the public, asked the court to enjoin defendants from interfering with the public's use of Navarro Beach in Mendocino County and an unimproved dirt road, called the Navarro Beach Road, leading to that beach. The beach is a small sandy peninsula jutting into the Pacific Ocean. It is surrounded by cliffs at the south and east, and is bounded by the Navarro River and the Navarro Beach Road (the only convenient access to the beach by land) on the north. The Navarro Beach Road branches from a county road that parallels State Highway One. The road runs in a southwesterly direction along the Navarro River for 1,500 feet and then turns for the final 1,500 feet due south to the beach. The road first crosses for a short distance land owned by the Carlyles, who maintain a residence adjacent to the road. It then crosses land owned by Mae Crider and Jack W. Sparkman, proprietors of an ancient structure called the Navarro-by-the-Sea Hotel, and, for the final 2,200 feet, land now owned by defendants.

The public has used the beach and the road for at least 100 years. Five cottages were built on the high ground of the ocean beach about 100 years ago. A small cemetery plot containing the remains of shipwrecked sailors and natives of the area existed there. Elderly witnesses testified that persons traveled over the road during the closing years of the last century. They came in substantial numbers to camp, picnic, collect and cut driftwood for fuel, and fish for abalone, crabs, and finned fish. Others came to the beach to decorate the graves, which had wooden crosses upon them. Indians, in groups of 50 to 75 came from as far away as Ukiah during the summer months. They camped on the beach for weeks at a time, drying kelp and catching and drying abalone and other fish. In decreasing numbers they continued to use the road and the beach until about 1950.

In more recent years the public use of Navarro Beach has expanded. The trial court found on substantial evidence that "For many years members of the public have used and enjoyed the said beach for various kinds of recreational activities, including picnicking, hiking, swimming, fishing, skin diving, camping, driftwood collecting, firewood collecting, and related activities." At times as many as 100 persons have been on the beach. They have come in automobiles, trucks, campers, and trailers. The beach has been used for commercial fishing, and during good weather a school for retarded children has brought its students to the beach once every week or two.

None of the previous owners of the King property ever objected to public use of Navarro Beach Road. The land was originally owned by a succession of lumber and railroad companies, which did not interfere with the public's free use of the road and beach. The Southern Pacific Land Company sold the land in 1942 to Mr. and Mrs. Oscar J. Haub who in turn sold it the the Kings in 1959. Mrs. Haub testified by deposition that she and her husband encouraged the public to use the beach. "We intended," she said, "that the public would go through and enjoy that beach without any charge and just for the fun of being out there." She also said that it "was a free beach for anyone to go down there," "you could go in and out as you pleased," and "[w]e intended that the beach be free for anybody to go down there and have a good time." Only during World War II, when the U.S. Coast Guard took over the beach as a base from which to patrol the coast, was the public barred from the beach.

In 1960, a year after the Kings acquired the land, they placed a large timber across the road at the entrance to their land. Within two hours it was removed by persons wishing to use the beach. Mr. King occasionally put up No Trespassing signs, but they were always removed by the time he returned to the land, and the public continued to use the beach until August 1966. During that month, Mr. King had another large log placed across the road at the entrance to his property. That barrier was, however, also quickly removed. He then sent in a caterpillar crew to permanently block the road. That operation was stopped by the issuance of a temporary restraining order.

The various owners of the Navarro-by-the-Sea property have at times placed an unlocked chain across the Navarro Beach Road on that property. One witness said she saw a chain between 1911 and 1920. Another witness said the chain was put up to discourage cows from straying and eating poisonous weeds. The chain was occasionally hooked to an upright spike, but was never locked in place and could be easily removed. Its purpose apparently was to restrict cows, not people, from the beach. In fact, the chain was almost always unhooked and lying on the ground.

From about 1949 on, a proprietor of the Navarro-by-the-Sea Hotel maintained a sign at the posts saying, "Private Road—Admission 50¢—please pay at hotel." With moderate success, the proprietor collected tolls for a relatively short period of time. Some years later another proprietor resumed the practice. Most persons ignored the sign, however, and went to the beach without paying. The hotel operators never applied any sanctions to those who declined to pay. In a recorded instrument the present owners of the Navarro-by-the-Sea property acknowledged that "for over one hundred years there has existed a public easement and right of way" in the road as it crosses their property. The Carlyles and the previous owners of the first stretch of the Navarro Beach Road never objected to its use over their property and do not now object.

The Mendocino county superior court ruled in favor of defendants, concluding that there had been no dedication of the beach or the road and in particular that widespread public use does not lead to an implied dedication.

In our most recent discussion of common-law dedication, Union Transp. Co. v. Sacramento County (1954) 42 Cal.2d 235, 240–241, 267 P.2d 10, we noted that a common-law dedication of property to the public can be proved either by showing acquiescence of the owner in use of the land under circumstances that negate the idea that the use is under a license or by establishing open and continuous use by the public for the prescriptive period. When

dedication by acquiescence for a period of less than five years is claimed, the owner's actual consent to the dedication must be proved. The owner's intent is the crucial factor. (42 Cal.2d at p. 241, 267 P.2d 10, quoting from Schwerdtle v. County of Placer (1895) 108 Cal. 589, 593, 41 P. 448.)

When, on the other hand, a litigant seeks to prove dedication by adverse use, the inquiry shifts from the intent and activities of the owner to those of the public. The question then is whether the public has used the land "for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by any one." (42 Cal.2d at p. 240, 267 P. 2d at p. 13, quoting from Hare v. Craig (1929) 206 Cal. 753, 757, 276 P. 336.) As other cases have stated, the question is whether the public has engaged in "long-continued adverse use" of the land sufficient to raise the "conclusive and undisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license." (42 Cal.2d at p. 241, 267 P.2d at p. 13, quoting from Schwerdtle v. County of Placer, supra, 108 Cal. 589, 593, 41 P. 448.)

In both cases at issue here, the litigants representing the public contend that the second test has been met. Although there is evidence in both cases from which it might be inferred that owners preceding the present fee owners acquiesced in the public use of the land, that argument has not been pressed before this court. We therefore turn to the issue of dedication by adverse use.

Three problems of interpretation have concerned the lower courts with respect to proof of dedication by adverse use: (1) When is a public use deemed to be adverse? (2) Must a litigant representing the public prove that the owner did not grant a license to the public? (3) Is there any difference between dedication of shoreline property and other property?

In determining the adverse use necessary to raise a conclusive presumption of dedication, analogies from the law of adverse possession and easement by prescriptive rights can be misleading. An adverse possessor or a person gaining a personal easement by prescription is acting to gain a property right in himself and the test in those situations is whether the person acted as if he actually claimed a personal legal right in the property. (O'Banion v. Borba (1948) 32 Cal.2d 145, 148, 151, 195 P.2d 10.) Such a personal claim of right need not be shown to establish a dedication because it is a public right that is being claimed. What must be shown is that persons used the property believing the public had a right to such use. This public use may not be "adverse" to the interests of the owner in the sense that the word is used in adverse possession cases. If a trial court finds that the public has used land without objection or interference for more than five years, it need not make a separate finding of "adversity" to support a decision of implied dedication.

Litigants, therefore, seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land. If the land involved is a beach or shoreline area, they should show that the land was used as if it were a public recreation area. If a road is involved, the litigants must show that it was used as if it were a public road. Evidence that the users looked to a governmental agency for maintenance of the land is significant in establishing an implied dedication to the public. (Washington Boulevard Beach Co. v. City of Los Angeles (1940) 38 Cal.App.2d 135, 137–138, 100 P.2d 828; Seaway Company v. Attorney General (Tex.Civ.App.1964) 375 S.W.2d 923, 936–937.)

Litigants seeking to establish dedication to the public must also show that various groups of persons have used the land. If only a limited and definable number of persons have used the land, those persons may be able to claim a personal easement but not dedication to the public. An owner may well tolerate use by some persons but object vigorously to use by others. If the fee owner proves that use of the land fluctuated seasonally, on the other hand, such a showing does not negate evidence of adverse user. "[T]he thing of significance is that whoever wanted to use [the land] did so * * * when they wished to do so without asking permission and without protest from the land owners." (Seaway Company v. Attorney General (Tex.Civ.App., supra), 375 S.W.2d 923, 936.)

The second problem that has concerned lower courts is whether there is a presumption that use by the public is under a license by the fee owner, a presumption that must be overcome by the public with evidence to the contrary. (Compare Rochex & Rochex, Inc. v. Southern Pac. Co. (1932) 128 Cal.App. 474, 479, 17 P.2d 794, to People v. Sayig (1951) 101 Cal.App.2d 890, 897, 226 P.2d 702.) Counsel for the fee owners have argued that the following language from F. A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436, 448, 150 P. 62, 68 is controlling:

"* * * where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate. (13 Cyc. 484.) This is more particularly true where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. (13 Cyc. 484.) It will not be presumed, from mere failure to object, that the owner of such land so used intends to create in the public a right which would practically destroy his own right to use any part of the property."[2]

We rejected that view, however, in O'Banion v. Borba, supra, 32 Cal.2d 145, 195 P.2d 10. With regard to the question of presumptions in establishing easements by prescription we said: "There has been considerable confusion in the cases involving the acquisition of easements by prescription, concerning the presence or absence of a presumption that the use is under a claim of right adverse to the owner of the servient tenement, and of which he has constructive notice, upon the showing of an open, continuous, notorious and peaceable use for the prescriptive period. Some cases hold that from that showing a presumption arises that the use is under a claim of right adverse to the owner. [Citations.] It has been intimated that the presumption does not arise when the easement is over unenclosed and unimproved land. [Citations.] Other cases hold that there must be specific direct evidence of an adverse claim of right, and in its absence, a presumption of permissive use is indulged. [Citations.] The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner. There seems to be no apparent reason for discussing the matter from the standpoint of presumptions." (32 Cal.2d at pp. 148–149, 195 P.2d at pp. 12–13.)

No reason appears for distinguishing proof of implied dedication by invoking a presumption of permissive use. The question whether public use of privately owned lands is under a license of the owner is ordinarily one of fact. We will not presume that owners of property today knowingly permit the general public to use their lands and grant a license to the public to do so. For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use. Whether an owner's efforts to halt public use are adequate in a particular case will turn on the means the owner uses in relation to the character of the property and the extent of public use. Although "No Trespassing" signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide whether the owner's activities have been adequate. If the owner has not attempted to halt public use in any significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication. . . .

This court has in the past been less receptive to arguments of implied dedication when open beach lands were involved than it has when well-defined roadways are at issue (Compare F. A. Hihn Co. v. City of Santa Cruz, supra, 170 Cal. 436, 150 P. 62 to Schwerdtle v. County of Placer, supra, 108 Cal. 589, 47 P. 448.) With the increased urbanization of this state,

however, beach areas are now as well-defined as roadways. This intensification of land use combined with the clear public policy in favor of encouraging and expanding public access to and use of shoreline areas leads us to the conclusion that the courts of this state must be as receptive to a finding of implied dedication of shoreline areas as they are to a finding of implied dedication of roadways. (For a similar result see State ex rel. Thornton v. Hay (1969) Or., 462 P.2d 671.)

We conclude that there was an implied dedication of property rights in both cases. In both cases the public used the land "for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by any one." (Union Transp. Co. v. Sacramento County, supra, 42 Cal.2d 235, 240, 267 P.2d 10, 13 quoting from Hare v. Craig, supra, 206 Cal. 753, 757, 276 P. 336.) In both cases the public used the land in public ways, as if the land was owned by a government, as if the land were a public park.

In Gion v. City of Santa Cruz, the public use of the land is accentuated by the active participation of the city in maintaining the land and helping the public to enjoy it. The variety and long duration of these activities indicate conclusively that the public looked to the city for maintenance and care of the land and that the city came to view the land as public land.

No governmental agency took an active part in maintaining the beach and road involved in Dietz v. King, but the public nonetheless treated the land as land they were free to use as they pleased. The evidence indicates that for over a hundred years persons used the beach without regard to who owned it. A few persons may have believed that the proprietors of the Navarro-by-the-Sea Hotel owned or supervised the beach, but no one paid any attention to any claim of the true owners. The activities of the Navarro-by-the-Sea proprietors in occasionally collecting tolls has no effect on the public's rights in the property because the question is whether the public's use was free from interference or objection by the fee owner or persons acting under his direction and authority. (Union Transp. Co. v. Sacramento County, supra, 42 Cal.2d 235, 240, 241, 267 P.2d 10.)

The rare occasions when the fee owners came onto the property in question and casually granted permission to those already there have, likewise, no effect on the adverse user of the public. By giving permission to a few, an owner cannot deprive the many, whose rights are claimed totally independent of any permission asked or received of their interest in the land. (Seaway Company v. Attorney General (Tex.Civ.App., supra) 375 S.W.2d 923, 933–936.) If a constantly changing group of persons use land in a public way without knowing or caring whether the owner permits their presence, it makes no difference that the owner has informed a few persons that their use of the land is permissive only.

The present fee owners of the lands in question have of course made it clear that they do not approve of the public use of the property. Previous owners, however, by ignoring the wide-spread public use of the land for more than five years have impliedly dedicated the property to the public. Nothing can be done by the present owners to take back that which was previously given away. In each case the trial court found the elements necessary to implied dedication were present—use by the public for the prescriptive period without asking or receiving permission from the fee owner. There is no evidence that the respective fee owners attempted to prevent or halt this use. It follows as a matter of law that a dedication to the public took place. The judgment in *Gion* is affirmed. The judgment in *Dietz* is reversed with directions that judgment be entered in favor of plaintiffs.

STATE EX REL. THORNTON V. HAY

Supreme Court of Oregon, 1969

254 Ore. 584, 462 P. 2d 671

GOODWIN, Justice.

William and Georgianna Hay, the owners of a tourist facility at Cannon Beach, appeal from a decree which enjoins them from constructing fences or other improvements in the dry-sand area between the sixteen-foot elevation contour line and the ordinary high-tide line of the Pacific Ocean.

The issue is whether the state has the power to prevent the defendant landowners from enclosing the dry-sand area contained within the legal description of their ocean-front property.

The state asserts two theories: (1) the landowners' record title to the disputed area is encumbered by a superior right in the public to go upon and enjoy the land for recreational purposes; and (2) if the disputed area is not encumbered by the asserted public easement, then the state has power to prevent construction under zoning regulations made pursuant to ORS 390.640.

The defendant landowners concede that the State Highway Commission has standing to represent the rights of the public in this litigation, ORS 390.620, and that all tideland lying seaward of the ordinary, or mean high-tide line is a state recreation area as defined in ORS 390.720.[1]

From the trial record, applicable statutes, and court decisions, certain terms and definitions have been extracted and will appear in this opinion. A short glossary follows:

ORS 390.720 refers to the "ordinary" high-tide line, while other sources refer to the "mean" high-tide line. For the purposes of this case the two lines will be considered to be the same. The mean high-tide line in Oregon is fixed by the 1947 Supplement to the 1929 United States Coast and Geodetic Survey data.

The land area in dispute will be called the dry-sand area. This will be assumed to be the land lying between the line of mean high tide and the visible line of vegetation.[2]

The vegetation line is the seaward edge of vegetation where the upland supports vegetation. It falls generally in the vicinity of the sixteen-foot-elevation contour line, but is not at all points necessarily identical with that line. Differences between the vegetation line and the sixteen-foot line are irrelevant for the purposes of this case.

The sixteen-foot line, which is an engineering line and not a line visible on the ground, is mentioned in ORS 390.640, and in the trial court's decree.

The extreme high-tide line and the high-water mark are mentioned in the record, but will be treated as identical with the vegetation line. While technical differences between extreme high tide and the high-water mark, and between both lines and the sixteen-foot line, might have legal significance in some other litigation, such differences, if any, have none in this case. We cite these variations in terminology only to point out that the cases and statutes relevant to the issues in this case, like the witnesses, have not always used the same words to describe similar topographical features.

Below, or seaward of, the mean high-tide line, is the state-owned foreshore, or wet-sand area, in which the landowners in this case concede the public's paramount right, and concerning which there is no justiciable controversy.

The only issue in this case, as noted, is the power of the state to limit the record owner's use and enjoyment of the dry-sand area, by whatever boundaries the area may be described.

The trial court found that the public had acquired, over the years, an easement for recreational purposes to go upon and enjoy the dry-sand area, and that this easement was appurtenant to the wet-sand portion of the beach which is admittedly

owned by the state and designated as a "state recreation area."

Because we hold that the trial court correctly found in favor of the state on the rights of the public in the dry-sand area, it follows that the state has an equitable right to protect the public in the enjoyment of those rights by causing the removal of fences and other obstacles.

It is not necessary, therefore, to consider whether ORS 390.640 would be constitutional if it were to be applied as a zoning regulation to lands upon which the public had not acquired an easement for recreational use.

In order to explain our reasons for affirming the trial court's decree, it is necessary to set out in some detail the historical facts which lead to our conclusion.

The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam-digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede. In the Cannon Beach vicinity, state and local officers have policed the dry sand, and municipal sanitary crews have attempted to keep the area reasonably free from man-made litter.

Perhaps one explanation for the evolution of the custom of the public to use the dry-sand area for recreational purposes is that the area could not be used conveniently by its owners for any other purpose. The dry-sand area is unstable in its seaward boundaries, unsafe during winter storms, and for the most part unfit for the construction of permanent structures. While the vegetation line remains relatively fixed, the western edge of the dry-sand area is subject to dramatic moves eastward or westward in response to erosion and accretion. For example, evidence in the trial below indicated that between April 1966 and August 1967 the seaward edge of the dry-sand area involved in this litigation moved westward 180 feet. At other points along the shore, the evidence showed, the seaward edge of the dry-sand area could move an equal distance to the east in a similar period of time.

Until very recently, no question concerning the right of the public to enjoy the dry-sand area appears to have been brought before the courts of this state. The public's assumption that the dry sand as well as the foreshore was "public property" had been reinforced by early judicial decisions. See Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894), which affirmed Bowlby v. Shively, 22 Or. 410, 30 P. 154 (1892). These cases held that landowners claiming under federal patents owned seaward only to the "high-water" line, a line that was then assumed to be the vegetation line.[3]

In 1935, the United States Supreme Court held that a federal patent conveyed title to land farther seaward, to the mean high-tide line. Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935). While this decision may have expanded seaward the record ownership of upland landowners, it was apparently little noticed by Oregonians. In any event, the *Borax* decision had no discernible effect on the actual practices of Oregon beachgoers and upland property owners.

Recently, however, the scarcity of ocean-front building sites has attracted substantial private investments in resort facilities. Resort owners like these defendants now desire to reserve for their paying guests the recreational advantages that accrue to the dry-sand portions of their deeded property. Consequently, in 1967, public debate and political activity resulted in legislative attempts to resolve conflicts between public and private interests in the dry-sand area:

ORS 390.610 "(1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore existing over the seashore and ocean beaches of the state from the Columbia River on the North to the Oregon-California line on the South so that the public may have the free and uninterrupted use thereof.

"(2) The Legislative Assembly recognizes that over the years the public has

made frequent and uninterrupted use of lands abutting, adjacent and contiguous to the public highways and state recreation areas and recognizes, further, that where such use has been sufficient to create easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources.

"(3) Accordingly, the Legislative Assembly hereby declares that all public rights and easements in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered in the same manner as those lands described in ORS 390.720.

"* * *."

The state concedes that such legislation cannot divest a person of his rights in land, Hughes v. Washington, 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967), and that the defendants' record title, which includes the dry-sand area, extends seaward to the ordinary or mean high-tide line. Borax Consolidated Ltd. v. Los Angeles, supra.

The landowners likewise concede that since 1899 the public's rights in the foreshore have been confirmed by law as well as by custom and usage. Oregon Laws 1899, p. 3, provided:

"That the shore of the Pacific ocean, between ordinary high and extreme low tides, and from the Columbia river on the north to the south boundary line of Clatsop county on the south, is hereby declared a public highway, and shall forever remain open as such to the public."

The disputed area is *sui generis*. While the foreshore is "owned" by the state, and the upland is "owned" by the patentee or record-title holder, neither can be said to "own" the full bundle of rights normally connoted by the term "estate in fee simple." 1 Powell, Real Property § 163, at 661 (1949).

In addition to the *sui generis* nature of the land itself, a multitude of complex and sometimes overlapping precedents in the law confronted the trial court. Several early Oregon decisions generally support the trial court's decision, i. e., that the public can acquire easements in private land by long-continued user that is inconsistent with the owner's exclusive possession and enjoyment of his land. A citation of the cases could end the discussion at this point. But because the early cases do not agree on the legal theories by which the results are reached, and because this is an important case affecting valuable rights in land, it is appropriate to review some of the law applicable to this case.

One group of precedents relied upon in part by the state and by the trial court can be called the "implied-dedication" cases. The doctrine of implied dedication is well known to the law in this state and elsewhere. See cases collected in Parks, The Law of Dedication in Oregon, 20 Or.L.Rev. 111 (1941). Dedication, however, whether express or implied, rests upon an intent to dedicate.[4] In the case at bar, it is unlikely that the landowners thought they had anything to dedicate, until 1967, when the notoriety of legislative debates about the public's rights in the dry-sand area sent a number of ocean-front landowners to the offices of their legal advisers.

A second group of cases relied upon by the state, but rejected by the trial court, deals with the possibility of a landowner's losing the exclusive possession and enjoyment of his land through the development of prescriptive easements in the public.

In Oregon, as in most common-law jurisdictions, an easement can be created in favor of one person in the land of another by uninterrupted use and enjoyment of the land in a particular manner for the statutory period, so long as the user is open, adverse, under claim of right, but without authority of law or consent of the owner. Feldman et ux. v. Knapp et ux., 196 Or. 453, 476, 250 P.2d 92 (1952); Coventon v. Seufert, 23 Or. 548, 550, 32 P. 508 (1893). In Oregon, the prescriptive period is ten years. ORS 12.050. The public use of the disputed land in the case at bar is admitted to be continuous for more than sixty years. There is no suggestion in the record that anyone's permission was sought or given; rather, the public used the land under a claim of right. Therefore, if the public can acquire an easement by prescription, the requirements for such an acquisition have been met in connection with the specific tract of land involved in this case.

The owners argue, however, that the general public, not being subject to actions in trespass and ejectment, cannot acquire rights by prescription, because the statute of limitations is irrelevant when an action does not lie.

While it may not be feasible for a landowner to sue the general public, it is nonetheless possible by means of signs and fences to prevent or minimize public invasions of private land for recreational purposes. In Oregon, moreover, the courts and the Legislative Assembly have both recognized that the public can acquire prescriptive easements in private land, at least for roads and highways. See, e. g., Huggett et ux. v. Moran et ux., 201 Or. 105, 266 P.2d 692 (1954), in which we observed that counties could acquire public roads by prescription. And see ORS 368.-405, which provides for the manner in which counties may establish roads. The statute enumerates the formal governmental actions that can be employed, and then concludes: "This section does not preclude acquiring public ways by adverse user."

Another statute codifies a policy favoring the acquisition by prescription of public recreational easements in beach lands. See ORS 390.610. While such a statute cannot create public rights at the expense of a private landowner the statute can, and does, express legislative approval of the common-law doctrine of prescription where the facts justify its application. Consequently, we conclude that the law in Oregon, regardless of the generalizations that may apply elsewhere,[5] does not preclude the creation of prescriptive easements in beach land for public recreational use.

Because many elements of prescription are present in this case, the state has relied upon the doctrine in support of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.

The other reason which commends the doctrine of custom over that of prescription as the principal basis for the decision in this case is the unique nature of the lands in question. This case deals solely with the dry-sand area along the Pacific shore, and this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.

A custom is defined in 1 Bouv. Law Dict., Rawle's Third Revision, p. 742 as "such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates."

In 1 Blackstone, Commentaries *75–*78, Sir William Blackstone set out the requisites of a particular custom.

Paraphrasing Blackstone, the first requirement of a custom, to be recognized as law, is that it must be ancient. It must have been used so long "that the memory of man runneth not to the contrary." Professor Cooley footnotes his edition of Blackstone with the comment that "long and general" usage is sufficient. In any event, the record in the case at bar satisfies the requirement of antiquity. So long as there has been an institutionalized system of land tenure in Oregon, the public has freely exercised the right to use the dry-sand area up and down the Oregon coast for the recreational purposes noted earlier in this opinion.

The second requirement is that the right be exercised without interruption. A customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right. In the case at bar, there was evidence that the public's use and enjoyment of the dry-sand area had never been interrupted by private landowners.

Blackstone's third requirement, that the customary use be peaceable and free from dispute, is satisfied by the evidence which related to the second requirement.

The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community. There is evidence in the record that when inappro-

priate uses have been detected, municipal police officers have intervened to preserve order.

The fifth requirement, certainty, is satisfied by the visible boundaries of the dry-sand area and by the character of the land, which limits the use thereof to recreational uses connected with the foreshore.

The sixth requirement is that a custom must be obligatory; that is, in the case at bar, not left to the option of each landowner whether or not he will recognize the public's right to go upon the dry-sand area for recreational purposes. The record shows that the dry-sand area in question has been used, as of right, uniformly with similarly situated lands elsewhere, and that the public's use has never been questioned by an upland owner so long as the public remained on the dry sand and refrained from trespassing upon the lands above the vegetation line.

Finally, a custom must not be repugnant, or inconsistent, with other customs or with other law. The custom under consideration violates no law, and is not repugnant.

Two arguments have been arrayed against the doctrine of custom as a basis for decision in Oregon. The first argument is that custom is unprecedented in this state, and has only scant adherence elsewhere in the United States. The second argument is that because of the relative brevity of our political history it is inappropriate to rely upon an English doctrine that requires greater antiquity than a newly-settled land can muster. Neither of these arguments is persuasive.

The custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites. While it is not necessary to rely upon precedent from other states, we are not the first state to recognize custom as a source of law. See Perley et ux'r v. Langley, 7 N.H. 233 (1834).

On the score of the brevity of our political history, it is true that the Anglo-American legal system on this continent is relatively new. Its newness has made it possible for government to provide for many of our institutions by written law rather than by customary law.[6] This truism does not, however, militate against the validity of a custom when the custom does in fact exist. If antiquity were the sole test of validity of a custom, Oregonians could satisfy that requirement by recalling that the European settlers were not the first people to use the dry-sand area as public land.

Finally, in support of custom, the record shows that the custom of the inhabitants of Oregon and of visitors in the state to use the dry sand as a public recreation area is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed. In the case at bar, the landowners conceded their actual knowledge of the public's long-standing use of the dry-sand area, and argued that the elements of consent present in the relationship between the landowners and the public precluded the application of the law of prescription. As noted, we are not resting this decision on prescription, and we leave open the effect upon prescription of the type of consent that may have been present in this case. Such elements of consent are, however, wholly consistent with the recognition of public rights derived from custom.

Because so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society. It seems particularly appropriate in the case at bar to look to an ancient and accepted custom in this state as the source of a rule of law. The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.

For the foregoing reasons, the decree of the trial court is affirmed.

IN RE OPINION OF THE JUSTICES

Supreme Judicial Court of Massachusetts, 1974

313 N.E. 2d 561

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit this reply to the question set forth in an order adopted by the House on May 8, 1974, and transmitted to us on May 10, 1974. The order recites the pendency before the General Court of a bill, a copy of which has been transmitted to us with the order. The bill is entitled, "An Act authorizing public right-of-passage along certain coastline of the Commonwealth" (House No. 481).

The bill declares that the reserved interests of the public in the land along the coastline between the mean high water line and the extreme low water line include a "public on-foot free right-of-passage." This "right-of-passage" is only to be exercised after sunrise and before one-half hour after sunset and is not to be exercised in those areas designated by the Commissioner of the Department of Natural Resources as of critical ecological significance and so posted. It is not to be exercised where there exists a structure or enclosure authorized by law, or an agricultural fence enclosing livestock, if such areas are clearly posted. An attempt to prevent the exercise of this right of passage is made punishable by fine, and the burden of proof in any action concerning the exclusion of the exercise of the right is to be on the party seeking to exclude or limit it. Interference with or making unsafe such passage is made unlawful, and a civil remedy is provided to any person affected by such action. Littering while exercising the right of passage is prohibited. The limited tort liability of G.L. c. 21, § 17C, is extended to coastal owners with respect to persons exercising the "right-of-passage" except for injuries caused by a violation of the proposed act.

The bill further provides that it is not to be construed as altering existing statutory or common law property or personal rights or remedies. It then states that any person having a recorded interest in any land affected may "within two years from the effective date of this act" petition the Superior Court under G.L. c. 79 "to determine whether . . . the activities authorized herein constitute an injury for which the owner is entitled to compensation under said chapter 79." Finally, the bill requires the Commissioner of Public Works to record a notice of its adoption, prior to its effective date, in every county where coastline land is required to be recorded. He is also required to give such notice by publication within sixty days after its effective date for three consecutive weeks in newspapers in cities and towns containing affected coastal land.

The order asserts that grave doubt exists as to the constitutionality of the bill if enacted into law and propounds the following question:

"Would the pending Bill if enacted into law violate Article X of the Bill of Rights of the Constitution of the Commonwealth or the Fourteenth Amendment to the Constitution of the United States?"

At common law, private ownership in coastal land extended only as far as mean high water line. Beyond that, ownership was in the Crown but subject to the rights of the public to use the coastal waters for fishing and navigation. Whittlesey, Law of the Seashore, Tidewaters and Great Ponds (1932) xxviii-xxix. Commonwealth v. Roxbury, 9 Gray 451, 482-483, (1857). When title was transferred to private persons it remained impressed with these public rights. Shively v. Bowlby, 152 U.S. 1, 13, 14 S.Ct. 548, 38 L.Ed. 331 (1893). The property inherent in the Crown in England was passed by charter

to the Massachusetts Bay Colony and ultimately to the Commonwealth. Massachusetts Constitution, Part II, c. 6, art. 6. See Commonwealth v. Roxbury, *supra*, 9 Gray at 483–484. In the 1640's, in order to encourage littoral owners to build wharves, the colonial authorities took the extraordinary step of extending private titles to encompass land as far as mean low water line or 100 rods from the mean high water line, whichever was the lesser measure. Storer v. Freeman, 6 Mass. 435 (1810). This was accomplished by what has become known as the colonial ordinance of 1641–47, which is found in the 1649 codification, The Book of the General Lawes and Libertyes, at p. 50. "Every Inhabitant who is an housholder shall have free fishing and fowling in any great ponds, bayes, Coves and Rivers, so farr as the Sea ebbs and flowes, within the precincts of the towne where they dwell, unles the freemen of the same Town or the General Court have otherwise appropriated them. . . . The which clearly to determine, It is Declared, That in all *Creeks, Coves* and other places, about and upon *Salt-water*, where the Sea ebbs and flowes, the proprietor of the land adjoyning, shall have propriety to the low-water mark, where the Sea doth not ebb above a hundred Rods, and not more wheresoever it ebbs further. Provided that such proprietor shall not by this liberty, have power to stop or hinder the passage of boates or other vessels, in or through any Sea, Creeks, or Coves, to other mens houses or lands."

Although strictly the ordinance was limited to the area of the Massachusetts Bay Colony, it has long been interpreted as effecting a grant of the tidal land to all coastal owners in the Commonwealth. Weston v. Sampson, 8 Cush. 347, 353–354 (1851), and cases cited. The language of the ordinance well illustrates the notion, previously alluded to, of reserved public right. It expressly specifies that the public is to retain the rights of fishing, fowling and navigation. Notwithstanding these limitations and the use of such ambiguous terms as "propriety" and "liberty," there is ample judicial authority to the effect that the ordinance is properly construed as granting the benefitted owners a fee in the seashore to the extent described and subject to the public rights reserved. It is unnecessary to cite more than a few of the many cases to that effect. In Commonwealth v. Alger, 7 Cush. 53 (1851), probably the leading case on the subject, Chief Justice Shaw wrote, "[The ordinance] imports not an easement, an incorporeal right, license, or privilege, but a *jus in re*, a real or proprietary title to, and interest in, the soil itself, in contradistinction to a usufruct, or an uncertain and precarious interest." *Id.* at 70. "[It created] a legal right and vested interest in the soil, and not a mere permissive indulgence, or gratuitous license, given without consideration, and to be revoked and annulled at the pleasure of those who gave it." *Id.* at 71.

If, therefore, the right of passage authorized by the bill is, as it declares, merely an exercise of existing public rights, and not a taking of private property, it must be a natural derivative of the rights preserved by the colonial ordinance. It has been held proper to interfere with the private property rights of coastal owners in the tidal area for purposes reasonably related to the protection or promotion of fishing or navigation without paying compensation. Home for Aged Women v. Commonwealth, 202 Mass. 422, 89 N.E. 124 (1909). Crocker v. Champlin, 202 Mass. 437, 89 N.E. 129 (1909). An "on-foot right-of-passage" is not so related to these public rights. The cases interpreting the right of the public in navigation all deal with the use in boats or other vessels of the area below mean high water mark "when covered with tide water." Commonwealth v. Charlestown, 1 Pick. 180, 183–184 (1822). Commonwealth v. Alger, 7 Cush. 53, 97 (1851). Old Colony St. Ry. v. Phillips, 207 Mass. 174, 180–181, 93 N.E. 792 (1911). Thus the right of passage over dry land at periods of low tide cannot be reasonably included as one of the traditional rights of navigation.

We have frequently had occasion to declare the limited nature of public rights in the seashore. For example, a littoral owner may build on his tidal land so as to exclude the public completely as long as he does not unreasonably interfere with

navigation. Compare Austin v. Carter, 1 Mass. 231 (1804), and Locke v. Motley, 2 Gray 265 (1854), with Kean v. Stetson, 5 Pick. 492 (1827). Nor do public rights extend so far as to give an adjoining owner the right to require a littoral owner to allow the tidewater to flow across the shore to the former's land for drainage. Henry v. Newburyport, 149 Mass. 582, 584–585, 22 N.E. 75 (1889). These limitations are also evident in comparing Weston v. Sampson, 8 Cush. 347 (1851), with Porter v. Shehan, 7 Gray 435 (1856), both written by Chief Justice Shaw. In the *Weston* case, the defendants entered upon the plaintiffs' tidal land by boat, and their digging for clams was held to be an exercise of the reserved public right of fishing. In the *Porter* case, however, it was deemed a trespass for the defendant to enter and take five cords of muscle mud "consisting of living and dead shell fish . . . and the soil or clay in which they were found," and used principally as a fertilizer. 7 Gray at 435–436. The Chief Justice wrote that this exceeded the public rights in fishing, and that there was "no right to take the soil, or fish shells, part of the soil, except as slight portions of the soil would necessarily and ordinarily be attached to shell fish, when taken." *Id.* at 437. A similar contrast may be discerned in Anthony v. Gifford, 2 Allen 549 (1861), in which it was held that the reserved public rights could be exercised under a statute allowing any person to collect seaweed, kelp and other marine plants "[s]o long as they are afloat and driven or moved from place to place by the rising tide," *id.* at 550, but not once they had come to rest on the beach land owned privately by virtue of the colonial ordinance.

We are unable to find any authority that the rights of the public include a right to walk on the beach. In a case presenting a very similar question to that raised by the bill, it was held that the public rights in the seashore do not include a right to use otherwise private beaches for public bathing. Butler v. Attorney Gen., 195 Mass. 79, 80 N.E. 688 (1907). "We think that there is a right to swim or float in or upon public waters as well as to sail upon them. But we do not think that this includes a right to use for bathing purposes, as these words are commonly understood, that part of the beach or shore above low-water mark, where the distance to high-water mark does not exceed one hundred rods, whether covered with water or not. It is plain we think, that under the law of Massachusetts there is no reservation or recognition of bathing on the beach as a separate right of property in individuals or the public under the colonial ordinance." *Id.* at 83–84, 80 N.E. at 689. See Michaelson v. Silver Beach Improvement Assn. Inc., 342 Mass. 251, 173 N.E.2d 273 (1961).

We have considered an able argument made in the brief of one of the amici curiae that we should interpret the colonial ordinance as vesting in the Commonwealth the right to allow all significant public uses in the seashore. It is contended that while fishing, fowling and navigation may have exhausted these uses in 1647, these public uses change with time and now must be deemed to include the important public interest in recreation. Whatever may be the propriety of such an interpretation with respect to public rights in littoral land held by the State, compare Borough of Neptune City v. Borough of Avon-by-the Sea, 61 N.J. 296, 308–309, 294 A.2d 47 (1972), we think the cases we have cited make clear that the grant to private parties effected by the colonial ordinance has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights as would result from such an interpretation. The rights of the public though strictly protected have also been strictly confined to these well defined areas. "[T]he only specific powers which have been expressly recognized as exercisable without compensation to private parties are those to regulate and improve navigation and the fisheries." Michaelson v. Silver Beach Improvement Assn. Inc., 342 Mass. 251, 256, 173 N.E.2d 273, 277 (1961). Since this is not such a project or regulation it cannot be considered merely a manifestation of the reserved rights of the public.

It is next necessary to inquire whether the authorization of the right of passage provided by the bill, while not within the public rights reserved by the co-

lonial ordinance, is nonetheless a proper exercise of the Commonwealth's police power and, as such, does not require that compensation be paid to the private owners. See, e. g., Massachusetts Commn. Against Discrimination v. Colangelo, 344 Mass. 387, 394–397, 182 N.E.2d 595 (1962). The elusive border between the police power of the State and the prohibition against taking of property without compensation has been the subject of extensive litigation and commentary. See Bosselman, Callies & Banta, The Taking Issue (1973). But these difficulties need not concern us here. The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the Constitutions of the Commonwealth and of the United States.

It is true that the bill does not completely deprive private owners of all use of their seashore property in the sense that a formal taking does. But the case is readily distinguishable from such regulation as merely prohibits some particular use or uses which are harmful to the public. See Commonwealth v. Alger, 7 Cush. 53, 86 (1851). The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others. Nichols, Eminent Domain (Rev. 3d ed.) § 5.1 [1] (1970).

Here the Commonwealth proposes to take easements for the benefit of the public, Grove Hall Sav. Bank v. Dedham, 284 Mass. 92, 187 N.E. 182 (1933); Cayon v. Chicopee, — Mass. —, ———, 277 N. E.2d 116 (1971),[n] and compensation is required. The bill seeks to require private owners to permit affirmative physical use of their property by the public. "[W]e know no right which the legislature have to require a citizen to make his property convenient for his neighbor's use without compensation." Morse v. Stocker, 1 Allen 150, 158 (1861). See Delaware, Lackawanna & Western R. R. v. Morristown, 276 U.S. 182, 194–195, 48 S.Ct. 276, 72 L. Ed. 523 (1928). Even commentators who, as a matter of constitutional law, favor the narrowest interpretation of "takings" agree that a "physical invasion" must be so considered. Bosselman, Callies & Banta, *supra*, at 254–255.

The bill, therefore, would effectively appropriate property of individuals to a public use and thus is controlled by the constitutional restriction of art. 10 of the Declaration of Rights of the Massachusetts Constitution, and the Fourteenth Amendment to the United States Constitution. These provisions require that such takings be for a public purpose and that reasonable compensation be paid. See Caleb Pierce, Inc. v. Commonwealth, 354 Mass. 306, 308–309, 237 N.E.2d 63 (1968). We think it is evident that the creation of the proposed right of passage would serve the recognized public interest in the providing of recreational facilities. Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371, 374, 102 N.E. 619 (1913). Rindge Co. v. County of Los Angeles, 262 U.S. 700, 708, 43 S.Ct. 689, 67 L.Ed. 1186 (1923). There is considerable question, however, whether the bill as written makes adequate provision for the constitutional requirement of fair compensation.

The bill permits "any person having a recorded interest in any land affected" by the bill within two years to "petition the superior court under the provisions of chapter 79 of the General Laws to determine whether this section or the activities authorized . . . [by the bill] constitute an injury for which the owner is entitled to compensation under said chapter 79." The exact intended meaning of this provision is somewhat unclear but we think that even under the most generous interpretation it is insufficient to satisfy the constitutional requirement of compensation.

By its choice of the word "injury" rather than "taking" or "appropriation," the bill may be making special reference to G. L. c. 79, § 9, which permits compensation to be awarded under G.L. c. 79 for "injury" to real estate caused "by the establishment, construction, maintenance, operation, alteration, repair or discontinuance of a public improvement which does not involve the taking of private property." "The lan-

guage of [this statute] reflects the distinction between takings, for which compensation is compelled, and other injuries which are compensated only as a matter of legislative grace." Cann v. Commonwealth, 353 Mass. 71, 74, 228 N.E.2d 67, 68 (1967). Such an interpretation of the bill, applying the compensation provisions only to indirect injury to the upland property of littoral owners, is plausible given the bill's initial statement that the proposed right of passage represents merely an exercise of reserved public rights. If this interpretation is correct the bill is plainly deficient for failing to provide compensation for the taking of tidal land which we have found implicit in its terms.

. . . Even if we were to construe the "injury" alluded to in the bill to be the taking of the right of passage itself, the method of compensation provided is inadequate. Such a taking with compensation "should not be accomplished by the use of ambiguous or uncertain language." Glover v. Boston, 14 Gray 282, 288 (1859). Turner v. Gardner, 216 Mass. 65, 70, 103 N.E. 54 (1913). It is not sufficient for a statute to authorize a taking and then provide a possibility of compensation in a later proceeding as this bill would do. "The power to take and the obligation to indemnify for the taking are inseparable." Attorney Gen. v. Old Colony R.R., 160 Mass. 62, 90, 35 N.E. 252, 257 (1893), quoting from Drury v. Midland R.R., 127 Mass. 571, 576 (1879).

What the bill in effect attempts is to transfer from the Legislature to the courts not merely the decision on the amount of compensation but also the decision whether or not to compensate, that is, whether or not to exercise the power of eminent domain. This would raise serious constitutional questions with respect to the separation of powers. See art. 30 of the Declaration of Rights of the Massachusetts Constitution. Article 10 of the Declaration of Rights provides that private property may not be appropriated to public uses without the consent of the owner or "of the representative body of the people." The power of eminent domain is a legislative power. Talbot v. Hudson, 16 Gray 417, 420–422 (1860). Nichols, Eminent Domain (Rev.3d Ed.) § 3.2 (1973). While that power may be delegated to various public and private agencies, Opinion of the Justices, 330 Mass. 713, 718–719, 113 N.E. 2d 452 (1953), particular care must be taken when the delegation crosses the boundaries of the three departments of government. "In Varick v. Smith, 5 Paige, 137, it is said that the legislature is the sole judge as to the expediency of . . . exercising the right of eminent domain . . . either for the benefit of the inhabitants of the state or of any particular portion thereof." Dingley v. Boston, 100 Mass. 544, 558 (1868).[3]

Even if we were to hold that compensation to private owners for the taking of this public easement were provided in the bill it would still be constitutionally defective, for the procedure proposed is inadequate both in the scope of its potential compensation and the notice accorded to property owners of their right to recover damages.

The only property owners given an opportunity to seek damages are those having a recorded interest in affected property. It is obvious that this omits all property owners who hold their title by unrecorded deed or adverse possession. Either manner of acquiring property gives good title. While the grantee under an unrecorded deed may not prevail against those protected by the recording statute, he still possesses a valuable property interest, see Jacobs v. Jacobs, 321 Mass. 350, 351, 73 N.E.2d 477 (1947), and is thus entitled to compensation. See Old Colony & Fall River R.R. v. County of Plymouth, 14 Gray 155, 161 (1859). Similarly, we have held that one holding title by adverse possession, as well as a holder by adverse possession which has not yet ripened into title, may maintain an action for compensation for a taking by the Commonwealth. Andrew v. Nantasket Beach R.R., 152 Mass. 506, 25 N.E. 966 (1890). Since the proposed bill does not provide compensation for either of these classes of owners it is constitutionally inadequate.

Furthermore, with respect to those owners as well as to those of recorded interests, it is a matter of serious question whether the method of notice to affected property owners is sufficient. Notice prior to the exercise of the power of eminent domain is constitutionally required. Appleton v. Newton, 178 Mass. 276, 281, 56 N.E. 648 (1901). The bill provides only constructive notice by recording and publica-

tion. A number of our older cases may be read to hold that such constructive notice is adequate. Taylor v. County Commrs. of Hampden, 18 Pick. 309, 311–312 (1836). Brock v. Old Colony R.R., 146 Mass. 194, 15 N.E. 555 (1888). Appleton v. Newton, supra, 178 Mass. at 281–283, 56 N.E. 648. More recent cases of the United States Supreme Court, however, suggest that a more stringent standard is necessary to satisfy the notice requirements of the Fourteenth Amendment. In Walker v. Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956), the court found that notice by publication was insufficient to meet the proper due process standard in a condemnation proceeding. The same was found true of more extensive publication, together with posting in the vicinity of the condemned property, in Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962). In both of these cases the court applied the notice standard articulated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), in which it was said that what was required was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 314, 70 S.Ct. at 657.

The notice provisions of the bill fall short of this standard. As was noted in the above cited cases, publication is inadequate when the names and addresses of the affected persons are available. Walker v. Hutchinson, *supra*, 352 U.S. at 116, 77 S.Ct. 200. Schroeder v. City of New York, *supra*, 371 U.S. at 212–213, 83 S.Ct. 279. "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property." Walker v. Hutchinson, *supra*, 352 U.S. at 116, 77 S.Ct. at 202. The recording of notice, which the bill would require, does not significantly increase the likelihood that the taking will come to the attention of affected owners before the two-year period expires. First, since there is no requirement that the notice be indexed or recorded on the certificate of registration of registered land, such notice will not be specifically directed to the affected land. Second, even if this were not the case, owners rarely have recourse to the registries of deeds other than on the sale or purchase of real estate. It is unlikely that any but a very few of the affected littoral owners would have occasion to come into contact with the recorded notices. Since individual personal notice is possible in most cases merely by obtaining the necessary names and addresses of the appropriate parties from the local assessors of the cities and towns where the land is located, the procedure prescribed in the bill would not comport with due process.

For all of the above reasons we believe the bill if enacted into law would violate art. 10 of the Declaration of Rights of the Massachusetts Constitution, and the Fourteenth Amendment to the Constitution of the United States. The foregoing discussion, however, is intended to give indication of the alterations necessary to render the bill constitutionally adequate.

We answer the question "Yes."

Mr. Justice KAPLAN did not participate in this opinion.

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NOTE

Beach Access

Increased demands for public recreational use and ecological awareness have created a struggle between the public right of access and use of the shoreline and the property rights of the private upland owner. While the public may have the right to use the beach area under the public trust or a related doctrine, a separate problem arises concerning the need to cross privately owned uplands to gain access to the beach. In the materials covered up to this point, the questions of who owns the beach and has the right to use the beach area have been examined. On the other hand, the issue of beach access involves problems arising when obstacles blocking the public way to the beach are erected -- either by the private owners, to prevent access to the beach or the use of the beach itself as a public way, or by public bodies or governmental units, in the form of legal as well as physical restraints. Cf. Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972).

The greatest deterrant to governmental action which increases public rights at the expense of private owners is the taking clause of the fifth amendment, as made applicable to the states by the fourteenth amendment. Several approaches have developed to determine the extent of public right of way and easement rights:

(a) Prescriptive easements in beach property arise when the public continually uses the land of another for a prescribed period of time. Such use must be adverse under a claim of right with the actual or imputed knowledge of the owner. In City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765 (Fla. 1974), the public had used the soft sand area for twenty years as a thoroughfare for sunbathing and general recreation, and the city had constantly policed the area and kept it clean. In an action to enjoin the purported owners to remove an observation tower, the District Court of Appeal held that where such use was open, notorious and adverse under an apparent claim of right and without material challenge or interference by the owner, the public had acquired a prescriptive right to continued use and enjoyment of the area. Once a prescriptive easement is established, what factors should determine whether a particular use by the private owner is prohibitted, as inconsistent with the public's easement? Must the private owner allow any public use? How does the taking clause of the fifth amendment relate to this problem?

(b) Unlike prescriptive easements, a theory of dedication may provide public access once an intent is shown by the owner to allow public use, without any requisite time period. This intent may be either

express or implied from the actions of the owner or the public. However, a number of problems arise:

(1) The dedication doctrine was applied early to roads crossing private property in the developing days of transportation. What policies make extension of the doctrine to beaches appropriate?
(2) What justification is there for requiring a private landowner to act to avoid the implied dedication of his land to public use?
(3) Why should the burden of proof be on the owner to show that earlier public access was by revocable license, to avoid implied dedication?
(4) On the other hand, if the public has been using the land in question, what has the landowner really lost?
(5) Arguably, the theory of dedication avoids the taking issue by implying a gift to the public from the owner's intent to dedicate the land to public use. In reality, is this a sound implication or a legal end run?
(6) It appears possible that, on balance, the public will lose more access than it gains, once private owners begin taking steps to exclude the public from crossing their land to avoid the implication of an intent to dedicate. Does this affect the usefulness of this doctrine?

(c) In Thornton v. Hay, the court revived the common law doctrine of customary rights in this country. How can one justify deeming a custom in this country old enough to be "immemorial"? What justification is there for finding a state-wide custom, as opposed to a narrowly defined geographic area? In Hawaii, two recent supreme court cases have pronounced that the entire area up to the vegetation line is public land. County of Hawaii v. Sotomura, 517 P. 2d 57 (1973); In re Ashford, 50 Hawaii 314, 440 P. 2d 76 (1968). The doctrine of customary rights is one possible solution to the problem of providing ways of passage or access to that area across privately held lands. What public policies justify this application in Hawaii? To what extent can arguments here be based on historical usages?

(d) In the Neptune City case reprinted above, the public trust doctrine was extended to include recreational uses, as well as navigation, commerce and fishing. However, in Opinion of the Justices, the court refused to so extend the doctrine. What arguments can be raised to support each determination? Do different public uses raise policies which influence the court's willingness to strictly denounce public access as a taking without compensation?

(e) Another approach available for providing public access is the zoning of districts in shoreline areas which provides for all streets designed at angles other than parellel to a public recreation resource, such as a beach, to be mapped to the boundary of that resource. This allows compatible development without allowing such development to obstruct the public way of passage to the beach. In addition, where large areas of shoreline are developed, the zoning ordinance may

provide that a public way be provided from a public roadway to the recreation area at 600 feet intervals along the shoreline. For an example of this approach, see "Zoning Ordinance, Currituck County, North Carolina", State of North Carolina, Department of Local Affairs, Division of Community Planning.

(f) The Texas Open Beaches Act

In reaction to the Texas Supreme Court's rejection of the vegetation line and adoption of an average high tide line as the seaward boundary of privately owned land in Luttes v. State, 324 S. W. 2d 167 (1959), private landowners began erecting barriers to prevent public traffic across and use of areas they had previously assumed to be controlled by the state. The Texas legislature, in Special Session, responded by enacting the Open Beaches Act, Tex. Rev. Stat. Ann. art. 5415d (1959).

The Act declares the public policy of the state to uphold the public right of ingress and egress to that portion of the beach owned by the state and also to that portion of the beach extending from the line of mean low tide to the line of vegetation. In effect, the Act creates a presumption of prescriptive right to an area which includes privately owned land between the average high tide line and the vegetation line.

This is accomplished by a provision that a showing that the land in question is within the area from mean low tide to the vegetation line is prima facie evidence that (1) the title of the littoral owner does not include the right to prevent the public from using the area for ingress and egress to the sea, and (2) there has been imposed upon the area subject to proof of easement a prescriptive right or easement in favor of the public for ingress and egress to the sea.

Since the right to use and pass across land can be equated to property interests, and private property may not be taken for public purposes without due process of law, U.S. Const. amend. V and amend. XIV, sec. 1, this prima facie case treads upon doubtful Constitutional ground. In an apparent effort to avoid this problem, the Texas legislature qualified its assertion of public rights with a condition precedent that the public must have already acquired these rights under the common law doctrines of dedication and prescription or as a "retained . . . right by virtue of continuous right in the public", Art. 5415d, sec. 1. While the meaning of this latter phrase has yet to be judicially determined, it appears that there are two possible views of the Act. It may be merely a statutory restatement of common law public rights, with procedural provisions to aid in the assertion of those rights, or it may be a positive assertion of use and access rights, which may be attacked in the future on Constitutional grounds.

In two opinions which have mentioned the Act, these questions were left unsettled. In Gulf Holding Co. v. Brazoria County, 497

S. W. 2d 614 (1973), the court upheld a temporary injunction granted by the trial court, in view of the Texas "Open Beaches Act", rejecting the degendant's claim that the Act was not applicable to the land in question because it was not a beach on the Gulf of Mexico. In Seaway Co. v. Attorney General, 375 S. W. 2d 923 (Civ. App. 1964) the court found it unnecessary to pass upon the Constitutional validity of that provision of the Act, since the plaintiff's claim did not rely on the statutory presumption.

There are further limitations placed upon the scope of coverage of the Act. It is limited in geographic scope to "beaches bordering on the seaward shore of the Gulf of Mexico". The Act exempts any structures built by governmental entities from coverage, as it does livestock fences and other obstructions where the beach is inaccessible to motor traffic via public roads or along the beach. The Act also provides that avenues of passage provisions are satisfied by existing roads that are available to the public.

For more on beach access See D. Owen and D. Brower, PUBLIC USE OF COASTAL BEACHES (U.N.C. Sea Grant, 1976)

CHAPTER SIX

GOVERNMENT DEVELOPMENTAL AND REGULATORY ACTIVITIES IN COASTAL AREAS

SECTION 1: GOVERNMENTAL CONSERVATION AND DEVELOPMENT

A. Public Lands.

One of the main means for preserving the coastal environment and controlling its development is through the National Park System. Instigated in 1872 with the establishment of Yellowstone National Park, the System is administered by the National Park Service of the Department of the Interior. The National Park Service has been given the duty to:

> promote and regulate the use of the Federal areas known as national parks, monuments, and reservations. . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historical objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. §1 (1970).

The National Park System contains over 23.3 million acres of land composed of three basic types: natural, historical, and recreational.[1] All of these types can be found in the coastal region.[2] In that region, the national seashores are of significance. Established by acts of Congress, ten such seashores include: Assateague Island (Maryland and Virginia), Cape Cod (Massachusetts), Cape Hatteras (North Carolina), Cape Lookout (North Carolina), Fire Island (New York), Padre Island (Texas), Point Reyes (California), Gulf Islands (Mississippi and Florida), Cumberland Island (Georgia), and Canaveral (Florida). 16 U.S.C. §459a-j (Supp. V, 1975).

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1. Environmental Law Institute, Federal Environmental Law (Dolgin & Guilbert, eds. 1974) at 498-99.

2. Id. at 837.

Closely linked with the National Park System is the National Wildlife Refuge System. Originally reserved by executive order, the reservation of federal land for such refuges can now be obtained by legislative authority.[3] The Bureau of Sport Fisheries and Wildlife, under the Department of the Interior, administers these refuges to conserve and protect the native fish and wildlife. 16 U.S.C. §668dd (1970). One objective of the program is to shelter waterfowl and shore birds; thus, many of the refuges are found in coastal areas.[4]

Status as a park or refuge can be used as a foundation for legal action to protect the designated area. In United States v. Florida Power and Light Company, 311 F. Supp. 1391 (S.D.Fla. 1970), the United States government sought to protect Biscayne Bay from discharges of heated water by a power plant. The fact that Biscayne Bay was a national monument served as a justification for this affirmative federal action.[5] Also, in Berkson v. Morton, 2 E.L.R. 20659 (D.Md. Oct. 1, 1971), the National Historic Preservation Act of 1966, 16 U.S.C. §§470 et seq. (1970), provided one of the bases for restraining the Interior Department from constructing a boat landing in the C. & O. Canal National Historic Park. In this case, private citizens used park status as justification for challenging federal procedures.[6] Thus, status as a park or refuge can protect an area from governmental and private infiltration and destruction.

A more recent type of legislation for conserving coastal resources is the Marine Sanctuary Act which follows.

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3. Id. at 838.

4. Id.

5. Id.

6. Id. at 839.

THE MARINE SANCTUARIES ACT OF 197_2

16 U.S.C. §§1431 et seq.

§ 1431. Definition

The term "Secretary", when used in this chapter, means Secretary of Commerce.

§ 1432. Designation of sanctuaries—Secretary of Commerce; consultation; proposed designations

(a) The Secretary, after consultation with the Secretaries of State, Defense, the Interior, and Transportation, the Administrator, and the heads of other interested Federal agencies, and with the approval of the President, may designate as marine sanctuaries those areas of the ocean waters, as far seaward as the outer edge of the Continental Shelf, as defined in the Convention of the Continental Shelf (15 U.S. T. 74; TIAS 5578), of other coastal waters where the tide ebbs and flows, or of the Great Lakes and their connecting waters, which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values. The consultation shall include an opportunity to review and comment on a specific proposed designation.

(b) Prior to designating a marine sanctuary which includes waters lying within the territorial limits of any State or superjacent to the subsoil and seabed within the seaward boundary of a coastal State, as that boundary is defined in section 1301 of Title 43, the Secretary shall consult with, and give due consideration to the views of, the responsible officials of the State involved. As to such waters, a designation under this section shall become effective sixty days after it is published, unless the Governor of any State involved shall, before the expiration of the sixty-day period, certify to the Secretary that the designation, or a specified portion thereof, is unacceptable to his State, in which case the designated sanctuary shall not include the area certified as unacceptable until such time as the Governor withdraws his certification of unacceptability.

(c) When a marine sanctuary is designated, pursuant to this section, which includes an area of ocean waters outside the territorial jurisdiction of the United States, the Secretary of State shall take such actions as may be appropriate to enter into negotiations with other Governments for the purpose of arriving at necessary agreements with those Governments, in order to protect such sanctuary and to promote the purposes for which it was established.

(e) Before a marine sanctuary is designated under this section, the Secretary shall hold public hearings in the coastal areas which would be most directly affected by such designation, for the purpose of receiving and giving proper consideration to the views of any interested party. Such hearings shall be held no earlier than thirty days after the publication of a public notice thereof.

(f) After a marine sanctuary has been designated under this section, the Secretary, after consultation with other interested Federal agencies, shall issue necessary and reasonable regulations to control any activities permitted within the designated marine sanctuary, and no permit, license, or other authorization issued pursuant to any other authority shall be valid unless the Secretary shall certify that the permitted activity is consistent with the purposes of this chapter and can be carried out within the regulations promulgated under this section.

§ 1433. Penalties

(a) Any person subject to the jurisdiction of the United States who violates any regulation issued pursuant to this chapter shall be liable to a civil penalty of not more than $50,000 for each such violation, to be assessed by the Secretary. Each day of a continuing violation shall constitute a separate violation.

(b) No penalty shall be assessed under this section until the person charged has been given notice and an opportunity to be heard. Upon failure of the offending party to pay an assessed penalty, the Attorney General, at the request of the Secretary, shall commence action in the appropriate district court of the United States to collect the penalty and to seek such other relief as may be appropriate.

(c) A vessel used in the violation of a regulation issued pursuant to this chapter shall be liable in rem for any civil penalty assessed for such violation and may be proceeded against in any district court of the United States having jurisdiction thereof.

(d) The district courts of the United States shall have jurisdiction to restrain a violation of the regulations issued pursuant to this chapter, and to grant such other relief as may be appropriate. Actions shall be brought by the Attorney General in the name of the United States, either on his own initiative or at the request of the Secretary.

Pub.L. 92-532, Title III, § 303, Oct. 23, 1972, 86 Stat. 1062.

SECRETARY OF COMMERCE MARINE SANCTUARIES GUIDELINES

15 C.F.R. § 922 (1976)

§ 922.1 Policy and objectives.

(a) The Marine Sanctuaries Program shall be conducted under the expressed policy of the Title which is to designate areas as far seaward as the outer edge of the continental shelf, as defined in the Convention of the Continental Shelf, 15 U.S.T. 74; TIAS 5578, of other coastal waters where the tide ebbs and flows, or of the Great Lakes and their connecting waters, which the Administrator determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values.

(b) Multiple use of marine sanctuaries as defined in this subpart will be permitted to the extent the uses are compatible with the primary purpose(s) of the sanctuary.

(c) It is anticipated that the marine sanctuaries program will be conducted in close cooperation with section 312 of the Coastal Zone Management Act of 1972, P.L. 92-583, which recognizes that the coastal zone is rich in a variety of natural, commercial, recreational, industrial and esthetic resources of immediate and potential value to the present and future well-being of the nation and which authorizes the Secretary of Commerce to make available to a coastal State grants of up to 50 percent of the costs of acquisition, development and operation of estuarine sanctuaries.

§ 922.2 Programmatic objectives.

Marine Sanctuaries may be designated to preserve, restore, or enhance areas for their conservational, recreational, ecological, research or esthetic values in coastal waters. Anticipated examples include:

(a) Areas necessary to protect valuable, unique or endangered marine life, geological features, and oceanographic features.

(b) Areas to complement and enhance public areas such as parks, national seashores and national or state monuments and other preserved areas.

(c) Areas important to the survival and preservation of the nation's fisheries and other ocean resources.

(d) Areas to advance and promote research which will lead to a more thorough understanding of the marine ecosystem and the impact of man's activities.

Subpart B—Classification of Marine Sanctuaries

§ 922.10 Classifications.

Multiple use may be permitted in each classification to the extent the uses are compatible with the primary purpose(s) for which the sanctuary is established. Areas may be established to augment public and private lands or marine areas set aside by local, state or Federal government and private organizations for analogous purposes. Marine sanctuaries

will be established for one, or a combination of, the following purposes:

(a) *Habitat areas.* Areas established under this concept are for the preservation, protection and management of essential or specialized habitats representative of important marine systems. Management emphasis will be toward preservation. The quantity and type of public use will be limited and controlled to protect the values for which the area was created.

(b) *Species areas.* Areas established under this concept are for conservation of genetic resources. Management emphasis may be to maintain species, populations and communities for restocking other areas and for reestablishment purposes in the future. The result will be a contribution to the goal stated by the Council on Environmental Quality, that is, "the widest possible diversity of and within species should be maintained for ecological stability of the biosphere and for use as natural resources." The orientation envisaged will be toward species preservation by protection of such areas as migratory pathways, spawning grounds, nursery grounds, and the constraints on these areas will be those necessary to achieve these purposes.

(c) *Research areas.* (1) Areas established under this concept will exist for scientific research and education in support of management programs carried out for the purpose of the title.

(2) The purpose of the research areas is to establish ecological baselines against which to compare and predict the effect on man's activities, and to develop an understanding of natural processes. Research areas will be chosen according to the biota they support, to include representative samples of the significant ecosystems in the nation, and to the history of prior research carried out in the area, and its proximity or availability to potential uses marine sanctuary designation will insure that the area will be relatively unaffected for a long period of time, thus adding a measure of stability to a research program and the value of the data in management decisions.

(d) *Recreational and esthetic areas.* Areas established under this concept will be based on esthetic or recreational value.

(e) *Unique areas.* Areas established under this concept will be to protect unique or nearly one of a kind geological, oceanographic, or living resource feature.

§ 922.11 Definitions.

As used in this part, the following terms shall have the meaning indicated below:

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration.

(b) "Marine sanctuary" means those areas of the ocean waters, as far seaward as the outer edge of the Continental Shelf, as defined in the Convention of the Continental Shelf, 15 U.S.T. 74, TIAS 5578, of other coastal waters where the tide ebbs and flows, of the Great Lakes and their connecting waters, for the purpose of preserving, restoring or enhancing such areas for their conservation, recreational, ecological, research, or esthetic values.

(c) The term "multiple use" as used in this section shall mean the contemporaneous utilization of an area or resource for a variety of compatible purposes to the primary purpose so as to provide more than one benefit. The term implies the long-term, continued uses of such resources in such a fashion that one will not interfere with, diminish, or prevent other permitted uses.

(d) "Ocean waters" means those waters of the open seas lying seaward of the baseline from which the territorial sea is measured, as provided for in the Convention of the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, TIAS 5639.

(e) "Person" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, or any state or local unit of government.

(f) "Secretary" means the Secretary of Commerce.

§ 922.30 Penalties.

Any person subject to the jurisdiction of the United States who violates any regulation issued pursuant to this title will be liable to a civil penalty of not more than $50,000 for each such violation, to be assessed by the Administrator. Each day of a continuing violation will constitute a separate violation. No penalty will be assessed under this section until the person charged has been given notice and an opportunity to be heard. Upon failure of the offending party to pay an assessed penalty, the Attorney General, at the request of the Administrator, will commence action in the appropriate district court of the United States in order to collect the penalty and to seek such other relief as may be appropriate. A vessel used in the violation of a regulation issued pursuant to this title will be liable in rem for any civil penalty assessed for such violation and may be proceeded against in any district court of the United States having jurisdiction thereof. The district courts of the United States will have jurisdiction to restrain a violation of the regulations issued pursuant to this title, and to grant such other relief as may be appropriate. Actions will be brought by the Attorney General in the name of the United States, either on his own initiative or at the request of the Administrator.

B. The Corps of Engineers' Civil Works Activities.

The Army Corps of Engineers is a major figure in the development of the coastal area. Congress created the Corps in 1802 to construct and maintain coastal defenses.[1] Gradually the Corps' responsibilities changed from providing defense to improving navigation.[2] After the Civil War, several Rivers and Harbors Acts were passed which collectively established the Corps' "responsibility for investigation, construction, operation, and maintenance of civil works projects for navigation, flood control, and related purposes including shore protection."[3]

In the coastal zone, the Corps of Engineers' activities encompass navigational improvements and preservation of beach areas.[4] Typical projects include dredging of channels and harbors, construction of jetties and dikes, and maintenance of these works. Prior to undertaking a project, the Corps will run a need and economic analysis to determine the feasibility of the endeavor.[5] Federal funding is granted by general legislation which also authorizes the projects. 33 U.S.C. §§540 et seq. (1970). Yet, if the project is large, specific authorization by Congress is necessary and local contributions may be required.[6]

The federal government also provides assistance for the construction of projects to aid in the prevention of beach erosion resulting from tidal and current action in the coastal areas. 33 U.S.C. §426 (1970). The federal contribution from these projects can range up to 50% and, in some situations, 70% of the costs, the rest to be borne by the state or other local municipalities. §426(e). Subject to certain conditions, the Secretary of the Army may also undertake small projects not specifically authorized by Congress. §426(g).

Prior to the recent concern over environmental resources, the Corps of Engineers gave little thought to the impact of their activities on the environment. Yet, with the enactment of the National Environmental Protection Act of 1969 (NEPA), 42 U.S.C. §§4321 et seq. (1970), the Corps developed an environ-

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1. Environmental Law Institutue, Federal Environmental Law (Dolgin & Guilbert, eds. 1974) at 796.

2. Id.

3. Id. at 797.

4. Id.

5. Id.

6. Id.

mental conscience. The major thrust of NEPA which affects the Corps of Engineers concerns the requirement of an environmental impact statement (EIS) as a prerequisite to any major federal action having a significant environmental effect. For its own civil works activities the Corps will prepare impact statements for: (1) reports to Congress concerning proposals for legislation affecting Corps of Engineers' programs; (2) proposals for the Corps' authorization for projects under continuing authorities; (3) initiation or construction of funded projects not yet begun which will significantly affect the human environment; (4) budget requests for funds to build projects or acquire land; (5) projects in continuing construction, land acquisition, or maintenance and operation status which have not previously had statements made and statements for which are to be made within three years subject to a schedule of priorities.[7] Completed projects turned over to local interests and infrequent maintenance work are specifically excluded.[8] Although the EIS requirement aids in environmental protection, it often provides a basis for legal action against the Corps.

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7. 33 C.F.R. §209.410(e) (1976).

8. 33 C.F.R. §209.410(e)(6)(b)(iii) (1976).

SAVE CRYSTAL BEACH ASSOCIATION v. CALLOWAY

8 ERC 1641 (1975)

Hodges, J.

The Intracoastal Waterway along the West Coast of Florida, from the Caloosahatchee River on the south (Fort Myers), to the Anclote River on the north (Tarpon Springs), is maintained by the U.S. Army Corps of Engineers.

Plaintiffs, an unincorporated association of citizens, filed this action on August 14, 1974, to enjoin the Defendants from proceeding with a maintenance dredging project involving a portion of the Intracoastal Waterway in St. Joseph's Sound, Pinellas County, Florida. Under the proposal sought to be enjoined, the spoil or material dredged from the Sound would be deposited on a 64 acre upland site known as the Crystal Beach area of Pinellas County where the Plaintiffs reside.

Plaintiffs' principal claim was that the project could not be implemented absent preparation of an environmental impact statement pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 USCA §4321, *et seq.*

Findings of Fact

1. The U.S. Army Corps of Engineers (the Corps) is responsible for constructing and maintaining the Intracoastal Waterway. 33 U.S.C. §540; Act of March 2, 1945, ch. 19, §2, 59 Stat. 17; Act of Sept. 3, 1954, Pub. L. No. 780, §105, 68 Stat. 1255.

2. The Intracoastal Waterway along the West Coast of Florida includes St. Joseph's Sound within the section between the Caloosahatchee River (Fort Myers) and the Anclote River (Tarpon Springs).

3. It is the policy of the Corps to prepare a "composite" environmental impact statement for navigation projects involving continuing maintenance over a large area. Such a composite statement forms the basic document for future projects and preparation of new or updated "assessments."

4. A composite statement for maintenance of the Intracoastal Waterway from Caloosahatchee to Anclote is now in draft form and in the process of being finalized, but has not yet been approved nor adopted by the Corps.

5. The composite statement treats the Intracoastal Waterway in five reaches or segments, one of which includes St. Joseph's Sound; however, it does not relate to any particular dredging project.

6. The Corps surveyed St. Joseph's Sound in June, 1971, and discovered that shoaling had reduced the project depth of nine feet to five feet in a 3.4 mile reach of the channel. However, this condition was not and is not such a threat or danger to commercial navigation or other interests as to be regarded as an emergency by the Corps.

7. The West Coast Inland Navigation District (WCIND) is a multi-county taxing district created by the State of Florida to co-operate with the Corps in securing real estate necessary for maintenance of the waterway and by contributing funds to defray the costs.

8. The Corps requested WCIND in November, 1971 to assist in locating a suitable disposal site for the dredging of St. Joseph's Sound.

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11. Crystal Beach and another upland site known as Mediterranean Manor were selected for further investigation and a "co-ordination letter" was sent to numerous state and federal agencies requesting comments regarding those two sites. A co-ordination letter is sent to other agencies to gain their aid and assistance in preparing an environmental impact statement, or in determining whether an environmental impact statement is required.

12. WCIND acquired easements for the Crystal Beach site but was unable to acquire easements for Mediterranean Manor, and another investigation was conducted to locate additional disposal areas. Additional land at the Crystal Beach site was one of five alternatives considered but no further consideration was given Honeymoon Island.

13. The Crystal Beach site was again selected and expanded to include Lake Chatauqua and surrounding land previously platted as a subdivision.

14. Another co-ordination letter on the project was disseminated on September 12, 1973, and eight agencies submitted comments.

15. The Corps prepared an environmental assessment of the project on October 25, 1973, and made the determination that an environmental impact statement was not required.

16. WCIND acquired new easements for the Crystal Beach site, including the additional land, and conveyed them to the United States in February, 1974, together with a contribution of $301,000 of its funds.

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18. No requests for public hearings were made prior to the Notice to Proceed; but, subsequently, plaintiffs protested the use of Crystal Beach as a spoil disposal site before WCIND and the Corps.

19. An extension was negotiated with Hendry Corporation until August 19, 1974, and a public hearing held in Clearwater, Florida, on June 17, 1974, regarding the project.

20. Following the hearing the Corps re-examined the project and modified the

spoil disposal plan. Use of existing spoil islands was reconsidered and found to be unacceptable. A revised plan was formulated by the Corps on July 18, 1974, which eliminated the use of Lake Chatauqua and Ogden Bayou, and made changes in the dike specifications.

21. A co-ordination letter explaining the entire, modified project was mailed on July 22, 1974.

22. On July 31, 1974, the Corps reviewed the environmental impact of the revised project and a supplemental assessment was made. The Corps again concluded that an environmental impact statement was not required.

23. The Corps notified the Save Crystal Beach Association on August 2, 1974, that the project would proceed on August 20.

24. The significance of the environmental affect of any proposed dredge-and-fill project is relative and difficult to quantify. However, there is substantial evidence that the Crystal Beach site as a whole is a small but important estuarine area along the West Coast of Florida; and that, as more and more of such areas have been filled in recent years, the ecological value of the remainder has been enhanced.

25. The project in issue is a maintenance dredging operation which must be repeated every five years, approximately, in order to remove natural shoaling and maintain the desired channel depth.

Conclusions of Law

1. This Court has jurisdiction of the parties and the subject matter. 5 USCA §§701-706; 28 USCA §§1331(a), 1361, 2201-2202; and 42 USCA §4321, *et seq.*

2. The National Environmental Policy Act (NEPA), 42 USCA §4321, *et seq.*, applies to major Federal actions significantly affecting the quality of the human environment. It requires the preparation of a detailed "environmental impact statement" identifying and discussing the environmental impact of the proposal; the adverse environmental effects which cannot be avoided if the proposal is implemented; alternatives to the proposed action; the relationship between short term uses of the environment and the maintenance and enhancement of long term productivity; and any irreversible commitment of environmental resources if the project is implemented. 42 USCA §4332(c).

3. NEPA has been appropriately described as an "environmental full disclosure law," and its requirements are more procedural than substantive in nature. That is, its objective is to insure that Federal decision-makers give full consideration to all environmental ramifications before resolving to go forward with "major Federal actions," but NEPA does not purport to prohibit any given project or type of project as such. See *Iowa Citizens for Environmental Quality* v. *Volpe*, 487 F.2d 849.851 (8th Cir. 1973); *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 453 F.2d 463, 481 [3 ERC 1232] (2d. Cir. 1971).

4. A threshhold decision by a Federal agency that no environmental impact statement is required by NEPA with respect to a contemplated project is subject to judicial review under a relaxed standard of "reasonableness" rather than the "narrower standard of arbitrariness or capriciousness." *Save Our Ten Acres* vs. *Kreger*, 472 F.2d 463, 465 [4 ERC 1941] (5th Cir. 1973).

5. In this instance there is little or no dispute, and the Court concludes, that the proposed project in St. Joseph's Sound and Crystal Beach is a "major" Federal action involving, as it does, a cost in excess of one million dollars. Thus, the ultimate issue is whether it was "reasonable" for the Corps to conclude that the project (as modified) would have no significant affect upon the quality of the human environment.

6. In reviewing the reasonableness of such a decision, however, the Court should evaluate not only the project's direct affect upon the various aspects of the environment, but should also consider the other factors which would be included in a NEPA statement if one were prepared — notably, alternatives to the project or alternative means of accomplishing the project. Indeed, the Court should weigh the totality of the circumstances involved in each case as the Federal agency itself will have (or should have) done. *Cf. Hiram Clarke Civic Club* vs. *Lynn*, 476 F.2d 421 [5 ERC 1177] (5th Cir. 1973); *Hanly* v. *Kleindienst*, 471 F.2d 823, 835 [4 ERC 1785] (2d Cir. 1972). This is particularly true in view of the lack of precise standards by which to measure, and the resultant difficulty in quantifying, the "significance" of the environmental affect of many Federal undertakings.

7. Approaching this case in that manner, the Court has concluded that the Corps' decision to omit an environmental impact statement in this instance was unreasonable for the following reasons taken as a whole: (a) no real consideration was given to the possible use of Honeymoon Island as an alternative if not a preferable disposal site; (b) the channel in St. Joseph's Sound is only a portion or segment of the Intracoastal Waterway with respect to which an EIS is being prepared and could safely be awaited, given the non-emergency nature of the shoaling here involved; and (c) the use of Crystal Beach will permanently and significantly affect an area of environmental importance but without long-range return of value to the Intracoastal Waterway in the sense that the site will accommodate only the spoil from the present maintenance dredging project. Still other sites will be needed in the future because maintenance dredging in the channel is an ongoing, periodic requirement.

8. With respect to Honeymoon Island, the Corps itself apparently recognized at the outset that it would be a likely disposal area but rejected the idea out-of-hand merely because the Corps was already in litigation with the owner who was, in fact, seeking a permit to continue his dredge-and-fill

operations on the island. The visit to the island by Corps representatives in February, 1972, can hardly be regarded as a genuine investigation of the location as a potential spoil disposal site since an adverse recommendation had already been made in January, primarily because of the litigation (Plaintiffs' Exhibit 1); and that recommendation was ultimately accepted on the grounds stated (see Plaintiffs' Exhibit 10 and the affidavit of Col. Lee in opposition to the application for a preliminary injunction.)

9. With respect to the pending preparation of an overall EIS concerning the Intracoastal Waterway as a whole (from Caloosahatchee to Anclote), it is established that a Federal agency may not divide a major project into separate units and evaluate each segment individually in determining whether NEPA requires an EIS as to that unit or phase. *Named Individual Members of San Antonio Conservation Society* vs. *Texas Highway Dept.*, 446 F.2d 1013 [2 ERC 1871] (5th Cir. 1971). While a separately authorized and funded project is not a segment in this context merely because it is integrated with another larger project (*Sierra Club* v. *Callaway*, 499 F.2d 982 987 [6 ERC 2080] (5th Cir. 1974)), the St. Joseph's Sound project is not separately authorized and funded. It is part of a lump sum appropriation for maintenance (e.g., P.L. 93-393, 93rd Cong., 2d Session). This is not to say, however, that the entire Intracoastal Waterway should be regarded as *the* single project whenever a decision is to be made concerning the preparation of an EIS with respect to maintenance dredging in a small portion of the channel. This case does not require that determination. Rather, the existence of the rule against segmentation and the fact that, at the present time, an overall EIS *is* in preparation, is merely one of the factors the Court has considered in assessing the reasonableness of the Corps' decision not to prepare a NEPA statement embracing St. Joseph's Sound and Crystal Beach.

10. Finally, some weight must be given to the fact that the use of the Crystal Beach site will result in permanent and adverse alteration of important estuarine terrain. The degree or significance of that alteration from an environmental standpoint is hotly contested. It is not disputed, however, that while the affect on Crystal Beach will be permanent and irreversible, the project is of short-term benefit to the Waterway and will yield no long-term advantage because (a) additional maintenance dredging will be required in approximately five years; and (b) another site will be necessary at that time since the Crystal Beach disposal area will accommodate only the spoil from the instant project. This is important because irreversible commitments and the relationship between short-term uses and long-term productivity are two of the factors expressly enumerated in the statute as essential elements in the preparation of an EIS. 42 USCA §4332(C)(iv) and (v).

11. For all of these reasons the Court concludes that the Corps' decision not to prepare an EIS in this case was unreasonable, and the Plaintiffs are entitled to a permanent injunction.

Federal requirements aside, the question has arisen whether civil works projects of the Corps of Engineers are subject to state environmental quality control regulations. The following case deals with this question and also illustrates potential federal/state conflicts in the regulation of navigational development.

STATE OF MINNESOTA, BY SPANNAUS v. HOFFMAN

United States Court of Appeals, Eighth Circuit 1976
543 F.2d 1198

TALBOT SMITH, Senior District Judge.

The case before us is one of first impression and involves the dredging operations of the Army Corps of Engineers. The various procedural arguments made below have not been pursued on appeal. The issue, the parties are agreed, is the authority of the State of Minnesota under the Federal Water Pollution Control Act Amendments of 1972 (hereafter "the Amendments"), 86 Stat. 816, 33 U.S.C. § 1251 *et seq.* (Supp. IV), to regulate the Corps of Engineers of the United States Army, in the Corps' conduct of dredging operations in the navigable waters[1] of the United States, within Minnesota. The District Court, writing before the recent interpretation of the 1972 Amendments by the Supreme Court in *EPA v. California ex rel. State Water Resources Control Board,* —— U.S. ——, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976), held that § 402(b) of the Amendments, 33 U.S.C. § 1342(b) (Supp. IV), establishing the National Pollutant Discharge Elimination System (hereafter "NPDES"), "grants to Minnesota authority to require defendants to comply with state pollution abatement requirements including obtaining a state discharge permit." *Minnesota, Spannaus v. Callaway,* 401 F.Supp. 524, 531 (D.Minn.1975). We reverse and remand for the entry of judgment in accordance herewith.

The original Federal Water Pollution Control Act was passed in 1948, frequently revised, and codified at 33 U.S.C. § 1151 *et seq.* It proved to be inadequate. The result was the enactment of the Amendments of 1972, their objective being "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Although the Amendments retained the basic policy placing primary responsibility for the control of water pollution in the states, two major changes were made. The first imposes direct restrictions on discharges of pollutants, phrased in terms of "effluent limitations" on "point sources," thus making it unnecessary, as had been the case theretofore, to work backwards from a polluted body of water to determine the point source of the pollution. The second major change was the establishment of the National Pollutant Discharge Elimination System (NPDES) for the purpose of attaining and enforcing the effluent limitations.

The Bill of Complaint alleged that the Corps of Engineers, for the purpose of aiding commercial navigation, maintains a navigation channel in the Mississippi River, various harbors on Lake Superior, and a harbor on Lake of the Woods by its dredging operations. These dredging operations are alleged to have caused deterioration in water quality. Both federal law and state law were relied upon and violations of both were alleged. The relief requested was a declaratory judgment that the "applicable federal law requires the dredging activity of the defendants to be carried out within the ambit of state laws and regulations," and that the dredging activities of the defendants within the State of Minnesota "be conducted in accordance with the Minnesota Statutes and Regulations regarding water quality."

First, the District Court's conclusion that the Corps is required to obtain discharge permits from the State of Minnesota cannot be maintained, in light of *State Water Resources Control Board, supra.* In *State Water Resources Control Board,* the Supreme Court held that agencies of the federal government do not need to obtain

1. The term, "navigable waters," as here used means "the waters of the United States, including the territorial seas." Amendments § 502(7), 33 U.S.C. § 1362(7) (Supp. IV). That the Congress intended to extend the Act's jurisdiction to the constitutional limit is clear from the Conference Committee report, S.Rep.No. 92-1236, 92d Cong., 2d Sess. 144 (1972), U.S. Code Cong. & Admin.News 1972, p. 3776 in 1 Legislative History of the Water Pollution Control Act Amendments of 1972 (compiled for the Senate Comm. on Public Works by the Library of Congress), Ser. No. 93-1 at 327 (1973) (hereafter "Leg.Hist.").

NPDES discharge permits from the states.[9]

We turn now to the major question posed by this case. In support of its argument that the Corps is required to conform to the State's water quality standards and effluent limitations, Minnesota relies primarily upon two sections of the Amendments, § 313, 33 U.S.C. § 1323 (Supp. IV), and § 510, 33 U.S.C. § 1370 (Supp. IV). The former, § 313, requires that:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. * * *

This provision of the Amendments, it is argued, "clearly and explicitly requires Federal entities to comply with State requirements respecting the control and abatement of pollution." In addition, in support of its position, the State urges to us the requirements of § 510, 33 U.S.C. § 1370 (Supp. IV), providing, in part, that:

> Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; * * *.

The Corps, per contra, raises a basic constitutional issue, asserting that the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2), absent Congressional authorization, bars state regulation of its dredging operations, which are performed in the navigable waters of the United States to maintain navigation, and that Congress has nowhere in the 1972 Amendments authorized such state regulation. Per contra, it urges that § 404 of the Amendments, 33 U.S.C. § 1344 (Supp. IV), creates an exclusive program for dredged or fill material, including dredged spoil. Under this section, it is argued, the sole and exclusive responsibility for the administration of the program is vested in the Secretary of the Army, acting through the Chief of Engineers, and no provision is found therein for administration by the EPA or by any state.

* * *

At the heart of the controversy, then, is the basic question of the existence and extent, if any, of the authority of the state, purportedly embodied principally in § 313, 33 U.S.C. § 1323 (Supp. IV), and § 510, 33 U.S.C. § 1370 (Supp. IV), over the Corps of Engineers as to the Corps' dredging for the purpose of aiding commercial navigation, in the light of the heretofore cited provisions relied upon by the Corps, principally §§ 402, 33 U.S.C. § 1342 (Supp. IV) and 404, 33 U.S.C. § 1344 (Supp. IV).

[At this point the court discusses the legislative history of the Act, finding no

9. There are actually two Minnesota permit programs involved in this case. The first, established under Minn.Stat. § 115.03 subds. 1(e) & 5 (1974), is the Minnesota NPDES program, which § 402(b) of the Amendments, 33 U.S.C. § 1342(b) (Supp. IV), authorizes. Minnesota's NPDES program has been approved by EPA, *see* 39 Fed.Reg. 2606 (July 16, 1974). The second, the Minnesota Disposal System, Minn. Stat. § 115.07, is an independent state permit program, not authorized by federal law, and not submitted to EPA for approval. As a matter of practice, Minnesota issues one permit to water polluters, designated as both a Minnesota Disposal System permit and a Minnesota NPDES permit.

While compliance by federal agencies with independent state permit programs was not directly at issue in *State Water Resources Control Board, supra*, the rationale for that decision leads, *a fortiori*, to the conclusion that the Corps need not obtain such permits. The Court's rationale in *State Water Resources Control Board* was that there had not been a clear and unequivocal waiver, by Congress, of federal immunity from state regulation with respect to state administered NPDES permit programs. Unlike state NPDES permit programs, the Minnesota Disposal system is not authorized by Congress, hence the case for finding a waiver of federal immunity is much weaker with respect to it than with respect to state NPDES programs.

intent to unreasonably impede dredging activities necessary for the maintenance of commerce.]

The State of Minnesota is subject to the authority of the United States Government in the matter before us. We start with the

> seminal principle of our law "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states and cannot be controlled by them." *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 426, 4 L.Ed. 579, 606 (1819). From this principle is deduced the corollary that
>
> > "[i]t is the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operation from their own influence." *Id.*, at 427, 4 L.Ed., at 606.
>
> The effect of this corollary, which derives from the Supremacy Clause and is exemplified in the Plenary Powers Clause giving Congress exclusive legislative authority over federal enclaves purchased with the consent of a State, is "that the activities of the Federal Government are free from regulation by any state." . . . *Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."*

Hancock v. Train, — U.S. —, —, 96 S.Ct. 2006, 2012, 48 L.Ed.2d 555 (1976) (footnotes omitted and emphasis added).

With these considerations and the Congressional debates in mind, we look to the principal arguments relied upon by the State, namely §§ 313, 33 U.S.C. § 1323 (Supp. IV), and 510, 33 U.S.C. § 1370 (Supp. IV), of the Amendments.

Minnesota seeks to find support for its position by virtue of the fact that Congress, in § 313, removed an asserted ambiguity in the prior law, § 21(a) of the Water Quality Improvement Act of 1970, 33 U.S.C. § 1171(a) (1970), by requiring federal agencies to "comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements * * *." There is no doubt that the prior law as to the duty of Federal facilities and activities to comply with the requirements of pollution control laws has been strengthened but this strengthening does not directly address the problem at hand: Whether Congress intended to waive the immunity of the Corps of Engineers from state regulation of those dredging activities of the Corps which are essential for the maintenance of interstate commerce. Nor is there any indication in the legislative history of § 313 that Congress intended to subject the disposal of dredged material by the Corps to state law.

Section 313 constitutes a general authorization on the part of Congress, that "[e]ach * * * agency * * * of the Federal Government * * * shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution." Minnesota urges that the words are clear and unambiguous and hence there is no need to look at the legislative history or other sections of the Amendments. We have seen, however, only recently, that § 313 is to be construed in the light of the Congressional intent with respect thereto. *State Water Resources Control Board, supra.* The problem arises from the fact that words do not construe themselves.

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. (Citation omitted.) The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.

United States v. Dickerson, 310 U.S. 554, 562, 60 S.Ct. 1034, 1038, 84 L.Ed. 1356 (1940) (Murphy, J.) (footnote omitted).

Moreover, a statute will not be read literally if such a reading leads to a result that conflicts with Congress' intent. . . .

Thus, what is asserted to be the literal meaning of § 313 must be interpreted to give effect to the intent of Congress that the Corps is not to be hampered in maintaining navigation. What we are here dealing with is a specific agency, the Corps of Engineers, performing a specific federal function, the clearing of the channels of interstate commerce for purposes of navigation, its responsibility being delineated in a special section of the Act, § 404, 33 U.S.C. § 1344 (Supp. IV). Unlike all other pollutants, dredged spoil is not regulated under the NPDES, § 402, 33 U.S.C. § 1342 (Supp. IV), since § 402(a)(1) establishing the NPDES begins, as we have seen, with the words, "[e]xcept as provided in sections 318 and 404."

With respect to § 510, 33 U.S.C. § 1370 (Supp. IV), quoted *supra* at p. 1202, Minnesota asserts that "[t]his unequivocal language was passed in direct response to claims such as the Corps is making in this case." A careful reading of § 510, however, makes it clear that this section does not purport to grant the states any new authority. By its terms, § 510 is designed only to prevent the Amendments from "preclud[ing] or deny[ing] the right of any State * * * to adopt or enforce" pollution control requirements. Thus it prevents the Amendments from pre-empting the states from adopting higher pollution control standards than those established under the Amendments. The Corps does not argue pre-emption. Section 510 does not address the issue of state control over the Corps' dredging essential for the purpose of maintaining navigation.

There is a suggestion by amici that failure to impose upon the Corps of Engineers the requirements of state water pollution control may result in action by the Secretary of the Army inimical to proper environmental considerations. The Act is not so construed by the Army and the EPA. Both the EPA guidelines and the Army's regulations bear directly on this point. Under the guidelines, evaluation criteria, expressly made applicable to the Corps of Engineers, are developed for all proposed discharges of dredged or fill material. The regulations controlling the Corps, in turn, require the Corps to consider the environmental, as well as the social and economic consequences of its civil projects. It appears also that the Corps is currently conducting a study of the environmental effects of the disposal of dredged material, which, we are also told, is being applied in implementing § 404, 33 U.S.C. § 1344 (Supp. IV), to assure that all discharges of dredged material result in the least environmental harm possible.

In light of the principles we have discussed, the Supremacy Clause, the legislative history of the Act, as well as its internal structure, we find with respect to the disposal of dredged material by the Corps, that there is insufficient evidence to meet the clear and unequivocal standard for finding Congressional authorization for state regulation under the teachings of *Hancock, supra*, and *State Water Resources Control Board, supra*, whether by authorization under the NPDES or independently thereof. Although environmental considerations were matters of grave concern to the Congress, and obviously so to both the Environmental Protection Administration and the Secretary of the Army, as appears clearly from their respective guidelines and regulations, the overriding concern of the Congress in this context was for the maintenance of unimpeded traffic in the navigable waters of the United States. Regulation by the various States of the Union, each with its own requirements, could result in a conceivably chaotic situation as riverborne traffic moved from the boundaries of one state to those of another. We find no authorization of such state regulation in the legislative history of the Act or its several sections. We hold that the Congress did not intend a subordination of the federal power and authority in this area to State control.

Reversed and remanded for entry of judgment in accordance herewith.

SECTION 2: REGULATORY ACTIVITIES

A. The Army Corps of Engineers.

i. §10 of the Rivers and Harbors Act of 1899

In addition to its own civil works activities, the Army Corps of Engineers also regulates the activities of other parties in the coastal areas. The Corps derives its power from Congress which has the power to "regulate commerce with foreign nations, and among the several states." U.S. Const. art. I, §8, cl. 3. Although control over navigable waters is not specifically granted by the Constitution, the judiciary, in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), found that the power to regulate commerce includes the power to regulate navigation. Through various congressional acts, the Corps has been delegated this power to maintain the navigability of the waters of the United States.

The Corps' regulatory activities primarily consist of issuing and enforcing permits for certain activities which are undertaken in the coastal regions. One of the oldest pieces of legislation authorizing permit issuance is the Rivers and Harbors Act of 1899, 33 U.S.C. §§401 et seq. (1970). Enacted to protect navigation, the Act, in §10, essentially gives the Chief of Engineers the power to grant permits for the building of wharves, piers, etc. and dredging and filling in navigable waters. A primary problem concerning this power is the extent of the Corps' jurisdiction or rather the extent of "navigable waters." Originally, navigability-in-fact controlled the exercise of the Corps' authority. Nevertheless, as illustrated by the following cases, navigability-in-law has become the crucial test.

UNITED STATES v. JOSEPH G. MORETTI, INC.

United States Court of Appeals, Fifth Circuit 1973
478 F. 2d 418

JOHN R. BROWN, Chief Judge:

Proving again that legislative intent frequently comes to exceed even the wildest imagination of those responsible for enactment, it is ironic that as a product of a laissez-faire society, a 19th Century act is now once again the effective tool in this decade's awakening awareness of the importance of man's environment. The Rivers and Harbors Act of 1899 . . . was at once the source of jurisdiction and the substantive basis for the action of the District Court.

