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SURVEY OF STATE COASTAL MANAGEMENT LAWS

By

Hal Ponder

School of Law
University of Maryland

APPENDIX L

INTERIM PROGRESS REPORT

VOLUME III

THE WETLANDS/EDGES PROGRAM

CHESAPEAKE RESEARCH CONSORTIUM, INC.

February 1974

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The Johns Hopkins University
University of Maryland
Smithsonian Institution
Virginia Institute of Marine Science

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PREFACE

The survey of state coastal management laws which follows was prepared by Mr. Hal Ponder while an Institute Fellow at the Environmental Law Institute of the University of Maryland during the summer of 1972. He received immeasurable assistance from public officials and private citizens in the various states surveyed. The survey was subsequently edited and updated (through December 31, 1972) by Anne C. Vermette, a student at the University of Maryland Law School, following review of a draft copy by the original contributors from the various states.

This survey was prepared in connection with A Study of Legal and Economic Problems of Wetlands Management under Grant No. G.I. 34869 from the Research Applied to National Needs program of the National Science Foundation to the Chesapeake Research Consortium, Inc. The principal investigators under this study were:

Professor Garrett Power
University of Maryland School of Law

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INTRODUCTION

The following is a survey of the coastal management laws of the seventeen states which are contiguous to the Atlantic Ocean, Gulf of Mexico, or Pacific Ocean. Several limitations where in the format selected for the survey. First it constitutes a static description of a dynamic situation -- the survey has only been systematically updated through December 31, 1972.

Second, all of the laws which may have significant effect on coastal management have not been includuded. Water quality standards, zoning ordinances, sediment control laws, to name just a few, have a significant impact on the coastal region. This survey, however, only addresses itself to laws regulating dredging and filling of wetlands and to the fledgling efforts of the states to exert special controls over land use in these coastal regions.

Third, the survey adopts a generalized perspective. Disparate laws from seventeen states are described in terms of a uniform framework. This technique facilitates comparisons from state to state, but may obfuscate some nicety in the approach of a particular state.

The backdrop against which the statutes of the various states are measured consists of three basic subdivisions: General; Administrative Process; and, Administrative Organization. The General subdivision addresses the following: "Plan" - is the state directed to develop a comprehensive plan for its coastal zone or are coastal development decisions to be made on a ad hoc basis?; "Inventory" - has the state developed a physical inventory of the extent of its wetland resources?; "Boundary" - what under state law is the presumptive division line on the foreshore between public and private property?; "Definition" --what definitions are extended to such key terms as 'wetlands' and 'coastal zone'?; "Permit system" - what licenses, if any, must be obtained

as a prerequisite to coastal development?; "Restrictive orders" - what authority, if any, is there for imposition of general development moratoriums, or establishment of conservation or protective zones?

The Administrative Process subdivision addresses the following: "Impact statement" - when, if ever, is an assessment of environmental impact, legally prerequisite to a decision?; "Hearing", "Notice", "Citizen Participation" and "Burden of Proof" - when, to what extent, and how, do the wetlands and coastal zone statutes deal with these administrative law issues?

The Administrative Organization subdivision addresses the following: "Agency" - what agencies have responsibility for wetlands and coastal zone management?; "Staff and funding" - how are they staffed and funded?; "Acquisition" - what procedures are employed for state acquisition of lands - in the coastal zone?; "Reclamation" - what antiosity does the state have for reclamation projects in the coastal zone?; "Penalties" - what penalties are provided for violation of the law? A digest of the important case law and a list of sources is also provided for each state surveyed.

CALIFORNIA

GENERAL

Plan: There is no comprehensive plan at present. The California Coastal Zone Conservation Act of 1972 requires the coastal commissions to prepare a plan for permanent controls of the coastal zone and to submit it to the Governor and the legislature on December 1, 1975. Presently, counties and cities are responsible for wetlands protection. In 1965, the McAteer-Petris Act created the San Francisco Bay Conservation and Development Commission (BCDC). This regional body, made up of government and public representatives, manages the wetlands of the Bay area.

Inventory: 3 million acres of tidal wetlands.

Boundary: Mean high tide.

Definition: Under the McAteer-Petris Act, wetlands are defined as all areas subject to tidal action, including marshlands lying between mean high tide and 5 feet above mean sea level, with a shoreline band consisting of a parallel line 100 feet landwards from the above defined area. The BCDC's jurisdiction includes saltponds and managed wetlands, diked off from the bay, which were in use for the three years prior to the passage of the act. Under the Coastal Zone Conservation Act a "permit area" has been created, extending 1,000 yards landwards from the mean high tide line.

Permit System: Yes. Under the McAteer-Petris Act, the major exception to this provision is the dredging permits issued by the U.S. Army Corps of Engineers prior to the passage of the act; continuation of and renewal and extension of these Corps permits is permitted. On January 18, 1972, the District Engineer of the Corps' San Francisco District announced that the Corps' permit jurisdiction extends to mean higher high tide, including diked areas, a broader area of jurisdiction than the Corps before had claimed. The Corps has an understanding with the BCDC by which it acts in accordance with the state law and the bay plan. The BCDC allows several exceptions to the permit requirement, such as developing port terminals, developing sites for industries dependent on access to water, and expansion of airport terminals and runways. Under the Coastal Zone Protection Act, a city or county may request the regional commission to exclude from the permit regulations certain urban land areas, both residential and commercial/industrial, based on the density of already existing development in those areas. However, tidal and submerged lands, beaches and lots immediately adjacent to the inland extent of any beach or of the mean high tide line where there is no beach may not be excluded.

Restrictive Orders: Yes. Both acts permit the responsible agency to adopt those regulations which are necessary to carry out the purpose of the act.

ADMINISTRATIVE PROCESS

Impact Statement: Yes.

Hearing: For permits. Mandatory, both for BCDC and under the Coastal Zone Protection Act.

For restrictive orders: Mandatory, both for BCDC and under the Coastal Zone Protection Act.

Notice: The rules governing the giving of notice are not spelled out in either act.

Citizen Participation: Not guaranteed.

Burden of Proof: On the state.

ADMINISTRATIVE ORGANIZATION

Agency: Presently, supervision of dredge-and-fill activities is shared by the U.S. Army Corps of Engineers and the counties and cities. The BCDC is a separate administrative body.

Under the Coastal Zone Protection Act, six regional commissions would be established, overall supervision resting with the state Coastal Zone Conservation Commission.