Applying § 10 of the Act[2] which forbids the creation of obstructions in, or alteration of the features of the navigable waters of the United States without permission of the Secretary of the Army the Court ordered Joseph G. Moretti, Jr. to undo dredge and fill operations involving 400,000 cubic yards of earth, because of his failure to obtain the required permit, 331 F.Supp. 151. Despite the fact that Moretti violated the Act flagrantly and our settled conviction that mandatory affirmative relief requiring a burdensome performance is statutorily and equitably appropriate on these facts, we modify and remand for completion of administrative action which conceivably could have the effect of validating the work done, thus rendering the issues litigated moot.

Moretti owns lands at Hammer Point on Key Largo, one of the Florida Keys curving fingerlike for 120 miles into the Gulf of Mexico off the southern tip of Florida. His property was located about 1⅛ miles from Tavernier on the Florida Bay side of the Key. Tavernier lies to the south of Hammer Point. Hammer Point is in turn about 4½ miles southwest of Rock Harbor.

. . . [H]e proposed to dredge and fill the land into a network of land fingers and canals for use as a mobile home park. Moretti, . . . decided to forego the prerequisite imprimatur of the Corps of Engineers before making his proposed project a reality. Having purchased his land in 1969, Moretti had completed substantial work on his project when paid a fateful visit by two employees of the Environmental Protection Agency in December of 1970.

Lee Purkerson and John Hagen, the EPA employees, were not on official business at the time that they noticed the extensive work on the Moretti project. They took some pictures of the drag-line as it was removing soil from the underwater portion of the Bay bottom and adding it to the shoreline there-

2. Section 10 states:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

The statutory authority for the injunction is found in § 406 which states:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

by moving the shoreline and Moretti's property bayward. They could also see where channels had been cut or deepened between the fingers. Moretti asked them what they were doing there, a question which they turned back at him. They asked him if he had a Corps of Engineering permit and he said he did not. These facts were reported to the Jacksonville office of the Corps of Engineer. On December 30, 1970, the Corps ordered Moretti to cease from further work below the mean high water mark because this was a violation of Federal law unless properly authorized by the Secretary of the Army.

After one or two exchanges with the Corps Moretti stopped working, a cessation which was to last for at least a few months. As authorized under Corps regulations the Moretti Company applied for an after-the-fact permit to dredge part of and fill part of Florida Bay. That is, he sought a permit which would legitimize the work done and to be done.

Structure of the Act and Regulations

In addition to construction and maintenance of flood-control and other improvements on the navigable waters of the United States, the Secretary of the Army acting through the Corps of Engineers has been charged by Congress with administering the Rivers and Harbors Act of 1899[6]. . .

The Corps of Engineers—the eyes and ears, and sometimes hand of the Secretary—is headed by the Chief of Engineers who is charged by law with advising the Secretary of the Army of the propriety of issuing permits. The Corps itself is divided into 11 "divisions" which are in turn subdivided into 37 "districts." As will be seen later, authority to grant permits is in some cases delegated down to the level of the District Engineers.

. . . .

The Secretary has authorized the Chief of the Corps, at the latter's option, to delegate authority to issue permits to District Offices of the Corps in any case in which the application for construction in navigable waters is "entirely routine and * * * involve[s] no difference of opinion * * * nor any opposition or other considerations which should be decided by higher authority." The regulations specify that this grant is not a delegation of the Secretary's discretionary powers. By § 209.120(c)(1)(iii) the Chief of Engineers has exercised this authority and commissioned Division and District Engineers with power to grant permits in the name of the Secretary where the matter is routine.

The Corps' general policy for issuing the permits require that it take into consideration and evaluate "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest * * *." More specifically the Corps is required by its regulations, various statutes, executive orders and an accord between the Secretary of the Interior and the Secretary of the Army to consider all applicable data including the views of other federal agencies and the views and objections of state agencies before granting a permit.

The watchword of the Corps' relation with other federal agencies charged with protection of the environment is cooperation. Besides its duty to cooperate and collaborate the Corps is charged by executive order, as are all federal agencies, to improve water quality through prevention control and abatement of water pollution. In its attempt faithfully to carry out this responsibility the Corps has through formal regulations established a policy, in cases where dredging operations may cause pollution problems, of seeking the technical assistance of state and federal pollution control authorities and conditioning the granting of the permit on the establishment of controls which will insure that federal and state water pollution control standards are met. This policy, and other statutorily required policies are summarized in a "memorandum of understanding" between the Secretary of the Army and the Secretary of the Interior signed July 13, 1967.

6. . . . The sections of the Statute as enacted, e. g., § 10, do not correspond to the Sections of the Statute as codified in 33 U.S.C.A. §§ 401–426i. Section 10 of the original act is § 403 of 33 U.S.C.A. This is pointed out for no other reason than to save the reader the possible confusion which might be encountered.

The memorandum of understanding was drafted in recognition of the statutory responsibility of the Corps of Engineers and the Department of Interior to interrelate their activities in the area of water pollution control where damage to fish and wildlife is possible as well as in recognition of the agencies responsibilities under Executive Order No. 11288 as discussed above. The memorandum sets forth procedures—given life in the Corps of Engineers permit procedure, *infra*—for carrying out these policies.

These procedures provide that (i) upon receipt of an application for dredging or filing permits the District Engineer shall notify Regional Directors of the Federal Water Pollution Control Administration, Fish and Wildlife Service, National Park Service, and the appropriate state agencies. (ii) The Regional Directors would immediately make such studies and investigations as are necessary and inform the District Engineer whether the quality of the waters will be reduced in violation of applicable standards or the value of natural resources and related environment will be unreasonably impaired. (iii) The District Engineer will hold public hearings when response to a public notice indicates that all parties will not have an opportunity to be heard except at a public hearing. (iv) Besides weighing *all* factors in granting a permit the District Engineer shall, when advised by the Regional Directors that work proposed will impair water quality or related natural resources encourage the hopeful permittee to take steps to resolve the dispute at the district level and failing this shall refer the case to the Chief of Engineers —his counterpart the Regional Director submitting his views to his agencies "Washington headquarters"—for appropriate action. (v) Finally the Chief of Engineers and the Under Secretary of Interior shall consult and attempt to resolve any differences between their departments and failing this the case shall be submitted to the Secretary of the Army for decision after consultation with the Secretary of the Interior.

The Corps regulation §§ 209.120(e), (f) and (g) govern the applications for permits and the handling of these applications with regard to public hearings and notices to other agencies of federal and state governments. . . .

The regulations state flatly that "the public notice is mandatory, and no permit or extention of time in which to complete work authorized by a permit will be granted unless notice has been issued and a reasonable time afforded for a protest * * *." The period in which the permit is to be kept pending awaiting objections is set at a minimum of ten days after issuance of notice. . . . Public hearings are provided for whenever it appears that there is sufficient public interest to justify such action and in case of doubt a public hearing is required. . . . Hearings, when held, are to be conducted in an informal manner, presided over by the District Engineer or his delegate with a full opportunity given each side to express their views. Formal adversary proceedings are not contemplated.

. . . .

After-the-fact permits—so vitally important to whatever chances Moretti has for saving the Hammer Point project—are specifically recognized in the Corps regulations. Read in conjunction with all the regulations, the regulations concerning after-the-fact permits provide that they be processed in the same manner as other permit applications. These procedures were not followed to full completion of the administrative processing of this application in this case. This is of great import to what we do in this opinion.

So long as that regulation stands the Department of the Army was required to respect it. [Citations omitted.] Moretti had a right to file the application and have it processed in accordance with those regulations. Conversely, the Corps of Engineers as the delegated agent of the Secretary of the Army had the duty to process Moretti's application.

But as it was, somewhere during administrative gestation the permit application was aborted, an event provoked by the mandatory injunction of the District Judge.

The Buck Stopped Where?

[The court noted that the after-the-fact permit was being processed until the Bureau of Sports, Fisheries, and Wildlife objected to the granting of the permit.]

At this point the permit granting procedure seems to have ground to a halt and left Moretti's application in a sort of limbo if not in fact stranded by the ubiquitous "sunken object."

Self Help For The Impatient?

Despite the unrevoked order of the District Engineer to discontinue dredging, Moretti resumed working below the mean high tide line, apparently in early June 1971. Presumably, he simply decided that he had waited long enough for the Corps of Engineers to act on his permit and that it was time to resume the construction of Hammer Point.

. . . .

Rumors that Moretti had resumed work reached the Jacksonville office which instructed engineer Ross of the Miami office to investigate the situation. On July 14, 1971 he found that Moretti had resumed, and substantially completed, work on the Hammer Point project.

The Scene Of Action Shifts

Pricked by Moretti's disregard of the permit requirements the government lashed out on several fronts. An information was filed by Engineer Ross charging Moretti with a criminal violation of § 403 which is outlawed by 33 U.S.C.A. § 406 and Moretti was arrested July 15. While Moretti was appearing for arraignment on July 30, originally set before a magistrate but taken over by the trial judge, Moretti was served with the civil complaint seeking preliminary and permanent injunction of further operations below the mean high water mark and for relief in the form of a mandatory injunction forcing Moretti to undo the fruits of his labors, all as authorized by § 406.

After a short hearing the trial court issued a preliminary injunction and proceeded to hear the case on the merits three weeks later. The court found, as is evident from the record, that Moretti had done substantial dredging and filling without a Corps of Engineers permit. The Court found the waters navigable, and determined that some of the work was done in the navigable water. The District Court ordered that the government should have all the relief it sought—namely to have Moretti undo what he had done.

Moretti challenged in the District Court and challenges on appeal the proof of a number of necessary elements of the government's case under 33 U.S.C.A. § 403 and § 406. They are (i) whether the water in question is "navigable water of the United States," (ii) whether the Mean High Water Mark was adequately proven, (iii) whether any obstruction to navigation had been created, and (iv) whether § 406 of the Act authorized the District Court to order the removal of a land fill as a "structure."

Navigability

Florida Bay is located at the southern tip of the Florida peninsula and merges with the Gulf of Mexico on its western boundary. On the east, Florida Bay is adjacent to Biscayne Bay which leads to the Port of Miami. The length of Florida Bay is traversed by the Intracoastal Waterway which runs from the Gulf and enters Biscayne Bay through Florida Bay. Although the record did not reveal the precise distance of appellant's property from the Intracoastal Waterway, it is clear that it is in close proximity to this Waterway. The Coast and Geodetic Survey Chart shows that at its nearest point, the Intracoastal Waterway is less than one-half mile from Hammer Point.

Navigability, even at a time when its requirements were more stringent, was simply a question of whether the waterway "in its natural and ordinary condition affords a channel for useful commerce." The Daniel Ball, 10 Wall. 557, 19 L.Ed. 999 (1871).[36] Accessible as it is to both the Gulf of Mexico and Biscayne Bay, and traversed lengthwise by the Intracoastal Waterway, Florida Bay is a natural passage for commerce and easily meets even the

36. "The test laid down in the DANIEL BALL was generally adhered to by the Supreme Court until the decision in United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243, in which the Court gave the term 'navigable water' in the Federal Power Act a broader construction than that laid down in the DANIEL BALL and in the decisions that followed it." Georgia Power Co. v. Federal Power Commission, 5 Cir., 1946, 152 F.2d 908, 912. The expansion of the concept of "navigability" was to include the capacity for reasonable improvements as an indicia of the ability of the waterway to support commerce—whether presently or potentially.

historical-literal test of navigability. Of course, as with most bodies of water, there comes a point where the depth of water is minimal as the bottom slopes up to the bank. But one would hardly contend that the Mississippi is any less navigable simply because a pirogue would go aground at the water's edge.

Questioned directly as to the navigability of Florida Bay the Resident Engineer for the Corps testified unequivocally that Florida Bay is a navigable water. Indeed, if Florida Bay were unnavigable Moretti's development of his property including finger slips and canals so that his mobile home park would be a "live-in marina" would be incomprehensible and obviously wasteful and a deception to purchasers who expected waterborne access to the sea, not the restricted movement in a short landlocked pond.

Obstruction To Navigation

Moretti's argument that there was no showing of an obstruction to navigation, and hence that one element prerequisite to relief was missing from the government's case, is unavailing. In light of Zabel v. Tabb, 5 Cir., 1970, 430 F.2d 199, 207 and United States v. Perma Paving Co., 2 Cir., 1964, 332 F.2d 754, any argument that the filling of navigable waters does not reduce navigable capacity of the filled waterway and thereby constitute an obstruction within the meaning of § 403 borders on the frivolous.

Structures

[6] Moretti next contends that § 406 grants to the District Court only the authority to cause the removal of "structures" from navigable water and that a land fill is not a structure. The meaning of "structures" in this provision has often enough been the subject of litigation that we have no doubt that it encompasses the land fills here in question. . . . In [United States v. Republic Steel Corp., 1960, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903,] the Supreme Court held that accidental sedimentation which caused the filling of a navigable water constituted a structure within the meaning of § 406. This double-bottomed answer is enough for us.

Mean High Tide Line

A good deal is urged about Mean High Tide Line (MHTL). Just what bearing it has at this, not the enforcement, stage is not easy to say. Everyone apparently concedes that the mean high tide line is not a precise measurement. And all concede for this case that relief sought depends on the government proving that Moretti dredged or filled bayward of MHTL. For the Corps has no power landward of it to regulate his conduct or force reconstruction of the topography as it existed before he began work. The District Court agreed that that which was landward of MHTL would not, could not, and should not be affected by mandatory injunction.

The record proof on location of MHTL took two forms. The first was on the trial. The second, as a part of the plan to be filed by Moretti outlining the method to be followed in restoring the prior condition. On the trial, the government called a civil engineer, Mr. James Glass, employed by Moretti in designing the Hammer Point project and in soliciting the after-the-fact permit from the Corps of Engineers. The MHTL was indicated on the sketch which accompanied the application for the after-the-fact permit. Engineer Glass testified that he placed the MHTL from aerial photographs taken before the project got underway. The District Court accepted this determination as correct, but whether the Corps of Engineers ever did is unknown since the permit application aborted. The Resident Engineer also testified as to the location of the MHTL. He stated that normally the MHTL would be located by visual observation, which, however, would be impossible in an after-the-fact situation. The upshot of his testimony was that he had presumed the location of the MHTL from the permit application supplied by Moretti.

Actually, the Court did not undertake to fix MHTL. His final order in a negative sense prohibited further activity bayward of it. And the hotly contested mandatory injunction simply ordered Moretti (i) to restore the prior conditions bayward of MHTL and (ii) to file a formal plan showing in detail how the work was to be carried out.

As a part of the formal post-decree plan Moretti included a plat prepared by Mr. Post, an engineer associated with the same firm as Mr. Glass, the engineer who drafted the after-the-fact permit application. Engineer Post's plat shows, and Moretti cannot seriously dispute, that substantial areas of excavation and

refill were bayward of MHTL. If Moretti challenges that, there is no mark of it in the record. Since there is no indication whether the District Court approved the plan it is unavoidable that the exact line may still be open to some question either in further proceedings before the Department of the Army, the District Court or both. But no action is yet before us which would call for any modification of MHTL.

Court's Use Of Negative—Affirmative Injunction

Putting to one side the drawing of the exact MHTL we have no doubt that the Judge had the right to reach the conclusions that he did both on jurisdiction and the operational facts. It is equally clear that in the posture of the case as it came to him and as he handled it . . . ,
the Court had the power to issue appropriate injunctions prohibiting any further work. This authority is drawn not only from the Court's equitable powers in carrying out the obvious policy of the Act but such relief is expressly authorized by § 406, see note 2, *supra*.

And for the further guidance of the Court and the parties as this case now takes a new twist we have no doubt that the issuance of a mandatory injunction requiring extensive restoration operations at very large expense to the developers is entirely within the Court's power as expressly mandated by the statute. Section 406 just plainly states, "the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist."

Thus, the statute itself specifically empowers the Court to do just what has been done. We do not mean to say here that in every case involving a violation of the Rivers and Harbors Act where no permit has been obtained and an order to cease operations has been issued the Court must impose such serious sanctions. But clearly the Court has the power to do it and we perceive nothing in this record which would compel us to say that in the Chancellor's discretion he ought not to have imposed this very substantial burden upon this developer.

But while we find ample jurisdiction, and on the record a set of facts which would otherwise authorize the stringent mandatory injunction of restoration, this part of the Court's order must be vacated to permit the further proceedings on the application for an after-the-fact permit.

The Scene Shifts Again Back To The Army

As we have pointed out in great detail § 403 and § 406 with their complementary regulations are structured on a permit system. The statute itself is not to be read as prohibiting all such obstructions, but only those not authorized in accordance with the regulations. Those regulations prescribe also the right to seek an after-the-fact permit. Moretti has initiated this application. Through no apparent fault of his own and without his ever having withdrawn it the Corps of Engineers has either ignored the application or reached some undisclosed determination that because the United States Attorney has successfully been importuned to enter the case the Corps and the Department of the Army have no further obligation. We have held above and repeat again that this is simply not so.

Since the statute and the regulations recognize that the developer has a right to seek—not necessarily obtain —an after-the-fact permit and Moretti has undertaken to do this in a way not challenged for its procedural or substantive sufficiency, a Federal Judge has no power to cut off this statutory scheme and insert his judgment for that of a successive layer of experts in the Corps of Engineers, the Chief of the Engineer's office, the Department of the Army, and now, in collaboration with the other departments or agencies under environmental statutes.

Whatever difficulties Moretti may face in trying to persuade those authorities that he should have an after-the-fact permit he is entitled to have that application processed fairly and diligently with an opportunity as permitted under the regulations to present supporting data, facts and argument as to why such relief should be granted. Since the application is either still in the Jacksonville office or perhaps has died there, the Army somehow has to revive it, put it back on the tracks and start the machinery as contemplated by

all of the regulations and the accord between the Secretary of the Army and the Secretary of the Interior and the application of all of the other environmental statutes and regulations. We do not undertake here to outline the scope and detail of those administrative proceedings. They must go on fairly as permitted by the regulations. As we read them, if there is a disposition to grant the after-the-fact permit by the Chief of Engineers and the Secretary of the Army they must then consult all of the other agencies concerned with environmental factors which as specified in pertinent legislation and regulations must be brought into the picture.

We do think, however, that as a matter of primary jurisdiction it is in the administrative process that the MHTL must first be determined. For where the boundary of its authority is this elusive line, it should have the first opportunity to determine whether and to what extent the area is or is not within its jurisdiction.

[Citations omitted.]

This line limits the jurisdiction of the Corps of Engineers both negatively and affirmatively, and inescapably they must determine this as a part of the application now pending. Whether in the administrative process the agency should rely to a great extent upon the record and findings of the Court below is a matter for initial determination by it.

Of course the action or non-action of the Department of the Army is judicially reviewable under the Administrative Procedures Act of 5 U.S.C.A. §§ 702, 704 (Supp. V 1970).

The Scene Shifts Again—Back To The Court Below

The upshot is that we remand the case for the Court to keep it actively on its docket. The prohibitory injunctions are to remain in full force pending final determination in the administrative proceedings and any appeals, administrative or judicial, therefrom. The mandatory injunction is vacated, subject to being reinstated on a proper showing after completion of the administrative proceedings and any appeal therefrom to the extent that the after-the-fact permit application does not authorize any or all of the work bayward of MHTL. Of course the Court is authorized to grant such interim relief as might be necessary on a proper showing to prevent further incursions into nature's domain growing out of inaction either in maintenance or in nonrestoration because of the stay which we have heretofore issued.

. . . .

Vacated in part and remanded.

SIERRA CLUB v. LESLIE SALTS CO.

412 F. Supp. 1096 (N.D. California 1976)

MEMORANDUM OF DECISION

SWEIGERT, District Judge.

These two consolidated actions are brought for injunctive and declaratory relief under the Rivers and Harbors Act of 1899 (33 U.S.C. § 401 et seq.) and the Federal Water Pollution Control Act of 1972 (33 U.S.C. § 1251 et seq.).

In No. 72-561, plaintiffs Sierra Club and Save San Francisco Bay Association, conservation organizations, and plaintiff Kent Dedrick, an individual member of the Sierra Club, sue defendants, Leslie Salt Co., Leslie Properties, Inc., and defendant Mobil Oil Estates. These defendants own many thousand acres of property along the shores of San Francisco Bay including diked evaporation ponds used for the production of salt. The plaintiffs seek a declaratory judgment that the dikes in and around the portion of defendants' (hereinafter "Leslie's") property known as Bair Island were illegally built and a permanent injunction ordering their removal or in the alternative prohibiting further construction or maintenance of dikes at Bair Island.

In No. 73-2294 the plaintiff is Leslie Salt Co., suing defendants the Secretary of the Army, the Chief of the United States Army Corps of Engineers, and the District Engineer of the Corps, San Francisco District, South Pacific Region (hereinafter "the Corps"), and Sierra Club (an intervenor) seeking a declaratory judgment that the Corps' assertion of jurisdiction shoreward beyond the mean high water (hereinafter "MHW") line is unlawful in that plaintiff's property above the MHW line does not constitute "navigable waters of the United States," also a permanent injunction restraining the Corps from requiring permit applications pursuant to the Rivers and Harbors Act of 1899 (33 U.S.C. § 401 *et seq.*) or the Federal Water Pollution Control Act of 1972 (hereinafter "FWPCA") (33 U.S.C. § 1251 *et seq.*) for any work to be performed above the MHW line.

ISSUES PRESENTED

Three issues presented by these motions are: (1) Whether the terms "navigable waters," "navigable water of the United States" and "waters of the United States," as used in defining the geographical extent of the Corps' regulatory jurisdiction under the Rivers and Harbors Act of 1899 (33 U.S.C. § 401 *et seq.*) and the Federal Water Pollution Control Act of 1972 (FWPCA) (33 U.S.C. § 1251 *et seq.*, especially § 1344), are limited to the line of mean high water (MHW) or extend to the line of mean higher high water (MHHW) on the Pacific Coast—including San Francisco Bay; (2) whether the properties here in question, i. e., Bair Island as well as Leslie's other salt evaporation and other San Francisco Bay properties over which the Corps asserts jurisdiction, are within the Corps' jurisdiction as defined in the two Acts; (3) if the Corps has jurisdiction over these properties, whether or to what extent the Corps is estopped from asserting such jurisdiction.

MEAN HIGH WATER AND MEAN HIGHER HIGH WATER

In order to understand the record below summarized, the contentions of the parties and the issues in this case, it is necessary to explain at the very outset the meaning of the two terms "*mean high water*" (MHW) and "*mean higher high water*" (MHHW): Each day (more precisely, within every 24.8 hours) both coasts of the United States experience two high tides, one of which rises to a relatively higher shoreward level than the other. The mean high water (MHW) line is the average of both high tides over a period of 18.6 years; the mean higher high water (MHHW) line is the average of only the higher of the two tides for the same period of time. . . . The record shows that on the Atlantic Coast the difference between MHW and MHHW is slight, and that on the Pacific Coast the difference is substantial.

THE EVIDENTIARY RECORD

The evidentiary record as to action 73–2294 shows in substance and without dispute that plaintiff Leslie owns approximately 35,000 acres of property along the shore of San Francisco Bay; that all of this property was originally marshland; that the property has been diked and reclaimed for agricultural and other purposes and has been used primarily for salt production by means of evaporation of Bay waters within the dikes; that the property was reclaimed and the dikes were built during the period 1860 to 1969, most of the work having been completed by 1927; that most or all of this property lies landward of the MHW line and bayward of the former mean higher high water (MHHW) line of the Bay in its natural state; that most or all of the property in its natural state was subject to the ebb and flow of the tide but that it has not been subject to tidal action since being reclaimed; that from 1899, the year of the adoption of the Rivers and Harbors Act, to 1971 the Corps failed to exercise jurisdiction over this property; that in 1971 and 1972 the Corps published two Public Notices (No. 71 22—June 11, 1971, and No. 71-22(a) —January 18, 1972) stating, in effect, that the Corps had changed its policy and would require permits for all "new work" on the property in question; that pursuant to this new policy the Corps has issued a number of cease and desist orders to Leslie and has threatened criminal penalties and fines of $2500 per day.

The evidentiary record as to action 72–561 shows in substance and without dispute that the property in question in that action is an area of approximately 3,000 acres along the shore of San Francisco Bay in San Mateo County, California, known as Bair Island which is physically similar to Leslie's land described above with reference to 73–2294 although Bair Island is no longer used for salt production; that the dikes on Bair Island were constructed between 1900 and 1952; that, as with Leslie's 35,000 acres above described, the Corps failed to exercise jurisdiction over the property until 1971.

I. GEOGRAPHICAL EXTENT OF FEDERAL REGULATORY JURISDICTION UNDER THE ACTS

Leslie contends in substance that the Corps of Engineers' jurisdiction under these two Acts extends only to the mean high water (MHW) line, relying on numerous cases holding that the Corps' jurisdiction over coastal navigable waters extends only to the MHW line.

The Corps and the Sierra Club contend that the Corps' jurisdiction on the Pacific Coast extends to the mean higher high water (MHHW) line, relying on what they contend is the underlying principle of various Atlantic coast and inland river cases.

This court has already ruled in its Memorandum of Decision of December 9, 1974, in No. 73–2294, 403 F.Supp. 1292, that on the Pacific Coast "navigable waters," within the meaning of the *FWPCA*, extends up to the mean higher high water (MHHW) line. However, we did not decide the extent of the Corps' jurisdiction under the Rivers and Harbors Act.

The FWPCA and the Rivers and Harbors Act must be distinguished. As set forth more fully in our Memorandum of Decision of December 9, 1974, 403 F.Supp. 1292, at p. 1295, the FWPCA, first enacted in 1948 and amended in 1972, makes unlawful the "discharge of a pollutant," including such materials as dredged rock or sand, into "navigable waters." (33 U.S.C. § 1311(a)). The 1972 amendments, however, (33 U.S.C. § 1344) provide, as an exception to the general prohibition against discharges, that the Corps is empowered to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." We ruled, in our earlier decision, that "navigable waters" within the meaning of the FWPCA extended up to the MHHW on the Pacific Coast.

The Rivers and Harbors Act, enacted in 1899, makes unlawful certain specified activities, including filling or the erection of a dike or obstruction in "navigable water of the United States" or in "waters of the United States" without, however, defining those terms.

Since the pending actions involve jurisdiction to regulate filling, dikes, and other obstructions, as well as jurisdiction to regulate the discharge of dredged or fill material, the powers of the Corps would stem from the Rivers and Harbors Act as well as from the FWPCA. It therefore becomes necessary to consider the extent of the Corps' jurisdiction under the Rivers and Harbors Act.

Although no definition of "navigable waters" or "waters of the United States" is included in the Rivers and Harbors Act itself, regulations defining these terms (as used in both the Rivers and Harbors Act and the FWPCA) have been adopted by the Corps. The Corps' "Interim Final Regulation" (33 CFR 209.120(a), (b)(1), (b)(2), (b)(7) and (d)(1), in effect since July 25, 1975, revising the earlier version of § 209.120) defines "navigable waters" as used in the Rivers and Harbors Act as follows:

> "Waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate commerce landward to their ordinary high water mark . . . and also waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark (*mean higher high water mark on the Pacific Coast.*) See 33 CFR 209.260 (ER 1165-2-302) for a more definitive explanation of this term." (emphasis added)

Regulation 209.260, adopted September 9, 1972, contains a lengthy general definition of navigable waters (subsect. (c) through (j)) and then in subsect. (k) and (*l*) defines "geographical and jurisdictional limits of oceanic and tidal waters" as follows:

> "(k)(1)(ii) *Shoreward limit of jurisdiction.* Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. *However, on the Pacific coasts, the line reached by the mean of the higher high waters is used.* (emphasis added)
>
> "(2) *Bays and Estuaries.* Regulatory jurisdiction extends to the entire surface and bed of all water bodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (k)(1)(ii) of this section, 'Shoreward Limit') of all such water bodies, even though portions of the water body may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered 'navigable in law,' but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.
>
> "(*l*) *Geographic Limits: Shifting Boundaries* . . . [A]n area will remain 'navigable in law,' even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. . . ."

Prior to the adoption of the above-quoted regulations the San Francisco District of the Corps of Engineers had published its Public Notices 71-22 (June 11, 1971) and 71-22(a) (January 18, 1972) which state that thenceforth the Corps would consider the limit of its jurisdiction over navigable waters established by the Rivers and Harbors Act to be "the plane of the mean of the higher high water" and that permits would be required for all "new work in unfilled portions of the interior of diked areas below former mean higher high water."

The case law definitions of navigable waters within the meaning of the Rivers and Harbors Act generally support the rules above quoted, although there are very few cases which concern navigable waters of the Pacific Coast.

The only case to specifically consider the MHHW phenomenon on the Pacific Coast is *United States v. Freethy*, C-73 1470 SC (N.D.Cal. Feb. 24, 1975). The court held, in its unpublished findings at pp. 1 and 8, that the Corps' jurisdiction on the Pacific Coast extends to the mean higher high water line and has always so extended since the enactment of the Rivers and Harbors Act of 1899; further, however, that (p. 9) the Corps was estopped from ordering the removal of fill from San Francisco Bay but that any new fill in the areas of San Francisco Bay there under consideration would require a permit.

. . . .

Other decisions arising on the Atlantic Coast, where there is no significant difference between MHW and MHHW, generally have held that navigable waters within the meaning of the Rivers and Harbors Act (and thus the jurisdiction of the Corps of Engineers under the Act) extends to the MHW line as defined in the above referenced Corps of Engineers regulations.

A leading Atlantic Coast case is *United States v. Stocco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974) *cert. den.* 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975) which held that in tidal waters the Corps' jurisdiction is defined by "the ebb and flow of the tide" and includes tidal marshes, citing primarily dicta in Justice

Field's opinion in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870).

The Supreme Court has not addressed the issue of the Corps' jurisdiction in cases arising under the Rivers and Harbors Act in tidal areas, but it has considered the issue in reference to rivers. The *Daniel Ball, supra,* defined the term "navigable waters" in reference to the admiralty jurisdiction in inland rivers. It was this definition, according to *Stoeco,* supra at p. 609, that Congress later intended to adopt in the Rivers and Harbors Act. The *Daniel Ball* held:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce . . . ."

In *Greenleaf-Johnson Lumber Co. v. Garrison,* 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939 (1915), the Supreme Court stated, in reference to the extent of the Corps' jurisdiction under the Act, that:

> "When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed." *Id.* at p. 263, 35 S.Ct. at 555, 59 L.Ed. at 945.

. . . .

The cases are not entirely consistent in their interpretation of the extent of "navigable waters" within the meaning of the Rivers and Harbors Act, but they do appear to be based upon the principle, as stated by the Supreme Court in *Greenleaf, supra,* that the authority over navigable waters delegated by Congress to the Corps "necessarily . . . extends to the whole expanse" of the body of water, regardless of its depth or shallowness. In differing physical circumstances this principle must necessarily be applied differently. In the case of inland rivers the Supreme Court has implemented the principle by defining the limit of the Corps' jurisdiction as the ordinary high water mark . . . , provided the rivers are navigable in fact in their ordinary condition (*The Daniel Ball, supra*). Along the Atlantic, where MHW and MHHW are not significantly different, the circuit and district courts have held that navigable waters include waters subject to the ebb and flow of the tide up to the line of MHW, although the leading *Stoeco* case also includes tidal marshes without reference to MHW.

On the Pacific Coast where MHW and MHHW do differ significantly, the only case of which we are aware which considers the issue, *Freethy, supra,* concludes that MHHW is the proper line. If we were to adopt MHW in the pending cases, simply because that standard has long been used in the very different circumstances prevailing on the Atlantic Coast, we would be following the letter of the earlier cases but ignoring their underlying principle. The wiser course is to recognize the Corps' jurisdiction, as nearly as practicable, so as to encompass the whole expanse of the body of water, just as has been done for inland rivers and along the Atlantic Coast.

Accordingly, we hold that the shoreward limit of "navigable waters" and "waters of the United States" along the Pacific Coast, including San Francisco Bay, within the meaning of the Rivers and Harbors Act, and therefore of the regulatory jurisdiction of the Army Corps of Engineers under the Act, extends to the mean higher high water line as defined at 33 CFR 209.260(k)(1)(ii).

II. APPLICATION OF THE MHHW LINE TO THE PENDING CASES

The next question to consider on the present motions is whether or not the properties under consideration herein lie within navigable waters—i. e., within the line of MHHW—as above defined under the two acts in question. The answer depends upon whether we use the *present* line of MHHW (which at least in part follows the outer edge of Leslie's dikes) or use instead the *former* line of MHHW of the Bay in its unobstructed natural state.

Leslie contends that any jurisdiction the Corps may once have had over these properties has long since been surrendered due to the Corps' failure to require permits for the construction of dikes in the past. Leslie cites *Stoeco,* supra, which held that the federal navigational servitude over the property there in question "had long since been surrendered" since the federal government had failed to assert its navigational servitude for eighty years. The property in *Stoeco* was filled former tidal marshland supporting streets and houses, which the court described as "fast land" and "improved solid upland." Accordingly, the

court specifically limited its holding "to tidal marshlands which had become fast land prior to the change in policy of the Army Corps of Engineers."

Sierra Club contends that neither the construction of the dikes nor the Corps' inaction removed the areas behind the dikes from Corps jurisdiction, relying primarily on *Economy Light Co. v. United States*, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847 (1921). *Economy* held that a river, which had been dammed since 1895 and had not been used for commerce for approximately a century, was, nevertheless, navigable within the meaning of the Rivers and Harbors Act, stating (p. 118, 41 S.Ct. p. 411, 65 L.Ed. p. 853):

> "The fact, however, that artificial obstructions exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state. . . ."
>
> . . . .

The rules of *Stoeco* and *Economy* are consistent in that under *Economy* the body of water in question remains navigable in law so long as the artificial obstruction is capable of being abated by due exercise of the public authority, whereas *Stoeco* holds, in effect, that the area in question ceases to be navigable in law only if the artificial obstruction has become fast land—i. e., improved solid upland.

The property here in question is not improved solid upland. It is instead unfilled Bay bottom, much if not all of it below the level of MHHW, and much of it still subject to periodic inundation by Bay water for the production of salt, but not now subject to the ebb and flow of the tide . . . . The property is such that, if the dikes were broken, it would return to its former natural condition of daily tidal inundation without the removal of any fill or other improvements. The dikes herein are, in short, much more closely akin to artificial obstructions capable of being abated by due exercise of the public authority as in *Economy*, than they are to the improved solid upland supporting streets and houses considered in *Stoeco*.

For the foregoing reasons, we find that the diked areas here in question, which lie within the former line of MHHW in its unobstructed, natural state, are still within the jurisdiction of the Corps of Engineers under both the FWPCA and the Rivers and Harbors Act.

III. ESTOPPEL

It is well established, as Sierra Club contends, that as a general principle equitable estoppel cannot be applied to deprive the public of the protection of a statute because of mistake or inaction on the part of public officials.

[Citations omitted.] . . .

See also *Economy*, supra, which held that congressional authority to remove obstructions is not taken away by inaction for almost 100 years.

Despite the general principle that the government may not be estopped, equitable principles do impose some limits on the Corps' power to now regulate activities which it could have regulated in the past but instead ignored for decades.

. . . .

In the pending cases we are unable to find that the Corps of Engineers is estopped from changing its policy and regulating the areas in question in the future. Nevertheless, we do find that in the circumstances of these cases it would be a violation of equitable principles of fairness for the Corps to now require permits for the maintenance of dikes which have been in place on the property here in question for more than 20 years—and in most cases for more than 50 years—without objection by the federal government.

ORDER

For the foregoing reasons Leslie's motions for summary judgment in 72 561 and 73 2294 are denied, and the motion of Sierra Club and the Corps for summary judgment in 73 2294 is granted. The Court, on its own motion in 72 561 and pursuant to the motion for summary judgment of Sierra Club and the Corps in 73 2294, declares the rights and legal relations of the parties, on the record as it now stands, to be as follows:

. . .

(b) Pursuant to the Rivers and Harbors Act of 1899 the Corps may require permits for the construction of any new bridge, dam, dike or causeway, or for the creation of any new obstruction, up to the above-described line of MHHW, but the Corps is estopped from requiring permits under the Rivers and Harbors Act for any bridge, dam, dike, causeway or obstruction which has been long in place as hereinabove set forth.

UNITED STATES v. SEXTON COVE ESTATES, INC.

United States Court of Appeals, Fifth Circuit 1976
526 F. 2d 1293

DYER, Circuit Judge:

Sexton Cove Estates (Sexton) and its former president Ralph Oesterle, appeal from the judgment of the district court requiring, because they had violated the Rivers and Harbors Act of 1899, 33 U.S. C.A. § 403, restoration, in varying degrees, of ten canals that they had dredged shoreward of the mean high tide line (MHTL) in Sexton Cove, a part of Blackwater Sound, in Key Largo, Florida, without a permit from the Army Corps of Engineers (Corps). The district court, 389 F.Supp. 602, ordered defendants to completely fill five plugged [1] canals, which had no connection with Blackwater Sound, and partially fill five unplugged canals that physically connected with the Sound, and to replant the mangrove fringe along the banks of the restored canals. It also enjoined defendants from selling, conveying or disposing of any real property in the development without its approval.

Defendants contend (1) that the Corps lacks jurisdiction over the ten canals because they are above the MHTL; (2) that if the Corps has jurisdiction, there was no Section 403 violation; (3) that reliance upon internal Corps jurisdictional policy should be sustained as an affirmative defense; (4) that the restoration order was an abuse of the district court's discretion; (5) that individual lot owners are indispensable parties; and (6) that Oesterle may not be held personally liable for the restoration.

We agree with the district court that appellants reliance argument lacks merit and that the lot owners are not indispensable parties. We further agree that the district court had jurisdiction to grant restoration relief with respect to the unplugged canals connected to the Sound but remand for a further hearing on the appropriate relief. We find that the district court lacked jurisdiction with respect to the five plugged canals not connected to the Sound, and that the judgment against Oesterle cannot stand.

Sexton Cove Estates is a 73-acre mobile home development which fronts on Sexton Cove in Blackwater Sound. Blackwater Sound is navigable water of the United States. Oesterle was Sexton's President from 1970 to 1972, the time of the questioned activities.

Sexton purchased the land in 1969 and took immediate steps to develop it. Preliminary studies were made by an engineering firm in May, 1969. In February, 1970, a plat was prepared and filed in Monroe County, Florida, indicating the proposed construction of ten canals connecting to Blackwater Sound. Paving, grading and drainage plans were completed by March, 1970. Lots were first sold in 1969.

Sexton was advised by a representative of the engineering firm and informally, by an attorney familiar with Corps procedure that no permit was necessary since the dredge and fill activities would be shoreward of the mangrove fringe [3] in Sexton Cove. However, neither Sexton nor any of its advisors, sought the opinion of any Corps representative concerning the proposed construction.

On May 20, 1970, Sexton employed a contractor to perform the dredge and fill work on the canals. For convenience, we allude to the canals as one through ten. Canals one and two were excavated shoreward of the MHTL. Canals three, four and five were pre-existing canals which were deepened and widened by Sexton. They, too, are shoreward of the MHTL. Canals six-ten were excavated but plugged by "many" feet of land.

Canals one, two and three were completed and connected with Blackwater Sound by February, 1971, when Charles Allen, a field inspector of the Corps, vis-

1. A "plug" is a strip of land separating waters from a navigable water.

3. The outer edge of the mangrove fringe was treated by the Corps as the MHTL, according to this advice. MHTL has never been so definitively established

ited Sexton Cove. Upon a subsequent search of Corps records, Allen determined that no dredging permit had been applied for by Sexton. As a result, on February 22, 1971, the Corps' resident engineer wrote to Oesterle to inform him that a permit was necessary for the excavation. Sexton responded on March 22, 1971, that it had been advised by counsel that no permit was required. On May 19, 1971, Allen returned to Sexton Cove and discovered that work was underway on canals four and five. These, as noted, were pre-existing canals which had connected to Blackwater Sound, but were plugged at this time in order to facilitate their widening, lengthening, and deepening.

On June 2, 1971, the Corps sent another letter to Oesterle which pointed out that the connection of the canals to Blackwater Sound without a permit was illegal, and no further connection should be made. On June 16, 1971, the Chief of the Corps' Operations Division also wrote to Oesterle telling him that a permit was required for the work at Sexton Cove.

The contractor left canals four and five plugged but they were unplugged in December, 1971. Canals six–ten were excavated after Allen's first visit but they have never been connected to Blackwater Sound.

On October 28, 1971, Sexton applied to the Corps for an after-the-fact permit. It was denied on June 12, 1973. Fourteen months later, the government filed this suit against Sexton and Oesterle.

[Reproduction of 33 U.S.C.A. §403 omitted.]

The statute does not use the words "mean high water mark" or "mean high tide line." After the passage of the Act, the Corps apparently adopted the MHTL as a self-imposed jurisdictional boundary. . . .

That this occurred is not surprising. The MHTL traditionally had been the limit of admiralty jurisdiction in tidal waters. *Waring v. Clarke*, 1847, 5 How. 441, 463, 46 U.S. 441, 463, 12 L.Ed. 226. MHTL is also the boundary of tidal lands for property law purposes. *Borax Consolidated, Ltd. v. Los Angeles*, 1935, 296 U.S. 10, 22, 56 S.Ct. 23, 80 L.Ed. 9. Furthermore, promoting and protecting navigation was the dominant theme of the Act; hence, there was "little need to focus attention on activities beyond the ordinary reach of the water." *United States v. Holland*, M.D.Fla.1974, 373 F.Supp. 665, 670.

There is, however, necessity for focusing on activities beyond MHTL today. Dredging or other activities may seriously "alter or modify" the course, condition, location, or capacity of navigable waters, yet take place just shoreward of the MHTL. Does mere location above MHTL insulate them from the Act's prohibitions?

The answer to this question, is rooted in traditional Supreme Court analysis of the scope of the federal authority over navigable waters. In *United States v. Rio Grande Irrigation Co.*, 1899, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136, the Court applied Section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 454, the predecessor to Section 403 of the 1899 Act. Defendant desired to build a dam across the Rio Grande River which the United States claimed would obstruct the navigable capacity of the river. Defendant argued that the river was not navigable in the New Mexico territory where the dam would be built and therefore the statute was inapplicable. The Court disagreed: "[a]ny obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition." *Id.* at 708, 19 S.Ct. at 777.

The Court used the Hudson River as an example to illustrate when relief is available. The Croton River was a non-navigable stream which flowed into and contributed to the volume of the Hudson. "Unquestionably," said the Court, the state of New York had a right to appropriate its waters and "the United States may not question such appropriation, *unless* thereby the navigability of the Hudson be disturbed." (emphasis added.) The Court continued that if the state should, "*even at a place above the limits of navigability*, by appropriation for any domestic purposes, diminish the volume of waters which flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise and its

power to restrain such appropriation [would] be unquestioned." *Id.* at 709, 19 S.Ct. at 777. (emphasis added.)

The Congressional grant under the Rivers and Harbors Act, of regulatory power to the Corps over navigable waters is the beneficiary of the same broadly reaching analysis. The local origin of the activity or the source of its operation is thus not wholly determinative; of at least equal significance is the "effect." *Zabel v. Tabb*, 5 Cir. 1970, 430 F.2d 199, 203, *cert. denied*, 1971, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808; *United States v. Underwood*, M.D.Fla.1972, 344 F.Supp. 486, 492. *See* Kramon, Section 10 of the Rivers and Harbors Act: The Emergence of a New Protection for Tidal Marshes, 33 Md.L.Rev. 229, 242, n. 72; Power, Federal Environmental Law, *supra*, at 794-796.

There has been no case resolving the question of the Corps' jurisdiction shoreward of the MHTL. In this Circuit, *Tatum v. Blackstock*, 5 Cir. 1963, 319 F.2d 397, and *United States v. Joseph G. Moretti, Inc.*, 5 Cir. 1973, 478 F.2d 418 (*Moretti I*) are cited to us but neither is dispositive. In *Tatum*, we held that a Corps permit was necessary before submerged land may lawfully be filled or excavated "if the area is navigable, or if the proposed work would affect nearby navigable waters." *Tatum v. Blackstock, supra*, at 399. However, the challenged activities occurred below MHTL there. In *Moretti I*, although we stated that the Corps had no power landward of MHTL to regulate Moretti's conduct or force reconstruction of the topography, the challenged activities had occurred below MHTL. In neither *Tatum* nor *Moretti I* was the Corps' jurisdiction shoreward of MHTL in issue.

The Second Circuit has held that a Section 403 obstruction may be caused directly in navigable waters or indirectly by activity upland which creates the obstruction. *United States v. Perma Paving Co.*, 2 Cir. 1964, 332 F.2d 754. There was no dispute over jurisdiction:

> "[P]lainly there is not one rule when a riparian owner discharges solids from his property into the stream and a different one when he places such excessive weight on the property as to cause the soil itself to move into the bed of the stream."

332 F.2d at 757. *See* also *United States v. Banister Realty Co.*, Cir.Ct.E.D.N.Y., 1907, 155 F. 583, 597.

With this background we examine Section 403. We find no locality assigned to its prohibitions. It prohibits any obstruction to navigable capacity. There is no suggestion that an obstruction whose source is above MHTL escapes prosecution. *United States v. Perma Paving Co., supra.* It prohibits the alteration or modification of the course, condition, location or capacity of a navigable water. There is not the slightest intimation that an alteration or modification whose source is above MHTL is any less an alteration or modification. There is nothing in the language of the statute nor the logic of its implementation which creates this barrier beyond which the Corps is ubiquitously powerless. Indeed, such a limitation would thwart the design of the statute. We conclude, then, that activities which occur shoreward of MHTL, absent Corps approval, may, within certain limitations, be within the prohibitions of the Act.

We now review those activities. We pause only briefly to consider the five canals which connect directly to Blackwater Sound. The district court found that these canals alter the course of the Sound because they changed its shoreline. This finding is supported by the record. Cf. *Booker v. Rochelle*, 5 Cir. 1928, 23 F.2d 492. The canals serve also as access to the Sound for numerous lot owners whose boats affect the navigable capacity of the area. Hence, the Corps has jurisdiction over them.

However, the Corps does not have jurisdiction over the construction of canals six ten. They are landlocked. Their creation did not affect the course, condition, capacity or location of Blackwater Sound. The district court's finding that it had jurisdiction has no evidentiary support and is clearly erroneous. F.R.Civ.P. 52(a).

Both the Corps and the district court rely on the fact that these landlocked canals exhibit tidal fluctuations. The argument is that if they exhibit these fluctuations after they are dug, a permit was required to excavate them initially. However, exhibition of tidal

fluctuation subsequent to excavation does not prove alteration or modification of course, condition, location or capacity. If it did, every hole dug in South Florida would be within the Corps' jurisdiction. The Corps jurisdictional fingers do not reach that far.

We turn now to appellants' reliance and indispensable party contentions. Appellants argue that they were "affirmatively misled" by Corps regulations and administrative practices which they interpreted to exempt them from the permit requirements. Their argument is without merit. Neither appellants nor any of their "advisors" contacted the Corps with respect to the Sexton Cove operation. Furthermore, a large part of the dredging activity at Sexton Cove occurred after the receipt of the February 22, 1971, letter from the Corps which stated that a permit was required. These circumstances hardly make out a case of an "affirmative" effort by the Corps to mislead appellants. *See United States v. Sunset Cove,* D.Or.1973, 5 ERC 1029, *aff'd,* 9 Cir. 1975, 514 F.2d 1089.

Finally, the question of Oesterle's personal liability to pay the costs of any restoration ordered must be determined. A corporate officer may not be held civilly liable for a corporate violation of the Rivers and Harbors Act unless either the Act itself authorizes such liability, or there are sufficient allegations and proof to permit negation of the corporate form. The enforcement section of the statute, 33 U.S.C.A. § 406, does not provide that an officer of a corporation which violates Section 403 is personally liable on any subsequent civil judgment obtained against the corporation. And there were neither any allegations in the complaint nor proof at trial to warrant "piercing the corporate veil." The judgment against Oesterle cannot stand.

Because we have found that the creation of the five plugged canals was not within the Corps' jurisdiction, the district court's restoration order with respect to them is without foundation. With respect to the five canals that are within the jurisdiction of the Corps, we deem it necessary to vacate the partial restoration order, and remand the case to the district court for a hearing on the question of relief. The full effects of any environmental disturbance are difficult to measure. Attempts to reverse such effects and restore the environment to its natural state carry with them no guarantee of success. Hence, any restoration plan must be carefully designed to confer maximum environmental benefits. At the same time, the law must be tempered with a touch of equity. *United States v. Sunset Cove, supra.* The degree and kind of wrong and the practicality of the remedy must be considered in the formulation of that remedy.

There is no doubt that the district court has powerful tools at its disposal in fashioning relief for violations of Section 403. *United States v. Moretti, supra* at 431. However, it is unclear from the record that the appellants were given an adequate opportunity before the district court to adduce evidence and present their contentions with respect to the restoration issue. Under these circumstances, and because of the uncertainty implicit in environmental rehabilitation, the parties should be afforded a hearing to fully develop the situation. We, of course, pretermit any views as to the reach of a restoration order that the district court may feel is appropriate after having heard the parties on this issue.

The judgment against Oesterle is reversed and judgment in his favor is rendered. The judgment requiring restoration of the plugged canals, six–ten, is reversed. The judgment requiring partial restoration of canals one–five is vacated and this cause is remanded for further proceedings not inconsistent with this opinion.

Generally, obstructions to navigation would be structures such as piers, jetties, and breakwaters. Nevertheless, §10 has been employed to prohibit activities which cause obstructions other than structures. In United States v. Perma Paving Company, 332 F. 2d 754 (Second Circuit 1964), cited in Sexton Cove, the defendant company overloaded riparian land with bricks. This extra weight caused the soil to fall into the river resulting in shoaling; thus, this activity was in violation of §10. A different situation was present in United States v. Republican Steel Corp, 362 U.S. 482 (1960). The defendant used a river as a repository for industrial waste solids. This waste flocculated and sank to the bottom, gradually reducing the depth of the river. The Supreme Court found that "obstruction" does not necessarily require a structure and, therefore, there was a violation of §10.

ii. §404 of the Federal Water Pollution Control Act Amendments

Although the Corps of Engineers exercises considerable influence under §10, limitations were still felt prior to the 1972 Amendments to the Federal Water Pollution Control Act, 33 U.S.C. §§1311 et seq. (Supp. V, 1975). Until then, the Corps' jurisdiction essentially extended only to the high water mark. Yet, there was concern for the preservation of water bodies and land/water interfaces or wetlands, which were not easily protected under §10. §404 of the Federal Water Pollution Control Act Amendments of 1972 gives the Corps of Engineers the power to issue permits for discharges of dredge or fill material into navigable waters. §404 does not supercede §10 and their permit processes are virtually identical. Yet, §404 gains greater force from the use of the phrase "the waters of the United States" rather than "navigable waters." 33 U.S.C. §1362(7) (Supp. V, 1975). Legislative history indicates that this was an intentional departure from the traditional definition. The Conference Report of the Senate-House Conference Committee stated that:

> "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations that have been made or may be made for administrative purposes."[1]

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1. Legislative History of the WPCAA of 1972 at 327 (1973).

THE FEDERAL WATER POLLUTION CONTROL ACT

33 U.S.C. §§1311, 1344, 1362 (Supp. II, 1972)

§ 1311. Effluent limitations—Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

§ 1344. Permits for dredged or fill material

(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator,[1] in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

§ 1362. Definitions

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

[1] "Administrator" refers to the EPA Administrator.

UNITED STATES v. HOLLAND

373 F. Supp. 665 (M.D. Fla. 1974)

KRENTZMAN, District Judge.

This is an action brought by the United States to enjoin allegedly unlawful landfilling operations in an area known as Harbor Isle, adjoining Papy's Bayou, St. Petersburg, Florida. The government contends that the defendants have begun filling the waters of the bayou with sand, dirt, dredged spoil and biological materials without the permits required by 33 U.S.C. §§ 403, 407 and 1311(a). For relief the government requests a stoppage of further filling and a restoration of some mangrove wetland.

A hearing was held on December 21, 1973, to consider the government's motion for a temporary restraining order. After considering the evidence and argument of both parties the motion was granted. On December 26th the temporary restraining order was extended in full force pending further hearings.

On January 9, 1974, plaintiff's motion for preliminary injunction was heard. At that proceeding the following were established to the Court's satisfaction:

1. Defendants are engaged in developing a 281 acre tract of land known as Harbor Isle.

2. For the purposes of the preliminary injunction hearing the Court accepted defendants' determination that the mean high water line is one foot above sea level.

3. Tide data, visual observation and classification of vegetation established that a substantial number of tides exceed two feet above sea level.

(a) The United States Geological Survey tide gauge data indicated that 50-100 tides exceed two feet in the subject waters each year.

4. The parties stipulated to the accuracy of a land survey introduced by defendants. The survey and other evidence established that:

(a) Most of the property is interlaced with artificial mosquito canals containing water.

(b) The water in the mosquito canals is connected to Papy's Bayou.

(c) The elevation of much of the property is less than two feet.

5. Without a permit issued under authority of Title 33, United States Code, Sections 407 and 1344, defendants have discharged sand, dirt, dredged spoil and biological materials into the man-made canals and into mangrove wetlands which are periodically inundated by tides exceeding two feet above sea level.

6. Defendants would continue to discharge sand, dirt, dredged spoil and biological materials until the fill created has effectively displaced tidal waters, thereby eliminating the normal ebb and flow of tides over the subject property.

7. Continued discharge would result in irreparable injury. ss and damage to the aquatic ecosystem of Papy's Bayou and to the commercial and sport fisheries which are dependent upon the estuaries of the Gulf of Mexico.

The Court felt these facts established acts of sufficient scope to warrant federal jurisdiction under the Federal Water Pollution Control Act, and of sufficient magnitude to justify a preliminary injunction. The motion for such an injunction was granted at the hearing. A brief order of injunction and findings was signed January 11, 1974.

Since the courts have not yet been faced with the question of whether federal jurisdiction over water pollution encompasses intertidal wetlands by virtue of the relatively new Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq., this opinion will offer the rationale for the grant of jurisdiction.

The Federal Water Pollution Control Act Amendments of 1972

The government charged the defendants with past and continuing violations of Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA). To sustain this allegation two showings had to be made. First it had to be established that the defendants' acts were such as to be prohibited if done in waters within federal jurisdiction, and second, that the waters receiving the impact of the prohibited conduct were indeed within that jurisdictional ambit.

Prohibited Activities

The FWPCA is an admirably comprehensive piece of legislation. It was designed to deal with all facets of recapturing and preserving the biological integrity of the nation's water by creating a web of complex interrelated regulatory programs. Section 301(a), the enforcement hub of the statute, however, is stated very simply. It provides that except as otherwise permitted within the Act "the discharge of any pollutant by any person shall be unlawful." The plainness of the prohibition is matched by the breadth given the definition of a "discharge of a pollutant":

> (A) Any addition of any pollutant to navigable waters from any point source,
>
> (B) Any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source . . . other than a vessel or other floating craft. 33 U.S.C. § 1362(12)

"Pollutant" is in turn defined as

> . . . *Dredged spoil*, solid waste, incinerator residue, sewage, garbage, sewer sludge, munitions, chemical wastes, *biological materials*, radioactive materials, heat, wrecked or discarded equipment, rock, *sand*, cellar dirt and *industrial*, municipal, and agricultural waste discharged into water. . . . Id. § 1362(6) (emphasis added)

And "point source" is

> . . . any discernible, confined and discrete conveyance, *including* but not limited to any *pipe, ditch*, channel, tunnel, conduit, well, discrete fissure, container, *rolling stock*, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *Id.* § 1362(14) (emphasis added)

The evidence substantiates the defendants' admission that without a permit they have discharged and would continue to discharge from point sources, including dump trucks, drag lines, and bulldozers, materials defined as pollutants. Whether these pollutants were discharged into waters within federal jurisdiction was the key issue.

Jurisdiction under the FWPCA

Throughout the course of this litigation there has been considerable discussion about whether the mosquito ditches that connect with Papy's Bayou are "navigable" and much testimony about whether certain discharges of pollutants were above or below the "mean high water line." Argument was heard on the issue of whether federal jurisdiction under the FWPCA was limited to activities taking place in navigable waters below the mean high water line. Because the terms "navigability" and "mean high water line" have played such important parts in determining federal jurisdiction over water pollution in the past, the contention that these terms should be used in arguing jurisdiction under the FWPCA was not surprising.

For years the mainstays of the federal water pollution effort were Sections 10 and 13 of Rivers and Harbors Act of 1899. Section 10 makes it illegal to fill, excavate, alter or modify the course, condition or capacity of waters within the boundaries of a navigable waterway without authorization from the Corps of Engineers. Section 13 prohibits the deposit of refuse in, or on the bank of, a navigable waterway without a Corps of Engineers' permit. Both of these laws are by their terms limited to waters that are deemed navigable. Because of this limitation past discussion of federal jurisdiction over water pollution was largely a question of the navigability of the waterway being affected.

Why the Congress limited the Rivers and Harbors Act to navigable waters is no insoluble mystery. Although the Constitution does not mention navigable waters, it vests in Congress the power to "regulate commerce with foreign nations and among the several states." Since much of the interstate commerce of the 19th century was water borne, it was early held that the commerce power necessarily included the power to regulate navigation. [Citations omitted.] To make this control effective Congress was deemed empowered to keep navigable waters open and free and to provide sanctions for interference. *See, e.g.*, Gilman v. Philadelphia, 3 Wall. 713, 70 U.S. 713, 18 L.Ed. 96 (1865). The Rivers and Harbors Act of 1899 was an exercise of that power.

. . . .

Although the reach of federal power under the commerce clause widened dra-

matically in the twentieth century, the nineteenth century legacy of "navigation" lingered to limit federal control over water pollution. Since Congress had clearly limited the Rivers and Harbors Act to navigation, any subsequent judicial broadening of jurisdiction under the statute of necessity had to be in the form of expanding the definition of "navigability."

Starting with the basic definition of waters that

> . . . form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. (The Daniel Ball, 10 Wall. 557, 77 U.S. 557, 19 L.Ed. 999 (1870).

the test of navigability was enlarged in 1874 to embrace waters that had the capability of commercial use, not merely those in actual use. The definition was again expanded in 1921 to bring in waterbodies whose past history of commercial use made it navigable despite subsequent physical or economic changes preventing present use for commerce. In 1940 it was held that a waterway would be deemed navigable-in-fact if by "reasonable improvements" it could be made navigable. Thus the jurisdictional basis broadened until only the most insignificant body of water could escape one of the tests of navigability.

But the limitation of navigability still worked to impede efforts to forestall the degradation of the aquatic environment. Not only did small feeder streams and tributaries remain exempt from federal jurisdiction but, more importantly, the wetland areas adjoining the waterways did also.

. . . .

The Mean High Water Line

Since the Rivers and Harbors Act was passed at a time when interstate commerce was thought of in a geographical sense, and since the Act was designed primarily to keep the navigable waters free of physical impediments, it was natural to draw on the property-law concept of the mean high water line to limit the scope of jurisdiction in tidal water areas.

But because the mean high water line was, and is, used to demarcate authority in tidal zones does not necessarily mean that the line is an inviolate barrier to federal assumption of authority over activities landward of the line. Examining the history and use of the line underscores the point.

At common law the ordinary high tide marked the boundary between private and sovereign lands.

The United States Supreme Court in Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935), . . . adopted the . . . "mean high water" line as the limit of a federal land grant. . . .

> [T]he test of the mean high water mark became the inveterate standard to be applied in limiting federal authority over navigable waters.

If the instant case involved only the question of federal jurisdiction over non-navigable streams and wetland areas under the Rivers and Harbors Act the Court might be compelled to deny jurisdiction by the sheer weight of precedent. But such is not the case. Here the Court is presented with a dispute brought pursuant to a new federal law not limited to the traditional tests of navigability.

On October 18, 1972, the Congress exercised its power under the commerce clause by enacting the FWPCA, establishing regulatory programs to combat pollution of the nation's waters. Even though it seems certain that Congress sought to broaden federal jurisdiction under the Act, it did so in a manner that appears calculated to force courts to engage in verbal acrobatics. Although using the term "navigable waters" in the prohibitory phase of the statute, the definition of "navigable waters" is stat- [illegible] including the territorial seas." 33 U.S. C. § 1362(7). The definition stands with no limiting language.

If indeed the Congress saw fit to define away the navigability restriction, the sole limitation on the reach of federal power remaining would be the commerce clause. Thus two questions emerge. Did Congress intend to define away the old "navigability" restriction? And does the Congress have such power?

The answer to the first question is in the affirmative. The Court is of the opinion that the clear meaning of the statutory definition may be ascertained on its face without having to rely

on the well established judicial philosophy that "forbids a narrow, cramped reading" of water pollution legislation. [Citations omitted.] The legislative history of the FWPCA supports this clear meaning.

[The court finds that Congress intended to broaden the definition of "navigable waters" for water quality purposes.]

The foregoing compels the Court to conclude that the former test of navigability was indeed defined away in the FWPCA.

Clearly Congress has the power to eliminate the "navigability" limitation from the reach of federal control under the Commerce Clause. The "geographic" and "transportation" conception of the Commerce Clause which may have placed the navigation restriction in the Rivers and Harbors Act of 1899 has long since been abandoned in defining federal power. Now when courts are forced with a challenge to congressional power under the Commerce Clause a statute's validity is upheld by determining first if the general activity sought to be regulated is reasonably related to, or has an effect on, interstate commerce and, second, whether the specific activities in the case before the court are those intended to be reached by Congress through the statute.

[Citations omitted.]

It is beyond question that water pollution has a serious effect on interstate commerce and that the Congress has the power to regulate activities such as dredging and filling which cause such pollution.

Congress and the courts have become aware of the lethal effect pollution has on all organisims. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms. To recognize this and yet hold that pollution does not affect interstate commerce unless committed in navigable waters below the mean high water line would be contrary to reason. Congress is not limited by the "navigable waters" test in its authority to control pollution under the Commerce Clause.

Having thus ascertained that Congress had the power to go beyond the "navigability" limitation in its control over water pollution and that it intended to do so in the FWPCA, the question remains whether the Congress intended to reach the type of activities involved in the instant case—the pollution of non-navigable mosquito canals and mangrove wetland areas.

As previously noted the defendants without a permit have filled and otherwise polluted various mosquito canals which connected with the waters of Papy's Bayou. The manmade canals were found to be non-navigable for the purposes of this action.

The conclusion that Congress intended to reach water-bodies such as these canals with the FWPCA is inescapable. The legislative history quoted *supra* manifests a clear intent to break from the limitations of the Rivers and Harbors Act to get at the sources of pollution. Polluting canals that empty into a bayou arm of Tampa Bay is clearly an activity Congress sought to regulate.[13] The fact that these canals were manmade makes no difference. They were constructed long before the development scheme was conceived. That the defendants used them to convey the pollutants without a permit is the matter of importance.

The Court is of the opinion that the waters of the mosquito canals were within definition of "waters of the United States" and that the filling of them without a permit was a violation of the FWPCA.

Whether the FWPCA was meant to reach activities such as those committed here in mangrove wetlands above the mean high water line is slightly less apparent. An examination of Congressional intent, however, leads this Court to the conclusion that such intertidal wetlands were indeed meant to be covered.

The first glimpse of Congressional intent comes from the FWPCA itself. Section 101(a) puts forth the purpose of the Act:

> "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—
>
> (1) It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." 33 U.S.C. § 1251(a).

In Section 102(c) the Administrator of the Environmental Protection Agency is authorized to make grants for basin studies to provide comprehensive water quality control plans for a basin. "Basin" in that section is defined to include "rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes, and portions thereof, as well as the lands drained thereby." 33 U.S.C. § 1252(c).

Section 404 of the Act establishes a program for permitting the discharge of dredged or fill materials into waters of the United States. Subsection (c) provides for careful consideration of whether or not such discharges will have "unacceptable adverse effect on municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c).

These three sections do not by themselves prove conclusively that Congress sought to assume jurisdiction over activities taking place in wetlands above the mean high water line. What these sections do reveal is a sensitivity to the value of a coastal breeding ground. Composed of various interdependent ecological systems (*i. e.* marshes, mudflats, shallow open water, mud and sand bottoms, beach and dunes) the delicately balanced coastal environment is highly sensitive to human activities within its confines. *See* Cooper, Ecological Considerations, Coastal Zone Management 129 (J. Hite & J. Stepp ed.1971)

Congress realizes the coastal ecology is endangered by poorly planned development. It cannot be gainsaid that the discharge of pollutants into coastal, estuarine and adjacent waters have caused considerable damage to the marine environment. Estuaries, partially enclosed bodies of water within which there is a measurable dilution of sea water by fresh-water run off, and other breeding zones have suffered the most damage. Salt water marshes and other wetlands constitute a major component of the estuarine system.

. . . .

One of the sources of pollution in the instant case was the discharge of sand, dirt and dredged spoil on land which, although above the mean high water line, was periodically innundated with the waters of Papy's Bayou. Defendants argue that such activities are beyond the reach of the FWPCA. This Court does not agree. Even the occasional lapping of the bayou waters has conveyed these pollutants into the waters of the United States. That the pollutants are not so conveyed every day is of no consequence. Pollutants have been introduced into the waters of the United States without a permit and the mean high water mark cannot be used to create a barrier behind which such activities can be excused. The environment cannot afford such safety zones.

The Court is of the opinion that the mean high water line is no limit to federal authority under the FWPCA. While the line remains a valid demarcation for other purposes, it has no rational connection to the aquatic ecosystems which the FWPCA is intended to protect. Congress has wisely determined that federal authority over water pollution properly rests on the Commerce Clause and not on past interpretations of an act designed to protect navigation. And the Commerce Clause gives Congress ample authority to reach activities above the mean high water line that pollute the waters of the United States.

The defendants' filling activities on land periodically innundated by tidal waters constituted discharges entering "waters of the United States" and, since done without a permit, were thus in violation of 33 U.S.C. § 1311(a).

. . . .

FINAL DECREE

This cause having come before this Court for final disposition pursuant to a stipulation and joint motion by the Government and all Defendants herein for Consent Decree, and this Court being fully advised in the premises, it is hereby, ordered and adjudged as follows:

. . . .

3. The activities upon which this action is based were conducted on property known as Harbor Island Development on Papy's Bayou, St. Petersburg, Pinellas County, Florida, the boundary lines of which are shown on the attached Survey Plat No. 14021A by George F. Young, Inc. Revision dated February 1, 1974. (Omitted from published opinion.)

4. On the property described hereinabove, defendants have discharged pollutants into waters of the United States in violation of Section 1311(a), Title 33, United States Code.

5. Defendants shall perform all work necessary to allow establishment of 78.6 acres as mangrove preserve areas consistent with proper environmental planning, preservation, restoration, and ecological considerations. . . .
Defendants shall commence to create said preserve areas within 30 days from the date of this Decree, and shall complete all necessary contouring and debris removal in those areas within three months from the date of this Decree. The dikes withholding tide waters from the preserve areas shall then be removed after consultation with and the approval of the United States Environmental Protection Agency and the United States Army Corps of Engineers.

. . . .

7. The mangrove preserve areas shall remain as natural environmental areas in perpetuity. Defendant shall take the necessary legal precautions to insure that the mangrove preserve areas are properly protected from lawful destruction by present and future owners of this property.

8. Should construction activities necessitate the discharge of water from any retention pond, defendants shall insure that total suspended solids shall not exceed concentrations of 30 parts per million as a "daily average," nor shall total suspended solids exceed concentrations of 50 parts per million as a "daily maximum."

. . . .

9. Within 30 days from the date of this Decree defendants shall apply to the appropriate Federal agency or agencies for any necessary permits for contemplated discharge during construction activities and shall meet the conditions outlined in paragraph 8, until such permits are issued or denied.

10. The temporary restraining order heretofore entered by this Court on December 21, 1973, and the preliminary injunction heretofore entered by this Court on January 11, 1974, are hereby dissolved.

11. Defendants are hereby authorized and permitted, from this date forward, to proceed with development activities on the property described hereinabove in any manner not inconsistent with the terms of this Final Decree. This Decree shall not be interpreted to affect, excuse, relieve, or modify any legal obligation of the defendants to comply with any requirements validly imposed by any applicable Federal or State laws or any local ordinances.

. . . .

13. Jurisdiction is retained for the purpose of enabling any party to this Decree to apply to this Court at any time for such further orders and directions as may be necessary for the construction or carrying out of this Decree, or for the modification or termination of any of the provisions herein, or for the enforcement of compliance herewith.

CONSERVATION COUNCIL OF NORTH CAROLINA v. COSTANZO

398 F. Supp. 653 (E.D.N.C. 1975)
Affirmed 528 F. 2d 250 (Fourth Cir. 1975)

LARKINS, District Judge:

I. INTRODUCTION

A. Statement of the Case

This action was initiated in the Wilmington Division of this Court by a complaint filed on June 5, 1974. . . .

In the complaint, plaintiffs sought preliminary and permanent injunctive relief restraining defendant Carolina Cape Fear Corporation (hereinafter, the Corporation) from further construction of a marina on Bald Head Island.

. . . .

This cause is now before this Court for a final determination on plaintiffs' action for permanent injunctive relief, preliminary relief having been denied. Plaintiffs request that the Court order a restoration of the dredging project area to its natural condition. They seek a reprocessing of the dredging permit application in accordance with NEPA and the additional filing of a permit application by the Corporation for its deposit of pollutants (dredge material) into the waters of the United States.

B. General Background Facts

Bald Head Island, formerly known as Smith Island, is an island complex lying at the mouth of the Cape Fear River in Brunswick County, North Carolina.

On June 30, 1970, defendant Carolina Cape Fear Corporation purchased Bald Head Island for the purpose of developing the Island and establishing a permanent residential community.

[The Corporation constructed a floating dock, for which no permit was required, in order to develop the Island.]

. . .

By July of 1974, an inn, a golf course, road beds, and several homes had been constructed.

. . . .

On October 1, 1973, the Corporation submitted an application for a Department of the Army permit to allow it to construct a marina on Bald Head Island. Accompanying that application was a detailed environmental assessment for the Bald Head Island development.

A Public Notice of the application was sent to over three hundred persons, agencies, and organizations on the District Engineer's mailing list. In response to the Public Notice, the District Engineer received one hundred and four (104) letters in favor of the permit, four letters requesting clarification of the application, and four letters which were against the permit. All Federal, State, and local agencies were in favor of the issuance of the permit subject to certain conditions which were subsequently incorporated into the permit finally issued by the District Engineer. . . . Four environmental groups, ECOS, Inc., the Sierra Club, the Conservation Council of North Carolina, and the North Carolina Public Interest Research Group, expressed opposition to the issuance of the permit.

By Public Notice of May 24, 1974, the District Engineer made written findings (1) that the applicant, Carolina Cape Fear Corporation, had given proper consideration to the various public resources in the area; (2) that the granting of the permit did not constitute major federal action; and (3) that because of the conditions imposed on the permittee, the resultant work would not have a significant effect on the quality of the human environment. The Corporation had made numerous concessions. In order to minimize possible environmental effects, revised plans included erosion controls, limitations on dredge-spoil fill areas, guarantees to leave 400 acres of highland maritime forest in its natural state, and provisions for conveying 9,000 acres of marshes, lowlands, and Atlantic coast beaches by quitclaim deed to the State of North Carolina. Therefore, the District Engineer concluded that a detailed statement on the environmental impact of the proposed action was not required under NEPA.

C. Testimony of Charles W. Hollis

The principal witness called by the defendants during the three day hearing in July of 1974 was Charles W. Hollis, Chief of Permits, Wilmington District, U. S. Corps of Engineers. See *Adminis-*

trative Record, Vol. IV, *Transcript of Testimony of Mr. Charlie W. Hollis on July 17, 1974.* The Hollis testimony covered most of the issues presented in this case. It is the primary basis for the findings of facts made by this Court both in this opinion and in the July 20, 1974 opinion. Most of it is uncontroverted.

Hollis testified that his office has never overridden the objection of another agency to a permit issuance. (Tr., p. 6). He stated that the fill area includes salt meadow grass and dunes, but that no "salt marshes" were in the fill area. (Tr., p. 9). He characterized part of the fill area as Type 16—coastal salt meadow (Tr., p. 10), which, according to *Wetlands of the United States,* is a wetland. Hollis testified that the land on which the marina itself is located and on which the spoils from the dredging were to be deposited are above mean high tide. (Tr., p. 11). He testified that the marina basin and the access channel will together constitute approximately ten acres. (Tr., p. 32). He further testified that the fill area, as finally approved, will constitute approximately 20.83 acres (Tr., p. 14), of which less than half is comprised of salt meadow grass, the remainder being dune community. (Tr., p. 20). The total project area would thus be approximately 30.98 acres. Hollis also testified that the 10.15 acres which fall below the mean high water line of the Cape Fear River represent less than two percent of the total development project of approximately 3,000 acres. (Tr., pp. 34–35).

Hollis revealed that he and representatives of the National Marine Fisheries Service inspected the project area on March 13, 1974. (Tr., p. 12). At the request of the National Marine Fisheries Service representatives, the stakes indicating the proposed dike alignment were moved so that all fill material was eliminated from areas containing benthic communities. (Tr., p. 13). He testified that dikes will prevent dredge material from going into the "marshes" and the river. (Tr., p. 16).

Even at the time of abnormally high tide, the dike alignment is from fifty to seventy-five yards from the water and the area upon which the dredge material is being deposited is dry. (Tr., p. 18). The material will be retained in the diked areas until the sediments settle out of the water; and when the water quality is sufficient, the water will be released to the creek or the river. (Tr., p. 17).

Although Hollis did not characterize coastal salt meadows (which are a part of the disposal site) as marshlands, he did refer to coastal salt meadows as being wetlands, always waterlogged during the growing season but rarely covered with tide water. (Tr., p. 20). See *Wetlands of the United States, supra,* at p. 16.

Hollis also testified that it was "fairly obvious" that the development of Bald Head Island above the mean high level mark will continue regardless of whether or not a permit for the marina is granted. (Tr., p. 31). He stated that "the development is on going as it has been for nearly three years." (Tr., p. 32).

II. FACTS RELATED TO ENVIRONMENTAL IMPACT STATEMENT ISSUE

A. Background Facts

On July 12, 1974, plaintiffs filed the affidavit of Dr. David A. Adams. . . . It was Dr. Adams who compiled the Corporation's environmental assessment of its development plans.

Dr. Adams testified in his affidavit that he has been personally familiar with the Island for twenty-five years or longer, that he authored or co-authored seven papers, published in the scientific and technical literature, based upon the area, and that in 1970 he co-authored "Smith Island: A Resource Capability Study." Based upon his professional experience and personal knowledge, Dr. Adams formulated the following conclusions about the environmental consequences of the proposed development:

(1) As a result of many conditions imposed on the developer by the permit, neither the marina itself nor the total development of which it is a part will have a significant adverse impact on the quality of the human environment.

(2) Under the revised plans, the marina basin and the surrounding fill area will be located on high land. The disposal dikes surrounding the fill

area have been carefully staked out by field biologists from the National Marine Fisheries Service to insure that no marshes containing conspicuous evidence of productive benthic communities will be excavated or filled.

(3) The marina is situated so that the channel entrance to the Cape Fear River will run through an unvegetated beach shoreline. Since the proposed marina will have no entrance through or connection with Bald Head Creek and the surrounding marshes, boat traffic passing to and from the marina will have no significant effect on wetland resources.

(4) During construction, the excavation of the marina will be accomplished behind a "plug" or screen separating the work from the water. Slurry and all aqueous portions of the dredged material will be retained behind confining structures until such time as water quality is suitable for release into the estuarine environment. These measures will serve to minimize any turbidity, flocculation, or sedimentation within the estuarine environment as a result of dredging.

(5) The inside perimeter of the basin and channel will be bulkheaded with concrete sheet piling to retain existing materials and fill. In addition, the disposal area effluent will be contained by pipes, troughs or similar devices to points at or below the mean low waterline of the Cape Fear River in order to prevent gulley erosion. Dikes will be planted within four weeks of dike construction to prevent eroded material from entering the adjacent marsh or water.

(6) Domestic sewage removed from the boats will be pumped to the central treatment complex for treatment. Because of the marina's position at the mouth of the Cape Fear River, tidal action may adequately flush the basin. If not, force-flushing will be accomplished by the installation of a pumping system.

(7) All of the aforementioned safeguards will serve to eliminate or minimize any adverse environmental effects of marine construction, maintenance, and use. Furthermore, it is my belief that the total development will have a net significant favorable impact on the quality of the human environment.

(8) The present permit does not authorize the dredging or filling of any productive marshlands.

(9) The 9,000 acres which the developer has agreed to convey to the State of North Carolina include all the marshlands below the mean high waterline, a number of marsh uplands, six miles of the north-south beach, and at least 60 acres of maritime forest. The conveyances will provide significant perpetual habitat for wildlife found in the area.

(10) These conveyances, along with the other conditions of the permit, will substantially reduce any adverse environmental effects of development. Current approved plans for the development include the preservation of more than 30 percent of the existing maritime forest found on the Smith Island complex (approximately 400 acres), the restriction against buildings or vehicular traffic in any foredune areas along the beach, the construction of roads and trails so as to prevent erosion, the maintenance of present vegetation wherever possible, the subordination of architectural design to the natural aesthetics, the disposal of solid waste on the mainland, the construction of a sewage treatment plant for the tertiary treatment of liquid waste, the approval of pest control programs by the Environmental Protection Agency before the application of insecticides, a warning and evacuation plan, the preservation of historical sites on the island, a potable water supply provided by the mainland through submarine pipe, and a circulating drainage system.

Dr. Adams' affidavit and other evidence in the record indicate future federal involvement on Bald Head Island. In his Statement of Findings of May 24, 1974, the District Engineer referred to a proposal to supply the Island with potable water by means of a submarine pipeline which is also mentioned in Dr. Adams' affidavit. Such a project, if carried out would involve additional work in navigable waters.

* * *

No other marina has ever been located on Bald Head Island. There are, however, marinas presently in operation at nearby Southport and at nearby Long

Beach. A pier constructed by Carolina Cape Fear Corporation was ordered removed on November 14, 1972.

The marina project will directly result in the use of 30.98 acres. The planned development involves the construction of 492 mediumrise condominiums, a yacht club, a racquet club, access roads, parking facilities, and the subdivision of most of the remainder of the high ground of the Island to allow a projected population of 14,711. The development will include the permanent removal of approximately 600 acres of virgin maritime forest. A great deal of wildlife habitat and wildlife will be eradicated, including members of endangered and depleted species such as the Atlantic loggerhead turtle, the Eastern brown pelican, the American peregrine falcon, and the Ipswich sparrow. See Letter from the Fish and Wildlife Service Regional Director to the District Engineer, dated February 22, 1974.

A letter of January 30, 1974 from Mr. Howard D. Zeller, Deputy Director, Enforcement Division, Environmental Protection Agency, to Colonel Albert C. Costanzo, District Engineer, January 30, 1974, filed by the plaintiffs on June 21, 1974 (written before the Corporation agreed to Interior's seven conditions in the development plans) shows that the Environmental Protection Agency considered the environmental assessment submitted by the Corporation insufficient and sought further study of the project.

The June 21, 1974 affidavit of the President of Carolina Cape Fear Corporation, William R. Henderson, revealed that the inn, complete with eight rooms, a lobby and dining facilities, had been completed by that date. Several roads had been cut out and graded. Also at that time, six permanent houses had been built and approximately 450 lots had been sold. At the May 15, 1975 hearing, this Court was advised by counsel for the Corporation that the marina has not yet been completed as a result of the effects of this lawsuit.

B. Findings of Facts

1. The Corps of Engineers made a good faith effort to solicit comments from both the public and the various Federal and State agencies.

2. The response was overwhelmingly in favor of the issuance of the permit, except for opposition from several conservationists including the plaintiffs in this action. All Federal and State agencies, including the U. S. Fish and Wildlife Service, presented a favorable response to the issuance of the permit subject to certain conditions which were subsequently incorporated into the permit which the District Engineer issued.

4. Throughout the permit application process, the District Engineer compiled an exhaustive administrative record with great care and orderliness so that he would have a basis on which to make his ultimate conclusions and decisions. The administrative record was adequate to enable the District Engineer to arrive at reasonable conclusions.

5. Although the environmental assessment is not an "environmental impact statement," it is a complete study of the environmental considerations connected with the marina project.

6. The District Engineer's conclusion that the marina project itself, including the dredge deposit site, the access channel and the marina basin, would not *directly* bring about a significant effect on the human environment was reasonable.

7. This is a private development being constructed almost entirely on privately owned land. Only about two percent of this entire project area *directly* involves public property rights.

8. The Corps of Engineers is only involved in this case in a regulatory capacity. This is not a project financed in whole or in part by federal funds. There is no direct federal involvement in this development at the present time.

9. It is more probable than not that because of the permit, future substantial federal involvement and labor will be more imminent than it would be if the Corporation did not have the permit.

10. The District Engineer could reasonably conclude that commercial and residential development by this Corporation will eventually take place even if the Corps denies all dredging permits. The District Engineer could reasonably conclude that alteration of the highland areas of the Island could fairly be anticipated in the absence of the marina project.

11. The District Engineer could not reasonably conclude that as a result of the issuance of this permit, development of the upland portions of the Island

would not be accelerated. In this respect, the District Engineer should have considered the upland portions of the Island development a secondary consequence of the federal action.

* * *

IV. FACTS RELATED TO THE FEDERAL WATER POLLUTION CONTROL ACT ISSUE

A. Background Facts

A cross-sectional view of the disposal area (see *Administrative Record*, Vol. II, Tab R-1) shows it elevation in relation to the "mean low water line" and the "mean high water line." The "mean high tide line" denotes the limit of areas which are flooded by the tide on the average of twice a day. According to the cross-sectional plat, the original elevation of the disposal area was over seven and one-half feet above the "mean low water line" and three and one-half feet above the "mean high water line." The elevation of the "mean spring tide" at Bald Head Island is 4.9 feet above the mean low water line. *Tide Tables, East Coast of North and South America, National Ocean Survey, U.S. Department of Commerce* (1975), at page 226. "Mean spring tide" is defined as the annual average of the two, monthly lunar spring tides. The disposal area is nearly three feet above the "mean spring tide line."

Plaintiffs have presented no evidence which disputes defendants' contention that these wetlands are never flooded by normal action of the tides. Defendants' contention is based on the elevation of the disposal area relative to "mean high tide" and "mean spring tide." Inundation, defendants argue, might only occur during a storm, a flood, or a hurricane.

* * *

From the results of the onsite field investigations of the marina area by the Bureau of Sport Fisheries and Wildlife (see February 22, 1974 letter from Regional Director Carlson to District Engineer, page 6), it is clear that the Type 16 wetlands in the disposal area are "vegetated with most of the above mentioned species in conjunction with salt meadow cordgrass (*Spartina patens*) and saltmarsh fimbristylis (*Fimbristelis spadicea*)."

Both the proposed letter from the Raleigh field office and the February 22, 1974 final letter from the Regional Director show that the sea level at Bald Head Island and elsewhere on the Atlantic coastline is rising approximately one inch every ten years.

B. Findings of Facts

1. Salt meadow grass (*Spartina patens*) grew on approximately ten acres of the disposal area. Salt meadow grass (*Spartina patens*) is within the definition of salt marshland under North Carolina General Statutes Section 113-229(n)(3)(Supp.1974).

2. The wetlands in question yield nutrients which contribute to the aquatic biological communities in the estuary. This contribution, however, is not great when compared to the contribution of marshes which are subject to relatively regular flushing by the tides. The acres of coastal salt meadow at issue are more comparable (in terms of contribution) to flood plain than to predictably flooded salt marshes. The flooding of this salt meadow is so infrequent that the biological communities in the surrounding waters can not be said to be dependent on this contribution for their continued existence and integrity. (The thousands of acres of high and low marsh in the Bald Head Island complex are the normal and basic contributors to the productivity of the biological communities in surrounding waters).

3. The salt meadow grass in the disposal area might be flooded a few times a year as a result of certain infrequent acts of nature.

* * *

VI. CONCLUSIONS OF LAW

A. Environmental Impact Statement

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. Sec. 4321 *et seq.*, requires all federal agencies in performing their functions to be responsive to the national policy of restoring and maintaining a quality environment. In order to ensure that the substantive policy is carried out, the Act provides certain procedural requirements which are designed to be "action forcing." Foremost among these is the duty of all federal agencies to prepare an environmental impact statement for every "major Federal actions significantly affecting the environment." 42 U.S.C. Sec. 4332(2)(C). It is settled law that the issuance of a permit by a federal

agency involves a "federal action" for purposes of the impact statement requirement. *National Forest Preservation Group v. Butz*, 485 F.2d 408, 411–412 (9th Cir. 1973). This is explicitly confirmed and stated in the Council on Environmental Quality's "Guidelines for Federal Agencies under the National Environmental Policy Act," 38 Fed.Reg. 20,549, Aug. 1, 1973, 42 C.F.R. Sec. 1500.5(a)(2). The Army Corps of Engineers' regulations on environmental impact statements also recognize this: 39 Fed.Reg. 12,737, April 8, 1974, 33 C.F.R. Sec. 209.410(3)(2).

2. In this circuit, the standard for review of the District Engineer's decision not to prepare an impact statement appears to be whether or not that decision was reasonable. [Citations omitted.] The reasonableness of the District Engineer's decision must be considered in light of NEPA and applicable regulations.

3. Under applicable principles of law, the cumulative effects of any federal action must be considered in determining the significance of the impact of the federal action on the human environment. *CEQ Guidelines for the Preparation of Environmental Impact Statements*, 40 C.F.R. Sec. 1500.6 (1973); *Corps of Engineers, Department of the Army Administrative Procedure Environmental Statements*, 39 Fed.Reg. 12,737, April 8, 1974, 33 C.F.R. Sec. 209.410(i)(7)(ii).

4. The CEQ Guidelines provide that significant effects on the environment also include secondary effects:

> "Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. Many major Federal actions, in particular those that involve the construction or licensing of infrastructure investments (e. g. . . . water resource projects . . .) stimulate or induce secondary effects in the form of associated investments and changed patterns of social and economic activities. Such secondary effects, through their impact on existing community facilities and activities, or through change in natural conditions, may often be more substantial than the primary effects of the original action itself." 40 C.F.R. Sec. 1500.6(b). 1509.8(a)(3)(ii).

5. It is inescapable that the marina permit will accelerate upland development. The anticipated population of 15,000 part-time residents will clearly be more imminent with the marina than without it. Acceleration of the development will have a significant effect on the environment.

6. A finding of a significant effect on the environment compels this Court to order the issuance by the Corps of Engineers of an environmental impact statement in accordance with the specific technical requirements of NEPA.

7. In spite of its finding of a significant effect on the environment, this Court finds in the District Engineer's record "a wide-ranging, good-faith assessment by the Corps of Engineers of the potential environmental impact of the proposed project." *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973). In addition, this Court finds "no basis for any suggestions that the decision was arbitrary or reached without adequate consideration of environmental factors." *Rucker v. Willis, supra*, at 162, citing *Conservation Council v. Froehlke*, 473 F.2d 664 (4th Cir. 1973). This Court's determination as to the adequacy of the consideration of environmental factors may be quite different from that of another judge or another district engineer. What is perceived to be an adequate and thorough examination of the consequences of federal action to one judge might be viewed as totally inadequate by another judge. For this reason, NEPA must be complied with so that the sufficiency of the environmental assessment will not be forever questioned.

8. The Corps of Engineers consulted with all appropriate Federal, State and local agencies and the public and assessed in detail the potential environmental impact of its action so as to comply with many of the policies and goals behind NEPA. This Court is therefore of the view that although the formal environmental impact statement was not filed before the agency decision, the assessment was of sufficient value for this Court to validate the Corps' decision to issue the permit, to be invalidated in the future if the Corps should reach a contrary decision as a result of the environmental impact statement or if this Court should find the District Engineer's decision on the basis of the environmental impact statement unreasonable.

9. This Court will not order the invalidation of the Section 10 permit on two grounds: (1) This Court is of the view that the Corps of Engineers conducted a wide-ranging, good-faith assessment of the potential environmental impact of the proposed project. *Rucker v. Willis, supra,* at 162. (2) A balancing of the equities demands that the permit not be invalidated and that the activities of the Corporation not be enjoined.

. . . .

C. Federal Water Pollution Control Act

1. Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Sec. 1311(a), provides in relevant part that:

> "Except as in compliance with this section and sections . . . 402. and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

2. Sections 402 and 404 provide for the issuance of permits for discharges which would otherwise be unlawful under Section 301(a).

3. Section 502(12), 33 U.S.C. Sec. 1362(12), defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source . . . ." Section 502(6), 33 U.S.C. Sec. 1362(6), defines "pollutant" to include "dredged spoil . . . rock, (and) sand."

. . . .

5. Jurisdiction over "waters of the United States" extends "well beyond the mean high water mark to marsh wetlands which are regularly or periodically inundated. [Citations omitted.]

6. The Corps of Engineers' regulations which have governed the Corps' position with regard to the coastal salt meadows in this case were directly declared invalid by the United States District Court for the District of Columbia on March 27, 1975. In his order, Judge Aubrey E. Robinson states:

> "1. Congress by defining the term 'navigable waters' in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. Sections 1251, *et seq.* (the 'Water Act') to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability."

Natural Resources Defense Council v. Callaway, 392 F.Supp. 685 (D.D.C.1975).

Judge Robinson ordered the revocation of the Corps' regulations and the publication of final regulations clearly recognizing the full regulatory mandate of the Water Act. As of this date, proposed regulations have been filed; final regulations are forthcoming.

7. Under all of the proposed regulations which have been submitted by the Corps and under the above-mentioned cases, the approximately ten acres of salt meadow wetlands which are within the Corporation's disposal site constitute "waters of the United States." This land is subject to periodic inundation by the tides.

8. The Corporation's filling activities on wetlands "regularly or periodically inundated by tidal waters constitute a discharge in the 'waters of the United States' and are thus a violation of Section 301(a) of the 1972 Amendments to the Federal Water Pollution Control Act (33 U.S.C. Section 1311 (a))." *U. S. v. Smith, supra,* at 1939.

9. Defendant Corporation is accordingly ordered to apply for an after-the-fact permit from the Corps of Engineers for the discharge of the dredge material at the disposal site.

10. Although the 1972 Water Act Amendments have been violated and will continue to be violated (until the Section 404 permit is issued), the violation is a minimal, technical violation under fast-changing, unstable law.

11. This Court recognizes the difficulty in distinguishing the wetlands in one case from the wetlands in another and has therefore found a violation of the Water Act. Nevertheless, this Court will not restrain the Corporation from its further use of the dredge deposit area pending its application for a permit. The decision not to restrain further use of the area is based on this Court's determination that the violation is a minimal, technical violation and that a weighing of the practicalities and the hardships demands that the Corporation not be so enjoined.

. . . .

E. Equity

This Court will not order the Corporation to physically restore its land to its previous condition. Nor will this Court restrain the Corporation from its full use of the marina or its continued work with respect to the access channel, the marina basin, the marina, or the disposal site. Nor will this Court compel the Corps of Engineers to reprocess the Section 10 permit application. The Corps of Engineers must process and file an impact statement in accordance with NEPA. The Corporation must file an application for an after-the-fact Section 404 permit pursuant to the Water Act. If, as a result of either the environmental impact statement or the Section 404 permit application, the Corps of Engineers revokes the Section 10 permit or refuses to allow the Corporation's Section 404 application, injunctive action will be reconsidered.

In a situation such as this, a court of equity is not obligated to grant the injunctive relief which the plaintiffs seek. This Court rejects the possibility of ordering the Corporation to restore the marina site to its previous state only to allow the marina project at some future date. This lawsuit has already inflicted grievous injury upon the Corporation, and this Court refuses to add to such injury without full confidence that such action is proper.

The public interest would be adversely affected by such injunctive relief. With such an injunction, the citizens of North Carolina would clearly be deprived of the unencumbered use of 9,000 acres of valuable salt marshes and Atlantic coast beaches (if they have not already been so deprived).

This Court's consciousness of the inevitability of the development of the Island has had a significant effect on its decision not to enjoin the Corporation. It is this Court's opinion that the development of this privately owned island, as planned, with the conditions which are attached to this permit, would have a more favorable environmental impact than the sort of development which will ensue if the Corporation is forced to abandon its project. An injunction would clearly force the Corporation to permanently abandon a project which is in the public interest.

Accordingly, the project will not be halted pending the release of the environmental impact statement, and the use of the dredge disposal area will not be restrained pending the Corporation's application for an after-the-fact Section 404 permit.

The Corps of Engineers was not eager to shoulder this new jurisdictional burden as indicated by its 1974 regulations which retained the same jurisdiction as previously exercised.[2] The Corps' refusal to recognize its new jurisdiction foreshadowed the demise of the §404 program and the destruction of the wetlands sought to be protected by the Act. Ultimately, suit was brought to require the Corps to conform to the new test of navigability. As a result of this suit, the Corps of Engineers issued new regulations which acknowledged the expanded jurisdiction.

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2. 39 Fed. Reg. 121195 et seq. (April 3, 1974).