Staff and Funding: Under the Coastal Zone Protection Act, $5,000,000 would be appropriated for the period 1973-76.

Acquisition: The BCDC handles its own acquisitions by requesting such action be taken by the appropriate state agencies. There are no state funds specifically marked for wetlands acquisition, but the Department of Fish and Game, using proceeds from the sale of personalized motor vehicle license plates, has acquired ecological reserves along the coast. The Department of Parks and Recreation has also acquired coastal park lands.

Reclamation: No provision.

Penalties: The McAteer-Petris Act provides only injunctive relief against violations, as well as classing them misdemeanors. Under the Coastal Zone Protection Act, a violator would be punished by a fine of not more than $10,000. A fine of not more than $500 would be imposed for each day of a continuing violation.

Litigation: Alameda Conservation Ass'n, v. California, No. 22961 (9th Cir., Jan. 19, 1970), 1 ELR 20097.

Held that plaintiffs had standing to sue for an injunction against the filling of wetlands in San Francisco Bay by the Leslie Salt Company. The court distinguished the issue, stating that while the individual plaintiffs could be considered to have standing, based on their being property holders and residents in the area, the parent organization, a non-profit, public interest group, did not have proper standing.

Candlestick Properties, Inc., v. San Francisco Bay Conservation and Development Comm., 11 Cal. App. 3rd 557, 89 Cal. Reptr. 897 (1970).

Held that the state's denial of a dredge-and-fill permit was a valid exercise of the state's police power and did not constitute an unjust taking.

People v. White, 1 Civil No. 28156 (Cal. Ct. App., 1st Dist., Dec. 2, 1971).

Held that there is a presumption against a grant of tidelands by the state to a private individual which may be overcome only be explicit language in the deed.

Marks v. Whitney, (Cal. Sup. Ct., Dec. 9, 1971), 2 ELR 20049.

Held that the owner of tidelands may be prohibited from filling thereon, since tidelands are in the public trust, having an easement in favor of the public. On the issue of standing to sue, the court held that anyone may sue to enforce the public trust and that, if the parties themselves did not raise the issue, the court might do so.

State of California v. Citron, No. 318922 (Sup. Ct., Sand Diego Co., filed June 15, 1970)(decision pending).

Involves a proposed commercial development of wetlands.

Sierra Club v. Leslie Salt Co., (ND Cal., October 13, 1972), 2 ELR 20662.

Suit seeking injunctive relief, based on the Rivers and Harbors Act of 1899, against defendant's diking and filling wetlands in San Francisco Bay.

The public trust doctrine is upheld by the courts in the following cases dealing with the public right of beach access: Gion v. City of Santa Cruz (and Diety v. King), 2 Cal. 3d 29 (1970), and Hudson v. Mendocino Co. Board of Supervisors, No. 31918 (Sup. Ct., Cal., Mendocino Co., filed Oct. 27, 1971), 1 ELR 20593 (decision pending).

Sources:

Act 1162-1965 (The McAteer-Petris Act) as amended, Sections 66000-66661 of the California Governmental Code.

Act 1642-1967 (Marine Resources Conservation and Development Act of 1967) Sections 8800 et. seq. of the California Governmental Code.

Coastal Zone Conservation Act of 1972

McKeon, Steve A., "Public Access to Beaches, "Stanford Law Review, No. 3, February 1970, pp. 564-586.

Ralezel, Janine M. and Warren, Bruce N., "Saving San Francisco Bay: A Case Study in Environmental Legislation," Stanford Law Review, January 1971, Vol. 23, No. 2, pp. 349-366.

"California's Tideland Trust: Shoring It Up," Hastings Law Journal, Vol. 22, February 1971, p. 759.

Sacks, David P., "Saving San Francisco Bay - In Sacramento," Ecotactics, Service Club, New York, 1970, pp. 132-92.

"Saving San Francisco Bay: A Case Study in Environmental Legislation," Stanford Law Review, Vol. 23, January 1971, p. 349.

"Comment: Marks v. Whitney Expands the Scope of Protection for Lands In The Public Trust," Environmental Law Reporter, Vol. 2, p. 10007.

"Comment: Standing in the Ninth Circuit," Environmental Law Reporter, Vol. 1, p. 10058.

"Comment: Supreme Court Decides the Mineral King Case: Sierra Club v. Morton," Environmental Law Reporter, Vol. 2, p. 10034.

San Francisco Bay Conservation and Development Commission, The Bay Commission: What it is and What it does, San Francisco, 1970.

Correspondence with Normal E. Hill, Special Assistant to the Secretary of the Resources Agency of California.

CONNECTICUT

GENERAL

Plan: There is no comprehensive plan as such but several laws give effective protection. The New England River Basins Commission is currently formulating a plan for regional management of the Long Island Sound.

Inventory: 18,000 acres of saline tidal wetlands and 7,000 acres of fresh water tidal wetlands. The State owns 4,000 acres of wetlands.

Boundary: Mean high tide.

Definition: Areas which are subject to tidal action whose surface is 1 foot or less above the local extreme high tide point and upon which may grow specified salt marsh vegetation. Included in the definition are upper estuarial areas subject to tidal influence upon which fresh water plants grow.

Permit System: Yes., The State's mosquito control program is exempt.

The State has issued only three dredge-and-fill permits since the wetlands legislation became effective on October 1, 1969.

Restrictive Orders: Yes.

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearings: For permits: Mandatory.

For restrictive orders: Mandatory.

Notice: For permits: Mailed to interested governmental agencies and to all abutting landowners. Publication by newspaper is required.

For restrictive orders: Published in the Connecticut Law Journal.

Citizen Participation: Any citizen may be heard at the hearings. Citizens may bring class actions to enjoin injury to wetlands.

Burden of Proof: On the State.

ADMINISTRATIVE ORGANIZATION

Agency: Centralized under the Department of Environmental Protection.

Staff and Funding: 550 persons; $7,000,000 (for the entire Department).

Acquisition: Handled by the Department of Environmental Protection. No special funds are marked for wetlands acquisition.

Reclamation: A violator of the wetlands act may be compelled to restore the injured wetlands. There is no state plan for reclamation.

Penalties: Fine of not more than $1000 plus the cost of restoration. Each day of a continuing violation is treated as a separate offense. Injunctive relief is available.

Litigation: Bartlett v. Zoning Commission of Town of Oly Lyme, 161 Conn. 24, 282 A2d 907, 1 ELR 20177 (1971).