NATIONAL RESOURCES DEFENSE COUNCIL v. CALLOWAY

392 F. Supp. 685 (D.D.C. 1975)

DECLARATION AND ORDER OF FINAL JUDGMENT

AUBREY E. ROBINSON, Jr., District Judge.

Plaintiffs have moved for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting partial summary judgment in favor of Plaintiffs on Count I of the Complaint; and Defendants' having moved to dismiss the complaint on all counts; and the Court having heard argument of counsel, the Motion for Partial Summary Judgment on Count I of the Complaint is granted; and it is DECLARED that:

1. Congress by defining the term "navigable waters" in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1251 et seq. (the "Water Act") to mean "the waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability.

2. Defendants Howard H. Callaway, Secretary of the Army, and Lt. Gen. William C. Gribble, Chief, Army Corps of Engineers, are without authority to amend or change the statutory definition of navigable waters and they are hereby declared to have acted unlawfully and in derogation of their responsibilities under Section 404 of the Water Act by the adoption of the definition of navigability described at 33 C.F.R. § 209.210(d)(1), 39 Federal Register 12119 (April 3, 1974) and 33 C.F.R. 209.260, and it is ordered that Defendants Callaway and Gribble:

1. Revoke and rescind so much of 39 Federal Register 12115, et seq. (April 3, 1974) as limits the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than "the waters of the United States."

2. Publish within fifteen (15) days of the date of this Order proposed regulations clearly recognizing the full regulatory mandate of the Water Act.

3. Publish within thirty (30) days of the date of this Order final regulations clearly recognizing the full regulatory mandate of the Water Act; and it is

Further ordered that the Clerk of this Court shall enter a final Judgment upon this Order Granting Plaintiffs' Motion for Partial Summary Judgment, the Court expressly having determined that there is no just reason for delay in the entry of final Judgment on this Order; and it is

Further ordered that Defendants' Motion to Dismiss be and hereby is denied.

CORPS OF ENGINEERS PERMIT GUIDELINES

33 C.F.R. §209.120 (1976)

(d) Definitions. For the purpose of issuing or denying authorizations under this regulation.

(1) *"Navigable waters of the United States."* The term, "navigable waters of the United States," is administratively defined to mean waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate commerce landward to their ordinary high water mark and up to the head of navigation as determined by the Chief of Engineers, and also waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high water mark on the Pacific Coast). See 33 CFR 209.260 (ER 1165-2-302) for a more definitive explanation of this term."

(2) *"Navigable waters"*. (i) The term, "navigable waters," as used herein for purposes of Section 404 of the Federal Water Pollution Control Act, is administratively defined to mean waters of the United States including the territorial seas with respect to the disposal of fill material and excluding the territorial seas with respect to the disposal of dredged material and shall include the following waters:

(*a*) Coastal waters that are navigable waters of the United States subject to the ebb and flow of the tide, shoreward to their mean high water mark (mean higher high water mark on the Pacific coast);

(*b*) All coastal wetlands, mudflats, swamps, and similar areas that are contiguous or adjacent to other navigable waters. "Coastal wetlands" includes marshes and shallows and means those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction;

• • • •

(*d*) All artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, landward to their ordinary high water mark;

(*e*) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

• • • •

(*i*) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality as expressed in the guidelines (40 CFR 230). For example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters identified in paragraphs (*a*)–(*h*), a decision on jurisdiction shall be made by the District Engineer.

(ii) The following additional terms are defined as follows:

• • • •

(*b*) *"Mean high water mark"* with respect to ocean and coastal waters means the line on the shore established by the average of all high tides (all higher high tides on the Pacific Coast). It is established by survey based on available tidal data (preferably averaged over a period of 18.6 years because of the variations in tide). In the absence of such data, less precise methods to determine the mean high water mark may be used, such as physical markings or comparison of the area in question with an area having similar physical characteristics for which tidal data are already available;

• • • •

(*e*) *"Primary tributaries"* means the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries.

(3) *"Ocean waters"*. The term "ocean waters," as defined in the Marine Protection, Research, and Sanctuaries Act of 1972 (P.L. 92–532, 86 Stat. 1052), means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(4) *"Dredged material"*. The term "dredged material" means material that is excavated or dredged from navigable waters. The term does not include material resulting from normal farming, silvaculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for production of food, fiber, and forest products.

(5) *"Discharge of dredged material"*. The term "discharge of dredged material" means any addition of dredged material, in excess of one cubic yard when used in a single or incidental operation, into navigable waters. The term includes, without limitation, the addition of dredged material to a specified disposal site located in navigable waters and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into navigable waters resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to section 402 of the Federal Water Pollution Control Act even though the extraction of such material may require a permit from the Corps of Engineers under section 10 of the River and Harbor Act of 1899.

(6) *"Fill material."* The term "fill material" means any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose. "Fill material" does not include the following:

(i) Material resulting from normal farming, silvaculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products;

(ii) Material placed for the purpose of maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.

(iii) Additions to these categories of activities that are not "fill" will be considered periodically and these regulations amended accordingly.

(7) *"Discharge of fill material."* The term "discharge of fill material" means the addition of fill material into navigable waters for the purpose of creating fastlands, elevations of land beneath navigable waters, or for impoundments of water. The term generally includes, without limitation, the following activities: placement of fill that is necessary to the construction of any structure in a navigable water; the building of any structure or impoundment requiring rock, sand, dirt, or other pollutants for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands, property protection and/or reclamation devices such as riprap, groins, seawalls, breakwalls, and bulkheads and fills; beach nourishment; levees; sanitary

landfills; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants, and subaqueous utility lines; and artificial reefs.

(8) *"Person".* The term "person" means any individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, any interstate body or any agency or instrumentality of the Federal Government, other than the Corps of Engineers (see 33 CFR 209.145 for procedures for Corps projects).

(9) *"Coastal zone."* The term "coastal zone" means the coastal waters and adjacent shorelands designated by a State as being included in its approved coastal zone management program under the Coastal Zone Management Act of 1972.

(e) *Activities Requiring Authorizations.* (1) Structures or work in navigable waters of the United States. Department of the Army authorizations are required under the River and Harbor Act of 1899 (See paragraph (b) of this section) for all structures or work in navigable waters of the United States except for bridges and causeways (see Appendix A), the placement of aids to navigation by the U.S. Coast Guard, structures constructed in artificial canals within principally residential developments where the canal has been connected to a navigable water of the United States (see paragraph (g) (11) of this section), and activities that were commenced or completed shoreward of established harbor lines before May 27, 1970 (see 33 CFR § 209.150) other than those activities involving the discharge of dredged or fill material in navigable waters after October 18, 1972.

. . . .

(ii) Structures or work licensed under the Federal Power Act of 1920 do not require Department of the Army authorizations under the River and Harbor Act of 1899 (see paragraphs (b) and (c) of this section); *Provided, however,* That any part of such structures or work that involves the discharge of dredged or fill material into navigable waters or the transportation of dredged material for the purpose of dumping it into ocean waters will require Department of the Army authorization under Section 404 of the Federal Water Pollution Control Act and Section 103 of the Marine Protection, Research, and Sanctuaries Act, as appropriate.

(2) *Discharges of dredged material or of fill material into navigable waters.* (i) Except as provided in subparagraphs (2) (ii) and (iii) of this paragraph, Department of the Army permits will be required for the discharge of dredged material or of fill material into navigable waters in accordance with the following phased schedule:

(*a*) *Phase I:* After the effective date of this regulation, discharges of dredged material or of fill material into coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States and freshwater wetlands contiguous or adjacent thereto are subject to the procedures of this regulation.

(*b*) *Phase II:* After July 1, 1976, discharges of dredged material or of fill material into primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes are subject to the procedures of this regulation.

(*c*) *Phase III:* After July 1, 1977, discharges of dredged material or of fill material into any navigable water are subject to the procedures of this regulation.

. . . .

(3) *Transportation of dredged material for the purpose of dumping it in ocean waters and construction of artificial islands and fixed structures on the outer continental shelf.* Department of the Army authorizations are required for the transportation of dredged material for the purpose of dumping it in ocean waters and construction of artificial islands and fixed structures on the outer continental shelf pursuant to Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 and Section 4(f) of the Outer Continental Shelf Lands Act, respectively.

(4) *Activities of Federal Agencies.* Except as specifically provided in this subparagraph, activities of the type described in paragraph (e) (1), (2), and (3) of this section done by or on behalf of any Federal agency, other than the Corps of Engineers, are subject to the authorization procedures of this regulation. Agreement for construction or engineering services performer for other agencies by the Corps of Engineers do not constitute authorization under the regulation. Division and District Engineers will therefore advise Federal agencies accordingly and cooperate to the fullest extent in the expediting processing of their applications.

. . . .

(ii) The policy provisions set out in paragraph (f) (3) of this section, relating to State or local authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are required to comply with the substantive State, interstate, and local water-quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provisions of the Federal Water Pollution Control Act, as amended, in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 11752, dated Dec. 17, 1973.) They are not required, however, to obtain and provide certification of compliance with effluent limitations and water-quality standards from State or interstate water pollution control agencies in connection with activities involving discharges into navigable waters.

iii. Criteria for Permit Issuance

In issuing permits, either §10 or §404, the Corps of Engineers must have certain criteria with which to judge the feasibility of the proposed project. In the early years of §10, the only consideration was whether the proposed project obstructed navigation.[3] Nevertheless, with the advent of environmental concern, the enactment of the Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§661 et seq. (1970), and the signing of the Memorandum of Understanding by the Secretaries of the Army and the Interior,[4] ecological factors crept into the permit criteria. To comply with this change of emphasis, the Corps published new regulations which included ecological and environmental factors in the §10 permit criteria.[5] These new regulations were subjected to challenge as is seen in the following case.

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3. Miami Beach Jockey Club Inc. v. Dern, 86 F.2d 135 (D.C. Cir.), (Per Curiam), cert. denied, 299 U.S. 556 (1936).

4. 33 C.F.R. §209.120 Appendix B (1976).

5. 33 C.F.R. §209.330(a) (1968).

ZABEL v. TABB

United States Court of Appeals, Fifth Circuit 1970
430 F. 2d 199

JOHN R. BROWN, Chief Judge:

It is the destiny of the Fifth Circuit to be in the middle of great, oftentimes explosive issues of spectacular public importance. So it is here as we enter in depth the contemporary interest in the preservation of our environment. By an injunction requiring the issuance of a permit to fill in eleven acres of tidelands in the beautiful Boca Ciega Bay in the St. Petersburg-Tampa, Florida area for use as a commercial mobile trailer park, the District Judge held that the Secretary of the Army and his functionary, the Chief of Engineers, had no power to consider anything except interference with navigation. There being no such obstruction to navigation, they were ordered to issue a permit even though the permittees acknowledge that "there was evidence before the Corps of Engineers sufficient to justify an administrative agency finding that [the] fill would do damage to the ecology or marine life on the bottom." We hold that nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see.

I

Genesis: The Beginning

In setting the stage we draw freely on the Government's brief. This suit was instituted by Landholders, Zabel and Russell, on May 10, 1967, to compel the Secretary of the Army to issue a permit to dredge and fill in the navigable waters of Boca Ciega Bay, in Pinellas County near St. Petersburg, Florida.

Landholders own land riparian to Boca Ciega Bay, and adjacent land underlying the Bay. It is navigable water of the United States on the Gulf side of Pinellas Peninsula, its length being traversed by the Intracoastal Waterway, which enters Tampa Bay from Roca Ciega Bay and is thus an arm of the Gulf of Mexico. The Zabel and Russell property is located about one mile from the Intracoastal Waterway.

Landholders desire to dredge and fill on their property in the Bay for a trailer park, with a bridge or culvert to their adjoining upland. To this purpose they first applied to the state and local authorities for permission to perform the work and obtained the consent or approval of all such agencies having jurisdiction to prohibit the work, ...

Landholders then applied to the Corps of Engineers for a federal permit to perform the dredging and filling. [There were many public objections to the granting of this permit.] The United States Fish and Wildlife Service, Department of the Interior, also opposed the dredging and filling because it "would have a distinctly harmful effect on the fish and wildlife resources of Boca Ciega Bay."

. . . .

. . .

[T]he Secretary of the Army denied the application on February 28, 1967, because issuance of the requested permit:

1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,

2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662),

3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County, and

4. Would be contrary to the public interest.

Landholders then instituted this suit to review the Secretary's determination and for an order compelling him to issue a permit. They urged that the proposed work would not hinder navigation and that the Secretary had no authority to refuse the permit on other grounds. They acknowledged that "there was evidence before the Corps of Engineers sufficient to justify an administrative agency finding that our fill would do damage to the ecology or marine life on the bottom." The Government urged lack of jurisdiction and supported the denial of the permit on authority of § 10 of the Rivers and Harbors Act of March 3,

1899, 30 Stat. 1121, 1151, 33 U.S.C.A. § 403, giving the Secretary discretion to issue permits and on the Fish and Wildlife Coordination Act of March 10, 1934, 48 Stat. 401, as amended, 16 U.S.C.A. §§ 661 and 662(a), requiring the Secretary to consult with the Fish and Wildlife Service and state conservation agencies before issuing a permit to dredge and fill.

The District Court held that it had jurisdiction, that the Fish and Wildlife Coordination Act was not authority for denying the permit, . . .
The Court granted summary judgment for Landholders and directed the Secretary of the Army to issue the permit. This appeal followed.

The question presented to us is whether the Secretary of the Army can refuse to authorize a dredge and fill project in navigable waters for factually substantial ecological reasons even though the project would not interfere with navigation, flood control, or the production of power. To answer this question in the affirmative, we must answer two intermediate questions affirmatively. (1) Does Congress for ecological reasons have the power to prohibit a project on private riparian submerged land in navigable waters? (2) If it does, has Congress committed the power to prohibit to the Secretary of the Army?

IV

Prohibiting Obstructions to Navigation

The action of the Chief of Engineers and the Secretary of the Army under attack rests immediately on the Rivers and Harbors Act, 33 U.S.C.A. § 403, which declares that "the creation of any obstruction * * * to the navigable capacity of any of the waters of the United States is prohibited." . . .

The Act itself does not put any restrictions on denial of a permit or the reasons why the Secretary may refuse to grant a permit to one seeking to build structures on or dredge and fill his own property. Although the Act has always been read as tempering the outright prohibition by the rule of reason against arbitrary action, the Act does flatly forbid the obstruction. The administrator may grant permission on conditions and conversely deny permission when the situation does not allow for those conditions.

But the statute does not prescribe either generally or specifically what those conditions may be. The question for us is whether under the Act the Secretary may include conservation considerations as conditions to be met to make the proposed project acceptable. Until now there has been no absolute answer to this question. In fact, in most cases under the Rivers and Harbors Act the Courts have been faced only with navigation problems." [Citations omitted.

One very big exception is United States ex rel. Greathouse v. Dern, 1933, 289 U.S. 352, 53 S.Ct. 614, 77 L.Ed. 1250. There petitioners sought a writ of mandamus to compel the Secretary of War and the Chief of Engineers to issue a permit to build a wharf in navigable waters. The Secretary, specifically finding that it would not interfere with navigation, denied the permit. The Supreme Court held that mandamus would not issue because the allowance of mandamus "is controlled by equitable principles * * * and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right." The reason was that the United States had plans to condemn petitioners' land for use as a means of access to a proposed parkway. Allowing a wharf to be built would increase the expense to the government since it would increase the market value of the land and would require the government to pay for tearing down the wharf. The importance of *Greathouse* is that it recognized that the Corps of Engineers does not have to wear navigational blinders when it considers a permit request. That there must be a reason does not mean that the reason has to be navigability.

But such circuity is not necessary. Governmental agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometimes effectuate and other times not thwart other valid statutory governmental policies. And here the government-wide policy of environmental conservation is spectacularly revealed in at least two statutes, The Fish and Wildlife Coordination Act and the National Environmental Policy Act of 1969.

[4] The Fish and Wildlife Coordination Act clearly requires the dredging and filling agency (under a governmental permit), whether public or private, to consult with the Fish and Wildlife Ser-

vice, with a view of conservation of wildlife resources. If there be any question as to whether the statute directs the licensing agency (the Corps) to so consult it can quickly be dispelled. Common sense and reason dictate that it would be incongruous for Congress, in light of the fact that it intends conservation to be considered in private dredge and fill operations (as evidenced by the clear wording of the statute), not to direct the only federal agency concerned with licensing such projects both to consult and to take such factors into account.

The second proof that the Secretary is directed and authorized by the Fish and Wildlife Coordination Act to consider conservation is found in the legislative history. The Senate Report on the Fish and Wildlife Coordination Act states:

> "Finally, the nursery and feeding grounds of valuable crustaceans, such as shrimp, as well as the young of valuable marine fishes, may be affected by dredging, filling, and diking operations often carried out to improve navigation and provide new industrial or residential land.
>
> * * * * * *
>
> Existing law has questionable application to projects of the Corps of Engineers for the dredging of bays and estuaries for navigation and filling purposes. More seriously, existing law has no application whatsoever to the dredging and filling of bays and estuaries by private interests or other non-Federal entities in navigable waters under permit from the Corps of Engineers. This is a particularly serious deficiency from the standpoint of commercial fishing interests. The dredging of these bays and estuaries along the coastlines to aid navigation and also to provide land fills for real estate and similar developments, both by Federal agencies or other agencies under permit from the Corps of Engineers, has increased tremendously in the last 5 years. Obviously, dredging activity of this sort has a profound disturbing effect on aquatic life, including shrimp and other species of tremendous significance to the commerical fishing industry. The bays, estuaries, and related marsh areas are highly important as spawning and nursery grounds for many commerical species of fish and shellfish."

S.Rep. No. 1981, 85th Cong.2d Sess. (July 28, 1958). 1958 U.S.Code Cong. & Admin.News, pp. 3446, 3448, 3450. This Report clearly shows that Congress intended the Chief of Engineers and Secretary of the Army to consult with the Fish and Wildlife Service before issuing a permit for a private dredge and fill operation.

The meaning and application of the Act are also reflected by the actions of the Executive that show the statute authorizes and directs the Secretary to consult with the Fish and Wildlife Service in deciding whether to grant a dredge and fill permit.

In a Memorandum of Understanding between the Secretary of the Army and the Secretary of the Interior, it is provided that, upon receipt of an application for a permit to dredge or fill in navigable waters, the District Engineer of the Corps of Engineers concerned is required to send notices to all interested parties, including the appropriate Regional Directors of the Federal Water Pollution Control Administration, the Fish and Wildlife Service, the National Park Service and the appropriate state conservation, resources, and water pollution agencies. The District Engineer is given the initial responsibility of evaluating all relevant factors in reaching a decision as to whether the particular permit involved should be granted or denied. The Memorandum also provides that in case of conflicting views the ultimate decision shall be made by the Secretary of the Army after consultation with the Secretary of the Interior.

This Executive action has almost a virtual legislative imprimatur from the November 1967 Report of the House Committee on Merchant Marine and Fisheries, in reporting favorably on a bill to protect estuarine areas which was later enacted into law. As a result of the effective operation of the Interdepartmental Memorandum of Understanding, the Interior Department and the Committee concluded that it was not necessary to provide for dual permits from Interior and Army.

The intent of the three branches has been unequivocally expressed: The Secretary must weigh the effect a dredge and fill project will have on conservation before he issues a permit lifting the Congressional ban.

The parallel of momentum as the three branches shape a national policy gets added impetus from the National Environmental Policy Act of 1969, Public Law 91–190, 42 U.S.C.A. §§ 4331–4347. This Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment.

Although this Congressional command was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards f today. . . . [W]e hold that while it is still the action of the Secretary of the Army on the recommendation of the Chief of Engineers, the Army must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors. In rejecting a permit on non-navigational grounds, the Secretary of the Army does not abdicate his sole ultimate responsibility and authority. Rather in weighing the application, the Secretary of the Army is acting under a Congressional mandate to collaborate and consider all of these factors.

To judge the ebb and flow of the national tide, he can look to the Report of the House Committee on Government Operations. Although this perhaps lacks traditional standing of legislative history, it certainly has relevance somewhat comparable to an Executive Commission Report. On March 17, 1970, it approved and adopted a Report, based on a study made by its Conservation and Natural Resources Subcommittee, entitled Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution. (H.Rep. No. 91–917, 91st Cong. 2d Sess. (1970)) The first section stifles any doubt as to how this part of Congress construes the Corps' duty under the Rivers and Harbors Act. The section traces the historical interpretation of the Corps' power under the Rivers and Harbors Act. It commends the Corps for recognizing ecological considerations under the Act to protect against unnecessary fills and cites the instant case. But following the temper of the times, the report by bold face black type cautions against any easy overconfidence and charges the Corps with ever-increasing vigilance.

[8] When the House Report and the National Environmental Policy Act of 1969 are considered together with the Fish and Wildlife Coordination Act and its interpretations, there is no doubt that the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act.

VII

Conclusion

Landholders' contentions fail on all grounds. The case is reversed and since there are no questions remaining to be resolved by the District Court, judgment is rendered for the Government and the associated agent-defendants.

Reversed and rendered.

With the enactment of NEPA and §404, environmental factors moved to the forefront in permit deliberations. The following Corps of Engineers' regulations present the current criteria.

CORPS OF ENGINEERS PERMIT GUIDELINES

33 C.F.R. §209.120 (1976)

(f) *General Policies for Evaluating Permit Applications.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed structure or work and its intended use on the public interest. Evaluation of the probable impact that the proposed structure or work may have on the public interest requires a careful weighing of all those factors that become relevant in each particular case. The benefit that reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal and, if authorized, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process (e.g., see § 209.400, Guidelines for Assessment of Economic, Social and Environmental Effects of Civil Works Projects). That decision should reflect the national concern for both protection and utilization of important resources. All factors that may be relevant to the proposal must be considered; among those factors are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood-damage prevention, land-use classifications, navigation, recreation, water supply, water quality, and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work.

(ii) The desirability of using appropriate alternative locations and methods to accomplish the objective of the proposed structure or work.

(iii) The extent and permanence of the beneficial and/or detrimental effects that the proposed structure or work may have on the public and private uses to which the area is suited.

(iv) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated structures or work in the general area.

. . . .

(4) The District Engineer shall consider the recommendations of the appropriate Regional Director of the Bureau of Sport Fisheries and Wildlife, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of appropriate State agencies in administering the policies and procedures of the regulation.

(g) *Policies on particular factors of consideration.* In applying the general policies cited above to the evaluation of a permit application, Corps of Engineers officials will also consider the following policies when they are applicable to the specific application:

(1) *Interference with adjacent properties or water resource projects.* Authorization of work or structures by the Department of the Army does not convey a property right, nor authorize any injury to property or invasion of other rights.

(i) (*a*) Because a landowner has the general right to protect his property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, the District Engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of government resources. A significant probability of resulting damage to nearby properties can be a basis for denial of an application.

(*b*) A landowner's general right of access to navigable waters is subject to the similar rights of access held by nearby landowners and to the general public's right of navigation on the water surface. Proposals which create undue interference with access to, or use of, navigable waters will generally not receive favorable consideration.

(ii) (*a*) Where it is found that the work for which a permit is desired may interfere with a proposed civil works project of the Corps of Engineers, the applicant and the party or parties responsible for fulfillment of the requirements of local cooperation should be apprised in writing of the fact and of the possibility that a civil works project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction.

(*b*) Proposed activities which are in the area of a civil works project which exists or is under construction will be evaluated to insure that they are compatible with the purposes of the project.

(2) *Non-Federal dredging for navigation.* (i) The benefits which an authorized Federal navigation project is intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging an access channel to dock and berthing facilities or deepening such a channel to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and mainte-

nance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, State, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-federal activities which are not so coordinated will be individually evaluated in accordance with paragraph (f) of this section. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will, therefore, be accorded to the fullest extent possible to both Federal and non-Federal operations. Furthermore, permits for non-Federal dredging operations will contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained, disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

(ii) A permit for the dredging of a channel, slip, or other such project for navigation will also authorize the periodic maintenance dredging of the project. Authority for maintenance dredging will be subject to revalidation at regular intervals to be specified in the permit.

• • • •

(3) *Effect on wetlands.* (i) Wetlands are those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage. Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps, and similar areas in coastal and inland navigable waters. Many such areas serve important purposes relating to fish and wildlife, recreation, and other elements of the general public interest. As environmentally vital areas, they constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.

(ii) Wetlands considered to perform functions important to the public interest include:

(*a*) Wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;

(*b*) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(*c*) Wetlands contiguous to areas listed in paragraph (g)(3)(ii) (*a*) and (*b*) of this section, the destruction or alteration of which would affect detrimentally the natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics of the above areas;

(*d*) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands often include barrier beaches, islands, reefs and bars;

(*e*) Wetlands which serve as valuable storage areas for storm and flood waters; and

(*f*) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected.

(iii) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it is part of a complete and interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas, in response to new applications, and in consultation with the appropriate Regional Director of the Bureau of Sport Fisheries and Wildlife, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate State agency to assess the cumulative effect of activities in such areas.

(iv) Unless the public interest requires otherwise, no permit shall be granted for work in wetlands identified as important by subparagraph (3)(ii), of this paragraph, unless the District Engineer concludes, on the basis of the analysis required in paragraph (f) of this section, that the benefits of the proposed alteration outweigh the damage of the wetlands resource and the proposed alteration is necessary to realize those benefits.

(*a*) In evaluating whether a particular alteration is necessary, the District Engineer shall primarily consider whether the proposed activity is dependent upon the wetland resources and environment and whether feasible alternative sites are available.

(*b*) The applicant must provide sufficient data on the basis of which the availability of feasible alternative sites can be evaluated.

(v) In accordance with the policy expressed in paragraph (f)(3) of this section, and with the Congressional policy expressed in the Estuary Protection Act, PL 90–454, state regulatory laws or programs for classification and protection of wetlands will be given great weight. (See also paragraph (g)(18) of this section).

(4) *Fish and wildlife.* (i) In accordance with the Fish and Wildlife Coordination Act (see paragraph (c)(5) of this section) Corps of Engineers officials will in all permit cases, consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which the work is to be performed, with a view to the conservation of wildlife resources by pre-

vention of their loss and damage due to the work or structures proposed in a permit application (see paragraphs (i) (1) (ii) and (j) (2) of this section). They will give great weight to these views on fish and wildlife considerations in evaluating the application. The applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases the permit may be conditioned to accomplish this purpose.

(5) *Water quality.* (i) Applications for permits for activities which may affect the quality of navigable waters will be evaluated with a view toward compliance with applicable effluent limitations and water quality standards during both the construction and operation of the proposed activity. . . . Any permit issued may be conditioned to implement water quality protection measures.

(6) *Historic, scenic, and recreational values.* (i) Applications for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on the enhancement, preservation, or development of such values. Recognition of those values is often reflected by State, regional, or local land use classifications (see paragraph (f) (3) of this section), or by similar Federal controls or policies. In both cases, action on permit applications should, insofar as possible, be consistent with, and avoid adverse effect on, the values or purposes for which those classifications, controls, or policies were established.

(ii) Specific application of the policy in paragraph (g) (6) (i) of this section, applies to:

(a) Rivers named in Section 3 of the Wild and Scenic Rivers Act (82 Stat. 906, 16 U.S.C. 1273 et seq.), and those proposed for inclusion as provided by sections 4 and 5 of the Act, or by later legislation.

(b) Historic, cultural, or archeological sites or practices as provided in the National Historic Preservation Act of 1966 (80 Stat. 852, 42 U.S.C. 4321 et seq.) (see also Executive Order 11593, May 13, 1971, and Statutes there cited). Particular attention should be directed toward any district, site, building, structure, or object listed in the National Register of Historic Places. Comments regarding such undertakings shall be sought and considered as provided by paragraph (i) (2) (iii) of this section.

(c) Sites included in the National Registry of Natural Landmarks which are published periodically in the FEDERAL REGISTER.

(d) Any other areas named in Acts of Congress or Presidential Proclamations as National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, and such areas as may be established under Federal law for similar and related purposes, such as estuarine and marine sanctuaries.

(7) *Structures for small boats.* As a matter of policy, in the absence of overriding public interest, favorable consideration will be generally be given to applications from riparian proprietors for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected.

(8) *Aids to navigation.* (i) The placing of non-Federal fixed and floating aids to navigation in a navigable water of the United States is within the purview of section 10 of the River and Harbor Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of their control of marking, lighting and standardization of such navigation aids. Applications for permits for installation of aids to navigation will, therefore, be coordinated with the appropriate District Commander, U.S. Coast Guard, and permits for such aids will include a condition to the effect that the permittee will conform to the requirements of the Coast Guard for marking, lighting, etc.

(9) *Outer continental shelf.* Artificial islands and fixed structures located on the outer continental shelf are subject to the standard permit procedures of this regulation. Where the islands or structures are to be constructed on lands which are under mineral lease from the Bureau of Land Management, Department of the Interior, that agency, in cooperation with other Federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security.

(10) *Effect on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or baseline from which the three mile belt is measured for purposes of the Submerged Lands Act and International Law. Generally, the coast line or base line is the line of ordinary low water on the mainland; however, there are exceptions where there are islands or low-tide elevations off shore. (See the Submerged Lands Act, 67 Stat 29, U.S. Code section 1301(c), and United States v. California, 381 U.S 139 (1965), 382 U.S. 448 (1966)). All applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine wheth-

er the coast line or baseline might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The District Engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, D.C. 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the file of the application. After completion of standard processing procedures, the file will be forwarded to the Chief of Engineers. The decision in the application will be made by the Secretary of the Army after coordination with the Attorney General.

(11) *Canals and other artificial waterways connected to navigable waters.* (i) A canal or similar artificial waterway is subject to the regulatory authorities discussed in paragraph (b) (2) of this section if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, condition, or capacity. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of this regulation. For all other canals the exercise of regulatory authority is restricted to those activities which affect the course, condition, or capacity of the navigable waters of the United States. Examples of the latter may include the length and depth of the canal; the currents circulation, quality and turbidity of its waters, especially as they affect fish and wildlife values; and modifications or extensions of its configuration.

* * * *

(17) *Discharge of dredged or fill material in navigable waters or dumping of dredged material in ocean waters.* (i) Applications for permits for the discharge of dredged or fill material into navigable waters at specific disposal sites will be reviewed in accordance with guidelines promulgated by the Administrator, EPA, under authority of section 404(b) of the Federal Water Pollution Control Act. If the EPA guidelines alone prohibit the designation of a proposed disposal site, the economic impact on navigation and anchorage of the failure to authorize the use of the proposed disposal site in navigable waters will also be considered in evaluating whether or not the proposed discharge is in the public interest.

(ii) Applications for permits for the transporting of dredged material for the purpose of dumping it into ocean waters will be evaluated to determine that the proposed dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. In making the evaluation, Corps of Engineers officials will apply criteria established by the Administrator, EPA, under authority of section 102 (a) of the Marine Protection, Research and Sanctuaries Act of 1972, and will specify the dumping sites, using the recommendations of the Administrator, pursuant to section 102(c) of the Act, to the extent feasible. (See 40 CFR Part 220). In evaluating the need for the dumping as required by paragraph (f) (2) (i) of this section, Corps of Engineers officials will consider the potential effect of a permit denial on navigation, economic and industrial development, and foreign and domestic commerce of the United States.

(iii) Sites previously designated for use as disposal sites for discharge or dumping of dredged material will be specified to the maximum practicable extent in permits for the discharge or dumping of dredged material in navigable waters or ocean waters unless restricted by the Administrator, EPA, in accordance with section 404(c) of the Federal Water Pollution Control Act or section 102(c) of the Marine Protection, Research, and Sanctuaries Act of 1972.

(iv) Prior to actual issuance of permits for the discharge or dumping of dredged or fill material in navigable or ocean waters, Corps of Engineers officials will advise appropriate Regional Administrators, EPA, of the intent to so issue permits. If the Regional Administrator advises, within fifteen days of the advice of the intent to issue, that he objects to the issuance of the permits, the case will be forwarded to the Chief of Engineers in accordance with paragraph (s) of this section, for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain an analysis for a determination by the Secretary of the Army that there is no economically feasible method or site available other than that to which the Regional Administrator objects. (See also paragraphs (b) (7) and (b) (8) of this section.)

(18) *Activities in coastal zones and marine sanctuaries.* (i) Applications for Department of the Army authorizations for activities in the coastal zones of those States having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued until the applicant has certified that his proposed activity complies with the coastal zone management program and the appropriate State agency has concurred with the certification or has waived its right to do so (see paragraph (i) (2) (ii) of this section); however, a permit may be issued if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interest of national security.

(ii) Applications for Department of the Army authorization for activities in a marine sanctuary established by the Secretary of Commerce under authority of section 302 of the Marine Protection,

Research, and Sanctuaries Act of 1972 will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title III of the Marine Protection, Research and Sanctuaries Act of 1972 and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary. Authorizations so issued will contain such special conditions as may be required by the Secretary of Commerce in connection with his certification.

iv. Permit variations.

In addition to the regular permit process, three other types of permit situations are important. Although the general precedure anticipates application for the permit prior to work instigation, after-the-fact permits are utilized to salvage negligent developers.[6] If the activity is within the traditional navigable waters, or if warranted by the circumstances, the district engineer will defer permit processing until legal action has been taken and judgment has been satisfied.[7] The application process follows the standard procedure for regular permits and the permit is the same with the addition of any conditions deemed necessary.[8]

A general permit covers certain specifically described categories of structures and work which cause only minimal adverse environmental impact.[9] This type of permit allows those specified projects to forego further authorization.

The Corps may also extend or renew permits which have expired prior to the completion of the project. NEPA and the new regulations create a problem in this situation. If the original permits were issued prior to NEPA's enactment, the Corps will apply the stricter criteria in the renewal deliberations. In Banker's Life v. North Palm Beach, 469 F.2d 994 (Fifth Circuit 1972), the court allowed the Corps of Engineers to base renewal of a permit on new criteria developed during the five year period between the expiration of the permit and the renewal application. The developer was responsible for the lapse of the permit. Thus, projects could be delayed due to the need for compiling environmental impact statements and halted in midstream if the renewal permit is denied.

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6. 33 C.F.R. §209.120(c)(1)(iv) (1976).

7. 33 C.F.R. §209.120(g)(12)(ii) (1976).

8. 33 C.F.R. §209.120(g)(12)(iii) (1976).

9. 33 C.F.R. §209.120(i)(ix) (1976).

V. Sanctions and penalties

A violation of the §10 or §404 permit requirements results in civil or criminal penalties established by statute. In addition to these penalties, injunctions, especially those issued during construction, may cost developers substantial sums due to lost time, interest on loans, and completion date penalties. The threat of these penalties and the suits brought to enforce them may, therefore, chill the development of the coastal areas.

THE RIVERS AND HARBORS ACT OF 1899

33 U.S.C. §406

§ 406. Penalty for wrongful construction of bridges, piers, etc.; removal of structures

Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

THE FEDERAL WATER POLLUTION CONTROL ACT

33 U.S.C. §1319
(Supp. II, 1972)

§ 1319. Enforcement—State enforcement; compliance orders

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, or 1318 of this title in a permit issued by a State under an approved permit program under section 1342 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, or 1318 of this title, or is in violation of any permit con-

dition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

Civil actions

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

Criminal penalties

(c) (1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

Civil penalties

(d) Any person who violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

State liability for judgments and expenses

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

UNITED STATES v. SUNSET COVE, INC.

United States Court of Appeals, Ninth Circuit 1975
514 F. 2d 1089

PER CURIAM:

The district court ordered the removal of about 1760 lineal feet of riprap (rock used for construction foundations) and fill material from a sandspit at the mouth of the Necanicum River. Sunset Cove, Inc., the developer of the sandspit, appeals. The judgment is affirmed as modified.

Sunset, apparently acting upon its belief that the Necanicum River was not a navigable stream within the meaning of 33 U.S.C. § 403, attempted to fill and stabilize the shoreline of a tract of land it had acquired from the city of Seaside, without requesting authorization from the Secretary of the Army.

Because of seasonal movement of the Necanicum channel and the migratory character of the shoals and sandbars within the area of its confluence with the sea, the sandspit in question has historically tended to expand and retract up and down the coast from north to south. In recent years northwest expansion has preponderated. Sunset acquired whatever title the city had to the sandspit during one of its more northerly extensions. Sunset then undertook to stabilize the sandspit against further erosion by the emplacement of riprap and by filling and elevating the surface to create building sites.

The district court, in findings of fact which are not clearly erroneous, found the Necanicum to be navigable and located the mean high-water line at a level that effectively declared the major part of Sunset's fill to be in violation of 33 U.S.C. § 403.

Substantial trial time was devoted to Sunset's efforts to establish some sort of estoppel against the Portland District of the United States Army Corps of Engineers. The court correctly found no basis for estoppel. Sunset was acting at its peril when, without permission it undertook to make improvements which effected permanent changes in the river channel and in its course.

In allowing the government's prayer for relief, the district court ordered the total removal of the illegal landfill. Such an operation is, as a practical matter, far beyond the resources of Sunset or its principals. Here, we believe the court might have tempered the law with a touch of equity.

The judgment should be modified to require the removal of as much of the riprap as will permit nature, in a reasonable period of time, to take its course and approximately re-establish former topographic conditions. The manner of removal, with the above standard as a guideline, should be supervised by the Chief of Engineers or his designee, pursuant to that officer's statutory responsibilities pertaining to navigable waters. In all other respects, the judgment of the district court is affirmed.

The district court may stay its judgment, if it sees fit, for a reasonable time to allow the defendant to apply to the Chief of Engineers for an after-the-fact permit to cover any part of the previous construction the Chief of Engineers may recommend for approval. *See* 33 C.F.R. § 209.120(g)(12)(ii)(b) (1974).

Affirmed in part; modified in part, and remanded.

In United States v. Moretti, Inc. (Moretti II), 526 F. 2d 1306 (1976), the court held that Joseph Moretti was not personally liable for the costs of restoring the dredged and filled areas, citing United States v. Sexton Cove, supra.. The Rivers and Harbors Act of 1899 does not authorize personal liability yet Congress, in the Federal Water Pollution Control Act, extended sanctions to include responsible corporate officers. Thus a violation of 404 could result in criminal or civil penalties for corporate officers.

vi. State Interaction in the Federal Regulatory Scheme

With the increase in areas subject to the Corps of Engineers' regulations, thought should be given to the repercussions for state and local governments. If the state does not regulate coastal development, the federal government will exercise substantial control in the coastal region and the state will have little veto power. Few states would enjoy such a position. On the other hand, when the state has its own development control system, the Corps allows for state input into the permit granting process as is provided in the Corps' regulations which follow. Under these circumstances, the state may have substantial influence over the federal granting of permits.

CORPS OF ENGINEERS PERMIT GUIDELINES

33 C.F.R. §209.120(f)(3) (1976)

(3) Permits will not be issued where certification or authorization of the proposed work is required by Federal, State, and/or local law and that certification or authorization has been denied. Initial processing of an application for a Department of the Army permit will proceed until definitive action has been taken by the responsible State agency to grant or deny the required certification and/or authorization. Where the required State certification and/or authorization has been denied and procedures for reconsideration exist, reasonable time not to exceed 90 days will be allowed for the applicant to attempt to resolve the problem and/or obtain reconsideration of the denial. If the State denial of authorization cannot be thus resolved, the application will be denied in accordance with paragraph (p) of this section.

(i) Where officially adopted State, regional, or local land-use classifications, determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest and shall be considered in addition with the other national factors of the public interest identified in paragraph (f)(1) of this section.

(ii) A proposed activity in a navigable water may result in conflicting comments from several agencies within the same State. While many States have designated a single State agency or individual to provide a single and coordinated State position regarding pending permit applications, where a State has not so designated a single source, District Engineers will elicit from the Governor an expression of his views and desires concerning the application (see also paragraph (j)(3), of this section) or, in the alternative, an expression from the Governor as to which State agency represents the official State position in this particular case. Even if official certification and/or authorization is not required by State or Federal law, but a State, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(iii) If a favorable State determination is received, the District Engineer will process the application to a conclusion in accordance with the policies and procedures of this regulation. In the absence of overriding national factors of the public interest that may be revealed during the subsequent processing of the permit application, a permit will generally be issued following receipt of a favorable State determination provided the concerns, policies, goals, and requirements as expressed in paragraphs (f)(1) and (2), of this section, the guidelines (40 CFR Part 230), and the following statutes have been followed and considered: the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archaeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research, and Sanctuaries Act of 1972; and the Federal Water Pollution Control Act (see paragraph (c) of this section).

(iv) If the responsible State agency fails to take definitive action to grant or deny required authorizations or to furnish comments as provided in subparagraph (3)(ii) of this paragraph within six months of the issuance of the public notice, the District Engineer shall process the application to a conclusion.

(v) The District Engineer may, in those States with ongoing State permit programs for work or structures in navigable waters of the United States or the discharge of dredged or fill material in navigable waters, enter into an agreement with the States to jointly process and evaluate Department of the Army and State permit applications. This may include the issuance of joint public notices; the conduct of joint public hearings, if held; and the joint review and analysis of information and comments developed in response to the public notice, public hearing, the environmental assessment and the environmental impact statement (if necessary), the Fish and Wildlife Coordination Act, the Historical and Archaeological Preservation Act, the National Historic Preservation Act, the Endangered Species Act, the Coastal Zone Management Act, the Marine Protection, Research, and Sanctuaries Act of 1972, and the Federal Water Pollution Control Act. In such cases, applications for Department of the Army permits may be processed concurrently with the processing of the State permit to an independent conclusion and decision by the District Engineer and appropriate State agency.

Although these regulations eliminate some of the potential federal/state conflicts, criticism is still prevalent concerning expansion of the Corps' permit program and its duplication in the states. As is illustrated in the following section, many states have permit requirements which result in an applicant having to file two separate applications for a single project. Often the Corps will begin processing the federal permit prior to the state's decision.[10] Thus, if the state denies the permit; the Corps has done needless work. Such a dual system results in an unnecessary waste of effort on the part of the applicant and the agencies.

As yet unresolved, several suggestions have been made to alter the Corps' jurisdiction and decrease federal/state overlapping. One alternative would be to place all permit and land control programs in the hands of the federal government.[11] This approach would avoid the problem of interstate coordination. This is, however, an unlikely alternative considering the amount of power the states would have to relinquish. Two other legislative suggestions have been made. In a recent impasse reached by Congress concerning an amendment to §404, the House sought to restrict the Corps' §404 jurisdiction by narrowing the definition of navigable waters.[12] The Senate, however, was in favor of a system, similar to the NPDES, under which the EPA and states with approved programs would handle these dredge and fill permits; the Corps would retain its dredge and fill jurisdiction in traditionally navigable waters.[13] Although no agreement was reached, either of these positions could become a reality. For the present, however, there is little likelihood that the Corps of Engineers will be relinquishing their new jurisdiction.

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10. 1 Sea Grant Law Journal 336 at 364.

11. Id. at 365.

12. H.R. 9560, 94th Cong., 2d Sess. (1976).

13. S. 2710, 94th Cong., 2d Sess. (1976).

B. State regulatory activities.

As suggested in the preceding section, many states have permit programs limiting the dredging and filling of wetlands which parallel federal programs. This section illustrates these programs with two samples, one from North Carolina and the other from New York. New York's program is especially interesting because there are two systems, one for freshwater wetlands and one for tidal wetlands. Although basically similar in procedure and intent, each system has unique aspects such as the establishment of a Freshwater Appeals Board (24-1101) and the moratorium on development of tidal wetland areas (25-0202). The following cases, which pertain to a specific project in New York, illustrate the different results possible under a state system as opposed to the federal one.

N.C.G.S. §§113-229, 113-230

§ 113-229. Permits to dredge or fill in or about estuarine waters or state-owned lakes. — (a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or state-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department of Natural and Economic Resources. Granting of a State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The North Carolina Department of Water and Air Resources [Department of Natural and Economic Resources] shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(d) Except in the case of an application for a special emergency dredge or fill permit, the applicant shall cause to be served in the manner provided by subdivision (g)(9) of this section upon an owner of each tract of riparian property adjoining that of the applicant a copy of the application filed with the State of North Carolina and each such adjacent riparian owner shall have 30 days from the date of such service to file with the Department of Natural and Economic Resources written objections to the granting of the permit to dredge or fill. An owner may be served by publication, in the manner provided by subdivision (g)(10) of this section, whenever the owner's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the owner under subdivision (g)(9) of this section. In the case of a special emergency dredge or fill permit the applicant must certify that he took all reasonable steps to notify adjacent riparian owners of the application for a special emergency dredge and fill permit prior to submission of the application. Upon receipt of this certification, the secretary shall issue or deny the permit within the time period specified in (e) of this section, upon the express understanding from the applicant that he will be entirely liable and hold the State harmless for all damage to adjacent riparian landowners directly and proximately caused by the dredging or filling for which approval may be given.

(e) Applications for permits except special emergency permit applications shall be circulated by the Department of Natural and Economic Resources among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. Permits may allow for projects granted a permit the right to maintain such project for a period of up to 10 years. The right to maintain such project shall be granted subject to such conditions as may be reasonably necessary to protect the public interest. The Marine Fisheries Commission shall by rule, after at least two public hearings, enumerate such conditions as it deems necessary to carry out the purposes of this subsection. Maintenance work as defined in this subsection shall be limited to such activities as are required to maintain the project dimensions as found in the permit granted. The Department shall act upon an application for permit within 90 days after the application is filed except for applications for a special emergency permit in which case the Department shall act within two working days after an application is filed, and failure to so act shall automatically approve the application.

(e1) The Secretary of the Department of Natural and Economic Resources is empowered to issue special emergency dredge or fill permits upon application. Emergency permits may be issued only when life or structural property is in

imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure. The Marine Fisheries Commission may, after public hearings, elaborate by rule on upon what conditions the Secretary may issue a special emergency dredge or fill permit. The Secretary may condition the emergency permit upon any reasonable conditions, consistent with the emergency situation, he feels are necessary to reasonably protect the public interest. Where an application for a special emergency permit includes work beyond which the Secretary, in his discretion, feels necessary to reduce imminent dangers to life or property he shall issue the emergency permit only for that part of the proposed work necessary to reasonably reduce the imminent danger. All further work must be applied for by application for an ordinary dredge or fill permit. The Secretary shall deny an application for a special dredge or fill permit upon a finding that the detriment to the public which would occur on issuance of the permit measured by the five factors in G.S. 113-229(e) clearly outweighs the detriment to the applicant if such permit application should be denied.

(f) If any State agency or the applicant raises an objection to the action of the Department of Natural and Economic Resources regarding the permit application within 20 days after said action was taken, the Department shall refer the matter to the Marine Fisheries Commission. The Marine Fisheries Commission shall hear the matter at its next regularly scheduled meeting, but in no case more than 90 days from the date of the departmental action. At said hearing, evidence shall be taken by the review commission from all interested persons, who shall have a right to be represented by counsel. After hearing the evidence, the review commission shall make findings of fact in writing and shall affirm, modify or overrule the action of the Department concerning the permit application. Any State agency or the applicant may appeal from the ruling of the review commission to the superior court of the county where the land or any part thereof is located, pursuant to the provisions of Chapter 150[A] of the General Statutes.

(h) The granting of a permit to dredge or fill shall be deemed conclusive evidence that the applicant has complied with all requisite conditions precedent to the issuance of such permit, and his right shall not thereafter be subject to challenge by reason of any alleged omission on his part, except failure to notify adjacent riparian landowners as required by subsection (d) of this section.

(i) All materials excavated pursuant to such permit, regardless of where placed, shall be encased or entrapped in such a manner as to minimize their moving back into the affected water.

(j) None of the provisions of this section shall relieve any riparian owner of the requirements imposed by the applicable laws and regulations of the United States.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment of not more than 90 days, or both. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. Notice to cease shall be pursuant to G.S. 113-229(g)(9).

(l) The Secretary may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the superior court in the name of the State upon the relation of the Secretary, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and state-owned lakes within the State, and to work to be performed by the State government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the North Carolina Department of Human Resources and local health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130-206 through 130-209. Provided, further, this section shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

(1) "State-owned lakes" include man-made as well as natural lakes.

(2) "Estuarine waters" means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department of Natural and Economic Resources and the Wildlife Resources Commission, within the meaning of G.S. 113-129.

(3) "Marshland" means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh and marsh plant species: Smooth or salt water Cordgrass (*Spartina alterniflora*), Black Needlerush (*Juncus roemerianus*), Glasswort (*Salicornia* spp.), Salt Grass (*Distichlis spicata*), Sea Lavender (*Limonium* spp.), Bulrush (*Scirpus* spp.), Saw Grass (*Cladium jamaicense*), Cattail (*Typha* spp.), Salt-Meadow Grass (*Spartina patens*), and Salt Reed-Grass (*Spartina Cynosuroides*). (1969)

§ **113-230. Orders to control activities in coastal wetlands.** — (a) The Secretary of Natural and Economic Resources, with the approval of the Marine Fisheries Commission, may from time to time, for the purpose of promoting the public safety, health, and welfare, and protecting public and private property, wildlife and marine fisheries, adopt, amend, modify, or repeal orders regulating, restricting, or prohibiting dredging, filling, removing or otherwise altering coastal wetlands. In this section, the term "coastal wetlands" shall mean any marsh as defined in G.S. 113-229(n)(3), as amended, and such contiguous land as the Secretary reasonably deems necessary to affect by any such order in carrying out the purposes of this section.

(b) The Secretary shall, before adopting, amending, modifying or repealing any such order, hold a public hearing thereon in the county in which the coastal wetlands to be affected are located, giving notice thereof to interested State agencies and each owner or claimed owner of such wetlands by certified or registered mail at least 21 days prior thereto.

(c) Upon adoption of any such order or any order amending, modifying or repealing the same, the Secretary shall cause a copy thereof, together with a plan of the lands affected and a list of the owners or claimed owners of such lands, to be recorded in the register of deeds office in the county where the land is located, and shall mail a copy of such order and plan to each owner or claimed owner of such lands affected thereby.

(d) Any person, firm or corporation that violates any order issued under the provisions of this section shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment for not more than six months, or both in the discretion of the court.

(e) The superior court shall have jurisdiction in equity to restrain violations of such orders.

(f) Any person having a recorded interest in or registered claim to land affected by any such order may, within 90 days after receiving notice thereof, petition the superior court to determine whether the petitioner is the owner of the land in question, and in case he is adjudged the owner of the subject land, whether such order so restricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation. If the court finds the order to be an unreasonable exercise of the police power, as aforesaid, the court shall enter a finding that such order shall not apply to the land of the petitioner; provided, however, that such finding shall not affect any other land than that of the petitioner. The Secretary shall cause a copy of such finding to be recorded forthwith in the register of deeds office in the county where the land is located. The method provided in this subsection for the determination of the issue of whether any such order constitutes a taking without compensation shall be exclusive, and such issue shall not be determined in any other proceeding. (1971)

NEW YORK FRESHWATER WETLANDS ACT OF 1975

(McKinney) §§24-0101 et seq.

§ 24-0103. Declaration of policy

It is declared to be the public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state.

§ 24-0107. Definitions

1. "Freshwater wetlands" means lands and waters of the state as shown on the freshwater wetlands map which contain any or all of the following:

(a) lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation of the following vegetative types:

(1) wetland trees, which depend upon seasonal or permanent flooding or sufficiently water-logged soils to give them a competitive advantage over other trees; including, among others, red maple (Acer rubum), willows (Salix spp.), black spruce (Picea mariana); swamp white oak (Quercus bicolor), red ash (Fraxinus pennsylvanica), American elm (Ulmus americana), and Larch (Larix laricina);

(2) wetland shrubs, which depend upon seasonal or permanent flooding or sufficiently water-logged soils to give them a competitive advantage over other shrubs; including, among others, alder (Alnus spp.), buttonbush (Cephalanthus occidentalis), bog rosemary (Andromeda glaucophylla), and leatherleaf (Chamaedaphne calyculata);

(3) emergent vegetation, including, among others, cattails (Typha spp.), pickerelweed (Pontederia cordata), bulrushes (Scirpus spp.), arrow arum (Peltandra virginica), arrowheads (Sagittaria spp.), reed (Phragmites communis), wildrice (Zizania aquatica), bur-reeds (Sparganium spp.), purple loosestrife (Lythrum salicaria), swamp loosestrife (Decodon verticillatus), and water plantain (Alisma plantago-aquatica);

(4) rooted, floating-leaved vegetation; including, among others, water-lily (Nymphaea odorata), water shield (Brasenia schreberi), and spatterdock (Nuphar spp.);

(5) free-floating vegetation; including among others, duckweed (Lemna spp.), big duckweed (Spirodela polyrhiza), and watermeal (Wolffia spp.);

(6) wet meadow vegetation, which depends upon seasonal or permanent flooding or sufficiently water-logged soils to give them a competitive advantage over other open land vegetation; including, among others, sedges (Carex spp.), rushes (Juncus spp.), cattails (Typha spp.), rice cut-grass (Leersia oryzoides), reed canary grass (Phalaris arundinace), swamp loosestrife (Decodon verticillatus), and spikerush (Eleocharis spp.);

(7) bog mat vegetation; including, among others, sphagnum mosses (Sphagnum spp.) bog rosemary (Andromeda glaucophylla), leatherleaf (Chamaedaphne calyculata), pitcher plant (Sarrancenia purpurea), and cranberries (Vaccineum macrocarpon and V. oxycoccos);

(8) submergent vegetation; including, among others, pondweeds (Potamoziton spp.), navads (Najas spp.) bladderworts (Ultricularia spp.), wild celery (Vallisneria americana), coontail (Ceratophyllum demersum), water milfoils (Myriophyllum spp.) muskgrass (Chara), stonewort (Nitella spp.), water weeds (Elodea spp.), and water smartweed (Polygonum amphibium);

(b) lands and submerged lands containing remnants of any vegetation that is not aquatic or semi-aquatic that has died because of wet conditions over a sufficiently long period, provided that such wet conditions do not exceed a maximum seasonal water depth of six feet and provided further that such conditions can be expected to persist indefinitely, barring human intervention;

(c) lands and waters enclosed by aquatic or semi-aquatic vegetation as set forth herein in paragraph (a) and dead vegetation as set forth in paragraph (b), the regulation of which is necessary to protect and preserve the aquatic and semi-aquatic vegetation; and

(d) the waters overlying the areas set forth in (a) and (b) and the lands underlying (c).

§ 24-0701. Permits

1. After issuance of the official freshwater wetlands map of the state, or of any selected section or region thereof, pursuant to section 24-0301 hereof, any person desiring to conduct on freshwater wetlands as so designated therein any of the regulated activities set forth in subdivision two of this section must obtain a permit as provided in this title.

2. Activities subject to regulation shall include any form of draining, dredging, excavation, removal of soil, mud, sand, shells, gravel or other aggregate from any freshwater wetland, either directly or indirectly; and any form of dumping, filling, or depositing of any soil, stones, sand, gravel, mud, rubbish or fill of any kind, either directly or indirectly; erecting any structures, roads, the driving of pilings, or placing of any other obstructions whether or not changing the ebb and flow of the water; any form of pollution, including but not limited to, installing a septic tank, running a sewer outfall, discharging sewage treatment effluent or other liquid wastes into or so as to drain into a freshwater wetland; and any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom which are set forth in section 24-0105 of this article. These activities are subject to regulation whether or not they occur upon the wetland itself, if they impinge upon or otherwise substantially affect the wetlands; provided, however, that no regulation shall apply to any area more than one hundred feet from the boundary of such wetland or any such lesser or greater distance therefrom as determined by the appropriate local government.

3. The depositing or removal of the natural products of the freshwater wetlands by recreational or commercial fishing, shell-fishing, aquaculture, hunting or trapping shall be excluded from the regulated activities, where otherwise legally permitted and regulated.

4. The activities of farmers and other landowners in grazing and watering livestock, making reasonable use of water resources, harvesting natural products of the wetlands, selectively cutting timber, draining land or wetlands for growing agricultural products and otherwise engaging in the use of wetlands or other land for growing agricultural products shall be excluded from regulated activities and shall not require a permit under subdivision one hereof, except that structures not required for enhancement or maintenance of the agricultural productivity of the land and any filling activities shall not be excluded hereunder, and provided that the use of land designated as a freshwater wetland upon the freshwater wetlands map at the effective date thereof for uses other than those referred to in this subdivision, shall be subject to the provisions of this article. Each farmer or landowner who intends to conduct an activity described in this subdivision which would otherwise be regulated shall notify the department in writing of his intention to engage in such activity, stating the approximate acreage to be affected, the general location thereof, the use or uses to be made of such land and the methods to be employed.

The filing of a soil and water conservation plan prepared by a soil and water conservation district for the owner of wetlands under this subdivision shall be deemed to satisfy the notification requirement.

5. Public health activities, orders, and regulations of the department of health shall be excluded from regulated activities. Copies of all such public health orders and regulations affecting wetlands shall be filed with the department of environmental conservation. The commissioner may request modification of such orders or regulations if he deems such necessary to implement the policy of this article.

6. The commissioner shall review all current mosquito control projects to determine whether they are having any adverse impact on freshwater wetlands. Where any adverse impact is found, the commissioner may require modification of such projects if he deems such necessary for the implementation of the policies of this article.

7. Where dredging or filling is in navigable waters of the state or is for the reconstruction or repair of certain dams and docks, and where such activity also affects freshwater wetlands, any person undertaking such activity must seek permission under this article as well as under any other applicable law.

8. On any land that is being developed pursuant to a planned unit development ordinance or local law where freshwater wetlands are to remain as open space, development activities shall be permitted in areas contiguous to such wetlands if the local government affirms that such activities will not despoil said wetland.

§ 24-1101. Freshwater wetlands appeals board

1. There is hereby created in the department an appeals board, to be known as the freshwater wetlands appeals board, hereinafter in this article referred to as the board, consisting of five members.

§ 24-1103. Powers

1. The board shall have power, and it shall be its duty:

c. To hear appeals by any party to any proceeding before the commissioner or local jurisdiction from all orders or decisions of the commissioner or local jurisdiction issued or made pursuant to this article, provided such appeals are commenced by the filing with the board of a notice of appeal within thirty days after service of such order or after notice of such decision given, as the case may be;

d. To review any decision or order of the commissioner or local government made pursuant to this article upon appeal therefrom by any person or municipal corporation affected thereby, providing such review is commenced by the filing with the board of a notice of review within thirty days after service of such order or notice of such decision given, as the case may be;

g. To stay the effectiveness of any order or decision of the commissioner or local jurisdiction pending the determination of an appeal in proper cases and on such terms and conditions as the board may require.

2. The board may affirm, remand or reverse any order or decision of the commissioner or local government or remand the matter to the commissioner or local government for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order or decision of the commissioner or local government is:

a. in conformity with the constitution and the laws of the state and the United States;

b. within the commissioner's or local government's statutory jurisdiction or authority;

c. made in accordance with procedures required by law or established by appropriate rules or regulations of the commissioner or local government;

d. supported by substantial evidence on the whole record; or

e. not arbitrary, capricious or characterized by abuse or discretion or clearly unwarranted exercise of discretion.

The commissioner or local government shall be bound by the decision of the board except to the extent such decision is reversed or otherwise modified by a court of competent jurisdiction pursuant to this article.

NEW YORK TIDAL WETLANDS ACT OF 1973

(McKinney) §§25-0101 et seq.

Legislative Findings. Section 1 of L.1973, c. 790, eff. Sept. 1, 1973, provided:

"The legislature hereby finds and declares that tidal wetlands constitute one of the most vital and productive areas of our natural world, and that their protection and preservation are essential. Among the many and multiple values of such wetlands are the following:

"(a) marine food production—tidal wetlands are an essential area of retention, conversion and availability of nutrients for crustaceans and shellfish; they are the nursery ground and sanctuary for many fin fish; they sustain microscopic marine organisms and vegetation which are essential in other food chains; two-thirds of the fish and shellfish are commercially harvested and two-thirds of sport fish depend on the marsh-estuarine system of the tidal wetlands at some point in their life cycle;

"(b) wildlife habitat—tidal wetlands are necessary as the breeding, nesting and feeding grounds and as cover to escape predators for many forms of wildlife, waterfowl and shorebirds;

"(c) flood and storm control—tidal wetlands are valuable and provide essential and irreplaceable protection in both flood and storm or hurricane weather conditions; their hydrologic water absorption and storage capacity minimizes erosion and flooding damage; their hydraulic and hydrographic functions serve as a natural buffer protecting upland and developed areas from storm tides and waves;

"(d) recreation—tidal wetlands provide hundreds of square miles and millions of days of recreation, hunting, fishing, boating, hiking, bird watching, photography and camping for many thousands of citizens of the state and visitors to the state; the location of many tidal wetlands fronting on the eastward expansion of human population in Long Island makes them 'the last frontier' for certain of the state's valuable natural resources, underscoring the necessity for their preservation in parks and reserves;

"(e) treating pollution—tidal wetlands serve as an invaluable and irreplaceable biological and chemical oxi-

dation basin in which organic run-off and organic pollution are oxidized, metabolized and converted into useful nutrients; the vast quantities of oxygen necessary for this process must come from the open, living tidal marsh and its photosynthesis;

"(f) sedimentation—tidal wetlands are an essential settling and filtering basin, absorbing silt and organic matter which otherwise would obstruct channels and harbors to the detriment of navigation;

"(g) education and research—tidal wetlands afford a wide range of opportunity for scientific research, outdoor biophysical laboratories, and living educational classrooms; their training and education value is enormous, and they offer unbounded opportunity for the imparting of environmental values in our youth;

"(h) open space and aesthetic appreciation—tidal wetlands comprise a large part of the remaining natural and unspoiled areas along the crowded coastal reaches of the state; the benefit to the public of these natural open areas in a region of rapid population growth is significant; such wetlands offer unique open space and aesthetic qualities while at the time permitting full play to their other natural values.

"The legislature further finds that vast acreage in the tidal wetlands in the state of New York has already been irreparably lost or despoiled as a result of unregulated dredging, dumping, filling, excavating, polluting, and like activities; that the remaining tidal wetlands are in imminent jeopardy of being lost or despoiled by these and other activities; that if the current rate of loss continues, most of the state's tidal wetlands will be entirely lost before the end of this century; and that presently many creeks and tidal wetlands are so polluted that shellfish harvesting is banned. Accordingly, the legislature finds that it is in the interest of the state, consistent with the reasonable economic and social development thereof, to preserve as much as possible of these remaining wetlands in their present natural state and to abate and remove the sources of their pollution."

§ 25-0102. Declaration of policy

It is declared to be the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the state.

§ 25-0103. Definitions

1. "Tidal wetlands" shall mean and include the following:

(a) those areas which border on or lie beneath tidal waters, such as, but not limited to, banks, bogs, salt marsh, swamps, meadows, flats or other low lands subject to tidal action, including those areas now or formerly connected to tidal waters;

(b) all banks, bogs, meadows, flats and tidal marsh subject to such tides, and upon which grow or may grow some or any of the following: salt hay (Spartina patens and Distichlis spicata), black grass (Juncus Gerardi), saltworts (Salicornia ssp.), sea lavender (Limonium carolinianum), tall cordgrass (Spartina pectinata and Spartina cynosuroides), hightide bush (Iva frutescens), cattails (Typha angustifolia and Typha latifolia), groundsel (Baccharis halmilifolia), marsh mallow (Hybiscus palustris) and the intertidal zone including low marsh cordgrass (Spartina alterniflora).

2. "Commissioner" shall mean the commissioner of environmental conservation.

§ 25-0202. Moratorium on alteration of tidal wetlands

1. No person shall alter the state of any tidal wetland or of any area immediately adjacent to such wetland as the commissioner may reasonably deem necessary to preserve in order to effectuate the policies and provisions of this act, prior to the effective date of the land-use regulations adopted by the commissioner pursuant to this act, unless a permit for such alteration shall have been obtained pursuant to section 15-0505 of the environmental conservation law. This moratorium shall not restrict in any way any summary action taken by the commissioner under section 71-0301 of the environmental conservation law.

2. Any person, upon a showing of hardships caused by this moratorium, may petition the commissioner for a review of the application of the moratorium to any tidal wetland or any area immediately adjacent thereto. Within thirty days of the petition being received, the commissioner shall provide the petitioner and any other person an opportunity to be heard. Notice of such hearing shall be published in at least two newspapers having a general circulation in the area where the wetlands are located, and notice of such hearing shall also be given by registered mail to the chief administrative officer of each municipality within whose boundary any such wetland or portion thereof is located. If the proposed alterations of the tidal wetlands are not contrary to the policy or any provision of this act, the commissioner may permit the alteration to continue during the moratorium, provided that permission may be revoked by the commissioner if its terms are violated and that the permission ends upon completion of the inventory for the area in which the affected wetlands are located, and provided further that any such hardship permit issued by the commissioner shall be in addition to, and not in lieu of, such permit or permits as may be required by any municipality within whose boundary such wetland or portion thereof is located.

§ 25-0401. Regulated activities

1. After completion of the inventory prescribed in title 2 of this article with respect to any tidal wetland, no person may conduct any of the activities set forth in subdivision 2 of this section unless he has obtained a permit from the commissioner to do so. The permit issued by the commissioner shall be in addition to, and not in lieu of, such permit or permits as may be required by any municipality within whose boundary such wetland or portion thereof is located.

2. Activities subject to regulation hereunder include any form of draining, dredging, excavation, and removal either directly or indirectly, of soil, mud, sand, shells, gravel or other aggregate from any tidal wetland; any form of dumping, filling, or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind; the erection of any structures or roads, the driving of any pilings or placing of any other obstructions, whether or not changing the ebb and flow of the tide, and any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area.

3. The depositing or removal of the natural products of the tidal wetlands by recreational or commercial fishing, shellfishing, aquaculture, hunting or trapping, shall be excluded from regulation hereunder, where otherwise legally permitted.

4. Activities, orders, and regulations of the department of health or of units of local government with respect to matters of public health shall be excluded from regulation hereunder, except as hereinafter provided. Copies of all such public health orders and regulations affecting tidal wetlands shall be filed with the department of environmental conservation. The commissioner may require modification of such orders or regulations if he deems it necessary to implement the policy of this act.

5. The commissioner shall review all current mosquito control projects to determine whether they are having any adverse impact on tidal wetlands. Where any adverse impact is found, the commissioner following a public hearing, may require modification of such projects if he deems it necessary to implement the policy of this act.

6. Where the dredging or filling is in the navigable waters of the state or is for the reconstruction or repair of certain dams and docks, and where such activity also substantially affects tidal wetlands, any person undertaking such activity must seek permission under this act as well as under any other applicable law.

§ 25-0403. Granting of permits

1. In granting, denying or limiting any permit under this act, the commissioner shall consider the compatability of the proposed activity with reference to the public health and welfare, marine fisheries, shellfisheries, wildlife, flood and hurricane and storm dangers, and the land-use regulations promulgated pursuant to section 25-0302 of this act.

2. Notice that the state or any agency or subdivision thereof is in the process of acquisition of any tidal wetlands by negotiation or condemnation shall be sufficient basis for denial of any permit under this section.

3. In granting a permit, the commissioner may impose such conditions or limitations as may be necessary to carry out the public policy set forth in this act. The commissioner may require a bond in an amount and with surety and conditions satisfactory to him securing to the state compliance with the conditions and limitations set forth in the permit. The commissioner may suspend or revoke a permit if he finds that the applicant has not complied with any of the conditions or limitations set forth in the permit or has exceeded the scope of the work as set forth in the application. The commissioner may suspend the permit if the applicant fails to comply with the terms and conditions set forth in the application.

MAIN, Justice.

This is an appeal from a judgment of the Supreme Court at Special Term, 70 Misc.2d 899, 335 N.Y.S.2d 103, entered August 9, 1972 in Albany County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to declare a determination of the respondent Commissioner of Environmental Conservation granting a permit to fill in the Hudson River at 190 River Road, Grand View-on-Hudson, illegal and void and to direct that such permit be revoked and rescinded.

On or about August 11, 1970, respondent Eberhard Thiermann and his wife acquired title to a lot at 190 River Road, Grand View-on-Hudson, along with certain underwater lands adjacent to the lot. The property lies between the River Road on the west and the Hudson River on the east and has an area of 8,378 square feet of land above the river's mean high water mark.

The Thiermanns, desirous of building a home on the land, proposed to the Department of Environmental Conservation that they be granted permission to construct a sea wall in the river and fill in the enclosure, pursuant to section 429-b of the Conservation Law (now Environmental Conservation Law, § 15-0505) and the rules and regulations promulgated to implement that section (6 NYCRR, Part 611 [now 6 NYCRR, Part 608]). This action was necessary to satisfy a local zoning ordinance which requires a lot containing not less than 10,000 square feet of land above the mean high water mark of the river for the construction of a dwelling.

In the exercise of the discretionary powers of his office, Robert Drew, the acting central permit agent, scheduled a public hearing on this request. Presided over by Mr. Stewart M. Dean, the hearing lasted several days, after which Mr. Drew made his determination wherein he set forth his findings of fact, conclusions and determinations. He decided that the application was in the public interest and would not adversely affect the health and welfare and safety of the State or its natural resources. Accordingly, the permit was granted.

Petitioners then brought this article 78 proceeding to set aside the determination and the court below dismissed their petition. They raise substantially the same issues here, which are: (1) whether the determination is illegal, arbitrary and an abuse of discretion and not supported by the evidence in the record; . . ..

We hold that the determination is neither illegal, arbitrary, nor capricious, and that it is supported by the evidence in the record. An examination of the various testimony and exhibits in the record reveals such substantial support for the determination that unmistakably the department had a rational basis for granting the permit and we must affirm its action (Matter of Bologno v. O'Connell, 7 N.Y.2d 155, 196 N.Y.S.2d 90, 164 N.E.2d 389).

That such a basis exists is manifest from even a cursory reading of the record. It is uncontested that the permit is necessary for compliance with the local zoning ordinance, as the Thiermanns have no room for expansion or reclamation in any other direction. Additionally, the proposed project provides for safe and proper construction, and there is substantial evidence as to the public benefits therefrom. There is testimony to the effect that unkempt, overgrown property would be developed, a littered shoreline would be cleaned up, the river water would be cleansed, erosion would be reduced, the shoreline would receive needed protection from savage and destructive "northeasters", and even that the property's present tax assessment would be quadrupled. On such a record as this, we cannot say that the Department of Environmental Conservation was irrational in its determination.

. . . .

Lastly, we recognize that the cumulative effect of many such landfills might well have a meaningful and deleterious impact upon the environment. However, there has been no showing that additional applications for similar projects will be forthcoming and, at any rate, each case must be decided upon its own individual facts.

The judgment should be affirmed, without costs.

RIVER DEFENSE COMMITTEE v. THIERMAN

380 F. Supp. 91 (S.D.N.Y. 1974)

STEWART, District Judge:

This conflict presents the classic clash between the interests of an individual landowner and the public interest. Here the landowner, the defendant in this action, purchased a piece of land, with the intent to use his rights to river areas under a State patent to create a fill so that his lot would then be big enough to build a house in conformity with the zoning laws. The plaintiffs, on the other hand, claim to assert their own and the community interest in preserving the Hudson River as an important estuary and spawning area for several kinds of fish. The ultimate resolution of this conflict should not be decided by this court because policy determinations of this kind are left to the expertise of the agency. The jurisdiction of the federal court extends only to reviewing whether the Corps of Engineers complied with Congressional dictates as well as with the Agency's own regulations.

. . . We conclude that plaintiffs have demonstrated a high degree of probability of establishing that the contested permit was invalidly granted by the Army Corps of Engineers, and that the public interest in the preservation of the Hudson River as a breeding and spawning area would be irreparably harmed if a preliminary injunction is not granted. As will be discussed herein, the defendants will suffer only inconvenience and any monetary damage will be covered by the security ordered by this Court.

. . . . For the purposes of the determination of plaintiffs' motion for a preliminary injunction, we need only consider the claim that the permit granted to Mr. Thierman is null and void in that (1) the District Engineer's

determination not to issue an environmental impact statement was based on conclusory evaluations which failed to develop a reviewable environmental record; (2) the Corps of Engineers failed to draft and file an environmental impact statement pursuant to Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C); and (3) the Corps of Engineers failed to hold a public hearing prior to issuing the permit as required by Section 404 of the Federal Water Pollution Control Act Amendments of 1972 and by the Corps of Engineers Regulation, 33 CFR §§ 209.120(d)(11) and (g).

* * * *

The basic facts are simple. The river sought to be protected is the Hudson River, a navigable body of water of the United States from the harbor of New York City to a point north of Albany, New York. The location of the planned fill is part of the shallows of the Hudson River, an estuary and an important spawning and nursery ground for many species of fish including striped bass. These shallows are found in limited areas along the shores and provide shelter and food for young fish. The ability of the Hudson to continue to sustain a major fishery is dependent on the continued existence of adequate amounts of healthy shallow areas within the estuary. The uncontested affidavits of John Russell Clark and Robert H. Boyle, men highly qualified in the field of marine life as well as familiar with the Hudson estuary, make it clear that there is at least a probability that the Thierman fill will have a detrimental impact on the Hudson River nursery and spawning area. It is also clear on the basis of the affidavits that continued granting of permits similar to Mr. Thierman's by the Corps of Engineers without a thorough evaluation of their effect will cause serious and irreparable injury to the Hudson River estuary.

The basis for plaintiffs' attempt to enjoin Mr. Thierman from proceeding with his planned construction is their claim that the action taken by the Corps of Engineers was not in conformity with the statutes and regulations under which it acts.

Mr. Thierman entered into this statutory and regulatory scheme after having received a permit from the State of New York which withstood judicial review by the New York State courts. On May 4, 1971, Mr. Thierman applied to the Corps of Engineers pursuant to 33 U.S.C. Section 403 for a permit to construct a concrete seawall and fill in the enclosed area behind it. The defendant Colonel Lombard issued public notice No. 6953 dated January 7, 1972 requesting interested parties to comment on Thierman's application. The response to this notice consisted of 33 letters of opposition, a petition in opposition bearing 166 signatures and 138 postcards protesting the planned construction. Eleven individuals wrote in support of the project. Besides eliciting public reaction, the planned project also evoked a response on February 19, 1972 from the Department of Interior which stated that Mr. Thierman's application:

> "constitutes a violation of the Refuse Act in that it creates an unreasonable occupancy in navigable waters. We also believe such a project should not be permitted since it creates 'cheap land' for construction purposes utilizing a publicly owned resource. Sufficient upland is available for project implementation space. We can presume that no concern is being given to the further decimation of shoreline habitat. Continued 'piecemeal' development of these valuable areas must be closely monitored if any are to remain.
>
> We recommend that this application be denied since the proposed construction is not within the best interests of the general public."

This position was subsequently withdrawn by the Department of Interior. The Corps of Engineers did not hold a public hearing on the Thierman project. On October 16, 1973 the Corps determined "that the issuance of a permit for the proposed work will not constitute a major federal action significantly affecting the quality of the human environment and therefore an environmental impact statement is not required." On October 29, 1973 Mr. Thierman received

a permit for his proposed construction and fill. At the preliminary injunction hearing, Mr. Thierman testified that he had access to free rock for fill if he received it immediately. Because the rock would otherwise cost him $20,000, Mr. Thierman plans to continue to deposit rock on the banks of the Hudson and into the Hudson River if not restrained.

Conclusions of Law.

Whether a public hearing was required to be held before granting a permit is the first issue raised by plaintiff in attacking the validity of the permit. Upon the facts before us we conclude that pursuant to 33 C.F.R. 209.-210(d)(11) and 209.210(g) the District Engineer should have held a public hearing. His failure to have done so prior to the issuance of the permit would require us to invalidate the permit. However, we note that the government has now scheduled a public hearing on the proposed fill.

Plaintiffs have demonstrated a high degree of likelihood of success on the merits as to their claim that the District Engineer's conclusion concerning Mr. Thierman's application was perfunctory and was not sufficient to support the Corps' determination. The Second Circuit in Hanly v. Kleindienst, 471 F.2d 823 (2nd Cir. 1972) made it clear that federal agencies must establish reviewable environmental records. In addition to instructing agencies that perfunctory conclusions were not acceptable as a basis for environmental determinations, the court also ruled it was error for the agency to consider the project as an isolated phenomenon. In light of the *Hanly* case it is not at all unlikely that the plaintiffs can successfully demonstrate that the Corps' environmental evaluation lacked the necessary basis to support its conclusion.

There is no question on the record before us that there exists a significant environmental controversy over the proposed plan which if allowed to proceed would render this litigation moot. Thus the plaintiffs have not only shown that there is a substantial likelihood of success as to the merits of their claims, they have also demonstrated that irreparable harm would result if a preliminary injunction did not issue. Since defendant obtained the free rock and dumped it on his land, we conclude that the preliminary injunction has not and will not cause him any harm other than delay.

C. Deepwater ports.

THE DEEPWATER PORT ACT OF 1975

33 U.S.C. §§1501 et seq.

§ 1501. Congressional declaration of policy

(a) It is declared to be the purposes of the Congress in this chapter

(1) authorize and regulate the location, ownership, construction, and operation of deepwater ports in waters beyond the territorial limits of the United States;

(2) provide for the protection of the marine and coastal environment to prevent or minimize any adverse impact which might occur as a consequence of the development of such ports;

(3) protect the interests of the United States and those of adjacent coastal States in the location, construction, and operation of deepwater ports; and

(4) protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law.

(b) The Congress declares that nothing in this chapter shall be construed to affect the legal status of the high seas, the superjacent airspace, or the seabed and subsoil, including the Continental Shelf.

§ 1502. Definitions

As used in this chapter, unless the context otherwise requires, the term—

(1) "adjacent coastal State" means any coastal State which (A) would be directly connected by pipeline to a deepwater port, as proposed in an application; (B) would be located within 15 miles of any such proposed deepwater port; or (C) is designated by the Secretary in accordance with section 1508(a)(2) of this title;

(2) "affiliate" means any entity owned or controlled by, any person who owns or controls, or any entity which is under common ownership or control with an applicant, licensee, or any person required to be disclosed pursuant to section 1504(c)(2)(A) or (B) of this title;

(3) "antitrust laws" includes the Act of July 2, 1890, as amended, the Act of October 15, 1914, as amended, the Federal Trade Commission, and sections 73 and 74 of the Act of August 27, 1894, as amended;

(4) "application" means any application submitted under this chapter (A) for a license for the ownership, construction, and operation of a deepwater port; (B) for transfer of any such license; or (C) for any substantial change in any of the conditions and provisions of any such license;

(5) "citizen of the United States" means any person who is a United States citizen by law, birth, or naturalization, any State, any agency of a State or a group of States, or any corporation, partnership, or association organized under the laws of any State which has as its president or other executive officer and as its chairman of the board of directors, or holder of a similar office, a person who is a United States citizen by law, birth or naturalization and which has no more of its directors who are not United States citizens by law, birth or naturalization than constitute a minority of the number required for a quorum necessary to conduct the business of the board;

(6) "coastal environment" means the navigable waters (including the lands therein and thereunder) and the adjacent shorelines including waters therein and thereunder). The term includes transitional and intertidal areas, bays, lagoons, salt marshes, estuaries, and beaches; the fish, wildlife and other living resources thereof; and the recreational and scenic values of such lands, waters and resources;

(7) "coastal State" means any State of the United States in or bordering on the Atlantic, Pacific, or Arctic Oceans, or the Gulf of Mexico;

(8) "construction" means the supervising, inspection, actual building, and all other activities incidental to the building, repairing, or expanding of a deepwater port or any of its components, including, but not limited to, pile driving and bulkheading, and alterations, modifications, or additions to the deepwater port;

(9) "control" means the power, directly or indirectly, to determine the policy, business practices, or decisionmaking process of another person, whether by stock or other ownership interest, by representation on a board of directors or similar body, by contract or other agreement with stockholders or others, or otherwise;

(10) "deepwater port" means any fixed or floating manmade structures other than a vessel, or any group of such structures, located beyond the territorial sea and off the coast of the United States and which are used or intended for use as a port or terminal for the loading or unloading and further handling of oil for transportation to any State, except as otherwise provided in section 1522 of this title. The term includes all associated components and equipment, including pipelines, pumping stations, service platforms, mooring buoys, and similar appurtenances to the extent they are located seaward of the high water mark. A deepwater port shall be considered a "new source" for purposes of the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended;

(11) "Governor" means the Governor of a State or the person designated by State law to exercise the powers granted to the Governor pursuant to this chapter;

(12) "licensee" means a citizen of the United States holding a valid license for the ownership, construction, and operation of a deepwater port that was issued, transferred, or renewed pursuant to this chapter;

(13) "marine environment" includes the coastal environment, waters of the contiguous zone, and waters of the high seas; the fish, wildlife, and other living resources of such waters; and the recreational and scenic values of such waters and resources;

(14) "oil" means petroleum, crude oil, and any substance refined from petroleum or crude oil;

(15) "person" includes an individual, a public or private corporation, a partnership or other association, or a government entity;

(16) "safety zone" means the safety zone established around a deepwater port as determined by the Secretary in accordance with section 1509(d) of this title;

(17) "Secretary" means the Secretary of Transportation;

§ 1503. License for ownership, construction, and operation of deepwater port—Requirement; restrictions on utilization of deepwater port

(a) No person may engage in the ownership, construction, or operation of a deepwater port except in accordance with a license issued pursuant to this chapter. No person may transport or otherwise transfer any oil between a deepwater port and the United States unless such port has been so licensed and the license is in force. A deepwater port, licensed pursuant to the provisions of this chapter, may not be utilized—

(1) for the loading and unloading of commodities or materials (other than oil) transported from the United States, other than materials to be used in the construction, maintenance, or operation of the high seas oil port, to be used as ship supplies, including bunkering for vessels utilizing the high seas oil port,

(2) for the transshipment of commodities or materials, to the United States, other than oil,

(3) except in cases where the Secretary otherwise by rule provides, for the transshipment of oil, destined for locations outside the United States,

* * * *

(c) The Secretary may issue a license in accordance with the provisions of this chapter if—

(1) he determines that the applicant is financially responsible and will meet the requirements of section 1517(*l*) of this title;

(2) he determines that the applicant can and will comply with applicable laws, regulations, and license conditions;

(3) he determines that the construction and operation of the deepwater port will be in the national interest and consistent with national security and other national policy goals and objectives, including energy sufficiency and environmental quality;

(4) he determines that the deepwater port will not unreasonably interfere with international navigation or other reasonable uses of the high seas, as defined by treaty, convention, or customary international law;

(5) he determines, in accordance with the environmental review criteria established pursuant to section 1505 of this title, that the applicant has demonstrated that the deepwater port will be constructed and operated using best available technology, so as to prevent or minimize adverse impact on the marine environment;

(6) he has not been informed, within 45 days of the last public hearing on a proposed license for a designated application area, by the Administrator of the Environmental Protection Agency that the deepwater port will not conform with all applicable provisions of the Clean Air Act, as amended, the Federal Water Pollution Control Act, as amended, or the Marine Protection, Research and Sanctuaries Act, as amended;

(7) he has received the opinions of the Federal Trade Commission and the Attorney General, pursuant to section 1506 of this title, as to whether issuance of the license would adversely affect competition, restrain trade, promote monopolization, or otherwise create a situation in contravention of the antitrust laws;

(8) he has consulted with the Secretary of the Army, the Secretary of State, and the Secretary of Defense, to determine their views on the adequacy of the application, and its effect on programs within their respective jurisdictions;

(9) the Governor of the adjacent coastal State or States, pursuant to section 1508 of this title, approves, or is presumed to approve, issuance of the license; and

(10) the adjacent coastal State to which the deepwater port is to be directly connected by pipeline has developed, or is making, at the time the application is submitted, reasonable progress, as determined in accordance with section 1508(c) of this title, toward developing, an approved coastal zone management program pursuant to the Coastal Zone Management Act of 1972.

(d) If an application is made under this chapter for a license to construct a deepwater port facility off the coast of a State, and a port of the State which will be directly connected by pipeline with such deepwater port, on the date of such application—

(1) has existing plans for construction of a deep draft channel and harbor; and

(2) has either (A) an active study by the Secretary of the Army relating to the construction of a deep draft channel and harbor, or (B) a pending application for a permit under section 403 of this title, for such construction; and

(3) applies to the Secretary for a determination under this section within 30 days of the date of the license application;

the Secretary shall not issue a license under this chapter until he has examined and compared the economic, social, and environmental effects of the construction and operation of the deepwater port with the economic, social and environmental effects of the construction, expansion, deepening, and operation of such State port, and has determined which project best serves the national interest or that both developments are warranted. The Secretary's determination shall be discretionary and nonreviewable.

• • •

(h) Licenses issued under this chapter shall be for a term of not to exceed 20 years. Each licensee shall have a preferential right to renew his license subject to the requirements of subsection (c) of this section, upon such conditions and for such term, not to exceed an additional 10 years upon each renewal, as the Secretary determines to be reasonable and appropriate.

§ 1504. Procedure—Regulations; issuance, amendment, or rescission; scope

(a) The Secretary shall, as soon as practicable after January 3, 1975, and after consultation with other Federal agencies, issue regulations to carry out the purposes and provisions of this chapter, in accordance with the provisions of section 553 of Title 5, without regard to subsection (a) thereof. Such regulations shall pertain to, but need not be limited to, application, issuance, transfer, renewal, suspension, and termination of licenses. Such regulations shall provide for full consultation and cooperation with all other interested Federal agencies and departments and with any potentially affected coastal State, and for consideration of the views of any interested members of the general public. The Secretary is further authorized, consistent with the purposes and provisions of this chapter, to amend or rescind any such regulation.

• • • •

(f) For all timely applications covering a single application area, the Secretary, in cooperation with other involved Federal agencies and departments, shall, pursuant to section 4332(2)(C) of Title 42, prepare a single, detailed environmental impact statement, which shall fulfill the requirement of all Federal agencies in carrying out their responsibilities pursuant to this chapter to prepare an environmental impact statement. In preparing such statement the Secretary shall consider the criteria established under section 1505 of this title.

. . . .

(h)

(2) Notwithstanding any other provision of this chapter, an adjacent coastal State may fix reasonable fees for the use of a deepwater port facility, and such State and any other State in which land-based facilities directly related to a deepwater port facility are located may set reasonable fees for the use of such land-based facilities. Fees may be fixed under authority of this paragraph as compensation for any economic cost attributable to the construction and operation of such deepwater port and such land-based facilities, which cannot be recovered under other authority of such State or political subdivision thereof, including, but not limited to, ad valorem taxes, and for environmental and administrative costs attributable to the construction and operation of such deepwater port and such land-based facilities. Fees under this paragraph shall not exceed such economic, environmental, and administrative costs of such State. Such fees shall be subject to the approval of the Secretary. As used in this paragraph, the term "land-based facilities directly related to a deepwater port facility" means the onshore tank farm and pipelines connecting such tank farm to the deepwater port facility.

(3) A licensee shall pay annually in advance the fair market rental value (as determined by the Secretary of the Interior) of the subsoil and seabed of the Outer Continental Shelf of the United States to be utilized by the deepwater port, including the fair market rental value of the right-of-way necessary for the pipeline segment of the port located on such subsoil and seabed.

(i)(1) The Secretary shall approve or deny any application for a designated application area submitted pursuant to this chapter not later than 90 days after the last public hearing on a proposed license for that area.

(2) In the event more than one application is submitted for an application area, the Secretary, unless one of the proposed deepwater ports clearly best serves the national interest, shall issue a license according to the following order of priorities:

(A) to an adjacent coastal State (or combination of States), any political subdivision thereof, or agency or instrumentality, including a wholly owned corporation of any such government;

(B) to a person who is neither (i) engaged in producing, refining, or marketing oil, nor (ii) an affiliate of any person who is engaged in producing, refining, or marketing oil or an affiliate of any such affiliate;

(C) to any other person.

(3) In determining whether any one proposed deepwater port clearly best serves the national interest, the Secretary shall consider the following factors:

(A) the degree to which the proposed deepwater ports affect the environment, as determined under criteria established pursuant to section 1505 of this title;

(B) any significant differences between anticipated completion dates for the proposed deepwater ports; and

(C) any differences in costs of construction and operation of the proposed deepwater ports, to the extent that such differential may significantly affect the ultimate cost of oil to the consumer.

§ 1505. Environmental review criteria—Establishment; evaluation of proposed deepwater ports

(a) The Secretary, in accordance with the recommendations of the Administrator of the Environmental Protection Agency and the Administrator of the National Oceanic and Atmospheric Administration and after consultation with any other Federal departments and agencies having jurisdiction over any aspect of the construction or operation of a deepwater port, shall establish, as soon as practicable after January 3, 1975, environmental review criteria consistent with the National Environmental Policy Act. Such criteria shall be used to evaluate a deepwater port as proposed in an application, including—

(1) the effect on the marine environment;

(2) the effect on oceanographic currents and wave patterns;

(3) the effect on alternate uses of the oceans and navigable waters, such as scientific study, fishing, and exploitation of other living and nonliving resources;

(4) the potential dangers to a deepwater port from waves, winds, weather, and geological conditions, and the steps which can be taken to protect against or minimize such dangers;

(5) effects of land-based developments related to deepwater port development;

(6) the effect on human health and welfare; and

(7) such other considerations as the Secretary deems necessary or appropriate.

(b) The Secretary shall periodically review and, whenever necessary, revise in the same manner as originally developed, criteria established pursuant to subsection (a) of this section.

§ 1506. Antitrust review—Opinions of Attorney General and Federal Trade Commission; defense to judicial proceedings, license inadmissible

(a) The Secretary shall not issue, transfer, or renew any license pursuant to section 1503 of this title unless he has received the opinions of the Attorney General of the United States and the Federal Trade Commission as to whether such action would adversely affect competition, restrain trade, promote monopolization, or otherwise create a situation in contravention of the antitrust laws. The issuance of a license under this chapter shall not be admissible in any way as a defense to any civil or criminal action for violation of the antitrust laws of the United States, nor shall it in any way modify or abridge any private right of action under such laws.

§ 1507. Common carrier status; discrimination prohibition; enforcement, suspension, or termination proceedings

(a) For the purpose of chapter 39 of Title 18 (sections 831–837 of Title 18), and part I of the Interstate Commerce Act (sections 1–27 of Title 49), a deepwater port and storage facilities serviced directly by such deepwater port shall be subject to regulation as a common carrier in accordance with the Interstate Commerce Act, as amended.

(b) A licensee under this chapter shall accept, transport, or convey without discrimination all oil delivered to the deepwater port with respect to which its license is issued. Whenever the Secretary has reason to believe that a licensee is not operating a deepwater port, any storage facility or component thereof, in compliance with its obligations as a common carrier, the Secretary shall commence an appropriate proceeding before the Interstate Commerce Commission or he shall request the Attorney General to take appropriate steps to enforce such obligation and, where appropriate, to secure the imposition of appropriate sanctions. The Secretary may, in addition, proceed as provided in section 1511 of this title to suspend or terminate the license of any person so involved.

§ 1508. Adjacent coastal States—Designation; direct pipeline connections; mileage; risk of damage to coastal environment, time for designation

(a)(1) The Secretary, in issuing notice of application pursuant to section 1504(c) of this title, shall designate as an "adjacent coastal State" any coastal State which (A) would be directly connected by pipeline to a deepwater port as proposed in an application, or (B) would be located within 15 miles of any such proposed deepwater port.

(2) The Secretary shall, upon request of a State, and after having received the recommendations of the Administrator of the National Oceanic and Atmospheric Administration, designate such State as an "adjacent coastal State" if he determines that there is a risk of damage to the coastal environment of such State equal to or greater than the risk posed to a State directly connected by pipeline to the proposed deepwater port. This paragraph shall apply only with respect to requests made by a State not later than the 14th day after the date of publication of notice of an application for a proposed deepwater port in the Federal Register in accordance with section 1504(c) of this title. The Secretary shall make the designation required by this paragraph not later than the 45th day after the date he receives such a request from a State.

(b)(1) Not later than 10 days after the designation of adjacent coastal States pursuant to this chapter, the Secretary shall transmit a complete copy of the application to the Governor of each adjacent coastal State. The Secretary shall not issue a license without the approval of the Governor of each adjacent coastal State. If the Governor fails to transmit his approval or disapproval to the Secretary not later than 45 days after the last public hearing on applications for a particular application area, such approval shall be conclusively presumed. If the Governor notifies the Secretary that an application, which would otherwise be approved pursuant to this paragraph, is inconsistent with State programs relating to environmental protection, land and water use, and coastal zone management, the Secretary shall condition the license granted so as to make it consistent with such State programs.

(2) Any other interested State shall have the opportunity to make its views known to, and shall be given full consideration by, the Secretary regarding the location, construction, and operation of a deepwater port.

(c) The Secretary shall not issue a license unless the adjacent coastal State to which the deepwater port is to be directly connected by pipeline has developed, or is making, at the time the application is submitted, reasonable progress toward developing an approved coastal zone management program pursuant to the Coastal Zone Management Act of 1972 in the area to be directly and primarily impacted by land and water development in the coastal zone resulting from such deepwater port. For the purposes of this chapter, a State shall be considered to be making reasonable progress if it is receiving a planning grant pursuant to section 305 of the Coastal Zone Management Act.

(d) The consent of Congress is given to two or more coastal States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, (1) to apply for a license for the ownership, construction, and operation of a deepwater port or for the transfer of such license, and (2) to establish such agencies, joint or otherwise, as are deemed necessary or appropriate for implementing and carrying out the provisions of any such agreement or compact. Such agreement or compact shall be binding and obligatory upon any State or party thereto without further approval by Congress.

§ 1510. International agreements

The Secretary of State, in consultation with the Secretary, shall seek effective international action and cooperation in support of the policy and purposes of this chapter and may formulate, present, or support specific proposals in the United Nations and other competent international organizations for the development of appropriate international rules and regulations relative to the construction, ownership, and operation of deepwater ports, with particular regard for measures that assure protection of such facilities as well as the promotion of navigational safety in the vicinity thereof.

§ 1514. Remedies—Criminal penalties

(a) Any person who willfully violates any provision of this chapter or any rule, order, or regulation issued pursuant thereto shall on conviction be fined not more than $25,000 for each day of violation or imprisoned for not more than 1 year, or both.

(b)(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any provision of this chapter or any rule, regulation, order, license, or condition thereof, or other requirements under this chapter, he shall issue an order requiring such person to comply with such provision or requirement, or he shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) Any order issued under this subsection shall state with reasonable specificity the nature of the violation and a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(3) Upon a request by the Secretary, the Attorney General shall commence a civil action for appropriate relief, including a permanent or temporary injunction or a civil penalty not to exceed $25,000 per day of such violation, for any violation for which the Secretary is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation, require compliance, or impose such penalty.

(c) Upon a request by the Secretary, the Attorney General shall bring an action in an appropriate district court of the United States for equitable relief to redress a violation by any person of any provision of this chapter, any regulation under this chapter, or any license condition. The district courts of the United States shall have jurisdiction to grant such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, compensatory damages, and punitive damages.

(d) Any vessel, except a public vessel engaged in noncommercial activities, used in a violation of this chapter or any rule or regulation issued pursuant to this chapter shall be liable in rem for any civil penalty assessed or criminal fine imposed and may be proceeded against in any district court of the United States having jurisdiction thereof; but no vessel shall be liable unless it shall appear that one or more of the owners, or bareboat charterers, was at the time of the violation a consenting party or privy to such violation.

§ 1515. Citizen civil action—Equitable relief; case or controversy; district court jurisdiction

(a) Except as provided in subsection (b) of this section, any person may commence a civil action for equitable relief on his own behalf, whenever such action constitutes a case or controversy—

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any provision of this chapter or any condition of a license issued pursuant to this chapter; or

(2) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under this chapter which is not discretionary with the Secretary. Any action brought against the Secretary under this paragraph shall be brought in the district court for the District of Columbia or the district of the appropriate adjacent coastal State.

In suits brought under this chapter, the district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any provision of this chapter or any condition of a license issued pursuant to this chapter, or to order the Secretary to perform such act or duty, as the case may be.

. . . .

(d) The Court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines that such an award is appropriate.

§ 1516. Judicial review; persons aggrieved; jurisdiction of courts of appeal

Any person suffering legal wrong, or who is adversely affected or aggrieved by the Secretary's decision to issue, transfer, modify, renew, suspend, or revoke a license may, not later than 60 days after any such decision is made, seek judicial review of such decision in the United States Court of Appeals for the circuit within which the nearest adjacent coastal State is located. A person shall be deemed to be aggrieved by the Secretary's decision within the meaning of this chapter if he—

(A) has participated in the administrative proceedings before the Secretary (or if he did not so participate, he can show that his failure to do so was caused by the Secretary's failure to provide the required notice); and

(B) is adversely affected by the Secretary's action.

§ 1517. Liability—Oil discharge, prohibition; penalty; notice and hearing; separate offense; vessel clearance withholding, bond or surety

(a)(1) The discharge of oil into the marine environment from a vessel within any safety zone, from a vessel which has received oil from another vessel at a deepwater port, or from a deepwater port is prohibited.

(2) The owner or operator of a vessel or the licensee of a deepwater port from which oil is discharged in violation of this subsection shall be assessed a civil penalty of not more than $10,000 for each violation. No penalty shall be assessed unless the owner or operator or the licensee has been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. The Secretary of the Treasury shall withhold, at the request of the Secretary, the clearance required by section 91 of Title 46, of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to the Secretary.

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(b) Any individual in charge of a vessel or a deepwater port shall notify the Secretary as soon as he has knowledge of a discharge of oil. Any such individual who fails to notify the Secretary immediately of such discharge shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than 1 year, or both. Notification received pursuant to this subsection, or information obtained by the use of such notification, shall not be used against any such individual in any criminal case, except a prosecution for perjury or for giving a false statement.

(c)(1) Whenever any oil is discharged from a vessel within any safety zone, from a vessel which has received oil from another vessel at a deepwater port, or from a deepwater port, the Secretary shall remove or arrange for the removal of such oil as soon as possible, unless he determines such removal will be done properly and expeditiously by the licensee of the deepwater port or the owner or operator of the vessel from which the discharge occurs.

(2) Removal of oil and actions to minimize damage from oil discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan for removal of oil and hazardous substances established pursuant to section 1321(c)(2) of this title.

(3) Whenever the Secretary acts to remove a discharge of oil pursuant to this subsection, he is authorized to draw upon money available in the Deepwater Port Liability Fund established pursuant to subsection (f) of this section. Such money shall be used to pay promptly for all cleanup costs incurred by the Secretary in removing or in minimizing damage caused by such oil discharge.

(d) Notwithstanding any other provision of law, except as provided in subsection (g) of this section, the owner and operator of a vessel shall be jointly and severally liable, without regard to fault, for cleanup costs and for damages that result from a discharge of oil from such vessel within any safety zone, or from a vessel which has received oil from another vessel at a deepwater port, except when such vessel is moored at a deepwater port. Such liability shall not exceed $150 per gross ton or $20,000,000, whichever is lesser, except that if it can be shown that such discharge was the result of gross negligence or willful misconduct within the privity and knowledge of the owner or operator, such owner and operator shall be jointly and severally liable for the full amount of all cleanup costs and damages.

(e) Notwithstanding any other provision of law, except as provided in subsection (g) of this section, the licensee of a deepwater port shall be liable, without regard to fault, for cleanup costs and damages that result from a discharge of oil from such deepwater port or from a vessel moored at such deepwater port. Such liability shall not exceed $50,000,000, except that if it can be shown that such damage was the result of gross negligence or willful misconduct within the privity and knowledge of the licensee, such licensee shall be liable for the full amount of all cleanup costs and damages.

(f)(1) There is established a Deepwater Port Liability Fund (hereinafter referred to as the "Fund") as a nonprofit corporate entity which may sue or be sued in its own name. The Fund shall be administered by the Secretary.

(2) The Fund shall be liable, without regard to fault, for all cleanup costs and all damages in excess of those actually compensated pursuant to subsections (d) and (e) of this section.

(3) Each licensee shall collect from the owner of any oil loaded or unloaded at the deepwater port operated by such licensee, at the time of loading or unloading, a fee of 2 cents per barrel, except that (A) bunker or fuel oil for the use of any vessel, and (B) oil which was transported through the trans-Alaska pipeline, shall not be subject to such collection. Such collections shall be delivered to the Fund at such times and in such manner as shall be prescribed by the Secretary. Such collections shall cease after the amount of money in the Fund has reached $100,000,000, unless there are adjudicated claims against the Fund yet to be satisfied. Collection shall be resumed when the Fund is reduced below $100,000,000. Whenever the money in the Fund is less than the claims for cleanup costs and damages for which it is liable under this section, the Fund shall borrow the balance required to pay such claims from the United States Treasury at an interest rate determined by the Secretary of the Treasury. Costs of administration shall be paid from the Fund only after appropriation in an appropriation bill. All sums not needed for administration and the satisfaction of claims shall be prudently invested in income-producing securities issued by the United States and approved by the Secretary of the Treasury. Income from such securities shall be applied to the principal of the Fund.

(g) Liability shall not be imposed under subsection (d) or (e) of this section if the owner or operator of a vessel or the licensee can show that the discharge was caused solely by (1) an act of war, or (2) negligence on the part of the Federal Government in establishing and maintaining aids to navigation. In addition, liability with respect to damages claimed by a damaged party shall not be imposed under subsection (d), (e), or (f) of this section if the owner or operator of a vessel, the licensee, or the Fund can show that such damage was caused solely by the negligence of such party.

(h)

. . . .

(5) In any case where the owner or operator of a vessel or the licensee of a deepwater port from which oil is discharged acts to remove such oil in accordance with subsection (c)(1) of this section, such owner or operator or such licensee shall be entitled to recover from the Fund the reasonable cleanup cost incurred in such removal if he can show that such discharge was caused solely by (A) an act of war or (B) negligence on the part of the Federal Government in establishing and maintaining aids to navigation.

. . . .

(j)(1) The Secretary shall establish by regulation procedures for the filing and payment of claims for cleanup costs and damages pursuant to this chapter.

(2) No claims for payment of cleanup costs or damages which are filed with the Secretary more than 3 years after the date of the discharge giving rise to such claims shall be considered.

(3) Appeals from any final determination of the Secretary pursuant to this section shall be filed not later than 30 days after such determination in the United States Court of Appeals of the circuit within which the nearest adjacent coastal State is located.

(k)(1) This section shall not be interpreted to preempt the field of liability or to preclude any State from imposing additional requirements or liability for any discharge of oil from a deepwater port or a vessel within any safety zone.

(2) Any person who receives compensation for damages pursuant to this section shall be precluded from recovering compensation for the same damages pursuant to any other State or Federal law. Any person who receives compensation for damages pursuant to any other Federal or State law shall be precluded from receiving compensation for the same damages as provided in this section.

(l) The Secretary shall require that any owner or operator of a vessel using any deepwater port, or any licensee of a deepwater port, shall carry insurance or give evidence of other financial responsibility in an amount sufficient to meet the liabilities imposed by this section.

(m) As used in this section the term—

(1) "cleanup costs" means all actual costs, including but not limited to costs of the Federal Government, of any State or local government, of other nations or of their contractors or subcontractors incurred in the (A) removing or attempting to remove, or (B) taking other measures to reduce or mitigate damages from, any oil discharged into the marine environment in violation of subsection (a)(1) of this section;

(2) "damages" means all damages (except cleanup costs) suffered by any person, or involving real or personal property, the natural resources of the marine environment, or the coastal environment of any nation, including damages claimed without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or natural resources;

(3) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping into the marine environment of quantities of oil determined to be harmful pursuant to regulations issued by the Administrator of the Environmental Protection Agency; and

(4) "owner or operator" means any person owning, operating, or chartering by demise, a vessel.

§ 1518. Relationship to other laws—Federal Constitution, laws, and treaties applicable; other Federal requirements applicable; status of deepwater port; Federal or State authorities and responsibilities within territorial seas unaffected

(a)(1) The Constitution, laws, and treaties of the United States shall apply to a deepwater port licensed under this chapter and to activities connected, associated, or potentially interfering with the use or operation of any such port, in the same manner as if such port were an area of exclusive Federal jurisdiction located within a State. Nothing in this chapter shall be construed to relieve, exempt, or immunize any person from any other requirement imposed by Federal law, regulation, or treaty. Deepwater ports licensed under this chapter do not possess the status of islands and have no territorial seas of their own.

(2) Except as otherwise provided by this chapter, nothing in this chapter shall in any way alter the responsibilities and authorities of a State or the United States within the territorial seas of the United States.

(b) The law of the nearest adjacent coastal State, now in effect or hereafter adopted, amended, or repealed, is declared to be the law of the United States, and shall apply to any deepwater port licensed pursuant to this chapter, to the extent applicable and not inconsistent with any provision or regulation under this chapter or other Federal laws and regulations now in effect or hereafter adopted, amended, or repealed. All such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. For purposes of this subsection, the nearest adjacent coastal State shall be that State whose seaward boundaries, if extended beyond 3 miles, would encompass the site of the deepwater port.

(c) Except in a situation involving force majeure, a licensee of a deepwater port shall not permit a vessel, registered in or flying the flag of a foreign state, to call at, or otherwise utilize a deepwater port licensed under this chapter unless (1) the foreign state involved, by specific agreement with the United States, has agreed to recognize the jurisdiction of the United States over the vessel and its personnel, in accordance with the provisions of this chapter, while the vessel is located within the safety zone, and (2) the vessel owner or operator has designated an agent in the United States for receipt of service of process in the event of any claim or legal proceeding resulting from activities of the vessel or its personnel while located within such a safety zone.

(d) The customs laws administered by the Secretary of the Treasury shall not apply to any deepwater port licensed under this chapter, but all foreign articles to be used in the construction of any such deepwater port, including any component thereof, shall first be made subject to all applicable duties and taxes which would be imposed upon or by reason of their importation if they were imported for consumption in the United States. Duties and taxes shall be paid thereon in accordance with laws applicable to merchandise imported into the customs territory of the United States.

(e) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with the construction and operation of deepwater ports, and proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent coastal State nearest the place where the cause of action arose.

NOTE

Deepwater ports in state waters.

The Deepwater Port Act of 1975 only governs ports located beyond the territorial limits of the United States. Consequently, ports located within the jurisdiction of the states are not controlled by this act. In the Submerged Lands Act of 1953, 43 U.S.C. §§1301 et seq. (1970), Congress gave the coastal states the proprietary right in the lands under the ocean for a distance of three geographic miles. This proprietary right is subject to the overriding constitutional right of the federal government to regulate that area for the purpose of "commerce, navigation, national defense, and international affairs." §1314(a). If a deepwater port is located within this area then the state will exercise control over it. Since the port is in navigable waters, the Corps of Engineers must issue a permit in order for the port to be constructed. Yet the Corps is not required to adhere to the standards set by the Deepwater Port Act; thus, no guarantee exists that such ports would meet these minimum safety and environmental criteria.[1] Furthermore, no coordination is required between the Corps and the Department of Transportation which controls ports established under the Deepwater Port Act.[2] Finally, ports established with the states' jurisdictions lack the coverage granted under the insurance and liability sections of the Deepwater Port Act.[3] A discrepancy could exist, therefore, between deepwater port activities within a state's jurisdiction and those outside that three mile limit.

Onshore effects of deepwater ports.

Although the deepwater port is an offshore facility, repercussions will be felt onshore. Adjacent coastal state status is a valuable asset for any state which might be affected by a deepwater port. Economic effects arise from the construction of the port and its onshore facilities. Environmental impacts result from an oil spill at or near the port or from construction of onshore facilities. Many of these factors are anticipated by the Deepwater Port Act although others are as yet unresolved.

Status as an adjacent coastal state can be obtained in one of the three ways stipulated in §1508 of the Deepwater Port Act. As will be discussed later, status sought by application to the Secretary of Transportation, §1508(a)(2), presents the greatest difficulty. Once a state is designated an adjacent coastal state, it acquires benefits from deepwater port operations and controls over them.

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1. Office of Technology Assessment, United States Congress, Coastal Effects of Offshore Energy Systems, Vol. I (November 1976) at 83. [Hereinafter cited as Office of Technology Assessment].

2. Id. at 185.

3. Id. at 84.

Several sections of the Deepwater Port Act grant privileges to adjacent coastal states unexercisable by other states. If an application for a deepwater terminal license has been received, adjacent coastal states have the right to obtain the complete application in order to evaluate the impact. §1508(b)(1). Plans for a deep draft channel and harbor of an adjacent coastal state to be connected by pipeline to the port will be considered by the Secretary when evaluating the deepwater port application. §1503(d). The Secretary may, if he deems necessary, deny the deepwater port license on this basis. §1504(h)(2) allows the state to set fees for the use of a deepwater port facility and any land-based facilities located within that state. Furthermore, an adjacent coastal state, seeking to establish a deepwater terminal, is given priority when there are more than one applicant for an application area. §1504(1)(2). Thus, a state derives benefits, especially economic, from being declared an adjacent coastal state.

These states also exercise considerable control over the construction and operations of a deepwater port. The most significant aspect lies in the adjacent coastal state's governor's veto power over the construction of the port. This stipulation is noteworthy in that the federal government defers to the states in the nationally significant area of Energy Policy.[4] Furthermore, the state can affect activities taking place on the outer continental shelf, previously an area of exclusive federal jurisdiction.[5] In addition to this veto power, §1518(b) stipulates that the law of the nearest adjacent state, where appropriate, shall apply to the port. Finally, the effects of the deepwater port on adjacent coastal states are considered throughout the application review process, e.g. §§1501(a)(5) and 1508(b)(1). Thus, adjacent coastal states are given crucial influence over deepwater port activities.

Although the governor of the adjacent state has the ultimate veto power, the legislative branch can inhibit deepwater port development. In 1971, Delaware passed a law banning the construction of new refineries in its coastal region.[6] The New Jersey Legislature, although refusing to enact a complete ban on deepwater ports, made each energy facility to be located in the coastal region subject to individual review.[7] This type of legislation could produce conflicts between the governor and the legislators if deepwater ports are planned for these types of areas.

At this point, only one controversy has arisen regarding the Deepwater Port Act's adjacent state stipulation. Two ports were recently licensed, Seadock off of the Texas coast and LOOP (Louisiana Offshore Oil Port, Inc.) off of Louisiana. Florida sought adjacent coastal state status claiming that the operation of these two ports would expose Florida to a risk of oil spills caused by ships passing close to her shores. The Secretary of Transportation denied this application finding that no increased risk of oil spills would result from the new ports. This precedential decision deserves closer scrutiny.

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4. A. Dawson, Deepwater Port Development in North Carolina: The Legal Context, UNC Sea Grant Pub. 75-08 (1975) at 18.

5. Id.

6. Office of Technology Assessment, supra note 1, at 180.

7. Id. at 183.

The Secretary of Transportation, in determining adjacent coastal state status, is required to ascertain whether there is a risk of damage to the potential adjacent state's coastal environment "equal to or greater than the risk posed to a State directly connected by pipeline to the proposed deepwater port." §1508(a)(2). This requirement necessitates three decisions: (1) what is "the coastal environment"; (2) what is "risk of damage"; and (3) what risks should be considered.[8] In order to determine the answers, a consulting firm, Arthur D. Little, Inc., was hired to make a determination of legislative intent. "Coastal environment" was defined as the area designated by §305(b)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. §§1451 et seq (Supp. V, 1975).[9] They found "risk of damage" by "combining the consequences of a damaging event with its probability of occurence."[10] The crucial decision came when the Secretary found that the risks to be considered were only those geographically proximate to the port facility or its port to shore pipeline.[11] Consequently, the probability of any state obtaining adjacent status, unless actually near or connected to the deepwater port, is limited.

In ruling on the Florida application, the Secretary relied on the lack of increased volume of oil to be transported. Yet this decision overlooked the different type of transportation involved.[12] Deepwater ports handle supertankers which, as a result of their size, have little manuverability.[13] The Straits of Florida could present significant difficulty to these tankers and thus raise the probability of oil spills.[14]

Thus, in this first decision on adjacent coastal state status, two noteworthy precedents have been set. In adjudging the potential hazards resulting from a deepwater terminal, volume, not the character of the transport, is to be considered.[15] Also, the risks to be evaluated are only those proximate to the port and its pipelines.[16] With judicial review of such decisions limited to their arbitrariness and capriciousness, adjacent coastal state status will be difficult to obtain.[17]

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8. 6 E.L.R. 10123 at 10124.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 10125.
16. Id.
17. Id.

As illustrated, acquiring adjacent coastal state status can be invaluable in controlling the repercussions of a deepwater port on a state's coastal region. Two major areas of impact should be considered when assessing these effects. Economic impacts result from not only the construction but also the maintenance of deepwater port onshore and offshore facilities. Environmental concerns center around potential oil spills and land-based facilities. An analysis of each of these considerations illustrates the positive and negative aspects of deepwater port development.

As with any major industrial venture, the construction of deepwater ports and their onshore facilities has a substantial effect on the state and local economy. A recent study on the impact of this development off of North Carolina, South Carolina, and Georgia indicated that the principal benefits gained by these regions are derived from resources flowing into the region.[18]

> These include: (1) compensation to workers during the construction and operation of the refineries, unloading terminal, pipelines, and onshore storage; (2) compensation to landowners for the purchase or leasing of land; and (3) tax payments to county and state governments. In each case the resources come from outside the Region (i.e., from the petroleum firms), but they are captured by households or public agencies in the Region.[19]

The costs of the facilities result from support systems such as highways, schools, housing, water supplies, electricity facilities, and transportation. In addition, certain indirect effects occur such as increases in local retail services to serve the large number of employees required by the port facility.[20]

Another study analyzed the total economic picture in phases, beginning with the feasibility study and ending with the maintenance operation of port facilities.[21] The study noted that the total process takes approximately five years with major construction during years 4 and 5.[22] Employee population would peak during year 3 and then decrease to a maintenance level after construction is completed.[23]

The study reached three major conclusions.

> First, during the first two or three years of . . . port development state and local revenues from onshore components of the activities cannot be expected to cover the costs of serving the

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18. Coastal Plains Regional Commission. The Coastal Plans Regional Commission Deepwater Terminal Study, Executive Summary (January 1975). [Hereinafter cited as Coastal Plains Regional Commission].

19. Id. at 9.

20. Id. at 10.

21. R. Bish, "Fiscal Effects of OCS Oil & Gas Development and Deepwater Port Development", Coastal Effects of Offshore Energy Systems Vol. II. (Office of Technology Assessment 1976).

22. Id. at 22.

23. Id.

> population involved in the offshore activities. Second, if all onshore components of an offshore development take place within a single state, beginning in either the third or fourth year revenues from onshore components will contribute larger per capita revenues from the population associated with the offshore development than is generated in other sectors of a state's economy. . . . Furthermore, unless large extra expenditures are necessitated by offshore development, the favorable net fiscal impact will be very large in most states . . . . Finally, if different onshore components are undertaken in different states, general conclusions on revenue surplus are not valid as it would be possible for one state to bear most of the costs of servicing the direct population, while another state obtained the revenues from the onshore components of the development.[24]

The repercussions of these conclusions present two points. During the first few years, revenues from the development will be lower than the amount necessary to support the added population; consequently, financial aid must be arranged.[25] In addition, if different states are involved, financial adjustment may be necessary for that state which bears the brunt of the costs while obtaining little of the benefits.[26] Nevertheless, with the construction and operation of deepwater port onshore facilities, increased per capita revenues will inject more money into state and local funds.[27] These funds would, hopefully, inure to the benefit of the existing population by providing better public services and lower per capita taxes.[28] A balance must, therefore, be reached between pre- and post-construction phases when anticipating deepwater port development.

An outgrowth of this economic impact is an alteration in the sociological profile of the community. During the construction phase, workmen and their families will move into the area, some remaining when this period is completed. A sudden influx of population could upset the balance of a sparcely populated area due to overtaxation of service, recreation, and transportation facilities.[29] Increased population could also increase crime.[30] The state and local officials responsible for the planning of deepwater port development should consider this factor, in addition to economic and environmental aspects, in their deliberations.

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24. Id. at 27-28.

25. Id. at 28.

26. Id.

27. Id. at 3.

28. Id.

29. 8 Southwestern Law Journal 967 at 973.

30. Id.

When focusing on environmental impact, oil spills immediately emerge as the major consideration. As history has indicated, oil spills spell environmental disaster for fish and wildlife, oyster beds, and wetland areas. Originally oil was transported by tankers which could manuver in the narrow and shallow harbors. As the tankers grew in size, their drafts exceeding harbor channel depths, lightening operations began.[31] Under this system, supertankers either unload their entire cargo onto barges which then take the oil to the terminal or the supertankers unload enough cargo to lighten the ship which may then clear the channel.[32] Both the shifting of the oil from the tanker to the barges and the manuvering of the tankers and barges in the harbor provoke potential oil spills.[33] Furthermore, such spills occur close to shore, thus guaranteeing adverse coastal effects.

The advocates of deepwater ports emphasize two features which lessen the probability of spills. First, the number of tankers needed to transport oil will be reduced.[34] As deepwater terminals are located several miles from shore, channel depth and width are no problem. Thus, larger ships carrying large volumes of oil may use these ports. A recent study on the feasibility of deepwater ports off the Delaware and New Jersey coasts found that the deepwater port/supertanker system has a "two-to-one advantage over small tankers based on total spillage within 50 miles of shore."[35] Second, in the event of an accidental spill at the port, the distance necessary for the oil to travel to reach shore is great. The likelihood that the oil will reach the coastal area is, therefore, lessened.[36]

In the event of an oil spill by the port facility or a vessel within its safety zone, liability would be governed by the Deepwater Port Act. §1517. An interesting aspect of this provision is the establishment of a Deepwater Port Liability Fund which will provide for clean-up costs and damages over the liability limits set in §1517(d) and (e). §1517(f). Furthermore, §1517(k)(1) allows states to impose additional liability limits which can be higher than those of the federal government. Nevertheless, with the difficulties implicit in the clean-up operations, emphasis should be placed on prevention rather than remedies.

A second environmental problem concerns the potential harm resulting from onshore operations. For construction operations of offshore facilities, approximately 20 acres of waterfront land are needed for a port intended to handle 1.6 to 2 million barrels per day.[37] The onshore tank-farms store ten times this daily capacity; thus, as a typical storage tank holds 600,000 barrels, 25 tanks on 125 acres would be necessary for this size port.[38] The larger the port, the larger the

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31. Office of Technology Assessment, supra note 1, at 174.

32. Id.

33. Id. at 175.

34. Id. at 193.

35. Id.

36. Id.

37. Id. at 192.

38. Id.

tank farm required. If a refinery is to be built, more land would be used. Construction of these facilities necessitates leveling and filling of the land which could prove harmful to valuable wildlife and vegetation areas in the coastal region.[39] The amount of impact varies with the size of the facility. The onshore facilities may also contribute to water and air pollution.[40]

The Deepwater Port Act requires that the Secretary of Transportation establish environmental review criteria to be used in evaluating a deepwater terminal application. §1505. Included in this review is an analysis of the "effects of land-based developments related to deepwater port development." §1505(a)(5). The Coast Guard, having been delegated this responsibility by the Secretary, specifically looks to the effects of land-based developments on stream and river flow, water quality and supply, air quality, and alternate land and water uses. This latter criterion includes wetlands, wilderness areas, preserves, wild and scenic rivers, existing and proposed sanctuaries, historical and cultural areas, recreational uses, agricultural uses, residential and commercial uses, transportation uses, and power generation and transmission uses.[41] These environmental effects are a major consideration in the application deliberation process. §1503(c)(5).

As a result of these various effects, the adjacent coastal state must weigh carefully the decision to approve a deepwater port facility. Even if approved, the state may wish to impose conditions on the license based on existing state programs, §1508(b)(1), or arrange to lessen the impact on the coastal area by other legislation.[42] Many states utilize environment quality programs, similar to NEPA, which would apply to any onshore facilities of a deepwater terminal.[41] Coastal commissions would also be useful in assessing and controlling the consequences of development.[43] One commentator has suggested that the police power of the state may also be utilized, one benefit being that local officials will have control.[44] Three approaches, encompassed by this police power, apply: zoning, regulatory ordinances, and the public nuisance doctrine.[45]

Zoning enables the local government to restrict the location of onshore storage areas and refineries and controls the growth of the area due to an increase in population. Thus, concern for human and environmental welfare can

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39. Coastal Plains Regional Commission, supra note 18, at 15.

40. Id.

41. 33 C.F.R. §148.109(p)(1976).

42. 8 Southwestern Law Journal 967 at 969.

43. Id.

44. Id.

45. Id. at 976.

be abated. The major hurdle is "whether the regulation zoning is reasonably related to a goal that is subject to police power protection."[46] Health, safety, and welfare are valid reasons and, more recently, conservation and aesthetics are allowable rationals.[47]

A variety of regulatory schemes may be utilized by the local government to control onshore impacts of deepwater terminals. Tax incentives and local ordinances often control pollution from these facilities.[48] Ordinances regulating pollution have been upheld by the courts.[49]

A final type of action can be taken under the public nuisance doctrine. A major asset of this doctrine is its applicability to any situation or activity which may prove injurious or unpleasant to the public as a result of the deepwater port.[50] Oil storage areas and refineries have been declared public nuisances;[51] yet, these facilities should be planned prior to their construction. One drawback of this nuisance approach lies in the fact that it must be enforced by public officials who are often unwilling or unable to shoulder this responsibility.[52] Consequently, the citizens themselves may be required to exert the necessary pressure, either by petitioning that official or bringing their own private suits.

With the increasing energy crunch, need for more expedient and efficient energy transportation is present. The deepwater port system provides one remedy. Before such a system is implemented, however, thought should be given to major onshore impacts. The Deepwater Port Act requires that environmental and some economical considerations be made yet it behooves the adjacent coastal state and its local governments to involve themselves in the planning stage in order to guard against adverse impacts. Only in this manner will an adequate balancing of benefits and burdens be effectuated.

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46. Id. at 977.

47. Id.

48. Id. at 982.

49. Id. at 984.

50. Id. at 987.

51. Id.

52. Id. at 986.

CHAPTER SEVEN

COMPREHENSIVE COASTAL PLANNING

During the decade of the 1960's American's became aware of both the importance and fragility of the coastal areas of the country. Scientists showed that coastal wetlands, once considered wastelands, were important components in the life cycles of many marine fishes and other wildlife. At the same time, it became evident that the resources of the coastal areas were rapidly being depleted due to over-development. In the 1970's the problem of energy development in coastal areas was added to the already acute pressures on these resources.

The response to these developments has been an attempt to stimulate comprehensive planning and management of coastal areas. The federal government has provided a legal framework for management and federal funds, while the states are given the opportunity to actually establish and operate the program.

This chapter contains materials designed to stimulate analysis of coastal planning and regulation. Section one sets out the federal requirements while section two provides the responses of several states to the problem, with emphasis on California and North Carolina. Section three focuses on the implementation of coastal planning and section four involves the constitutional questions that have arisen in the courts regarding the legal tools it is necessary to use in order to comprehensively manage these resources.

COASTAL ZONE MANAGEMENT ACT of 1972

86 Stat. 1280 (1972), as amended,
16 U.S.C. §§1451-1464 (1976)

§ 1451. Congressional findings

The Congress finds that—

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

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

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

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

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

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

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

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

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

§ 1452. Congressional declaration of policy

The Congress finds and declares that it is the national policy (a) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations, (b) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, (c) for all Federal agencies engaged in programs affecting the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this chapter, and (d) to encourage the participation of the public, of Federal, state, and local governments and of regional agencies in the development of coastal zone management programs. With respect to implementation of such management programs, it is the national policy to encourage cooperation among the various state and regional agencies including establishment of interstate and regional agreements, cooperative procedures, and joint action particularly regarding environmental problems.

§ 1453. Definitions

For the purposes of this chapter—

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

(2) The term "coastal waters" means (A) in the Great Lakes area, the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors, roadsteads, and estuary-type areas such as bays, shallows, and marshes and (B) in other areas, those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of sea water, including, but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries.

(3) The term "coastal state" means a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of this chapter, the term also includes Puerto Rico, the Virgin Islands, Guam and American Samoa.

(4) The term "coastal energy activity" means any of the following activities if, and to the extent that (A) the conduct, support, or facilitation of such activity requires and involves the siting, construction, expansion, or operation of any equipment or facility; and (B) any technical requirement exists which, in the determination of the Secretary, necessitates that the siting, construction, expansion, or operation of such equipment or facility be carried out in, or in close proximity to, the coastal zone of any coastal state:

(i) Any outer Continental Shelf energy activity.

(ii) Any transportation, conversion, treatment, transfer, or

(iii) Any transportaton, transfer, or storage of oil, natural gas, or coal (including, but not limited to, by means of any deepwater port, as defined in section 1502(10) of Title 33).

For purposes of this paragraph, the siting, construction, expansion, or operation of any equipment or facility shall be "in close proximity to" the coastal zone of any coastal state if such siting, construction, expansion, or operation has, or is likely to have, a significant effect on such coastal zone.

(5) The term "energy facilities" means any equipment or facility which is or will be used primarily—

(A) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of, any energy resource; or

(B) for the manufacture, production, or assembly of equipment, machinery, products, or devices which are involved in any activity described in subparagraph (A).

The term includes, but is not limited to (i) electric generating plants; (ii) petroleum refineries and associated facilities; (iii) gasification plants; (iv) facilities used for the transportation, conversion, treatment, transfer, or storage of liquified natural gas; (v) uranium enrichment or nuclear fuel processing facilities; (vi) oil and gas facilities, including platforms, assembly plants, storage depots, tank farms, crew and supply bases, and refining complexes; (vii) facilities including deepwater ports, for the transfer of petroleum; (viii) pipelines and transmission facilities; and (ix) terminals which are associated with any of the foregoing.

(6) The term "estuary" means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage. The term includes estuary-type areas of the Great Lakes.

(7) The term "Estuarine sanctuary" means a research area which may include any part or all of an estuary and any island, transitional area, and upland in, adjoining, or adjacent to such estuary, and which constitutes to the extent feasible a natural unit, set aside to provide scientists and students the opportunity to examine over a period of time the ecological relationships within the area.

(8) The term "Fund" means the Coastal Energy Impact Fund established by section 1456a(h) of this title.

(9) The term "land use" means activities which are conducted in, or on the shorelands within, the coastal zone, subject to the requirements outlined in section 1456(g) of this title.

(10) The term "local government" means any political subdivision of, or any special entity created by, any coastal state which (in whole or part) is located in, or has authority over, such state's coastal zone and which (A) has authority to levy taxes, or to establish and collect user fees, or (B) provides any public facility or public service which is financed in whole or part by taxes or user fees. The term includes, but is not limited to, any school district, fire district, transportation authority, and any other special purpose district or authority.

(11) The term "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this chapter, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

(12) The term "outer Continental Shelf energy activity" means any exploration for, or any development or production of, oil or natural gas from the outer Continental Shelf (as defined in section 1331(a) of Title 43), or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production.

(13) The term "person" means any individual; any corporation, partnership, association, or other entity organized or existing under the laws of any state; the Federal Government; any state, regional, or local government; or any entity of any such Federal, state, regional, or local government.

(14) The term "public facilities and public services" means facilities or services which are financed, in whole or in part, by any state or political subdivision thereof, including, but not limited to, highways and secondary roads, parking, mass transit, docks, navigation aids, fire and police protection, water supply, waste collection and treatment (including drainage), schools and education, and hospitals and health care. Such term may also include any other facility or service so financed which the Secretary finds will support increased population.

(15) The term "Secretary" means the Secretary of Commerce.

(16) The term "water use" means activities which are conducted in or on the water; but does not mean or include the establishment of any water quality standard or criteria or the regulation of the discharge or runoff of water pollutants except the standards, criteria, or regulations which are incorporated in any program as required by the provisions of section 1456(f) of this title.

§ 1454. Management program development grants—Authorization

(a) The Secretary may make grants to any coastal state—

(1) under subsection (c) of this section for the purpose of assisting such state in the development of a management program for the land and water resources of its coastal zone; and

(2) under subsection (d) of this section for the purpose of assisting such state in the completion of the development, and the initial implementation, of its management program before such state qualifies for administrative grants under section 1455 of this title.

Program requirements

(b) The management program for each coastal state shall include each of the following requirements:

(1) An identification of the boundaries of the coastal zone subject to the management program.

(2) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(3) An inventory and designation of areas of particular concern within the coastal zone.

(4) An identification of the means by which the state proposes to exert control over the land uses and water uses referred to in paragraph (2), including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions.

(5) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(6) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, state, regional, and interstate agencies in the management process.

(7) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(8) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing the impacts from such facilities.

(9) A planning process for (A) assessing the effects of shoreline erosion (however caused), and (B) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.

No management program is required to meet the requirements in paragraphs (7), (8), and (9) before October 1, 1978.

Limits on grants

(c) The Secretary may make a grant annually to any coastal state for the purposes described in subsection (a)(1) of this section if such state reasonably demonstrates to the satisfaction of the Secretary that such grant will be used to develop a management program consistent with the requirements set forth in section 1455 of this title. The amount of any such grant shall not exceed 80 per centum of such state's costs for such purposes in any one year. No coastal state is eligible to receive more than four grants pursuant to this subsection. After the initial grant is made to any coastal state pursuant to this subsection, no subsequent grant shall be made to such state pursuant to this subsection unless the Secretary finds that such state is satisfactorily developing its management program.

Grants for completion of development and implementation of management programs; limits and eligibility requirements

(d)(1) The Secretary may make a grant annually to any coastal state for the purposes described in subsection (a)(2) of this section if the Secretary finds that such state meets the eligibility requirements set forth in paragraph (2). The amount of any such grant shall not exceed 80 per centum of the costs for such purposes in any one year.

(2) A coastal state is eligible to receive grants under this subsection if it has—

(A) developed a management program which—

(i) is in compliance with the rules and regulations promulgated to carry out subsection (b) of this section, but

(ii) has not yet been approved by the Secretary under section 1455 of this title;

(B) specifically identified, after consultation with the Secretary, any deficiency in such program which makes it ineligible for approval by the Secretary pursuant to section 1455 of this title, and has established a reasonable time schedule during which it can remedy any such deficiency;

(C) specified the purposes for which any such grant will be used;

(D) taken or is taking adequate steps to meet any requirement under section 1455 or 1456 of this title which involves any Federal official or agency; and

(E) complied with any other requirement which the Secretary, by rules and regulations, prescribes as being necessary and appropriate to carry out the purposes of this subsection.

(3) No management program for which grants are made under this subsection shall be considered an approved program for purposes of section 1457 of this title.

Allocation of grants

(e) Grants under this section shall be made to, and allocated among, the coastal states pursuant to rules and regulations promulgated by the Secretary; except that—

(1) no grant shall be made under this section in an amount which is more than 10 per centum of the total amount appropriated to carry out the purposes of this section, but the Secretary may waive this limitation in the case of any coastal state which is eligible for grants under subsection (d) of this section; and

(2) no grant shall be made under this section in an amount which is less than 1 per centum of the total amount appropriated to carry out the purposes of this section, but the Secretary shall waive this limitation in the case of any coastal state which requests such a waiver.

Reversion of unobligated grants

(f) The amount of any grant (or portion thereof) made under this section which is not obligated by the coastal state concerned during the fiscal year for which it was first authorized to be obligated by such state, or during the fiscal year immediately following, shall revert to the Secretary who shall add such amount to the funds available for grants under this section.

Grants to other political subdivisions

(g) With the approval of the Secretary, any coastal state may allocate to any local government, to any areawide agency designated under section 3334 of Title 42 to any regional agency, or to any interstate agency, a portion of any grant received by it under this section for the purpose of carrying out the provisions of this section.

Submission of program for review and approval

(h) Any coastal state which has completed the development of its management program shall submit such program to the Secretary for review and approval pursuant to section 1455 of this title. Whenever the Secretary approves the management program of any coastal state under section 1455 of this title, such state thereafter—

(1) shall not be eligible for grants under this section; except that such state may receive grants under subsection (c) of this section in order to comply with the requirements of paragraphs (7), (8), and (9) of subsection (b) of this section; and

(2) shall be eligible for grants under section 1455 of this title.

Expiration date of grant authority

(i) The authority to make grants under this section shall expire on September 30, 1979.

§ 1455. Administrative grants—Authorization

(a) The Secretary may make a grant annually to any coastal state for not more than 80 per centum of the costs of administering such state's management program if the Secretary (1) finds that such program meets the requirements of section 1454(b) of this title, and (2) approves such program in accordance with subsections (c), (d), and (e) of this section.

(b) Such grants shall be allocated to the states with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the plan, population of the area, and other relevant factors: *Provided*, That no annual grant made under this section shall be in excess of $2,000,000 for fiscal year 1975, in excess of $2,500,000 for fiscal year 1976, nor in excess of $3,000,000 for fiscal year 1977: *Provided further*, That no annual grant made under this section shall be less than 1 per centum of the total amount appropriated to carry out the purposes of this section: *And provided further*, That the Secretary shall waive the application of the 1 per centum minimum requirement as to any grant under this section, when the coastal State involved requests such a waiver.

(c) Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that:

(1) The state has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 of this title.

(2) The state has:

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the state's management program is submitted to the Secretary, which plans have been developed by a local government, an areawide agency designated pursuant to regulations established under section 3334 of Title 42, a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (5) of this subsection and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of such local governments and agencies in carrying out the purposes of this chapter; except that the Secretary shall not find any mechanism to be "effective" for purposes of this subparagraph unless it includes each of the following requirements:

(i) Such management agency is required, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, to send a notice of such management program decision to any local government whose zoning authority is affected thereby.

(ii) Any such notice shall provide that such local government may, within the 30-day period commencing on the date of receipt of such notice, submit to the management agency written comments on such management program decision, and any recommendation for alternatives thereto, if no action is taken during such period which would conflict or interfere with such management program decision, unless such local government waives its right to comment.

(iii) Such management agency, if any such comments are submitted to it, with such 30-day period, by any local government—

(I) is required to consider any such comments,

(II) is authorized, in its discretion, to hold a public hearing on such comments, and

(III) may not take any action within such 30-day period to implement the management program decision, whether or not modified on the basis of such comments.

(3) The state has held public hearings in the development of the management program.

(4) The management program and any changes thereto have been reviewed and approved by the Governor.

(5) The Governor of the state has designated a single agency to receive and administer the grants for implementing the management program required under paragraph (1) of this subsection.

(6) The state is organized to implement the management program required under paragraph (1) of this subsection.

(7) The state has the authorities necessary to implement the program, including the authority required under subsection (d) of this section.

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

(9) The management program makes provision for procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, or esthetic values.

(d) Prior to granting approval of the management program, the Secretary shall find that the state, acting through its chosen agency or agencies, including local governments, areawide agencies designated under section 3334 of Title 42, regional agencies, or interstate agencies, has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power—

(1) to administer land and water use regulations, control development in order to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(2) to acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(e) Prior to granting approval, the Secretary shall also find that the program provides:

(1) for any one or a combination of the following general techniques for control of land and water uses within the coastal zone;

(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, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(2) for a method of assuring that local land and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit.

(f) With the approval of the Secretary, a state may allocate to a local government, an areawide agency designated under section 3334 of Title 42, a regional agency, or an interstate agency, a portion of the grant under this section for the purpose of carrying out the provisions of this section: *Provided*, That such allocation shall not relieve the state of the responsibility for ensuring that any funds so allocated are applied in furtherance of such state's approved management program.

Program modification

(g) Any coastal state may amend or modify the management program which it has submitted and which has been approved by the Secretary under this section, pursuant to the required procedures described in subsection (c) of this section. Except with respect to any such amendment which is made before October 1, 1978, for the purpose of complying with the requirements of paragraphs (7), (8), and (9) of section 1454(b) of this title, no grant shall be made under this section to any coastal state after the date of such an amendment or modification, until the Secretary approves such amendment or modification.

(h) At the discretion of the state and with the approval of the Secretary, a management program may be developed and adopted in segments so that immediate attention may be devoted to those areas within the coastal zone which most urgently need management programs: *Provided*, That the state adequately provides for the ultimate coordination of the various segments of the management program into a single unified program and that the unified program will be completed as soon as is reasonably practicable.

§ 1456. Coordination and cooperation—Federal agencies

(a) In carrying out his functions and responsibilities under this chapter, the Secretary shall consult with, cooperate with, and, to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

Adequate consideration of views of Federal agencies

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

Consistency of Federal activities with state management programs; certification

(c)(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.

(3) (A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 1455 of this title, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed, as provided for in subparagraph (A); or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

(d) State and local governments submitting applications for Federal assistance under other Federal programs affecting the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of title IV of the Intergovernmental Coordination Act of 1968. Federal agencies shall not approve proposed projects that are inconsistent with a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this chapter or necessary in the interest of national security.

(e) Nothing in this chapter shall be construed—

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

(f) Notwithstanding any other provision of this chapter, nothing in this chapter shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this chapter and shall be the water pollution control and air pollution control requirements applicable to such program.

(g) When any state's coastal zone management program, submitted for approval or proposed for modification pursuant to section 1455 of this title, includes requirements as to shorelands which also would be subject to any Federally supported national land use program which may be hereafter enacted, the Secretary, prior to approving such program, shall obtain the concurrence of the Secretary of the Interior, or such other Federal official as may be designated to administer the national land use program, with respect to that portion of the coastal zone management program affecting such inland areas.

Mediation of disagreements

(h) In case of serious disagreement between any Federal agency and a coastal state—

(1) in the development or the initial implementation of a management program under section 1454 of this title; or

(2) in the administration of a management program approved under section 1455 of this title;

the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

§ 1456a. Coastal energy impact program—Administration and coordination by Secretary; financial assistance; audit; rules and regulations

(a) (1) The Secretary shall administer and coordinate, as part of the coastal zone management activities of the Federal Government provided for under this chapter, a coastal energy impact program. Such program shall consist of the provision of financial assistance to meet the needs of coastal states and local governments in such states resulting from specified activities involving energy development. Such assistance, which includes—

(A) grants, under subsection (b) of this section, to coastal states for the purposes set forth in subsection (b)(4) of this section with respect to consequences resulting from the energy activities specified therein;

(B) grants, under subsection (c) of this section, to coastal states for study of, and planning for, consequences relating to new or expanded energy facilities in, or which significantly affect, the coastal zone;

(C) loans, under subsection (d)(1) of this section, to coastal states and units of general purpose local government to assist such states and units to provide new or improved public facilities or public services which are required as a result of coastal energy activity;

(D) guarantees, under subsection (d)(2) of this section and subject to the provisions of subsection (f) of this section, of bonds or other evidences of indebtedness issued by coastal states and units of general purpose local government for the purpose of providing new or improved public facilities or public services which are required as a result of coastal energy activity;

(E) grants or other assistance, under subsection (d)(3) of this section, to coastal states and units of general purpose local government to enable such states and units to meet obligations under loans or guarantees under subsection (d)(1) or (2) of this section which they are unable to meet as they mature, for reasons specified in subsection (d)(3) of this section; and

(F) grants, under subsection (d)(4) of this section, to coastal states which have suffered, are suffering, or will suffer any unavoidable loss of a valuable environmental or recreational resource;

shall be provided, administered, and coordinated by the Secretary in accordance with the provisions of this section and under the rules and regulations required to be promulgated pursuant to paragraph (2). Any such financial assistance shall be subject to audit under section 1459 of this title.

(2) The Secretary shall promulgate, in accordance with section 1463 of this title, such rules and regulations (including, but not limited to, those required under subsection (e) of this section as may be necessary and appropriate to carry out the provisions of this section.

Grants; calculations; purposes and priority of proceeds; supervision by Secretary

(b)(1) The Secretary shall make grants annually to coastal states, in accordance with the provisions of this subsection.

(2) The amounts granted to coastal states under this subsection shall be, with respect to any such state for any fiscal year, the sum of the amounts calculated, with respect to such state, pursuant to subparagraphs (A), (B), (C), and (D):

(A) An amount which bears, to one-third of the amount appropriated for the purpose of funding grants under this subsection for such fiscal year, the same ratio that the amount of outer Continental Shelf acreage which is adjacent to such state and which is newly leased by the Federal Government in the immediately preceding fiscal year bears to the total amount of outer Continental Shelf acreage which is newly leased by the Federal Government in such preceding year.

(B) An amount which bears, to one-sixth of the amount appropriated for such purpose for such fiscal year, the same ratio that the volume of oil and natural gas produced in the immediately preceding fiscal year from the outer Continental Shelf acreage which is adjacent to such state and which is leased by the Federal Government bears to the total volume of oil and natural gas produced in such year from all of the outer Continental Shelf acreage which is leased by the Federal Government.

(C) An amount which bears, to one-sixth of the amount appropriated for such purpose for such fiscal year, the same ratio that the volume of oil and natural gas produced from outer Continental Shelf acreage leased by the Federal Government which is first landed in such state in the immediately preceding fiscal year bears to the total volume of oil and natural gas produced from all outer Continental Shelf acreage leased by the Federal Government which is first landed in all of the coastal states in such year.

(D) An amount which bears, to one-third of the amount appropriated for such purpose for such fiscal year, the same ratio that the number of individuals residing in such state in the immediately preceding fiscal year who obtain new employment in such year as a result of new or expanded outer Continental Shelf energy activities bears to the total number of individuals residing in all of the coastal states in such year who obtain new employment in such year as a result of such outer Continental Shelf energy activities.

(3)(A) The Secretary shall determine annually the amounts of the grants to be provided under this subsection and shall collect and evaluate such information as may be necessary to make such determinations. Each Federal department, agency, and instrumentality shall provide to the Secretary such assistance in collecting and evaluating relevant information as the Secretary may request. The Secretary shall request the assistance of any appropriate state agency in collecting and evaluating such information.

(B) For purposes of making calculations under paragraph (2), outer Continental Shelf acreage is adjacent to a particular coastal state if such acreage lies on that state's side of the extended lateral seaward boundaries of such state. The extended lateral seaward boundaries of a coastal state shall be determined as follows:

(i) If lateral seaward boundaries have been clearly defined or fixed by an interstate compact, agreement, or judicial decision (if entered into, agreed to, or issued before July 26, 1976), such boundaries shall be extended on the basis of the principles of delimitation used to so define or fix them in such compact, agreement, or decision.

(ii) If no lateral seaward boundaries, or any portion thereof, have been clearly defined or fixed by an interstate compact, agreement, or judicial decision, lateral seaward boundaries shall be determined according to the applicable principles of law, including the principles of the Convention on the Territorial Sea and the Contiguous Zone, and extended on the basis of such principles.

(iii) If, after July 26, 1976, two or more coastal states enter into or amend an interstate compact or agreement in order to clearly define or fix lateral seaward boundaries, such boundaries shall thereafter be extended on the basis of the principles of delimitation used to so define or fix them in such compact or agreement.

(C) For purposes of making calculations under this subsection, the transitional quarter beginning July 1, 1976, and ending September 30, 1976, shall be included within the fiscal year ending June 30, 1976.

(4) Each coastal state shall use the proceeds of grants received by it under this subsection for the following purposes (except that priority shall be given to the use of such proceeds for the purpose set forth in subparagraph (A)):

(A) The retirement of state and local bonds, if any, which are guaranteed under subsection (d)(2) of this section; except that, if the amount of such grants is insufficient to retire both state and local bonds, priority shall be given to retiring local bonds.

(B) The study of, planning for, development of, and the carrying out of projects and programs in such state which are—

(i) necessary, because of the unavailability of adequate financing under any other subsection, to provide new or improved public facilities and public services which are required as a direct result of new or expanded outer Continental Shelf energy activity; and

(ii) of a type approved by the Secretary as eligible for grants under this paragraph, except that the Secretary may not disapprove any project or program for highways and secondary roads, docks, navigation aids, fire and police protection, water supply, waste collection and treatment (including drainage), schools and education, and hospitals and health care.

(C) The prevention, reduction, or amelioration of any unavoidable loss in such state's coastal zone of any valuable environmental or recreational resource if such loss results from coastal energy activity.

(5) The Secretary, in a timely manner, shall determine that each coastal state has expended or committed, and may determine that such state will expend or commit, grants which such state has received under this subsection in accordance with the purposes set forth in paragraph (4). The United States shall be entitled to recover from any coastal state an amount equal to any portion of any such grant received by such state under this subsection which—

(A) is not expended or committed by such state before the close of the fiscal year immediately following the fiscal year in which the grant was disbursed, or

(B) is expended or committed by such state for any purpose other than a purpose set forth in paragraph (4).

Before disbursing the proceeds of any grant under this subsection to any coastal state, the Secretary shall require such state to provide adequate assurances of being able to return to the United States any amounts to which the preceding sentence may apply.

Grants; study and planning; consequences affecting coastal zone relating to new or expanded energy facilities; limits on grants

(c) The Secretary shall make grants to any coastal state if the Secretary finds that the coastal zone of such state is being, or is likely to be, significantly affected by the siting, construction, expansion, or operation of new or expanded energy facilities. Such grants shall be used for the study of, and planning for (including, but not limited to, the application of the planning process included in a management program pursuant to section 1454(b)(8) of this title) any economic, social, or environmental consequence which has occurred, is occurring, or is likely to occur in such state's coastal zone as a result of the siting, construction, expansion, or operation of such new or expanded energy facilities. The amount of any such grant shall not exceed 80 per centum of the cost of such study and planning.

Loans; coastal energy activity requiring new or improved public facilities or services; guarantees; relief from inability to meet obligations

(d)(1) The Secretary shall make loans to any coastal state and to any unit of general purpose local government to assist such state or unit to provide new or improved public facilities or public services, or both, which are required as a result of coastal energy activity. Such loans shall be made solely pursuant to this chapter, and no such loan shall require as a condition thereof that any such state or unit pledge its full faith and credit to the repayment thereof. No loan shall be made under this paragraph after September 30, 1986.

(2) The Secretary shall, subject to the provisions of subsection (f) of this section, guarantee, or enter into commitments to guarantee, the payment of interest on, and the principal amount of, any bond or other evidence of indebtedness if it is issued by a coastal state or a unit of general purpose local government for the purpose of providing new or improved public facilities or public services, or both, which are required as a result of a coastal energy activity.

(3) If the Secretary finds that any coastal state or unit of general purpose local government is unable to meet its obligations pursuant to a loan or guarantee made under paragraph (1) or (2) because the actual increases in employment and related population resulting from coastal energy activity and the facilities associated with such activity do not provide adequate revenues to enable such state or unit to meet such obligations in accordance with the appropriate repayment schedule, the Secretary shall, after review of the information submitted by such state or unit pursuant to subsection (e)(3) of this section, take any of the following actions:

(A) Modify appropriately the terms and conditions of such loan or guarantee.

(B) Refinance such loan.

(C) Make a supplemental loan to such state or unit the proceeds of which shall be applied to the payment of principal and interest due under such loan or guarantee.

(D) Make a grant to such state or unit the proceeds of which shall be applied to the payment of principal and interest due under such loan or guarantee.

Notwithstanding the preceding sentence, if the Secretary—

(i) has taken action under subparagraph (A), (B), or (C) with respect to any loan or guarantee made under paragraph (1) or (2), and

(ii) finds that additional action under subparagraph (A), (B), or (C) will not enable such state or unit to meet, within a reasonable time, its obligations under such loan or guarantee and any additional obligations related to such loan or guarantee,

the Secretary shall make a grant or grants under subparagraph (D) to such state or unit in an amount sufficient to enable such state or unit to meet such outstanding obligations.

(4) The Secretary shall make grants to any coastal state to enable such state to prevent, reduce, or ameliorate any unavoidable loss in such state's coastal zone of any valuable environmental or recreational resource, if such loss results from coastal energy activity, if the Secretary finds that such state has not received amounts under subsection (b) of this section which are sufficient to prevent, reduce, or ameliorate such loss.

Rules and regulations; financial assistance, formula, and procedures; criteria for review; criteria and procedures for repayment; loan requirements, terms, and conditions; interest rates

(e) Rules and regulations with respect to the following matters shall be promulgated by the Secretary as soon as practicable, but not later than 270 days after July 26, 1976.

(1) A formula and procedures for apportioning equitably, among the coastal states, the amounts which are available for the provision of financial assistance under subsection (d) of this section. Such formula shall be based on, and limited to, the following factors:

(A) The number of additional individuals who are expected to become employed in new or expanded coastal energy activity, and the related new population, who reside in the respective coastal states.

(B) The standardized unit costs (as determined by the Secretary by rule), in the relevant regions of such states, for new or improved public facilities and public services which are required as a result of such expected employment and the related new population.

(2) Criteria under which the Secretary shall review each coastal state's compliance with the requirements of subsection (g)(2) of this section.

(3) Criteria and procedures for evaluating the extent to which any loan or guarantee under subsection (d)(1) or (2) of this section which is applied for by any coastal state or unit of general

purpose local government can be repaid through its ordinary methods and rates for generating tax revenues. Such procedures shall require such state or unit to submit to the Secretary such information which is specified by the Secretary to be necessary for such evaluation, including, but not limited to—

(A) a statement as to the number of additional individuals who are expected to become employed in the new or expanded coastal energy activity involved, and the related new population, who reside in such state or unit;

(B) a description, and the estimated costs, of the new or improved public facilities or public services needed or likely to be needed as a result of such expected employment and related new population;

(C) a projection of such state's or unit's estimated tax receipts during such reasonable time thereafter, not to exceed 30 years, which will be available for the repayment of such loan or guarantee; and

(D) a proposed repayment schedule.

The procedures required by this paragraph shall also provide for the periodic verification, review, and modification (if necessary) by the Secretary of the information or other material required to be submitted pursuant to this paragraph.

(4) Requirements, terms, and conditions (which may include the posting of security) which shall be imposed by the Secretary, in connection with loans and guarantees made under subsections (d)(1) and (2) of this section, in order to assure repayment within the time fixed, to assure that the proceeds thereof may not be used to provide public services for an unreasonable length of time, and otherwise to protect the financial interests of the United States.

(5) Criteria under which the Secretary shall establish rates of interest on loans made under subsections (d)(1) and (3) of this section. Such rates shall not exceed the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturity of such loans.

In developing rules and regulations under this subsection, the Secretary shall, to the extent practicable, request the views of, or consult with, appropriate persons regarding impacts resulting from coastal energy activity.

Guarantees; terms and conditions; full faith and credit; fees; interest; payments; defaults; enforcement by Attorney General; insufficient funds

(f)(1) Bonds or other evidences of indebtedness guaranteed under subsection (d)(2) of this section shall be guaranteed on such terms and conditions as the Secretary shall prescribe, except that—

(A) no guarantee shall be made unless the indebtedness involved will be completely amortized within a reasonable period, not to exceed 30 years;

(B) no guarantee shall be made unless the Secretary determines that such bonds or other evidences of indebtedness will—

(i) be issued only to investors who meet the requirements prescribed by the Secretary, or, if an offering to the public is contemplated, be underwritten upon terms and conditions approved by the Secretary;

(ii) bear interest at a rate found not to be excessive by the Secretary; and

(iii) contain, or be subject to, repayment, maturity, and other provisions which are satisfactory to the Secretary;

(C) the approval of the Secretary of the Treasury shall be required with respect to any such guarantee, unless the Secretary of the Treasury waives such approval; and

(D) no guarantee shall be made after September 30, 1986.

(2) The full faith and credit of the United States is pledged to the payment, under paragraph (5), of any default on any indebtedness guaranteed under subsection (d)(2) of this section. Any such guarantee made by the Secretary shall be conclusive evidence of the eligibility of the obligation involved for such guarantee, and the validity of any such guarantee so made shall be incontestable in the hands of a holder of the guaranteed obligation, except for fraud or material misrepresentation on the part of the holder, or known to the holder at the time acquired.

(3) The Secretary shall prescribe and collect fees in connection with guarantees made under subsection (d)(2) of this section. These fees may not exceed the amount which the Secretary estimates to be necessary to cover the administrative costs pertaining to such guarantees.

(4) The interest paid on any obligation which is guaranteed under subsection (d)(2) of this section and which is received by the purchaser thereof (or the purchaser's successor in interest), shall be included in gross income for the purpose of chapter 1 of Title 26. The Secretary may pay out of the Fund to the coastal state or the unit of general purpose local government issuing such obligations not more than such portion of the interest on such obligations as exceeds the amount of interest that would be due at a comparable rate determined for loans made under subsection (d)(1) of this section.

(5)(A) Payments required to be made as a result of any guarantee made under subsection (d)(2) of this section shall be made by the Secretary from sums appropriated to the Fund or from moneys obtained from the Secretary of the Treasury pursuant to paragraph (6).

(B) If there is a default by a coastal state or unit of general purpose local government in any payment of principal or interest due under a bond or other evidence of indebtedness guaranteed by the Secretary under subsection (d)(2) of this section, any holder of such bond or other evidence of indebtedness may demand payment by the Secretary of the unpaid interest on and the unpaid principal of such obligation as they become due. The Secretary, after investigating the facts presented by the holder, shall pay to the holder the amount which is due such holder, unless the Secretary finds that there was no default by such state or unit or that such default has been remedied.

(C) If the Secretary makes a payment to a holder under subparagraph (B), the Secretary shall—

(i) have all of the rights granted to the Secretary or the United States by law or by agreement with the obligor; and

(ii) be subrogated to all of the rights which were granted such holder, by law, assignment, or security agreement between such holder and the obligor.

Such rights shall include, but not be limited to, a right of reimbursement to the United States against the coastal state or unit of general purpose local government for which the payment was made for the amount of such payment plus interest at the prevailing current rate as determined by the Secretary. If such coastal state, or the coastal state in which such unit is located, is due to receive any amount under subsection (b) of this section, the Secretary shall, in lieu of paying such amount to such state, deposit such amount in the Fund until such right of reimbursement has been satisfied. The Secretary may accept, in complete or partial satisfaction of any such rights, a conveyance of property or interests therein. Any property so obtained by the Secretary may be completed, maintained, operated, held, rented, sold, or otherwise dealt with or disposed of on such terms or conditions as the Secretary prescribes or approves. If, in any case, the sum received through the sale of such property is greater than the amount paid to the holder under subparagraph (D) plus costs, the Secretary shall pay any such excess to the obligor.

(D) The Attorney General shall, upon the request of the Secretary, take such action as may be appropriate to enforce any right accruing to the Secretary or the United States as a result of the making of any guarantee under subsection (d)(2) of this section. Any sums received through any sale under subparagraph (C) or recovered pursuant to this subparagraph shall be paid into the Fund.

(6) If the moneys available to the Secretary are not sufficient to pay any amount which the Secretary is obligated to pay under paragraph (5), the Secretary shall issue to the Secretary of the Treasury notes or other obligations (only to such extent and in such amounts as may be provided for in appropriation Acts) in such forms and denominations, bearing such maturities, and subject to such terms and conditions as the Secretary of the Treasury prescribes. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States on comparable maturities during the month preceding the issuance of such notes or other obligations. Any sums received by the Secretary through such issuance shall be deposited in the Fund. The Secretary of the Treasury shall purchase any notes or other obligations issued under this paragraph, and for this purpose such Secretary may use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as now or hereafter in force. The purposes for which securities may be issued under that Act are extended to include any purchase of notes or other obligations issued under this paragraph. The Secretary of the Treasury may at any time sell any of the notes or other obligations so acquired under this paragraph. All redemptions, purchases, and sales of such notes or other obligations by the Secretary of the Treasury shall be treated as public debt transactions of the United States.

Eligibility requirements; apportionment of assistance

(g)(1) No coastal state is eligible to receive any financial assistance under this section unless such state—

(A) has a management program which has been approved under section 1455 of this title;

(B) is receiving a grant under section 1454(c) or (d) of this title; or

(C) is, in the judgment of the Secretary, making satisfactory progress toward the development of a management program which is consistent with the policies set forth in section 1452 of this title.

(2) Each coastal state shall, to the maximum extent practicable, provide that financial assistance provided under this section be apportioned, allocated, and granted to units of local government within such state on a basis which is proportional to the extent to which such units need such assistance.

Coastal Energy Impact Fund; establishment

(h) There is established in the Treasury of the United States the Coastal Energy Impact Fund. The Fund shall be available to the Secretary without fiscal year limitation as a revolving fund for the purposes of carrying out subsections (c) and (d) of this section. The Fund shall consist of—

(1) any sums appropriated to the Fund;

(2) payments of principal and interest received under any loan made under subsection (d)(1) of this section;

(3) any fees received in connection with any guarantee made under subsection (d)(2) of this section; and

(4) any recoveries and receipts under security, subrogation, and other rights and authorities described in subsection (f) of this section.

All payments made by the Secretary to carry out the provisions of subsections (c), (d), and (f) of this section (including reimbursements to other Government accounts) shall be paid from the Fund, only to the extent provided for in appropriation Acts. Sums in the Fund which are not currently needed for the purposes of subsections (c), (d), and (f) of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

Land use or water use decisions; intercession of Secretary prohibited

(i) The Secretary shall not intercede in any land use or water use decision of any coastal state with respect to the siting of any energy facility or public facility by making siting in a particular location a prerequisite to, or a condition of, financial assistance under this section.

Report to Congress; evaluations

(j) The Secretary may evaluate, and report to the Congress, on the efforts of the coastal states and units of local government therein to reduce or ameliorate adverse consequences resulting from coastal energy activity and on the extent to which such efforts involve adequate consideration of alternative sites.

Basis of Secretary's administration of financial assistance

(k) To the extent that Federal funds are available under, or pursuant to, any other law with respect to—

(1) study and planning for which financial assistance may be provided under subsection (b)(4)(B) and (c) of this section, or

(2) public facilities and public services for which financial assistance may be provided under subsection (b)(4)(B) and (d) of this section,

the Secretary shall, to the extent practicable, administer such subsections—

(A) on the basis that the financial assistance shall be in addition to, and not in lieu of, any Federal funds which any coastal state or unit of general purpose local government may obtain under any other law; and

(B) to avoid duplication.

Definitions

(l) As used in this section—

(1) The term "retirement", when used with respect to bonds, means the redemption in full and the withdrawal from circulation of those which cannot be repaid by the issuing jurisdiction in accordance with the appropriate repayment schedule.

(2) The term "unavoidable", when used with respect to a loss of any valuable environmental or recreational resource, means a loss, in whole or in part—

(A) the costs of prevention, reduction, or amelioration of which cannot be directly or indirectly attributed to, or assessed against, any identifiable person; and

(B) cannot be paid for with funds which are available under, or pursuant to, any provision of Federal law other than this section.

(3) The term "unit of general purpose local government" means any political subdivision of any coastal state or any special entity created by such a state or subdivision which (in whole or part) is located in, or has authority over, such state's coastal zone, and which (A) has authority to levy taxes or establish and collect user fees, and (B) provides any public facility or public service which is financed in whole or part by taxes or user fees.

§ 1456b. Interstate grants—Priorities; limits on grants

(a) The coastal states are encouraged to give high priority—

(1) to coordinating state coastal zone planning, policies, and programs with respect to contiguous areas of such states; and

(2) to studying, planning, and implementing unified coastal zone policies with respect to such areas.

Such coordination, study, planning, and implementation may be conducted pursuant to interstate agreements or compacts. The Secretary may make grants annually, in amounts not to exceed 90 per centum of the cost of such coordination, study, planning, or implementation, if the Secretary finds that the proceeds of such grants will be used for purposes consistent with sections 1454 and 1455 of this title.

Agreements or compacts

(b) The consent of the Congress is hereby given to two or more coastal states to negotiate, and to enter into, agreements or compacts, which do not conflict with any law or treaty of the United States, for—

(1) developing and administering coordinated coastal zone planning, policies, and programs pursuant to sections 1454 and 1455 of this title; and

(2) establishing executive instrumentalities or agencies which such states deem desirable for the effective implementation of such agreements or compacts.

Such agreements or compacts shall be binding and obligatory upon any state or party thereto without further approved [1] by the Congress.

Federal-State consultation procedure

(c) Each executive instrumentality or agency which is established by an interstate agreement or compact pursuant to this section is encouraged to adopt a Federal-State consultation procedure for the identification, examination, and cooperative resolution of mutual problems with respect to the marine and coastal areas which affect, directly or indirectly, the applicable coastal zone. The Secretary, the Secretary of the Interior, the Chairman of the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Secretary of the department in which the Coast Guard is operating, and the Administrator of the Federal Energy Administration, or their designated representatives, shall participate ex officio on behalf of the Federal Government whenever any such Federal-State consultation is requested by such an instrumentality or agency.

Temporary planning and coordinating entity; limits on grants

(d) If no applicable interstate agreement or compact exists, the Secretary may coordinate coastal zone activities described in subsection (a) of this section and may make grants to assist any group of two or more coastal states to create and maintain a temporary planning and coordinating entity to—

(1) coordinate state coastal zone planning, policies, and programs with respect to contiguous areas of the states involved;

(2) study, plan, and implement unified coastal zone policies with respect to such areas; and

(3) establish an effective mechanism, and adopt a Federal-State consultation procedure, for the identification, examination, and cooperative resolution of mutual problems with respect to the marine and coastal areas which affect, directly or indirectly, the applicable coastal zone.

The amount of such grants shall not exceed 90 per centum of the cost of creating and maintaining such an entity. The Federal officials specified in subsection (c) of this section, or their designated representatives, shall participate on behalf of the Federal Government, upon the request of any such temporary planning and coordinating entity.

§ 1456c. Research and technical assistance for coastal zone management—Programs supporting development and implementation conducted by Secretary; assistance of executive branch; contracts or other arrangements

(a) The Secretary may conduct a program of research, study, and training to support the development and implementation of management programs. Each department, agency, and instrumentality of the executive branch of the Federal Government may assist the Secretary, on a reimbursable basis or otherwise, in carrying out the purposes of this section, including, but not limited to, the furnishing of information to the extent permitted by law, the transfer of personnel with their consent and without prejudice to their position and rating, and the performance of any research, study, and training which does not interfere with the performance of the primary duties of such department, agency, or instrumentality. The Secretary may enter into contracts or other arrangements with any qualified person for the purposes of carrying out this subsection.

Grants; limits

(b) The Secretary may make grants to coastal states to assist such states in carrying out research, studies, and training required with respect to coastal zone management. The amount of any grant made under this subsection shall not exceed 80 per centum of the cost of such research, studies, and training.

Coordination with other activities; availability of results

(c)(1) The Secretary shall provide for the coordination of research, studies, and training activities under this section with any other such activities that are conducted by, or subject to the authority of, the Secretary.

(2) The Secretary shall make the results of research conducted pursuant to this section available to any interested person.

§ 1457. Public hearings

All public hearings required under this chapter must be announced at least thirty days prior to the hearing date. At the time of the announcement, all agency materials pertinent to the hearings, including documents, studies, and other data, must be made available to the public for review and study. As similar materials are subsequently developed, they shall be made available to the public as they become available to the agency.

§ 1457. Public hearings

Section 308 of Pub.L. 89-454, Title III, was redesignated 311 by Pub.L. 94-370, § 7, July 26, 1976, 90 Stat. 1019.

§ 1458. Review of performance; termination of financial assistance

(a) The Secretary shall conduct a continuing review of—

(1) the management programs of the coastal states and the performance of such states with respect to coastal zone management; and

(2) the coastal energy impact program provided for under section 1456a of this title.

(b) The Secretary shall have the authority to terminate any financial assistance extended under section 1455 of this title and to withdraw any unexpended portion of such assistance if (1) he determines that the state is failing to adhere to and is not justified in deviating from the program approved by the Secretary; and (2) the state has been given notice of the proposed termination and withdrawal and given an opportunity to present evidence of adherence or justification for altering its program.

§ 1459. Records and audit

(a) Each recipient of a grant under this chapter or of financial assistance under section 1456a of this title shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition of the funds received under the grant and of the proceeds of such assistance, the total cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall—

(1) after any grant is made under this chapter or any financial assistance is provided under section 1456a(d) of this title; and

(2) until the expiration of 3 years after—

(A) completion of the project, program, or other undertaking for which such grant was made or used, or

(B) repayment of the loan or guaranteed indebtedness for which such financial assistance was provided,

have access for purposes of audit and examination to any record, book, document, and paper which belongs to or is used or controlled by, any recipient of the grant funds or any person who entered into any transaction relating to such financial assistance and which is pertinent for purposes of determining if the grant funds or the proceeds of such financial assistance are being, or were, used in accordance with the provisions of this chapter.

§ 1460. Coastal Zone Management Advisory Committee

(a) The Secretary is authorized and directed to establish a Coastal Zone Management Advisory Committee to advise, consult with, and make recommendations to the Secretary on matters of policy concerning the coastal zone. Such committee shall be composed of not more than fifteen persons designated by the Secretary and shall perform such functions and operate in such a manner as the Secretary may direct. The Secretary shall insure that the committee membership as a group possesses a broad range of experience and knowledge relating to problems involving management, use, conservation, protection, and development of coastal zone resources.

(b) Members of the committee who are not regular full-time employees of the United States, while serving on the business of the committee, including traveltime, may receive compensation at rates not exceeding $100 per diem; and while so serving away from their homes or regular places of business may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5 for individuals in the Government service employed intermittently.

§ 1460. Coastal Zone Management Advisory Committee

Section 311 of Pub.L. 89-454, Title III, was redesignated 314 by Pub.L. 94-370, § 7, July 26, 1976, 90 Stat. 1019.

§ 1461. Estuarine sanctuaries, access to beaches and other coastal areas, and preservation of islands

The Secretary may, in accordance with this section and in accordance with such rules and regulations as the Secretary shall promulgate, make grants to any coastal state for the purpose of—

(1) acquiring, developing, or operating estuarine sanctuaries, to serve as natural field laboratories in which to study and gather data on the natural and human processes occurring within the estuaries of the coastal zone; and

(2) acquiring lands to provide for access to public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value, and for the preservation of islands.

The amount of any such grant shall not exceed 50 per centum of the cost of the project involved; except that, in the case of acquisition of any estuarine sanctuary, the Federal share of the cost thereof shall not exceed $2,000,000.

§ 1462. Annual report

(a) The Secretary shall prepare and submit to the President for transmittal to the Congress not later than November 1 of each year a report on the administration of this chapter for the preceding fiscal year. The report shall include but not be restricted to (1) an identification of the state programs approved pursuant to this chapter during the preceding Federal fiscal year and a description of those programs; (2) a listing of the states participating in the provisions of this chapter and a description of the status of each state's programs and its accomplishments during the preceding Federal fiscal year; (3) an itemization of the allocation of funds to the various coastal states and a breakdown of the major projects and areas on which these funds were expended; (4) an identification of any state programs which have been reviewed and disapproved or with respect to which grants have been terminated under this chapter, and a statement of the reasons for such action; (5) a listing of all activities and projects which, pursuant to the provisions of subsection (c) or subsection (d) of section 1456 of this title, are not consistent with an applicable approved state management program; (6) a summary of the regulations issued by the Secretary or in effect during the preceding Federal fiscal year; (7) a summary of a coordinated national strategy and program for the Nation's coastal zone including identification and discussion of Federal, regional, state, and local responsibilities and functions therein; (8) a summary of outstanding problems arising in the administration of this chapter in order of priority; (9) a description of the economic, environmental, and social consequences of energy activity affecting the coastal zone and an evaluation of the effectiveness of financial assistance under section 1456a of this title in dealing with such consequences; (10) a description and evaluation of applicable interstate and regional planning and coordination mechanisms developed by the coastal states; (11) a summary and evaluation of the research, studies, and training conducted in support of coastal zone management; and (12) such other information as may be appropriate.

(b) The report required by subsection (a) of this section shall contain such recommendations for additional legislation as the Secretary deems necessary to achieve the objectives of this chapter and enhance its effective operation.

CALIFORNIA COASTAL ACT

CAL. PUB. RES. CODE §§ 30000 - 30900 (West Supp. 1976)

CHAPTER 1. FINDINGS AND DECLARATIONS AND GENERAL PROVISIONS

30000.

This division shall be known and may be cited as the California Coastal Act of 1976.

30001.

The Legislature hereby finds and declares:

(a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.

(b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation.

(c) That to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.

30001.2.

The Legislature further finds and declares that, notwithstanding the fact electrical generating facilities, refineries, and coastal-dependent developments, including ports and commercial fishing facilities, offshore petroleum and gas development, and liquefied natural gas facilities, may have significant adverse effects on coastal resources or coastal access, it may be necessary to locate such developments in the coastal zone in order to ensure that inland as well as coastal resources are preserved and that orderly economic development proceeds within the state.

30001.5.

The Legislature further finds and declares that the basic goals of the state for the coastal zone are to:

(a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and manmade resources.

(b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.

(c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.

(d) Assure priority for coastal-dependent development over other development on the coast.

(e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.

30002.

The Legislature further finds and declares that:

(a) The California Coastal Zone Conservation Commission, pursuant to the California Coastal Zone Conservation Act of 1972 (commencing with Section 27000), has made a detailed study of the coastal zone; that there has been extensive participation by other governmental agencies, private interests, and the general public in the study; and that, based on the study, the commission has prepared a plan for the orderly, long-range conservation, use, and management of the natural, scenic, cultural, recreational, and manmade resources of the coastal zone.

(b) Such plan contains a series of recommendations which require implementation by the Legislature and that some of those recommendations are appropriate for immediate implementation as provided for in this division while others require additional review.

30003.

All public agencies and all federal agencies, to the extent possible under federal law or regulations or the United States Constitution, shall comply with the provisions of this division.

30004.

The Legislature further finds and declares that:

(a) To achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement.

(b) To ensure conformity with the provisions of this division, and to provide maximum state involvement in federal activities allowable under federal law or regulations or the United States Constitution which affect California's coastal resources, to protect regional, state, and national interests in assuring the maintenance of the long-term productivity and economic vitality of coastal resources necessary for the well-being of the people of the state, and to avoid long-term costs to the public and a diminished quality of life resulting from the misuse of coastal resources, to coordinate and integrate the activities of the many agencies whose ac-

tivities impact the coastal zone, and to supplement their activities in matters not properly within the jurisdiction of any existing agency, it is necessary to provide for continued state coastal planning and management through a state coastal commission.

30005.

No provision of this division is a limitation on any of the following:

(a) Except as otherwise limited by state law, on the power of a city or county or city and county to adopt and enforce additional regulations, not in conflict with this act, imposing further conditions, restrictions, or limitations with respect to any land or water use or other activity which might adversely affect the resources of the coastal zone.

(b) On the power of any city or county or city and county to declare, prohibit, and abate nuisances.

(c) On the power of the Attorney General to bring an action in the name of the people of the state to enjoin any waste or pollution of the resources of the coastal zone or any nuisance.

(d) On the right of any person to maintain an appropriate action for relief against a private nuisance or for any other private relief.

30006.

The Legislature further finds and declares that the public has a right to fully participate in decisions affecting coastal planning, conservation, and development; that achievement of sound coastal conservation and development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation.

30007.

Nothing in this division shall exempt local governments from meeting the requirements of state and federal law with respect to providing low- and moderate-income housing, replacement housing, relocation benefits, or any other obligation related to housing imposed by existing law or any law hereafter enacted.

30007.5.

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

30008.

This division shall constitute California's coastal zone management program within the coastal zone for purposes of the Federal Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et seq.) and any other federal act heretofore or hereafter enacted or amended that relates to the planning or management of coastal zone resources; provided, however, that pursuant to the Federal Coastal Zone Management Act of 1972, excluded from coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the federal government, its officers or agents.

30009.

This division shall be liberally construed to accomplish its purposes and objectives.

30010.

The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the regional commission, the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

CHAPTER 2. DEFINITIONS

30100.

Unless the context otherwise requires, the definitions in this chapter govern the interpretation of this division.

30100.5.

"Coastal county" means a county or city and county which lies, in whole or in part, within the coastal zone.

30101.

"Coastal-dependent development or use" means any development or use which requires a site on, or adjacent to, the sea to be able to function at all.

30101.5.

"Coastal development permit" means a permit for any development within the coastal zone that is required pursuant to subdivision (a) of Section 30600.

30102.

"Coastal plan" means the California Coastal Zone Conservation Plan prepared and adopted by the California Coastal Zone Conservation Commission and submitted to the Governor and the Legislature on December 1, 1975, pursuant to the California Coastal Zone Conservation Act of 1972 (commencing with Section 27000).

30103.

(a) "Coastal zone" means that land and water area of the State of California from the Oregon border to the border of the Republic of Mexico, specified on the maps identified and set forth in Section 17 of that chapter of the Statutes of the 1975–76 Regular Session enacting this division, extending seaward to the state's outer limit of jurisdiction, including all offshore islands, and extending inland generally 1,000 yards from the mean high tide line of the sea. In significant coastal estuarine, habitat, and recreational areas it extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less, and in developed urban areas the zone generally extends inland less than 1,000 yards. The coastal zone does not include the area of jurisdiction of the San Francisco Bay Conservation and Development Commission, established pursuant to Title 7.2 (commencing with Section 66600) of the Government Code, nor any area contiguous thereto, including any river, stream, tributary, creek, or flood control or drainage channel flowing into such area.

(b) The commission shall, within 60 days after its first meeting, prepare and adopt a detailed map, on a scale of one inch equals 24,000 inches for the coastal zone and shall file a copy of such map with the county clerk of each coastal county. The purpose of this provision is to provide greater detail than is provided by the maps identified in Section 17 of that chapter of the Statutes of the 1975–76 Regular Session enacting this division. The commission may adjust the inland boundary of the coastal zone the minimum landward distance necessary, but in no event more than 100 yards, to avoid bisecting any single lot or parcel or to conform it to readily identifiable natural or manmade features.

30105.

(a) "Commission" means the California Coastal Commission. Whenever the term California Coastal Zone Conservation Commission appears in any law, it means the California Coastal Commission.

(b) "Regional commission" means any regional coastal commission. Whenever the term regional coastal zone conservation commission appears in any law, it means the regional coastal commission.

30106.

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

30107.

"Energy facility" means any public or private processing, producing, generating, storing, transmitting, or recovering facility for electricity, natural gas, petroleum, coal, or other source of energy.

30107.5

"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

30108.

"Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.

30108.2.

"Fill" means earth or any other substance or material, including pilings placed for the purposes of erecting structures thereon, placed in a submerged area.

30108.4.

"Implementing actions" means the ordinances, regulations, or programs which implement either the provisions of the certified local coastal program or the policies of this division and which are submitted pursuant to Section 30502.

30108.5

"Land use plan" means the relevant portions of a local government's general plan, or local coastal element which are sufficiently detailed to indicate the kinds, location, and intensity of land uses, the applicable resource protection and development policies and, where necessary, a listing of implementing actions.

30108.55

"Local coastal element" is that portion of a general plan applicable to the coastal zone which may be prepared by local government pursuant to this division, or such additional elements of the local government's general plan prepared pursuant to subdivision (k) of Section 65303 of the Government Code, as such local government deems appropriate.

30108.6.

"Local coastal program" means a local government's land use plans, zoning ordinances, zoning district maps, and implementing actions which, when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level.

30109.

"Local government" means any chartered or general law city, chartered or general law county, or any city and county.

30110.

"Permit" means any license, certificate, approval, or other entitlement for use granted or denied by any public agency which is subject to the provisions of this division.

30111.

"Person" means any individual, organization, partnership, or other business association or corporation, including any utility, and any federal, state, local government, or special district or an agency thereof.

30112.

"Port governing body" means the Board of Harbor Commissioners or Board of Port Commissioners which has authority over the Ports of Hueneme, Long Beach, Los Angeles, and San Diego Unified Port District.

30113.

"Prime agricultural land" means those lands defined in Section 51201 of the Government Code.

30114.

"Public works" means the following:

(a) All production, storage, transmission, and recovery facilities for water, sewerage, telephone, and other similar utilities owned or operated by any public agency or by any utility subject to the jurisdiction of the Public Utilities Commission, except for energy facilities.

(b) All public transportation facilities, including streets, roads, highways, public parking lots and structures, ports, harbors, airports, railroads, and mass transit facilities and stations, bridges, trolley wires, and other related facilities. For purposes of this division, neither the Ports of Hueneme, Long Beach, Los Angeles, nor San Diego Unified Port District nor any of the developments within these ports shall be considered public works.

(c) All publicly financed recreational facilities and any development by a special district.

(d) All community college facilities.

30115.

"Sea" means the Pacific Ocean and all harbors, bays, channels, estuaries, salt marshes, sloughs, and other areas subject to tidal action through any connection with the Pacific Ocean, excluding nonestuarine rivers, streams, tributaries, creeks, and flood control and drainage channels. "Sea" does not include the area of jurisdiction of the San Francisco Bay Conservation and Development Commission, established pursuant to Title 7.2 (commencing with Section 66600) of the Government Code, including any river, stream, tributary, creek, or flood control or drainage channel flowing directly or indirectly into such area.

30116.

"Sensitive coastal resource areas" means those identifiable and geographically bounded land and water areas within the coastal zone of vital interest and sensitivity. "Sensitive coastal resource areas" include the following:

(a) Special marine and land habitat areas, wetlands, lagoons, and estuaries as mapped and designated in Part 4 of the coastal plan.

(b) Areas possessing significant recreational value.

(c) Highly scenic areas.

(d) Archaeological sites referenced in the California Coastline and Recreation Plan or as designated by the State Historic Preservation Officer.

(e) Special communities or neighborhoods which are significant visitor destination areas.

(f) Areas that provide existing coastal housing or recreational opportunities for low- and moderate-income persons.

(g) Areas where divisions of land could substantially impair or restrict coastal access.

30118.

"Special district" means any public agency, other than a local government as defined in this chapter, formed pursuant to general law or special act for the local performance of governmental or proprietary functions within limited boundaries. "Special district" includes, but is not limited to, a county service area, a maintenance district or area, an improvement district or improvement zone, or any other zone or area, formed for the purpose of designating an area within which a property tax rate will be levied to pay for a service or improvement benefiting that area.

30118.5.

"Special treatment area" means an identifiable and geographically bounded forested area within the coastal zone that constitute a significant habitat area, area of special scenic significance, and any land where logging activities could adversely effect public recreation area or the biological productivity of any wetland, estuary, or stream especially valuable because of its role in a coastal ecosystem.

30119.

"State university or college" means the University of California and the California State University and Colleges.

30120.

"Treatment works" shall have the same meaning as set forth in the Federal Water Pollution Control Act (33 U.S.C. 1251, et seq.) and any other federal act which amends or supplements the Federal Water Pollution Control Act.

30121.

"Wetland" means lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.

CHAPTER 3. COASTAL RESOURCES PLANNING AND MANAGEMENT POLICIES

ARTICLE 1. GENERAL

30200.

Consistent with the basic goals set forth in Section 30001.5, and except as may be otherwise specifically provided in this division, the policies of this chapter shall constitute the standards by which the adequacy of local coastal programs, as provided in Chapter 6 (commencing with Section 30500), and, the permissibility of proposed developments subject to the provisions of this division are determined. All public agencies carrying out or supporting activities outside the coastal zone that could have a direct impact on resources within the coastal zone shall consider the effect of such actions on coastal zone resources in order to assure that these policies are achieved.

ARTICLE 2. PUBLIC ACCESS

30210.

In carrying out the requirement of Section 2 of Article XV of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

30211.

Development shall not interfere with the public's right of access to the sea where acquired through use * * * or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

30212.

Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 2 of Article XV of the California Constitution.

30212.5.

Wherever appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.

30213.

Lower cost visitor and recreational facilities and housing opportunities for persons of low and moderate income shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. New housing in the coastal zone shall be developed in conformity with the standards, policies, and goals of local housing elements adopted in accordance with the requirements of subdivision (c) of Section 65302 of the Government Code.

ARTICLE 3. RECREATION

30220.

Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.

30221.

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and forseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

30222.

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.

30223.

Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.

30224.

Increased recreational boating use of coastal waters shall be encouraged, in accordance with this division, by developing dry storage areas, increasing public launching facilities, providing additional berthing space in existing harbors, limiting non-water-dependent land uses that congest access corridors and preclude boating support facilities, providing harbors of refuge, and by providing for new boating facilities in natural harbors, new protected water areas, and in areas dredged from dry land.

ARTICLE 4. MARINE ENVIRONMENT

30230.

Marine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

30231.

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine or-

ganisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

30232.

Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.

30233.

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland; provided, however, that in no event shall the size of the wetland area used for such boating facility, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, be greater than 25 percent of the total wetland area to be restored.

(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities.

(5) Incidental public service purposes, including, but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(7) Restoration purposes.

(8) Nature study, aquaculture, or similar resource-dependent activities.

(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable longshore current systems.

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division.

30234.

Facilities serving the commercial fishing and recreational boating industries shall be protected and, where feasible, upgraded. Existing commercial fishing and recreational boating harbor space shall not be reduced unless the demand for those facilities no longer exists or adequate substitute space has been provided. Proposed recreational boating facilities shall, where feasible, be designed and located in such a fashion as not to interfere with the needs of the commercial fishing industry.

30235.

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible.

30236.

Channelizations, dams, or other substantial alterations of rivers and streams shall incorporate the best mitigation measures feasible, and be limited to (1) necessary water supply projects, (2) flood control projects where no other method for protecting existing structures in the flood plain is feasible and where such protection is necessary for public safety or to protect existing development, or (3) developments where the primary function is the improvement of fish and wildlife habitat.

ARTICLE 5. LAND RESOURCES

30240.

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resouces shall be allowed within such areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

30241.

The maximum amount of prime agricultural land shall be maintained in agricultural production to assure the protection of the areas' agricultural economy, and conflicts shall be minimized between agricultural and urban land uses through all of the following:

(a) By establishing stable boundaries separating urban and rural areas, including, where necessary, clearly defined buffer areas to minimize conflicts between agricultural and urban land uses.

(b) By limiting conversions of agricultural lands around the periphery of urban areas to the lands where the viability of existing agricultural use is already severely limited by conflicts with urban uses and where the conversion of the lands would complete a logical and viable neighborhood and contribute to the establishment of a stable limit to urban development.

(c) By developing available lands not suited for agriculture prior to the conversion of agricultural lands.

(d) By assuring that public service and facility expansions and nonagricultural development do not impair agricultural viability, either through increased assessment costs or degraded air and water quality.

(e) By assuring that all divisions of prime agriculutral lands, except those conversions approved pursuant to subdivision (b) of this section, and all development adjacent to prime agricultural lands shall not diminish the productivity of such prime agricultural lands.

30242.

All other lands suitable for agricultural use shall not be converted to nonagricultural uses unless (1) continued or renewed agricultural use is not feasible, or (2) such conversion would preserve prime agricultural land or concentrate development consistent with Section 30250. Any such permitted conversion shall be compatible with continued agricultural use on surrounding lands.

30243.

The long-term productivity of soils and timberlands shall be protected, and conversions of coastal commercial timberlands in units of commercial size to other uses or their division into units of noncommercial size shall be limited to providing for necessary timber processing and related facilities.

30244.

Where development would adversely impact achaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

ARTICLE 6. DEVELOPMENT

30250.

(a) New development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. In addition, land divisions, other than leases for agricultural uses, outside existing developed areas shall be permitted only where 50 percent of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of surrounding parcels.

(b) Where feasible, new hazardous industrial development shall be located away from existing developed areas.

(c) Visitor-serving facilities that cannot feasibly be located in existing developed areas shall be located in existing isolated developments or at selected points of attraction for visitors.

30251.

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

ganisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

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30233.

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(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland; provided, however, that in no event shall the size of the wetland area used for such boating facility, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, be greater than 25 percent of the total wetland area to be restored.

(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities.

(5) Incidental public service purposes, including, but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(7) Restoration purposes.

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(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable longshore current systems.

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division.

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Facilities serving the commercial fishing and recreational boating industries shall be protected and, where feasible, upgraded. Existing commercial fishing and recreational boating harbor space shall not be reduced unless the demand for those facilities no longer exists or adequate substitute space has been provided. Proposed recreational boating facilities shall, where feasible, be designed and located in such a fashion as not to interfere with the needs of the commercial fishing industry.

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Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible.

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Channelizations, dams, or other substantial alterations of rivers and streams shall incorporate the best mitigation measures feasible, and be limited to (1) necessary water supply projects, (2) flood control projects where no other method for protecting existing structures in the flood plain is feasible and where such protection is necessary for public safety or to protect existing development, or (3) developments where the primary function is the improvement of fish and wildlife habitat.

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(a) By establishing stable boundaries separating urban and rural areas, including, where necessary, clearly defined buffer areas to minimize conflicts between agricultural and urban land uses.

(b) By limiting conversions of agricultural lands around the periphery of urban areas to the lands where the viability of existing agricultural use is already severely limited by conflicts with urban uses and where the conversion of the lands would complete a logical and viable neighborhood and contribute to the establishment of a stable limit to urban development.

(c) By developing available lands not suited for agriculture prior to the conversion of agricultural lands.

(d) By assuring that public service and facility expansions and nonagricultural development do not impair agricultural viability, either through increased assessment costs or degraded air and water quality.

(e) By assuring that all divisions of prime agriculutral lands, except those conversions approved pursuant to subdivision (b) of this section, and all development adjacent to prime agricultural lands shall not diminish the productivity of such prime agricultural lands.

30242.

All other lands suitable for agricultural use shall not be converted to nonagricultural uses unless (1) continued or renewed agricultural use is not feasible, or (2) such conversion would preserve prime agricultural land or concentrate development consistent with Section 30250. Any such permitted conversion shall be compatible with continued agricultural use on surrounding lands.

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Where development would adversely impact achaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

ARTICLE 6. DEVELOPMENT

30250.

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(b) Where feasible, new hazardous industrial development shall be located away from existing developed areas.

(c) Visitor-serving facilities that cannot feasibly be located in existing developed areas shall be located in existing isolated developments or at selected points of attraction for visitors.

30251.

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

30252.

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing non-automobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.

30253.

New development shall:

(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

(3) Be consistent with requirements imposed by an air pollution control district or the State Air Resources Control Board as to each particular development.

(4) Minimize energy consumption and vehicle miles traveled.