Held that zoning requirements which so restricted the use of tidal marshlands that their value was substantially reduced amounted to an unjust taking. The plaintiff had specifically acquired the land for investment purposes.

Hotchkiss Grove Association, Inc. v. Water Resources Commission, 32 Conn. L.J. 9, 1 ELR 20248 (Sup. Ct., 1971). Riparian owners sought and were granted a permit to build a pier into the navigable waters of the Long Island Sound. Court held that a rehearing was necessary since the state had issued the permit without holding a hearing and without considering all the evidence in the case.

Rykar Industrial Corporation v. Connecticut, No. 170229 (Sup. Ct., Hartford Co.)(decision pending).

Plaintiff contends that the state's denial of a dredge-and-fill permit constitutes an unjust taking of property without compensation.

Redding Conservation Commission v. Bonsignore, No. 145379 (Sup. Ct., Fairfield Co., filed Jan. 31, 1972)(decision pending). Plaintiffs ask for injunctive relief from dredging and filling of wetlands by defendant. Plaintiffs' citizen action is based on theory that the defendant's wetlands are a part of the public trust which the state must protect.

Sources: Act 695-1969 (Preservation of Tidal Wetlands) as amended (Sections 22-7h-22-7o of the Connecticut General Statutes Annotated.

Environmental Protection Act of 1971, No. 96 of the Connecticut General Statutes Annotated.

Correspondence with Rita Bowlby, Executive Assistant to the Commissioner of the Department of Environmental Protection and Stephen C. Thomson, Director Water and Water Related Resources, Department of Environmental Protection.

DELAWARE

GENERAL

Plan: The "Governor's Wetlands Action Committee," established June 23, 1972, is presently formulating a comprehensive plan to be completed by January 15, 1973. Presently, wetlands are partially protected by several laws.

Inventory: 106,000 acres. Of these, 10,000 acres are state owned; 22,800 acres are federally owned.

Boundary: The limit of State ownership is the mean low water line. The limit of State jurisdiction with respect to subaqueous lands regulations is the mean high water line.

Definition: Public subaqueous lands are generally those lands lying below the mean low water line. Private subaqueous lands are those lying between mean high and mean low water marks. Wetlands are those lands lying above the mean low water line, and in addition, supporting certain characteristic types of vegetation.

Permit System: No general permit system covering all subaqueous lands. A permit is required for dredging, filling or placing a structure on public lands, for excavation or channelizing on public or private land which will connect with public subaqueous land and for filling or otherwise altering private land which is adjacent to public subaqueous land. There is a fee of $.50 per cubic yard for fill taken from public subaqueous lands. When public subaqueous lands are filled, the land created remains state property to be leased to the developer for the first 10 year period on the basis of square feet of newly created land. After the end of the first 10 year term, the property is to be rented based on the then-assessed value of the property.

Permits issued: 1972 - 8 (for residential and recreational development)
1971 - 4 (one for residential development)
1970 - 1 (for marina expansion)

Restrictive Orders: The Coastal Zone Act bans all heavy industry from that area and makes the location of light industry in the coastal zone subject to state approval. Another act prohibits the sale of any public land unless specifically approved by the state legislature.

ADMINISTRATIVE PROCESS

Impact Statement: Required for applicants wishing to locate light industry in the coastal zone. Not required for dredging and filling applications.

Hearing: For permits: period in excess of 10 years: Mandatory.
written objection timely filed: Mandatory.
Commission determines public interest is involved: Optional.

For restrictive orders: Mandatory.

Notice: The hearings held by the Coastal Zone Industrial Control Board are governed by rules for the giving of notice. All applications for subaqueous lands permits are advertised with a published notice in 2 State newspapers. All hearings held pursuant to subaqueous lands regulations require published notice in 2 State newspapers.

Citizen Participation: Any citizen has the right to comment on applications through reply to the published notice of application. If the citizen makes a timely filed objection to an application, a public hearing on the project must be held. Notice of hearing is given by newspaper.
Any citizen may make a presentation at the hearing.

Burden of Proof: Generally on the State. For permits under the Coastal Zone Act applicant must demonstrate no significant environmental harm.

ADMINISTRATIVE ORGANIZATION

Agency: Fragmentation of responsibilities. The Department of Natural Resources and Environmental Control (DNREC) is in charge of management of the publicly owned wetlands only. The Water and Air Resources Commission has jurisdiction over public subaqueous lands. DNREC staff processes applications for permits, but the decision to grant or deny rests solely on the Water and Air Resources Commission and the Governor. Under the Coastal Zone Act, the State Planning Office supervises manufacturing, heavy industry and bulk product transfer facilities in the zone.

Staff and Funding: Not available.

Acquisition: No clear delegation of authority. The Division of Fish and Wildlife and the Division of Parks, Recreation and Forestry of the Department of Natural Resources and Environmental Control (DNREC) have retained certain acquisition powers from the time when they were separate agencies. Their funds are supplied from general revenues and by the Bureau of Outdoor Recreation (federal). Generally, acquisition is handled by DNREC's Office of Planning and Construction. Money for all land acquisition is obtained through State Capital Bonds. Revenues designated for acquisition by DNREC are:

1973 - $1.1 million
1972 0
1971 - #3.0 million

Reclamation: No provision.

Penalties: No provision for fines or injunctive relief for violation of the subaqueous lands permit rules. A violator of the Coastal Zone Act is fined not more than $50,000 for each offense. Each day of a continuing violation is treated as a separate offense. The Coastal Zone Act also provides for cease and desist plus injunctive relief.

Litigation: Delaware v. Pennsylvania New York Central Transportation Co., 323 FSupp 487, 1 ELR 20106 (1971).

Action seeking injunctive relief against a dredge-and-fill operation in navigable waters.

Sources: Act 175-1971 (The Coastal Zone Act)(Chapter 70, Title 7 of the Delaware Code).

State Regulations Governing the Use of Public Subaqueous Lands. 55 Laws of Delaware, Chapter 442, Section 6451-59 (July 1, 1966).

"Legislation: The Delaware Coastal Zone Act," Buffalo Law Review, Vol. 21, Winter 1972, p. 481.

Correspondence with Robert D. Henry, Water Resources Section, Department of Natural Resources and Environmental Control and N.C. Vasuki, Manager of the Water Resources Section, Department of Natural Resources and Environmental Control.

FLORIDA

GENERAL

Plan: Several existing laws and regulations combine to provide protection. In addition, the Coastal Coordinating Council enabling legislation calls for the development of a comprehensive coastal zone management plan. The Environmental Land and Water Management Act of 1972 mandates the development of a comprehensive land use plan for the State. The Florida Water Resources Act of 1972 is designed to develop a master plan for the management of State water resources.

Inventory: 17,185,300 acres (this figure includes inland wetlands).

Boundary: Mean high tide.

Definition: Wetlands are not defined, but submerged and tidal lands, islands, sandbars, shallow banks and spoil islands, including bottom lands of meandered freshwater subject to tidal action and flowing into or connected with navigable coastal or intracoastal waters, are protected through the permit procedures of the Board of Trustees of the Internal Improvement Trust Fund and the Florida Department of Natural Resources (DNR). Additional protection will be provided through the new land and water management legislation.

Permit System: Yes. The Board of Trustees of the Internal Improvement Trust Fund and/or the Department of Natural Resources issue permits for wetlands alteration or coastal construction. These procedures apply to any development occurring in or affecting the areas listed above.

The 1972 Land and Water Management Act provides for the establishment of a permitting procedure for "developments of regional impact".

Restrictive Orders: Yes. 1) The Board of Trustees of the Internal Improvement Trust Fund establishes bulkhead lines to regulate dredge-and-fill operations; 2) The Department of Natural Resources sets coastal construction setback lines for each county. Until such lines are established, there is a 50-foot setback line in force for all Atlantic-Gulf beaches of the State; and 3) The 1972 Land and Water Management Act provides for the creation of "areas of critical State concern": those areas, including those deemed for containing or having a significant impact upon environmental or natural resources will be "off limits" for development.

ADMINISTRATIVE PROCESS

Impact Statement: Yes. For wetlands alteration or coastal construction.

Hearing: For permits: Mandatory.

For restrictive orders: Mandatory to establish or request variances from bulkhead or coastal construction setback lines. An appeal hearing procedure is provided for areas of critical State concern and developments of regional impact.

Notice: Published by newspaper.

Citizen Participation: Under the Florida Environmental Protection Act of 1971, any citizen may bring suit for injunctive relief against environmental harm.

Burden of Proof: On the State.

Agency: The Trustees of the Internal Improvement Trust Fund and the Department of Natural Resources supervise activities affecting wetlands. The Division of State Planning will supervise developments of regional impact.

Staff and Funding: The Department of Natural Resources has a staff of 881 persons and funding of $25 million. The Trustees of the Internal Improvement Fund has a staff of 98 persons and funding of $1.5 million.

Acquisition: Under the Land Conservation Act of 1972, the Governor and Cabinet, as head of the Department of Natural Resources are empowered to spend not more than $200 million to acquire environmentally endangered lands and $40 million for outdoor recreation lands. The Division of Recreation and Parks and the Trustees of the Internal Improvement Trust Fund also may acquire wetlands.

Reclamation: No provision.

Penalties: Penalties are provided for violations of dredge-and-fill and coastal construction regulations. Penalties for violations of the Land and Water Management Act of 1972 are to be adopted.

Litigation: Zabel v. Tabb, 430 F.2d 199, 1 ELR 20023, cert' denied, 30 USLW 3360, 401 US 910 (1971).

Held that the U.S. Army Corps of Engineers must consider the environmental impact of a proposed project in granting or denying a dredge-and-fill permit. The project here under consideration involved a proposal to fill coastal wetlands in order to build a trailer park. The lower court had held that the Corps, acting under the authority given it in the Rivers and Harbors Act of 1899, was limited to the consideration of a dredge-and-fill project's effect on navigation. The Fifth Circuit Court held that under the National Environmental Policy Act (NEPA), 42 USC 4321, and the Fish and Wildlife Coordination Act, 16 USC 661, the Corps must also weigh environmental considerations.

Coastal Petroleum v. Secretary of the Army, 315 FSupp 845, 1 ELR 65024 (1970).

Held that the Corps denial of a permit, based on environmental considerations, was valid. "Coastal's profit motive does not outweigh the public interest in eliminating a threat to the environment."

U.S. v. Moretti, 331 FSupp 151, 1 ELR 20443 (1971).

Held that defendant was enjoined to cease further dredge-and-fill operations, to remove the fill deposited and to restore the damaged wetlands as nearly as possible to their original condition. Defendant had carried on the illegal dredge-and-fill operation without a Corps permit.

Groover v. A.B.E. Options, Inc., No. 2-350 (Cir. Ct. Fla., Dec. 10, 1970), 1 ELR 20094.

Held that drainage of a wetland was enjoined as being harmful to the ecosystem, including coastal waters.

Mainor v. Hobbie, 218 S2d 203 (1969).

Held that property owners, alleging that a recreational use was a valuable property right, had standing to sue as individuals or as a class to protect either a private or a public right.

Regarding the application of the public trust doctrine, in State ex rel. Taylor v. Simberg, 2 Fla. Supp. 178 (1952) and State ex rel. Marsh v. Simberg, 4 Fla. Supp. 85 (1953), the court held that "the ocean foreshore or beach is held by the state in trust for the public for purposes of navigation, fishing and bathing" (emphasis added).

Sources:

Florida Statutes, Chapter 161: Beach and Shore Preservation Act.

Florida Statutes, Chapter 253.12: Internal Improvement Trust Fund, Bulkhead Lines.

Florida Statutes, Chapter 370.021: Coastal Coordinating Council.

Florida Statutes, Chapter 403.412: Environmental Protection Act.

Laws of Florida, Chapter 72-300 Land Conservation Act of 1972.

Laws of Florida, Chapter 72-317 Environmental Land and Water Management Act of 1972.

"Environmental Law: Ecology Held Valid Criterion for Denying Dredge and Fill Permit Under Section 10, Rivers and Harbors Act of 1899," Duke Law Journal Vol. 1970 No. 4, p. 1239.

"NEPA of 1969: A Mandate to the Corps of Engineers to Consider Ecological Factors," Buffalo University Law Review, Vol. 50, 1970, p. 616.

"Environmental Law - Denial of Dredge and Fill Permit Under Rivers and Harbors Appropriation Act of 1899 on Ecological Grounds," University of Kansas Law Review, Vol. 19, p. 539 (1970).

"Comment: Army Corps of Engineers' Authority under Proposed Refuse Act Permit System," Environmental Law Reporter, Vol. 1, p. 10011.