(5) Where appropriate, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.

30254.

New or expanded public works facilities shall be designed and limited to accommodate needs generated by development or uses permitted consistent with the provisions of this division; provided, however, that it is the intent of the Legislature that State Highway Route 1 in rural areas of the coastal zone remain a scenic two-lane road. Special districts shall not be formed or expanded except where assessment for, and provision of, the service would not induce new development inconsistent with this division. Where existing or planned public works facilities can accommodate only a limited amount of new development, services to coastal-dependent land use, essential public services and basic industries vital to the economic health of the region, state, or nation, public recreation, commercial recreation, and visitor-serving land uses shall not be precluded by other development.

30255.

Coastal-dependent developments shall have priority over other developments on or near the shoreline. Except as provided elsewhere in this division, coastal-dependent developments shall not be sited in a wetland.

ARTICLE 7. INDUSTRIAL DEVELOPMENT

30260.

Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 and 30262 if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.

30261.

(a) Multicompany use of existing and new tanker facilities shall be encouraged to the maximum extent feasible and legally permissible, except where to do so would result in increased tanker operations and associated onshore development incompatible with the land use and environmental goals for the area. New tanker terminals outside of existing terminal areas shall be * * * situated as to avoid risk to environmentally sensitive areas and shall use a monobuoy system, unless an alternative type of system can be shown to be environmentally preferable for a specific site. Tanker facilities shall be designed to (1) minimize the total volume of oil spilled, (2) minimize the risk of collision from movement of other vessels, (3) have ready access to the most effective feasible containment and recovery equipment for oilspills, and (4) have onshore deballasting facilities to receive any fouled ballast water from tankers where operationally or legally required.

(b) Only one liquefied natural gas terminal shall be permitted in the coastal zone until engineering and operational practices can eliminate any significant risk to life due to accident or until guaranteed supplies of liquefied natural gas and distribution system dependence on liquefied natural gas are substantial enough that an interruption of service from a single liquefied natural gas facility would cause substantial public harm.

Until the risks inherent in liquefied natural gas terminal operations can be sufficiently identified and overcome and such terminals are found to be consistent with the health and safety of nearby human populations, terminals shall be built only at sites remote from human population concentrations. Other unrelated development in the vicinity of a liquefied natural gas terminal site which is remote from human population concentrations shall be prohibited. At such time as liquefied natural gas marine terminal operations are found consistent with public safety, terminal sites only in developed or industrialized port areas may be approved.

30262.

Oil and gas development shall be permitted in accordance with Section 30260, if the following conditions are met:

(a) The development is performed safely and consistent with the geologic conditions of the well site.

(b) New or expanded facilities related to such development are consolidated, to the maximum extent feasible and legally permissible, unless consolidation will have adverse environmental consequences and will not significantly reduce the number of producing wells, support facilities, or sites required to produce the reservoir economically and with minimal environmental impacts.

(c) Environmentally safe and feasible subsea completions are used when drilling platforms or islands would substantially degrade coastal visual qualities unless use of such structures will result in substantially less environmental risks.

(d) Platforms or islands will not be sited where a substantial hazard to vessel traffic might result from the facility or related operations, determined in consultation with the United States Coast Guard and the Army Corps of Engineers.

(e) Such development will not cause or contribute to subsidence hazards unless it is determined that * * * adequate measures will be undertaken to prevent damage from such subsidence.

(f) With respect to new facilities, all oilfield brines are reinjected into oil-producing zones unless the Division of Oil and Gas of the Department of Conservation determines to do so would adversely affect production of the reservoirs and unless injection into other subsurface zones will reduce environmental risks. * * * Exceptions to reinjections will be granted consistent with the Ocean Waters Discharge Plan of the State Water Resources Control Board and where adequate provision is made for the elimination of petroleum odors and water quality problems.

Where appropriate, monitoring programs to record land surface and near-shore ocean floor movements shall be initiated in locations of new large-scale fluid extraction on land or near shore before operations begin and shall continue until surface conditions have stabilized. Costs of monitoring and mitigation programs shall be borne by liquid and gas extraction operators.

30263.

(a) New or expanded refineries or petrochemical facilities not otherwise consistent with the provisions of this division shall be permitted if (1) alternative locations are not feasible or are more environmentally damaging; (2) adverse environmental effects are mitigated to the maximum extent feasible; (3) it is found that not permitting such development would adversely affect the public welfare; (4) the facility is not located in a highly scenic or seismically hazardous area, on any of the Channel Islands, or within or contiguous to environmentally sensitive areas; and (5) the facility is sited so as to provide a sufficient buffer area to minimize adverse impacts on surrounding property.

(b) In addition to meeting all applicable air quality standards, new or expanded refineries or petrochemical facilities shall be permitted in areas designated as air quality maintenance areas by the State Air Resources Board and in areas where coastal resources would be adversely affected only if the negative impacts of the project upon air quality are offset by reductions in gaseous emissions in the area by the users of the fuels, or, in the case of an expansion of an existing site, total site emission levels, and site levels for each emission type for which national or state ambient air quality standards have been established, do not increase.

(c) New or expanded refineries or petrochemical facilities shall minimize the need for once-through cooling by using air cooling to the maximum extent feasible and by using treated waste waters from inplant processes where feasible.

30264.

Notwithstanding any other provision of this division, except subdivisions (b) and (c) of Section 30413, new or expanded thermal electric generating plants may be constructed in the coastal zone if the proposed coastal site has been determined by the State Energy Resources Conservation and Development Commission to have greater relative merit pursuant to the provisions of Section 25516.1 than available alternative sites and related facilities for an applicant's service area which have been determined to be acceptable pursuant to the provisions of Section 25516.

§ 30303. Regional commissions; selection or appointment of members

The members of the regional commissions shall be selected or appointed as follows:

(a) All supervisors, by the board of supervisors on which they sit.

(b) All city councilpersons, except under paragraph (2) of subdivision (e) and paragraph (2) of subdivision (f) of Section 30302, by the city selection committee of their respective counties.

(c) All delegates of regional agencies, by their respective agency.

(d) All members representing the public at large, equally by the Governor, the Senate Rules Committee, and the Speaker of the Assembly; provided, however, that the extra member under paragraph (4) of subdivision (b) of Section 30302 shall be appointed by the Governor and the extra members under paragraph (4) of subdivision (c) of Section 30302 shall be appointed one by the Senate Rules Committee and one by the Speaker of the Assembly, respectively.

§ 30304. Regional commissions; alternate members

A member of a regional commission who is also a supervisor from a county or city and county with a population greater than 400,000 may, subject to confirmation by his or her appointing power, appoint an alternate member to represent him or her at any regional commission meeting. The alternate shall serve at the pleasure of the member who appointed him or her and shall have all the powers and duties as a member of the regional commission, except that the alternate shall only participate and vote in meetings in the absence of the member who appointed him or her.

An alternate shall not be eligible for appointment to the commission as a regional representative to the commission.

§ 30304.5 Regional commissions; selection of representatives to commission; certification of necessity of regional commission

(a) The regional commission shall be established pursuant to the provisions of this chapter and shall, no later than January 11, 1977, select their representatives to the commission.

(b) A regional commission shall take no action, other than selecting a representative to the commission as provided in subdivision (a), and shall have no powers, duties or responsibilities pursuant to the provisions of this division unless and until the commission, pursuant to subdivision (c), has certified that the regional commission for any region is necessary to expedite the review of local coastal programs and coastal development permit applications pursuant to the provisions of this division.

(c) The commission shall review the anticipated workload relative to the processing and review of local coastal programs and coastal development permits within each region of the coastal zone. If the commission determines that its workload and the anticipated workload within any region is of such magnitude that unreasonable delays will result unless the appropriate regional commission is authorized to review and process local coastal programs and coastal development permit applications, the commission shall, by majority vote of its appointed members, certify that such regional commission is necessary to carry out the provisions of this division. Upon certification by the commission pursuant to this subdivision, the appropriate regional commission shall assume all the powers, duties and responsibilities provided in this division.

(d) In the absence of a certification pursuant to subdivision (c), the commission shall, within any region of the coastal zone, assume all the powers, duties, and responsibilities of the regional commission as provided in this division. After certification pursuant to subdivision (c), the powers, duties and responsibilities of the commission and the appropriate regional commission shall be exercised in the manner provided in this division.

30305.

Each regional commission shall terminate within 30 days after the last local coastal program required within its region pursuant to Chapter 6 (commencing with Section 30500) of this division has been certified and all implementing devices have become effective or June 30, 1979, whichever is the earlier date. Upon the termination of any regional commission, the commission shall succeed to any and all of such regional commission's obligations, powers, duties, responsibilities, benefits, or legal interests.

§ 30310. Transition

(a) It is the intent of the Legislature to provide, to the maximum extent possible, for a smooth transition and continuity between the coastal program established by the California Coastal Zone Conservation Act of 1972 (commencing with Section 27000) and this division. Except with respect to appointments made pursuant to subdivision (e) of Section 30301, at least one-half of each of the commission and regional commission member appointments by the Governor, the Senate Rules Committee, and the Speaker of the Assembly shall be persons who on November 30, 1976, were serving as members of the California Coastal Zone Conservation Commission or regional coastal zone conservation commissions established by the California Coastal Zone Conservation Act of 1972 (commencing with Section 27000), unless such persons are not available for such appointment.

30311.

Notwithstanding any other provision of law, each member of the commission and each regional commission shall be appointed or selected on or before January 2, 1977.

30312.

The terms of office of commission and regional commission members shall be as follows:

(a) Any person qualified for membership because he or she holds a specified office as a locally elected official shall serve at the pleasure of his or her selecting or appointing authority; provided, however, that such membership shall cease when his or her term of office as a locally elected official ceases.

(b) Any member appointed by the Governor, the Senate Rules Committee, or the Speaker of the Assembly shall serve for two years at the pleasure of their appointing power. Such members may be reappointed for succeeding two-year periods.

(c) Members of the commission who are representatives of a regional commission shall serve on the commission at the pleasure of the regional commission.

30313.

Vacancies that occur shall be filled within 30 days after the occurrence of the vacancy, and shall be filled in the same manner in which the vacating member was selected or appointed.

30314.

Except as provided in this section, members or alternates of the commission or any regional commission shall serve without compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of their duties to the extent that reimbursement for such expenses is not otherwise provided or payable by another public agency or agencies, and shall receive fifty dollars ($50) for each full day of attending meetings of the commission or of any regional commission. In addition, members or alternates of the commission shall receive twelve dollars and fifty cents ($12.50) for each hour actually spent in preparation for a commission meeting; provided, however, that for each meeting no more than eight hours of preparation time shall be compensated as provided herein.

An alternate shall be entitled to payment and reimbursement for the necessary expenses incurred in participating in regional commission or commission meetings; provided, however, that only the member or his or her alternate shall receive such payment and reimbursement, and if both the member and alternate prepare for, in the case of alternates to the commission, attend, and participate in any portion of a regional commission or commission meeting, only the alternate shall be entitled to such payment and reimbursmeent.

30315.

The commission and regional commission shall meet at least once a month at a place convenient to the public. All meetings of the commission and each regional commission shall be open to the public.

Unless otherwise specifically provided for in this division, a majority of the total appointed membership of the commission or of the regional commission, as the case may be, shall constitute a quorum and shall be necessary to approve any action required or permitted under this division.

30316.

The commission and each regional commission shall elect a chairperson and vice chairperson from among its members.

30317.

The headquarters of the commission shall be in a coastal county, but it may meet and may exercise any or all of its powers in any part of the state.

The commission shall designate the location of the headquarters for each regional commission within the region of such regional commission. After the termination of a regional commission pursuant to Section 30305, the commission may maintain regional offices, if it finds that accessibility to, and participation by, the public will be better served or that the provisions of this division can be implemented more efficiently through the maintenance of such offices.

30318.

Nothing in this division shall preclude or prevent any member or employee of the commission or any regional commission who is also an employee of another public agency, a county supervisor or city councilperson, member of the Association of Bay Area Governments, member of the Association of Monterey Bay Area Governments, delegate to the Southern California Association of Governments, or member of the San Diego Comprehensive Planning Organization, and who has in such designated capacity voted or acted upon a particular matter, from voting or otherwise acting upon such matter as a member or employee of the commission or any regional commission, as the case may be. Nothing in this section shall exempt any such member or employee of the commission or any regional commission, from any other provision of this article.

ARTICLE 3. POWERS AND DUTIES

30330.

The commission, unless specifically otherwise provided, shall have the primary responsibility for the implementation of the provisions of this division and is designated as the state coastal zone planning and management agency for any and all purposes, and may exercise any and all powers set forth in the Federal Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et seq.) or any amendment thereto or any other federal act heretofore or hereafter enacted that relates to the planning or management of the coastal zone.

In addition to any other authority, the commission may, except for a facility defined in Section 25110, grant or issue any certificate or statement required pursuant to any such federal law that an activity of any person, including any local, state, or federal agency, is in conformity with the provisions of this division. With respect to any project outside the coastal zone that may have a substantial effect on the resources within the jurisdiction of the San Francisco Bay Conservation and Development Commission, established pursuant to Title 7.2 (commencing with Section 66600) of the Government Code, and for which any certification is required pursuant to the Federal Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et seq.), such certification shall be issued by the Bay Conservation and Development Commission; provided however, the commission may review and submit comments for any such project which affects resources within the coastal zone.

30331.

The commission is designated the successor in interest to all remaining obligations, powers, duties, responsibilities, benefits, and interests of any sort of the California Coastal Zone Conservation Commission and of the six regional coastal zone conservation commissions established by the California Coastal Zone Conservation Act of 1972 (commencing with Section 27000).

30333.

The commission may adopt rules and regulations to carry out the purposes and provisions of this division, and to govern procedures of the commission and regional commissions.

Each regional commission may adopt any regulation or take any action it deems reasonable and necessary to carry out the provisions of this division; provided, however, that no regulation adopted by a regional commission shall take effect until the commission has first reviewed such proposed regulation and found it consistent with this division.

Except as provided in Section 30501 and subdivision (a) of Section 30620, such rules and regulations shall be adopted in accordance with the Administrative Procedure Act (commencing with Section 11370 of the Government Code). Such rules and regulations shall be consistent with this division and other applicable law.

30333.5.

Notwithstanding any other provision of this division, the commission may, by a majority vote of the appointed members, remove any local coastal program or

any portion thereof, any coastal development permit application or appeal therefrom, from any regional commission for direct consideration and action by the commission where to do so would expedite the review of such local coastal program or coastal development permit application pursuant to this division. The commission shall make such removal where it finds that the regional commission is not processing the local coastal program or any portion thereof, a coastal development permit application, or appeal therefrom, in a reasonably expeditious and timely manner.

30334.

The commission and each regional commission, subject to the approval of the commission, may do * * * the following: * * *

(a) Contract for any private professional or governmental services, if such work or services cannot be satisfactorily performed by its employees.

(b) Sue and be sued. The Attorney General shall represent the commission and any regional commission in any litigation or proceeding before any court, board, or agency of the state or federal government.

30334.5.

In addition to the authority granted by Section 30334, the commission may apply for and accept grants, appropriations, and contributions in any form.

30335.

The commission and each regional commission shall appoint an executive director who shall be exempt from civil service and shall serve at the pleasure of his or her appointing power. The commission shall prescribe the duties and salaries of each executive director, and, consistent with applicable civil service laws, shall appoint and discharge any officer, house staff counsel, or employee of the commission or any regional commission as it deems necessary to carry out the provisions of this division.

30336.

The commission and each regional commission shall, to the maximum extent feasible, assist local governments in exercising the planning and regulatory powers and responsibilities provided for by this division where the local government elects to exercise such powers and responsibilities and requests assistance from the commission or regional commissions, and shall cooperate with and assist other public agencies in carrying out this division. Similarly, every public agency, including regional and state agencies and local governments, shall cooperate with the commission and any regional commission and shall, to the extent their resources permit, provide any advice, assistance, or information the commission or regional commission may require to perform its duties and to more effectively exercise its authority.

30337.

The commission shall, where feasible, and in cooperation with the affected agency, establish a joint development permit application system and public hearing procedures with permit issuing agencies.

30338.

By May 1, 1977, the commission, after full consultation with the State Water Resources Control Board, shall adopt regulations for the timing of its review of proposed treatment works pursuant to the provisions of subdivision (c) of Section 30412.

30339.

The commission and each regional commission shall:

(a) Ensure full and adequate participation by all interested groups and the public at large in the commission's and each regional commission's work program.

(b) Ensure that timely and complete notice of commission and regional commission meetings and public hearings is disseminated to all interested groups and the public at large.

(c) Advise all interested groups and the public at large as to effective ways of participating in commission and regional commission proceedings.

(d) Recommend to any local government preparing or implementing a local coastal program and to any state agency that is carrying out duties or responsibilities pursuant to the provisions of this division, and additional measures to assure open consideration and more effective public participation in such programs or activities.

30340.

The commission shall be responsible for the management and budgeting of any and all funds that may be appropriated, allocated, granted, or in any other way made available to the commission or any regional commission for expenditure.

30341.

The commission or any regional commission, with the commission's approval, may prepare and adopt any additional plans and maps and undertake any studies it deems necessary and appropriate to better accomplish the purposes, goals, and policies of this division; provided, however, that such plans and maps shall only be adopted after public hearing.

30342.

The commission shall evaluate progress being made toward implementation of the provisions of this division and shall submit a report to the Governor and Legislature on January 1st of every other year, commencing on January 1, 1979.

CHAPTER 5. STATE AGENCIES

ARTICLE 1. GENERAL

30400.

It is the intent of the Legislature to minimize duplication and conflicts among existing state agencies carrying out their regulatory duties and responsibilities.

30401.

Except as otherwise specifically provided in this division, enactment of this division does not increase, decrease, duplicate or supersede the authority of any existing state agency. * * *

This chapter shall not be construed to limit in any way the regulatory controls over development pursuant to Chapters 7 (commencing with Section 30600) and 8 (commencing with Section 30700), provided however, neither the commission nor any regional commission shall set standards or adopt regulations that duplicate regulatory controls established by any existing state agency pursuant to specific statutory requirements or authorization.

30402.

All state agencies shall carry out their duties and responsibilities in conformity with this division.

30403.

It is the intent of the Legislature that the policies of this division and all local coastal programs prepared pursuant to Chapter 6 (commencing with Section 30500) should provide the common assumptions upon which state functional plans for the coastal zone are based in accordance with the provisions of Section 65036 of the Government Code.

30404.

The commission shall periodically, in the case of the State Energy Resources Conservation and Development Commission, the State Board of Forestry, the State Water Resources Control Board and the California regional water quality control boards, the State Air Resources Board and air pollution control districts, the Department of Fish and Game, the Department of Parks and Recreation, the Department of Navigation and Ocean Development, the Division of Mines and Geology, the Division of Oil and Gas, and the State Lands Commission, and may, with respect to any other state agency, submit recommendations designed to encourage it to carry out its functions in a manner consistent with this division. The recommendations may include proposed changes in administrative regulations, rules, and statutes.

Each such state agency shall review and consider such recommendations and shall, within six months after receipt and in the event the recommendations are not implemented, report to the Governor and the Legislature its action and reasons therefor. Such report shall also include the agency's comments on any legislation which may have been proposed by the commission.

ARTICLE 2. STATE AGENCIES

30410.

(a) The commission and the San Francisco Bay Conservation and Development Commission shall conduct a joint review of this division and Title 7.2 (commencing with Section 66600) of the Government Code to determine how the program administered by the San Francisco Bay Conservation and Development Commission shall be related to this division. Both commissions shall jointly present their recommendations to the Legislature not later than July 1, 1978.

(b) It is the intent of the Legislature that the ports under the jurisdiction of the San Francisco Bay Conservation and Development Commission, including the Ports of San Francisco, Oakland, Richmond, Redwood City, Encinal Terminals, and Benicia, should be treated no less favorably than the ports under the jurisdiction of the commission covered in Chapter 8 (commencing with Section 30700) under the terms of any legislation which is developed pursuant to such study.

30411.

(a) The Department of Fish and Game and the Fish and Game Commission are the principal state agencies responsible for the establishment and control of wildlife and fishery management programs and neither the commission nor any regional commission shall establish or impose any controls with respect thereto that duplicate or exceed regulatory controls established by such agencies pursuant to specific statutory requirements or authorization.

(b) The Department of Fish and Game, in consultation with the commission and the Department of Navigation and Ocean Development, may study degraded wetlands and identify those which can most feasibly be restored in conjunction with development of a boating facility as provided in subdivision (a) of Section 30233. Any such study shall include consideration of all of the following:

(1) Whether the wetland is so severely degraded and its natural processes so substantially impaired that it is not capable of recovering and maintaining a high level of biological productivity without major restoration activities.

(2) Whether a substantial portion of the degraded wetland, but in no event less than 75 percent, can be restored and maintained as a highly productive wetland in conjunction with a boating facilities project.

(3) Whether restoration of the wetland's natural values, including its biological productivity and wildlife habitat features, can most feasibly be achieved and maintained in conjunction with a boating facility or whether there are other feasible ways to achieve such values.

30412.

(a) In addition to the provisions set forth in Section 13142.5 of the Water Code, the provisions of this section shall apply to the commission and the State Water Resources Control Board and the California regional water quality control boards.

(b) The State Water Resources Control Board and the California regional water quality control boards are the state agencies with primary responsibility for the coordination and control of water quality. The State Water Resources Control Board has primary responsibility for the administration of water rights pursuant to applicable law. The commission shall assure that proposed development and local coastal programs shall not frustrate the provisions of this section. Neither the commission nor any regional commission shall, except as provided in subdivision (c), modify, adopt conditions, or take any action in conflict with any determination by the State Water Resources Control Board or any California regional water quality control board in matters relating to water quality or the administration of water rights.

Except as provided in this section, nothing herein shall be interpreted in any way either as prohibiting or limiting the commission, regional commission, local government, or port governing body from exercising the regulatory controls over development pursuant to this division in a manner necessary to carry out the provisions of this division.

(c) Any development within the coastal zone or outside the coastal zone which provides service to any area within the coastal zone that constitutes a treatment work shall be reviewed by the commission and any permit it issues, if any, shall be determinative only with respect to the following aspects of such development:

(1) The siting and visual appearance of treatment works within the coastal zone.

(2) The geographic limits of service areas within the coastal zone which are to be served by particular treatment works and the timing of the use of capacity of treatment works for such service areas to allow for phasing of development and use of facilities consistent with this division.

(3) Development projections which determine the sizing of treatment works for providing service within the coastal zone.

The commission shall * * * make these determinations in accordance with the policies of this division and shall make its final determination on a permit application for a treatment work prior to the final approval by the State Water Resources Control Board for the funding of such treatment works. Except as specifically provided in this subdivision, the decisions of the State Water Resources Control Board relative to the construction of treatment works shall be final and binding upon the commission and any regional commission.

(d) The commission shall provide or require reservations of sites for the construction of treatment works and points of discharge within the coastal zone adequate for the protection of coastal resources consistent with the provisions of this division.

(e) Nothing in this section shall require the State Water Resources Control Board to fund or certify for funding, any specific treatment works within the coastal zone or to prohibit the State Water Resources Control Board or any California regional water quality control board from requiring a higher degree of treatment at any existing treatment works.

30413.

(a) In addition to the provisions set forth in subdivision (f) of Section 30241, and in Sections 25302, 25500, 25507, 25508, 25514, 25516.1, 25519, 25523, and 25526, the provisions of this section shall apply to the commission and the State Energy Resources Conservation and Development Commission with respect to matters within the statutory responsibility of the latter.

(b) The commission shall, prior to January 1, 1978, and after one or more public hearings, designate those specific locations within the coastal zone where the location of a facility as defined in Section 25110 would prevent the achievement of the objectives of this division; provided, however, that specific locations that are presently used for such facilities and reasonable expansion thereof shall not be so designated. Each such designation shall include a description of the boundaries of such locations, the objectives of this division which would be so affected, and detailed findings concerning the significant adverse impacts that would result from development of a facility in the designated area. The commission shall consider the conclusions, if any, reached by the State Energy Resources Conservation and Development Commission in its most recently promulgated comprehensive report issues pursuant to Section 25309. The commission shall transmit a copy of its report prepared pursuant to this subdivision to the State Energy Resources Conservation and Development Commission.

(c) The commission shall every two years revise and update the designations specified in subdivision (b) of this section. The provisions of subdivision (b) of this section shall not apply to any sites and related facilities specified in any notice of intention to file an application for certification filed with the State Energy Resources Conservation and Development Commission pursuant to Section 25502 prior to designation of additional locations made by the commission pursuant to this subdivision.

(d) Whenever the State Energy Resources Conservation and Development Commission exercises its siting authority and undertakes proceedings pursuant to the provisions of Chapter 6 (commencing with Section 25500) of Division 15 with respect to any thermal powerplant or transmission line to be located, in whole or in part, within the coastal zone, the commission shall participate in such proceedings and shall receive from the State Energy Resources Conservation and Development Commission any notice of intention to file an application for certification of a site and related facilities within the coastal zone. The commission shall analyze each notice of intent and shall, prior to completion of the preliminary report required by Section 25510, forward to the State Energy Resources Conservation and Development Commission a written report on the suitability of the proposed site and related facilities specified in such notice of intent. The commission's report shall contain a consideration of, and findings regarding, all of the following:

(1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources.

(2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site.

(3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values.

(4) The potential adverse environmental effects on fish and wildlife and their habitats.

(5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development.

(6) The degree to which the proposed site and related facilities could reasonably be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned coastal-dependent uses at or near the site, and promote the policies of this division.

(7) Such other matters as the commission deems appropriate and necessary to carry out the provisions of this division.

(e) The commission may, at its discretion, participate fully in other proceedings conducted by the State Energy Resources Conservation and Development Commission pursuant to its powerplant siting authority. In the event the commission participates in any public hearings held by the State Energy Resources Conservation and Development Commission, it shall be afforded full opportunity to present evidence and examine and cross-examine witnesses.

(f) The State Energy Resources Conservation and Development Commission shall forward a copy of all reports it distributes pursuant to Sections 25302 and 25306 to the commission and the commission shall, with respect to any report that relates to the coastal zone or coastal zone resources, comment on such reports, and shall in its comments include a discussion of the desirability of particular areas within the coastal zone as designated in such reports for potential powerplant development. The commission may propose alternate areas for powerplant development within the coastal zone and shall provide detailed findings to support the suggested alternatives.

30414.

(a) The State Air Resources Board and local air pollution control districts established pursuant to state law and consistent with requirements of federal law are the principal public agencies responsible for the establishment of ambient air quality and emission standards and air pollution control programs. Neither the commission nor any regional commission shall modify any ambient air quality or emission standard established by the State Air Resources Board or any local air pollution control district in establishing ambient air quality or emission standards.

(b) The State Air Resources Board and any local air pollution control district may recommend ways in which actions of the commission or any regional commission can complement or assist in the implementation of established air quality programs.

30415.

The Director of the Office of Planning and Research shall, in cooperation with the commission and other appropriate state agencies, review the policies of this division. If the director determines that effective implementation of any policy requires the cooperative and coordinated efforts of several state agencies, he shall, no later than July 1, 1978 and from time to time thereafter, recommend to the appropriate agencies actions that should be taken to minimize potential duplication and conflicts and which could, if taken, better achieve effective implementation of such policy. The director shall, where appropriate and after consultation with the affected agency, recommend to the Governor and the Legislature how the programs, duties, * * * responsibilities, and enabling legislation of any state agency should be changed to better achieve the goals and policies of this division.

30416.

(a) The State Lands Commission, in carrying out its duties and responsibilities as the state agency responsible for the management of all state lands, including tide and submerged lands, in accordance with the provisions of Division 6 (commencing with Section 6001), shall, prior to certification by the commission pursuant to Chapters 6 (commencing with Section 30500) and 8 (commencing with Section 30700) review, and may comment on any proposed local coastal program or port master plan that could affect state lands.

(b) No power granted to any local government, port governing body, or special district, under this division, shall change the authority of the State Lands Commission over granted or ungranted lands within its jurisdiction or change the rights and duties of its lessees or permittees.

(c) Boundary settlements between the State Lands Commission and other parties and any exchanges of land in connection therewith shall not be a development within the meaning of this division.

(d) Nothing in this division shall amend or alter the terms and conditions in any legislative grant of lands, in trust, to any local government, port governing body, or special district; provided, however, that any development on such granted lands shall, in addition to the terms and conditions of such grant, be subject to the regulatory controls provided by Chapters 7 (commencing with Section 30600) and 8 (commencing with Section 30700).

30417.

(a) In addition to the provisions set forth in Section 4551.5, the provisions of this section shall apply to the State Board of Forestry.

(b) Within 180 days after January 1, 1977, the commission shall identify special treatment areas within the coastal zone in order to assure that natural and scenic resources are adequately protected. The commission shall forward to the State Board of Forestry maps of the designated special treatment areas together with specific reasons for such designations and with recommendations designed to assist the State Board of Forestry in adopting rules and regulations which adequately protect the natural and scenic qualities of such special treatment areas.

30418.

(a) Pursuant to Division 3 (commencing with Section 3000), the Division of Oil and Gas of the Department of Conservation is the principal state agency responsible for regulating the drilling, operation, maintenance, and abandonment of all oil, gas, and geothermal wells in the state. Neither the commission, regional commission, local government, port governing body, or special district shall establish or impose such regulatory controls that duplicate or exceed controls established by the Division of Oil and Gas pursuant to specific statutory requirements or authorization.

This section shall not be construed to limit in any way, except as specifically provided, the regulatory controls over oil and gas development pursuant to Chapters 7 (commencing with Section 30600) and 8 (commencing with Section 30700).

(b) The Division of Oil and Gas of the Department of Conservation shall cooperate with the commission by providing necessary data and technical expertise regarding proposed well operations within the coastal zone.

CHAPTER 6. IMPLEMENTATION

ARTICLE 1. LOCAL COASTAL PROGRAM

30500.

(a) Each local government lying, in whole or in part, within the coastal zone shall prepare a local coastal program for that portion of the coastal zone within its jurisdiction. However, any such local government may request the commission to prepare a local coastal program, or a portion thereof for the local government; provided, such request is submitted to the commission, in writing, not later than July 1, 1977. Each local coastal program prepared pursuant to this chapter shall contain a specific public access component to assure that maximum public access to the coast and public recreation areas is provided.

(b) Amendments to a local general plan for the purpose of developing a certified local coastal program shall not constitute an amendment of a general plan for purposes of Section 65361 of the Government Code.

(c) The precise content of each local coastal program shall be determined by the local government, consistent with Section 30501, in full consultation with the commission and an appropriate regional commission, and with full public participation.

30501.

The commission shall, within 90 days after January 1, 1977, adopt, after public hearing, procedures for the preparation, submission, approval, appeal, certification, and amendment of any local coastal program, including, but not limited to, all of the following:

(a) A common methodology for the preparation of, and the determination of the scope of, the local coastal programs, taking into account the fact that local governments have differing needs and characteristics.

(b) A schedule for the processing of all local coastal programs and specific guidelines to be followed by each regional commission in establishing, within 30 days after the commission has adopted such guidelines, its own schedule for processing local coastal programs within its region; however, in no event shall a local coastal program that is prepared by a local government be required to be submitted to any regional commission prior to July 1, 1978, or later than January 1, 1980.

Local coastal programs or portions thereof, prepared by the commission shall be completed not later than July 1, 1980, and certified not later than December 1, 1980.

(c) Recommended uses that are of more than local importance that should be considered in the preparation of local coastal programs. Such uses may be listed generally or the commission may, from time to time, recommend specific uses for consideration by any local government.

30502.

(a) The commission, in consultation with affected local governments and the appropriate regional commissions, shall, not later than September 1, 1977, after public hearing, designate sensitive coastal resource areas within the coastal zone where the protection of coastal resources and public access requires, in addition to the review and approval of zoning ordinances, * * * the review and approval by the regional commissions and commission of other implementing actions.

(b) The designation of each sensitive coastal resource area shall be based upon a separate report prepared and adopted by the commission which shall contain all of the following:

(1) A description of the coastal resources to be protected and the reasons why the area has been designated as a sensitive coastal resource area.

(2) A specific determination that the designated area is of regional or statewide significance.

(3) A specific list of significant adverse impacts that could result from development where zoning regulations alone may not adequately protect coastal resources or access.

(4) A map of the area indicating its size and location.

(c) In sensitive coastal resource areas designated pursuant to this section, a local coastal program shall include the implementing actions adequate to protect the coastal resources enumerated in the findings of the sensitive coastal resource area report in conformity with the policies of this division.

30502.5.

The commission shall recommend to the Legislature for designation by concurrent resolution those sensitive coastal resource areas designated by the commission pursuant to Section 30502. Recommendation by the commission to the Legislature shall place the described area in the sensitive coastal resource area category for no more than two years, or a shorter period if the Legislature specifically rejects the recommendation. If two years pass and a recommended area has not been designated by concurrent resolution, it shall no longer be designated as a sensitive coastal resource area. Such a concurrent resolution may not be held in committee, but shall be reported from committee to the floor of each respective house with its recommendation within 60 days of referral to committee.

30503.

During the preparation, approval, certification, and amendment of any local coastal program, the public, as well as all affected governmental agencies, including special districts, shall be provided maximum opportunities to participate. Prior to submission of a local coastal program for approval, local governments shall hold a public hearing or hearings on that portion of the program which has not been subjected to public hearings within four years of such submission.

30504.

Special districts, which issue permits or otherwise grant approval for development or which conduct development activities that may affect coastal resources, shall submit their development plans to the affected local government pursuant to Section 65401 of the Government Code. Such plans shall be considered by the affected local government in the preparation of its local coastal program.

ARTICLE 2. PROCEDURE FOR PREPARATION, APPROVAL, AND CERTIFICATION OF LOCAL COASTAL PROGRAMS

30510.

Consistent with the provisions of this chapter, a proposed local coastal program may be submitted to a regional commission, if both of the following are met:

(a) It is submitted pursuant to a resolution adopted by the local government, after public hearing, that certifies the local coastal program is intended to be carried out in a manner fully in conformity with this division.

(b) It contains, in accordance with guidelines established by the commission, materials sufficient for a thorough and complete review.

30511.

Local coastal programs shall be submitted in accordance with the schedule established pursuant to subdivision (b) of Section 30501. At the option of the local government, such program may be submitted and processed in any of the following ways:

(a) At one time, in which event the provisions of Section 30512 with respect to time limits, resubmission, approval, and certification shall apply; provided, however, that the zoning ordinances, zoning district maps, and, if required, other implementing actions included in the local coastal program shall be approved and certified pursuant to the standards of subdivisions (a) and (f) of Section 30513.

(b) In two phases, in which event, the land use plans shall be processed first pursuant to the provisions of Section 30512, and the zoning ordinances, zoning district maps, and, if required, other implementing actions, shall be processed thereafter pursuant to the provisions of Section 30513.

(c) In separate geographic units consisting of less than the local government's jurisdiction lying within the coastal zone, each submitted pursuant to subdivision (a) or (b); provided, that the commission finds that the area or areas proposed for separate review can be analyzed for the potential cumulative impacts of development on coastal resources and access independently of the remainder of the affected jurisdiction.

30512.

(a) The land use plan of a proposed local coastal program shall be submitted to the regional commission. The regional commission shall, within 90 days after the submittal, after public hearing, either approve or disapprove, in whole or in part, the land use plan. If the proposed land use plan is not acted upon within the 90-day period, it shall be deemed approved by the regional commission.

(b) Where a land use plan is disapproved, in whole or in part, the regional commission shall provide a written explanation and may suggest ways in which to modify the disapproved provisions. A local government may revise a disapproved land use plan and resubmit the revised version to the regional commission or it may appeal either the disapproved portion or revised version thereof to the commission. Where the proposed land use plan is approved, in whole or in part, the land use plan or the approved portion thereof shall, within 10 working days of such approval, be forwarded by the regional commission to the commission for certification.

(c) The commission shall, not less than 21 days nor more than 45 days after a land use plan has been submitted or appealed to it, determine by majority vote, after a public hearing, whether specific provisions of the land use plan raise a substantial issue as to conformity with the policies of Chapter 3 (commencing with Section 30200). If the commission finds no substantial issue, the decision of the regional commission shall be final, and in the case of regional commission approvals, the land use plan shall be deemed certified. If the commission determines a substantial issue is raised, it shall, following public hearing and within 60 days from receipt of the land use plan, either refuse certification or certify, in whole or in part, the land use plan.

(d) If the commission refuses certification, in whole or in part, it shall send a written explanation for such action to the appropriate local government and regional commission. A revised land use plan may be resubmitted directly to the commission for certification.

(e) A regional commission shall approve and the commission shall certify, or the commission shall approve and certify where there is no regional commission, a land use plan, or any amendments thereto, if such commission finds that a land use plan meets the requirements of, and is in conformity with, the policies of Chapter 3 (commencing with Section 30200) of this division.

30513.

The local government shall submit to the regional commission and the commission the zoning ordinances, zoning district maps, and, where necessary, other implementing actions which are required pursuant to this chapter.

(a) If within 60 days after receipt of the zoning ordinances, zoning district maps, and other implementing actions, the regional commission, after public hearing, has not rejected the zoning ordinances, zoning district maps, or other implementing actions, they shall be deemed approved. A regional commission may only reject zoning ordinances, zoning district maps, or other implementing actions on the grounds that they do not conform with, or are inadequate to carry out, the provisions of the certified land use plan. If the regional commission rejects the zoning ordinances, zoning district maps, or other implementing actions, it shall give written notice of the rejection specifying the provisions of land use plan with which the rejected zoning ordinances do not conform or which it finds will not be adequately carried out together with its reasons for the action taken.

(b) The local government may revise and resubmit the rejected zoning ordinances, zoning district maps, or other implementing actions to the regional commission or it may, within 10 days after receipt of a notice of such rejection, appeal to the commission.

(c) Any aggrieved person may appeal to the commission within 10 working days after approval or rejection of the zoning ordinances, zoning district maps, or other implementing actions by a regional commission or after the zoning ordinances, zoning district maps, or other implementing actions are deemed approved due to the failure of the regional commission to act.

(d) An appeal pursuant to subdivision (b) or (c) shall specify the action which is being appealed, the specific provision of the certified land use plan with which the zoning ordinances, zoning district maps, or other implementing actions either conform or do not conform or which will or will not be adequately carried out, and the appellant's reasons for such position. The commission, by majority vote of those present, may refuse to hear an appeal which it determines raises no substantial issue. If the commission refuses to hear an appeal, the action of the regional commission shall be final.

(e) In the absence of an appeal pursuant to subdivision (b) or (c), the commission, by a majority of those present, may, within 30 days after a zoning ordinance, zoning district map, or other implementing action has been approved by the re-

gional commission, determine that a substantial issue is presented as to conformity with or adequacy to carry out the certified land use plan.

(f) If within 60 days after receipt of an appeal pursuant to subdivision (b) or (c) or within 30 days after a determination to review pursuant to subdivision (e), the commission, after public hearing, has not rejected the zoning ordinances, zoning district maps, or other implementing actions, such zoning ordinances, zoning district maps, or other implementing actions shall be deemed approved. The commission may only reject a zoning ordinance, zoning district map, or other implementing action on the grounds set forth in subdivision (a) and, if it does so, shall give written notice as provided in subdivision (a). The local government may revise and resubmit a rejected zoning ordinance, zoning district map, or other implementing action to the regional commission or directly to the commission in accordance with the provisions of this section.

30514.

(a) A certified local coastal program and all local implementing ordinances, regulations, and other actions may be amended by the appropriate local government but no such amendment shall take effect until it has been certified by the commission.

(b) Any proposed amendment of a certified local coastal program shall be submitted to, and processed by, the appropriate regional commission and the commission, or the commission where there is no regional commission, in accordance with the provisions of Sections 30512 and 30513.

(c) The commission shall, by regulations, establish a procedure whereby proposed amendments to a certified local coastal program may be reviewed and designated by the executive director of the commission as being minor in nature. Proposed amendments that are designated as minor shall not be subject to the provisions of Sections 30512 and 30513 and shall take effect on the 10th working day after such designation. Amendments that allow changes in uses shall not be designated as minor.

(d) For the purpose of this section, an "amendment of a certified local coastal program" includes, but is not limited to, any action by the local government which authorizes a use of a parcel of land other than that designated in the certified local coastal program as a permitted use of such parcel.

30515.

Any person authorized to undertake a public works project or proposing an energy facility development may request any local government to amend its certified local coastal program, if the purpose of the proposed amendment is to meet public needs of an area greater than that included within such certified local coastal program that had not been anticipated by the person making the request at the time the local coastal program was before the commission for certification. If, after review, the local government determines that the amendment requested would be in conformity with the policies of this division, it may amend its certified local coastal program as provided in Section 30514.

If the local government does not amend its local coastal program, such person may file with the commission a request for amendment which shall set forth the reasons why the proposed amendment is necessary and how such amendment is in conformity with the policies of this division. The local government shall be provided an opportunity to set forth the reasons for its action. The commission may, after public hearing, approve and certify the proposed amendment if it finds, after a careful balancing of social, economic, and environmental effects, that to do otherwise would adversely affect the public welfare, that a public need of an area greater than that included within the certified local coastal program would be met, that there is no feasible, less environmentally damaging alternative way to meet such need, and that the proposed amendment is in conformity with the policies of this division.

30516.

(a) Approval of a local coastal program shall not be withheld because of the inability of the local government to financially support or implement any policy or policies contained in this division; provided, however, that this shall not require the approval of a local coastal program allowing development not in conformity with the policies in Chapter 3 (commencing with Section 30200).

(b) Where a certified port master plan has been incorporated in a local coastal program in accordance with Section 30711 and the local coastal program is disapproved by the regional commission or the commission, such disapproval shall not apply to the certified port master plan.

30517.

The commission or the regional commission may extend, for a period of not to exceed one year, except as provided for in Section 30518, any time limitation established by this chapter for good cause.

30518.

If a local coastal program has not been certified and all implementing devices become effective on or before January 1, 1981, the commission may take any of the following actions, if it finds that, in the absence of a certified local coastal

program, any new development in the coastal zone would not be in conformity within the jurisdiction of the affected local government and would be inconsistent with the policies of this division:

(a) Prohibit or otherwise restrict, by regulation, the affected local government from issuing any permit or any type of entitlement for use for any development with the coastal zone, or any portion thereof, of such local government.

(b) By regulation, extend the permit requirements of Chapter 7 (commencing with Section 30600) by requiring a permit from the commission for any development within any area of the coastal zone under the jurisdiction of the affected local government.

30519.

Except for appeals to the commission, as provided in Section 30603, after a local coastal program, or any portion thereof, has been certified and all implementing actions within the area affected have become effective, the development review authority provided for in Chapter 7 (commencing with Section 30600) shall no longer be exercised by the regional commission or by the commission where there is no regional commission over any new development proposed within the area to which such certified local coastal program, or any portion thereof, applies and shall at that time be delegated to the local government that is implementing such local coastal program or any portion thereof.

(b) Subdivision (a) shall not apply to any development proposed or undertaken on any tidelands, submerged lands, or on public trust lands, whether filled or unfilled, lying within the coastal zone, nor shall it appy to any development proposed or undertaken within ports covered by Chapter 8 (commencing with Section 30700) or within any state university or college within the coastal zone; however, this section shall apply to any development proposed or undertaken by a port or harbor district or authority on lands or waters granted by the Legislature to a local government whose certified local coastal program includes the specific development plans for such district or authority.

30519.5.

(a) The commission shall, from time to time, but at least once every five years after certification, review every certified local coastal program to determine whether such program is being effectively implemented in conformity with the policies of this division. If the commission determines that a certified local coastal program is not being carried out in conformity with any policy of this division it shall submit to the affected local government recommendations of corrective actions that should be taken. Such recommendations may include recommended amendments to the affected local government's local coastal program.

(b) Recommendations submitted pursuant to this section shall be reviewed by the affected local government and, if the recommended action is not taken, the local government shall, within one year of such submission, forward to the commission a report setting forth its reasons for not taking the recommended action. The commission shall review such report and, where appropriate, report to the Legislature and recommend legislative action necessary to assure effective implementation of the relevant policy or policies of this division.

30520.

If the application of any local coastal program or part thereof is prohibited or stayed by any court, the permit authority provided for in Chapter 7 (commencing with Section 30600) shall be reinstated in the regional commission or in the commission where there is no regional commission. The reinstated permit authority shall apply as to any development which would be affected by the prohibition or stay.

30521.

The Legislature hereby finds and declares that the early review of a limited number of local coastal programs may provide valuable experience for future review and processing of local coastal programs and that in consideration of the early commitments made by the involved local governments, any local coastal program prepared for that portion of a local jurisdiction designated as a pilot project area by the California Coastal Zone Conservation Commission between August 31, 1976, and October 31, 1976, shall receive priority from the regional commission and the commission by being processed ahead of other local coastal programs pursuant to the provisions of this chapter. Any such pilot project may be reviewed and approved by the appropriate regional commission and the commission without being subject to the procedures required by Section 30501; provided, that the proposed local coastal program, or portion thereof, is in conformity with the policies of Chapter 3 (commencing with Section 30200), serves as a useful model for future review of local coastal programs, and the regional commission has commenced formal review of the land use phase of a local coastal program by June 1, 1977.

30522.

Nothing in this chapter shall permit the commission to certify a local coastal program which provides for a lesser degree of environmental protection than that provided by the plans and policies of any state regulatory agency.

CHAPTER 7. DEVELOPMENT CONTROLS

ARTICLE 1. GENERAL PROVISIONS

30600.

(a) In addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, on or after January 1, 1977, any person wishing to perform or undertake any development in the coastal zone, other than a facility subject to the provisions of Section 25500, shall obtain a coastal development permit.

(b) Prior to certification of its local coastal program, a local government may, with respect to any development within its area of jurisdiction in the coastal zone and consistent with the provisions of Sections 30604, 30620, and 30620.5, establish procedures for the filing, processing, review, modification, approval, or denial of a coastal development permit. Such procedures may be incorporated and made a part of the procedures relating to any other appropriate land use development permit issued by the local government. A coastal development permit from a local government shall not be required by this subdivision for any development on tidelands, submerged lands, or on public trust lands, whether filled or unfilled, or for any development by a public agency for which a local government permit is not otherwise required.

(c) If prior to certification of its local coastal program, a local government does not exercise the option provided in subdivision (b), or a development is not subject to the requirements of subdivision (b), a coastal development permit shall be obtained from a regional commission, the commission on appeal, or the commission where there is no regional commission.

(d) After certification of its local coastal program, a coastal development permit shall be obtained from the local government as provided for in Section 30519.

30601.

Prior to certification of the local coastal program and, where applicable, in addition to a permit from local government pursuant to subdivision (b) of Section 30600, a coastal development permit shall be obtained from the regional commission, or the commission on appeal, or the commission where there is no regional commission, for any of the following:

(1) Developments between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.

(2) Developments not included within paragraph (1) located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.

(3) Any development which constitutes a major public works project or a major energy facility.

30602.

(a) Prior to certification of its local coastal program, any action taken by a local government on a coastal development permit application may be appealed by the executive director of the regional commission, any person, including the applicant, or any two members of the regional commission or the commission to the regional commission. Such action shall become final after the 20th working day after receipt of the notice required by subdivision (c) of Section 30620.5, unless an appeal is filed within that time.

(b) Any action taken by a regional commission on a coastal development permit application pursuant to this section or Section 30600, may be appealed to the commission, in accordance with the provisions of subdivision (a) of Section 30625. Such action shall become final after the 10th working day, unless an appeal is filed within that time.

30603.

(a) After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for any of the following:

(1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.

(2) Developments approved by the local government not included within paragraph (1) of this subdivision located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.

(3) Developments approved by the local government not included within paragraph (1) or (2) of this subdivision located in a sensitive coastal resource area if the allegation on appeal is that the development is not in conformity with the implementing actions of the certified local coastal program.

(4) Any development approved by a coastal county that is not designated as the principal permitted use under the zoning ordinance or zoning district map approved pursuant to Chapter 6 (commencing with Section 30500).

(5) Any development which constitutes a major public works project or a major energy facility.

(b) The grounds for an appeal pursuant to paragraph (1) of subdivision (a) shall be limited to the following:

(1) The development fails to provide adequate physical access or public or private commercial use or interferes with such uses.

(2) The development fails to protect public views from any public road or from a recreational area to, and along, the coast.

(3) The development is not compatible with the established physical scale of the area.

(4) The development may significantly alter existing natural landforms.

(5) The development does not comply with shoreline erosion and geologic setback requirements.

(c) The standard of review for any development reviewed pursuant to subdivision (a) * * * (3) shall be in conformity with the implementing actions of the certified local coastal program.

Such action shall become final after the 10th working day, unless an appeal is filed within that time.

30604.

(a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200).

(b) After certification of the local coastal program a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program.

(c) Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that such development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).

(d) Nothing in this division shall authorize the denial of a coastal development permit on grounds that a portion of the proposed development not within the coastal zone will have adverse environmental impacts outside the coastal zone; provided, however, that the portion of the proposed development within the coastal zone shall meet the requirements of this chapter.

30605.

To promote greater efficiency for the planning of any public works or state university or college development projects and as an alternative to project-by-project review, plans for public works or state university or college long-range land use development plans may be submitted to the regional commission and the commission for review in the same manner prescribed for the review of local coastal programs as set forth in Chapter 6 (commencing with Section 30500). If any such plan for public works or state university or college development project is submitted prior to certification of the local coastal programs for the jurisdictions affected by the proposed public works, the commission shall certify whether such proposed plan is consistent with the provisions of Chapter 3 (commencing with Section 30200). The commission shall, by regulation, provide for the submission and distribution to the public, prior to public hearings on the plan, detailed environmental information sufficient to enable the commission to determine the consistency of the plans with the policies of this division. If any such plan for public works is submitted after the certification of local coastal programs, any such plan shall be approved by the commission only if it finds, after full consultation with the affected local governments, that the proposed plan for public works is in conformity with certified local coastal programs in jurisdictions affected by the proposed public works. Each state university or college shall coordinate and consult with local government in the preparation of long-range development plans so as to be consistent, to the fullest extent feasible, with the appropriate local coastal program. Where a plan for a public works or state university or college development project has been certified by the commission, any subsequent review by the commission of a specific project contained in such certified plan shall be limited to imposing conditions consistent with Sections 30607 and 30607.1. A certified long-range development plan may be amended by the state university or college, but no such amendment shall take effect until it has been certified by the commission. Any proposed amendment shall be submitted to, and processed by, the regional commission or the commission in the same manner as prescribed for amendment of a local coastal program.

30606.

Prior to the commencement of any development pursuant to Section 30605, the public agency proposing the public works project, or state university or college, shall notify the commission and other interested persons, organizations, and governmental agencies of the impending development and provide data to show that it is consistent with the certified public works plan or long-range development plan. No development shall take place within 30 working days after such notice.

30607.

Any permit that is issued or any development or action approved on appeal, pursuant to this chapter, shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of this division.

30607.1.

Where any dike and fill development is permitted in wetlands in conformity with this division, mitigation measures shall include, at a minimum, either acquisition of equivalent areas of equal or greater biological productivity or opening up equivalent areas to tidal action; provided, however, that if no appropriate restoration site is available, an in-lieu fee sufficient to provide an area of equivalent productive value or surface areas shall be dedicated to an appropriate public agency, or such replacement site shall be purchased before the dike or fill development may proceed. Such mitigation measures shall not be required for temporary or short-term fill or diking; provided, that a bond or other evidence of financial responsibility is provided to assure that restoration will be accomplished in the shortest feasible time.

30608.

(a) No person who has obtained a vested right in a development prior to the effective date of this division * * * or who has obtained a permit from the California Coastal Zone Conservation Commission pursuant to the California Coastal Zone Conservation Act of 1972 (commencing with Section 27000) shall be required to secure approval for the development pursuant to this division; provided, however, that no substantial change may be made in any such development without prior approval having been obtained under this division. * * *

30609.

Where, prior to January 1, 1977, a permit was issued and expressly made subject to recorded terms and conditions that are not dedications of land or interests in land for the benefit of the public or a public agency pursuant to the California Coastal Zone Conservation Act of 1972 (commencing with Section 27000), the owner of real property which is the subject of such permit may apply for modification or elimination of the recordation of such terms and conditions pursuant to the provisions of this division. Such application shall be made in the same manner as a permit application. In no event, however, shall such a modification or elimination of recordation result in the imposition of terms or conditions which are more restrictive than those imposed at the time of the initial grant of the permit. Unless modified or deleted pursuant to this section, any condition imposed on a permit issued pursuant to the former California Coastal Zone Conservation Act of 1972 (commencing with Section 27000) shall remain in full force and effect.

30610.

Notwithstanding any provision in this division to the contrary, no coastal development permit shall be required pursuant to this chapter for the following types of development and in the following areas:

(a) Improvements to existing single-family residences; provided, however, that the commission shall specify, by regulation, those classes of development which involve a risk of adverse environmental effect and shall require that a coastal development permit be obtained under this chapter.

(b) Maintenance dredging of existing navigation channels or moving dredged material from such channels to a disposal area outside the coastal zone, pursuant to a permit from the United States Army Corps of Engineers.

(c) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of such repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance that involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained under this chapter.

(d) Any category of development, or any category of development within a specifically defined geographic area, that the commission, by regulation, after public hearing, and by two-thirds vote of its * * * appointed members, has described or identified and with respect to which the commission has found that there is no potential for any significant adverse effect, either individually or cumulatively, on coastal resources or on public access to, or along, the coast and that such exclusion will not impair the ability of local government to prepare a local coastal program.

(e) The installation, testing, and placement in service or the replacement of any necessary utility connection between an existing service facility and any development approved pursuant to this division; provided, that the commission may, where necessary, require reasonable conditions to mitigate any adverse impacts on coastal resources, including scenic resources. * * *

30610.5.

Urban land areas shall, pursuant to the provisions of this section, be excluded from the permit provisions of this chapter.

(a) Upon the request of a local government, an urban land area, as specifically identified by such local government, shall, after public hearing, be excluded by the commission from the permit provisions of this chapter where both of the following conditions are met:

(1) The area to be excluded is either a residential area zoned and developed to a density of four or more dwelling units per acre on or before January 1, 1977, or a commercial or industrial area zoned and developed for such use on or before January 1, 1977.

(2) The commission finds both of the following:

(i) Locally permitted development will be infilling or replacement and will be in conformity with the scale, size, and character of the surrounding community.

(ii) There is no potential for significant adverse effects, either individually or cumulatively, on public access to the coast or on coastal resources from any locally permitted development; provided, however, that no area may be excluded unless more than 50 percent of the lots are built upon, to the same general density or intensity of use.

(b) Every exclusion granted under subdivision (a) of this section and subdivision (d) of Section 30610 shall be subject to terms and conditions to assure that no significant change in density, height, or nature of uses will occur without further proceedings under this division, and an order granting an exclusion under subdivision (d) of Section 30610, but not under subdivision (a) of this section may be revoked at any time by the commission, if the conditions of exclusion are violated. Tide and submerged land, beaches, and lots immediately adjacent to the inland extent of any beach, or of the mean high tide line of the sea where there is no beach, and all lands and waters subject to the public trust shall not be excluded under either subdivision (a) of this section or subdivision (d) of Section 30610.

30611.

When immediate action by a person or public agency performing a public service is required to protect life and public property from imminent danger, or to restore, repair, or maintain public works, utilities, or services destroyed, damaged, or interrupted by natural disaster, serious accident, or in other cases of emergency, the requirements of obtaining any permit under this division may be waived upon notification of the executive director of the commission of the type and location of the work within three days of the disaster or discovery of the danger, whichever occurs first. Nothing in this section authorizes permanent erection of structures valued at more than twenty-five thousand dollars ($25,000).

ARTICLE 2. DEVELOPMENT CONTROL PROCEDURES

30620.

(a) By January 30, 1977, the commission shall, consistent with the provisions of this chapter, prepare interim procedures for the submission, review, and appeal of coastal development permit applications and of claims of exemption. Such procedures shall include, but are not limited to, the following:

(1) Application and appeal forms.

(2) Reasonable provisions for notification to the regional commission, the commission, and other interested persons of any action taken by a local government pursuant to this chapter, in sufficient detail to assure that a preliminary review of such action for conformity with the provisions of this chapter can be made.

(3) Interpretive guidelines designed to assist local governments, the regional commissions, the commission, and persons subject to the provisions of this chapter in determining how the policies of this division shall be applied in the coastal zone prior to certification of local coastal programs; provided however, that such guidelines shall not supersede, enlarge, or diminish the powers or authority of any regional commission, the commission, or any other public agency.

(b) Not later than May 1, 1977, the commission shall, after public hearing, adopt permanent procedures that include the components specified in subdivision (a) and shall transmit a copy of such procedures to each local government within the coastal zone and shall make them readily available to the public. The commission may thereafter, from time to time, and, except in cases of emergency, after public hearing, modify or adopt additional procedures or guidelines as it deems necessary to better carry out the provisions of this division.

(c) The commission may require a reasonable filing fee and the reimbursement of expenses for the processing by the regional commission or the commission of any application for a coastal development permit under this division. The funds received under this subdivision shall be expended by the commission only when appropriated by the Legislature.

30620.5.

(a) A local government may exercise the option provided in subdivision (b) of Section 30600; provided it does so for the entire area of its jurisdiction within the coastal zone and after it establishes procedures for the issuance of coastal development permits. Such procedures shall incorporate, where applicable, the interpretive guidelines issued by the commission pursuant to Section 30620.

(b) If a local government elects to exercise the option provided in subdivision (b) of Section 30600, the local government shall, by resolution adopted by the governing body of such local government, notify the appropriate regional commission and the commission and shall take appropriate steps to assure that the public is properly notified of such action. The provisions of subdivision (b) of Section 30600 shall take effect and shall be exercised by the local government on the 10th working day after the date on which the resolution required by this subdivision is adopted.

(c) Every local government exercising the option provided in subdivision (b) of Section 30600, shall within five working days notify the appropriate regional commission and any person who, in writing, has requested such notification, in the manner prescribed by the commission pursuant to Section 30620, of any coastal development permit it issues.

(d) Within five working days of receipt of the notice required by subdivision (c), the executive director of the regional commission shall post, at a conspicuous location in the regional commission's office, a description of the coastal development permit issued by the local government. Within 15 working days of receipt of such notice, the executive director shall, in the manner prescribed by the commission pursuant to subdivision (a) of Section 30620, provide notice of the locally issued coastal development permit to members of the regional commission, and the commission.

30620.6.

The commission shall, not later than August 1, 1978, and after public hearing, adopt public notice and appeal procedures for the review of development projects appealable pursuant to Sections 30603 and 30715. The commission shall send copies of such procedures to every local government within the coastal zone and shall make them readily available to the public.

30621.

The regional commission or the commission shall provide for a de novo public hearing on applications for coastal development permits and any appeals brought pursuant to this division and shall give to any affected person a written public notice of the nature of the proceeding and of the time and place of the public hearing. Notice shall also be given to any person who requests, in writing, such notification. A hearing on any coastal development permit application or an appeal shall be set no earlier than 21 days nor later than 42 days after the date on which the application or appeal is filed with the regional commission or the commission.

30622.

A regional commission or the commission shall act upon the coastal development permit application or an appeal within 21 days after the conclusion of the hearing pursuant to Section 30621. Any action by a regional commission shall become final after the 10th working day, unless an appeal is filed with the commission within such time.

30623.

If an appeal of any action on any development by any regional commission, any local government, or port governing body is filed with the regional commission or the commission, the operation and effect of such action shall be stayed pending a decision on appeal.

30624.

The commission shall provide, by regulation, for the issuance of coastal development permits by the executive director of the commission or any regional commission without compliance with the procedures specified in this chapter in cases of emergency, other than an emergency provided for under Section 30611, or for improvements to any existing structure not in excess of twenty-five thousand dollars ($25,000), and any other developments not in excess of twenty thousand dollars ($20,000). Such permit for nonemergency development shall not be effective until after reasonable public notice and adequate time for the review of such issuance has been provided. If any two members of the regional commission or the commission so request, at the first meeting following the issuance of such permit, such issuance shall not be effective, and, instead, the application shall be set for a public hearing pursuant to the provisions of this chapter.

No monetary limitations shall be required for emergencies covered by the provisions of this section.

30625.

(a) Except as otherwise specifically provided in subdivision (a) of Section 30602, any appealable action on a coastal development permit or claim of exemption for any development by a local government or a regional commission or port governing body may be appealed to the commission by an applicant, any aggrieved person except in the case of denials by a regional commission, or any two members of the commission. The regional commission, with respect to appeals pursuant to subdivision (a) of Section 30602, or the commission may approve, modify, or deny such proposed development, and if no action is taken within the time limit specified in Sections 30621 and 30622, the decision of the regional commission, the local government, or port governing body, as the case may be, shall become final, unless the time limit in Section 30621 or 30622 is waived by the applicant.

For purposes of this division, failure by any regional commission to act within any time limit specified in this division shall constitute an "action taken".

(b) The regional commission with respect to appeals pursuant to subdivision (a) of Section 30602, or the commission shall hear an appeal unless it determines that the appeal raises no substantial issue, or it finds the following:

(1) With respect to appeals pursuant to subdivision (a) of Section 30602, that no significant question exists as to conformity with Chapter 3 (commencing with Section 30200).

(2) With respect to appeals to the commission after certification of a local coastal program, that no significant question exists as to conformity with the certified local coastal program.

(3) With respect to appeals to the commission after certification of a port master plan, that no significant question exists as to conformity with the certified port master plan.

(c) Decisions of the commission, where applicable, shall guide the regional commissions, local governments, or port governing bodies in their future actions under the provisions of this division.

30626.

The commission may, by regulation, provide for the reconsideration of the terms and conditions of any coastal development permit granted by a regional commission or the commission solely for the purpose of correcting any information contained in such terms and conditions.

CHAPTER 8. PORTS

ARTICLE 1. FINDINGS AND GENERAL PROVISIONS

30700.

For purposes of this division, notwithstanding any other provisions of this division except as specifically stated in this chapter, this chapter shall govern those portions of the Ports of Hueneme, Long Beach, Los Angeles, and San Diego Unified Port District, located within the coastal zone excluding any wetland, estuary, or existing recreation area indicated in Part IV of the coastal plan, are contained within this chapter.

30700.5.

The definitions of Chapter 2 (commencing with Section 30100) and the provisions of Chapter 9 (commencing with Section 30800) and Section 30900 shall apply to this chapter.

30701.

The Legislature finds and declares that:

(a) The ports of the State of California constitute one of the state's primary economic and coastal resources and are an essential element of the national maritime industry.

(b) The locations of the commercial port districts within the State of California are well established, and for many years such areas have been devoted to transportation and commercial, industrial, and manufacturing uses consistent with federal, state, and local regulations. Coastal planning requires no change in the number or location of the established commercial port districts. Existing ports shall be encouraged to modernize and construct necessary facilities within their boundaries in order to minimize or eliminate the necessity for future dredging and filling to create new ports in new areas of the state.

ARTICLE 2. POLICIES

30702.

For purposes of this division, the policies of the state with respect to providing for port-related developments consistent with coastal protection in the port areas to which this chapter applies, which require no commission permit after certification of a port master plan and which, except as provided in Section 30715, are not appealable to the commission after certification of a master plan, are set forth in this chapter.

30703.

The California commercial fishing industry is important to the State of California; therefore, ports shall not eliminate or reduce existing commercial fishing harbor space, unless the demand for commercial fishing facilities no longer exists or adequate alternative space has been provided. Proposed recreational boating facilities within port areas shall, to the extent it is feasible to do so, be designed and located in such a fashion as not to interfere with the needs of the commercial fishing industry.

30705.

(a) Water areas may be diked, filled, or dredged when consistent with a certified port master plan only for the following:

(1) Such construction, deepening, widening, lengthening, or maintenance of ship channel approaches, ship channels, turning basins, berthing areas, and facilities as are required for the safety and the accommodation of commerce and vessels to be served by port facilities.

(2) New or expanded facilities or waterfront land for port-related facilities.

(3) New or expanded commercial fishing facilities or recreational boating facilities.

(4) Incidental public service purposes, including, but not limited to, burying cables or pipes or inspection of piers and maintenance of existing intake and outfall lines.

(5) Mineral extraction, including sand for restoring beaches, except in biologically sensitive areas.

(6) Restoration purposes or creation of new habitat areas.

(7) Nature study, mariculture, or similar resource-dependent activities.

(8) Minor fill for improving shoreline appearance or public access to the water.

(b) The design and location of new or expanded facilities shall, to the extent practicable, take advantage of existing water depths, water circulation, siltation patterns, and means available to reduce controllable sedimentation so as to diminish the need for future dredging.

(c) Dredging shall be planned, scheduled, and carried out to minimize disruption to fish and bird breeding and migrations, marine habitats, and water circulation. Bottom sediments or sediment elutriate shall be analyzed for toxicants prior to dredging or mining, and where water quality standards are met, dredge spoils may be deposited in open coastal water sites designated to minimize potential adverse impacts on marine organisms, or in confined coastal waters designated as fill sites by the master plan where such spoil can be isolated and contained, or in fill basins on upland sites. Dredge material shall not be transported from coastal waters into estuarine or fresh water areas for disposal.

30706.

In addition to the other provisions of this chapter, the policies contained in this section shall govern filling seaward of the mean high tide line within the jurisdiction of ports:

(a) The water area to be filled shall be the minimum necessary to achieve the purpose of the fill.

(b) The nature, location, and extent of any fill, including the disposal of dredge spoils within an area designated for fill, shall minimize harmful effects to coastal resources, such as water quality, fish or wildlife resources, recreational resources, or sand transport systems, and shall minimize reductions of the volume, surface area, or circulation of water.

(c) The fill is constructed in accordance with sound safety standards which will afford reasonable protection to persons and property against the hazards of unstable geologic or soil conditions or of flood or storm waters.

(d) The fill is consistent with navigational safety.

30707.

New or expanded tanker terminals shall be designed and constructed to do all of the following:

(a) Minimize the total volume of oil spilled * * *.

(b) Minimize the risk of collision from movement of other vessels.

(c) Have ready access to the most effective feasible oilspill containment and recovery equipment.

(d) Have onshore deballasting facilities to receive any fouled ballast water from tankers where operationally or legally required.

30708.

All port-related developments shall be located, designed, and constructed so as to:

(a) Minimize substantial adverse environmental impacts.

(b) Minimize potential traffic conflicts between vessels.

(c) Give highest priority to the use of existing land space within harbors for port purposes, including, but not limited to, navigational facilities, shipping industries, and necessary support and access facilities.

(d) Provide for other beneficial uses consistent with the public trust, including, but not limited to, recreation and wildlife habitat uses, to the extent feasible.

(e) Encourage rail service to port areas and multicompany use of facilities.

ARTICLE 3. IMPLEMENTATION; MASTER PLAN

30710.

Within 90 days after January 1, 1977, the commission shall, after public hearing, adopt, certify, and file with each port governing body a map delineating the present legal geographical boundaries of each port's jurisdiction within the coastal zone. The commission shall, within such 90-day period, adopt and certify after public hearing, a map delineating boundaries of any wetland, estuary, or existing recreation area indicated in Part IV of the coastal plan within the geographical boundaries of each port.

30711.

(a) A port master plan that carries out the provisions of this chapter shall be prepared and adopted by each port governing body, and for informational purposes, each city, county, or city and county which has a port within its jurisdiction shall incorporate the certified port master plan in its local coastal program. A port master plan shall include all of the following:

(1) The proposed uses of land and water areas, where known.

(2) The projected design and location of port land areas, water areas, berthing, and navigation ways and systems intended to serve commercial traffic within the area of jurisdiction of the port governing body.

(3) An estimate of the effect of development on habitat areas and the marine environment, a review of existing water quality, habitat areas, and quantitative and qualitative biological inventories, and proposals to minimize and mitigate any substantial adverse impact.

(4) Proposed projects listed as appealable in Section 30715 in sufficient detail to be able to determine their consistency with the policies of Chapter 3 (commencing with Section 30200) of this division.

(5) Provisions for adequate public hearings and public participation in port planning and development decisions.

(b) A port master plan shall contain information in sufficient detail to allow the commission to determine its adequacy and conformity with the applicable policies of this division.

30712.

In the consideration and approval of a proposed port master plan, the public, interested organizations, and governmental agencies shall be encouraged to submit relevant testimony, statements, and evidence which shall be considered by the port governing body. The port governing body shall publish notice of the completion of the draft master plan and submit a copy thereof to the commission and shall, upon request, provide copies to other interested persons, organizations, and governmental agencies. Thereafter, the port governing body shall hold a public hearing on the draft master plan not earlier than 30 days and not later than 90 days following the date the notice of completion was published.

30713.

Ports having completed a master plan prior to January 1, 1977, shall submit a copy thereof to the commission and hold a public hearing in accordance with the provisions of Section 30712 for the purpose of reviewing such master plan for conformity with the applicable provisions of this division and, if necessary, adopting such changes as would conform such plan to the applicable provisions of this division. Notice of completion of a master plan shall not be filed prior to January 2, 1977.

30714.

After public notice, hearing, and consideration of comments and testimony received pursuant to Sections 30712 and 30713, the port governing body shall adopt its master plan and submit it to the commission for certification in accordance with this chapter. Within 90 days after the submittal, the commission, after public hearing, shall certify such plan or portion of a plan and reject any portion of a plan which is not certified. If the commission fails to take action within the 90-day period, the port master plan shall be deemed certified. The commission shall certify such plan or portion of a plan if the commission finds both of the following:

(a) The master plan or certified portions thereof conforms with and carries out the policies of this chapter.

(b) Where a master plan or certified portions thereof provide for any of the developments listed as appealable in Section 30715 of this chapter, such development or developments are in conformity with all of the policies of Chapter 3 (commencing with Section 30200) of this division.

30715.

Until such time as a port master plan or any portion thereof has been certified, the commission and regional commissions shall permit developments within ports as provided for in Chapter 7 (commencing with Section 30600). After a port master plan or any portion thereof has been certified, the permit authority of the commission provided in Chapter 7 (commencing with Section 30600) shall no longer be exercised by the regional commission or by the commission over any new development contained in such a certified plan or any portion thereof and shall at that time be delegated to the appropriate port governing body, except that approvals of any of the following categories of development by the port governing body may be appealed to the commission:

(a) Developments for the storage, transmission, and processing of liquefied natural gas and crude oil in such quantities as would have a significant impact upon the oil and gas supply of the state or nation or both the state and nation. A development which has a significant impact shall be defined in the master plans.

(b) Waste water treatment facilities, except for such facilities, which process waste water discharged incidental to normal port activities or by vessels.

(c) Roads or highways which are not principally for internal circulation within the port boundaries.

(d) Office and residential buildings not principally devoted to administration of activities within the port; hotels, motels, and shopping facilities not principally devoted to the sale of commercial goods utilized for water-oriented purposes; commercial fishing facilities; and recreational small craft marina related facilities.

(e) Oil refineries.

(f) Petrochemical production plants.

30715.5.

No development within the area covered by the certified port master plan shall be approved by the port governing body unless it finds that the proposed development conforms with such certified plan.

30716.

(a) A certified port master plan may be amended by the port governing body, but no such amendment shall take effect until it has been certified by the commission. Any proposed amendment shall be submitted to, and processed by, the commission in the same manner as provided for submission and certification of a port master plan.

(b) The commission shall, by regulation, establish a procedure whereby proposed amendments to a certified port master plan may be reviewed and designated by the executive director of the commission as being minor in nature and need not comply with Section 30714. Such amendments shall take effect on the 10th working day after the executive director designates such amendments as minor.

30717.

The governing bodies of ports shall inform and advise the commission in the planning and design of appealable developments authorized under this chapter, and prior to commencement of any appealable development, the governing body of a port shall notify the commission and other interested persons, organizations, and governmental agencies of the approval of a proposed appealable development and indicate how it is consistent with the appropriate port master plan and this division. An approval of the appealable development by the port governing body pursuant to a certified port master plan shall become effective after the 10th working day after notification of its approval, unless an appeal is filed with the commission within that time. Appeals shall be filed and processed by the commission in the same manner as appeals from local government actions as set forth in Chapter 7 (commencing with Section 30600) of this division. No appealable development shall take place until the approval becomes effective.

30718.

For developments approved by the commission in a certified master plan, but not appealable under the provisions of this chapter, the port governing body shall forward all environmental impact reports and negative declarations prepared pursuant to the Environmental Quality Act of 1970 (commencing with Section 21000) or any environmental impact statements prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) to the commission in a timely manner for comment.

30719.

Any development project or activity authorized or approved pursuant to the provisions of this chapter shall be deemed certified by the commission as being in conformity with the coastal zone management program insofar as any such certification is requested by any federal agency pursuant to the Federal Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et seq.), National Oceanic and Atmospheric Administration, and memoranda of understanding between the state and federal governments relative thereto.

30720.

If the application of any port master plan or part thereof is prohibited or stayed by any court, the permit authority provided for in Chapter 7 (commencing with Section 30600) shall be reinstated in the regional commission or in the commission where there is no regional commission. The reinstated permit authority shall apply as to any development which would be affected by the prohibition or stay.

CHAPTER 9. JUDICIAL REVIEW, ENFORCEMENT, AND PENALTIES

ARTICLE 1. GENERAL PROVISIONS

30800.

The provisions of this chapter shall be in addition to any other remedies available at law.

30801.

Any aggrieved person shall have a right to judicial review of any decision or action of the commission or a regional commission by filing a petition for a writ of mandate in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure, within 60 days after such decision or action has become final.

For purposes of this section and subdivision (c) of Section 30513 and Section 30625, an "aggrieved person" means any person who, in person or through a representative, appeared at a public hearing of the commission, regional commission, local government, or port governing body in connection with the decision or action appealed, or who, by other appropriate means prior to a hearing, informed the commission, regional commission, local government, or port governing body of the nature of his concerns or who for good cause was unable to do either. "Aggrieved person" includes the applicant for a permit and, in the case of an approval of a local coastal program, the local government involved.

30802.

Any person, including an applicant for a permit or the commission, aggrieved by the decision or action of a local government that is implementing a certified local coastal program or certified port master plan, which decision or action may not be appealed to the commission, shall have a right to judicial review of such decision or action by filing a petition for writ of mandate in accordance with the

provisions of Section 1094.5 of the Code of Civil Procedure within 60 days after the decision or action has become final. The commission may intervene in any such proceeding upon a showing that the matter involves a question of the conformity of a proposed development with a certified local coastal program or certified port master plan or the validity of a local government action taken to implement a local coastal program or certified port master plan. Any local government or port governing body may request that the commission intervene. Notice of any such action against a local government or port governing body shall be filed with the commission within five working days of the filing of such action. When an action is brought challenging the validity of a local coastal program or certified port master plan, a preliminary showing shall be made prior to proceeding on the merits as to why such action should not have been brought pursuant to the provisions of Section 30801.

30803.

Any person may maintain an action for declaratory and equitable relief to restrain any violation of this division. On a prima facie showing of a violation of this division, preliminary equitable relief shall be issued to restrain any further violation of this division. No bond shall be required for an action under this section.

30804.

Any person may maintain an action to enforce the duties specifically imposed upon the commission, any regional commission, any governmental agency, any special district, or any local government by this division. No bond shall be required for an action under this section.

30805.

Any person may maintain an action for the recovery of civil penalties provided for in Section 30820 or 30821.

30806.

Any civil action under this division by, or against, a city, county, or city and county, the commission, regional commission, special district, or any other public agency shall, upon motion of either party, be transferred to a county or city and county not a party to the action or to a county or city and county other than that in which the city, special district, or any other public agency which is a party to the action is located.

30807.

Any person may maintain an action seeking an order to remove a local coastal program or any portion thereof, any coastal development permit application, or appeal therefrom, from the appropriate regional commission's consideration and to require that such local coastal program or any portion thereof, coastal development permit application or appeal therefrom, be reviewed and processed by the commission. The court may grant such order where to do so would better carry out the purposes of this division and where the court determines that such order would expedite the review of such local coastal program or any portion thereof, or of such coastal development permit application, or appeal therefrom.

§ 30808. Actions to ensure compliance with terms and conditions of urban exclusion

In addition to any other remedy provided by this article, any person including the commission, may bring an action to restrain a violation of the terms and conditions of an urban exclusion imposed pursuant to Section 30610.5. In any such action the court may grant whatever relief it deems appropriate to ensure compliance with the terms and conditions of the urban exclusion.

ARTICLE 2. PENALTIES

30820.

Any person who violates any provision of this division shall be subject to a civil fine of not to exceed ten thousand dollars ($10,000).

30821.

In addition to any other penalties, any person who intentionally and knowingly performs any development in violation of this division shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousand dollars ($5,000) per day for each day in which such violation occurs.

30822.

Where a person has intentionally and knowingly violated any provision of this division, the commission may maintain an action, in addition to Section 30801, for exemplary damages and may recover an award, the size of which is left to the discretion of the court. In exercising its discretion, the court shall consider the amount of liability necessary to deter further violations.

30823.

Any funds derived by the commission or regional commission under this article shall be expended for carrying out the provisions of this division, when appropriated by the Legislature.

CHAPTER 10. SEVERABILITY

30900.

If any provision of this division or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the division which can be given effect without the invalid provision or application, and to this end the provisions of this division are severable.

NORTH CAROLINA COASTAL AREA MANAGEMENT ACT

N.C. GEN. STAT. Sections 113A-100 to -128 (1975)

ARTICLE 7.

Coastal Area Management.

Part 1. Organization and Goals.

§ 113A-100. Short title. — This Article shall be known as the Coastal Area Management Act of 1974. (1973, c. 1284, s. 1.)

Editor's Note. — Session Laws 1973, c. 1284, s. 3, provides: "This act shall become effective July 1, 1974, except that the provisions of this act relating to the selection of the initial Commission shall become effective upon ratification, and the entire act shall expire on June 30, 1981." The act was ratified April 12, 1974.

Session Laws 1973, c. 1284, s. 1, contains a section numbered § 113A-129, which is a severability clause.

Editor's Note. —

Session Laws 1975, c. 452, s. 5, amends Session Laws 1973, c. 1284, s. 3, so as to change the expiration date of the 1973 act from June 30, 1981, to June 30, 1983.

§ 113A-101. Cooperative State-local program. — This Article establishes a cooperative program of coastal area management between local and State governments. Local government shall have the initiative for planning. State government shall establish areas of environmental concern. With regard to planning, State government shall act primarily in a supportive standard-setting and review capacity, except where local governments do not elect to exercise their initiative. Enforcement shall be a concurrent State-local responsibility. (1973, c. 1284, s. 1.)

§ 113A-102. Legislative findings and goals. — (a) Findings. — It is hereby determined and declared as a matter of legislative finding that among North Carolina's most valuable resources are its coastal lands and waters. The coastal area, and in particular the estuaries, are among the most biologically productive regions of this State and of the nation. Coastal and estuarine waters and marshlands provide almost ninety percent (90%) of the most productive sport fisheries on the east coast of the United States. North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

In recent years the coastal area has been subjected to increasing pressures which are the result of the often-conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the coast which make it economically, esthetically, and ecologically rich will be destroyed. The General Assembly therefore finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina.

In the implementation of the coastal area management plan, the public's opportunity to enjoy the physical, esthetic, cultural, and recreational qualities of the natural shorelines of the State shall be preserved to the greatest extent feasible; water resources shall be managed in order to preserve and enhance water quality and to provide optimum utilization of water resources; land resources shall be managed in order to guide growth and development and to minimize damage to the natural environment; and private property rights shall be preserved in accord with the Constitution of this State and of the United States.

(b) Goals. — The goals of the coastal area management system to be created pursuant to this Article are as follows:

(1) To provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values;

(2) To insure that the development or preservation of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations;

(3) To insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation;

(4) To establish policies, guidelines and standards for:
   a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to intensive use or development, as well as areas of significant natural value;
   b. The economic development of the coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments;
   c. Recreation and tourist facilities and parklands;
   d. Transportation and circulation patterns for the coastal area including major thoroughfares, transportation routes, navigation channels and harbors, and other public utilities and facilities;
   e. Preservation and enhancement of the historic, cultural, and scientific aspects of the coastal area;
   f. Protection of present common-law and statutory public rights in the lands and waters of the coastal area;
   g. Any other purposes deemed necessary or appropriate to effectuate the policy of this Article. (1973, c. 1284, s. 1.)

§ 113A-103. **Definitions.** — As used in this Article:
(1) "Advisory Council" means the Coastal Resources Advisory Council created by G.S. 113A-105.
(2) "Coastal area" means the counties that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean (extending offshore to the limits of State jurisdiction, as may be identified by rule of the Commission for purposes of this Article, but in no event less than three geographical miles offshore) or any coastal sound. The Governor, in accordance with the standards set forth in this subdivision and in subdivision (3) of this section, shall designate the counties that constitute the "coastal area," as defined by this section, and his designation shall be final and conclusive. On or before May 1, 1974, the Governor shall file copies of a list of said coastal-area counties with the chairmen of the boards of commissioners of each county in the coastal area, with the mayors of each incorporated city within the coastal area (as so defined) having a population of 2,000 or more and of each incorporated city having a population of less than 2,000 whose corporate boundaries are contiguous with the Atlantic Ocean, and with the Secretary of State. The said coastal-area counties and cities shall thereafter transmit nominations to the Governor of members of the Coastal Resources Commission as provided in G.S. 113A-104(d).
(3) "Coastal sound" means Albemarle, Bogue, Core, Croatan, Currituck, Pamlico and Roanoke Sounds. For purposes of this Article, the inland limits of a sound on a tributary river shall be defined as the limits of seawater encroachment on said tributary river under normal conditions. "Normal conditions" shall be understood to include regularly occurring conditions of low stream flow and high tide, but shall not include unusual conditions such as those associated with hurricane and other storm tides. Unless otherwise determined by the Commission, the limits of seawater encroachment shall be considered to be the confluence of a sound's tributary river with the river or creek entering it nearest to the farthest inland movement of oceanic salt water under normal conditions. For purposes of this Article, the aforementioned points of confluence with tributary rivers shall include the following:
   a. On the Chowan River, its confluence with the Meherrin River;
   b. On the Roanoke River, its confluence with the northeast branch of the Cashie River;
   c. On the Tar River, its confluence with Tranters Creek;
   d. On the Neuse River, its confluence with Swift Creek;
   e. On the Trent River, its confluence with Ready Branch.

   Provided, however, that no county shall be considered to be within the coastal area which: (i) is adjacent to, adjoining or bounded by any of the above points of confluence and lies entirely west of said point of confluence; or (ii) is not bounded by the Atlantic Ocean and lies entirely west of the westernmost of the above points of confluence.

(4) "Commission" means the Coastal Resources Commission created by G.S. 113A-104.

(5) a. "Development" means any activity in a duly designated area of environmental concern (except as provided in paragraph b of this subdivision) involving, requiring, or consisting of the construction or enlargement of a structure; excavation; dredging; filling; dumping; removal of clay, silt, sand, gravel or minerals; bulkheading, driving of pilings; clearing or alteration of land as an adjunct of construction; alteration or removal of sand dunes; alteration of the shore, bank, or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake, or canal.

b. The following activities including the normal and incidental operations associated therewith shall not be deemed to be development under this section:

1. Work by a highway or road agency for the maintenance of an existing road, if the work is carried out on land within the boundaries of the existing right-of-way;
2. Work by any railroad company or by any utility and other persons engaged in the distribution and transmission of petroleum products, water, telephone or telegraph messages, or electricity for the purpose of inspecting, repairing, maintaining, or upgrading any existing substations, sewers, mains, pipes, cables, utility tunnels, lines, towers, poles, tracks, and the like on any of its existing railroad or utility property or rights-of-way, or the extension of any of the above distribution-related facilities to serve development approved pursuant to G.S. 113A-121 or 113A-122;
3. Work by any utility and other persons for the purpose of construction of facilities for the development, generation, and transmission of energy to the extent that such activities are regulated by other law or by present or future rules of the State Utilities Commission regulating the siting of such facilities (including environmental aspects of such siting), and work on facilities used directly in connection with the above facilities;
4. The use of any land for the purpose of planting, growing, or harvesting plants, crops, trees, or other agricultural or forestry products, including normal private road construction, raising livestock or poultry, or for other agricultural purposes except where excavation or filling affecting estuarine waters (as defined in G.S. 113-229) or navigable waters is involved;
5. Emergency maintenance or repairs;
6. The construction of any accessory building customarily incident to an existing structure if the work does not involve filling, excavation, or the alteration of any sand dune or beach;
7. Completion of any development, not otherwise in violation of law, for which a valid building or zoning permit was issued prior to ratification of this Article and which development was initiated prior to the ratification of this Article;
8. Completion of installation of any utilities or roads or related facilities not otherwise in violation of law, within a subdivision that was duly approved and recorded prior to the ratification of this Article and which installation was initiated prior to the ratification of this Article;
9. Construction or installation of any development, not otherwise in violation of law, for which an application for a building or zoning permit was pending prior to the ratification of this Article and for which a loan commitment (evidenced by a notarized document signed by both parties) had been made prior to the ratification of this Article; provided, said building or zoning application is granted by July 1, 1974;
10. It is the intention of the General Assembly that if the provisions of any of the foregoing subparagraphs 1 to 10 of this paragraph are held invalid as a grant of an exclusive or separate emolument or privilege or as a denial of the equal protection of the laws, within the meaning of Article I, Secs. 19 and 32 of the North Carolina Constitution, the remainder of this Article shall be given effect without the invalid provision or provisions.

c. The Commission shall define by rule (and may revise from time to time) certain classes of minor maintenance and improvements which shall be exempted from the permit requirements of this Article, in addition to the exclusions set forth in paragraph b of this subdivision. In developing such rules the Commission shall consider, with regard to the class or classes of units to be exempted:

1. The size of the improvement or scope of the maintenance work;
2. The location of the improvement or work in proximity to dunes, waters, marshlands, areas of high seismic activity, areas of unstable soils or geologic formations, and areas enumerated in G.S. 113A-113(b)(3); and
3. Whether or nor dredging or filling is involved in the maintenance or improvement.

(6) "Key facilities" include the site location and the location of major improvement and major access features of key facilities, and mean:

a. Public facilities, as determined by the Commission, on nonfederal lands which tend to induce development and urbanization of more than local impact, including but not limited to:

1. Any major airport designed to serve as a terminal for regularly scheduled air passenger service or one of State concern;
2. Major interchanges between the interstate highway system and frontage-access streets or highways; major interchanges between other limited-access highways and frontage-access streets or highways;
3. Major frontage-access streets and highways, both of State concern; and
4. Major recreational lands and facilities;

b. Major facilities on nonfederal lands for the development, generation, and transmission of energy.

(7) "Lead regional organizations" mean the regional planning agencies created by and representative of the local governments of a multi-county region, and designated as lead regional organizations by the Governor.

(8) "Local government" means the governing body of any county or city which contains within its boundaries any lands or waters subject to this Article.

(9) "Person" means any individual, citizen, partnership, corporation, association, organization, business trust, estate, trust, public or municipal corporation, or agency of the State or local government unit, or any other legal entity however designated.

(10) "Rule" means any policy, regulation or requirement of general application adopted pursuant to this Article. (1973, c. 1284, s. 1.)

§ 113A-104. Coastal Resources Commission. — (a) The General Assembly hereby establishes within the Department of Natural and Economic Resources a commission to be designated the Coastal Resources Commission.

(b) Composition. — The Coastal Resources Commission shall consist of 15 members appointed by the Governor, as follows:

(1) One who shall at the time of appointment be actively connected with or have experience in commercial fishing.
(2) One who shall at the time of appointment be actively connected with or have experience in wildlife or sports fishing.
(3) One who shall at the time of appointment be actively connected with or have experience in marine ecology.
(4) One who shall at the time of appointment be actively connected with or have experience in coastal agriculture.
(5) One who shall at the time of appointment be actively connected with or have experience in coastal forestry.
(6) One who shall at the time of appointment be actively connected with or have experience in coastal land development.
(7) One who shall at the time of appointment be actively connected with or have experience in marine-related business (other than fishing and wildlife).

(8) One who shall at the time of appointment be actively connected with or have experience in engineering in the coastal area.
(9) One who shall at the time of appointment be actively associated with a State or national conservation organization.
(10) One who shall at the time of appointment be actively connected with or have experience in financing of coastal land development.
(11) Two who shall at the time of appointment be actively connected with or have experience in local government within the coastal area.
(12) Three at-large members.

(c) The Governor shall appoint in his sole discretion those members of the Commission whose qualifications are described in subdivisions (6) and (10), and one of the three members described in subdivision (12) of subsection (b) of this section. The remaining members of the Commission shall be appointed by the Governor after completion of the nominating procedures prescribed by subsection (d) of this section.

(d) On or before May 1 in every even-numbered year the Governor shall designate and transmit to the board of commissioners in each county in the coastal area four nominating categories applicable to that county for that year. Said nominating categories shall be selected by the Governor from among the categories represented, respectively by subdivisions (1), (2), (3), (4), (5), (7), (8), (9), (11) — two persons, and (12) — two persons, of subsection (b) of this section (or so many of the above-listed paragraphs as may correspond to vacancies by expiration of term that are subject to being filled in that year). On or before June 1 in every even-numbered year the board of commissioners of each county in the coastal area shall nominate (and transmit to the Governor the names of) one qualified person in each of the four nominating categories that was designated by the Governor for that county for that year. In designating nominating categories from biennium to biennium, the Governor shall equitably rotate said categories among the several counties of the coastal area as in his judgment he deems best; and he shall assign, as near as may be, an even number of nominees to each nominating category and shall assign in his best judgment any excess above such even number of nominees. On or before June 1 in every even-numbered year the governing body of each incorporated city within the coastal area having a population of 2,000 or more, and of each incorporated city having a population of less than 2,000 whose corporate boundaries are contiguous with the Atlantic Ocean, shall nominate (and transmit to the Governor the name of) one person as a nominee to the Commission. The Governor shall appoint 12 persons from among said city and county nominees to the Commission. The several boards of county commissioners and city governing bodies shall transmit the names, addresses, and a brief summary of the qualifications of their nominees to the Governor on or before June 1 in each even-numbered year, beginning in 1974; provided, that the Governor, by registered or certified mail, shall notify the chairmen or the mayors of the said local governing boards by May 20 in each such even-numbered year of the duties of local governing boards under this sentence. If any board of commissioners or city governing body fails to transmit its list of nominations to the Governor by June 1, the Governor may add to the nominations a list of qualified nominees in lieu of those that were not transmitted by the board of commissioners or city governing body. Within the meaning of this section, the "governing body" is the mayor and council of a city as defined in G.S. 160A-66. The population of cities shall be determined according to the most recent annual estimates of population as certified to the Secretary of Revenue by the Secretary of Administration.

(e) All nominees of the several boards of county commissioners and city governing bodies must reside within the coastal area, but need not reside in the county from which they were nominated. No more than one of those members appointed by the Governor from among said nominees may reside in a particular county. No more than two members of the entire Commission, at any time, may reside in a particular county. No more than two members of the entire Commission, at any time, may reside outside the coastal area.

(f) Membership on the Coastal Resources Commission is hereby declared to be an office that may be held concurrently with other elective or appointive offices in addition to the maximum number of offices permitted to be held by one person under G.S. 128-1.1.

(g) The members shall serve staggered terms of office of four years. At the expiration of each member's term, the Governor shall reappoint or replace the member with a new member of like qualification (as specified in subsection (b) of this section), in the manner provided by subsections (c) and (d) of this section. The initial term shall be determined by the Governor in accordance with customary practice but eight of the initial members shall be appointed for two years and seven for four years.

(h) In the event of a vacancy arising otherwise than by expiration of term, the Governor shall appoint a successor of like qualification (as specified in subsection (b) of this section) who shall then serve the remainder of his predecessor's term. When any such vacancy arises, the Governor shall immediately notify the board of commissioners of each county in the coastal area and the governing body of each incorporated city within the coastal area having a population of 2,000 or more and of each incorporated city having a population of less than 2,000 whose corporate boundaries are contiguous with the Atlantic Ocean. Within 30 days after receipt of such notification each such county board and city governing body shall nominate and transmit to the Governor the name and address of one person who is qualified in the category represented by the position to be filled, together with a brief summary of the qualifications of the nominee. The Governor shall make the appointment from among said city and county nominees. If any county board or city governing body fails to make a timely transmittal of its nominee, the Governor may add to the nominations a qualified person in lieu of said nominee.

(i) The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at the pleasure of the Governor. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term.

(j) Compensation. — The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5. (1973, c. 1284, s. 1.)

§ 113A-105. Coastal Resources Advisory Council. — (a) Creation. — There is hereby created and established a council to be known as the Coastal Resources Advisory Council.

(b) The Coastal Resources Advisory Council shall consist of not more than 47 members appointed or designated as follows:

(1) Three individuals designated by the Secretary of Natural and Economic Resources from among the employees of his Department;
(2) The Secretary of the Department of Administration or his designee;
(3) The Secretary of the Department of Transportation and Highway Safety or his designee, and one additional member selected by him from his Department;
(4) The Secretary of the Department of Human Resources or his designee;
(5) The Commissioner of Agriculture or his designee;
(6) The Secretary of the Department of Cultural Resources or his designee;
(7) One member from each of the four multi-county planning districts of the coastal area to be appointed by the lead regional agency of each district;
(8) One representative from each of the counties in the coastal area to be designated by the respective boards of county commissioners;
(9) No more than eight additional members representative of cities in the coastal area and to be designated by the Commission;
(10) Three members selected by the Commission who are marine scientists or technologists;
(11) One member who is a local health director selected by the Commission upon the recommendation of the Secretary of Human Resources.

(c) Functions and Duties. — The Advisory Council shall assist the Secretaries of Administration and of Natural and Economic Resources in an advisory capacity:

(1) On matters which may be submitted to it by either of them or by the Commission, including technical questions relating to the development of rules and regulations, and
(2) On such other matters arising under this Article as the Council considers appropriate.

(d) Multiple Offices. — Membership on the Coastal Resources Advisory Council is hereby declared to be an office that may be held concurrently with other elective or appointive offices (except the office of Commission member) in addition to the maximum number of offices permitted to be held by one person under G.S. 128-1.1.

(e) Chairman and Vice-Chairman. — A chairman and vice-chairman shall be elected annually by the Council.

(f) Compensation. — The members of the Advisory Council who are not State employees shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5. (1973, c. 1284, s. 1.)

§ 113A-106. Scope of planning processes. — Planning processes covered by this Article include the development and adoption of State guidelines for the coastal area and the development and adoption of a land-use plan for each county within the coastal area, which plans shall serve as criteria for the issuance or denial of development permits under Part 4. (1973, c. 1284, s. 1.)

§ 113A-107. State guidelines for the coastal area. — (a) State guidelines for the coastal area shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area. Such guidelines shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102. They shall give particular attention to the nature of development which shall be appropriate within the various types of areas of environmental concern that may be designated by the Commission under Part 3. Such guidelines shall be adopted, and may be amended from time to time, in accordance with the procedures set forth in this section.

(b) The Commission shall be responsible for the preparation, adoption, and amendment of the State guidelines. In exercising this function it shall be furnished such staff assistance as it requires by the Secretary of Natural and Economic Resources and the Secretary of the Department of Administration, together with such incidental assistance as may be requested of any other State department or agency.

(c) Within 90 days after July 1, 1974, the Commission shall submit proposed State guidelines to all cities and counties and lead regional organizations within the coastal area for their comments and recommendations. In addition, it shall submit such guidelines to all State, private, federal, regional, and local agencies which it deems to have special expertise with respect to any environmental, social, economic, esthetic, cultural, or historical aspect of development in the coastal area. It shall make copies of the proposed guidelines available to the public through the Department of Administration.

(d) Cities, counties, and lead regional organizations and such other agencies or individuals as desire to do so shall have 60 days from receipt of such proposed guidelines within which to submit to the Commission their written comments and recommendations concerning the proposed guidelines.

(e) The Commission shall review and consider all such written comments and recommendations. Within 210 days after the effective date of this Article, the Commission shall by rule adopt State guidelines for the coastal area. Certified copies of such guidelines shall be filed with the Secretary of State and the principal clerks of the Senate and House, and the guidelines shall be mailed to each city, county, and lead regional organization in the coastal area and to such other agencies or individuals as the Commission deems appropriate. Copies shall be made available to the public through the Department of Administration.

(f) The Commission may from time to time amend the State guidelines as it deems necessary. In addition, it shall review such guidelines each five years after July 1, 1974, in accordance with the procedures for adoption of the original guidelines, to determine whether further amendments are desirable. Any proposed amendments shall be submitted to all cities, counties, members of the General Assembly and lead regional organizations in the coastal area, and may be distributed to such other agencies and individuals as the Commission deems appropriate. All comments and recommendations of such governments, agencies, and individuals shall be submitted to the Commission in writing within 30 days of receipt of the proposed amendments. The Commission shall review and consider these written comments and thereupon may by rule reject or adopt the proposed amendments or modify and adopt the amendments. Certified copies of all amendments shall be filed with the Secretary of State and the principal clerks of the Senate and House. Amendments shall thereupon be mailed to each city, county, members of the General Assembly and lead regional organization in the coastal area and to such other agencies and individuals as the Commission deems appropriate. Copies shall be made available to the public through the Department of Administration. (1973, c. 1284, s. 1.)

§ 113A-108. Effect of State guidelines. — All local land-use plans adopted pursuant to this Article within the coastal area shall be consistent with the State guidelines. No permit shall be issued under Part 4 of this Article which is inconsistent with the State guidelines. Any State land policies governing the acquisition, use and disposition of land by State departments and agencies shall take account of and be consistent with the State guidelines adopted under this Article, insofar as lands within the coastal area are concerned. Any State land classification system which shall be promulgated shall take account of and be consistent with the State guidelines adopted under this Article, insofar as it applies to lands within the coastal area. (1973, c. 1284, s. 1.)

§ 113A-109. County letter of intent; timetable for preparation of land-use plan. — Within 120 days after July 1, 1974, each county within the coastal area shall submit to the Commission a written statement of its intent to develop a land-use plan under this Article or its intent not to develop such a plan. If any county states its intent not to develop a land-use plan or fails to submit a statement of intent within the required period, the Commission shall prepare and adopt a land-use plan for that county. If a county states its intent to develop a land-use plan, it shall complete the preparation and adoption of such plan within 480 days after adoption of the State guidelines. In the event of failure by any county to complete its required plan within this time, the Commission shall promptly prepare and adopt such a plan.

In any case where the Commission has adopted a land-use plan for a county that county may prepare its own land-use plan in accordance with the procedures of this Article, and upon approval of such plan by the Commission it shall supersede the Commission's plan on a date specified by the Commission. (1973, c. 1284, s. 1; 1975, c. 452, s. 1.)

§ 113A-110. Land-use plans. — (a) A land-use plan for a county shall, for the purpose of this Article, consist of statements of objectives, policies, and standards to be followed in public and private use of land within the county, which shall be supplemented by maps showing the appropriate location of particular types of land or water use and their relationships to each other and to public facilities and by specific criteria for particular types of land or water use in particular areas. The plan shall give special attention to the protection and appropriate development of areas of environmental concern designated under Part 3. The plan shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102 and with the State guidelines adopted by the Commission under G.S. 113A-107. The plan shall be adopted, and may be amended from time to time, in accordance with the procedures set forth in this section.

(b) The body charged with preparation and adoption of a county's land-use plan (whether the county government or the Commission) may delegate some or all of its responsibilities to the lead regional organization for the region of which the county is a part. Any such delegation shall become effective upon the acceptance thereof by the lead regional organization. Any county proposing a delegation to the lead regional organization shall give written notice thereof to the Commission at least two weeks prior to the date on which such action is to be taken. Any city or county within the coastal area may also seek the assistance or advice of its lead regional organization in carrying out any planning activity under this Article.

(c) The body charged with preparation and adoption of a county's land-use plan (whether the county or the Commission or a unit delegated such responsibility) may either (i) delegate to a city within the county responsibility for preparing those portions of the land-use plan which affect land within the city's zoning jurisdiction or (ii) receive recommendations from the city concerning those portions of the land-use plan which affect land within the city's zoning jurisdiction, prior to finally adopting the plan or any amendments thereto or (iii) delegate responsibility to some cities and receive recommendations from other cities in the county. The body shall give written notice to the Commission of its election among these alternatives. On written application from a city to the Commission, the Commission shall require the body to delegate plan-making authority to that city for land within the city's zoning jurisdiction if the Commission finds that the city is currently enforcing its zoning ordinance, its subdivision regulations, and the State Building Code within such jurisdiction.

(d) The body charged with adoption of a land-use plan may either adopt it as a whole by a single resolution or adopt it in parts by successive resolutions; said parts may either correspond with major geographical sections or divisions of the county or with functional subdivisions of the subject matters of the plan. Amendments and extensions to the plan may be adopted in the same manner.

(e) Prior to adoption or subsequent amendment of any land-use plan, the body charged with its preparation and adoption (whether the county or the Commission or a unit delegated such responsibility) shall hold a public hearing at which public and private parties shall have the opportunity to present comments and recommendations. Notice of the hearing shall be given not less than 30 days before the date of the hearing and shall state the date, time, and place of the hearing; the subject of the hearing; the action which is proposed; and that copies of the proposed plan or amendment are available for public inspection at a designated office in the county courthouse during designated hours. Any such notice shall be published at least once in a newspaper of general circulation in the county.

(f) No land-use plan shall become finally effective until it has been approved by the Commission. The county or other unit adopting the plan shall transmit it, when adopted, to the Commission for review. The Commission shall afford interested persons an opportunity to present objections and comments regarding the plan, and shall review and consider each county land-use plan in light of such objections and comments, the State guidelines, the requirements of this Article, and any generally applicable standards of review adopted by rule of the Commission. Within 45 days after receipt of a county land-use plan the Commission shall either approve the plan or notify the county of the specific changes which must be made in order for it to be approved. Following such changes, the plan may be resubmitted in the same manner as the original plan.

(g) Copies of each county land-use plan which has been approved, and as it may have been amended from time to time, shall be maintained in a form available for public inspection by (i) the county, (ii) the Commission, and (iii) the lead regional organization of the region which includes the county. (1973, c. 1284, s. 1.)

§ 113A-111. Effect of land-use plan. — No permit shall be issued under Part 4 of this Article for development which is inconsistent with the approved land-use plan for the county in which it is proposed. No local ordinance or other local regulation shall be adopted which, within an area of environmental concern, is inconsistent with the land-use plan of the county or city in which it is effective; any existing local ordinances and regulations within areas of environmental concern shall be reviewed in light of the applicable local land-use plan and modified as may be necessary to make them consistent therewith. All local ordinances and other local regulations affecting a county within the coastal area, but not affecting an area of environmental concern, shall be reviewed by the Commission for consistency with the applicable county and city land-use plans and, if the Commission finds any such ordinance or regulation to be inconsistent with the applicable land-use plan, it shall transmit recommendations for modification to the adopting local government. (1973, c. 1284, s. 1.)

§ 113A-112. Planning grants. — The Secretary of Natural and Economic Resources is authorized to make annual grants to local governmental units for the purpose of assisting in the development of local plans and management programs under this Article. The Secretary shall develop and administer generally applicable criteria under which local governments may qualify for such assistance. (1973, c. 1284, s. 1.)

Part 3. Areas of Environmental Concern.

§ 113A-113. Areas of environmental concern; in general. — (a) The Coastal Resources Commission shall by rule designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof, in the manner provided in this Part.

(b) The Commission may designate as areas of environmental concern any one or more of the following, singly or in combination:

(1) Coastal wetlands as defined in G.S. 113-230(a);

(2) Estuarine waters as defined in G.S. 113-229(n)(2), that is, all the water of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters, as set forth in an agreement adopted by the Wildlife Resources Commission and the Department of Natural and Economic Resources filed with the Secretary of State, entitled "Boundary Lines, North Carolina Commercial Fishing — Inland Fishing Waters, Revised to March 1, 1965";

(3) Renewable resource areas where uncontrolled or incompatible development which results in the loss or reduction of continued long-range productivity could jeopardize future water, food or fiber requirements of more than local concern, which may include:

a. Watersheds or aquifers that are present sources of public water supply, as identified by the Department of Human Resources or Environmental Management Commission, or that are classified for water-supply use pursuant to G.S. 143-214.1;

b. Capacity use areas that have been declared by the Environmental Management Commission pursuant to G.S. 143-215.13(c) and areas wherein said Environmental Management Commission (pursuant to G.S. 143-215.3(d) or 143-215.3(a)(8)) has determined that a generalized condition of water depletion or water or air pollution exists;

c. Prime forestry land (sites capable of producing 85 cubic feet per acre-year, or more, of marketable timber), as identified by the Department of Natural and Economic Resources.

(4) Fragile or historic areas, and other areas containing environmental or natural resources of more than local significance, where uncontrolled or incompatible development could result in major or irreversible damage to important historic, cultural, scientific or scenic values or natural systems, which may include:
   a. Existing national or State parks or forests, wilderness areas, the State Nature and Historic Preserve, or public recreation areas; existing sites that have been acquired for any of the same, as identified by the Secretary of Natural and Economic Resources; and proposed sites for any of the same, as identified by the Secretary of Natural and Economic Resources, provided that the proposed site has been formally designated for acquisition by the governmental agency having jurisdiction;
   b. Present sections of the natural and scenic rivers system;
   c. Stream segments that have been classified for scientific or research uses by the Environmental Management Commission, or that are proposed to be so classified in a proceeding that is pending before said Environmental Management Commission pursuant to G.S. 143-214.1 at the time of the designation of the area of environmental concern;
   d. Existing wildlife refuges, preserves or management areas, and proposed sites for the same, as identified by the Wildlife Resources Commission, provided that the proposed site has been formally designated for acquisition (as hereinafter defined) or for inclusion in a cooperative agreement by the governmental agency having jurisdiction;
   e. Complex natural areas surrounded by modified landscapes that do not drastically alter the landscape, such as virgin forest stands within a commercially managed forest, or bogs in an urban complex;
   f. Areas that sustain remnant species or aberrations in the landscape produced by natural forces, such as rare and endangered botanical or animal species;
   g. Areas containing unique geological formations, as identified by the State Geologist; and
   h. Historic places that are listed, or have been approved for listing by the North Carolina Historical Commission, in the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966; historical, archeological, and other places and properties owned, managed or assisted by the State of North Carolina pursuant to Chapter 121; and properties or areas that are or may be designated by the Secretary of the Interior as registered natural landmarks or as national historic landmarks;

(5) Areas such as waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights, and areas which the State of North Carolina may be authorized to preserve, conserve, or protect under Article XIV, Sec. 5 of the North Carolina Constitution;

(6) Natural-hazard areas where uncontrolled or incompatible development could unreasonably endanger life or property, and other areas especially vulnerable to erosion, flooding, or other adverse effects of sand, wind and water, which may include:
   a. Sand dunes along the Outer Banks;
   b. Ocean and estuarine beaches and shoreline;
   c. Floodways and floodplains;
   d. Areas where geologic and soil conditions are such that there is a substantial possibility of excessive erosion or seismic activity, as identified by the State Geologist;
   e. Areas with a significant potential for air inversions, as identified by the Environmental Management Commission.

(7) Areas which are or may be impacted by key facilities.

(c) In those instances where subsection (b) of this section refers to locations identified by a specified agency, said agency is hereby authorized to make the indicated identification from time to time and is directed to transmit the identification to the Commission; provided, however, that no designation of an area of environmental concern based solely on an agency identification of a proposed location may remain effective for longer than three years unless, in the case of paragraphs (4)a and d of subsection (b) of this section, the proposed site has been at least seventy-five percent (75%) acquired. Within the meaning of this section, "formal designation for acquisition" means designation in a formal resolution adopted by the governing body of the agency having jurisdiction (or by its chief executive, if it has no governing body), together with a direction in said resolution that the initial step in the land acquisition process be taken (as by filing an application with the Department of Administration to acquire property pursuant to G.S. 146-23).

(d) Additional grounds for designation of areas of environmental concern are prohibited unless enacted into law by an act of the General Assembly.

§ 113A-114. Designation of interim areas of environmental concern; notice of developments within such areas. — (a) Pending the designation of areas of environmental concern pursuant to G.S. 113A-115, the Commission may by rule designate such interim areas of environmental concern (hereafter referred to as "interim areas") as it deems appropriate.

(b) Not earlier than 15 days nor later than 75 days after July 1, 1974, the Secretary of Natural and Economic Resources, or his designee or designees, shall hold a one-day public hearing, at which public and private parties shall have the opportunity to present views and comments concerning proposed interim areas, in each of the following cities: Elizabeth City, Jacksonville, Manteo, Morehead City, Washington and Wilmington. The following provisions shall apply for all such hearings:

(1) The hearing shall begin with a description of interim areas proposed by the Secretary.

(2) Notice of any such hearing shall be given not less than seven days before the date of such hearing and shall state the date, time and place of the hearing, the subject of the hearing and the action to be taken. The notice shall state that a copy of a description of interim areas proposed by the Secretary (including a map of such proposed areas) is available for public inspection at the county courthouse of each county affected.

(3) Any such notice shall be published one time in a newspaper of general circulation in the county or counties affected at least seven days before the date of the public hearing.

(4) Any person who desires to be heard at such public hearing shall give notice thereof in writing to the Secretary on or before the date set for the hearing. The Secretary is authorized to set reasonable time limits for the oral presentation of views by any one person at any such hearing. The Secretary shall permit anyone who so desires to file a written argument or other statement with him in relation to proposed interim areas within five days following the conclusion of any public hearing or within such additional time as he may allow in his discretion.

(5) A record of each such hearing shall be presented to the Commission by the Secretary, together with the description of interim areas proposed by the Secretary (with such revisions as he deems appropriate in light of the hearings). Upon receipt of said hearing records and description, and consideration of submitted evidence and arguments with respect to any proposed action pursuant to this section, the Commission shall adopt its final action with respect thereto and shall file a duly certified copy thereof with the Secretary of State and with the board of commissioners of each county affected thereby.

(c) The Commission may revise the interim areas (or any part thereof) at any time in the manner provided by subsection (b) of this section, except that the hearing or hearings shall be held in each county in which lands to be affected are located.

(d) The interim areas (with such revisions as may be made pursuant to this section) shall remain in effect until designation of areas of environmental concern are made purusuant to G.S. 113A-115.

(e) During the period while interim areas are in effect, any person proposing to undertake any development in an interim area shall notify the Commission at least 60 days in advance of initiating construction, installation or other land- or water-disturbing activity in connection with said development.

§ 113A-115. Designation of areas of environmental concern. — (a) Prior to adopting any rule permanently designating any area of environmental concern the Secretary and the Commission shall hold a public hearing in each county in which lands to be affected are located, at which public and private parties shall have the opportunity to present comments and views. The following provisions shall apply for all such hearings:

(1) Notice of any such hearing shall be given not less than 30 days before the date of such hearing and shall state the date, time and place of the hearing, the subject of the hearing, and the action to be taken. The notice shall specify that a copy of the description of the area or areas of environmental concern proposed by the Secretary is available for public inspection at the county courthouse of each county affected.

(2) Any such notice shall be published at least once in one newspaper of general circulation in the county or counties affected at least 30 days before the date on which the public hearing is scheduled to begin.

(3) Any person who desires to be heard at such public hearing shall give notice thereof in writing to the Secretary on or before the first date set for the hearing. The Secretary is authorized to set reasonable time limits for the oral presentation of views by any one person at any such hearing. The Secretary shall permit anyone who so desires to file a written argument or other statement with him in relation to any proposed plan any time within 30 days following the conclusion of any public hearing or within such additional time as he may allow by notice given as prescribed in this section.

(4) Upon completion of the hearing and consideration of submitted evidence and arguments with respect to any proposed action pursuant to this section, the Commission shall adopt its final action with respect thereto and shall file a duly certified copy thereof with the Secretary of State and with the board of commissioners of each county affected thereby.

(b) In addition to the notice required by G.S. 113A-115(a)(2) notice shall be given to any interested State agency and to any citizen or group that has filed a request to be notified of a public hearing to be held under this section.

(c) The Commission shall review the designated areas of environmental concern at least biennially. New areas may be designated and designated areas may be deleted, in accordance with the same procedures as apply to the original designations of areas under this section. Areas shall not be deleted unless it is found that the conditions upon which the original designation was based shall have been found to be substantially altered. (1973, c. 1284, s. 1.)

Part 4. Permit Letting and Enforcement.

§ 113A-116. Local government letter of intent. — Within two years after July 1, 1974, each county and city within the coastal area shall submit to the Commission a written statement of its intent to act, or not to act, as a permit-letting agency under G.S. 113A-121. If any city or county states its intent not to act as a permit-letting agency or fails to submit a statement of intent within the required period, the Secretary of Natural and Economic Resources shall issue permits therein under G.S. 113A-121; provided that a county may submit a letter of intent to issue permits in any city within said county that disclaims its intent to issue permits or fails to submit a letter of intent. Provided, however, should any city or county fail to become a permit-letting agency for any reason, but shall later express its desire to do so, it shall be permitted by the Coastal Resources Commission to qualify as such an agency by following the procedure herein set forth for qualification in the first instance. (1973, c. 1284, s. 1; 1975, c. 452, s. 2.)

§ 113A-117. Implementation and enforcement programs. — (a) The Secretary of Natural and Economic Resources shall develop and present to the Commission for consideration and to all cities and counties and lead regional organizations within the coastal area for comment a set of criteria for local implementation and enforcement programs. In the preparation of such criteria, the Secretary shall emphasize the necessity for the expeditious processing of permit applications. Said criteria may contain recommendations and guidelines as to the procedures to be followed in developing local implementation and enforcement programs, the scope and coverage of said programs, minimum standards to be prescribed in said programs, staffing of permit-letting agencies, permit-letting procedures, and priorities of regional or statewide concern. Within 20 months after July 1, 1974, the Commission shall adopt and transmit said criteria (with any revisions) to each coastal-area county and city that has filed an applicable letter of intent, for its guidance.

(b) The governing body of each city in the coastal area that filed an affirmative letter of intent shall adopt an implementation and enforcement plan with respect to its zoning area within 36 months after July 1, 1974. The board of commissioners of each coastal-area county that filed an affirmative letter of intent shall adopt an implementation plan with respect to portions of the county outside city zoning areas within 36 months after July 1, 1974, provided, however, that a county implementation and enforcement plan may also cover city jurisdictions for those cities within the counties that have not filed affirmative letters of intent pursuant to G.S. 113A-116. Prior to adopting the implementation and enforcement program the local governing body shall hold a public hearing at which public and private parties shall have the opportunity to present comments and views. Notice of the hearing shall be given not less than 15 days before the date of the hearing, and shall state the date, time and place of the hearing, the subject of the hearing, and the action which is to be taken. The notice shall state that copies of the proposed implementation and enforcement program are available for public inspection at the county courthouse. Any such notice shall be published at least once in one newspaper of general circulation in the county at least 15 days before the date on which the public hearing is scheduled to begin.

(c) Each coastal-area county and city shall transmit its implementation and enforcement program when adopted to the Commission for review. The Commission shall afford interested persons an opportunity to present objections and comments regarding the program, and shall review and consider each local implementation and enforcement program submitted in light of such objections and comments, the Commission's criteria and any general standards of review applicable throughout the coastal area as may be adopted by the Commission. Within 45 days after receipt of a local implementation and enforcement program the Commission shall either approve the program or notify the county or city of the specific changes that must be made in order for it to be approved. Following such changes, the program may be resubmitted in the same manner as the original program.

(d) If the Commission determines that any local government is failing to administer or enforce an approved implementation and enforcement program, it shall notify the local government in writing and shall specify the deficiencies of administration and enforcement. If the local government has not taken corrective action within 90 days of receipt of notification from the Commission, the Commission shall assume enforcement of the program until such time as the local government indicates its willingness and ability to resume administration and enforcement of the program. (1973, c. 1284, s. 1.)

§ 113A-118. Permit required. — (a) After the date designated by the Secretary of Natural and Economic Resources pursuant to G.S. 113A-125, every person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part.

(b) Under the expedited procedure provided for by G.S. 113A-121, the permit shall be obtained from the appropriate city or county for any minor development; provided, that if the city or county has not developed an approved implementation and enforcement program, the permit shall be obtained from the Secretary of Natural and Economic Resources.

(c) Under the quasi-judicial procedure provided for by G.S. 113A-122, the permit shall be obtained from the Commission.

(d) Within the meaning of this Part:

(1) A "major development" is any development which requires permission, licensing, approval, certification or authorization in any form from the Environmental Management Commission, the Department of Human Resources, the State Department of Natural and Economic Resources, the State Department of Administration, the North Carolina Mining Commission, the North Carolina Pesticides Board, or the North Carolina Sedimentation Control Board; or which occupies a land or water area in excess of 20 acres; or which contemplates drilling for or excavating natural resources on land or under water; or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

(2) A "minor development" is any development other than a "major development."

(e) If, within the meaning of G.S. 113A-103(5)b3, the siting of any utility facility for the development, generation or transmission of energy is subject to regulation under this Article rather than by the State Utilities Commission or by other law, permits for such facilities shall be obtained from the Coastal Resources Commission rather than from the appropriate city or county. (1973, c. 476, s. 128; c. 1262, ss. 23, 33; c. 1284, s. 1.)

§ 113A-119. Permit applications generally. — (a) Any person required to obtain a permit under this Part shall file with the Secretary of Natural and Economic Resources and (in the case of a permit sought from a city or county) with the designated local official an application for a permit in accordance with the form and content designated by the Secretary and approved by the Commission. The applicant must submit with the application a check or money order payable to the Department or the city or county, as the case may be, constituting a reasonable fee (not to exceed twenty-five dollars ($25.00)) set by the Commission to cover the administrative costs in processing the said application.

(b) Upon receipt of an application, the Secretary shall issue public notice of the proposed development (i) by mailing a copy of the application, or a brief description thereof together with a statement indicating where a detailed copy of the proposed development may be inspected, to any citizen or group which has filed a request to be notified of the proposed development, and to any interested State agency; (ii) by posting or causing to be posted a copy of the application at the location of the proposed development; and (iii) by publishing notice of the application at least once in one newspaper of general circulation in the county or counties wherein the development would be located at least seven days before final action on a permit under G.S. 113A-121 or before the beginning of the hearing on a permit under G.S. 113A-122. The notice shall set out that any comments on the development should be submitted to the Secretary by a specified date, not to exceed 15 days from the date of the newspaper publication of the notice. Public notice under this subsection is mandatory.

(c) Within the meaning of this Part, the "designated local official" is the official who has been designated by the local governing body to receive and consider permit applications under this Part. (1973, c. 1284, s. 1.)

§ 113A-120. Grant or denial of permits. — (a) After consideration of submitted evidence and arguments submitted at the hearing, or otherwise in the case where no hearing was conducted, the responsible official or body shall deny the application for permit upon finding:

(1) In the case of coastal wetlands, that the development would contravene an order that has been or could be issued pursuant to G.S. 113-230.

(2) In the case of estuarine waters, that a permit for the development would be denied pursuant to G.S. 113-229(e).

(3) In the case of a renewable resource area, that the development will result in loss or significant reduction of continued long-range productivity that would jeopardize one or more of the water, food or fiber requirements of more than local concern identified in paragraphs a to c of subsection (b)(3) of G.S. 113A-113.

(4) In the case of a fragile or historic area, or other area containing environmental or natural resources of more than local significance, that the development will result in major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in paragraphs a to h of subsection (b)(4) of G.S. 113A-113.

(5) In the case of areas covered by G.S. 113A-113(4) [G.S. 113A-113(b)(4)], that the development will jeopardize the public rights or interests specified in said subdivision.

(6) In the case of natural hazard areas, that the development would occur in one or more of the areas identified in paragraphs a to e of subsection (b)(6) [of G.S. 113A-113] in such a manner as to unreasonably endanger life or property.

(7) In the case of areas which are or may be impacted by key facilities, that the development is inconsistent with the State guidelines or the local land-use plans, or would contravene any of the provisions of subdivisions (1) to (6) of this subsection.

(8) In any case, that the development is inconsistent with the State guidelines or the local land-use plans.

(b) In the absence of such findings, a permit shall be granted. The permit may be conditioned upon the applicant's amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (a) of this section.

(c) Variances. — Any person may petition the Commission for a variance granting permission to use his land in a manner otherwise prohibited by rules, regulations, standards or limitations prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. When it finds that (i) practical difficulties or unnecessary hardships would result from strict application of the guidelines, rules, regulations, standards, or other restrictions applicable to the property, (ii) such difficulties or hardships result from conditions which are peculiar to the property involved, (iii) such conditions could not reasonably have been anticipated when the applicable guidelines, rules, regulations, standards, or restrictions were adopted or amended, the Commission may vary or modify the application of the restrictions to the property so that the spirit, purpose, and intent of the restrictions are preserved, public safety and welfare secured, and substantial justice preserved. In varying such regulations, the Commission may impose reasonable and appropriate conditions and safeguards upon any permit it issues. The Commission may conduct a hearing within 45 days from the receipt of the petition and shall notify such persons and agencies that may have an interest in the subject matter of the time and place of the hearing. (1973, c. 1284, s. 1.)

§ 113A-121. Permits for minor developments under expedited procedures. — (a) Applications for permits for minor developments shall be expeditiously processed so as to enable their promptest feasible disposition.

(b) In cities and counties that have developed approved implementation and enforcement programs, applications for permits for minor developments shall be considered and determined by the designated local official of the city or county as the case may be. In cities and counties that have not developed approved implementation and enforcement programs, such applications shall be considered and determined by the Secretary of Natural and Economic Resources.

(c) Failure of the Secretary or the designated local official (as the case may be) to approve or deny an application for a permit for a minor development within 30 days from receipt of application shall be treated as approval of such application, except that the Secretary or the designated local official (as the case may be) may extend such deadline by not more than an additional 30 days if necessary properly to consider the application. No waiver of the foregoing time limitation (or of the time limitation established in G.S. 113A-122(c)) shall be required of any applicant.

(d) Any person who is directly affected by the decision of the Secretary or the designated local official (as the case may be) to grant or deny an application for minor development permit may request within 20 days of such action, a hearing before the Commission. In the case of a grant or denial of a permit by a local official, the Secretary shall be considered to be a person affected by the decision. Pending final disposition of any such appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this section. (1973, c. 1284, s. 1.)

§ 113A-122. **Permits under quasi-judicial procedures.** — (a) The procedure set forth in this section applies to all permit applications for major developments, as well as to permit applications for minor developments whose disposition was appealed under G.S. 113A-121(d). All permit applications subject to this section shall be heard by the Commission.

(b) The following provisions shall be applicable in connection with hearings pursuant to this section:

(1) Any hearing held pursuant to this section shall be held upon not less than 30 days' written notice given by the Commission to any person who is a party to the proceedings with respect to which such hearing is to be held, unless a shorter notice is agreed upon by all such parties.

(2) All hearings under this section shall be open to the public. Any person to whom a delegation of power is made to conduct a hearing shall report the hearing with its evidence and record to the Commission for decision.

(3) A full and complete record of all proceedings at any hearing under this section shall be taken by a reporter appointed by the Commission or by other method approved by the Attorney General. Any party to a proceeding shall be entitled to a copy of such record upon the payment of the reasonable cost thereof as determined by the Commission.

(4) The Commission and its duly authorized agents shall follow generally the procedures applicable in civil actions in the superior court insofar as practicable, including rules and procedures with regard to the taking and use of depositions, the making and use of stipulations, and the entering into of agreed settlements and consent orders.

(5) The Commission and its duly authorized agents may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, and other documents belonging to the said person.

(6) Subpoenas issued by the Commission in connection with any hearing under this section shall be directed to any officer authorized by law to serve process, and the further procedures and rules of law applicable with respect thereto shall be prescribed in connection with subpoenas to the same extent as if issued by a court of record. In case of a refusal to obey a subpoena issued by the Commission, application may be made to the superior court of the appropriate county for enforcement thereof.

(7) The burden of proof at any hearing under this section on appeal pursuant to G.S. 113A-121(d) shall be upon the Secretary. The burden of proof at any hearing under this section on a permit application for a major development shall be upon the applicant. The provisions of this paragraph shall apply only to the hearings specified in this paragraph.

(8) No decision or order of the Commission shall be made in any proceeding unless the same is supported by competent, material, and substantial evidence upon consideration of the whole record.

(9) Following any hearing, the Commission shall afford the parties thereto an opportunity to submit within 30 days, or within such additional time as prescribed by the Commission, proposed findings of fact and conclusions of law and any brief in connection therewith.

(10) After hearing the evidence, the Commission shall grant or deny the permit in accordance with the provisions of G.S. 113A-120. All such orders and decisions of the Commission shall set forth separately the Commission's findings of fact and conclusions of law and shall, wherever necessary, cite the appropriate provision of law or other source of authority on which any action or decision of the Commission is based.

(11) The Commission shall have the authority to adopt a seal which shall be the seal of said Commission and which shall be judicially noticed by the courts of the State. Any document, proceeding, order, decree, special order, rule, regulation, rule of procedure or any other official act or records of the Commission or its minutes may be certified by the Executive Director under his hand and the seal of the Commission and when so certified shall be received in evidence in all actions or proceedings in the courts of the State without further proof of the identity of the same if such records are competent, relevant and material in any such action to proceedings. The Commission shall have the right to take judicial notice of all studies, reports, statistical data or any other official reports or records of the federal government or of any sister state and all such records, reports and data may be placed in evidence by the Commission or by any other person or interested party where material, relevant and competent.

(c) Failure of the Commission to approve or deny an application for a permit (or to dispose of an appeal) pursuant to this section within 90 days from receipt of application or notice of appeal shall be treated as approval of such application or of the action appealed from, as the case may be, except that the Commission may extend such deadline by not more than an additional 90 days if necessary properly to consider the application or the appeal.

(d) All notices which are required to be given by the Secretary or Commission or by any party to a proceeding under this section shall be given by registered or certified mail to all persons entitled thereto. The date of receipt or refusal for such registered or certified mail shall be the date when such notice is deemed to have been given. Notice by the Commission may be given to any person upon whom a summons may be served in accordance with the provisions of law covering civil actions in the superior courts of this State. The Commission may prescribe the form and content of any particular notice. (1973, c. 1284, s. 1.)

§ 113A-123. Judicial review. — (a) Any person directly affected by any final decision or order of the Commission under this Part may appeal such decision or order to the superior court of the county where the land or any part thereof is located, pursuant to the provisions of chapter 150[A] of the General Statutes. Pending final disposition of any appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this Part.

(b) Any person having a recorded interest or interest by operation of law in or registered claim to land within an area of environmental concern affected by any final decision or order of the Commission under this Part may, within 90 days after receiving notice thereof, petition the superior court to determine whether the petitioner is the owner of the land in question, or an interest, therein, and in case he is adjudged the owner of the subject land, or an interest therein, the court shall determine whether such order so restricts the use of his property as to deprive him of the practical uses thereof, being not otherwise authorized by law, and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of taking without compensation. The burden of proof shall be on petitioner as to ownership and the burden of proof shall be on the Commission to prove that the order is not an unreasonable exercise of the police power, as aforesaid. Either party shall be entitled to a jury trial on all issues of fact, and the court shall enter a judgment in accordance with the issues, as to whether the Commission order shall apply to the land of the petitioner. The Secretary of Natural and Economic Resources shall cause a copy of such finding to be recorded forthwith in the register of deeds office in the county where the land is located. The method provided in this subsection for the determination of the issue of whether such order constitutes a taking without compensation shall be exclusive and such issue shall not be determined in any other proceeding. Any action authorized by this subsection shall be calendared for trial at the next civil session of superior court after the summons and complaint have been served for 30 days, regardless of whether issues were joined more than 10 days before the session. It is the duty of the presiding judge to expedite the trial of these actions and to give them a preemptory setting over all others, civil or criminal. From any decision of the superior court either party may appeal to the court of appeals as a matter of right.

(c) After a finding has been entered that such order shall not apply to certain land as provided in the preceding subsection, the Department of Administration, upon the request of the Commission and upon finding that sufficient funds are available therefor, and with the consent of the Governor and Council of State may take the fee or any lesser interest in such land in the name of the State by eminent domain under the provisions of Chapter 146 of the General Statutes and hold the same for the purposes set forth in this Article. (1973, c. 1284, s. 1; c. 1331, s. 3.)

Editor's Note. — Session Laws 1975, c. 69, s. 4, amends Session Laws 1973, c. 1331, s. 4, so as to change the effective date of the 1973 act from July 1, 1975, to Feb. 1, 1976.

§ 113A-124. Additional powers and duties. — (a) The Secretary of Natural and Economic Resources shall have the following additional powers and duties under this Article:

(1) To conduct or cause to be conducted, investigations of proposed developments in areas of environmental concern in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of permits to build such developments.

(2) To cooperate with the Secretary of the Department of Administration in drafting State guidelines for the coastal area.

(3) To keep a list of interested persons who wish to be notified of proposed developments and proposed rules designating areas of environmental concern and to so notify these persons of such proposed developments by regular mail. A reasonable registration fee to defray the cost of handling and mailing notices may be charged to any person who so registers with the Commission.

(4) To propose rules and regulations to implement this Article for consideration by the Commission.

(5) To delegate such of his powers as he may deem appropriate to one or more qualified employees of the Department of Natural and Economic Resources or to any local government, provided that the provisions of any such delegation of power shall be set forth in departmental regulations.

(6) To delegate the power to conduct a hearing, on his behalf, to any member of the Commission or to any qualified employee of the Department of Natural and Economic Resources. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the evidence and the record of the hearing to the Secretary for decision or action.

(b) In order to carry out the provisions of this Article the secretaries of administration and of Natural and Economic Resources may employ such clerical, technical and professional personnel, and consultants with such qualifications as the Commission may prescribe, in accordance with the State personnel regulations and budgetary laws, and are hereby authorized to pay such personnel from any funds made available to them through grants, appropriations, or any other sources. In addition, the said secretaries may contract with any local governmental unit or lead regional organization to carry out the planning provisions of this Article.

(c) The Commission shall have the following additional powers and duties under this Article:

(1) To recommend to the Secretary of Natural and Economic Resources the acceptance of donations, gifts, grants, contributions and appropriations from any public or private source to use in carrying out the provisions of this Article.

(2) To recommend to the Secretary of Administration the acquisition by purchase, gift, condemnation, or otherwise, lands or any interest in any lands within the coastal area.

(3) To hold such public hearings as the Commission deems appropriate.

(4) To delegate the power to conduct a hearing, on behalf of the Commission, to any member of the Commission or to any qualified employee of the Department of Natural and Economic Resources. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the evidence and the record of the hearing to the Commission for decision or action.

(5) To adopt from time to time and to modify and revoke official regulations interpreting and applying the provisions of this Article and rules of procedure establishing and amplifying the procedures to be followed in the administration of this Article.

(d) The Attorney General shall act as attorney for the Commission and shall initiate actions in the name of, and at the request of, the Commission, and shall represent the Commission in the hearing of any appeal from or other review of any order of the Commission. (1973, c. 1284, s. 1.)

§ 113A-125. Transitional provisions. — (a) Existing regulatory permits shall continue to be administered within the coastal area by the agencies presently responsible for their administration until a date (not later than 44 months after July 1, 1974), to be designated by the Secretary of Natural and Economic Resources as the permit changeover date. Said designation shall be effective from and after its filing with the Secretary of State.

(1975, c. 452, s. 4.)

(b) From and after the "permit changeover date," all existing regulatory permits within the coastal area shall be administered in coordination and consultation with (but not subject to the veto of) the Commission. No such existing permit within the coastal area shall be issued, modified, renewed or terminated except after consultation with the Commission. The provisions of this subsection concerning consultation and coordination shall not be interpreted to authorize or require the extension of any deadline established by this Article or any other law for completion of any permit, licensing, certification or other regulatory proceedings.

(c) Within the meaning of this section, "existing regulatory permits" include dredge and fill permits issued pursuant to G.S. 113-229; sand dune permits issued pursuant to G.S. 104B-4; air pollution control and water pollution control permits, special orders or certificates issued pursuant to G.S. 143-215.1 and 143-215.2, or any other permits, licenses, authorizations, approvals or certificates issued by the Board of Water and Air Resources pursuant to Chapter 143; capacity use area permits issued pursuant to G.S. 143-215.15; final approval of dams pursuant to G.S. 143-215.30; floodway permits issued pursuant to G.S. 143-215.54; water diversion authorizations issued pursuant to G.S. 143-354(c); oil refinery permits issued pursuant to G.S. 143-215.99; mining operating permits issued pursuant to G.S. 74-51; permissions for construction of wells issued

pursuant to G.S. 87-88; restricted-use pesticide permits issued pursuant to G.S. 143-440(b), pesticide applicator licenses issued pursuant to G.S. 143-452 for persons who may apply pesticides within the coastal area, and regulations concerning pesticide application within the coastal area issued pursuant to G.S. 143-458; approvals by the Department of Human Resources of plans for water supply, drainage or sewerage, pursuant to G.S. 130-161.1 and 130-161.2; standards and approvals for solid waste disposal sites and facilities, adopted by the Department of Human Resources pursuant to Chapter 130, Article 13B; permits relating to sanitation of shellfish, crustacea or scallops issued pursuant to Chapter 130, Articles 14A or 14B; permits, approvals, authorizations and regulations issued by the Department of Human Resources pursuant to Articles 23 or 24 of Chapter 130 with reference to mosquito control programs or districts; any permits, licenses, authorizations, regulations, approvals or certificates issued by the Department of Human Resources relating to septic tanks or water wells; oil or gas well regulations and orders issued for the protection of environmental values or resources pursuant to G.S. 113-391; a certificate of public convenience and necessity issued by the State Utilities Commission pursuant to Chapter 62 for any public utility plant or system, other than a carrier of persons or property; permits, licenses, leases, options, authorization or approvals relating to the use of State forestlands, State parks or other state-owned land issued by the State Department of Administration, the State Department of Natural and Economic Resources or any other State department, agency or institution; any approvals of erosion control plans that may be issued by the North Carolina Sedimentation Control Commission pursuant to G.S. 113A-60 or 113A-61; and any permits, licenses, authorizations, regulations, approvals or certificates issued by any State agency pursuant to any environmental protection legislation not specified in this subsection that may be enacted prior to the permit changeover date.

Editor's Note. — Section 130-161.2, referred to in subsection (c) of this section, does not exist.

(d) The Commission shall conduct continuing studies addressed to developing a better coordinated and more unified system of environmental and land-use permits in the coastal area, and shall report its recommendations thereon from time to time to the General Assembly. Specifically, the Commission shall report to the 1975 General Assembly recommended procedures to implement the requirement of subsection (b) of this section for administration of existing regulatory permits within the coastal area in coordination and consultation with the Commission. In its 1975 recommendations, the Commission shall seek to develop procedures that are administratively practicable, that are not unduly burdensome for the affected agencies, and that are adapted to the circumstances of each agency, taking into account the volume of permits issued, the location of the regulated activity (whether or not within or near an area of environmental concern), the significance of the environmental consequences of the regulated activity, and the scheduling problems and needs of the regulatory agency: Provided, however, that no consultation or coordination shall be required in advance of issuance of individual pesticide applicator licenses, but only periodic consultation concerning the overall effect of the applicator licensing program within the coastal area. In its 1975 recommendations, the Commission shall also evaluate the desirability of legislation to provide for coordination of environmental permits at the option of permit applicants. In developing its 1975 recommendations, the Commission shall meet with all affected State agencies and shall hold one or more public hearings concerning its recommendations. (1973, c. 1284, s. 1.)

§ 113A-126. Injunctive relief and penalties. — (a) Upon violation of any of the provisions of this Article or of any regulation, rule or order adopted under the authority of this Article the Secretary may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice in the name of the State upon the relation of the Secretary for injunctive relief to restrain the violation and for such other or further relief in the premises as said court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed by this Article for any violation of same.

(b) Upon violation of any of the provisions of this Article relating to permits for minor developments issued by a local government, or of any regulation, rule or order adopted under the authority of this Article relating to such permits, the designated local official may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice in the name of the affected local government upon the relation of the designated local official for injunctive relief to restrain the violation and for such other and further relief in the premises as said court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed by this Article for any violation of same.

(c) Any person who shall be adjudged to have knowingly or willfully violated any provision of this Article, or any regulation, rule or order adopted pursuant to this Article, shall be guilty of a misdemeanor, and for each violation shall be liable for a penalty of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) or shall be imprisoned for not more than 60 days, or both. In addition, if any person continues to violate or further violates, any such provision, regulation, rule or order after written notice from the Secretary or (in the case of a permit for a minor development issued by a local government) written notice from the designated local official, the court may determine that each day during which the violation continues or is repeated constitutes a separate violation subject to the foregoing penalties.

(d) (1) A civil penalty of not more than one thousand dollars ($1,000) may be assessed by the Commission against any person who:

a. Is required but fails to apply for or to secure a permit required by G.S. 113A-122, or who violates or fails to act in accordance with the terms, conditions, or requirements of such permit.

b. Fails to file, submit, or make available, as the case may be, any documents, data or reports required by the Commission pursuant to this Article.

c. Refuses access to the Commission or its duly designated representative, who has sufficiently identified himself by displaying official credentials, to any premises, not including any occupied dwelling house or curtilage, for the purpose of conducting any investigations provided for in this Article.

d. Violates any duly adopted regulation of the Commission implementing the provisions of this Article. Provided, however, that this paragraph d shall not apply to regulations relating to minor developments.

(2) If any action or failure to act for which a penalty may be assessed under this subsection is willful, the Commission may assess a penalty not to exceed one thousand dollars ($1,000) for each separate violation, after the first assessment, provided, however, no penalty shall be imposed under this subsection pending court review of the first assessment, if appealed pursuant to subdivision (3).

(3) The Commission may assess the penalties provided for in this subsection, When the Commission proposes to assess a penalty, it shall notify the person whom it proposes to assess by registered or certified mail of the proposal to assess a penalty, and the notice shall specify the reason for assessment and the date of the proposed hearing when assessment is to be determined. The hearing shall be no sooner than 15 days after the mailing of notice of the proposed assessment. Any hearing shall be based upon competent evidence, and the person the Commission proposes to assess shall be allowed to present evidence, and the hearing shall be reported. The person assessed may apply to the superior court of the county where such person resides for review of the hearing and assessment and the scope of the court's review of the Commission's action (which shall include a review of the amount of the assessment), shall be as provided in G.S. 143-315. If the person assessed fails to pay the amount of the assessment to the Department of Natural and Economic Resources within 30 days after receipt of notice, or such longer period, not to exceed 180 days, as the Commission may specify, the Commission may institute a civil action in the superior court of the county in which the violation occurred or, in the discretion of the Commission in the superior court of the county in which the person assessed resides or has his or its principal place of business, to recover the amount of the assessment. In any such civil action, the scope of the court's review of the Commission's action (which shall include a review of the amount of the assessment), shall be as provided in G.S. 143-315.

(4) In determining the amount of the penalty the Commission shall consider the degree and extent of harm caused by the violation and the cost of rectifying the damage. (1973, c. 1284, s. 1.)

§ 113A-127. Coordination with the federal government. — All State agencies shall keep informed of federal and interstate agency plans, activities, and procedures within their area of expertise that affect the coastal area. Where federal or interstate agency plans, activities or procedures conflict with State policies, all reasonable steps shall be taken by the State to preserve the integrity of its policies. (1973, c. 1284, s. 1.)

§ 113A-128. Protection of landowners' rights. — Nothing in this Article authorizes any governmental agency to adopt a rule or regulation or issue any order that constitutes a taking of property in violation of the Constitution of this State or of the United States. (1973, c. 1284, s. 1.)

NOTE: Other State Programs

The responsibility for protecting the nation's shorelines and wetlands lies primarily with the states. Current responses to increased environmental concern and to incentive programs, such as the federal Coastal Zone Management Act of 1972, supra, range from comprehensive reorganization of state government structures to statutory bans on particularly disruptive development.

Washington

The State of Washington enacted the Shorelines Management Act, Wash. Rev. Code 90.58.101 et seq., in 1971, as part of one of the first comprehensive schemes designed to manage activities affecting the environment. The newly created Department of Ecology not only received responsibility for the shoreline management program and the environmental impact program, but also incorporated the previously separate Department of Water Resources, the Water Pollution Control Commission and the air quality and solid wastes sections of the Department of Health. The Act is a statewide management effort, for it applies not only to coastal areas but to all shorelines within the state. These are defined to include all water areas and wetlands, except streams and associated wetlands upstream of a point where the mean annual flow is twenty cubic feet per second or less, and lakes of twenty acres or less, Wash. Rev. Code 90.58.030(2)(d). Contrast this approach with the scheme of North Carolina's Coastal Area Management Act, supra.

The central mechanism of Washington's Act is a four step planning process, with power systematically allocated between local and state governments. Local governments first conduct shoreline inventories, surveying public and private land use patterns, natural land characteristics and present and projected land uses, Wash. Rev. Code 90.58.080. Second, the state authorities provide guidelines for master land use plans and develop criteria for use in evaluating land use permits. Third, the local governments develop such master programs to serve as standards against which all future shoreline development proposals are to be judged, Wash. Rev. Code 90.58.100 (2)(a)-(h):

> The master programs shall include, when appropriate, the following:
> (a) An economic development element for the location and design of industries, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state;
> (b) A public access element making provision for public access to publicly owned areas;
> (c) A recreational element for the preservation and enlargement of recreational opportunities, including but not limited to parks, tidelands, beaches, and recreational areas;

(d) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shoreline use element;
(e) A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public buildings and grounds, and other categories of public and private uses of the land;
(f) A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection;
(g) An historic, cultural, scientific, and educational element for the protection and restoration of buildings, sites, and areas having historic, cultural, scientific, or educational values; and
(h) Any other element deemed appropriate or necessary to effectuate the policy of this chapter.

Fourth, local governments implement permit-granting systems for all "substantial development," Wash. Rev. Code 90.58.140(2). Appeals from permit determinations may be taken to the local Superior Court or to the Shoreline Hearing Board, a state administrative body, Wash. Rev. Code 90.58.180.

Special protection is given to "shorelines of state-wide significance," including most of the coastline, lakes with surface acreage of one thousand acres or more, and associated wetlands, and rivers downstream from a point where the mean annual flow is one thousand cubic feet per second, and associated wetlands. The local master programs must particularly protect and preserve these areas, with "preferences to uses which favor public and long-range goals," Washington Administrative Code 173-16-040. The state's guidelines establish a priority system for evaluation of proposed uses for shorelines of state-wide significance, with particular emphasis on conservation and recreational uses.

Rhode Island

Rhode Island has also enacted a comprehensive plan. The Coastal Management Act created a coastal resources management council as the principal mechanism for management of the state's coastal resources, R.I. Gen. Laws §46-23-1. Composed of representatives of the state legislature, members of the general public, and state and local government officials, the council is authorized to formulate policies and adopt regulations necessary to implement its various management programs. Below the mean high water mark, any person, firm or government agency proposing any development or operation must demonstrate to the council

that its proposal would not (1) conflict with any management program; (2) make any area unsuitable for uses to which it is allocated by a resources management plan; or (3) significantly damage the environment of the coastal region. The council can approve, modify, set conditions for, or reject any such proposal, R.I. Gen. Laws §46-23-6(B). Above the mean high water mark, the authority of the council "shall be limited to that necessary to carry out effective resources management programs," R.I. Gen. Laws §46-23-6(B). The council's authority is limited to specified activities or land uses when these are related to a water area under the agency's jurisdiction, regardless of their actual location. It is further limited to situations in which there is a reasonable probability of conflict with a plan or damage to the coastal environment. These uses and activities are: (a) power generation and desalination plants, (b) chemical or petroleum processing, transfer, or storage, (c) mineral extraction, (d) shoreline protection facilities and physiographical features, (e) intertidal salt marshes, (f) sewage treatment and disposal and solid waste disposal facilities, R.I. Gen. Laws §46-23-6(B). This regulation is accomplished through a permit-granting system administered by the Coastal Management Council.

Delaware

Short of restructuring state government to create a mechanism for comprehensive planning, several overlapping approaches are evidenced by current coastal and wetlands legislation. In its Site Location Development law, Delaware prohibited all "heavy industry uses of any kind not in operation on June 28, 1971...," within six miles of the coast, Del. Code tit. 7, §7003. All other uses within the coastal zone are allowed by permit only. In passing on permit requests, the State Planner and the State Coastal Zone Industrial Control Board must consider these factors: environmental impact, economic effect, aesthetic effect, number and type of supporting facilities required and the effect of these facilities, effect on neighboring land uses and current and municipal comprehensive plans for development and conservation, Del. Code tit.7, §7004(b).

Maine

As one of several statutes affecting the coastal zone in Maine, the statewide site location law requires developers, including subdividers of developments larger than twenty acreas, to notify the Environmental Improvements Commission of the plans before starting construction anywhere in the state of Maine. To secure approval, the developer must demonstrate that it has the financial capacity to meet state air and water pollution control standards, and has made "adequate provision for fitting the development harmoniously into the existing environment" such that the development "will not adversely affect existing uses, scenic character, or natural resources," Me. Rev. Stat. tit. 38, §§481-488.

Zoning has been employed in various types of state legislation to protect coastal areas. Delaware's site location law uses the zoning mechanism, as does Washington's Shoreline Management Act. Maine enacted a mandatory zoning and subdivision act, in which all shoreland areas within two hundred and fifty feet of the normal high water mark of any pond, river or salt water body are subject to zoning and subdivision controls, Me. Rev. Stat. tit 12, §4811. Municipalities are authorized to "plan, zone and control the subdivision of land," Me. Rev. Stat. tit. 12, §4812. However, state guidelines are furnished by the Department of Environmental Protection and the Maine Land Use Regulation Commission, and municipal failure to abide by these guidelines results in mandatory adoption and enforcement of ordinances for the municipality, Me. Rev. Stat. tit. 12, §4813.

Florida

Florida has adopted a land use planning device which vests primary responsibility in the state, rather than in the local government. By designating "areas of critical environmental concern," as provided for in the federal Coastal Zone Management Act of 1972, 16 U.S.C. 1456(b)(3) (Supp.V, 1975), the state of Florida recognizes areas with particular needs to be met with state management policies and activities.

The Florida Environmental Land and Water Management Act of 1972 provides for the designation of areas of critical concern for the purpose of controlling and coordinating development of the areas through existing processes for guidance of growth. The state planning agency may designate an area of critical concern only for areas defined in the statute, Fla. Stat. §380.05(2):

(a) An area containing, or having a significant impact upon, environmental, historical, natural or archeological resources of regional or statewide importance.

(b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.

(c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.

After an area is so designated, local governments and regional planning agencies submit existing or new land development regulations to the state agency for approval. The approved regulations must be adopted and enforced on the local level. If the local response is inadequate, the state planning board may sue to enforce the regulations, Fla. Stat. §380.05(9).

Another aspect of Florida's coastal regulation is represented in the Beach and Shore Preservation Act, Fla. Stat. §161.011 et seq.

Structures such as dwellings, motels, apartment buildings, sea walls, or other comparable structures are not allowed within fifty feet of the line of mean high water at any riparian coastal location, exclusive of bays, inlets, rivers..., Fla. Stat. §161.052. However, a waiver or variance of this setback requirement may be authorized by the department of natural resources. Control of more general coastal development is achieved through a permit-granting system:

> If any person, firm, corporation, county, municipality, township, special district, or any public agency shall desire to make any coastal construction or reconstruction or physical activity undertaken for shore protection purposes, or other structures and physical activity including groins, jetties, moles, breakwaters, sea walls, revetments and artificial nourishment or other deposition or removal of beach material or other structures if of a solid or highly impermeable design, upon sovereignty lands of Florida, below the mean high water line of any tidal water of the state, a permit must be obtained from the department of natural resources prior to the commencement of such work, Fla. Stat. §161.041.

The Beach and Shore Preservation Act further provides that on the local level, the board of county commissioners serve as the county beach and shore preservation authority and as the governing body of each beach and shore preservation district established thereby, Fla. Stat. §161.36. It is the duty of the board to initiate studies necessary to plan a logical and suitable program for comprehensive preservation and restoration of beach and shore areas, with an emphasis on erosion control, Fla. Stat. § 161.28. The board is empowered to levy an ad valorem benefits tax or to issue bonds to fund the preservation program, Fla. Stat. §§ 161.37-.38.

NOTE : Critism of Coastal Planning

Thoughtful commentators have voiced many concerns about the statutory plans for coastal zone management. Several fundamental disputes are involved when planning mechanisms are codified. Critics ask who will make the decisions, who will benefit or suffer from those decisions, and who will pay the bills.

A charge frequently hurled at planning proposals is that an elitist group of planners is deciding the future for everyone, with a resulting loss of personal freedom of choice.

> Then the planning elite will be in a position to allocate coastal resources in the "right" way; no more motels, trailer parks, small beach cottages, apartments, condominiums, or restaurants--those awful developments created by the common man exercising his vulgar tastes in the unrestricted marketplace. Instead, the "priceless" marshes, bird refuges, fragile cliffs, and majestic views will be preserved. The superior tastes of the planning elite will have triumphed over the tastes of the common man. As (a) Coastal Commissioner...said, "It's never a pleasant task to save someone from themselves (sic)." (footnote omitted), M.B.Johnson, Some Observations on the Economics of the California Coastal Plan, 49 S.Cal.L.Rev.749,756 (1976).

While planners seek innovative solutions to coastal area problems, economists seek to analyze the effects of proposed solutions using current economic models. Land regulation raises financial, political and sociological issues. The costs of implementation of any coastal management plan will clearly range far beyond the budgetary additions needed to administer a statutory scheme. When development is controlled, land prices reflect use restrictions. Coastal land on which heavy restrictions are placed may drop in value. If new housing construction is curtailed, the costs of new and pre-existing housing can be expected to rise. Who will benefit and who will suffer in typical sale and lease arrangements in an area with increasing demand for housing? See R.C. Ellickson, Ticket to Thermidor: A Commentary on the Proposed California Coastal Plan, 49 S.Cal.L.Rev.715, 733-35 (1976). Further, in an area in which an active construction industry declines, resulting unemployment may depress the entire local economy. How will property values shift upon implementation of a plan "which would alter the location of industries, the size of ports, the nature of the transportation system, the design of structures, and the cost and desirability of energy?" D.J. Misczynski, The Awkward Economics of Coastal Planning, 49 S.Cal.L.Rev.737,739 (1976).

A coastal plan which intrudes upon preexisting patterns of development must meet the criticism of decreased efficiency. Consider the concept of efficiency in these examples: an industry manufactures its product most cheaply and rapidly when located near a port, but it has an unacceptable impact on the coastal environment; housing development construction methods deemed most efficient are banned; energy sources that are presently most economical are projected to be most detrimental to the environment.

The process of implementation of a coastal plan raises dilemmas which must be solved even as the long-range effects of a plan are debated. Once a statute is in force, it must be interpreted and implemented. California's Coastal Act was the result of a coastal plan written by a state commission. Several issues are raised in one commentator's view of that process:

> As the Plan is now written, generalized state and regional plans must be interpreted and carried out by cities and counties which lack the necessary sense of scale which the state Coastal Commission developed during its work on the Plan. By excluding local government from this goal-identification process, the Commission lost an opportunity to generate policies which would be understood, if not accepted, by local leaders, G Bowden, Hurdles in the Path of Coastal Plan Implementation, 49 S.Cal.L. Rev.759,768 (1976).

General language must be translated into specific activity. Who is best suited to translate? What are possible conflicts between state or regional representatives and local government officials? Reread Section 30004 of the California Coastal Act, supra. When authority is undisputed, consider the task of interpreting statutory goals, such as those in Section 113A-102 of the North Carolina Coastal Area Management Act, supra.

ECOLOGICAL DETERMINANTS OF COASTAL AREA MANAGEMENT
Principal Investigators David Brower, Dirk Frankenberg, and Francis Parker
Sea Grant Publication UNC-SG-76-05 (April 1976)
Appendix Two--Tools and Techniques for Coastal Area Management

I. LAND ACQUISITION
- Land Acquisition
- Land Banking
  - Advance Site Acquisition
  - Growth Management
- Transferable Development Rights (TDR)
- Acquisition of Less Than Fee Interests
- Fee Simple Acquisition
- Compensable Regulation
- North Carolina Land Conservancy Corporation
- Land and Water Conservation Fund
- The Nature Conservancy

II. PUBLIC SPENDING
- Capital Programing
- Urban and Rural Service Areas
- Acquisition
- Utilities Extension
- Development Timing
- Access to Existing Facilities

III. TAXATION
- Income Tax-Excess Profit Tax
- Cost-Benefit Taxation (User Service Charges, Land Service Charges)
- Special Assessments
- Preferential Assessment of Property (Use-Value Assessment Taxation)
- Land Gains Taxation

IV. DEVELOPMENT REGULATION
- Challenges (Constitutional, based on Inadequate Authority, Procedural Due Process)
- Interim or Temporary Development Regulations
- Zoning
  - Conventional Zoning
  - Exclusive Agricultural or Nonresidential Zones
  - Minimum Lot Size
  - Height Restrictions
  - Mandatory Low Income Housing Construction Ordinance
  - Conditional and Contractual Zoning
  - Special Exception
  - Variance
  - Minimum Floor Space Requirement
  - Regulation of Multi-Family Housing
  - Bonus and Incentive Zoning
  - Floating Zones
  - Performance Zoning and Performance Control for Sensitive Lands
- Regulation of Development
  - Planned Unit Development (PUD) and Cluster or Average Density Zoning
  - Traditional Subdivision Regulation
  - Subdivision Controls Relating to Off-Site Facilities

Numerical Restraints or Quota Systems
  Total Population or Quota Systems
  Population and Employment Targets
  Annual Permit Limits
Official Mapping
Regional Anti-Exclusion Techniques
Building Inspection
Regulation of Mobile Homes
Municipal Enforcement of Restrictive Covenants

V. ENVIRONMENTAL REGULATION
Locally Administered Regulation
  Local Health Regulation
  Sand Dune Protection Ordinance
  Local Environmental Impact Ordinances
State Administered Regulations
  Regulation of Public Drinking Water Supplies
  Mosquito Control
  Prohibited Discharge to Water
  Regulation of Solid Waste Disposal Sites
  Prohibited Discharges (Ocean Disposal)
  Regulation of Construction of Water Wells
  Regulation of Septic Tanks
  Obstruction of Navigable and Open Waters
  Air Pollution Control Permits
  Licensing and Regulation of Pesticide Application
  Environmental Pesticide Control
  Regulation of Oil Refineries
  Control of Coast Wetlands Activities
  Dredge and Fill Permits
  Regulation of Water Capacity Use Areas
  Dam Approval
  Regulations Pursuant to Erosion and Sedimentation Control Plans
  Oil Petroleum Control Program
  Regulation of Mining Operations
  Regulation of Oil and Gas Wells
  North Carolina Environmental Policy Act of 1971
  A-95 Review (process providing systematic opportunity for units of government to review and comment on a variety of programs and projects involving federal funding)
Environmental Regulation (Federal)
  National Environmental Policy Act of 1969 (NEPA)
  National Flood Insurance Program
  National Pollution Discharge and Elimination System (NPDES)
  Ocean Dumping Permit
  Regulation of Bridges Over Navigable Waters
  Permits for Dredge and Fill and for Structures Other Than Bridges in or Over Navigable Waters

VI. REGULATION OF DEVELOPMENT IN AREAS OF ENVIRONMENTAL CONCERN

THE LEGAL IMPLEMENTATION OF COASTAL ZONE MANAGEMENT: THE NORTH CAROLINA MODEL

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INTRODUCTION

Most of the coastal states of the nation are in the process of creating coastal zone management programs in response to the Coastal Zone Management Act of 1972 (CZMA),[1] which makes federal funds available for the development and administration of such programs. The first stage of this effort, program development, requires each state receiving federal funds to (1) identify the boundaries of the coastal zone planning area, (2) define the permissible land and water uses that have a direct and significant impact on coastal waters, (3) designate environmentally critical areas, (4) enumerate the means by which proposed control over land and water uses will be exercised, (5) designate broad priority uses in particular areas, and (6) describe the appropriate organizational structure to implement the program.[2]

The details of the management programs are left to the states, but it is apparent that the CZMA essentially requires coastal land use planning centered around a land classification system, and the designation and protection of critical environmental areas. The states that are developing such systems, however, are beginning to realize that no matter how carefully the planning process is carried out, the new coastal management laws will founder if the legal mechanisms for implementation are inadequate and are not made an integral part of the planning process.

Yet developing an effective land use guidance system for coastal areas is difficult. The federal guidelines under the CZMA give the states a choice of several possible methods: state standards for local implementation subject to state review and approval, direct state regulation and implementation, state administrative review of all land and water use decisions, or a combination of these techniques.[3] This is not much help since total control by the state is seldom politically feasible, and zoning, which is the only local mechanism specifically mentioned in the federal guidelines,[4] is subject to well-known deficiencies.[5] Municipal growth control mechanisms, now a major topic of discussion,[6] would seem to have value in coastal zone management insofar as they present methods for controlling the timing, sequence, and location of development. Growth control, however, is not the only issue in coastal zone management. Regional and national concerns must be addressed. The CZMA requires each state to list land and water uses that have benefits which extend beyond the boundaries of particular municipalities, including "national interest" uses and facilities.[7] The state program must provide "a method of assuring that local land and water use regulations do not unreasonably restrict or exclude" such uses.[8] States must therefore determine what constitutes an unreasonable exclusion of regional or national uses.

*footnotes omitted

The implementation of coastal zone management programs requires the elaboration of a land use guidance system that is open to organic growth and responsive to economic opportunity, but one that affords maximum protection to critical environmental areas and the natural processes of the coastal area. The point of departure for such a system should be the natural carrying capacity of the resources of the area as determined by objective study of its soils, water, air, and natural systems, as well as its institutional resources.[9]

The concept of carrying capacity was first used as a resource management tool in park and rangeland management[10] to determine the threshold of use intensity beyond which the destruction of the support systems of the area would occur. Its application to regional planning is, however, quite new: the idea is to determine the possible uses of an area of land by analyzing its natural characteristics. This implies that objective limits for the use of land exist, and that there are inherent limits beyond which degradation and irreversible damage will result.[11] The most sophisticated refinement of this technique has been suggested by Professor Howard T. Odum, who has developed an energy-based computer modeling technique with diagrammatic representation of all the components of a given natural support system as its point of departure. Hypothetical changes in the system can then be tested to determine their effect on the carrying capacity of the natural support system.[12]

Although valid as a threshold consideration, this version of the concept of carrying capacity is not a suitable regulatory technique. It ignores the reality that the carrying capacity of any given area is dynamic: the carrying capacity can almost always be changed or expanded by institutional investment and the importation of energy-inputs from the outside.[13] In addition, it is erroneous to assume that carrying capacity is an objective guide to decision-making. Since its limits can be expanded by the importation of resources from other areas, and since environmental standards presume some allowable degradation, carrying capacity must be regarded as a political decision resting on value judgments. The application of a land use guidance system based on a dynamic concept of carrying capacity must thus await legislative and administrative definition of the resource baselines, *i.e.* the minimum standards for various resources.

In most coastal states, the baselines for certain resources have been legislatively defined. Air and water quality standards are being defined pursuant to federal legislation.[14] Dredge and fill and dune protection laws are designed to protect the contours of coastal areas and particular types of plant communities.[15] A baseline for water withdrawals and use has often been established.[16]

Still, baselines for particular resources are not enough; carrying capacity becomes a practical tool only after baselines for *the functioning of natural systems* have been legislatively and administratively determined. This void can be filled by planning and by designating critical environmental areas, prerequisites to funding under the CZMA,[17] which becomes clear when one considers that the purpose of the designation of critical areas is not merely to protect a geographic unit but is primarily to preserve the ongoing natural systems.[18] A political decision has been made to protect natural systems from degradation whether resulting from their direct use or from activities outside such areas which may have an indirect adverse impact on their functioning.

The thesis of this Article is that the dynamic concept of environmental carrying capacity should be used, in addition to more traditional planning tools, in the implementation of a state coastal zone management program. This can be accomplished only through a coherent system that both incorporates traditional regulatory techniques, such as zoning and subdivision control, and creates supplementary legal tools for better implementation of the carrying capacity concept. The system must also provide for possible major revisions in the carrying capacity baselines through the political process. In connection with such a change—which would usually be a decision to allow greater degradation—it is important that legal mechanisms be provided to allow the greatest possible public scrutiny and debate before a decision is reached.

In order to construct such a model, it is useful to focus on a particular jurisdiction. The problems in North Carolina, which is more advanced in the development of a coastal zone management program than most states,[19] have been chosen as typical of those inherent in the implementation of such a program. North Carolina is one of the very few states to undertake the coordinated development of land use plans simultaneously by a great number of counties and municipalities in a large geographic area, an alternative to the geographically limited growth control models. North Carolina's coastal zone management program is also a prototype which seeks to employ a combination of the three methods specified in the CZMA for controlling land and water uses: direct regulation by the state, local regulation in accordance with state-established standards, and local regulation subject to state review.

I. The Statutory Framework: The North Carolina Coastal Area Management Act

After almost a decade of preparation, North Carolina acquired the legislative authority to develop a coastal zone management program in 1974.[20] The North Carolina Coastal Area Management Act (CAMA)[21] embodies many of the features of the Model Land Development Code of the American Law Institute.[22] A new state agency, the Coastal Resources Commission, was created and given the principal responsibility for the development of the coastal zone management program.[23] Local governments are also given important functions under the CAMA; unlike some state land use laws,[24] the CAMA gives regional organizations only a very minor role.

A. *Planning*

The process of formulating a land use plan for the twenty-county coastal area covered by the CAMA is a collaborative effort of the state and the local governments involved. The state, through the Coastal Resources Commission, has the authority to designate specific "areas of environmental concern";[25] in addition, the Commission formulates guidelines for the coastal planning required of local governments, whose plans must be reviewed and approved by the Commission.[26] At this writing the planning guidelines have been promulgated and use plans are being formulated, but action has been deferred on the final designation of areas of environmental concern pending receipt of the recommendations by the local governments.[27]

Despite the incompleteness of the planning process, however, a fairly precise idea of the content of the local land use plans can be gleaned from the planning guidelines. Each land use plan is to consist of five elements: (1) a statement of local land use objectives, policies, and standards, (2) a summary of data collection and analysis, (3) a map of existing land use, (4) a land classification map, and (5) a written text describing appropriate development for proposed areas of environmental concern.[28]

The policy element of the plan must take into account population projections, economic trends, the provision of housing and services, and the protection of natural environments to arrive at a general statement of what type of community is desired for the future. This is to be used to guide future development, to set priorities for action, and to give necessary background information for land classification.[29]

Data collection and analysis are necessary for the formulation of policies. This begins with a review and mapping of existing land use patterns. Then an analysis of carrying capacity is required, which must take into consideration not only natural constraints on development, such as physical limitations (hazard areas, soil limitations, and water supply), fragile areas (wetlands, wildlife habitat, beaches, and scenic areas), and resource potential (productive woodlands and agricultural areas), but also institutional restraints, such as design capacity of existing water and sewage facilities and roads. Anticipated demand for land is then calculated on the basis of population and economic trends. Some prediction then can be made of future land needs in particular use categories as well as of future demand for community facilities.[30]

Using this analysis as background, the planning guidelines also require the classification and mapping of all lands within the jurisdiction into five broad categories: developed (lands of moderate to high population density), transition (lands where population density will be accommodated through the provision of the necessary public services), community (lands with present or predicted low density development which will not require extensive public services), rural (lands whose highest use is for forestry, agriculture, or other resource use, as well as lands for future needs currently recognized), and conservation (fragile, hazard, and other lands necessary for a healthy environment).[31] Local jurisdictions may also formulate detailed land use maps together with the land classification map, but this is not required.[32] Despite the fact that separate land use plans will be prepared by each local jurisdiction, a single comprehensive plan will emerge since the Coastal Resources Commission has the responsibility of coordinating the individual plans.[33]

The local governments may also delineate the specially protected "areas of environmental concern,"[34] but this does not serve as a designation for purposes of granting permits. Areas of environmental concern will be designated by the Commission through the adoption of written descriptions of such areas;[35] the Commission is also studying the possibility of mapping such areas.[36]

B. *Implementation: The Legal Effect of Planning*

Unlike the management programs in effect in Oregon and Florida (which have stringent consistency provisions requiring zoning, subdivision decisions, and all state and local government regulatory actions to

be in accord with the required comprehensive land use plans),[37] the North Carolina CAMA provides for only partial legal effectiveness of the plan.[38] Lands and waters which are determined to be areas of environmental concern are subject to direct control by the state: development cannot take place within such areas without a permit.[39] Local governments may assume responsibility for granting permits for "minor developments"[40] within those areas, but their implementation and enforcement programs are subject to state-level review.[41] No permit for development within an area of environmental concern may be issued unless it is consistent with the approved land use plan, and existing local ordinances and regulations affecting an area of environmental concern must be modified to be consistent with the plan.[42]

On the other hand, the coastal management plan has no legal effect insofar as lands and waters outside these designated areas are concerned. The implementation of the plan is up to the local governments; the state has the power only to review local ordinances and regulations for consistency and to transmit nonbinding recommendations.[43] In addition, state-level regulation and decisions under legislative authority apart from the CAMA are not required to be consistent with the plan, even within the areas of environmental concern. The only requirement is that existing state regulatory programs be administered "in coordination and consultation with . . . the [Coastal Resources] Commission."[44]

It is obvious that this lack of enforceability is the Achilles' heel of North Carolina's emerging coastal zone management program. Unless corrected, this weakness will not only allow the carefully developed plans to go for naught; uncontrolled development in other parts of the planning area will also create irresistible pressures on the areas of environmental concern, thus undermining the effectiveness of that portion of the management program as well. Analogous problems exist in the coastal zone management programs of other states.[45] To overcome this fatal weakness, it is imperative that action be taken to develop a land use guidance system to implement coastal planning.

II. A Management System to Implement Planning

Restrictions on development in environmentally critical areas, directly enforced by the state, are characteristic of many state programs,[46] but they are inadequate for implementation of a coastal management plan. Those restrictions must be supplemented on the local, state, and federal levels by a coordinated land use guidance system that respects the integrity of the plan. Such a guidance system can include traditional as well as newer forms of land use regulation. It should be recognized that each regulatory tool, considered individually, will have significant weaknesses that may have to be compensated for by other mechanisms.

A. *The Function of Traditional Forms of Land Use Controls: Zoning, Subdivision Regulation, and Capital Improvement Budgeting*

The traditional approach to land use planning in the United States consists of projecting economic and population growth, formulating a capital improvement plan for the construction necessary to accommodate the expected growth, and relying on zoning and subdivision regulation to design the resulting pattern of land use. Zoning, which long

ago was upheld against constitutional challenge by the United States Supreme Court,[47] is traditionally used to divide a jurisdiction into districts and to prescribe regulations controlling the height and bulk of structures, lot coverage and open space, density of population, and the land uses permitted within each district.[48] Conventional subdivision requirements operate only at the moment when raw land is converted to building sites. They supplement zoning by requiring the dedication and proper specifications of streets, minimum lot sizes, and provision for water, sewer, and other public utilities.[49]

Most of the cities and counties within the coastal area of North Carolina have enacted zoning and subdivision controls.[50] All either have employed full-time planning staffs or rely on outside consultants or the state Department of Natural and Economic Resources for technical planning assistance. Existing zoning ordinances are very much alike. The boundaries of about ten different "use districts" are drawn on an official zoning map.[51] Within each district certain named uses are permitted by right; other named uses are permitted if the Board of Adjustment finds that particular prescribed conditions will be met.[52] In addition, dimensional requirements are prescribed for developments in each category of uses. These are usually minimum lot sizes, minimum required lot area and setback for improvements, building heights, and off-street parking requirements.[53] Extractive uses such as quarrying and the removal of sand and gravel are typically allowed by right in industrial districts and as a special use in other districts.[54] Licenses may be required for mobile homes which, in addition, are required to meet specified conditions.[55] Beach access is provided in some ordinances through requirements that any road designed at angles other than parallel to a public recreation-resource must be mapped to the boundary of the resource and that large developments involving more than 600 feet of recreation-resource frontage must provide public pedestrian access from the roadway to the recreation area.[56]

Existing subdivision ordinances in coastal jurisdictions in North Carolina are intended to regulate the internal development of particular building sites and to supplement the area's capital improvements budget by ensuring that minimum design standards for streets, utilities, and other community services are met. Although North Carolina enabling legislation authorizes counties and cities to require that the subdivider dedicate streets, utility rights of way, and recreational areas for residents of the immediate neighborhood,[57] the typical local ordinance provides only for the first two types of dedication while merely recommending the dedication of recreational areas.[58] Many jurisdictions have enacted planned unit development[59] ordinances which give the planning commission the discretion to vary subdivision regulations in the case of a complete group development which provides "adequate" public spaces and improvements and which also provides binding assurance of the achievement of the plan.[60]

It is clear that reliance solely on the foregoing legal devices to implement the new type of planning required under the CAMA would be disastrous. Conventional zoning and subdivision regulation assume that an essentially unlimited supply of land suitable for urbanization exists.[61] The system divides and regulates the use of land in an effort to provide the most desirable living and working conditions for the individual; the land resource itself is not the focus of attention. The capacity of the land to support development is considered less important than the compatibility of land uses with one another. Since the passage of the first zoning ordinances, local governments have altered the basic zoning framework somewhat by increasing the complexity of the regulations within a larger variety of land use classification;[62] however, the focus has remained on existing use patterns and projected demand directions rather than on environmental carrying capacity. An additional problem with zoning as the basic land use tool is its assumption that rigid use categories can be maintained for an indefinite time. It has been demonstrated that this assumption is erroneous.[63] Even the best zoning plan is typically overtaken by events. Unexpected development pressures cause ever-increasing use of the variance, the zoning amendment, and the special use procedures, to the point where there is little relation between the zoning plan and the actual physical make-up of the community.[64]

This does not mean, however, that zoning should be discarded as a tool in coastal zone management. Rather, its limitations should be recognized and supplementary management techniques devised to meet implementation problems that traditional zoning was never intended to fulfill. Zoning should also be adapted to the new kind of regional environmental planning required under the CAMA.

Several changes in the zoning process are necessary to make it an instrument to implement planning.[65] First, each local government should, simultaneously with the adoption of the coastal management plan, pass a zoning plan that is consistent with the land classification system required under the coastal management plan. This zoning plan would provide a detailed land use map that would be more specific than the coastal management plan map, and would guide the implementation of the general classification categories.

Second, since the land classification system set forth in the coastal area management guidelines calls for conservation and resource preservation areas,[66] while the typical zoning ordinance contains only developmental classifications,[67] new zoning districts must be created that correspond with the conservation classifications. Zoning ordinances should thus include flood plain, shoreland, wetland, historical forest, watershed, and wildlife habitat districts.[68] The purpose for these new districts need not necessarily be to prohibit all development or to maintain the areas in a totally natural condition.[69] The intent would be to restrict and condition uses in order to protect the resource involved. Accordingly, no use should be permitted as of right in such districts. The types of uses would be restricted, and all uses would be conditional and thus subject to case-by-case review. Specific use conditions based on the environmental carrying capacity of each type of district could be drafted and included in the ordinance. In addition, all uses in such districts should be subjected to a pre-development environmental impact analysis,[70] and the Board of Adjustment should have the power to impose additional conditions in connection with the granting of a permit.[71]

There is precedent for such an approach. For example, the zoning ordinance of Currituck County, North Carolina, contains a "flood plain" district designation,[72] in which no uses are permitted as of right. The basic aim of the district is to maintain the barrier dunes and shoreland vegetation free of all encroachment 500 feet shoreward of the mean high water mark.[73] This basic approach should be expanded to include additional categories of districts. Authority for the creation of such new districts can be derived from the general grant of power in state enabling legislation to promote "health, safety, morals, or the general welfare of the community,"[74] but to remove all doubt, it would be desirable that the state enabling act be amended to recognize the preservation of environmental values as a valid zoning purpose.

Third, authority for a cluster zone or planned unit development (PUD) should be provided in local government zoning ordinances and subdivision regulations. The PUD has been defined as

> an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, and commercial and industrial uses, if any, the plan for which does not correspond in lot size, bulk or type of dwelling or commercial or industrial use, density, lot coverage and required open space to the regulations established in any one or more districts created . . . under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state.[75]

The PUD technique generally allows such developments to have clusters of increased density combined with provisions for open space; it provides flexibility since the actual design is a matter of negotiation between the developer and planning authorities. Four varieties of planned unit development have been identified: (1) the density transfer, (2) the mixed residential development without density increases, (3) the mixed residential development with density increases, and (4) mixed uses. Although the PUD is theoretically applicable to projects of any size and to low-income as well as luxury housing, it is most attractive to developers of large tracts. Generally speaking, the PUD process has been undertaken in jurisdictions having long experience with planning and zoning techniques, large and competent planning staffs, and specific enabling authority. The PUD system should not be considered a primary land use tool for a coastal county with little experience in the field of developmental control. This mechanism may, however, have greater value for the government capable of utilizing it. Planned unit development offers the advantage of clustering growth in areas capable of supporting population and structures. And, by increasing density in some locations, the technique can provide more open space. Clustering also permits more efficent provision of urban services to an area of limited size. Energy use is also curtailed.[76]

Although several coastal jurisdictions in North Carolina have PUD ordinances, their validity has never been tested in the North Carolina courts, and they are not specifically authorized in the zoning enabling act. One commentator, after reviewing the case law, has concluded that, although PUD ordinances may be upheld even in the absence of a zoning enabling provision, appropriate enabling legislation is needed on the state level to remove all doubt as to the validity of this device.[77]

Fourth, the coastal management plan, when adopted by local governments, should be considered, in effect, a constitution to which future zoning decisions must conform. In this way, zoning would assume a proper relationship to planning: the plan would provide policy determination and guiding principles, while the zoning ordinance would

provide detailed means for its implementation. The plan would have immediate effect in the community, changing land market values. Applications for zoning changes and variances should be judged by decision-making bodies on the basis of their fidelity to the specific criteria of the plan. Zoning decisions should be reviewed by the courts for their reasonableness in relation to the plan as well as for their conformity to due process standards.[78]

Each local jurisdiction should thus amend its zoning ordinance to require that decisions be consistent with the plan adopted under the CAMA. Even in the absence of such action, however, the courts may require that zoning conform to coastal land use planning. Although in North Carolina zoning has been held to be a self-contained activity, requiring no conformity to an extrinsic master plan,[79] this view may change with the passage of the CAMA since local governments in coastal areas must now adopt an extrinsic master plan separate from the zoning process. The North Carolina courts may follow the trend in a growing minority of jurisdictions toward granting legal status or even controlling weight to the planning document and requiring zoning decisions to conform, or at least be reasonably related, to the master plan.[80]

Similarly, local capital investment policies and subdivision ordinances should be required to conform to the adopted coastal land use plan. Standards for land subdivision should ensure that growth does not outstrip community infrastructure planning. Dedication of land for recreation should be required, as permitted by the North Carolina enabling statute.[81] Particular attention should be given to adequate, bonded[82] water supply and sewage disposal facilities, storm water drainage, and the mitigation of damage to topographical and natural features. Where feasible, the developer should be required to leave a minimum percentage of the natural vegetative cover undisturbed.[83]

Some local jurisdictions may want to go beyond this and regulate not only the location but also the timing and sequence of development, through the zoning, subdivision, and capital budgeting mechanisms. For example, the village of Ramapo, New York, a suburb of New York City, has placed all residential development under special permit requirements framed in terms of the availability of five categories of public services, and the San Francisco suburb of Petaluma has limited the number of new residential units to 500 per year for a five year period.[84] It must be recognized, however, that such techniques may not be suitable for the coastal zones of other states where socio-economic and environmental conditions are markedly different from those in the suburban areas of New York and San Francisco. Most coastal areas of North Carolina, for example, have a relatively stable population,[85] high unemployment with an attendant need for economic growth,[86] and a development process that, except in a few areas, is largely characteristic of a low-demand area.[87]

B. *Environmental Impact Analysis as a Supplement to the Zoning Process*

Although the foregoing proposed reforms of the zoning, subdivision, and capital budgeting mechanisms would aid the implementation of the coastal zone management program, additional problems remain. First, the zoning process is not designed to gather information about the impact of development on environmental carrying capacity. Second, zoning is essentially pre-regulation; the most carefully prepared zoning map may be overwhelmed by variances, zoning amendments, and special exceptions that are granted on a case-by-case basis. These deficiencies can be corrected by requiring that significant land use decisions involve a review of the environmental consequences of the proposed action.[88] A land use decision should be considered significant if it involves a variance, zoning amendment, conditional use permit, special exception, subdivision approval, or any "major development project."[89] Environmental impact review can thus supplement the zoning and subdivision reforms suggested above.[90]

Environmental impact analysis would have two basic purposes: (1) full disclosure of the impact of the development on the carrying capacity of the land and on the objectives and principles of coastal planning, and (2) the guidance of substantive decision-making and the development of conditions and restrictions to preserve acceptable levels of environmental and institutional carrying capacity, as well as to protect the integrity of the plan. It would also provide a basis for judicial review of local land use decision-making. The use of this process presupposes, of course, that the local community, operating under the planning guidelines promulgated by the Coastal Resources Commission, has made a political value judgment regarding the protection of minimum levels of carrying capacity for environmental systems, and has implemented these values through the processes described above, namely, the coordination of zoning with the coastal land use plan and the creation of new zoning districts with specific carrying capacity guidelines for floodways, wetlands, historic areas, forests, and complex natural areas.[91] It also depends on the exercise of some degree of discretion by the relevant decision-making authority.[92]

The environmental review process should be constructed so that it does not unduly burden landowners and developers. A checklist form, no longer than two sides of one sheet of paper, should be developed to be completed and submitted along with the zoning permit application. The developer would be required merely to state impact factors such as water use, water discharge, number of units, present vegetative cover, land clearing required, wetland filling or dredging, dune disturbance, soil characteristics, and energy use requirements. The planning board or board of adjustment should be empowered to require more information where necessary.

The implementation of a local government environmental impact assessment process would, of course, have to be authorized under state law. The North Carolina Environmental Policy Act, for instance, authorizes the governing bodies of all cities, towns, and counties to require detailed environmental impact statements of any special purpose

unit of government as well as any private developer for "major developments," which are defined as including virtually all projects at least two acres in extent.[93] This authority has been utilized by only two local governments in the state.[94] The Environmental Policy Acts of at least four other states require environmental impact statements of local governments.[95] The law of one of these states, California, has been interpreted by the state's highest court to require the impact statement process in connection with a local government's grant of conditional use and building permits when the project would have a significant effect on the environment.[96]

It would appear, however, that the full environmental impact statement process that is designed for evaluation of governmental actions would not be appropriate for private developers. It is too burdensome and expensive to be a practical tool. But the advantages of the assessment technique should not be overlooked.[97]

C. *State and Federal Regulatory and Program Activities: Permit Coordination and Plan Revision*

Many state and federal regulatory programs established to exercise control over coastal resources will continue to operate after a coastal area management program has been established. These include state-federal regulation of water and air quality,[98] wetland protection legislation,[99] sand dune preservation,[100] flood plain regulation,[101] and controls on excavating or filling within navigable waters.[102]

State and federal governments may also conduct or support development within or activities affecting the coastal zone. This is best typified by the current controversy over strategies for achieving national energy goals through outer continental shelf oil and gas production, offshore nuclear development, and deepwater super-tanker ports; these measures necessitate the siting of accompanying onshore facilities.[103] More traditional state-federal development decisions include water supply systems,[104] sewer facilities,[105] and highways.[106] In addition, the federal government is responsible for major conservation programs within the coastal zone such as national seashores[107] and wildlife refuges.[108]

In order to explore the complex issue of intergovernmental and interagency cooperation, it is useful to distinguish two broad categories of relationships between these regulatory-developmental programs and coastal zone management: those programs which must be consistent with the coastal management plan and those which need not be. The first category reflects the fact that many state and federal regulatory programs and even developmental decisions are required to be consistent with or to supplement a state's management program. For example, the CZMA requires that, after approval of a state's management plan, (1) applicants for a federal license or permit obtain certification that the proposed action is consistent with the state's program,[109] and (2) state and local government applicants for federal grants show that proposed projects are consistent with the management program.[110] In addition, water and air quality norms established by federal, state, or local governments are specifically incorporated and required to be adhered to in the administration of a state's management program.[111]

In this first category, then, the major problem is administrative coordination of the multiple permit requirements of various agencies and levels of government. Considerations of basic fairness, as well as due process, dictate reform of the regulatory process to allow orderly consideration of applications for permits and the elimination of needless duplication. A master permit application form should be devised for coastal development projects subject to multiple agency and governmental regulation. The content of the form could be worked out between local governments, the Coastal Resources Commission, and other state and federal agencies.[112] Uniform agency procedures, joint investigation, and public hearings should be provided. A design for the sequence of approval of permit applications should be prepared to allow orderly consideration by each relevant agency and level of government. Points of possible policy conflict and overlapping governmental responsibilities should be identified and resolved through interagency and intergovernmental agreements. Minor projects should be given expedited consideration.

The second category of relationships reflects the fact that some state or federal regulatory-developmental programs may involve a deviation from the carrying capacity norms of a state's management program. The CZMA requires federal agencies conducting or supporting activities or undertaking development projects to be consistent with a state's management program only "to the maximum extent practicable."[113] Furthermore, the Act requires state management programs to provide adequate consideration for "national interest" facilities as well as assurance that land and water uses of regional benefit are not unreasonably restricted.[114] The North Carolina CAMA does not require other state regulatory and development programs affecting the coastal zone to be consistent with the management program,[115] though it gives the state authority over the siting of "key facilities," *i.e.* those having more than local impact, such as energy facilities.[116]

This aspect assures that coastal zone management will be a dynamic process which is open to change and growth. Both coastal planning and the underlying carrying capacity norms will be subject to revision as circumstances change. Such revision may involve either further protection of resources, as in a decision to establish a national seashore, or more intensive use of resources, as in a decision to permit the siting of major energy facilities.

It is important, however, to provide an appropriate process for the consideration and evaluation of such decisions. The best mechanism for this task is the environmental impact statement review process required by the National Environmental Policy Act[117] (NEPA) and state environmental policy acts.[118] The impact statement, which is required under NEPA in the case of any major federal action having significant impact on the environment, must fully assess probable environmental consequences of alternative courses of action.[119] Under applicable principles of law, the impact statement would fully disclose not only the direct impact on the environment, but also secondary and cumulative impacts on growth or population patterns and the effects on

land use, water, and public services.[120] The impact statement is required to be prepared before final agency action is taken, and is reviewed by federal agencies concerned with resource management,[121] such as the Council on Environmental Quality and the Environmental Protection Agency, as well as by state and local agencies and the public. This process provides a basis for informed political decision on proposed adjustments in the established carrying capacity norms and the concomitant revisions in the coastal management plan.

A related problem is the possibility of conflict between federal and state governments over particular resource use and facility siting questions. This has already occurred with regard to energy-related developmental measures.[122] It appears that no coastal state has created a mechanism for dealing with potential federal-state conflicts,[123] yet these may be too important to be resolved on a case-by-case basis. This defect should be corrected through the establishment of an ongoing coordination process on the state and federal levels.[124]

III. Taxation Policy and Coastal Zone Management

In North Carolina, as in most states, the taxation of real and personal property is the dominant source of local government tax revenues.[125] Local governments exercise this power under a specific delegation of power by the state[126] and subject to constitutional limitations.[127] Two major questions arise as a result of the land use restrictions that are characteristic of a coastal area management program. First, what will be the impact of these restrictions on the tax liability of property owners within the coastal area? Will property continue to be assessed in the traditional way? If not, what will be the impact on local government? Second, should the property tax mechanism be artificially manipulated to achieve the goals of coastal zone management; for example, should certain lands be preferentially assessed to provide a disincentive for development?

A. *Impact on Landowners*

The answer to the first question requires an analysis of the administration of real property appraisal. Under present procedures in North Carolina, for instance, all real property in each local jurisdiction is appraised at least once every eight years.[128] In addition, property must be reappraised in other years if there has been a value change of more than $100 by reason of external factors other than general economic conditions.[129] A schedule of values and standards is prepared by the county tax supervisor subject to the approval of the county commissioners.[130] A uniform standard of appraisal must be used, however, requiring real property to be valued at its "true value."[131] In determining "true value," the appraisers must take into consideration factors such as location advantages and disadvantages, soil quality, adaptability for various uses, and *zoning*.[132] The legal standards for appraisals in North Carolina therefore mandate a determination of the fair market value which takes into account legal restrictions imposed by the police power. An appraisal of property at its highest market value regardless of use restrictions, which is the standard in some states,[133] would be improper[134] in the context of coastal management planning.