"Comment: Further Analysis of the Reguse Act Permit Program," Environmental Law Reporter, Vol. 1, p. 10030.

Correspondence with Barry Lessinger, Legal Consultant to the Coastal Coordinating Committee, Department of Natural Resources.

GEORGIA

GENERAL

Plan: There is a comprehensive plan.

Inventory: 500,000,000 acres.

Boundary: Mean tide.

Definition: All areas subject to tidal action (whether or not the tide waters reach the littoral areas through natural or artificial water courses), from 5.6 feet above mean tide level and below.

Permit System: Yes. Exceptions include construction of highways and laying of public utility lines.

Restrictive Orders: Yes.

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearing: For permits: Not required.

For restrictive orders: Mandatory. Two public hearings are required before the issuance of any orders.

Notice: For permits: Notice that an application has been made must be mailed to all abutting landowners. If the landowners are unknown, publication of notice by newspaper is required.

For restrictive orders: Given through newspaper publication.

Citizen Participation: None guaranteed.

Burden of Proof: On the state.

ADMINISTRATIVE ORGANIZATION

Agency: Overall supervision is under a three-man committee, composed of the Commissioner of the Department of Natural Resources, the Director of the Environmental Protection Division and the Director of the Game and Fish Division.

Staff and Funding: The Environmental Protection Division currently has a staff of approximately 175 people and a budget of $2.8 million.

Acquisition: Handled by the State Properties Control Commission. No funds are specifically marked for wetlands acquisition.

Reclamation: No provision.

Penalties: Injunctive relief is available for continuing violations.

Litigation: The state Attorney General has declared that all of Georgia's marshlands are within the public trust and therefore under state ownership. This has not yet been tested.

Sources: Act 1332-1970 (The Coastal Marshlands Protection Act of 1970) Sections 45-136 - 45-147 of the Georgia Code Annotated.

Abbott, Laurie K., "Some Legal Problems Involved in Saving Georgia's Marshlands," Georgia State Bar Journal, Vol. 7, No. 1, August 1970, pp. 27-36.

"Regulations and Ownership of the Marshlands: The Georgia Marshlands Act," Georgia Law Review, Vol. 5, Spring 1971, p. 563.

Correspondence with James B. Talley, Assistant Attorney General.

LOUISIANA

GENERAL

Plan: The Louisiana Advisory Commission on Coastal and Marine Resources is currently developing a comprehensive coastal zone management plan, scheduled for completion in September of 1973.

Inventory: The Wildlife and Fisheries Commission has prepared a 4 volume Cooperative Gulf of Mexico, Estuarine Inventory and Study, Louisiana (1971). The four volumes deal with Area Description, Hydrology, Sedimentology, and Biology.

Boundary: Not yet established.

Definition: Not yet established.

Permit System: The Wildlife and Fisheries Commission issues informal "letters of no objection" for state mineral leases, dredging and canaling in state owned waterbottoms.

Restrictive Orders: There is no statutory authority, but the Wildlife and Fisheries Commission sometimes requires pre-conditions to the issuance of "letters of no objection."

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearing: Not required.

Notice: Not required.

Citizen Participation: None guaranteed.

Burden of Proof: Not clearly defined.

ADMINISTRATIVE ORGANIZATION

Agency: The Louisiana Advisory Commission on Coastal and Marine Resources was created by La. Act 35 of 1971.

Staff and Funding: Legislative appropriation of $58,213.00 for FY 1973. One full time scientist, one part-time executive director, one part-time technical writer, and clerical personnel. However, legal and scientific assistance is provided by the LSU Sea Grant Program.

Acquisition: Handled by the Wildlife and Fisheries Commission. No funds are specifically earmarked for wetlands acquisition. Acquisitions are funded by state appropriations and matching federal funds.

Reclamation: Various state and local agencies are statutorily empowered to reclaim wetlands.

Penalties: None.

Litigation: Natural Resource Defense Fund v. Martin, 337 F. Supp. 165, 458 F. 827 (1972). Environmental groups sought and won a preliminary injunction enjoining an offshore lease sale for oil and gas exploration pending adequate compliance with NEPA (particularly the consideration of alternatives).

Sources: Louisiana Act 35 of 1971.

Correspondence with J. Arthur Smith, Sea Grant Legal Program, Louisiana State University.

MAINE

GENERAL

Plan: There is no comprehensive management plan, but several laws give effective protection.

Inventory: Not available.

Boundary: Not available.

Definition: The area above extreme low water, subject to tidal action or normal storm flowage at any time excepting periods of maximum storm activity.

Permit System: Yes.

Restrictive Orders: Yes. The Coastal Wetlands Act confers a broad authority to regulate the polluting as well as the altering of wetlands. The Site Location Law regulates industrial uses in the coastal areas. However, the Site Location Law does not control developments of land less than 20 acres, and it permits certain dredging operations. Wetlands receive indirect benefit from the law regulating oil spillage in the sea.

ADMINISTRATIVE PROCESS

Impact Statement: No

Hearing: For permits: Mandatory.

For restrictive orders: Mandatory.

Under the Site Location Law, hearings are discretionary.

Notice: For permits: Mailed to abutting landowners. Publication by newspaper is required.

For restrictive orders: Mailed to abutting landowners. Publication by newspaper is required.

Under the Site Location Law, if a hearing is to be held, the notice is to be made by newspaper publication only.

Citizen Participation: Any citizen may bring suit for injunctive relief based on an injury to wetlands.

Burden of Proof: On the state.

ADMINISTRATIVE ORGANIZATION

Agency: Centralized under the Department of Environmental Protection.

Staff and Funding: Not available.

Acquisition: Not available.

Reclamation: Not available.

Penalties: Fine of not more than $500 plus the cost of restoration. Injunctive relief is available.

Litigation: A provision of the Coastal Wetlands Regulations which makes prosecution of violators easier, states that any filling, dredging or otherwise altering of wetlands will be prima facie evidence that it was caused to be done by the owner of those wetlands.

Maine v. Johnson, 265 A2d 711, 1 ELR 65016 (1970).

Held that the denial of a dredge-and-fill permit constituted a taking of property without due process of law and without compensation.

The Court did not rule on the constitutionality of the Wetlands Act, holding only that the Johnsons' private interests outweighed the public interest in preserving the wetlands. The Court said that a denial of the application would leave the Johnsons' with commercially worthless land and that they would therefore be bearing an unreasonably large burden of the cost of Maine's conservation program. The Court thus felt that the denial of the permit was an unreasonable exercise of the state's police power.