It would thus appear that the designation of areas of environmental concern, and the zoning changes that would be required to implement coastal zone management in North Carolina, will cause major changes in the appraised value of the property within the jurisdiction, since these police power restrictions would be considered in the appraisal process. Lands subject to the greatest police power restrictions would go down in appraised value, while lands receiving developmental classifications would go up.[135] The resultant pattern of taxation appears equitable and should be implemented along with the coastal area management program. The taxes foregone on the restricted land would be effectively transferred to lands of increased, or at least undiminished, value in the rest of the community.[136] It has also been argued that proper zoning and consideration of land use restrictions in property assessment maximizes the tax base of the community because the failure to zone means that the increased value of the unrestricted property would be offset by reductions in the values of all the properties which bear the external costs produced by permitted uses.[137]

Under existing North Carolina law, either the state or owners of restricted coastal land should be able to compel local governments to accept the appraisal readjustments. The state, through the Property Tax Commission of the Department of Revenue, exercises general and specific supervision over the valuation and taxation of property.[138] Individual property owners can appeal either the general county valuation standards or specific appraisal decisions to the Commission,[139] as well as to the courts.[140]

B. *Preferential Property Tax Assessment*

Acting on the presumption that the valuation of real property at its highest rather than its present use encourages the urbanizing conversion of rural land, at least twenty-eight states have enacted preferential assessment statutes for farmland.[141] The preferential assessment idea is based on several premises. First, it was intended to provide tax relief for farmers whose lands had appreciated in value due to developmental pressures, thus seeking to maintain the agricultural use of productive land and to insulate farmers from the financial impact of escalating tax bills.[142] Second, aside from its justification as a direct farm subsidy, preferential tax policy was suggested as a means of preserving a dwindling supply of prime arable land. Since flat farmland could be easily converted into mass housing developments, it was feared that agricultural productivity near large markets would be destroyed without some preventive measure.[143] Third, in the early 1960s, conservationists considered the preferential tax assessment programs an important technique for the provision of open space; similar justifications were presented for preferential tax plans directed towards the protection of forest and open space lands.[144] Finally, most if not all state preferential assessment programs have required that lost or uncollected taxes be recaptured upon the sale or change of use of protected lands. In some instances additional penalties are also incurred. The tax recapture and the penalties are intended as inducements to maintain current land use patterns and as deterrents against speculation and rapid development.[145]

Not surprisingly, preferential taxation policy has received substantial criticism and has stirred considerable debate. Several arguments are raised against it. First, the technique has been described as a tax windfall for large corporate agricultural enterprises and speculators. Since the preferential assessment is uniformly applicable to all landowners using their property for agricultural purposes, the large agri-business firm gains along with the economically hard-pressed small farmer.[146] In addition, the program applies on a statewide basis so that land well beyond the pressures of urban development receives the same preferential treatment as does realty directly bordering urban areas. Early analysis of California's Williamson Act[147] found that most preferentially assessed land was "below average value nonprime agricultural land located some distance from incorporated areas."[148] Consequently, by its over-inclusiveness the Act protected property in only slight danger of immediate conversion to nonfarm use.

Second, the method has been criticized for failing to discourage "premature and unnecessary conversion of agricultural land to nonagricultural use."[149] Research studies have borne this out. In Montgomery County, Maryland, preferential assessment has been found (1) to prolong the pre-development or speculative period when the land is not agriculturally productive and (2) to cause a slight delay in conversion of no more than one to one and a half years.[150] Therefore, the effect of preferential assessment on regional development appears to be minor.

Third, preferential assessment also causes a reduction in the tax base of the taxing jurisdiction and hence reduces local government revenues in these areas. This phenomenon results in a severe fiscal impact on tax districts which are far removed from developmental pressures, and in fact transfers the tax burden to the nonpreferred land uses in those places.[151] The United States Department of Agriculture has estimated that the revenue loss necessitated by lowered property assessments in Montgomery County, Maryland, could have supported a vigorous public land acquisition program.[152] According to the study, one percent of the preferentially assessed agricultural land—amounting to more than 1500 acres—could have been purchased in fee with the revenues lost during each of the years the program was in effect. If the figures are accurate, a direct public effort to acquire ownership of open land would have been considerably more effective in slowing development and preserving open space. Moreover, the predicted negative impact of the tax rollback or recapture provisions may in fact be illusory in the case of the land speculator. Since property taxes are deductible expenses used to offset ordinary income, and in some cases capital gains, their postponement and imposition at the time of the land's sale may be beneficial to the seller in terms of federal income tax.[153]

This combination of criticisms presents a solid challenge to the idea that preferential assessment by itself can accomplish its stated purposes.[154]

IV. GOVERNMENTAL ACQUISITION AND OWNERSHIP POLICIES AND COASTAL ZONE MANAGEMENT

A. *Coordinated Use of the Acquisition and Ownership Powers to Implement Coastal Zone Management*

Public acquisition and ownership of land is certainly the most direct method for controlling its use. Yet the use of this governmental power is not emphasized under federal and state coastal zone management laws. Under the federal CZMA, the only mention of acquisition as an implementation tool is the authorization of federal grants of up to fifty percent of the costs of acquisition, development, and operation by a coastal state of estuarine sanctuaries created for the purpose of studying the natural and human processes occurring within estuarine areas.[155] The North Carolina CAMA deals with acquisition as a policy tool only by providing for the use of the condemnation power to acquire a fee or lesser interest in order to protect an area of environmental concern where it has been judicially determined that a regulatory order affecting the area constitutes a "taking."[156]

Other statutory provisions and legal doctrines, however, provide a broader basis for using the acquisition and ownership power as a coastal management implementation device. In North Carolina, local governments may acquire land by purchase, gift, or otherwise, not only for parks and recreational purposes,[157] but also for conservation or historic purposes or to preserve an area of great natural scenic beauty.[158] In the latter case cities and counties are expressly authorized to acquire or accept less than fee interests in real property;[159] this makes possible a program for acquisition of development rights and of scenic and conservation easements through which the fee interest remains in private hands.[160]

Under existing law the state has analogous authority. The Department of Natural and Economic Resources has broad powers to acquire lands for state forests and parks,[161] and the Wildlife Resources Commission may purchase or accept property to establish wildlife refuges and management areas.[162] In addition, a public body, the North Carolina Land Conservancy Corporation, has been created to acquire and preserve areas in their natural state.[163] This entity is authorized to acquire fee simple or less than fee simple interests in land[164] and could thus institute a state conservation easement or development rights program. Similar structures are available in several other coastal states.[165]

A common law concept of state ownership, the public trust doctrine,[166] is also important in coastal areas. In North Carolina, the public trust doctrine would appear to affirm state title to all tidelands below mean high tide[167] except where private claimants can show, with respect to specific parcels, a "connected chain of title from the sovereign to (them) for the identical lands claimed by (them)."[168] Private claims to submerged land can therefore be settled only on a case-by-case basis,[169] and North Carolina has only begun the task of determining their validity.[170] As a practical matter, however, it may be unimportant whether title to certain parcels of submerged lands is held by private parties; since the title originally held by the state was burdened with a public trust, the grantee of the state could not obtain a better title than

his grantor.[171] It would appear, therefore, that private parties would also hold such lands subject to the trust, and observance of the trust would generally require that such lands be maintained in their natural state.[172] Government regulation of these lands in order to preserve the trust would not appear to present any "taking" problem.[173]

These ownership and acquisition powers of state and local governments have great potential for use as a policy instrument in coastal zone management. They should be systematically employed to implement planning and to protect areas of environmental concern where regulation is impractical or unconstitutional. In order to be fully effective, however, they must be used in ways that are consistent, or at least coordinated, with the coastal management plan.[174]

B. *Additional Possible Uses of the Acquisition Power*

1. *Transferable Development Rights.* Transferable Development Rights (TDR) systems have rising importance in the land use planning field.[175] Originally developed and used as a means of preserving central city landmarks, TDR is now being experimented with as a tool to preserve existing open spaces and environmentally sensitive areas through the transfer of development rights to other areas from the land sought to be preserved. Pilot programs and variations of TDR are being considered or used by local governments in several states.[176]

The prototype of the use of the TDR for ecological preservation is the plan developed by Professor John J. Costonis for Puerto Rico.[177] This involves the designation of environmentally sensitive areas as well as the earmarking of lands where greater development would be desirable. Criteria would be established for environmentally sensitive areas so that any development which would damage the protected resources would be prohibited. Owners of other lands would be subject to two sets of zoning restrictions: they would be free to develop their lands up to the limits provided in the first set of restrictions, but they would have to purchase development rights from a government planning board if they wanted to develop further, up to the limits provided in the second set. The fund thus established would be used to compensate owners of environmentally sensitive lands who are denied a reasonable return because of applicable restrictions.[178] As thus conceived, TDR becomes an innovative method to supplement regulatory restrictions by providing compensation for lost land values.

It is evident that before this or any other variation of a TDR system can be used as a technique to implement coastal zone management, many legal and policy questions must be resolved. It is uncertain whether such a concept could withstand constitutional attack.[179] Furthermore, TDR systems have never been attempted in a relatively large geographical area, such as the North Carolina coastal zone. Nevertheless, a TDR program may have value in coastal zone management, and appropriate enabling legislation should be passed in order to encourage local jurisdictions to experiment with this device.

2. *Land Banking.* Land banking is another use of the government acquisition power that has been proposed as a way of promoting more efficient land development patterns and conserving natural re-

sources.[180] Although it has been successfully used elsewhere,[181] land banking is an untried mechanism in the United States. The technique involves the purchase of land by government in amounts sufficiently large that land use patterns are affected, the holding of land without immediately committing it to a specific future use, and the gradual disposition of the land to government and private parties.

The use of this technique has been encouraged by recent developments. The federal Community Development Act of 1974 allows the use of federal funds by local governments for the purchase of land for "the guidance of urban development."[182] Moreover, the influential American Law Institute (ALI) has adopted an article for the initiation of a state system of land banking as a part of its Model Land Development Code.[183] The ALI proposal would rely on a state land reserve agency which would be empowered to acquire, hold, and dispose of lands according to the policies and limitations of the state land development plan.[184] Local governments would participate in the banking system through agreements with the banking agency that designate the latter as the local government's agent for the purpose of acquiring, managing, and disposing of lands.[185]

Here too, however, many legal, economic, and social policy questions must be resolved before land banking can be relied upon as an instrument for coastal zone management. It is doubtful whether private property can be acquired or condemned for some unspecified future use.[186] Furthermore, the technique would have a substantial impact on property tax revenues of local governments.[187] Land banking would thus appear to be a useful policy instrument only in the long term, if at all.

3. *Natural Area Preservation Through a Land Conservancy Trust.* In contrast to transferable development rights and land banking proposals, which cannot be expected to play an immediate part in coastal zone management, the Nature Conservancy Trust device is a potentially important tool for preservation and the implementation of planning. In North Carolina, the Land Conservancy Corporation is authorized to purchase and accept donations of fee and lesser interests in land and to hold them in their natural state.[188] It is operated by a nine member board of trustees.[189] This public body could be effectively used in coastal zone management to implement a planned program for the acquisition of natural areas, including development rights and conservation easements, in the coastal area. The pattern of acquisition could be designed to ensure the survival of the biotic diversity and natural systems of the region. The Land Conservancy Corporation also has flexible powers for rapid acquisition of areas of environmental concern that have been so designated by the Coastal Resources Commission and are threatened with development.[190] It is also empowered to enter into agreements with local governments and state agencies[191] and could thus act as an agent for local governments and state agencies in land acquisition where ultimate disposition is to be made to them.[192] The Corporation can also accept donations and bequests of lands and money,[193] and should promulgate information on the substantial tax advantages under existing law which accrue to such gifts and bequests.[194]

Conclusion

States that are in the process of instituting regional land use planning for the purpose of protecting valuable resources and critical environmental areas will soon face the problem of how to implement their plans. They will find that the traditional legal tools for implementation of planning are inadequate for the task. Newer land use guidance techniques, such as growth-control systems, land banking, and transferable development rights, while valuable, have not been sufficiently developed or tested to serve as realistic alternatives for the implementation of planning in a geographically large region. This Article has presented a third alternative, the coordinated use of traditional mechanisms to influence land use through government regulation, taxing, and acquisition. This land use guidance mechanism can be instituted largely without additional legislation; to realize the full potential of this method, however, legal reforms are needed, especially on the local level. The keys to the success of such an approach are intergovernmental cooperation by federal, state, and local decision-makers, and the awareness of their respective powers and the functions of these powers within the land use guidance system.

JUST v. MARINETTE COUNTY

56 Wis.2d 7, 201 N.W. 2d 761 (1972)

These two cases were consolidated for trial and argued together on appeal. In case number 106, Ronald Just and Kathryn L. Just, his wife (Justs), sought a declaratory judgment stating: (1) The shoreland zoning ordinance of the respondent Marinette County (Marinette) was unconstitutional, (2) their property was not "wetlands" as defined in the ordinance, and (3) the prohibition against the filling of wetlands was unconstitutional. In case number 107, Marinette county sought a mandatory injunction to restrain the Justs from placing fill material on their property without first obtaining a conditional-use permit as required by the ordinance and also a forfeiture for their violation of the ordinance in having placed fill on their lands without a permit. The trial court held the ordinance was valid, the Justs' property was "wetlands," the Justs had violated the ordinance and they were subject to a forfeiture of $100. From the judgments, the Justs appeal.

[2] There can be no disagreement over the public purpose sought to be obtained by the ordinance. Its basic purpose is to protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands. In the Navigable Waters Protection Act, sec. 144.-26, the purpose of the state's shoreland regulation program is stated as being to "aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare".[1] In sec. 59.971(1), which grants authority for shoreland zoning to counties, the same purposes are reaffirmed.[2] The Marinette county shoreland zoning ordinance in secs. 1.2 and 1.3 states the uncontrolled use of shorelands and pollution of navigable waters of Marinette county adversely affect public health, safety, convenience, and general welfare and impair the tax base.

The shoreland zoning ordinance divides the shorelands of Marinette county into general purpose districts, general recreation districts, and conservancy districts. A "conservancy" district is required by the statutory minimum standards and is defined in sec. 3.4 of the ordinance to include "all shorelands designated as swamps or marshes on the United States Geological Survey maps which have been designated as the Shoreland Zoning Map of Marinette County, Wisconsin or on the detailed Insert Shoreland Zoning Maps." The ordinance provides for permitted uses[3] and conditional uses.[4] One of the conditional uses requiring a permit under sec. 3.42(4) is the filling, drainage or dredging of wetlands according to the provisions of sec. 5 of the ordinance. "Wetlands" are defined in sec. 2.29 as "(a)reas where ground water is at or near the surface much of the year or where any segment of plant cover is deemed an aquatic according to N. C. Fassett's "Manual of Aquatic Plants." Section 5.42(2) of the ordinance requires a conditional-use permit for any filling or grading "Of any area which is within three hundred feet horizontal distance of a navigable water and which has surface drainage toward the water and on which there is: (a) Filling of more than five hundred square feet of any wetland which it contiguous to the water . . . (d) Filling or grading of more than 2,000 square feet on slopes of twelve per cent or less."

In April of 1961, several years prior to the passage of this ordinance, the Justs purchased 36.4 acres of land in the town of Lake along the south shore of Lake Noquebay, a navigable lake in Marinette county. This land had a frontage of 1,-266.7 feet on the lake and was purchased partially for personal use and partially for resale. During the years 1964, 1966, and 1967, the Justs made five sales of parcels having frontage and extending back from the lake some 600 feet, leaving the property involved in these suits. This property has a frontage of 366.7 feet and the south one half contains a stand of cedar, pine, various hard woods, birch and red maple. The north one half, closer to the lake, is barren of trees except immediately along the shore. The south three fourths of this north one half is populated with various plant grasses and vegetation including some plants which N. C. Fassett in his manual of aquatic plants has classified as "aquatic." There are also non-aquatic plants which grow upon the land. Along the shoreline there is a belt of trees. The shoreline is from one foot to 3.2 feet higher than the lake level and there is a narrow belt of higher land along the shore known as a "pressure ridge" or "ice heave," varying in width from one to three feet. South of this point, the natural level of the land ranges one to two feet above lake level. The land slopes generally toward the lake but has a slope less than twelve per cent. No water flows onto the land from the lake, but there is some surface water which collects on land and stands in pools.

The land owned by the Justs is designated as swamps or marshes on the United States Geological Survey Map and is located within 1,000 feet of the normal high-water elevation of the lake. Thus, the property is included in a conservancy district and, by sec. 2.29 of the ordinance, classified as "wetlands." Consequently, in order to place more than 500 square feet of fill on this property, the Justs were required to obtain a conditional-use permit from the zoning administrator of the county and pay a fee of $20 or incur a forfeiture of $10 to $200 for each day of violation.

In February and March of 1968, six months after the ordinance became effective, Ronald Just, without securing a conditional-use permit, hauled 1,040 square yards of sand onto this property and filled an area approximately 20-feet wide commencing at the southwest corner and extending almost 600 feet north to the northwest corner near the shoreline, then easterly along the shoreline almost to the lot line. He stayed back from the pressure ridge about 20 feet. More than 500 square feet of this fill was upon wetlands located contiguous to the water and which had surface drainage toward the lake. The fill within 300 feet of the lake also was more than 2,000 square feet on a slope less than 12 percent. It is not seriously contended that the Justs did not violate the ordinance and the trial court correctly found a violation.

The real issue is whether the conservancy district provisions and the wetlands-filling restrictions are unconstitutional because they amount to a constructive taking of the Justs' land without compensation. Marinette county and the state of Wisconsin argue the restrictions of the conservancy district and wetlands provisions constitute a proper exercise of the police power of the state and do not so severely limit the use or depreciate the value of the land as to constitute a taking without compensation.

To state the issue in more meaningful terms, it is a conflict between the public interest in stopping the despoilation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes. The protection of public rights may be accomplished by the exercise of the police power unless the damage to the property owner is too great and amounts to a confiscation. The securing or taking of a benefit not presently enjoyed by the public for its use is obtained by the government through its power of eminent domain. The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner. In the valid exercise of the police power reasonably restricting the use of property, the damage suffered by the owner is said to be incidental. However, where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense.

Whether a taking has occurred depends upon whether "the restriction practically or substantially renders the land useless for all reasonable purposes." Buhler v. Racine County, supra. The loss caused the individual must be weighed to determine if it is more than he should bear. As this court stated in *Stefan*, at pp. 369–370, 124 N.W.2d 319, p. 323, ". . . if the damage is such as to be suffered by many similarly situated and is in the nature of a restriction on the use to which land may be put and ought to be borne by the individual as a member of society for the good of the public safety, health or general welfare, it is said to be a reasonable exercise of the police power, but if the damage is so great to the individual that he ought not to bear it under contemporary standards, then courts are inclined to treat it as a 'taking' of the property or an unreasonable exercise of the police power."

Many years ago, Professor Freund stated in his work on The Police Power, sec. 511, at 546–547, "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . From this results the difference between the power of eminent domain and the police power, that the former recognises a right to compensation, while the latter on principle does not." Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.

This case causes us to reexamine the concepts of public benefit in contrast to public harm and the scope of an owner's right to use of his property. In the instant case we have a restriction on the use of a citizens' property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property. We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural *status quo* of the environment. What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.

Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes? The great forests of our state were stripped on the theory man's ownership was unlimited. But in forestry, the land at least was used naturally, only the natural fruit of the land (the trees) were taken. The despoilage was in the failure to look to the future and provide for the reforestration of the land. An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.

This is not a case where an owner is prevented from using his land for natural and indigenous uses. The uses consistent with the nature of the land are allowed and other uses recognized and still others permitted by special permit. The shoreland zoning ordinance prevents to some extent the changing of the natural character of the land within 1,000 feet of a navigable lake and 300 feet of a navigable river because of such land's interrelation to the contiguous water. The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation. Changes and filling to some extent are permitted because the extent of such changes and fillings does not cause harm. We realize no case in Wisconsin has yet dealt with shoreland regulations and there are several cases in other states which seem to hold such regulations unconstitutional; but nothing this court has said or held in prior cases indicate that destroying the natural character of a swamp or a wetland so as to make that location available for human habitation is a reasonable use of that land when the new use, although of a more economical value to the owner, causes a harm to the general public.

Wisconsin has long held that laws and regulations to prevent pollution and to protect the waters of this state from degradation are valid police-power enactments. The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty.

To further this duty, the legislature may delegate authority to local units of the government, which the state did by requiring counties to pass shoreland zoning ordinances.

This is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights. Lands adjacent to or near navigable waters exist in a special relationship to the state.

The restrictions in the Marinette county ordinance upon wetlands within 1,000 feet of Lake Noquebay which prevent the placing of excess fill upon such land without a permit is not confiscatory or unreasonable.

Cases wherein a confiscation was found cannot be relied upon by the Justs. In State v. Herwig (1962), 17 Wis.2d 442, 117 N.W.2d 335, a "taking" was found where a regulation which prohibited hunting on farmland had the effect of establishing a game refuge and resulted in an unnatural, concentrated foraging of the owner's land by waterfowl. In State v. Becker, supra, the court held void a law which established a wildlife refuge (and prohibited hunting) on private property. In Benka v. Consolidated Water Power Co. (1929), 198 Wis. 472, 224 N.W. 718, the court held if damages to plaintiff's property were in fact caused by flooding from a dam constructed by a public utility, those damages constituted a "taking" within the meaning of the condemnation statutes. In Bino v. Hurley (1955), 273 Wis. 10, 76 N.W.2d 571, the court held unconstitutional as a "taking" without compensation an ordinance which, in attempting to prevent pollution, prohibited the owners of land surrounding a lake from bathing, boating, or swimming in the lake. In Piper v. Ekern (1923), 180 Wis. 586, 593, 194 N.W. 159, 162, the court held a statute which limited the height of buildings surrounding the state capitol to be unnecessary for the public health, safety, or welfare and, thus, to constitute an unreasonable exercise of the police power. In all these cases the unreasonableness of the exercise of the police power lay in excessive restriction of the natural use of the land or rights in relation thereto.

Cases holding the exercise of police power to be reasonable likewise provide no assistance to Marinette county in their argument. In More-Way North Corp. v. State Highway Comm. (1969), 44 Wis.2d 165, 175 N.W.2d 749, the court held that no "taking" occurred as a result of the state's lowering the grade of a highway, which necessitated plaintiff's reconstruction of its parking lot and loss of 42 parking spaces. In Wisconsin Power & Light Co. v. Columbia County (1958), 3 Wis.2d 1, 87 N.W.2d 279, no "taking" was found where the county, in relocating a highway, deposited gravel close to plaintiff's tower, causing it to tilt. In Nick v. State Highway Comm., supra, the court held where property itself is not physically taken by the state, a restriction of access to a highway, while it may decrease the value of the land, does not entitle the owner to compensation. In *Buhler* the court held the mere depreciation of value was not sufficient ground to enjoin the county from enforcing the ordinance. In Hasslinger v. Hartland (1940), 234 Wis. 201, 290 N.W. 647, the court noted that "(a)ssuming an actionable nuisance by the creation of odors which make occupation of plaintiffs' farm inconvenient . . . and impair its value, it cannot be said that defendant has dispossessed plaintiffs or taken their property."

The Justs rely on several cases from other jurisdictions which have held zoning regulations involving flood plain districts, flood basins and wetlands to be so confiscatory as to amount to a taking because the owners of the land were prevented from improving such property for residential or commercial purposes. While some of these cases may be distinguished on their facts, it is doubtful whether these differences go to the basic rationale which permeates the decision that an owner has a right to use his property in any way and for any purpose he sees fit. In Dooley v. Town Plan & Zon. Com. of Town of Fairfield (1964), 151 Conn. 304, 197 A.2d 770, the court held the restriction on land located in a flood plain district prevented its being used for residential or business purposes and thus the restriction destroyed the economic value to the owner. The court recognized the land was needed for a public purpose as it was part of the area in which the tidal stream overflowed when abnormally high tides existed, but the property was half a mile from the ocean and therefore could not be used for marina or boathouse purposes. In Morris County Land I. Co. v. Parsippany-Troy Hills Tp. (1963), 40 N.J. 539, 193 A.2d 232, a flood basin zoning ordinance was involved which required the controversial land to be retained in its natural state. The plaintiff owned 66 acres of a 1,500-acre swamp which was part of a river basin and acted as a natural detention basin for flood waters in times of very heavy rainfall. There was an extraneous issue that the freezing regulations were intended as a stop-gap until such time as the government would buy the property under a flood-control project. However, the court took the view the zoning had an effect of preserving the land as an open space as a water-detention basin and only the government or the public would be benefited, to the complete damage of the owner.

In State v. Johnson (1970), Me., 265 A.2d 711, the Wetlands Act restricted the alteration and use of certain wetlands without permission. The act was a conservation measure enacted under the police power to protect the ecology of areas bordering the coastal waters. The plaintiff owned a small tract of a salt-water marsh which was flooded at high tide. By filling, the land would be adapted for building purposes. The court held the restrictions against filling constituted a deprivation of a reasonable use of the owner's property and, thus, an unreasonable exercise of the police power. In MacGibbon v. Board of Appeals of Duxbury (1970), 356 Mass. 635, 255 N.E.2d 347, the plaintiff owned seven acres of land which were under water about twice a month in a shoreland area. He was denied a permit to excavate and fill part of his property. The purpose of the ordinance was to preserve from despoilage natural features and resources such as salt marshes, wetlands, and ponds. The court took the view the preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose was not within the limit and scope of the police power and the ordinance was not saved by the use of special permits.

[18] It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public. It is observed that a use of special permits is a means of control and accomplishing the purpose of the zoning ordinance as distinguished from the old concept of providing for variances. The special permit technique is now common practice and has met with judicial approval, and we think it is of some significance in considering whether or not a particular zoning ordinance is reasonable.

A recent case sustaining the validity of a zoning ordinance establishing a flood plain district is Turnpike Realty Company v. Town of Dedham (June, 1972), 72 Mass. 1303, 284 N.E.2d 891. The court held the validity of the ordinance was supported by valid considerations of public welfare, the conservation of "natural conditions, wildlife and open spaces." The ordinance provided that lands which were subject to seasonal or periodic flooding could not be used for residences or other purposes in such a manner as to endanger the health, safety or occupancy thereof and prohibited the erection of structures or buildings which required land to be filled. This case is analogous to the instant facts. The ordinance had a public purpose to preserve the natural condition of the area. No change was allowed which would injure the purposes sought to be preserved and through the special-permit technique, particular land within the zoning district could be excepted from the restrictions.

The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.

We are not unmindful of the warning in Pennsylvania Coal Co. v. Mahon (1922), 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322:

> ". . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

This observation refers to the improvement of the public condition, the securing of a benefit not presently enjoyed and to which the public is not entitled. The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right.[6] The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans.

We note the lower court dismissed the action commenced by the Justs, although it sought a declaratory judgment and the rights of the Justs were declared. This dismissal is in conflict with the procedure which this court has made clear should be followed, namely, that the complaint should not be dismissed when contrary to the plaintiffs' contention, but rather the judgment should set forth the declaratory adjudication.

In commenting on the propriety of its deciding the issue of constitutionality of the ordinance, the trial court quoted State v. Stehlek (1953), 262 Wis. 642, at 645, 56 N.W.2d 514, 516:

> "The exercise of the power to declare laws unconstitutional by inferior courts, should be carefully limited and avoided if possible. The authorities are to the effect that unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional, it is considered better practice for the court to assume the statute is constitutional, until the contrary is decided by a court of appellate jurisdiction."

This view has consistently been followed.

In *Gregorski* the district court of Milwaukee held a statute constitutional and we affirmed the holding of constitutionality by the circuit court when it denied a writ of prohibition. We pointed out the above language did not justify an inference the trial court could not pass upon the constitutionality of a statute. In *White House* we reversed the circuit court's holding of unconstitutionality and quoted the *Stehlek Case* without comment. In *Associated Hospital* the circuit court denied summary judgment on the ground the constitutionality question required hearing evidence. We recognized the circuit court's power to decide the issue and stated we were hesitant "to lay down any rule governing the exercise of discretion by trial courts, when confronted with an issue of constitutionality of a statute on demurrer or motion for summary judgment . . ." but stated "it is better practice for it to assume the statute is constitutional until the appellate court has passed upon it except where unconstitutionality is apparent beyond a reasonable doubt." In *Hoffmann* we affirmed the circuit court which reversed the county court in holding a city ordinance unconstitutional and pointed out the county court had decided a question of constitutionality when one party was not represented by counsel, the other side had stated it was not ready for trial, without the benefit of briefs and without giving a written reason for the holding.

Although the practice for trial courts not to hold laws unconstitutional has not been uniformly followed, nevertheless, it is our belief many lawyers have and are bringing to the federal courts cases involving questions of constitutionality of state laws because of the limitation placed on state courts in the exercise of the power to declare a law unconstitutional.

We think that when a constitutional issue is now presented to the trial courts of this state, it is the better practice for those courts to recognize its importance, have the issue thoroughly briefed, and fully presented. The issue should be decided as any other important issue with due consideration. The practice of assuming constitutionality, until the contrary is decided by an appellate court, is no longer necessary or workable. Of course, a presumption of constitutionality exists until declared otherwise by a competent court, which we think the trial courts of Wisconsin are, because a regularly enacted statute is presumed to be constitutional and the party attacking the statute must meet the burden of proof of showing unconstitutionality beyond a reasonable doubt.

The Judgment in case number 106, dismissing the Justs' action, is modified to set forth the declaratory adjudication that the shoreland zoning ordinance of respondent Marinette County is constitutional; that the Justs' property constitutes wetlands and that particularly the prohibition in the ordinance against the filling of wetlands is constitutional; and the judgment, as so modified, is affirmed. The judgment in case number 107, declaring a forfeiture, is affirmed.

NOTE ON THE TAKING ISSUE

An understanding of the current diversity of opinion concerning the "taking" issue begins with the final phrase of the Fifth Amendment: "...nor shall private property be taken for public use without just compensation," U.S. Constitution, Amendment V. For a historical review of the English and American law which produced this phrase, see Bosselman, Callies and Banta, The Taking Issue 51-104 (1973).

In Mugler v. Kansas, 123 U.S. 623 (1887), the Supreme Court supplied the foundation for a strong police power requiring no compensation to damaged property owners. Mugler owned a brewery that became nearly worthless when the state passed legislation forbidding the manufacture or sale of alcohol. The court rejected the argument that the theory of eminent domain governed, under which no property could be taken for public use without compensation, even where the state did so to abate a nuisance. Affirming the state's right to make some uses of land unlawful, Justice Harlan wrote:

> A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain purposes, is prejudicial...to the health, morals, or safety of the public...The power...cannot be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property to inflict injury upon the community..., 123 U.S. 623,668-9.

Thus, Mugler focuses on the nature of the regulation to test whether there has been a taking in the guise of of police power regulation. Upon determination that the regulation was not an eminent domain taking, the court narrowed the issue to whether the police power statute had a rational relationship to the public welfare.

Pennsylvania Coal Co.v. Mahon, 260 U.S. 393 (1922) was a radical departure from Mugler. Engineered by Justice Holmes, the case presented a balancing test, on the theory that the difference between the police power and the power of eminent domain was not one in kind, but only in degree: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking," 260 U.S. 393,413. The Mahons owned a house and lot bound by a valid and not uncommon covenant to permit the Company to mine coal beneath the surface of their land without liability for damages caused thereby. In response to the serious problem of mine subsidence, the Kohler Act forbade mining so as to cause any collapse of dwellings or other specified structures. The court found that the denial of the right to mine coal was a total deprivation of the Company's property rights. Thus, the Act could not be sustained under the police power:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must

> yield to the police power. But obviously the implied limitation must have its limits...One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act, 260 U.S. 393,413.

The impact of Holmes' opinion has been incalculable, despite the fact that no precedent supported his balancing test. Because Mahon did not overrule Mugler, debated continued over which test should be applied. Following Mahon, the extent to which the diminution can be carried was evidenced in Hadacheck v. Sebastian, 239 U.S. 394 (1915). The court sustained an ordinance which reduced the value of a brickyard from $800,000 to $60,000. The land on which the brickyard was situated had soil particularly suited for manufacturing bricks, but the area had developed into a residential section. Despite the tremendous loss in value, the petitioner was free to use the property for residential purposes, or to remove the clay to another location for manufacture.

The Supreme Court has yet to clarify this confusion. In one of the significant zoning case in recent years, the court again declined to present a specific formula to decide the taking issue: "There is no set formula to determine where regulation ends and taking begins," Goldblatt v. Town of Hempstead, 269 U.S. 590,594 (1962). Goldblatt owned a 38-acre tract within the town, on which it mined gravel. The excavation formed a lake, ultimately covering 20 acres, around which residential areas developed. The suit challenged an ordinance forbidding excavation below the water table. The court used the Mahon balancing test, but quoted Mugler extensively in emphasizing the difference between the police power and eminent domain. Having narrowed the issue to whether the prohibition was a valid exercise of the police power, the court held that plaintiff failed in its burden of proving that the ordinance was unreasonable.

Lower court decisions reflect various responses to this dichotomous precedent. Because no single rationale exists for determining when a taking has occurred, state courts have produced widely divergent tests. The Maine Supreme Court has applied a diminution of value test. In State v. Johnson, 265 A.2d 711 (Me.1970), the Johnsons appealed an injunction granted under the Wetland Act, which denied them permission to fill a portion of their small tract of land. The court considered the extent to which appellants were deprived of their usual incidents of ownership. Accepting a finding that, absent fill, the land had no commercial value, the court also noted that the Act provided a benefit to the public:

> The cost of (the wetlands) preservation should be publicly born. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this statewide conservation program, granting its fully commendable purpose," 265 A.wd 711,716.

Compare Johnson with In the Matter of Spring Valley Development, in which the same court upheld a zoning law. The commercial subdivider of a 92-acre tract attacked the constitutionality of a law requiring

it to present evidence to show that its proposed development met certain standards. Affirming the Act, the court held:

> Nothing in the record indicates an unreasonable burden upon the property as would equal an uncompensated taking... The record demonstrates only that the...land cannot be sold for residential purposes while subdivided to the extent and in the manner Lakesites originally planned," 300 A.2d 736,749.

The Maine court also generally affirmed the police power limitation on land where "the use is actually and substantially an injury or impairment of the public interest," 300 A.2d 736,748.

This distinction between public benefit and public harm is the basis for the test applied by the Massachusetts Supreme Judicial Court. In Turnpike Realty Co.v. Town of Dedham, 362 Mass.221, 284 N.E.2d 891 (1972) a flood plain law was sustained as a valid act under the police power on the ground that it saved the public form the harm of uncontrolled use of land in the flood plain. The court cited Vartelas v. Water Resources Commn., 146 Conn.650,654, 153 A.2d 822,824 (1959):

> The police power regulates use of property because uncontrolled use would be harmful to the public interest. Eminent domain...takes private property because it is useful to the public.

Still another test is evidenced in Lorio v. Sea Isle City, 88 N.J. Super. 506, 212 A.2d 802 (1965) and Speigle v. Beach Haven, 46 N.J.479, 218 A.2d 129 (1966), in which two New Jersey courts applied an alternate use test. In Lorio, the court found that compensation was required where plaintiffs were denied any use of their land when the city built dunes on their property as part of a plan to protect the city from flooding. In Speigle, the New Jersey Supreme Court found that a prohibition of construction beyond the dune line on plaintiff's property was not a taking. The plaintiffs failed to produce evidence of any economic use to which the property could be put, while the City of Beach Haven submitted proof that destruction would be more severe without the regulation.

Compare these holdings with the opinion in Just v. Marinette County, supra.

J.M. MILLS, INC. v. MURPHY
352 A.2d 661 (R.I. 1976)

The plaintiffs, a Rhode Island corporation, together with certain individuals, are owners of approximately one hundred acres of land in the Towns of Cumberland and Lincoln. In 1969, as part of a reclamation project, plaintiffs attempted to relocate some 3800 feet of the Blackstone River where it ran through their property. The director of Natural Resources required plaintiffs to submit detailed plans of the projected relocation, and after public hearings on the question, plaintiffs were ordered to cease all filling operations and to restore the river to its natural course.

On July 27, 1970, plaintiffs filed a complaint in Superior Court alleging that the department lacked jurisdiction over the relocation of the river. On July 2, 1971, after a hearing, judgment was entered for plaintiffs on the grounds the department lacked jurisdiction to order the reclamation stopped.

On July 16, 1971, the Legislature passed the "Fresh Water Wetlands Act" (hereinafter termed the Act), G.L. 1956, § 2-1-18 to § 2-1-24. The Act provides for regulation of all fresh water wetlands, a classification into which plaintiffs' property admittedly falls. It opens with a declaration of state policy in regards to wetlands; it then proceeds to define the geographical jurisdiction of the Act and to declare that approval of both the director of the Department of Natural Resources and the municipality in which the land is located is required before a wetland may be altered; the procedure for obtaining such approval is outlined and the Act closes with a delineation of the authority of the director to respond to violations of the provisions of the Act.

On May 18, 1973, plaintiffs filed a complaint for a declaratory judgment alleging that unless defendant, the director of Department of Natural Resources, is restrained from enforcing the Act they will suffer irreparable harm. The complaint further alleges that the Act is unconstitutional on its face in that it is an unlawful delegation of legislative authority, that it denies its subjects the equal protection of the law, and that it deprives the landowner of the beneficial use of his property without just compensation.

The defendant filed an answer denying plaintiffs' allegations of unconstitutionality, and both parties proceeded to file motions for summary judgment. After memoranda of law were submitted by the parties and amicus curiae, a hearing was scheduled before a justice of the Superior Court sitting without a jury. At the close of oral argument, the Superior Court held that the Act was not unconstitutional on its face, denied plaintiffs' motion for summary judgment, and granted defendant's motion.

Judgment for defendant was entered on October 18, 1973, and on October 23, 1973, plaintiffs filed their notice of appeal to this court. During the pendency of the appeal, the Act was amended by P.L. 1974, ch. 197, which in important part added a subsection to § 2-1-21. On appeal, plaintiffs develop the same arguments of unconstitutionality they offered below, directed this time towards the Act as amended.

We first address ourselves to the question of whether we should consider the Act as it existed at the time the case was heard below or in its amended form. There is a division of authority on the issue of whether an appellate court should apply the law existing at the time of its decision or the law existing at the time of the judgment below. Annot., 111 A.L.R. 1317 (1937). This court has noted that the resolution of this issue will depend on the peculiar nature of the case presenting the issue. *Twomey v. Carlton House of Providence, Inc.*, 113 R.I. 264, 320 A.2d 98 (1974). Thus in recent years we have reached differing results when confronted with different kinds of cases.

Other jurisdictions have generally held that the right to an injunction will be determined on appeal according to the law prevailing at the time the decision is rendered on the theory that the rights at issue are future rights only.

We note that the instant action is for a declaratory judgment and could not possible involve the abrogation of substantive rights already vested, the rights in question are all in futuro.

We also note that in zoning cases we have applied the law prevailing at the time of our decision on the theory that the public's interest in the zoning scheme should outweigh the individual's right to obtain a permit, at least in the situation where the landowner has not relied to his detriment on the original ordinance. *Goodman v. Zoning Bd. of Review, supra; A. Ferland & Sons v. Zoning Bd. of Review,* 105 R.I. 275, 251 A.2d 536 (1969). A similar balance of interest obtains in the instant case except that here the landowners are actually requesting that the Act be considered as amended.

This factor of the public interest in the result of the decision may be applied to the question of what law should govern the decision in a somewhat different way. The United States Supreme Court has suggested that in a suit involving the limited concerns of two private parties, a court should attempt to avoid a construction having a retrospective impact on the rights of the parties, but that where great public rights are involved a construction of the present impact of the law should be attempted. *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801), cited by Annot., 111 A.L.R. *supra* at 1326. In the instant case, plaintiffs are attempting to litigate the validity of a legislative enactment affecting the rights of all owners of wetlands and not merely the impact of the Act upon their own piece of property.

Finally, the determination that an appellate court should apply the law prevailing at the time of the decision below is based on the postulate that the basic function of an appellate court is to review the judgments made below for errors of law. While we subscribe to this view as a general principle, it is clear that its application is of substantially less force in a declaratory judgment action which presents pure issues of law on which the appellate court must in any case render an independent judgment.

The combined weight of these various factors convinces us that we should pass on the constitutionality of the Act in its amended form. We proceed now to an examination of plaintiffs' various allegations of unconstitutionality.

The plaintiffs' first contention is that the Act attempts to delegate legislative power in violation of R.I.Const. art. IV, §§ 1 and 2. The delegation is contained in § 2-1-21, as amended by P.L.1974, ch. 197, and gives to the director of the Department of Natural Resources and the municipality in which the land is located, the authority to approve or disapprove a landowner's application to alter the character of any fresh water wetland. Section 2-1-21 reads in relevant part as follows:

> "Such approval will be denied if in the opinion of the director granting of such approval would not be in the best public interest. Such approval shall not be granted if the city council or town council of the town within whose borders the project lies shall have disapproved within forty-five (45) days period provided for objections set forth in § 2-1-22. Appeal from such denial may be made to the superior court."

The plaintiffs argue that this language does not cloak the legislative delegation with sufficient standards confining the exercise of the power delegated to the public welfare sought to be served. They also argue that it fails to provide adequate guidelines for meaningful judicial review.

The nondelegation doctrine in Rhode Island stems from R.I.Const. art. IV, §§ 1 and 2, which provides that the Rhode Island Constitution shall be the supreme law of the state and that under the Constitution the legislative power shall be vested in the two houses of the Legislature. These sections, however, are not construed to prohibit entirely the delegation of legislative power.

To the contrary they have been held to require only that a delegation of legislative power be cloaked with adequate standards.

With this relaxation of the nondelegation doctrine has come the realization that the adequacy of legislative standards cannot be meaningfully measured against some abstract limitation contained in R.I.Const. art. IV, §§ 1 and 2. Thus recent decisions have taken into account such factors as the need of the Legislature to utilize an administrative agent to accomplish the purposes of the legislation and secondly public benefit accruing from the enactment of legislative standards to accompany the delegation.

In *Pascale v. Capaldi*, 95 R.I. 38, 41, 182 A.2d 435, 436 (1962), we concluded that a delegation to the director of public works was valid where it was "* * * the most practical manner in which the legislative power to condemn may be exercised." Likewise in *City of Warwick v. Warwick Regular Firemen's Ass'n, supra,* at 113, 256 A.2d at 209 we stated that:

> "Where the purposes of the antecedent legislative enactment may be best accomplished through the employment of an agent acting in its stead, the legislature may delegate to that agent a sufficient portion of its power to enable it to make the statute operative."

In addition to this practical limitation on the standards required for a valid delegation is the conclusion that the adequacy of legislative standards may best be measured against their intended purposes. In *City of Warwick v. Warwick Regular Firemen's Ass'n, supra,* for example, we concluded that the standards prescribed in the legislation were sufficient to accomplish their bifurcated purpose of limiting the discretion of the administrative delegatees and providing a basis for judicial review of the actions taken pursuant to the authority delegated.

With these general principles in mind, we proceed to consider the validity of a delegation of authority to the director of the Department of Natural Resources to disapprove applications to alter fresh water wetlands. Section 2-1-21 requires anyone who would alter the character of a wetland to obtain the approval of the director and fixes the governing standard as the "best public interest." The plaintiffs argue that this is not a meaningful standard. In response to this contention, we first note that the director is given jurisdiction over only a very limited area, wetlands. The term "wetlands" is precisely defined in § 2-1-20. In a previous case where this court found a valid delegation of authority to the Blackstone Valley Sewer District Commission, *City of Central Falls v. Halloran,* 94 R.I. 189, 179 A.2d 570 (1962), we placed great weight on the fact that the administrative agency was given discretion to act only in a well-defined geographical area. Here, also, the scope of administrative authority is clearly confined.

Secondly, the Legislature in §§ 2-1-18 and 2-1-19 has set forth basic legislative policy in the area of wetlands. Section 2-1-18 recognizes specifically the valuable function played by wetlands in acting as buffer zones and absorption areas for flood waters and providing both wildlife habitats and recreational areas. The section goes on to say that protection of such wetlands for those and other stated purposes is in the "best public interest." Section 2-1-19 reiterates that it is state policy to preserve wetlands and declares that in order to accomplish this purpose, wetlands shall be regulated under the police power.

It is our opinion that the repetition of "best public interest" in § 2-1-21, the delegation section, may reasonably be construed to incorporate the contents of §§ 2-1-18 and 2-1-19. Thus § 2-1-21 delegates to the director the authority to disapprove an application whenever the proposed project would thwart the policies expressed in § 2-1-19 to preserve wetlands in order that they may continue to carry out the functions expressly enumerated in § 2-1-18. This court has consistently held that the stated purposes of a legislative enactment are relevant to the issue of whether the delegation was adequately cloaked with standards.

We conclude that the Legislature has thus enacted into law the general policy of preserving fresh water wetlands in order that the functions of these wetlands as enumerated in § 2-1-18 may continue to be fulfilled. Pursuant to this authoritative statement in the best public interest, an administrative official has been delegated the power to make case-by-case determinations of whether a proposed project would significantly inhibit the present valuable functions of wetlands. In our opinion the statements of purpose and policy contained in the Act adequately limit the discretion of the director, and the Act therefore does not violate R.I.Const. art. IV, §§ 1 and 2 in granting authority to the director of the Department of Natural Resources accordingly to disapprove applications to alter fresh water wetlands.

We move now to a consideration of the delegation of authority to municipal units to disapprove an application to alter a wetland. Section 2-1-21(a) states in pertinent part that:

"* * * approval shall not be granted if the city council or town council of the town within whose borders the project lies shall have disapproved within the forty-five (45) days period provided for objections set forth in § 2-1-22."

The plaintiffs argue that this constitutes a delegation without even the best public interest standard and is therefore invalid.

Assuming, without deciding, that the nondelegation doctrine applies equally to the conferring of legislative power upon a unit of local government as to like delegation to a legislatively-created agency, we would find no violation of that doctrine here. The clear thrust of § 2-1-21 is to confer upon the director the authority to decide whether a proposed wetland alteration is in the "best public interest," which determination is to be made by him, as we have already indicated, by reference to the express legislative statements of purpose and policy contained in §§ 2-1-18 and 2-1-19. To read the final sentence of § 2-1-21 to confer upon local government the power to disapprove a proposed wetland change without regard to those same purpose and policy standards would be, in our opinion, a highly dubious if not absurd construction of that sentence and one we are therefore unable to accept. Thus, while there are no express limitations placed on a town's or city's authority under § 2-1-21, the same standards that control the director's determinations obtain by implication to actions taken thereunder by local governmental units.[1]

This would mark the conclusion of our inquiry into the validity of powers delegated by this Act were it not for the fact that plaintiffs' brief on appeal attacks not only the dearth of standards in § 2-1-21 but also the nature of the authority delegated to the municipalities. They characterize this authority as an "unfettered, arbitrary and capricious veto power." Furthermore, the parties have stipulated that the decision of the Superior Court in the case of *Colapietro et al. v. Murphy*, C.A. No. 74-1734 may be added to the record before us. The text of this decision develops an argument which attacks the delegation to a municipality of power to disapprove an application to alter a wetland on the grounds of denial of due process under U.S.Const. art. XIV, § 1. In the interests of judicial economy and believing the parties intended to incorporate these arguments, we will briefly consider the issues.

At the outset the parties would undoubtedly accept the principles that the Legislature may neither authorize arbitrary or otherwise unconstitutional action by a city or town council nor delegate the authority to do what it could not do itself, and that there exist potential limitations on the authority a delegatee may exercise other than those arising from R.I.Const. art. IV.

The authority delegated by § 2-1-21 is the authority to regulate the use of fresh water wetlands within municipal boundaries. This court has held that the exercise of such power is the exercise in part of the state police power. *Atlantic Tubing & Rubber Co. v. City Council*, 105 R.I. 584, 254 A.2d 92 (1969); *State v. Krzak*, 97 R.I. 156, 196 A.2d 417 (1964). In the *Atlantic Tubing* case, we noted that a municipality's authority to regulate the use of private property within its jurisdiction, being an exercise of the police power, is not inherent and is possessed by the municipality only by a grant from the Legislature. We went on to say that the exercise of such authority must be in accordance with the limitations on the police power. It is settled law that the exercise of the state's police power by municipality must be consistent with the law and policy of the state and that such exercise must not be arbitrary, capricious, or confiscatory. McQuillin, *supra*, § 24.46.

As these inherent limitations on the exercise of the police power are necessarily included in § 2-1-21, the city and town councils have been granted the authority to disapprove an application to alter a wetland only where such disapproval would not violate the constitutional rights of the landowner and where it is in accordance with the state policy on wetlands as established in §§ 2-1-18 and 2-1-19 of this Act. That being so, we conclude that the authority granted by § 2-1-21 is not unconstitutional on its face as a denial of substantive due process.

Nor does § 2-1-21, as written, deny a landowner procedural due process. The Act grants the municipality the power to share in the regulation of wetlands within its boundaries, but it does not specify the procedures by which this municipal regulation is to be accomplished.[2]

Having concluded, however, that a city or town council may disapprove an application under § 2-1-21 only if the "best public interest" would otherwise be violated, it follows that its proceedings are judicial in character and that, as a condition precedent to those actions, an applicant is entitled even in the absence of statutory language providing therefore to due notice of a hearing, and an opportunity to be heard and offer evidence. *See Davis v. Cousineau,* 97 R.I. 85, 196 A.2d 153 (1963); *Cugini v. Chiaradio,* 96 R.I. 120, 189 A.2d 798 (1963); *Aniello v. Marcello,* 91 R.I. 198, 162 A.2d 270 (1960); *Norton v. Adams,* 24 R.I. 97, 52 A. 688 (1902). Whether the municipal council has succeeded in satisfying those preconditions in a given case is a question that may be raised on appeal to Superior Court. By providing for judicial review, the Legislature has given the landowner the opportunity to attack the decision below on the grounds that it denies him procedural or substantive due process or that it frustrates state policy by not taking cognizance of the considerations set out in §§ 2-1-18 and 2-1-19. Should the municipal council fail to specify its findings of facts or its reasons for disapproval, its decision should be dealt with by the Superior Court which is vested with jurisdiction to hear appeals in such matters in the same manner as would be an appeal from an agency decision under the Administrative Procedures Act. We cannot say at this time that § 2-1-21 denies a landowner due process of law.

The plaintiffs' second contention is that the Act denies them equal protection of the law as guaranteed by U.S.Const. amend. XIV, § 1. They allege that owners of fresh water wetlands are accorded different and less favorable treatment under the General Laws of Rhode Island than are owners of salt water wetlands.

Unless a suspect classification is created, a legislative decision to distinguish between two sets of persons will be upheld if it has any rational basis. *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). In order to establish a denial of equal protection in the instant case, plaintiffs must show that owners of fresh and salt water wetlands are similarly situated and that the differences in procedure adopted by the Coastal Wetlands Act, §§ 2-1-13 to 2-1-17 and by the instant Act lack all rational basis.

The Coastal Wetlands Act envisions affirmative action on the part of the Department of Natural Resources to the end of establishing a statewide plan for the protection of wetlands. The instant Act, on the other hand, sets out a permit procedure whereby the landowner is required to initiate the proceedings. This difference in overall approach is susceptible to a variety of reasonable explanations: the greater development pressure on coastal wetlands suggests the need for immediate state action while the situation regarding fresh water wetlands might not be so pressing; the high incidence of state-ownership in coastal wetlands might facilitate centralized action while the almost exclusively private ownership of fresh water wetlands would tend to hinder such an approach; the probable interdependence and interactions of coastal wetlands could necessitate unitary state action while the more random pattern of fresh water wetlands might thwart such an attempt.

Having in mind the need for significantly different approaches to the regulation of fresh and salt water wetlands, the Legislature could reasonably conclude that the two methods of regulation posed dangers of differing magnitude to the rights of private individuals. Thus they may have decided that a statewide program of affirmative action, being less sensitive to individual circumstances, required the inclusion of prior hearings and a provision for compensation, while a procedure that envisioned the processing of a series of individual applications required only the availability of judicial review to ensure the protection of all constitutional rights, including that of just compensation. In these circumstances, we cannot say that the classifications created by the Legislature lack all rational basis. The plaintiffs' argument is without merit.

The plaintiffs' final contention is that § 2-1-21(b) deprives them of property without just compensation in violation of U.S. Const. amend. V, § 1 and R.I.Const. art. I, §§ 2 and 16. They do not include the provisions of § 2-1-21(a) in their challenge. As we believe the provisions of § 2-1-21(b) cannot be meaningfully construed without an understanding of the preceding subsection, we first examine the function of § 2-1-21(a) in the context of the just compensation issue.

The final sentence of § 2–1–21(a) provides that appeal from the denial of approval to alter the character of a wetland may be taken to the Superior Court.[3] The formal denial of such approval will in all cases come from the Department of Natural Resources, a body whose actions are governed by the provisions of the Administrative Procedures Act, G.L.1956 (1969 Reenactment) §§ 42–35–1 to 42–35–18. Section 42–35–15 provides for judicial review of contested cases. It specifically gives an aggrieved party the right to raise all legal issues concerning the validity of the agency decision, including all relevant constitutional issues. Section 42–35–15(g)(1).

As the Act does not confer the power of eminent domain on the director, his decision to withhold approval of a proposed alteration may be attacked on appeal as a denial of any beneficial use of the landowner's property and a violation of the constitutional right not to have that property taken without just compensation. U.S.Const. amend. V; R.I.Const. art. I, § 16. If this contention were upheld, presumably the action of the director would be null and void, and the landowner, as a matter of constitutional right, would be permitted to proceed with his project. Thus the Act, by incorporating the provisions of the Administrative Procedures Act, gives any landowner the opportunity to vindicate his constitutional rights in a judicial forum. By reserving to the courts the question of whether the Act as applied may be unconstitutional, § 2–1–21(a) is clearly constitutional on its face.

The plaintiffs, however, base their arguments on § 2–1–21(b). This subsection reads as follows:

> "Whenever a landowner shall be denied approval to alter a wetland by the director, or by the city or town within whose borders the wetland lies under subsection (a), the landowner may elect to have the state, or such city or town, acquire the land involved by petitioning to the superior court. If such court shall determine that the proposed alteration would not essentially change the natural character of the land, would not be unsuited to the land in the natural state, and would not injure the rights of others, the court shall, upon determining the fair market value of the wetland, based upon its value as a wetland, direct the state, if approval were denied by the director, or the city or town, if approval were denied by such city or town, or both, if they concurred in such disapproval, to pay to the landowner the fair market value of the wetland; provided, however, that if the state, or the city or town, or both, where both are ordered to pay, shall decline such acquisition, the landowner may proceed to alter the wetland as initially requested. Any amount paid by the state hereunder shall be paid from any funds in the treasury not otherwise appropriated. If the director of natural resources alone denied approval under subsection (a) then the state shall make payment. If the city or town alone denied approval under subsection (a) then the city or town shall make payment. If both the state and the city or town denied approval then payment shall be shared equally by the state and the city or town."

While the intended impact of this subsection is admittedly ambiguous, this court must construe a duly enacted statute to be constitutional if such construction is reasonably possible. Giving this admonition due weight, we note that the subsection speaks in terms of "electing" to petition to the Superior Court. This language suggests that the Legislature viewed § 2–1–21(b) as an alternative to the review procedure provided in § 2–1–21(a), a nonessential addition to the statute supplementing, but in no way limiting, the landowner's right, already secured by the previous subsection, to raise all relevant constitutional claims.

An examination of the relative kinds of review offered by the two subsections reinforces this construction; they are in no sense duplicitous. Section 42–35–15(g) states specifically that the reviewing court shall not substitute its judgment for that of the agency on questions of fact. To overturn a decision on factual grounds, a landowner must establish that it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Section 42–35–15(g)(5).

Earlier in this opinion we noted that the director would disapprove a landowner's application when he concluded that the proposed alteration would thwart the legislative mandate to preserve and protect wetlands in order that they continue to fulfill

the functions specified in § 2–1–18. We also noted that this determination inevitably invokes difficult factual questions of a scientific nature. With the scope of review provided by § 42–35–15, the landowner faces a difficult task if he should wish to contest the findings made below as to the ecological impact of his proposed project. If, however, a landowner elects to petition under subsection 2–1–21(b), the Superior Court must make an independent determination of whether "* * * the proposed alteration would *not* essentially change the natural character of the land, would *not* be unsuited to the land in the natural state, and would *not* injure the rights of others * * *." (Emphasis added.) In effect these determinations constitute a de novo review of the essential questions of fact and law in the case. Should the court decide that the landowner is correct in his contention that the proposed use will not essentially alter the natural character of the land, and by implication that the director was incorrect in denying his approval, then the landowner must either be compensated or he must be allowed to proceed with his project. This compensation provision does not replace the judicial determination on appeal under § 2–1–21(a) of what, in the event that the director was correct in his disapproval, would constitute just compensation for taking. Rather, it functions as a gratuitous offer by the state to purchase a landowner's property in some cases where the director is found to have overestimated the impact of a proposed alteration.

We anticipate that § 2–1–21(a) will be the usual avenue of appeal and that the provisions of § 2–1–21(b) will be invoked only where an appeal under § 2–1–21(a) proves unavailing or where the landowner allows the appeals period to run, thereby foregoing his opportunity to raise issues of a constitutional dimension. If then, § 2–1–21(b) is so construed only as a limited supplementary remedy giving those landowners who have no interest in substantially altering the character of their wetlands an opportunity to gain de novo review of certain essential issues of fact and law, the Act does not on its face deprive any person of property without just compensation.

For the reasons stated, the plaintiffs' appeal is denied and dismissed, and the judgment appealed from is affirmed.

KELLEHER, Justice, dissenting in part and concurring in part.

I disagree with that portion of the majority opinion which deals with the authority granted the legislative bodies of our various cities and towns, and I reluctantly concur with their view as to the thrust of the proviso which requires the denying authority to purchase the subject property but restricts the amount it must pay to the value of the property "as a wetland."

I cannot share the view that it is highly dubious, if not absurd, to read the pertinent provisions of § 2–1–21 as giving a city or town council the absolute and unqualified right to give a "thumbs down" on any affirmative action taken by the Director of Natural Resources on a proposal which seeks to alter a wetland. My disagreement with my brothers is based upon the language of the statute and an examination of the travel of the wetlands legislation after it first made its appearance on the legislative scene during the General Assembly's 1971 session.

While we are bound to construe a statute so that it is constitutional, the usual canons of statutory construction are not applicable where the statute is clear and unambiguous. In such instances, the statute declares itself, and its terms cannot be interpreted or extended; they must be applied literally. *Andreozzi v. D'Antuono*, 113 R.I. 155, 158, 319 A.2d 16, 18 (1974); *Smith v. Raparot*, 101 R.I. 565, 567, 225 A.2d 666, 667 (1967).

The original Wetlands Act was introduced on March 4, 1971.[1] The bill was numbered "S–434" and was referred to the Senate Judiciary Committee. The bill passed the Senate on April 15.[2] At that time it contained provisions several of which can still be found in §§ 2–1–21 and 2–1–22. These sections set forth the procedural and substantive rules which would govern the ultimate fate of one who might wish to change any property which fell within the statutory definition of what constituted a "fresh water wetland."

When S–434 passed the Senate, the sole and exclusive power to grant or deny the application was vested in the director, whose guide would be the public interest.

The bill required the director, once he had received an alteration application, to notify the abutting landowners as well as a variety of municipal agencies, including the council, the conservation commission, and the planning and zoning boards, of the application's pendency. The director was also authorized to send a similar notice to such persons or agencies whose names are on a departmental mailing list because they have informed the director of their desire to be notified of the filing of all alteration applications. If any objection was received within 45 days of the mailing of the notice from any of those notified, the bill mandated a public hearing.

S–434 was transmitted to the House of Representatives on April 16 and referred to the Finance Committee.[3] On June 30 the committee reported the bill on to the floor with recommendation that the House concur in its passage. The report was received and the bill placed on the calendar for July 1.[4] On that day, however, the bill was amended on the floor in two respects.[5] The proposed § 2–1–21 was modified so that the Water Resources Board was not required to seek the director's approval, and the proposed § 2–1–22 was revamped so that "* * * any person affecting inland wetlands or waters as described within § 2–1–21 of this chapter" would file with the town council or the mayor of the municipality in which the wetlands were situated as well as the state Department of Natural Resources a written notice of his intention, together with the plans describing the proposed activity. The amendment retained the requirement of notice to the abutting owners and municipal agencies but specified that the requisite notice would be given and the public hearing would be conducted by the local authorities. The amendment provided that the council or the mayor could recommend such protective measures as may protect the public interest and transmit their recommendations to the director. Thereafter, the director had 6 weeks in which to make his decision.

The amended bill was then recommitted to the Finance Committee where the July 1 amendments were deleted and the original language proposed for §§ 2–1–21 and 2–1–22 was restored with one significant addition. The committee amended § 2–1–21 by making an insertion between the provision mandating a denial by the director of an application if its grant would not be in the public interest and the stipulation providing for an appeal to the Superior Court from such a denial. The insertion specifically directed the withholding of a director's approval unless the project had been approved by the governing body of the municipality within which the wetland was located. The House passed the committee's amended version of S–434 on July 9, 1971,[6] and 4 days later, on July 13, the Senate concurred in its passage.[7] Thereafter, the Governor signed the bill, and S–434 became law.

I believe, from the explicit language found in § 2–1–21 and the deletions and additions made in the House of Representatives, that the blank check given the local legislatures regarding proposed changes in the local wetlands was purposeful. The General Assembly, in its effort to preserve the wetlands' "integrity and purity," intended that the final say on any alteration to a local wetland would be vested with the council no matter what occurred on the state level and that the municipal officers would not be bound to the public-interest standard which is to be the director's guideline.

Perhaps the General Assembly, when giving this unrestricted power to the local legislatures, believed that their actions were justified by a principle expressed by some courts: the Legislature, in delegating police power to the municipalities, need not fix guides and standards for its exercise. *LaRoque v. Board of County Commissioners*, 233 Md. 329, 196 A.2d 902 (1964). Assuming the validity of such a proposition, its applicability depends upon the function being delegated. If it is a legislative function, it may pass muster. If it is judicial, it is a nullity.

The test for distinguishing legislative and judicial action was made by Mr. Justice Holmes, speaking for the Court, in *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908). There he said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

In applying this test, it has been recognized that it is the nature of the act performed rather than the name of the officer, board, or agency doing the act which determines whether it is judicial or legislative.

Here the power vested in the city and town councils is unquestionably judicial in nature. It follows that the proper exercise of this power is conditioned upon minimum requisites of due process being satisfied. Restriction on one's property is valid only if the restriction is reasonably related to the public health, safety, or welfare. *Town of Glocester v. Olivo's Mobile Home Court, Inc.*, 111 R.I. 120, 124, 300 A.2d 465, 468 (1973). Here the Wetlands Act contains no standard which requires that there be a reasonable relationship between the council's denial and the applicant's proposed use of his land. Furthermore, due process demands that before the council can deny an application, the applicant is entitled to notice and an opportunity to be heard. *Carroll v. Zoning Board of Review*, 104 R.I. 676, 248 A.2d 321 (1968). Consequently, the unfettered veto power given the city and town councils is unquestionably unconstitutional.

Turning to § 2-1-21(b), my agreement with the majority on the thrust of this section is clouded with concern. Section 2-1-21(b) comes about as the result of an effort, begun in 1973, to make certain changes in the original Wetlands Act. The 1973 legislation, known as 73-H 6267, received rather expeditious treatment in the House of Representatives after being introduced there on April 5.[8] It did not reach the Senate until the last legislative day of its 1973 session. When the Senate reached final adjournment on May 4, 73-H 6267 was placed on the president's desk[9] where it remained until the Senate returned for the 1974 session. On January 23, 1974,[10] the fourteenth legislative day of the session, the bill was recommitted to the Joint Committee on Environment.

One of the proposed changes, awaiting Senate vote, would have amended § 2-1-21 so that a municipal legislature would have to register its disapproval on an alteration plan within 45 days after the director had mailed notice of its pendency before him. This change was prompted by a recognition of the hardship that would be suffered by a landowner who had to wait until the council decided when and what it was going to do. Another change amended § 2-1-22 by empowering a property owner to ask the director to determine whether the proposed alteration came within the ambit of the Wetlands Act. Once the director received such a request, he or his duly authorized agent was required to make an on-site inspection of the project area. If it appeared that the proposal contemplated a "significant alteration" to the wetland, an alteration application would have to be filed and the necessary notices of its pendency given.

It is obvious that § 2-1-21(b) is a manifestation of the General Assembly's concern for a property owner whose interests must give way to the public interest in the preservation of the environment. However, the language used by the Legislature is by no means precise or clear. Apparently, the Legislature has afforded the landowner who does not want to continue his fight with those in the State House or the city and town halls a chance to obtain some compensation. If he wishes, the property owner can go to the Superior Court and seek the alternative relief delineated in § 21(b). If he takes this route, however, he must satisfy the three conditions set forth in this subsection. If he does, he will have convinced the trial justice that the denial of his application actually amounted to an invalid exercise of the police power. However, by invoking § 21(b), the property owner has waived his right to receive just compensation and will settle for a sum that represents the value of his wetland "as a wetland."

While I agree with the majority that § 21(b) is a gratuitous offer, I can envision circumstances where a landowner who employs its provisions and gets paid for his wetland may discover that there has been a substantial diminution in the value of his property which adjoins the wetland. While the public interest in preserving flood plains and habitat for wildlife is commendable, it must not overshadow an awareness of the danger that the exercise of the police power can result in the "taking" of one's real estate just as if a condemnation plat had been filed.[12] If such an event occurs, the landowner should receive just compensation, which may not necessarily be the wetland value specified in § 21(b). If, in enacting § 21(b), the Legislature desired the state or municipality to pay just compensation when either disapproves an alteration plan, I would respectfully suggest that it give this subsection a second look.

GOLDEN v. PLANNING BOARD OF TOWN OF RAMAPO
30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972)

Both cases arise out of the 1969 amendments to the Town of Ramapo's Zoning Ordinance. In *Golden*, petitioners, the owner of record and contract vendee, by way of a proceeding pursuant to CPLR article 78 sought an order reviewing and annulling a decision and determination of the Planning Board of the Town of Ramapo which denied their application for preliminary approval of a residential subdivision plat because of an admitted failure to secure a special permit as required by section 46–13.1 of the Town zoning ordinance prohibiting subdivision approval except where the residential developer has secured, prior to the application for plat approval, a special permit or a variance pursuant to section F of the ordinance. Special Term sustained the amendments and granted summary judgment. On appeal, the Appellate Division elected, since all necessary parties were before the court, to treat the proceeding as an action for declaratory judgment and reversed,

The plaintiffs in *Rockland County Builders Association*, on the other hand, sought, in an action for declaratory judgment, to set aside the ordinance as unconstitutional and commenced the present action after the Planning Board had denied plaintiff Mildred Rhodes preliminary plat approval for her parcel of property because of a conceded failure on her part to obtain a special permit as required under the challenged ordinance. The remaining plaintiffs, Rockland County Builders Association, a membership corporation composed of builders engaged in the purchase of land and construction of residences of all types through the Town, as well as the Eldorado Developing Corporation, possessed of some 12 acres situate within the Town, apparently have never made application for approval of a plat and have never sought a special permit, as a prerequisite to such approval. Special Term, concluding that the constitutional attack was premature because of the asserted failure to exhaust administrative remedies (cf. Old Farm Road v. Town of New Castle, 26 N.Y.2d 462, 311 N.Y.S.2d 500, 259 N.E.2d 920), denied their motion for summary judgment and granted defendants' cross motion to dismiss. On appeal, the Appellate Division, 37 A.D.2d 783, 324 N.Y.S.2d 190, held that the parties were presently aggrieved and relying on *Golden*, reversed and granted plaintiffs' motion for summary judgment.

Among the complaining parties, Rockland County Builders is not a property owner and Eldorado has never sought preliminary approval of a subdivision plat. Petitioner Golden and plaintiff Rhodes have both sought plat approval and have been denied the same for failure to apply for a special permit. Though the builders are obviously not aggrieved by the recent amendments, landowners prior to gaining approval for subdivision, of necessity, would be required to apply for a special permit, which, absent certain enumerated improvements would invariably be denied. The prescription is mandatory and, were we to conclude that the standards established for the permit's issuance were unconstitutional, quite unlike the situation obtaining in Old Farm Road v. Town of New Castle, the ordinance itself could admit of no constitutionally permissible construction so as to require initial administrative relief to determine whether injury has occurred

The attack by the subdividing landowner is directed against the ordinance in its entirety, and the thrust of the petition and complaint, respectively, is that the ordinance of itself operates to destroy the value and marketability of the subject premises for residential use and thus constitutes a present invasion of the property rights of the complaining landholders. The alleged harm is thus immediate and is sufficient to raise a justiciable issue as to the validity of the subject ordinance

Experiencing the pressures of an increase in population and the ancillary problem of providing municipal facilities and services,[1] the Town of Ramapo, as early as 1964, made application for grant under section 801 of the Housing Act of 1964 (78 U.S.Stat. 769) to develop a master plan. The plan's preparation included a four-volume study of the existing land uses, public facilities, transportation, industry and commerce, housing needs and projected population trends.

The master plan was followed by the adoption of a comprehensive zoning ordinance. Additional sewage district and drainage studies were undertaken which culminated in the adoption of a capital budget, providing for the development of the improvements specified in the master plan within the next six years. Pursuant to section 271 of the Town Law, authorizing comprehensive planning, and as a supplement to the capital budget, the Town Board adopted a capital program which provides for the location and sequence of

additional capital improvements for the 12 years following the life of the capital budget. The two plans, covering a period of 18 years, detail the capital improvements projected for maximum development and conform to the specifications set forth in the master plan, the official map and drainage plan.

Based upon these criteria, the Town subsequently adopted the subject amendments for the alleged purpose of eliminating premature subdivision and urban sprawl. Residential development is to proceed according to the provision of adequate municipal facilities and services, with the assurance that any concomitant restraint upon property use is to be of a "temporary" nature and that other private uses, including the construction of individual housing, are authorized.

The amendments did not rezone or reclassify any land into different residential or use districts,[2] but, for the purposes of implementing the proposals appearing in the comprehensive plan, consist, in the main, of additions to the definitional sections of the ordinance, section 46–3, and the adoption of a new class of "Special Permit Uses", designated "Residential Development Use." "Residential Development Use" is defined as "The erection or construction of dwellings or any vacant plots, lots or parcels of land" (§ 46–3, as amd.); and, any person who acts so as to come within that definition, "shall be deemed to be engaged in residential development which shall be a separate use classification under this ordinance and subject to the requirement of obtaining a special permit from the Town Board"

The standards for the issuance of special permits are framed in terms of the availability to the proposed subdivision plat of five essential facilities or services; specifically (1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) State, county or town roads—major, secondary or collector; and, (5) firehouses. No special permit shall issue unless the proposed residential development has accumulated 15 development points, to be computed on a sliding scale of values assigned to the specified improvements under the statute. Subdivision is thus a function of immediate availability to the proposed plat of certain municipal improvements; the avowed purpose of the amendments being to phase residential development to the Town's ability to provide the above facilities or services.

Certain savings and remedial provisions are designed to relieve of potentially unreasonable restrictions. Thus, the board may issue special permits vesting a present right to proceed with residential development in such year as the development meets the required point minimum, but in no event later than the final year of the 18-year capital plan. The approved special use permit is fully assignable, and improvements scheduled for completion within one year from the date of an application are to be credited as though existing on the date of the application. A prospective developer may advance the date of subdivision approval by agreeing to provide those improvements which will bring the proposed plat within the number of development points required by the amendments. And applications are authorized to the "Development Easement Acquisition Commission" for a reduction of the assessed valuation. Finally, upon application to the Town Board, the development point requirements may be varied should the board determine that such a variance or modification is consistent with the on-going development plan.

The undisputed effect of these integrated efforts in land use planning and development is to provide an over-all program of orderly growth and adequate facilities through a sequential development policy commensurate with progressing availability and capacity of public facilities. While its goals are clear and its purposes undisputably laudatory, serious questions are raised as to the manner in which these ends are to be effected, not the least of which relates to their legal viability under present zoning enabling legislation, particularly sections 261 and 263 of the Town Law. The owners of the subject premises argue, and the Appellate Division has sustained the proposition, that the primary purpose of the amending ordinance is to control or regulate population growth within the Town and as such is not within the authorized objectives of the zoning enabling legislation. We disagree.

In enacting the challenged amendments, the Town Board has sought to control subdivision in all residential districts, pending the provision (public or private) at some future date of various services and facilities. A reading of the relevant statutory provisions reveals that there is no specific authorization for the "sequential" and "timing" controls adopted here. That, of course, cannot be said to end the matter, for the additional inquiry remains as to whether the challenged amendments find their basis within the perimefers of the devices authorized and purposes sanctioned under current enabling legislation. Our concern is, as it should be, with the effects of the statutory scheme taken as a whole and its role in the propagation of a viable policy of land use and planning.

Towns, cities and villages lack the power to enact and enforce zoning or other land use regulations (Matter of Barker v. Switzer, 209 App.Div. 151, 153, 205 N.Y.S. 108, 109; cf. De Sena v. Gulde, 24 A.D.2d 165, 171, 265 N.Y.S.2d 239, 245). The exercise of that power, to the extent that it is lawful, must be founded upon a legislative delegation to so proceed, and in the absence of such a grant will be held *ultra vires* and void

That delegation, set forth in section 261[3] of the Town Law, is not, however, coterminous with stated police power objectives and has been considered less inclusive traditionally. Hence, although the power to zone must be exercised under the aegis of the police power, indeed must inevitably find justification for its exercise in some aspect of the same, the recital of police power purposes in the grant, attests more to the drafters' attempts to specify a valid constitutional predicate than to detail authorized zoning purposes.[4] The latter, "legitimate zoning purposes," are incorporated in accompanying section 263 and are designed to secure safety from various calamities, to avoid undue concentration of population and to facilitate "adequate provision of transportation, water, sewerage, schools, parks, and other public requirements" (Town Law, § 263). In the end, zoning properly effects, and only in the manner prescribed, those purposes detailed under section 263 of the Town Law. It may not be invoked to further the general police powers of a municipality

Even so, considering the activities enumerated by section 261 of the Town Law, and relating those powers to the authorized purposes detailed in section 263, the challenged amendments are proper zoning techniques, exercised for legitimate zoning purposes. The power to restrict and regulate conferred under section 261 includes within its grant, by way of necessary implication, the authority to direct the growth of population for the purposes indicated, within the confines of the township. It is the matrix of land use restrictions, common to each of the enumerated powers and sanctioned goals, a necessary concomitant to the municipalities' recognized authority to determine the lines along which local development shall proceed, though it may divert it from its natural course (Euclid v. Ambler Co., 272 U.S. 365, 389–390.

Of course, zoning historically has assumed the development of individual plats and has proven characteristically ineffective in treating with the problems attending subdivision and development of larger parcels, involving as it invariably does, the provision of adequate public services and facilities. To this end, subdivision control (Town Law, §§ 276, 277) purports to guide community development in the directions outlined here, while at the same time encouraging the provision of adequate facilities for the housing, distribution, comfort and convenience of local residents (Village of Lynbrook v. Cadoo, 252 N.Y. 308, 314, 169 N.E. 394, 396). It reflects in essence, a legislative judgment that the development of unimproved areas be accompanied by provision of essential facilities And though it may not, in a definitional or conceptual sense be identifed with the power to zone, it is designed to complement other land use restrictions, which, taken together, seek to implement a broader, comprehensive plan for community development

It is argued, nevertheless, that the timing controls currently in issue are not legislatively authorized since their effect is to prohibit subdivision absent precedent or concurrent action of the Town, and hence constitutes an unauthorized blanket interdiction against subdivision.

It is, indeed, true that the Planning Board is not in an absolute sense statutorily authorized to deny the right to subdivide. That is not, however, what is sought to be accomplished here. The Planning Board has the right to refuse approval of subdivision plats in the absence of those improvements specified in section 277, and the fact that it is the Town and not the subdividing owner or land developer who is required to make those improvements before the plat will be approved cannot be said to transform the scheme into an absolute prohibition any more than it would be so where it was the developer who refused to provide the facilities required for plat approval. Denial of subdivision plat approval, invariably amounts to a prohibition against subdivision, albeit a conditional one ; and to say that the Planning Board lacks the authority to deny subdivision rights is to mistake the nature of our inquiry which is essentially whether development may be conditioned pending the provision by the municipality of specified services and facilities. Whether it is the municipality or the developer who is to provide the improvements, the objective is the same—to provide adequate facilities, off-site and on-site; and in either case subdivision rights are conditioned, not denied.

Undoubtedly, current zoning enabling legislation is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government—that the public interest of the State is exhausted once its political subdivisions have been delegated the authority to zone While such jurisdictional allocations may well have been consistent with formerly prevailing conditions and assumptions, questions of broader public interest have commonly been ignored

Experience, over the last quarter century, however, with greater technological integration and drastic shifts in population distribution has pointed up serious defects and community autonomy in land use controls has come under increasing attack by legal commentators, and students of urban problems alike, because of its pronounced insularism and its correlative role in producing distortions in metropolitan growth patterns, and perhaps more importantly, in crippling efforts toward regional and State-wide problem solving, be it pollution, decent housing, or public transportation.

Recognition of communal and regional interdependence, in turn, has resulted in proposals for schemes of regional and State-wide planning, in the hope that decisions would then correspond roughly to their level of impact Yet, as salutary as such proposals may be, the power to zone under current law is vested in local municipalities, and we are constrained to resolve the issues accordingly. What does become more apparent in treating with the problem, however, is that though the issues are framed in terms of the developer's due process rights, those rights cannot, realistically speaking, be viewed separately and apart from the rights of others "'in search of a [more] comfortable place to live.'"

There is, then, something inherently suspect in a scheme which, apart from its professed purposes, effects a restriction upon the free mobility of a people until sometime in the future when projected facilities are available to meet increased demands. Although zoning must include schemes designed to allow municipalities to more effectively contend with the increased demands of evolving and growing communities, under its guise, townships have been wont to try their hand at an array of exclusionary devices in the hope of avoiding the very burden which growth must inevitably bring. Though the conflict engendered by such tactics is certainly real, and its implications vast, accumulated evidence, scientific and social, points circumspectly at the hazards of undirected growth and the naive, somewhat nostalgic imperative that egalitarianism is a function of growth.

Of course, these problems cannot be solved by Ramapo or any single municipality, but depend upon the accommodation of widely disparate interests for their ultimate resolution. To that end, State-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies. Nevertheless, that should not be the only context in which growth devices such as these, aimed at population assimilation, not exclusion, will be sustained; especially where, as here, we would have no alternative but to strike the provision down in the wistful hope that the efforts of the State Office of Planning Coordination and the American Law Institute will soon bear fruit.

Hence, unless we are to ignore the plain meaning of the statutory delegation, this much is clear: phased growth is well within the ambit of existing enabling legislation. And, of course, it is no answer to point to emergent problems to buttress the conclusion that such innovative schemes are beyond the perimeters of statutory authorization. These considerations, admittedly real, to the extent which they are relevant, bear solely upon the continued viability of "localism" in land use regulation; obviously, they can neither add nor detract from the initial grant of authority, obsolescent though it may be. The answer which Ramapo has posed can by no means be termed definitive; it is, however, a first practical step toward controlled growth achieved without forsaking broader social purposes.

The evolution of more sophisticated efforts to contend with the increasing complexities of urban and suburban growth has been met by a corresponding reluctance upon the part of the judiciary to substitute its judgment as to the plan's over-all effectiveness for the considered deliberations of its progenitors.

Implicit in such a philosophy of judicial self-restraint is the growing awareness that matters of land use and development are peculiarly within the expertise of students of city and suburban planning, and thus well within the legislative prerogative, not lightly to be impeded To this same end, we have afforded such regulations, the usual presumption of validity attending the exercise of the police power, and have cast the burden of proving their invalidity upon the party challenging their enactment Deference in the matter of the regulations' over-all effectiveness, however, is not to be viewed as an abdication of judicial responsibility, and ours remains the function of defining the metes and bounds beyond which local regulations may not venture, regardless of their professedly beneficent purposes.

The subject ordinance is said to advance legitimate zoning purposes as it assures that each new home built in the township will have at least a minimum of public services in the categories regulated by the ordinance. The Town argues that various public facilities are presently being constructed but that for want of time and money it has been unable to provide such services and facilities at a pace commensurate with increased public need. It is urged that although the zoning power includes reasonable restrictions upon the private use of property, exacted in the hope of development according to well-laid plans, calculated to advance the public welfare of the community in the future the subject regulations go further and seek to avoid the increased responsibilities and economic burdens which time and growth must ultimately bring.

It is the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district and to that extent such restrictions invariably impede the forces of natural growth.

Where those restrictions upon the beneficial use and enjoyment of land are necessary to promote the ultimate good of the community and are within the bounds of reason, they have been sustained. "Zoning [, however,] is a means by which a governmental body can plan for the future —it may not be used as a means to deny the future".

Its exercise assumes that development shall not stop at the community's threshold, but only that whatever growth there may be shall proceed along a predetermined course.

It is inextricably bound to the dynamics of community life and its function is to guide, not to isolate or facilitate efforts at avoiding the ordinary incidents of growth. What segregates permissible from impermissible restrictions, depends in the final analysis upon the purpose of the restrictions and their impact in terms of both the community and general public interest.

The line of delineation between the two is not a constant, but will be found to vary with prevailing circumstances and conditions.

the preeminent protection against their abuse resides in the mandatory on-going planning and development requirement, present here, which attends their implementation and use.

What we will not countenance, then, under any guise, is community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land. The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth. True other alternatives, such as requiring off-site improvements as a prerequisite to subdivision, may be available, but the choice as how best to proceed, in view of the difficulties attending such exactions cannot be faulted.

Perhaps even more importantly, timed growth, unlike the minimum lot requirements recently struck down by the Pennsylvania Supreme Court as exclusionary, does not impose permanent restrictions upon land use (see National Land & Inv. Co. v. Easttown Twp. Bd. of Adj., 419 Pa. 504, 215 A.2d 597, *supra*; Concord Twp. Appeal, 439 Pa. 466, 268 A.2d 765, *supra*). Its obvious purpose is to prevent premature subdivision absent essential municipal facilities and to insure continuous development commensurate with the Town's obligation to provide such facilities. They seek, not to freeze population at present levels but to maximize growth by the efficient use of land, and in so doing testify to this community's continuing role in population assimilation. In sum, Ramapo asks not that it be left alone, but only that it be allowed to prevent the kind of deterioration that has transformed well-ordered and thriving residential communities into blighted ghettos with attendant hazards to health, security and social stability—a danger not without substantial basis in fact.

We only require that communities confront the challenge of population growth with open doors. Where in grappling with that problem, the community undertakes, by imposing temporary restrictions upon development, to provide required municipal services in a rational manner, courts are rightfully reluctant to strike down such schemes. The timing controls challenged here parallel recent proposals put forth by various study groups and have their genesis in certain of the pronouncements of this and the courts of sister States.

We may assume, therefore, that the present amendments are the product of foresighted planning calculated to promote the welfare of the township. The Town has imposed temporary restrictions upon land use in residential areas while committing itself to a program of development. It has utilized its comprehensive plan to implement its timing controls and has coupled with these restrictions provisions for low and moderate income housing on a large scale. Considered as a whole, it represents both in its inception and implementation a reasonable attempt to provide for the sequential, orderly development of land in conjunction with the needs of the community, as well as individual parcels of land, while simultaneously obviating the blighted aftermath which the initial failure to provide needed facilities so often brings.

The proposed amendments have the effect of restricting development for onwards to 18 years in certain areas. Whether the subject parcels will be so restricted for the full term is not clear, for it is equally probable that the proposed facilities will be brought into these areas well before that time. Assuming, however, that the restrictions will remain outstanding for the life of the program, they still fall short of a confiscation within the meaning of the Constitution.

[11] An ordinance which seeks to permanently restrict the use of property so that it may not be used for any reasonable purpose must be recognized as a taking: The only difference between the restriction and an outright taking in such a case, "is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden." An appreciably different situation obtains where the restriction constitutes a *temporary* restriction, promising that the property may be put to a profitable use within a reasonable time. The hardship of holding unproductive property for some time might be compensated for by the ultimate benefit inuring to the individual owner in the form of a substantial increase in valuation; or, for that matter, the landowner, might be compelled to chafe under the temporary restriction, without the benefit of such compensation, when that burden serves to promote the public good.

We are reminded, however, that these restrictions threaten to burden individual parcels for as long as a full generation and that such a restriction cannot, in any context, be viewed as a temporary expedient. The Town, on the other hand, contends that the landowner is not deprived of either the best use of his land or of numerous other appropriate uses, still permitted within various residential districts, including the construction of a single-family residence, and consequently, it cannot be deemed confiscatory. Although no proof has been submitted on reduction of value, the landowners point to obvious disparity between the value of the property, if limited in use by the subject amendments, and its value for residential development purposes, and argue that the diminution is so considerable that for all intents and purposes the land cannot presently or in the near future be put to profitable or beneficial use, without violation of the restrictions.

Every restriction on the use of property entails hardships for some individual owners. Those difficulties are invariably the product of police regulation and the pecuniary profits of the individual must in the long run be subordinated to the needs of the community. The fact that the ordinance limits the use of, and may depreciate the value of the property will not render it unconstitutional, however, unless it can be shown that the measure is either unreasonable in terms of necessity or the diminution in value is such as to be tantamount to a confiscation (see, e. g., Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 499, 121 N.E.2d 517, 520). Diminution, in turn, is a relative factor and though its magnitude is an indicia of a taking, it does not of itself establish a confiscation.

Without a doubt restrictions upon the property in the present case are substantial in nature and duration. They are not, however, absolute. The amendments contemplate a definite term, as the development points are designed to operate for a maximum period of 18 years and during that period, the Town is committed to the construction and installation of capital improvements. The net result of the ongoing development provision is that individual parcels may be committed to a residential development use prior to the expiration of the maximum period. Similarly, property owners under the terms of the amendments may elect to accelerate the date of development by installing, at their own expense, the necessary public services to bring the parcel within the required number of development points. While even the best of plans may not always be realized, in the absence of proof to the contrary, we must assume the Town will put its best effort forward in implementing the physical and fiscal timetable outlined under the plan. Should subsequent events prove this assumption unwarranted, or should the Town because of some unforeseen event fail in its primary obligation to these landowners, there will be ample opportunity to undo the restrictions upon default. For the present, at least, we are constrained to proceed upon the assumption that the program will be fully and timely implemented

Thus, unlike the situation presented in Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, *supra*, the present amendments propose restrictions of a certain duration and founded upon estimate determined by fact. Prognostication on our part in upholding the ordinance proceeds upon the presently permissible inference that within a reasonable time the subject property will be put to the desired use at an appreciated value. In the interim assessed valuations for real estate tax purposes reflect the impact of the proposed restrictions. The proposed restraints, mitigated by the prospect of appreciated value and interim reductions in assessed value, and measured in terms of the nature and magnitude of the project undertaken, are within the limits of necessity.

In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for "phased growth" and hence, the challenged ordinance is not violative of the Federal and State Constitutions. Accordingly, the order appealed from should be reversed and the actions remitted to Special Term for entry of a judgment declaring section 46-13.1 of the Town Ordinance constitutional.

BREITEL, Judge (dissenting).

The limited powers of district zoning and subdivision regulation delegated to a municipality do not include the power to impose a moratorium on land development. Such conclusion is dictated by settled doctrine that a municipality has only those powers, and especially land use powers, delegated or necessarily implied.

But there is more involved in these cases than the arrogation of undelegated powers. Raised are vital constitutional issues, and, most important, policy issues trenching on grave domestic problems of our time, without the benefit of a legislative determination which would reflect the interests of the entire State. The policy issues relate to needed housing, planned land development under government control, and the exclusion in effect or by motive, of walled-in urban populations of the middle class and the poor. The issues are raised by a town ordinance, which, as one of the Appellate Division Justices noted below, reflect a parochial stance without regard to its impact on the region or the State, especially if it become a valid model for many other towns similarly situated.

Because the issues are so important they must be restated in this court, although the opinions in the Appellate Division cover every issue involved and do so without neglecting any of the legal, economic, or social considerations relevant. A reading of them is desirable and what is said now will assume that what was said once, and said well, need not be repeated in detail.

The Town of Ramapo, following an intensive study by highly-competent experts, amended its zoning ordinance by adding to it section 46–13.1, a section with extensive scope and detailed provisions. It broadly defines a developer as any landowner who proposes to erect and sell a dwelling or dwellings for residential use.* Regardless of the district zone, any proposed development, as so broadly defined, is forbidden unless a special permit is obtained. Permits will be granted only if the land qualifies for enough assigned points under some five categories of available municipal facilities, namely, sewerage, drainage, park-recreation-public school facilities, roads, and firehouses. The purpose is to prohibit development until an acceptable level of supporting facilities exists. The town has committed itself, it is said, by its capital budget and capital improvement plans to insure eventual availability of supporting facilities. But in some areas this eventuality will not be realized for 18 years. To prevent undue delay, the town allows for a crediting of points based on the scheduled improvements even if the town program should not be realized as planned, because of fiscal, economic, or political impediments. Because the effect of the ordinance is to freeze an owner's use for varying periods of time, up to 18 years, the town also allows the owner to apply for a reduction in tax assessments.

It is important to note how radically the Ramapo scheme differs from those used and adopted under existing enabling acts. The zoning acts, starting from 50 years ago, based on national models, provided simply for district zoning to control population density and some planning to protect preferred uses of land, such as single-family dwellings, from other uses considered less desirable or even harmful to residential living or environmental balance. Since the beginning, in this State and elsewhere, by amendment to the enabling acts by the Legislature, provision has been made for subdivision planning and, in some instances, planned unit development, to prevent large-scale developers from dumping homes wholesale in raw land areas without private and, to some extent, public facilities essential to the use of the homes. In more recent years, since World War II, the need for a much enlarged kind of land planning has become critical. The evils of uncontrolled urban sprawl on the one hand, and the suburban and exurban pressure to exclude urban population on the other hand, have created a massive conflict, with social and economic implications of the gravest character. Throughout the nation the conflict has risen or threatened and solutions are being sought in careful, intensive examination of the problem affecting those within and those without the localities to be regulated.

The President's National Commission on Urban Problems has made relevant recommendations, the American Law Institute is engaged in drafting a model land development code, and, in this State, the Office of Planning Coordination is working on a planning code. The conflict has surfaced

in other States in efforts by municipalities to cut their own swaths in solving their difficulties, and, in every instance uncovered, the courts have struck down the efforts as unconstitutional or as invalid under enabling acts much like those in this State. Generally, there is the view that the conflict requires solution at a regional or State level, usually with local administration, and not by compounding the conflict with idiosyncratic municipal action.

The Ramapo ordinance flies in the face of and would frustrate these well-directed efforts.

Decisive of the present appeals, however, is the absence in the town of legislative authorization to postpone growth, let alone to establish unilaterally phased population levels, through the expedient of barring residential development for scheduled periods of up to 18 years. It has always been the rule that a municipality has only those land use powers delegated or necessarily implied (1 Anderson, American Law of Zoning, § 3.10). Existing enabling legislation does not grant the power upon which the Ramapo ordinance rests. And for policy reasons, one should not strain the reading of the enabling acts, even if straining would avail, to distort them, beyond any meaning ever attributed to them, except by the ingenious draftsmen of the Ramapo ordinance.

The enabling acts for the several classes of municipalities in the State are substantially alike. They followed the model acts drafted by the U. S. Department of Commerce in the 1920's, after an earlier zoning effort by New York City in 1916 (Report of National Commission on Urban Problems, p. 200; see L.1916, ch. 497). Since then they have been amended, usually in identical fashion, as the need for broader powers was envisaged and accepted. Article 16 of the Town Law is the enabling act for towns. Section 261 in pertinent part provides: "For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes;". This is a typical district zoning provision. It grants power to define permissible physical characteristics of land and structure; and says nothing about exercising control in time. The town would stretch the reference to "density of population" to give the town the powers it purports to exercise by the ordinance. Section 263, defining the purposes of district zoning, by any standard of statutory construction provides no help. The section reads: "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality." It does not broaden powers granted. Instead it is intended to be restrictive in two ways: first, by making certain that zoning regulations conform to a master plan; and second, by relating them directly to specified public purposes. In short, district zoning is permitted if, and only if, it is pursuant to a comprehensive plan and it serves the purposes listed.

Going beyond district zoning, the statute provides for subdivision platting (§ 276, et seq.). It does not provide support for the procedures essayed in the Ramapo ordinance. But what is important is that even intensive subdivision regulation was required to be authorized by statute before towns could control subdivision developers. Statutory authorization was all the more important because the then drastic regulation required the developers to provide private and public facilities for the wholesale distribution of homes and to provide moneys and bonds to make sure that they performed as promised. Notably, no developer is forbidden to develop for a period of years.

The urgent need to control the tempo and sequence of land development has been recognized by courts, government commissions, and commentators.

Techniques to control the rate, nature and sequence of community development are plentiful although not all are presently authorized or comport with constitutional limitations. Thus, in Albrecht Realty Co. v. Town of New Castle, 8 Misc.2d 255, 167 N.Y.S.2d 843, the Town of New Castle in Westchester County sought to control growth by placing a moratorium on the issuance of building permits for unspecified periods and with no apparent object other than controlling growth. The measure was voided because the enabling act did not authorize "a direct regulation of the rate of growth" (at p. 256, 167 N.Y.S.2d at p. 844). For another technique, in California the purchase of "development rights" or a time-limited easement by the local government reportedly has been employed. The community is saved the expense of purchasing the fee simple of the owner. It obtains flexibility by the power to release land for development while landowners are compensated. The method is also said to justify assessing or taxing the owner at a lower rate (see Cutler, *op. cit., supra,* at p. 394). A similar approach is followed in England and has been recently recommended by the President's National Commission on Urban Problems (Report, at p. 251; Mandelker, Notes from the English: Compensation in Town and County Planning, 49 Cal.L.Rev. 699; see, also, Ann., Zoning —— With Compensation, 41 ALR 3d 636).

A common technique is minimum area zoning. If it does not amount to prohibitory zoning, minimum lot requirements may be used to regulate the tempo and sequence of land development (see Matter of Josephs v. Town Bd. of Town of Clarkstown, 24 Misc.2d 366, 198 N.Y.S.2d 695). Unfortunately, however, the method is often used as an exclusionary or prohibitory device.

Finally, there is the technique sought to be exercised by Ramapo—a technique partaking somewhat of the motivation for and methods used in holding zones.

Holding zones, that is, areas reserved for future development, if legislatively authorized and carefully circumscribed, can validly and effectively implement land planning. Both the interests of localities and the broader interests of the State and its large metropolitan areas can be reconciled. Indeed, it has been suggested by the National Commission on Urban Problems that enabling legislation grant communities such power. The devising and authorization of new powers, one of which is to create holding or delayed development zones, is a chief concern of the State Office of Planning Coordination. Indeed, it plays a prominent role in its proposed legislation. Notably, in delayed development schemes limitations are invariably suggested, limitations absent in the Ramapo ordinance (e. g., 3- to 5-year limits, regional and State agency review, provision for compensation). Such limitations may be essential if the delegation is to be valid constitutionally. Aside from considerations of unlimited delegation, without the standards which universally circumscribe the conduct of administrative agencies, the limitations reflect basic doctrine that even the State's zoning power is not unlimited. As observed by the Pennsylvania Supreme Court, "Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future." "Communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels."

Either by legislation limited by decisional rule, or by decisional rule alone a limited amount of restraint in time has been held valid in controlling development, even without compensation. Thus, in the State of Washington it was suggested that the legislatively authorized right to impress "holding zones" on private property beyond the immediate reaches of present development, must be reasonably limited in its duration. Significantly, the time limitations should be brief, or reasonably fixed, and justified by emergency or statutory authorization.

It is not necessary now, as observed later, to confront the serious constitutional issues raised by mandatory delayed development. The crux of the matter in these cases is that before wrestling with the constitutional issues the Ramapo ordinance is destroyed at the threshold. It lacks statutory authorization, and this despite the fact that its reach is more ambitious than any before essayed even with enabling legislation.

By the unsupportable extrapolation from existing enabling acts, one may not usurp the unique responsibility of the Legislature, even where it has failed to act. What is worse, to do this, as a State Legislature would not, without considering the social and economic ramifications for the locality, region, and State, and without limitations essential to an intelligent delegation, is unsound as well as invalid. Moreover, to allow Ramapo's idiosyncratic solution, which would then be available to any other community like Ramapo, may end indefinitely the possibility of commanding better legislation for land planning, just because such legislation requires some diminution in the local control now exercised under the zoning acts.

There are, to be sure, the constitutional issues in the case. Some relate to the power of government to deprive the landowner of any reasonable use of his land for a period of years, up to 18 years, without compensation. These are knotty problems confronting the draftsmen of a land development code. The problems are not insuperable. The initial, principal land zoning case, Euclid v. Ambler Co., 272 U. S. 365, 47 S.Ct. 114, 71 L.Ed. 303, held rather flatly, as far back as 1926, that an owner may be made to suffer a substantial loss in the economic potential of his land without compensation. But it has always been made clear that an owner could not be deprived of all reasonable use nor could his use be postponed for more than a short time, even if only to prevent an overloading of municipal facilities

Be that as it may, for many reasons these constitutional issues are better reserved for future consideration. There is little doubt that the compulsion of current interests and conflicts will require a re-examination of much legal and judicial thinking in this area. The problem, however, is not only legal. As some students of the subject have pointed out, it is not enough to regulate land development. There must be incentive to develop, or else there will be little new housing except that which government could afford to build (Mandelker, The Zoning Dilemma, pp. 47–51). These are just some of the problems that the Ramapo ordinance glosses over as it attacks the problem for one town alone, a device that maybe a few more towns like Ramapo could adopt, but not all, without destroying the economy and channelling the demographic course of the State to suit their own insular interests.

At least one of the concurring opinions at the Appellate Division raised another constitutional question, namely, the power of the town to adjust tax assessments as provided in the ordinance. The point would be a salient one, if reached. It and the other constitutional questions need not and should not be reached because it is enough that the enabling acts do not permit the arrogation of power that the Ramapo ordinance projects.

Consequently, although the town had no power under the enabling act to adopt the ordinance in question, this does not mean that the town is not faced with a grave problem. It is. So are the many towns and villages in the State, and elsewhere in the country. But there is no doubt that the Ramapos, in isolation, cannot solve their problems alone, legally, under existing laws, or socially, politically, or economically. For the time being, the Ramapos must do what they can with district zoning and subdivision platting control. They may not declare moratoria on growth and development for as much as a generation. They may not separately or in concert impair the freedom of movement or residence of those outside their borders, even by ingenious schemes. Nor is it important whether their intention is to exclude, if that is the effect of their arrogated powers.

The exclusionary effect of local efforts to preserve the country's Edens has been largely noted. Professor Roberts, in an important essay, explores the conditions bedevilling places like Ramapo but also assesses the calamitous effects of ill-advised parochial devices (E. F. Roberts, The Demise of Property Law, 57 Cornell L.Rev. 1). The problems of development of the larger community run so deep, he suggests that: "'Snob zoning,' of course, may best be 'solved' by the legislature. This really is the lesson contained in *Girsh* which seems, moderately enough, to suggest that a regional planning mechanism should be devised to create a pluralist suburbia in which each class could find its proper place. More interest, however, is being generated by the notion of statewide land-use planning which presumably would allow each class its niche outside center city. Whether this interest in formulating state planning derives from a concern for the lower orders or reflects instead an irritation at the lack of order when a multitude of tiny hamlets makes any planning impossible, is difficult to tell." (at p. 37). To leave vital decisions controlling the mix and timing of development to the unfettered discretion of the local community invites disaster.

A glance at other legislation in this State reveals that regional or co-ordinated planning is not new to the Legislature, albeit the steps thus far taken may one day be regarded as quite primitive compared with what, necessarily, is to be. Article 12–B of the General Municipal Law, Consol.Laws, c. 24, contains a congeries of provisions authorizing optional metropolitan, regional, and county planning boards. Their powers are still rather limited. Perhaps most interesting is section 239–*l* of that article which authorizes a scheme for mandatory co-ordination in counties or regions of various kinds of zoning action by the included municipalities. The legislation is significant evidence of the activity and understanding of the Legislature in land use planning, into which Ramapo would thrust itself beyond the limits now authorized by law.

A glance at history suggests that Ramapo's plan to have public services installed in advance of development is unrealistic. Richard Babcock, the distinguished practitioner in land development law, some years ago addressed himself to the natural desire of communities to stay development while they caught up with the inexorable thrust of population growth and movement. He observed eloquently that this country was built and is still being built by people who moved about, innovated, pioneered, and created industry and employment, and thereby provided both the need and the means for the public services and facilities that followed (Babcock, The Zoning Game, at pp. 149–150). Thus, the movement has not been in the other direction, first the provision of public and utility services and then the building of homes, farms, and businesses. This court has said as much, in effect, in Westwood Forest Estates v. Village of South Nyack, 23 N.Y.2d 424, 297 N.Y.S.2d 129, 244 N.E.2d 700, *supra*) unanimously and in reliance on commonplace authority and precedent.

As said earlier, when the problem arose outside the State the judicial response has been the same, frustrating communities, intent on walling themselves from the mainstream of development, namely, that the effort was invalid under existing enabling acts or unconstitutional.

The response may not be charged to judicial conservatism or self-restraint. In short, it has not been illiberal. It has indeed reflected the larger understanding that American society is at a critical crossroads in the accommodation of urbanization and suburban living, with effects that are no longer confined, bad as they are, to ethnic exclusion or "snob" zoning. Ramapo would preserve its nature, delightful as that may be, but the supervening question is whether it alone may decide this or whether it must be decided by the larger community represented by the Legislature. Legally, politically, economically, and sociologically, the base for determination must be larger than that provided by the town fathers.

Accordingly, I dissent and vote to affirm the orders in both cases.

CONSTRUCTION INDUSTRY ASSOC. OF SONOMA CO. v. CITY OF PETALUMA
522 F.2d 897 (9th Cir. 1975)
cert.den., 424 U.S. 934 (1976)

The City of Petaluma (the City) appeals from a district court decision voiding as unconstitutional certain aspects of its five-year housing and zoning plan. We reverse.

Statement of Facts

The City is located in southern Sonoma County, about 40 miles north of San Franciso. In the 1950's and 1960's, Petaluma was a relatively self-sufficient town. It experienced a steady population growth from 10,315 in 1950 to 24,870 in 1970. Eventually, the City was drawn into the Bay Area metropolitan housing market as people working in San Francisco and San Rafael became willing to commute longer distances to secure relatively inexpensive housing available there. By November 1972, according to unofficial figures, Petaluma's population was at 30,500, a dramatic increase of almost 25 per cent in little over two years.

In 1970 and 1971, the years of the most rapid growth, demand for housing in the City was even greater than above indicated. Taking 1970 and 1971 together, builders won approval of a total of 2000 permits although only 1482 were actually completed by the end of 1971.

Alarmed by the accelerated rate of growth in 1970 and 1971, the demand for even more housing, and the sprawl of the City eastward, the City adopted a temporary freeze on development in early 1971. The construction and zoning change moratorium was intended to give the City Council and the City planners an opportunity to study the housing and zoning situation and to develop short and long range plans. The Council made specific findings with respect to housing patterns and availability in Petaluma, including the following: That from 1960–1970 housing had been in almost unvarying 6000 square-foot lots laid out in regular grid patterns; that there was a density of approximately 4.5 housing units per acre in the single-family home areas; that during 1960–1970, 88 per cent of housing permits issued were for single-family detached homes; that in 1970, 83 per cent of Petaluma's housing was single-family dwellings; that the bulk of recent development (largely single-family homes) occurred in the eastern portion of the City, causing a large deficiency in moderately priced multi-family and apartment units on the east side.

To correct the imbalance between single-family and multi-family dwellings, curb the sprawl of the City on the east, and retard the accelerating growth of the City, the Council in 1972 adopted several resolutions, which collectively are called the "Petaluma Plan" (the Plan).

The Plan, on its face limited to a five-year period (1972–1977),[1] fixes a housing development growth rate not to exceed 500 dwelling units per year.[2] Each dwelling unit represents approximately three people. The 500-unit figure is somewhat misleading, however, because it applies only to housing units (hereinafter referred to as "development-units") that are part of projects involving five units or more. Thus, the 500-unit figure does not reflect any housing and population growth due to construction of single-family homes or even four-unit apartment buildings not part of any larger project.

The Plan also positions a 200 foot wide "greenbelt" around the City,[3] to serve as a boundary for urban expansion for at least five years, and with respect to the east and north sides of the City, for perhaps ten to fifteen years. One of the most innovative features of the Plan is the Residential Development Control System which provides procedures and criteria for the award of the annual 500 development-unit permits. At the heart of the allocation procedure is an intricate point system, whereby a builder accumulates points for conformity by his projects with the City's general plan and environmental design plans, for good architectural design, and for providing low and moderate income dwelling units and various recreational facilities. The Plan further directs that allocations of building permits are to be divided as evenly as feasible between the west and east sections of the City and between single-family dwellings and multiple residential units (including rental units),[4] that the sections of the City closest to the center are to be developed first in order to cause "infilling" of vacant area, and that 8 to 12 per cent of the housing units approved be for low and moderate income persons.

In a provision of the Plan, intended to maintain the close-in rural space outside and surrounding Petaluma, the City solicited Sonoma County to establish stringent subdivision and appropriate acreage parcel controls for the areas outside the urban extension line of the City and to limit severely further residential infilling.

Purpose of the Plan

The purpose of the Plan is much disputed in this case. According to general statements in the Plan itself, the Plan was devised to ensure that "development in the next five years, will take place in a reasonable, orderly, attractive manner, rather than in a completely haphazard and unattractive manner." The controversial 500-unit limitation on residential development-units was adopted by the City "[i]n order to protect its small town character and surrounding open space." [5] The other features of the Plan were designed to encourage an east-west balance in development, to provide for variety in densities and building types and wide ranges in prices and rents, to ensure infilling of close-in vacant areas, and to prevent the sprawl of the City to the east and north. The Construction Industry Association of Sonoma County (the Association) argues and the district court found, however, that the Plan was primarily enacted "to limit Petaluma's demographic and market growth rate in housing and in the immigration of new residents." Construction Industry Assn. v. City of Petaluma, 375 F.Supp. 574, 576 (N.D.Cal.1974).

Market Demand and Effect of the Plan

In 1970 and 1971, housing permits were allotted at the rate of 1000 annually, and there was no indication that without some governmental control on growth consumer demand would subside or even remain at the 1000-unit per year level. Thus, if Petaluma had imposed a flat 500-unit limitation on *all* residential housing, the effect of the Plan would clearly be to retard to a substantial degree the natural growth rate of the City. Petaluma, however, did not apply the 500-unit limitation across the board, but instead exempted all projects of four units or less. Because appellees failed to introduce any evidence whatsoever as to the number of exempt units expected to be built during the five-year period, the effect of the 500 *development-unit* limitation on the natural growth in housing is uncertain. For purposes of this decision, however, we will assume that the 500 development-unit growth rate is in fact below the reasonably anticipated market demand for such units and that absent the Petaluma Plan, the City would grow at a faster rate.

According to undisputed expert testimony at trial, if the Plan (limiting housing starts to approximately 6 per cent of existing housing stock each year) were to be adopted by municipalities throughout the region, the impact on the housing market would be substantial. For the decade 1970 to 1980, the shortfall in needed housing in the region would be about 105,000 units (or 25 per cent of the units needed). Further, the aggregate effect of a proliferation of the Plan throughout the San Francisco region would be a decline in regional housing stock quality, a loss of the mobility of current and prospective residents and a deterioration in the quality and choice of housing available to income earners with real incomes of $14,000 per year or less. If, however, the Plan were considered by itself and with respect to Petaluma only, there is no evidence to suggest that there would be a deterioration in the quality and choice of housing available there to persons in the lower and middle income brackets. Actually, the Plan increases the availability of multi-family units (owner-occupied and rental units) and low-income units which were rarely constructed in the pre-Plan days.

Although we conclude that appellees lack standing to assert the rights of third parties, they nonetheless having standing to maintain claims based on violations of rights personal to them. Accordingly, appellees have standing to challenge the Petaluma Plan on the grounds asserted in their complaint that the Plan is arbitrary and thus violative of their due process rights guaranteed by the Fourteenth Amendment and that the Plan poses an unreasonable burden on interstate commerce. *See Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F.2d 956, 959 (1st Cir. 1972); *Sisters of Providence of St. Mary of the Woods v. City of Evanston,* 385 F.Supp. 396, 400 (N.D.Ill.1971). The fact that one of the Landowner's property lies wholly outside the present City boundaries and that the other's property lies mostly outside the boundaries is no bar to their challenging the City's Plan which has a direct, intended and immediate effect on the property. *See Scott v. City of Indian Wells,* 6 Cal.3d 541, 548–49, 99 Cal.Rptr. 745, 749–50, 492 P.2d 1137, 1141–42 (1972).

Other Challenges to the Plan

Although the district court rested its decision solely on the right to travel claim, all the facts and legal conclusions necessary to resolve appellees' other claims are part of the record. Thus, in order to promote judicial economy, we now dispose of the other challenges to the Plan. *See Blaney v. Florida National Bank at Orlando*, 357 F.2d 27, 28 (5th Cir. 1966); *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 697 (2d Cir. 1965), *cert. denied*, 383 U.S. 909, 86 S.Ct. 892, 15 L.Ed.2d 664 (1966).

Substantive Due Process

Appellees claim that the Plan is arbitrary and unreasonable and, thus, violative of the due process clause of the Fourteenth Amendment. According to appellees, the Plan is nothing more than an exclusionary zoning device,[10] designed solely to insulate Petaluma from the urban complex in which it finds itself. The Association and the Landowners reject, as falling outside the scope of any legitimate governmental interest, the City's avowed purposes in implementing the Plan—the preservation of Petaluma's small town character and the avoidance of the social and environmental problems caused by an uncontrolled growth rate.

In attacking the validity of the Plan, appellees rely heavily on the district court's finding that the express purpose and the actual effect of the Plan is to exclude substantial numbers of people who would otherwise elect to move to the City. 375 F.Supp. at 581. The existence of an exclusionary purpose and effect reflects, however, only *one* side of the zoning regulation. Practically all zoning restrictions have as a purpose and effect the *exclusion* of some activity or type of structure or a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose. We must determine further whether the *exclusion* bears any rational relationship to a *legitimate state interest*. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation.[12] The reasonableness, not the wisdom, of the Petaluma Plan is at issue in this suit.

It is well settled that zoning regulations "must find their justification in some aspect of the police power, asserted for the public welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926). The concept of the public welfare, however, is not limited to the regulation of noxious activities or dangerous structures. As the Court stated in *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954):

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

In determining whether the City's interest in preserving its small town character and in avoiding uncontrolled and rapid growth falls within the broad concept of "public welfare," we are considerably assisted by two recent cases. *Belle Terre, supra*, and *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974), each of which upheld as not unreasonable a zoning regulation much more restrictive than the Petaluma Plan, are dispositive of the due process issue in this case.

In *Belle Terre* the Supreme Court rejected numerous challenges to a village's restricting land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses or multiple-dwelling houses. By absolutely prohibiting the construction of or conversion of a building to other than single-family dwelling, the village ensured that it would never grow, if at all, much larger than its population of 700 living in 220 residences. Nonetheless, the Court found that the prohibition of boarding houses and other multi-family dwellings was reasonable and within the public welfare because such dwellings present urban problems, such as the occupation of a given space by more people, the increase in traffic and parked cars and the noise that comes with increased crowds.

While dissenting from the majority opinion in *Belle Terre* on the ground that the regulation unreasonably burdened the exercise of First Amendment associational rights, Mr. Justice Marshall concurred in the Court's express holding that a local entity's zoning power is extremely broad.

Following the *Belle Terre* decision, this court in *Los Altos Hills* had an opportunity to review a zoning ordinance providing that a housing lot shall be contain not less than one acre and that no lot shall be occupied by more than one primary dwelling unit. The ordinance as a practical matter prevented poor people from living in Los Altos Hills and restricted the density, and thus the population, of the town. This court, nonetheless, found that the ordinance was rationally related to a legitimate governmental interest—*the preservation of the town's rural environment*—and, thus, did not violate the equal protection clause of the Fourteenth Amendment. 503 F.2d at 254.

Both the Belle Terre ordinance and the Los Altos Hills regulation had the purpose and effect of permanently restricting growth; nonetheless, the court in each case upheld the particular law before it on the ground that the regulation served a legitimate governmental interest falling within the concept of the public welfare: the preservation of quiet family neighborhoods (Belle Terre) and the preservation of a rural environment (Los Altos Hills). Even less restrictive or exclusionary than the above zoning ordinances is the Petaluma Plan which, unlike those ordinances, does not freeze the population at present or near-present levels. Further, unlike the Los Altos Hills ordinance and the various zoning regulations struck down by state courts in recent years, the Petaluma Plan does not have the undesirable effect of walling out any particular income class nor any racial minority group.

Although we assume that some persons desirous of living in Petaluma will be excluded under the housing permit limitation and that, thus, the Plan may frustrate some legitimate regional housing needs, the Plan is not arbitrary or unreasonable. We agree with appellees that unlike the situation in the past most municipalities today are neither isolated nor wholly independent from neighboring municipalities and that, consequently, unilateral land use decisions by one local entity affect the needs and resources of an entire region.

It does not necessarily follow, however, that the *due process* rights of builders and landowners are violated merely because a local entity exercises in its own self-interest the police power lawfully delegated to it by the state. *See Belle Terre, supra; Los Altos Hills, supra.* If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. As stated *supra*, the federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests. *See* Note, *supra*, at 608–11.

We conclude therefore that under *Belle Terre* and *Los Altos Hills* the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.

Commerce Clause

The district court found that housing in Petaluma and the surrounding areas is produced substantially through goods and services in interstate commerce and that curtailment of residential growth in Petaluma will cause serious dislocation to commerce. 375 F.Supp. at 577, 579. Our ruling today, however, that the Petaluma Plan represents a reasonable and legitimate exercise of the police power obviates the necessity of remanding the case for consideration of appellees' claim that the Plan unreasonably burdens interstate commerce.

Consequently, since the local regulation here is rationally related to the social and environmental welfare of the community and does not discriminate against interstate commerce or operate to disrupt its required uniformity, appellees' claim that the Plan unreasonably burdens commerce must fail.

Reversed.

ASSOCIATED HOME BUILDERS OF THE GREATER EASTBAY, INC. v. CITY OF LIVERMORE, No. S.F. 23222 (557 P.2d 473, 135 Cal. Rptr.41) (Cal.Sup.Ct. Dec. 17, 1976)

We face today the question of the validity of an initiative ordinance enacted by the voters of the City of Livermore which prohibits issuance of further residential building permits until local educational, sewage disposal, and water supply facilities comply with specified standards.[1] Plaintiff, an association of contractors, subdividers, and other persons interested in residential construction in Livermore, brought this suit to enjoin enforcement of the ordinance. The superior court issued a permanent injunction, and the city appealed.

In *Hurst v. City of Burlingame* (1929) 207 Cal. 134, 277 P. 308, we held that statutes requiring notice and hearing to precede enactment of municipal zoning and land use ordinances applied to initiatives, a holding which effectively denied voters of general law cities the power to enact such legislation by initiative. In accord with that precedent, the trial court here held that Livermore, as a general law city, lacked authority to enact the initiative ordinance at issue. We have concluded, however, that *Hurst* was incorrectly decided; the statutory notice and hearing provisions govern only ordinances enacted by city council action and do not limit the power of municipal electors, reserved to them by the state Constitution, to enact legislation by initiative. We therefore reverse the trial court holding on this issue.

We also reject the trial court's alternative holding that the ordinance is unconstitutionally vague. By interpreting the ordinance to incorporate standards established by the Livermore Valley Joint School District and the Regional Water Quality Control Board, we render its terms sufficiently specific to comply with constitutional requisites. The failure of the ordinance to designate the person or agency who determines when its standards have been fulfilled does not make it unconstitutionally vague; the duty to enforce the ordinance reposes in the city's building inspector, whose decisions are subject to judicial review by writ of mandamus.

Finally, we reject plaintiff's suggestion that we sustain the trial court's injunction on the ground that the ordinance unconstitutionally attempts to bar immigration to Livermore. Plaintiff's contention symbolizes the growing conflict between the efforts of suburban communities to check disorderly development, with its concomitant problems of air and water pollution and inadequate public facilities, and the increasing public need for adequate housing opportunities. We take this opportunity, therefore, to reaffirm and clarify the principles which govern validity of land use ordinances which substantially limit immigration into a community; we hold that such ordinances need not be sustained by a compelling state interest, but are constitutional if they are reasonably related to the welfare of the region affected by the ordinance. Since on the limited record before us plaintiff has not demonstrated that the Livermore ordinance lacks a reasonable relationship to the regional welfare, we cannot hold the ordinance unconstitutional under this standard.

1. *Summary of proceedings.*

The initiative ordinance in question was enacted by a majority of the voters at the Livermore municipal election of April 11, 1972, and became effective on April 28, 1972. The ordinance, set out in full in the margin,[2] states that it was enacted to fur-

1. For the history of the events leading to the enactment of the Livermore ordinance see Stanford Environmental Law Society, A Handbook for Controlling Local Growth (1973) pages 90-96; Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California* (1974) 15 Santa Clara Law. 1, 12-14.

2. The initiative provides as follows:

"INITIATIVE ORDINANCE RE BUILDING PERMITS

"An ordinance to control residential building permits in the City of Livermore:

"A. The people of the City of Livermore hereby find and declare that it is in the best interest of the City in order to protect the health, safety, and general welfare of the citizens of the city, to control residential building permits in the said city. Residential building permits include single-family residential, multiple residential, and trailer court building permits within the meaning of the City Code of Livermore and the General Plan of Livermore. Additionally, it is the purpose of this initiative measure to contribute to the solution of air pollution in the City of Livermore.

"B. The specific reasons for the proposed position are that the undersigned believe

ther the health, safety, and welfare of the citizens of Livermore and to contribute to the solution of air pollution. Finding that excessive issuance of residential building permits has caused school overcrowding, sewage pollution, and water rationing, the ordinance prohibits issuance of further permits until three standards are met: "1. EDUCATIONAL FACILITIES—No double sessions in the schools nor overcrowded classrooms as determined by the California Education Code. 2. SEWAGE—The sewage treatment facilities and capacities meet the standards set by the Regional Water Quality Control Board. 3. WATER SUPPLY—No rationing of water with respect to human consumption or irrigation and adequate water reserves for fire protection exist."

Plaintiff association filed suit to enjoin enforcement of the ordinance and for declaratory relief. After the city filed its answer, all parties moved for judgment on the pleadings and stipulated that the court, upon the pleadings and other documents submitted, could determine the merits of the cause. On the basis of that stipulation the court rendered findings and entered judgment for plaintiff. The city appeals from that judgment.

2. *The enactment of the Livermore ordinance by initiative does not violate the state zoning law.*

The superior court found that the initiative ordinance was adopted "without complying with the statutes . . . governing general law cities," specifically Government Code sections 65853 through 65857. These sections provide that any ordinance which changes zoning or imposes a land use restriction listed in Government Code section 65850 can be enacted only after noticed hearing before the city's planning commission and legislative body.[3] The superior court concluded that notice and hearing must precede enactment of any ordinance regulating land use. Since Livermore passed its ordinance pursuant to the procedures specified in the statutes governing municipal initiatives (Elec.Code, § 4000 et seq.), which do not provide for hearings before the city planning commission or council, the court held the ordinance invalid.

The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's.[4] Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them.[5] Declaring it "the duty of the courts to jealously guard the right of the people" (*Martin v. Smith* (1959) 176 Cal.App.2d 115, 117, 1 Cal.Rptr. 307, 309), the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process." (*Mervynne v. Acker, supra*, 189 Cal.App.2d 558, 563, 11 Cal.Rptr. 340, 344). "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."

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that the resulting impact from issuing residential building permits at the current rate results in the following problems mentioned below. Therefore no further residential permits are to be issued by the said city until satisfactory solutions, as determined in the standards set forth, exist to all the following problems:

"1. EDUCATIONAL FACILITIES—No double sessions in the schools nor overcrowded classrooms as determined by the California Education Code.

"2. SEWAGE—The sewage treatment facilities and capacities meet the standards set by the Regional Water Quality Control Board.

"3. WATER SUPPLY—No rationing of water with respect to human consumption or irrigation and adequate water reserves for fire protection exist.

"C. This ordinance may only be amended or repealed by the voters at a regular municipal election.

"D. If any portion of this ordinance is declared invalid the remaining portions are to be considered valid."

3. Government Code section 65853 provides in part that: "A zoning ordinance or an amendment to a zoning ordinance, which amendment changes any property from one zone to another or imposes any regulation listed in Section 65850 not theretofore imposed or removes or modifies any such regulation therefore imposed shall be adopted in the manner set forth in Sections 65854 to 65857, inclusive. Any other amendment to a zoning ordinance may be adopted as other ordinances are adopted." Section 65854 provides for notice and hearing before the planning commission. Section 65855 requires the commission to render a written recommendation to the city legislative body. Section 65856 requires a noticed public hearing before the legislative body. Finally, section 65857 authorizes the city legislative body to approve, modify, or disapprove the ordinance, but provides that no modification of the ordinance not previously considered by the planning commission can be adopted without first referring that matter to the commission.

4. See Note, *The Scope of the Initiative and Referendum in California* (1966) 54 Cal.L.Rev. 1717.

5. See *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court* (1974) 13 Cal.3d 225, 231, 118 Cal.Rptr. 158, 529 P.2d 582; *Blotter v. Farrell* (1954) 42 Cal.2d 804, 809, 270 P.2d 481; *Ley v. Dominguez* (1931) 212 Cal. 587, 593, 299 P. 713; *Dwyer v. City Council* (1927) 200 Cal. 525, 513, 253 P. 932; *Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 258, 101 Cal.Rptr. 628; *Mervynne v. Acker* (1961) 189 Cal.App.2d 558, 563, 11 Cal.Rptr. 340.

(*Mervynne v. Acker, supra*, 189 Cal.App.2d 558, 563 564, 11 Cal.Rptr. 340, 344; *Gayle v. Hamm, supra*, 25 Cal.App.3d 250, 258, 101 Cal.Rptr. 628.)[6]

The 1911 amendment, in reserving the right of initiative to electors of counties and cities, authorized the Legislature to establish procedures to facilitate the exercise of that right.[7] Accordingly the Legislature enacted statutes, now codified as sections 4000-4023 of the Election Code, providing for the circulation of petitions, the calling of elections, and other procedures required to enact an initiative measure.

The 1911 amendment was first applied to zoning matters in 1927 in *Dwyer v. City Council, supra*, 200 Cal. 505, 253 P. 932, in which the court mandated the Berkeley City Council to submit a zoning ordinance to referendum. The opinion reasoned that since the city council had the legislative authority to enact zoning ordinances, the people had the power to do so by initiative or referendum. Rejecting an argument that the referendum procedure denied affected persons the right, granted them by municipal ordinance, to appear before the city council and state their views on the ordinance, the court replied that "the matter has been removed from the forum of the Council to the forum of the electorate. The proponents and opponents are given all the privileges and rights to express themselves in an open election that a democracy or republican form of government can afford to its citizens . . . . It is clear that the constitutional right reserved by the people to submit legislative questions to a direct vote cannot be abridged by any procedural requirements . . . ." (200 Cal. at p. 516, 253 P. at p. 936.)

Two years later the court decided *Hurst v. City of Burlingame, supra*, 207 Cal. 134, 277 P. 308, the decision on which the trial court in the instant case based its ruling. The City of Burlingame had enacted by initiative a city-wide zoning ordinance which classified as residential the property where plaintiff had a retail store. Contending that he had been denied the right to a public hearing established in the Zoning Act of 1917 (Stats.1917, p. 1419), plaintiff sued to enjoin enforcement of the ordinance. Beginning with the premise that "an ordinance proposed by the electors of a county or of a city in this state under the initiative law must constitute such legislation as the legislative body of such county or city has the power to enact . . . ." (207 Cal. at p. 140, 277 P. at p. 311), the *Hurst* court reasoned that since the board of trustees of the City of Burlingame could not lawfully enact a zoning ordinance without complying with the hearing requirement of the state law, the voters could not adopt such an ordinance by initiative.

Responding to the argument that the enactment of the ordinance complied with the state initiative law, the court stated that "The initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance. The Zoning Act is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative, which is general in its scope." (P. 141, 277 P. at p. 311.) Finally, the court distinguished *Dwyer v. City Council, supra*, 200 Cal. 505, 253 P. 932, on the ground that *Dwyer* upheld a referendum, and thus persons affected by the referendum had already been granted a right to notice and hearing at the time of the original enactment of the ordinance. (See 207 Cal. p. 142, 277 P. 308.)

Although *Hurst* thus held the Burlingame initiative invalid for noncompliance with the state zoning law, the court added a constitutional dictum, asserting that "the statutory notice and hearing . . . . becomes necessary in order to satisfy the requirements of due process . . . ." (P. 141, 277 P. at p. 311.) In later years this constitutional dictum overshadowed the statutory holding of *Hurst*. Courts and commentators alike questioned *Hurst's* statutory holding,[8] but reexamination of that holding seemed pointless if the landowner's right to notice and hearing derived from constitutional compulsion independent of statute.[9]

Two years ago, however, in *San Diego Bldg. Contractors Assn. v. City Council*

6. See *Farley v. Healey* (1967) 67 Cal.2d 325, 328, 62 Cal.Rptr. 26, 431 P.2d 650; *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332, 196 P.2d 787; *Gage v. Jordan* (1944) 23 Cal.2d 794, 799, 147 P.2d 387; cf. *Hunt v. Mayor & Council of Riverside* (1948) 31 Cal.2d 619, 628, 191 P.2d 426 (referendum).

7. The initiative and referendum amendment, formerly article IV, section 1, of the California Constitution, stated in part that "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law. . . . This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." This language was repealed in 1966 and replaced by article IV, section 25, which provides that "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide."

8. See *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 65, 107 Cal.Rptr. 214; *Bayless v. Limber* (1972) 26 Cal.App.3d 463, 469, footnote 5, 102 Cal.Rptr. 647; Hagman et al., California Zoning Practice (Cont.Ed.Bar 1969) page 105.

9. See discussion in *Taschner v. City Council*, supra, 31 Cal.App.3d 48, 65, 107 Cal.Rptr. 214.

(1974) 13 Cal.3d 205, 216, 118 Cal.Rptr. 146, 529 P.2d 570 (app. dismissed, —— U.S. ——, 96 S.Ct. 3184, 49 L.Ed.2d —— (1976) we expressly disapproved the constitutional dictum of *Hurst* and later decisions. We held that a city violates no constitutional prohibition in enacting a zoning ordinance without notice and hearing to landowners, and hence may do so by initiative. (13 Cal.3d at pp. 217-218, 118 Cal.Rptr. 146, 529 P.2d 570.) That decision clears the way for a long-needed reconsideration of the actual holding of *Hurst* that bars a general law city from enacting a zoning ordinance by initiative.

At first glance it becomes apparent that something must be wrong with the reasoning in *Hurst*. Starting from a premise of equality—that the voters possess only the same legislative authority as does the city council—*Hurst* arrived at the conclusion that only the council and not the voters had the authority to enact zoning measures. Thus in the name of equality *Hurst* decrees inequality. The errors which lead to this non-sequitur appear after further analysis.

First, *Hurst*, erroneously contriving a conflict between state zoning statutes and the initiative law, set out to resolve that presumed conflict.[10] No conflict occurs, however; the Legislature never intended the notice and hearing requirements of the zoning law to apply to the enactment of zoning initiatives. (See Comment, *The Initiative and Referendum's Use in Zoning* (1976) 64 Cal.L.Rev. 74, 104-105.) The Legislature plainly drafted the questioned provisions of the zoning law with a view to ordinances adopted by vote of the city council; the provisions merely add certain additional procedural requirements to those already specified in Government Code sections 36931-36937 for the enactment of ordinances in general. Procedural requirements which govern *council* action, however, generally do not apply to initiatives,[11] any more than the provisions of the initiative law govern the enactment of ordinances in council. No one would contend, for example, that an initiative of the people failed because a quorum of councilmen had not voted upon it, any more than one would contend that an ordinary ordinance of a council failed because a majority of voters had not voted upon it.

In the second place, *Hurst*, in treating the case as one involving a conflict between two statutes of equal status—the zoning law and the initiative law—overlooked a crucial distinction: that although the procedures for exercise of the right of initiative are spelled out in the initiative law, the right itself is guaranteed by the Constitution. The 1911 constitutional amendment, in reserving the right of initiative on behalf of municipal voters, stated that "This section is self-executing, but legislation may be enacted to facilitate its operation, *but in no way limiting or restricting* either the provisions of this section or *the powers herein reserved.*" (Former Cal. Const., art. IV, § 1.) (Emphasis added.)[12] Although the Legislature can specify the manner in which general law cities enact ordinances restricting land use,[13] legislation which permits council action but effectively bars initiative action may run afoul of the 1911 amendment. (See Comment, *op. cit., supra*, 64 Cal.L.Rev. 74, 102.) Thus the notice and hearing provisions of the state zoning law, if interpreted to bar initiative land use ordinances, would be of doubtful constitutionality; all such doubt dissolves in the light of an interpretation which limits those requirements to ordinances enacted

10. "The fundamental test as to whether statutes are in conflict with each other is the legislative intent. If it appears that the statutes were designed for different purposes, they are not irreconcilable, and may stand together." (*People v. Lustman* (1970) 13 Cal.App.3d 278, 288, 91 Cal.Rptr. 548, 555; *Rudman v. Superior Court* (1973) 36 Cal.App.3d 22, 27, 111 Cal. Rptr. 249.)

11. See *Blotter v. Farrell, supra*, 42 Cal.2d 804, 270 P.2d 481; *Bayless v. Limber, supra*, 26 Cal.App.3d 463, 469, footnote 5, 102 Cal.Rptr. 647.

In *Galvin v. Board of Supervisors* (1925) 195 Cal. 686, 235 P. 450, we held that the County of Contra Costa could not by initiative award a franchise for a toll bridge spanning navigable waters to neighboring Solano County without complying with statutory requirements for advance approval by the state engineer and a public hearing. The exceptional character of the statute involved in *Galvin*, which permitted one county to legislate on a matter which otherwise might require joint action of the state and both the counties affected, but permitted that action only if the legislating county complied with requirements designed to protect the interests of the state and the neighboring county, distinguishes *Galvin* from the present case.

12. Article IV of the California Constitution was revised in 1966. The right of municipal initiative now appears in section 25, which states simply that "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide." The 1966 constitutional revision was intended solely to shorten and simplify the Constitution, deleting unnecessary provisions; it did not enact any substantive change in the power of the Legislature and the people. The drafters of the revision expressly stated that they proposed deletion of the clauses barring the Legislature from restricting the reserved power of municipal initiative solely on the ground that it was surplusage, and that the deletion would be made "without, in the end result, changing the meaning of the provisions." (Cal.Const. Revision Com. (1966) Proposed Revision of the Cal.Const., pp. 49-50.)

13. Article XI, section 2 of the California Constitution authorizes the Legislature to "provide for city powers"; article XI, section 7 states that a "city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws.*" (Emphasis added.)

by city councils.

The fact that the zoning law is a special statute will not support *Hurst*; special legislation is still subject to constitutional limitations. If, for example, a "special" statute were enacted prohibiting criticism of a named official, such as the Vice-President, it would not be deemed controlling over the First Amendment on the ground that the latter is "general in its scope." Indeed if the constitutional power reserved by the people can be abridged by special statutes, then by enacting a host of special statutes the Legislature could totally abrogate that power.

Finally, *Hurst* erred in distinguishing *Dwyer v. City Council, supra*, 200 Cal. 505, 253 P. 932, on the ground that *Dwyer* involved a referendum on a zoning ordinance; as *Dwyer* itself pointed out, "if the right of referendum can be invoked, the corollary right to initiate legislation must be conceded to exist." (200 Cal. at p. 511, 253 P. at p. 934.)

Thus both precedent and established principles of judicial construction dictate the conclusion that *Hurst* erred in holding the notice and hearing provisions of the Zoning Act of 1917 applied to zoning ordinances enacted by initiative. Resting upon the precepts that statutes which are apparently in conflict should, if reasonably possible, be reconciled (see, e. g., *Warne v. Harkness* (1963) 60 Cal.2d 579, 588, 35 Cal.Rptr. 601, 387 P.2d 377; *Pacific Motor Transport Co. v. State Bd. of Equalization* (1972) 28 Cal.App.3d 230, 235, 104 Cal.Rptr. 558); that a statute should be construed to "eliminate . . . doubts as to the provision's constitutionality" (*In re Kay* (1970) 1 Cal.3d 930, 942, 83 Cal.Rptr. 686, 694, 464 P.2d 142, 150); that the initiative power must be broadly construed, resolving all doubts in favor of the reserved power (see cases cited p. 45 of 135 Cal.Rptr., pp. ——— of ——— P.2d, *ante*, and fn. 6), we resolve that *Hurst v. Burlingame, supra*, 207 Cal. 134, 277 P. 308, was incorrectly decided and is therefore overruled.[14]

The notice and hearing provisions of the present zoning law (Gov.Code, §§ 65853–65857), like the provisions of the 1911 law before the *Hurst* court, make no mention of zoning by initiative. The procedures they prescribe refer only to action by the city council, and are inconsistent with the regulations that the Legislature has established to govern enactment of initiatives. For the reasons stated in our discussion of *Hurst v. Burlingame, supra*, we conclude that sections 65853–65857 do not apply to initiative action, and that the Livermore ordinance is not invalid for noncompliance with those sections.

3. *The Livermore ordinance is not void for vagueness.*

The trial court found the ordinance unconstitutionally vague on two grounds: (1) that the ordinance did not contain sufficiently specific standards for the issuance or denial of building permits; and (2) that it did not specify what person or agency was empowered to determine if the ordinance's standards have been met. We disagree with both rationales and find the ordinance sufficiently specific to fulfill constitutional requirements.

The controversy concerning the specificity of the ordinance centers upon the standard as to education. The ordinance prohibits issuance of residential building permits until a "satisfactory solution" has been evolved to the problem of "Educational Facilities"; it defines a satisfactory solution as one characterized by "No double sessions in the schools nor overcrowded classrooms as determined by the California Education Code."

The term "double sessions" is sufficiently specific; as stated by Professor Deutsch, it "can be defined by reference to common practice, since the term is frequently used to refer to a situation where different groups of students in the same grade are attending the same school at different times of the day because of a lack of space." (Deutsch, *op. cit., supra*, pp. 22–23.) The phrase "overcrowded classrooms as determined by the California Education Code," however, is less clear, since nowhere in the Education Code does there appear a definition of "overcrowded classrooms."

The City of Livermore, however, points out that the ordinance does not refer to a definition of "overcrowded classrooms" con-

14. We also disapprove language in the following decisions which, relying on *Hurst v. City of Burlingame, supra*, assert that general law cities cannot adopt zoning ordinances by initiative: *Johnston v. City of Claremont* (1958) 49 Cal.2d 826, 837, 323 P.2d 71 (dictum); *Taschner v. City Council, supra*, 31 Cal.App.3d 48, 61–65, 107 Cal.Rptr. 214; *People's Lobby, Inc. v. Board of Supervisors* (1973) 30 Cal.App.3d 869, 872–873, 106 Cal.Rptr. 666; *Laguna Beach Taxpayers' Assn. v. City Council* (1960) 187 Cal.App.2d 412, 415, 9 Cal.Rptr. 775.

We distinguish those decisions which bar the use of the initiative and referendum in a situation in which the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state. (*Housing Authority v. Superior Court* (1950) 35 Cal.2d 550, 219 P.2d 457; *Simpson v. Hite* (1950) 36 Cal.2d 125, 222 P.2d 225; *Riedman v. Brison* (1933) 217 Cal. 383, 18 P.2d 947; cf. *Hughes v. City of Lincoln* (1965) 232 Cal.App.2d 741, 43 Cal.Rptr. 306.) In enacting the instant ordinance, the voters of Livermore were acting in a legislative, not an administrative, capacity. (See *San Diego Bldg. Contractors Assn. v. City Council, supra*, 13 Cal.3d 205, 212–213, fn. 5, 118 Cal.Rptr. 146, 529 P.2d 570.)

tained in the Education Code, but to a *determination* of that subject. The language, it contends—and plaintiff does not dispute the contention—was intended to refer to resolution 3220, adopted by the board of the Livermore Valley Joint School District on January 18, 1972, in which that board, pursuant to authority granted it by Education Code section 1052, established clear and specific standards for determining whether schools are overcrowded.[15]

Rather than interpret the ordinance in a manner which would expose it to the charge of unconstitutional vagueness, we adopt the suggestion of the city and construe the ordinance's standard on education to incorporate the specific guidelines established in board resolution 3220. In so doing we conform to the rule that enactments should be interpreted when possible to uphold their validity (see *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 948, 92 Cal.Rptr. 309, 479 P.2d 669), and the corollary principle that courts should construe enactments to give specific content to terms that might otherwise be unconstitutionally vague. (See *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 127 Cal. Rptr. 317, 545 P.2d 229; *In re Kay, supra*, 1 Cal.3d 930, 83 Cal.Rptr. 686, 464 P.2d 142.)

Our decision in *Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 109 Cal.Rptr. 897, 514 P.2d 697, illustrates the principle and provides a close analogy to the present case. In *Braxton*, we construed Penal Code section 626.4, which authorized a state college or university to bar from its campus anyone who had "disrupted" the orderly operation of the campus. Defendants argued that the term "disrupted" was unconstitutionally vague. We determined, however, that the Legislature had intended to authorize banishment only of persons who had violated other more specific criminal statutes. Although section 626.4 did not expressly refer to such other statutes, we interpreted section 626.4 to incorporate the specific standards set out in those statutes in order to uphold the constitutionality of the section. (10 Cal.3d at p. 152, 109 Cal. Rptr. 897, 514 P.2d 697.)

Following the course suggested by *Braxton*, we construe the Livermore ordinance to incorporate the standards for determining the overcrowded condition of schools contained in the school board resolution of January 18, 1972. So construed, the ordinance provides a clear and ascertainable educational standard to guide the issuance or denial of a building permit, and is not void for vagueness.

The ordinance's standards relating to sewage and water supply present no constitutional difficulties. The sewage provision incorporates the "standards set by the Regional Water Quality Control Board"; that agency has in fact established specific and detailed standards of water purification and sewage disposal.[16] The water supply provision describes a "satisfactory solution" as one in which water is not rationed, and "adequate water reserves for fire protection exist." The existence of rationing is an objective fact which can be ascertained by inquiry to the agencies having authority to ration.[17] Although individuals may differ as to the adequacy of reserves for fire protection, the considered judgment of the agencies responsible for fire protection would provide a reliable guide.

Although we have determined that the ordinance's standards meet constitutional requirements of certainty, plaintiff argues, and the trial court held, that the ordinance is void because it fails to designate what agency or person determines whether these

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15. Board Resolution 3220 provides as follows:

"*ADEQUACY OF SCHOOLS*

"1. Sufficient instructional space shall be determined to exist when:

a. For elementary schools:

(1) All students can be housed in single session classes in affected schools.

(2) At least 900 square feet of functional instructional area are available for each classroom or teaching station.

(3) Class sizes average 30 students or less throughout the District.

b. For secondary schools:

(1) All students can be housed within the capacity of existing schools on regular day session. Capacity will be determined by applying State Department of Education criteria in keeping with Maximum class size.

"2. Minimum support services exist when:

a. Sufficient shelf and cabinet space is provided to accommodate books and equipment normally associated with a classroom.

b. A faculty workroom exists.

c. Off-street parking for 1½ cars per teaching station is provided.

d. Sufficient playground area and playground equipment is provided to support outdoor play activity.

e. Sufficient furniture and equipment for each classroom to accommodate all students and teachers.

f. A library is established equivalent to at least one classroom for each 600 students.

"3. School construction and outfitting, in terms of classroom space, architectural layout, space relationship, outdoor facilities, utilities, grounds development, and furniture and equipment, shall meet or exceed State Bureau of Education standards."

16. A statute otherwise uncertain "will be upheld if its terms may be made reasonably certain by reference to other definable sources." (*American Civil Liberties Union v. Board of Education* (1963) 59 Cal.2d 203, 218, 28 Cal. Rptr. 700, 709, 379 P.2d 4, 13.)

17. Professor Deutsch has suggested that absence of rationing is not a realistic measure of the adequacy of water supplies in Northern California where seasonal scarcity often requires rationing. (Deutsch, *op. cit., supra*, 15 Santa Clara Law. 1, 23.) Plaintiffs in the present case, however, do not contend that the standards established in the ordinance are arbitrary or unreasonable.

standards have been achieved. We question plaintiff's underlying assumption that an ordinance or statute is void if it does not specify on its face the agency that is to adjudge disputes concerning its application; by such a test most of the civil and criminal laws of this state would be invalidated. In any event, we believe that the Livermore ordinance, read in the light of the structure of Livermore's city government and the applicable judicial decisions, does indicate the method by which disagreements concerning the ordinance's standards are resolved.

The Livermore ordinance establishes standards to govern the issuance or denial of residential building permits. These standards must be directed in the first instance to the city building inspector, the official charged with the duty of issuing or denying such permits. Since the duties of this official are ministerial in character, his decisions can be reviewed by writ of mandamus. (*McCombs v. Larson* (1959) 176 Cal.App.2d 105, 107, 1 Cal.Rptr. 140; *Palmer v. Fox* (1953) 118 Cal.App.2d 453, 258 P.2d 30.) Thus the ultimate decision as to compliance with the standards will be rendered by the courts. (See generally Hagman et al., Cal. Zoning Practice (Cont.Ed.Bar 1969) § 12.4.)

4. *On the limited record before us, plaintiff cannot demonstrate that the Livermore ordinance is not a constitutional exercise of the city's police power.*

Plaintiff urges that we affirm the trial court's injunction on a ground which it raised below, but upon which the trial court did not rely. Plaintiff contends that the ordinance proposes, and will cause, the prevention of nonresidents from migrating to Livermore, and that the ordinance therefore attempts an unconstitutional exercise of the police power, both because no compelling state interest justifies its infringement upon the migrant's constitutionally protected right to travel, and because it exceeds the police power of the municipality.[18]

The ordinance on its face imposes no absolute prohibition or limitation upon population growth or residential construction. It does provide that no building permits will issue unless standards for educational facilities, water supply and sewage disposal have been met, but plaintiff presented no evidence to show that the ordinance's standards were unreasonable or unrelated to their apparent objectives of protecting the public health and welfare. Thus, we do not here confront the question of the constitutionality of an ordinance which limits or bars population growth either directly in express language or indirectly by the imposition of prohibitory standards; we adjudicate only the validity of an ordinance limiting building permits in accord with standards that reasonably measure the adequacy of public services.

As we shall explain, the limited record here prevents us from resolving that constitutional issue. We deal here with a case in which a land use ordinance is challenged solely on the ground that it assertedly exceeds the municipality's authority under the police power; the challenger eschews any claim that the ordinance discriminates on a basis of race or wealth. Under such circumstances, we view the past decisions of this court and the federal courts as establishing the following standard: the land use restriction withstands constitutional attack if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare. For the guidance of the trial court we point out that if a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region. We explain the process by which the court can determine whether or not such a restriction reasonably relates to the regional welfare. Since the record in the present case is limited to the pleadings and stipulations, and is devoid of evidence concerning the probable impact and duration of the ordinance's restrictions, we conclude that we cannot now adjudicate the constitutionality of the ordinance. Thus we cannot sustain the trial court judgment on the ground that the ordinance exceeds the city's authority under the police power; that issue can be resolved only after trial.

We turn now to consider plaintiff's arguments in greater detail. Seeking to capitalize upon the absence of an evidentiary record, plaintiff contends that the challenged ordinance must be subjected to strict judicial scrutiny; that it can be sustained only upon a showing of a compelling interest, and that the city has failed to make that showing.

Many writers have contended that exclusionary land use ordinances tend primarily to exclude racial minorities and the poor, and on that account should be subject to

18. Plaintiff does not contend that the ordinance constitutes an inverse condemnation of property (compare *Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606), that it unreasonably burdens interstate commerce (compare *Construction Ind. Assn., Sonoma City. v. City of Petaluma* (9th Cir. 1975) 522 F.2d 897, 909) or that it denies the equal protection of the laws either to landowners (compare *Town of Los Altos Hills v. Adobe Creek Properties, Inc.* (1973) 32 Cal.App.3d 488, 108 Cal.Rptr. 271) or to migrants (compare *Ybarra v. City of Town of Los Altos Hills* (9th Cir. 1974) 503 F.2d 250).

strict judicial scrutiny. (See e. g., Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls* (1971) 22 Syracuse L.Rev. 509; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent* (1969) 21 Stan.L. Rev. 767; Note, *op. cit., supra*, 26 Stan.L. Rev. 585, 597, fn. 45 and authorities there cited; Note, *The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge* (1971) 81 Yale L.J. 61.) These writers, however, are concerned primarily with ordinances which ban or limit less expensive forms of housing while permitting expensive single family residences on large lots. The Livermore ordinance is not made from this mold; it impartially bans all residential construction, expensive or inexpensive. Consequently plaintiff at bar has eschewed reliance upon any claim that the ordinance discriminates on a basis of race or wealth.

Plaintiff's contention that the Livermore ordinance must be tested by a standard of strict scrutiny, and can be sustained only upon a showing of a compelling state interest, thus rests solely on plaintiff's assertion that the ordinance abridges a constitutionally protected right to travel. As we shall explain, however, the indirect burden imposed on the right to travel by the ordinance does not warrant application of the plaintiff's asserted standard of "compelling interest." [19]

In asserting that legislation which burdens a right to travel requires strict scrutiny, and can be sustained only upon proof of compelling need, plaintiff relies on recent decisions of this court (*In re King* (1970) 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983) and the United States Supreme Court (*Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306; *Dunn v. Blumstein* (1972) 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274; *Shapiro v. Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600). The legislation held invalid by those decisions, however, directly burdened the right to travel by distinguishing between nonresidents or newly arrived residents on the one hand and established residents on the other, and imposing penalties or disabilities on the former group.[20]

Both the United States Supreme Court and this court have refused to apply the strict constitutional test to legislation, such as the present ordinance, which does not penalize travel and resettlement but merely makes it more difficult for the outsider to establish his residence in the place of his choosing.[21] (See *Village of Belle Terre v. Boraas* (1973) 416 U.S. 1, 7, 94 S.Ct. 1536, 39 L.Ed.2d 797; *Ector v. City of Torrance* (1973) 10 Cal.3d 129, 135, 109 Cal.Rptr. 849, 514 P.2d 433; see also *McCarthy v. Philadelphia* (1976) 424 U.S. 645, 96 S.Ct. 1154; 47 L.Ed.2d 366; *Construction Ind. Ass'n, Sonoma County v. City of Petaluma, supra*, 522 F.2d 897, 906-907, fn. 13; Note, 50 N.Y.U. L.F. (1975) 1163, 1168.) The only contrary authority, the decision of the federal district court in *Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma* (N.D.Cal.1974) 375 F.Supp. 574 holding that an ordinance limiting residential construction must be supported by a compelling state interest has now been reversed by the Court of Appeals for the Ninth Circuit. (*Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma, supra*, 522 F.2d 897, cert. den., 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342.)

Most zoning and land use ordinances affect population growth and density. (See *Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma, supra*, 522 F.2d 897, 906; Note, *op. cit., supra*, 26 Stan.L.Rev. 585, 606-607, fn. 91.) As commentators have observed, to insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning. (See Note, *op. cit., supra*, 26 Hastings L.J. 849, 854.) "Were a court to hold that an inferred right of any group to live wherever it chooses might not be abridged without some compelling state interest, the law of zoning would be literally turned upside down; presumptions of validity would become presumptions of invalidity and traditional police powers of a state would be severely circumscribed." (Comment, *Zoning, Communes and Equal Protection*, 1973 Urban L.Ann. 319, 324.)

We conclude that the indirect burden upon the right to travel imposed by the Livermore ordinance does not call for strict judicial scrutiny. The validity of the chal-

19. For analysis of the constitutional origins of the right to travel, see Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?* (1975) 17 Ariz.L.Rev. 145, 148-152.

20. *In re King* struck down a penal code provision which declared that failure of a father to support his child was a misdemeanor when the father was a California resident, but decreed that it was a felony when the father resided out of the state. The United States Supreme Court cases overturned residency requirements imposed to restrict eligibility for medical care (*Memorial Hospital v. Maricopa County*), voting (*Dunn v. Blumstein*), or welfare (*Shapiro v. Thompson*). For analysis of these decisions, see generally Comment, *A Strict Scrutiny of the Right to Travel* (1975) 22 UCLAL Rev. 1129.)

21. For discussion of the application of the right to travel to land use regulations see Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?* (1972) 39 U.Chi.L.Rev. 612; Note, *The Right to Travel and Exclusionary Zoning* (1975) 26 Hastings L.J. 849.

lenged ordinance must be measured by the more liberal standards that have traditionally tested the validity of land use restrictions enacted under the municipal police power.[22]

This conclusion brings us to plaintiff's final contention: that the Livermore ordinance exceeds the authority conferred upon the city under the police power. The constitutional measure by which we judge the validity of a land use ordinance that is assailed as exceeding municipal authority under the police power dates in California from the landmark decision in *Miller v. Board of Public Works* (1925) 195 Cal. 477, 234 P. 381. Upholding a Los Angeles ordinance which excluded commercial and apartment uses from certain residential zones, we declared that an ordinance restricting land use was valid if it had a "real or substantial relation to the public health, safety, morals or general welfare." (195 Cal. at p. 490, 234 P. at p. 385.) A year later the United States Supreme Court, in the landmark case of *Euclid v. Ambler Co.* (1926) 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, adopted the same test, holding that before a zoning ordinance can be held unconstitutional, "it must be said that [its] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (272 U.S. at p. 395, 47 S.Ct. at p. 121.) Later California decisions confirmed that a land use restriction lies within the public power if it has a "reasonable relation to the public welfare." (*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461, 202 P.2d 38, 42; *Hamer v. Town of Ross* (1963) 59 Cal.2d 776, 783, 31 Cal.Rptr. 335, 382 P.2d 375; see *Town of Los Altos Hills v. Adobe Creek Properties, Inc., supra*, 32 Cal.App.3d 488, 508 509, 108 Cal.Rptr. 271 and cases there cited.)

In deciding whether a challenged ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor. (*Lockard v. City of Los Angeles, supra*, 33 Cal.2d 453, 460, 202 P.2d 38.) "The courts may differ with the zoning authorities as to the 'necessity or propriety of an enactment', but so long as it remains a 'question upon which reasonable minds might differ,' there will be no judicial interference with the municipality's determination of policy." (*Clemons v. City of Los Angeles* (1950) 36 Cal.2d 95, 98, 222 P.2d 439, 441.) In short, as stated by the Supreme Court in *Euclid v. Ambler Co., supra*, "If the validity . . . be fairly debatable, the legislative judgment must be allowed to control." (272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303.)

Recent decisions of the United States Supreme Court and the Court of Appeals for the Ninth Circuit have applied this liberal standard and, deferring to legislative judgment, have upheld ordinances attacked as exclusionary. In *Village of Belle Terre v. Boraas, supra*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, the court sustained an ordinance which banned all multiple family housing. The majority opinion by Justice Douglas found a rational basis for the ordinance in the community's desire to preserve a pleasant environment; "[t]he police power," he asserted, "is not confined to the elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." (416 U.S. at p. 9, 94 S.Ct. at p. 1541.) In dissent, Justice Marshall argued that the village's exclusion of groups of three or more unrelated persons from living in a single residence violated protected rights of privacy and association. He agreed, however, that the village could properly enact ordinances to control population density and restrict uncontrolled growth so long as it did not abridge fundamental rights, and that in reviewing such ordinances the courts should defer to the legislative judgment. (See 416 U.S. at pp. 13, 19 20, 94 S.Ct. 1536.)

In *Construction Industry Ass'n, Sonoma Cty. v. City of Petaluma, supra*, 522 F.2d 897, the Ninth Circuit Court of Appeals upheld a city ordinance fixing a housing development growth rate of 500 units per year. Relying largely on *Belle Terre v. Boraas, supra*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, the court concluded that "the concept of public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open space and low density of population, and to

22. In *Village of Belle Terre v. Boraas, supra*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, appellants assailed an ordinance which prohibited three or more unrelated persons from living in a single household on the ground, among others, that it violated appellants' right to travel. Stating that the ordinance "is not aimed at transients" (p. 7, 94 S.Ct. 1536), the majority rejected that contention, and applied a rational relationship test to uphold the challenged ordinance. Justice Marshall, dissenting, stated that a municipality may properly undertake to restrict uncontrolled growth and to maintain a community attractive to families. He asserted, however, that the Belle Terre ordinance in question infringed appellants' fundamental rights of association and privacy, and thus must be judged by the stricter compelling interest test.

Thus both the majority and the dissenting opinion in *Boraas* support our conclusion that an ordinance which has the effect of limiting migration to a community does not necessarily abridge a fundamental right to travel, and thus should not be examined by the compelling interest standard unless it infringes some other fundamental right or discriminates on a suspect basis.

grow at an orderly and deliberate pace." (522 F.2d at pp. 908-909.) The Supreme Court denied certiorari. (424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342.)

We conclude from these federal decisions that when an exclusionary ordinance is challenged under the federal due process clause, the standard of constitutional adjudication remains that set forth in *Euclid v. Ambler Co., supra*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303: if it is fairly debatable that the ordinance is reasonably related to the public welfare, the ordinance is constitutional. A number of recent decisions from courts of other states, however, have declined to accord the traditional deference to legislative judgment in the review of exclusionary ordinances, and ruled that communities lacked authority to adopt such ordinances. Plaintiff urges that we apply the standards of review employed in those decisions in passing upon the instant ordinance.

The cases cited by plaintiff, however, cannot serve as a guide to resolution of the present controversy. Not only do those decisions rest, for the most part, upon principles of state law inapplicable in California, but, unlike the present case, all involve ordinances which impede the ability of low or moderate income persons to immigrate to a community but permit largely unimpeded entry by wealthier persons.[23]

We therefore reaffirm the established constitutional principle that a local land use ordinance falls within the authority of the police power if it is reasonably related to the public welfare. Most previous decisions applying this test, however, have involved ordinances without substantial effect beyond the municipal boundaries. The present ordinance, in contrast, significantly affects the interests of nonresidents who are not represented in the city legislative body and cannot vote on a city initiative. We therefore believe it desirable for the guidance of the trial court to clarify the application of the traditional police power test to an ordinance which significantly affects nonresidents of the municipality.

When we inquire whether an ordinance reasonably relates to the public welfare, inquiry should begin by asking *whose* welfare must the ordinance serve. In past cases, when discussing ordinances without significant effect beyond the municipal boundaries, we have been content to assume that the ordinance need only reasonably relate to the welfare of the enacting municipality and its residents. But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.

These considerations impel us to the conclusion that the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects. If its impact is limited to the city boundaries, the inquiry may be limited accordingly; if, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region.[24]

As far back as *Euclid v. Ambler Co.*, courts recognized "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." (272 U.S. 365, 390, 47 S.Ct. 114, 119, 71 L.Ed. 303.) More recently, in *Scott v. Indian Wells* (1972) 6

23. The most recent of these decisions, *South Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel* (1975) 67 N.J. 151, 336 A.2d 713, invalidated a township zoning ordinance which discriminated against low and moderate cost housing. The court based its decision upon an extensive trial record which convinced the court that deference to local legislative bodies would impede measures it found essential to the regional welfare. In *National Land & Investment Co. v. Kohn* (1965) 419 Pa. 504, 215 A.2d 597, the Pennsylvania Supreme Court, striking down a four-acre minimum lot requirement, independently determined that the zoning ordinance would not promote the general welfare; as we explain in text, California courts do not claim the authority to invalidate ordinances that they believe undesirable so long as it is fairly debatable that the ordinance is reasonably related to the public welfare. *Appeal of Kit-Mar Builders, Inc.* (1970) 439 Pa. 466, 268 A.2d 765 followed *National Land* in striking down a two-and-three-acre zoning law. *Appeal of Girsh* (1970) 437 Pa. 237, 263 A.2d 395 invoked the doctrine that a community cannot totally exclude a lawful enterprise, a doctrine rejected in California. (See *Town of Los Altos Hills v. Adobe Creek Properties, Inc., supra*, 32 Cal. App.3d 488, 108 Cal.Rptr. 271.) The two-acre zoning law in *Board of County Sup'rs of Fairfax County v. Carper* (1959) 200 Va. 653, 107 S.E.2d 390, was held invalid as an arbitrary attempt to exclude low income persons from the western two-thirds of the county. *Bristow v. City of Woodhaven* (1971) 35 Mich.App. 205, 192 N.W.2d 322, and other Michigan cases cited rest on a unique Michigan doctrine which presumes the unconstitutionality of ordinances restricting certain favored uses of land. The other cases cited by plaintiff (*Albrecht Realty Company v. Town of New Castle* (N.Y.Sup.Ct. 1957) 8 Misc.2d 255, 167 N.Y.S.2d 843; *Baltimore Planning Com'n v. Victor Development Co.* (1971) 261 Md. 387, 275 A.2d 478; *Beach v. Planning and Zoning Commission* (1954) 141 Conn. 79, 103 A.2d 814) merely hold that the zoning ordinance in question exceeds the powers granted local zoning authorities under the laws of those states.

24. In ascertaining whether a challenged ordinance reasonably relates to the regional welfare, the extent and bounds of the region significantly affected by the ordinance should be determined as a question of fact by the trial court.

Cal.3d 541, 99 Cal.Rptr. 745, 492 P.2d 1137, we stated that "To hold . . . . that defendant city may zone the land within its border without any concern for [nonresidents] would indeed 'make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning.'" (P. 548, 99 Cal.Rptr. p. 749, 492 P.2d p. 1141.) The New Jersey Supreme Court summed up the principle and explained its doctrinal basis: "[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served." (*So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, supra*, 336 A.2d 713, 726.)[25]

We explain the process by which a trial court may determine whether a challenged restriction reasonably relates to the regional welfare. The first step in that analysis is to forecast the probable effect and duration of the restriction. In the instant case the Livermore ordinance posits a total ban on residential construction, but one which terminates as soon as public facilities reach specified standards. Thus to evaluate the impact of the restriction, the court must ascertain the extent to which public facilities currently fall short of the specified standards, must inquire whether the city or appropriate regional agencies have undertaken to construct needed improvements, and must determine when the improvements are likely to be completed.

The second step is to identify the competing interests affected by the restriction. We touch in this area deep social antagonisms. We allude to the conflict between the environmental protectionists and the egalitarian humanists; a collision between the forces that would save the benefits of nature and those that would preserve the opportunity of people in general to settle. Suburban residents who seek to overcome problems of inadequate schools and public facilities to secure "the blessing of quiet seclusion and clean air" and to "make the area a sanctuary for people" (*Village of Belle Terre v. Boraas, supra*, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797) may assert a vital interest in limiting immigration to their community. Outsiders searching for a place to live in the face of a growing shortage of adequate housing, and hoping to share in the perceived benefits of suburban life, may present a countervailing interest opposing barriers to immigration.

Having identified and weighed the competing interests, the final step is to determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests.[26] We do not hold that a court in inquiring whether an ordinance reasonably relates to the regional welfare, cannot defer to the judgment of the municipality's legislative body.[27] But judicial deference is not judicial abdication. The ordinance must have a *real and substantial* relation to the public welfare. (*Miller v. Board of Public Works, supra*, 195 Cal. 477, 490, 234 P. 381.) There must be a reasonable basis in fact, not in fancy, to support the legislative determination. (*Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal.2d 515, 522, 20 Cal.Rptr. 638, 370 P.2d 342.) Although in many cases it will be "fairly debatable" (*Euclid v. Ambler Co., supra*, 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303) that the ordinance reasonably relates to the regional welfare, it cannot be assumed that a land use ordinance can *never* be invalidated as an enactment in excess of the police power.

The burden rests with the party challenging the constitutionality of an ordinance to present the evidence and documentation which the court will require in undertaking this constitutional analysis. Plain-

25. See also *Golden v. Planning Board of Town of Ramapo* (1972) 30 N.Y.2d 359, 334 N.Y.S.2d 138, 150, 285 N.E.2d 291, 300; Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?* (1971) 3 Conn.L.Rev. 244; Williams & Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre and Berman* (1975) 29 Rutgers L.Rev. 73; Note *op. cit. supra*, 26 Stan.L.Rev. 585, 606 608; Stanford Environmental Law Society, A Handbook for Controlling Local Growth (1973) page 16.

26. For example, in upholding a city ordinance requiring a subdivider to dedicate land for park purposes, we stated in *Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 that the risk that increased development costs could exclude economically depressed persons could be "balanced against the phenomenon of the appalling rapid disappearance of open areas in and around our cities." (4 Cal.3d at p. 648, 94 Cal.Rptr. at p. 642, 484 P.2d at p. 618.)

27. The reconciliation and accommodation of the competing interests can reasonably take a variety of forms, depending upon the needs and characteristics of the community and its surrounding region. Courts have upheld restrictive zoning ordinances of limited duration (see *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court* (1974) 13 Cal.3d 225, 118 Cal.Rptr. 158, 529 P.2d 582 (app. dismissed, —— U.S. ——, 96 S.Ct. 3184, 49 L.Ed.2d —— (1976); *Metro Realty v. County of El Dorado* (1963) 222 Cal.App.2d 508, 35 Cal.Rptr. 480), an ordinance aimed at diverting growth to less impacted areas of a city (*Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court, supra*), and phased growth ordinances (see *Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma, supra*, 522 F.2d 897; *Golden v. Planning Board of Town of Ramapo* (1972) 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291.)

tiff in the present case has not yet attempted to shoulder that burden. Although plaintiff obtained a stipulation that as of the date of trial the ordinance's goals had not been fulfilled, it presented no evidence to show the likely duration or effect of the ordinance's restriction upon building permits. We must presume that the City of Livermore and appropriate regional agencies will attempt in good faith to provide that community with adequate schools, sewage disposal facilities, and a sufficient water supply; plaintiff, however, has not presented evidence to show whether the city and such agencies have undertaken to construct the needed improvements or when such improvements will be completed. Consequently we cannot determine the impact upon either Livermore or the surrounding region of the ordinance's restriction on the issuance of building permits pending achievement of its goals.

With respect to the competing interests, plaintiff asserts the existence of an acute housing shortage in the San Francisco Bay Area, but presents no evidence to document that shortage or to relate it to the probable effect of the Livermore ordinance. Defendants maintain that Livermore has severe problems of air pollution and inadequate public facilities which make it reasonable to divert new housing, at least temporarily, to other communities but offer no evidence to support that claim. Without an evidentiary record to demonstrate the validity and significance of the asserted interests, we cannot determine whether the instant ordinance attempts a reasonable accommodation of those interests.

In short, we cannot determine on the pleadings and stipulations alone whether this ordinance reasonably relates to the general welfare of the region it affects. The ordinance carries the presumption of constitutionality; plaintiff cannot overcome that presumption on the limited record before us. Thus the judgment rendered on this limited record cannot be sustained on the ground that the initiative ordinance falls beyond the proper scope of the police power.

5. *Conclusion.*

For the reasons we have explained, the Livermore ordinance is neither invalid on the ground that it was enacted by initiative nor unconstitutional by reason of vagueness. The more difficult question whether the measure is one which reasonably relates to the welfare of the region affected by its exclusionary impact, and thus falls within the police power of the city, cannot be decided on the limited record here. That issue can only be resolved by a trial at which evidence is presented to document the probable impact of the ordinance upon the municipality and the surrounding region.

The judgment of the superior court is reversed, and the cause remanded for further proceedings consistent with the views expressed herein

CLARK, Justice (dissenting)

I dissent.

The zoning provisions of our law applicable to general law cities and the initiative provisions are clearly in conflict as recognized in *Hurst v. City of Burlingame* (1929) 207 Cal. 134, 277 P. 308. A long line of decisions by this court and the Courts of Appeal has followed *Hurst*. (E. g., *Johnston v. City of Claremont* (1958) 49 Cal.2d 826, 836-837, 323 P.2d 71; *Simpson v. Hite* (1950) 36 Cal.2d 125, 134, 222 P.2d 225; *Taschner v. City Council* (1973) 31 Cal. App.3d 48, 61 et seq., 107 Cal.Rptr. 214; *Laguna Beach Taxpayers' Assn. v. City Council* (1960) 187 Cal.App.2d 412, 415, 9 Cal.Rptr. 775; see *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 215, 118 Cal.Rptr. 146, 529 P.2d 570.) Until today, it was held that because of the conflict general law cities' zoning ordinances were not subject to enactment by initiative. The rationale was: the statute conferring upon the legislative body the power to enact zoning prescribes the enactment method thereby establishing the measure of the power to enact; where a state act specifies the steps to be followed by the local body in enacting legislation, the initiative could not be used unless the steps were taken, and the steps required for zoning ordinances could not be followed within the initiative process. (*Id.*) The reasoning is compelling and indeed conclusive; I would not overrule *Hurst* and the numerous cases following it.

When we look at constitutional and statutory provisions governing zoning, related matters, and initiative process, the conflict is apparent.

ZONING

As pointed out in *Hurst*, a general law city is limited in the exercise of its powers by the Constitution and the general laws. (207 Cal. at p. 138, 277 P. 308; see *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61, 81 Cal.Rptr. 465, 460 P.2d 137.) The power of a general law city to zone is derived from article XI, section 11: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws.*" (Italics added; *Miller v. Board of Public Works* (1925) 195 Cal. 477, 483, 234 P. 381; *People v. Johnson* (1955) 129 Cal. App.2d 1, 5, 277 P.2d 45.)[1]

1. Beginning in 1879, the quoted language has appeared in our Constitution with nonmaterial

The Legislature has specifically authorized general law cities and counties to adopt zoning ordinances, enumerating many of the types of zoning regulations. (Gov.Code, §§ 65800, 65850.) Government Code section 65802 provides that the procedures for enactment of zoning laws are exclusive: "No provisions of this code, other than the provisions of this chapter, and no provisions of any other code or statute shall restrict or limit the procedures provided in this chapter by which the legislative body of any county or city enacts, amends, administers, or provides for the administration of any zoning law, ordinance, rule or regulation."

The Legislature has expressly provided that a zoning ordinance changing property from one zone to another or imposing or removing any of the numerous regulations set forth in Government Code section 65850 shall be adopted in the manner specified in sections 65854 to 65857 inclusive. (Gov. Code, § 65853.)

The procedure established provides for notice and hearing by the planning commission; a written report and recommendation by the planning commission including specification of the relationship of the proposed ordinance to general and specific plans, public hearings by the city council or board of supervisors after notice, and a further report by the planning commission in the event of modification by the legislative body. (Gov.Code, §§ 65854-65857.) Interim ordinances may be adopted as urgency measures prohibiting uses in conflict with a contemplated zoning proposal but only by four-fifths vote and only for a short period of time. (Gov.Code, § 65858.) Zoning ordinances are required to be consistent with the general plan. (Gov.Code, § 65860.) Extensive provisions regulate adoption and amendment of the general plan. (Gov. Code, §§ 65300-65552.) There is also provision for variances. (Gov.Code, § 65906.)

Although the zoning power is legislative, administrative duties in addition to the ones in the above code sections have been imported into the zoning process. Legislative bodies adopting zoning ordinances are not free to merely follow the interests of their constituents but must give consideration to the interests of residents of nearby communities. (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 546-549, 99 Cal.Rptr. 745, 492 P.2d 1137.) Recently, this court held that the California Environmental Quality Act (Pub.Resources Code, § 21050 et seq.) applied to zoning ordinances, that environmental impact reports must be prepared in cases of significant environmental impact, and that legislative bodies are required to make a written finding of no significant impact before enacting zoning ordinances if the report is not prepared. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79 et seq., 118 Cal.Rptr. 34, 529 P.2d 66.)

changes. The only difference in language between the current section and former article XI, section 11, is that in lieu of the opening phrase "A county or city" the former provision stated "Any county, city, town, or township."

INITIATIVE

Article IV, section 25 of our Constitution provides: "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide." Proponents of an initiative in a city must give notice thereof and then circulate petitions to voters. (Elec.Code, §§ 4000-4009.) If the requisite number of signatures are obtained, the ordinance is presented to the legislative body which may adopt it without change. (Elec.Code §§ 4011, 4012.) If within 10 days it fails to adopt, the proposed ordinance must be submitted to the voters at a special or general election. (*Id.*) If the legislative body adopts the proposed ordinance without submission to the voters or if upon submission a majority of the voters approve, the proposed ordinance goes into effect, and the ordinance may not be repealed or amended except by vote of the People unless provision is otherwise made in the original ordinance. (Elec.Code, § 4015.)

CONFLICT

The zoning law and the initiative law conflict in a number of respects. Fundamentally, the zoning statutes contemplate that to achieve orderly and wise land use regulation any change in zoning ordinances is not to be made until the experts in the field have had an opportunity to evaluate the effects of the change after noticed hearing and report. Further, the zoning law contemplates that in evaluating zoning changes, the legislative body must refer modifications not covered by the initial report to the planning commission. Such reports as to the instant ordinance would show, for example, which lots are zoned solely for residential use and might indicate the potential liability, if any, of the city in inverse condemnation.[2] The reports would probably indicate the anticipated effect of the ordinance on surrounding communities. Preparation of reports might also lead to clarification; for example, it is unclear whether the ordinance is limited to permits for new residences or extends to permits for additions to and modifications of existing residences. The environmental impact report might show potential increases in auto-

2. The issue of inverse condemnation is not raised in argument but the issue is raised by the adoption of the ordinance. (Cf. *Goldblatt v. Hempstead* (1972) 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130; *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322; *Eldridge v. City of Palo Alto* (1976) 57 Cal.App.3d 613, 618 et seq., 129 Cal.Rptr. 575.)

mobile congestion and air pollution which might result because adoption of the ordinance may require many people to commute to work in Livermore.

Because of the short time limitation in the initiative, the proposed initiative ordinance must be adopted without the notice, hearings, and reports the Legislature has required for zoning changes. The initiative law conflicts with the zoning law by permitting the voters or the city council to adopt the ordinance without compliance with the specified procedures designed to insure orderly land use planning.

There are additional conflicts and potential conflicts. There is no assurance that interests of nearby residents will be considered by the electorate, although such consideration is required. There is no procedure under the initiative law for determining compliance with the general plan as required by statute. Because the city council must either reject or accept the proposed ordinance without change, it does not have the opportunity to impose conditions and modifications in the initiative process as provided in the zoning statutes. There are potential conflicts between the initiative law's requirement that amendment be by the voters and the zoning law's provision for variances, and between the majority vote of the initiative and the zoning law's specific requirements for interim zoning.

The conflict between the two statutes is clear. The zoning laws establish an administrative process which must be followed prior to the legislative act of adopting an ordinance. The initiative statutes leave no room to carry out the administrative function. Both the statutes governing zoning of general law cities and governing initiative in such cities find their authority in our Constitution. Thus, there is no basis for the majority's thesis suggesting that the Constitution requires that initiative law take precedence over the zoning law insofar as there may be conflict. Rather, the familiar rule that the specific governs the general in cases of conflict is applicable, and as held in *Hurst*, the zoning statutes must be given effect. The reasoning of *Hurst* is as applicable today as it was when the case was decided in 1929, if not more so in view of new administrative procedures governing land use planning, and I would reaffirm *Hurst*.

It is ironic that today's decision, reviewing a "no growth" ordinance, may provide a loophole for developers to avoid the numerous procedures established by the Legislature which in recent years have made real estate development so difficult. Seeking approval of planned unit developments, land developers with the aid of the building trade unions should have little difficulty in securing the requisite signatures for an initiative ordinance. Because of today's holding that the initiative takes precedence over zoning laws, the legislative scheme of notice, hearings, agency consideration, reports, findings, and modifications can be bypassed, and the city council may immediately adopt the planned unit development or, if the council refuses, the voters may approve.[3] However desirable the creation of the loophole and the elimination of so-called administrative red tape, it is not for this court, but for the Legislature to determine whether the current housing crisis warrants bypassing the zoning laws.[4]

I would affirm the judgment.

MOSK, Justice (dissenting)

I dissent.

Limitations on growth may be justified in resort communities, beach and lake and mountain sites, and other rural and recreational areas; such restrictions are generally designed to preserve nature's environment for the benefit of all mankind. They fulfill our fiduciary obligation to posterity. As Thomas Jefferson wrote, the earth belongs to the living, but in usufruct.[1]

But there is a vast qualitative difference when a suburban community invokes an elitist concept to construct a mythical moat around its perimeter, not for the benefit of mankind but to exclude all but its fortunate current residents.

The procedural posture of the ordinance does not detain me; the majority is correct in overruling *Hurst v. Burlingame* (1929) 207 Cal. 134, 277 P. 308. The *Hurst* doctrine has long outlived its usefulness; it should no longer hobble the initiative process. Where I part company with the majority is in its substantive holding that a total

3. The validity of *Hurst* was raised for the first time in this court by amici curiae. Associated Home Builders did not respond to the amici brief—the interests of Associated Home Builders' members extending beyond the borders of Livermore, they may well have preferred repudiation of *Hurst* to invalidation of the Livermore ordinance.

4. Although the majority hold that the Livermore ordinance does not conflict with Government Code sections 65853-65857, they do not deal with potential conflicts between the zoning ordinance before us and other zoning statutes, for example, whether the initiative conflicts with a general plan in violation of Government Code section 65860, whether the ordinance conflicts with section 65858 of that code limiting interim ordinances, and whether there is a conflict with the four-fifths approval requirement of that section. In regard to the latter, the ordinance was approved by approximately 55 percent of those voting, 36 percent of the registered voters. Presumably, the additional conflicts may be raised when the case is returned to the trial court.

1. Jefferson called this principle "self-evident." (Laing, *Jefferson's Usufruct Principle* (July 3, 1976) 223 The Nation Magazine, p. 7.)

exclusion of new residents can be constitutionally accomplished under a city's police power.

The majority, somewhat desultorily, deny that the ordinance imposes an absolute prohibition upon population growth or residential construction. It is true that the measure prohibits the issuance of building permits for single-family residential, multiple residential and trailer residential units until designated public services meet specified standards. But to see such restriction in practicality as something short of total prohibition is to employ ostrich vision.

First of all, the ordinance provides no timetable or dates by which the public services are to be made adequate. Thus the moratorium on permits is likely to continue for decades, or at least until attrition ultimately reduces the present population. Second, it is obvious that no inducement exists for *present* residents to expend their resources to render facilities adequate for the purpose of accommodating *future* residents. It would seem more rational, if improved services are really contemplated for any time in the foreseeable future, to admit the new residents and compel them to make their proportionate contribution to the cost of the educational, sewage and water services. Thus it cannot seriously be argued that Livermore maintains anything other than total exclusion.

The trial court found, inter alia, that the ordinance prohibited the issuance of building permits for residential purposes until certain conditions are met, but the measure does not provide that any person or agency is required to expend or commence any efforts on behalf of the city to meet the requirements. Nor is the city itself obliged to act within any specified time to cure its own deficiencies. Thus, in these circumstances procrastination produces its own reward: continued exclusion of new residents.

The significant omissions, when noted in relation to the ordinance preamble, reveal that the underlying purpose of the measure is "to control residential building permits in the City of Livermore"—translation: to keep newcomers out of the city—and not to solve the purported inadequacies in municipal educational, sewage and water services. Livermore concedes no building permits are now being issued and it relates no current or prospective schedule designed to correct its defective municipal services.

A municipal policy of preventing acquisition and development of property by nonresidents clearly violates article I, sections 1 and 7, subdivisions (a) and (b), of the Constitution of California.

Exclusion of unwanted outsiders, while a more frequent phenomenon recently, is not entirely innovative. The State of California made an abortive effort toward exclusivity back in the 1930s as part of a scheme to stem the influx of poor migrants from the dust bowl states of the southwest. The additional burden these indigent new residents placed on California services and facilities was severely aggravated by the great depression of that period. In *Edwards v. California* (1941) 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119, the Supreme Court held, however, that the nature of the union established by the Constitution did not permit any one state to "isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders." The sanction against immigration of indigents was invalidated.

If California could not protect itself from the growth problems of that era, may Livermore build a Chinese Wall to insulate itself from growth problems today? And if Livermore may do so, why not every municipality in Alameda County and in all other counties in Northern California? With a patchwork of enclaves the inevitable result will be creation of an aristocracy housed in exclusive suburbs while modest wage earners will be confined to declining neighborhoods, crowded into sterile, monotonous, multifamily projects, or assigned to pockets of marginal housing on the urban fringe. The overriding objective should be to minimize rather than exacerbate social and economic disparities, to lower barriers rather than raise them, to emphasize heterogeneity rather than homogeneity, to increase choice rather than limit it.

I am aware, of course, of the decision in *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797, in which the Supreme Court, speaking through Justice Douglas, rejected challenges to an ordinance restricting land use to one-family dwellings, with a very narrow definition of "family," excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The village sought to assure that it would never grow much larger than 700 persons living in 220 residences. Comparable, although some growth was permitted, was the ordinance approved in *Construction Ind. Assn., Sonoma Cty. v. City of Petaluma* (9th Cir. 1975) 522 F.2d 897. Also similar, although allowing phased growth, was *Golden v. Planning Board of Town of Ramapo* (1972) 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291.[2]

2. There are other variations in traditional zoning that attempt to accommodate both orderly development and community concerns: flexible zoning, compensatory regulations, planned unit development, density zoning, contract zoning, floating zoning and time-phased zoning. Until now total prohibition of all building permits

In *Belle Terre,* Justice Douglas declared, "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people. . . . A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."

This is a comforting environmentalist declaration with which few would disagree, although the result was to allow the village of Belle Terre to remain an affluent island. Nevertheless, "preservation of the character of the community" is a stirring slogan, at least where it is used for nothing more harmful than the exclusion of the six students who rented the large house in Belle Terre. Complications arise when ordinances are employed to exclude not merely student lodgers, but all outsiders. While the affluent may seek a congenial suburban atmosphere other than Belle Terre or Livermore, what are the alternatives for those in megalopolitan areas who cannot afford similar selectivity?

The right of all persons to acquire housing is not a mere esoteric principle; it has commanded recognition in a wide spectrum of aspects. In *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, race restrictive covenants were declared to be constitutionally unenforceable. Chief Justice Vinson noted in his opinion that among the guarantees of the Fourteenth Amendment "are the rights to acquire, enjoy, own and dispose of property." In *Reitman v. Mulkey* (1967) 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830, the Supreme Court upheld our invalidation of a ballot proposition, declaring that " 'Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.' " Justice Douglas, in a concurring opinion in *Reitman,* went even further to insist that "housing is clearly marked with the public interest." (*Id.* at p. 385, 87 S.Ct. at p. 1636.) Again in *Jones v. Mayer Co.* (1968) 392 U.S. 409, 418, 88 S.Ct. 2186, 2192, 20 L.Ed.2d 1189, a case involving racial discrimination in housing, Justice Stewart spoke of the right of all citizens " 'to inherit, purchase, lease, sell, hold, and convey real and personal property.' " (Also see *Buchanan v. Warley* (1917) 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149.)

One thing emerges with clarity from the foregoing and from numerous related cases: access to housing is regarded by the Supreme Court as a matter of serious social and constitutional concern. While this interest has generally been manifest in the context of racial discrimination, there is no valid reason for not invoking the principle when persons of all races and of all economic groups are involved. There are no invariable racial or economic characteristics of the goodly numbers of families which seek social mobility, the opportunities for the good life available in a suburban atmosphere, and access to types of housing, education and employment differing from those indigenous to crowded urban centers.

There is a plethora of commentary on efforts, in a variety of contexts, of local communities to discourage the influx of outsiders. In virtually every instance, however, the cities limited availability of housing; until now it has never been seriously contemplated that a community would attempt total exclusion by refusing all building permits. (See, e. g., Williams & Doughty, *Studies in Legal Realism: Mount Laurel, Belle Terre and Berman* (1975) 29 Rutgers L.Rev. 73; Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development* (1974) 26 Stan.L.Rev. 585; Note, *The Right to Travel and Exclusionary Zoning* (1974) 26 Hastings L.J. 849; Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California* (1974) 15 Santa Clara Law. 1; Schroeder, *Public Regulation of Private Land Use,* 1973 Law & Soc. Order 747; Large, *This Land is Whose Land? Changing Concepts of Land as Property* (1973) Wis.L.Rev. 1039; Gaffrey, *Containment Policies for Urban Sprawl,* Univ. of Kan. Publications, No. 27; McClaughry, *The New Feudalism* (1975) 5 Environmental L. 673; Kohl, *The Environmental Movement: What It Might Be* (1975) 15 Nat.Res.J. 327; Note, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?* (1972) 39 U.Chi.L.Rev. 612; Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents* (1971) 23 Stan.L.Rev. 774; Note, *Exclusionary Zoning and Equal Protection* (1971) 84 Harv.L. Rev. 1645; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent* (1969) 21 Stan.L.Rev. 767.)

The trend in the more perceptive jurisdictions is to prevent municipalities from selfishly donning blinders to obscure the problems of their neighbors. The Supreme Court of New Jersey has taken the lead in frowning upon creation of local exclusive enclaves and in insisting upon consideration of regional housing needs. In *Oakwood at Madison, Inc. v. Township of Madison* (1971) 117 N.J.Super. 11, 283 A.2d 353, 358, the court held, "In pursuing the valid zoning

has never been included among acceptable zoning schemes.

purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population *and of the region.* Housing needs are encompassed within the general welfare. *The general welfare does not stop at each municipal boundary.*" (Italics added.)

Again in the oft-cited *Mt. Laurel* case (*So. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel* (1975) 67 N.J 151, 336 A.2d 713, 724) the New Jersey Supreme Court required that municipalities afford the opportunity for housing, "at least to the extent of the municipality's fair share of the present and *prospective regional need* therefor." (Italics added.) (Also see *Schere v. Township of Freehold* (1972) 119 N.J.Super. 433, 292 A.2d 35, 37.)

Pennsylvania is another state that has forthrightly spoken out against ordinances "designed to be exclusive and exclusionary." In *National Land and Investment Company v. Kohn* (1966) 419 Pa. 504, 215 A.2d 597, 612, a case remarkably similar to the instant matter, the Easttown community refused to admit new residents "unless such admittance will not create any additional burdens upon governmental functions and services." Justice Roberts, for the Supreme Court, replied: "The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid."

In *Appeal of Girsh* (1970) 437 Pa. 237, 263 A.2d 395, the Pennsylvania Supreme Court again spoke from a broad perspective. The community involved there barred all apartment houses for the identical reasons advanced by Livermore here. Said the court with irrefutable logic: "Appellee argues that apartment uses would cause a significant population increase with a resulting strain on available municipal services and roads, and would clash with the existing residential neighborhood. But we *explicitly* rejected both these claims in *National Land*, supra: 'Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future. . . . Zoning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.' 419 Pa. at 527–528, 215 A.2d at 610. . . . .

". . . Appellee here has simply made a decision that it is content with things as they are, and that the expense or change in character that would result from people moving in to find 'a comfortable place to live' are for someone else to worry about. That decision is unacceptable. Statistics indicate that people are attempting to move away from the urban core areas, relieving the grossly overcrowded conditions that exist in most of our major cities. . . . It follows then that formerly 'outlying', somewhat rural communities, are becoming logical areas for development and population growth—in a sense suburbs to the suburbs. With improvements in regional transportation systems, these areas also are now more accessible to the central city.

"In light of this, Nether Providence Township may not permissibly choose to only take as many people as can live in single-family housing, in effect freezing the population at near present levels. Obviously if every municipality took that view, population spread would be completely frustrated. Municipal services must be provided *somewhere*, and if Nether Providence is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden." (*Id.* at pp. 398 399; fn. omitted.)

In *Girsh* the Pennsylvania court added: "Perhaps in an ideal world, planning and zoning would be done on a *regional* basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city." (*Id.* at p. 399, fn. 4.)

Ordinances comparable to those invalidated in New Jersey and Pennsylvania have also been held invalid in Michigan (*Bristow v. City of Woodhaven* (1971) 35 Mich.App. 205, 192 N.W.2d 322), Maryland (*Baltimore Planning Com'n v. Victor Development Co.* (1971) 261 Md. 387, 275 A.2d 478) and Connecticut (*Beach v. Planning & Zoning Commission* (1954) 141 Conn. 79, 103 A.2d 814).

In sum, I realize the easiest course is for this court to defer to the political judgment of the townspeople of Livermore, on a they-know-what's-best-for-them theory (*Eastlake v. Forest City Enterprises, Inc.* (1976) ---- U.S. ----, 96 S.Ct. 2358, 49 L.Ed.2d 132; *James v. Valtierra* (1971) 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678). But conceptually, when a locality adopts a comprehensive, articulated program to prevent any population growth over the foreseeable future, it places its public policy intentions visibly on the table for judicial scrutiny and constitutional analysis.

Communities adopt growth limits from a variety of motives. There may be conservationists genuinely motivated to preserve general or specific environments. There may be others whose motivation is social exclusionism, racial exclusion, racial discrimination, income segregation, fiscal protection, or just fear of any future change; each of these purposes is well served by growth prevention.

Whatever the motivation, total exclusion of people from a community is both immoral and illegal. (Cal.Const. art. I, §§ 1, 7, subds. (a) & (b).) Courts have a duty to prevent such practices, while at the same time recognizing the validity of genuine conservationist efforts.

The problem is not insoluble, nor does it necessarily provoke extreme results. Indeed, the solution can be relatively simple if municipal agencies would consider the aspirations of society as a whole, rather than merely the effect upon their narrow constituency. (See, e. g., A.L.I. Model Land Development Code, art. 7.) Accommodation between environmental preservation and satisfaction of housing needs can be reached through rational guidelines for land-use decision-making. Ours, of course, is not the legislative function. But two legal inhibitions must be the benchmark of any such guidelines. First, any absolute prohibition on housing development is presumptively invalid. And second, local regulations, based on parochialism, that limit population densities in growing suburban areas may be found invalid unless the community is absorbing a reasonable share of the region's population pressures.

Under the foregoing test, the Livermore ordinance is fatally flawed. I would affirm the judgment of the trial court.