Sources: Act 348-1967 (Coastal Wetlands Regulations) as amended, Title 12, Chapter 421, Sections 4701-09 of the Maine Revised Statutes.

Act 571-1970 (Site Location Regulation), Title 38, Chapter 3, Sections 481-488 of the Maine Revised Statutes.

Act 572-1970 (Coastal Conveyance of Petroleum), Title 38, Chapter 3, Sections 541-557 of the Maine Revised Statutes.

Act 541-1971 (Coastal Wetlands Regulations), Title 12, Chapter 421, Sections 4571-4758 of the Maine Revised Statutes.

Henry, Harriet P., and Halperin, David J., Maine Law Affecting Marine Resources, Vol. I-IV, University of Maine School of Law, 1969-1970.

Wilkes, Daniel, "Constitutional Dilemmas Posed by State Policies Against Marine Pollution--The Maine Example," Maine Law Review, Vol. 23, No. 1, pp. 143-174.

Correspondence with Henry E. Warren, Director, Bureau of Land Quality Control, Site Location Division, Department of Environmental Protection.

MARYLAND

GENERAL

Plan: There is a comprehensive plan. The state legislature passed in 1970 two laws giving effective protection to wetlands.

Inventory: 1,900,000 acres (300,000 of marsh and swamp land; 1,600,000 of submerged land).

Boundary: Mean high tide.

Definition: All lands bordering on or lying beneath tidal waters (other than the state land beneath navigable waters), subject to tidal action and which support aquatic growth.

Permit System: Yes. There are different dredge-and-fill requirements for state and for private wetlands. Permits for the former are issued by the Board of Public Works. Transferral of public wetlands are prohibited except to the riparian owners. Private wetlands are managed by the Department of Natural Resources. There is a "grandfather clause" in the law providing that dredge-and-fill permits issued before 1970 will continue to be valid. Exceptions to the permit regulations include mosquito control work.

Permits issued: 1970 - 80 (20 for commercial purposes)

1971 - 150 (25 for commercial purposes)

1972 - 170 (30 for commercial purposes)

Restrictive Orders: Yes. Rules and regulations are formulated by the Secretary of Natural Resources, with the advice and consent of the State Agricultural Commission. Two counties which have supplemental legislation affecting wetlands are Worcester and Charles Counties. The Shoreline Commission of Worcester County, which was established prior to the present wetlands law, is permitted to continue its own regulation of dredge-and-fill operations in conformity with the general regulatory authority in the Wetlands Law. In 1971, the legislature passed Chapter 792, which absolutely prohibits any dredging or filling operations in the tidal waters and marshlands of Charles County.

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearing: For permits: Mandatory.

For restrictive orders: Mandatory

Notice: For permits: Given by newspaper publication.

For restrictive orders: By mail to affected landowners and by newspaper publication.

Citizen Participation: Any citizens may appear and be heard at the hearings. There is no provision under the law for citizens to bring suit.

Burden of Proof: On the state.

ADMINISTRATIVE ORGANIZATION

Agency: Centralized within the Department of Natural Resources. However, public lands are managed by the Board of Public Works. Commercial development is handled by the Department of Economic and Community Development.

Staff and Funding: Not available.

Acquisition: Handled by the Department of Natural Resources and General Services Administration. They are acquired with revenue from "open space" bonds. A Wetlands Fund was established in 1969 and is presently being used for acquisition of unique private wetland areas.

Reclamation: Violators are liable for the restoration of the wetlands they have injured. There is no state plan for reclamation.

Penalties: Violations of the state wetlands permit system is punishable by a fine of not less than $500 nor more than $1000, plus the cost of restoration. Violations of the restrictive orders and the permit system for private wetlands are punishable by a fine of not more than $100 or one month's imprisonment, or both. Injunctive relief is available. In addition, anyone who knowingly violates the provisions relating to private wetlands is liable for the cost of restoring the wetlands.

Litigation: Kerpelman v. Mandel, 261 Md. 436, 176 A2d 56, 1 ELR 20269 (1971).

Held that plaintiff did not have standing to sue for injunctive relief against the filling and commercial development of coastal wetlands. Plaintiff alleged that the state had violated the public trust by selling the wetlands for development--and at a grossly undervalued price. The court held that there could be not violation of the public trust, since the legislature had authorized the transfer of lands. Plaintiff had alleged injury as a taxpayer. The court held that this did not give standing, since plaintiff could allege no special interest or economic injury.

Board of Public Works v. Larmar, 262 Md. 24, 277 A.2d 427, 1 ELR 20230 (1971).

Held that private developers are permitted to retain those wetlands they had filled prior to the passage of the Wetlands Act of 1970, but that from that time, developers must meet the Act's permit requirements before further filling.

Potomac Sand and Gravel Co. v. Mandel, No. 35 (Md. Ct. App., July 6, 1972, 2 ELR 20101.

Held that a legislative order which absolutely prohibits any dredging and filling in tidal waters and marshlands in a designated area is a reasonable exercise of the state's police powers and does not constitute an unjust taking. "It is within the purview of the police powers for the State to preserve its exhaustible natural resources".

State of Maryland v. Coates, (Cir. Ct., Worcester Co., filed Sept. 7, 1972)

Action seeking injunctive relief against defendant's unlawful dredge-and-fill work and requesting defendant be enjoined to restore the injury done to the wetlands. Complainants allege that defendant is conducting dredge-and-fill work without the permit required by law.

Sources:

Act 242-1970 Wetlands, Section 15A of Article 15A of the Annotated Code of Maryland.

Act 241-1970 Wetlands, Section 718 of Article 66c of the Annotated Code of Maryland.

Dredging Operations in Charles County Act of 1972, Chap. 792; Codes of the Annotated Laws of Maryland.

August, Robert M., Maryland's Wetlands, Marshes, and Submerged Lands in the Context of Common and Statutory Law, Maryland State Planning Department, October, 1968.

Demsey, Dennis T., Wetlands: The Legal Context, report prepared for the Maryland State Planning Department, July, 1968

Power, Garrett, Project Director, Chesapeake Bay in Legal Perspective, Estuarine Pollution Study Series - 1, U.S. Department of Interior, Federal Water Pollution Control Administration, Washington, D.C., March, 1970.

Power, Garrett, "Note: Board of Public Works v. Larmar," Environmental Law Reporter, Vol. 1, p. 50053.

Salisbury, Stuart Marshall, "Maryland Wetlands: The Legal Quagmire," Maryland Law Review, Vol. XXX, No. 3, Summer, 1970, pp. 240-266.

Correspondence with Warren Rich, Assistant Attorney General, Department of Water Resources.

MASSACHUSETTS

GENERAL

Plan: There is no comprehensive plan, but several laws give effective protection.

Inventory: Approximately 64,000 acres of coastal wetlands, about 4,000 of which are state owned.

Boundary: Mean high tide.

Definition: Any area bordering on the ocean or on any estuary, or subject to tidal action, coastal storm flowage, or flooding. The restrictive orders act includes, along with the above defined area, such contiguous land as the commissioner deems necessary to affect in order to carry out the purpose of the act.

Permit System: Yes. Applications must go through the local Conservation Commissions or the municipal government if there is not a Conservation Commission in a locality. The decision of the Conservation Commission, mayor or selectmen may be overruled by the state Department of Natural Resources. The exceptions to the regulation are mosquito control work and work performed for agricultural purposes.

At present, while a study is being conducted by the Division of Mineral Resources, no permits are being issued for dredging of fill from public subaqueous lands. In the past, the charge for such fill was 10 cents per cubic yard. When public lands are sold into private hands, most frequently they are exchanged on a value for value basis.

Permits issued: 1972 - 93

1971 - 113

1970 - 121

(80% of the permits issued involved commercial development).

Restrictive Orders: Yes. Massachusetts was the first to adopt this method of protection and now has a large part of its wetlands under restrictive orders. The Massachusetts Department of Public Works, through its Division of Waterways may place additional restrictions on certain areas proposed for development.

ADMINISTRATIVE PROCESS

Impact Statement: Yes.

Hearing: For permits: Mandatory, Hearings are held by the Conservation Commission, mayor or aldermen. No public hearing is required for the Department of Natural Resources' review.

For restrictive orders: Mandatory.

Notice: For permits: Mailed to applicant and to interested governmental agencies. Publication by newspaper is required.

For restrictive orders: Mailed to interested governmental agencies and affected landowners. Publication by newspaper is required.

Citizen Participation: Citizens may bring suit to restrain actual or potential injury to wetlands. Suit must be brought by not less than 10 citizens. The court may require a $500 bond. Furthermore, any 10 citizens may appeal to the Department of Natural Resources from a decision of the local authority.

Burden of Proof: On the individual.

ADMINISTRATIVE ORGANIZATION

Agency: Overall supervision is by the Executive Office of Environmental Affairs. It consists of the Department of Natural Resources, the Metropolitan District Commission and the Department of Agriculture.

Staff and Funding: For fiscal 1973, the Executive Office of Environmental Affairs has a budget of $60 million. In addition, the Department of Natural Resources is to share with the Metropolitan District Commission some $124 million, the largest portion of which will be spent on the betterment of Boston Harbor.

Acquisition: Handled by the Division of Fish and Game and the Department of Natural Resources. The Division of Fish and Game has $5 million specifically marked for wetlands acquisition. Conservation Commissions may also acquire wetland areas and may receive 50% reimbursement under the "Self-Help" program administered by the Department of Natural Resources. Wetlands acquisition is supplemented and frequently made unnecessary by the protection given through restrictive orders.

Reclamation: No provision.

Penalties: For violation of permits: Fine of not more than $100, or 6 months imprisonment, or both.

For violation of restrictive orders: Fine of not less than $10 nor more than $50, or 1 month imprisonment, or both.

For any violation, injunctive relief is available.

Litigation: Commissioner of Natural Resources v. Volpe, 349 Mass. 104, 206 NE 2d 666 (1965). The court remanded, stating that although a law regulating filling of wetlands is constitutional, if a prohibition against filling should deprive an owner of the practical uses of his land, this would constitute an interference with use amounting to an unjust taking without compensation.

Robbins v. Dept. of Public Works, 355 Mass. 328, 244 NE 2d 577 (1969). Held that land in the public trust cannot be transferred or alienated, even with the approval of the Governor and his Council, without a special enactment by the legislature.

MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 255 NE 2d 347 (1969). The court remanded without specifically ruling on the issue of taking. The court said that the municipality was acting outside the scope of its zoning authority in denying the owner of wetlands a permit to fill, because preservation of the wetlands in their natural state was not a purpose of the zoning enabling act.

Golden v. Board of Selectmen (Mass), 265 NE 2d 573, 1 ELR 20095 (1970). Held that the municipality had the zoning authority to deny a dredge-and-fill permit, even though the state had approved the permit. (Perhaps the reason that Golden was decided contra to MacGibbon is that here the municipality was acting on economic motives--to protect marine fisheries--rather than on other grounds).

Sources: Act 768-1965 (Coastal Wetlands Protection Act of 1965), Chapter 130, Section 105 of the General Laws of Massachusetts.

Wetlands Protection Act of 1972, Chap. 784 of the General Laws of Massachusetts. (Law combines Hatch and Jones Act).

Rice, David A., A Study Of The Law Pertaining To The Tidelands Of Massachusetts, Final Report for the Commonwealth of Massachusetts, House Document No. 4932, 1970.

Correspondence with Commissioner Arthur W. Brownell, Department of Natural Resources.

NEW HAMPSHIRE

GENERAL

Plan: There is no comprehensive plan, although a coastal zone management plan is currently being devised by the Coastal Zone Study Commission.

Inventory: 9,000 acres of tidal wetlands. The number of acres under state ownership is undetermined.

Boundary: The boundary question is subject to presently on-going litigation to determine whether all wetlands below the mean high tide mark belong to the state.

Definition: All areas subject to tidal action (including areas presently or formerly connected to tidal waters) whose surface is three-and-one-half feet or less above local mean high tide and upon which may grow specified salt marsh vegetation.

Permit System: Yes. No exceptions are listed. A permit will not be issued if it "shall infringe on the property rights or unreasonably affect the value or enjoyment of property of abutting owners."

Restrictive Orders: No.

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearing: Mandatory for "major" proposals.

Notice: Mailed to interested parties and to all known abutting landowners. Newspaper publication is required.

Citizen Participation: Any citizen may request a hearing on a proposal deemed "minor". Any citizen may make a personal statement of his views at a hearing. Citizens do not have standing to sue for injury done to wetlands, although there are bills pending before the legislature which would grant such standing.

Burden of Proof: On the state.

ADMINISTRATIVE ORGANIZATION

Agency: Overall supervision is by an interagency Special Board. Director supervision is under the Water Resources Board.

Staff and Funding: Not available.

Acquisition: Handled by the Fish and Game Department. $200,000 per year is marked for the acquisition of wildlife habitat, although none is specifically set aside for wetlands acquisition.

Reclamation: No provision.

Penalties: Fine of not more than $1000. Injunctive relief is available. A violator is liable for removal of ill, spoil or structures, although no further restoration is required.

Litigation: Sibson v. State, 110 N.H. 8, 259 A.2d 397 (1969).

Pic-N-Pay v. State, 110 N.H. 16, 259 A.2d 659 (1969).

Held that denial of a dredge-and-fill permit constituted an unjust taking without compensation. These cases have been superceded by the 1969 amendment to N.H.R.S.A. 483-A which gives a more inclusive definition of wetlands.

Sibson v. Special Board, Nos. E4815 and E5464 (Sup. Ct., Rockingham Co., filed March 15, 1972) (decision pending).

The issue is the extent of public ownership of wetlands. (See "Boundary" above).

Sources: Act 215-1967 (Regulation of Dredging and Filling in and adjacent to Tidal Waters) (Chapter 483-A of the New Hampshire Revised Statutes Annotated).

Act 254-1967 (Regulation of Dredging and Filling in and adjacent to Public Waters) (Section 149:8a of the New Hampshire Revised Statutes Annotated).

Act 274-1967 (Regulation of Dredging, Filling, Construction, etc., in Surface Waters) (Chapter 488-A of the New Hampshire Revised Statutes Annotated).

Correspondence with Donald W. Stever, Jr., Assistant Attorney General, Environmental Protection Division.

NEW JERSEY

GENERAL

Plan: There is a comprehensive plan for the state, except for the Hackensack Meadowlands, which are handled by a special commission (see Litigation section, infra).

Inventory: Not available.

Boundary: Mean high tide.

Definition: All areas subject to tidal action or at an elevation of one foot above local extreme high water and on which may grow specified marshland vegetation.

Permit System: Yes. The state's mosquito control program is exempt.

A fee of $.35 per cubic yard is charged for fill taken from state-owned land.

Permits issued: 1972 - 2

1971 - 5

1970 - 3

(All for commercial development).

Restrictive Orders: Yes.

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearing: For permits: Not required.

For restrictive orders: Mandatory.

Notice: Mailed to affected landowner. Also given through newspaper publication.

Citizen Participation: None guaranteed.

Burden of Proof: On the state.

ADMINISTRATIVE ORGANIZATION

Agency: Centralized under the Department of Environmental Protection. Commercial development is under the Department of Conservation and Economic Development.

Staff and Funding: 1347 persons; $22,000,000 (for the entire Department).

Acquisition: Handled by the Department of Environmental Protection. No funds specifically marked for wetlands acquisition, but the Green Acres Bond monies may be used for this purpose.

Reclamation: A violator of the Wetlands Act may be required to restore the damaged land to its original condition. There is no state plan for reclamation.

Penalties: Fine of not more than $1000 plus the cost of restoration.

Litigation: Morris County Land Development Co. v. Township of Parsippany-Troy Hills, 40 NJ.539, 193 A2d 233 (1963).

Held that a municipal zoning ordinance which has as its purpose the preservation of land in its natural state through the restricting of land uses constitutes an unjust taking without compensation. The owner of such restricted land is thereby deprived of all practical uses of the land.

New Jersey Sports and Exposition Authority v. McCrane, Nos. L26438-70, L29368-70, L30458-70, L34540-70 (Sup. Ct., Bergen Co.) 2 ELR 20056 (1971).

Held that although the Hackensack Meadowlands are a part of public trust resources, the New Jersey Legislature had the authority to transfer lands out of the public trust since the legislature determined that to do so would benefit the public (the purpose was to build a sports complex on the Hackensack Meadowlands).

Cheval v. New Jersey, No. L29368-70 (Sup. Ct.) 1 ELR 65167 (filed June 9, 1971)(decision pending).

Action seeking declaratory judgment that New Jersey Sports and Exposition Authority Act is unconstitutional (see McCrane, above) and requesting injunctive relief against development of wetlands, since the wetlands are a part of the public trust.

Cape May County Chapter, Inc., Izaak Walton League of America v. Macchia, No. 1037-70 (D.N.J., June 16, 1971), 1 ELR 20300 (decision pending).

Action seeking declaratory judgment of an existing public trust, injunctive relief against defendants' dredging and filling and restoration of the wetlands which defendants had diked and filled.

Court held that plaintiffs have standing to sue; their interests are within the "zone of interests" which the statute seeks to protect.

Borough of Neptune City v. Borough of Avon-by-the-Sea, (Sup. Ct., July 24, 1972).

Action involved right of beach access. Court based its decision on the public trust doctrine, stating that since the shorefront was within the public trust all should have equal access.

Sources:

Act 205-1970 (The Wetlands Act of 1970) Sections 13:9A-1-13:9A-10 of the New Jersey Statutes Annotated.

Coastal Areas Protection Act (proposed), No. 722.

Jaffee, D., "State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey," Rutgers Law Review, Vol. 25, No. 4, 1971, p. 571.

Cooper, Charles, "Filling New Jersey's Meadowlands--With People," Environmental Action, Vol. 3, No. 22, April 1, 1972, pp. 11-13.

Hay, John, "Making Peace With The Marshes of New Jersey," Smithsonian Magazine, Vol. 2, No. 12, March 1971, pp. 40-49.

Porro, Alfred A., Jr., and Teleky, Lorraine S., "Marshland Title Dilemma: A Tidal Phenomenon,: Seton Hall Law Review, Vol. 3, No. 2, 1972.

Correspondence with Richard D. Goodenough, Director of the New Jersey Department of Environmental Protection.

GENERAL

Plan: There is no comprehensive plan. The laws governing the use of navigable waters exclude the tidal waters bordering on and lying within the boundaries of Nassau and Suffolk Counties (i.e., Long Island Sound and the coast bordering the Atlantic Ocean). Thus wetlands are left unprotected.

The state legislature in the past year passed four bills which would have given comprehensive protection to tidal wetlands. These were vetoed by the Governor.

Inventory: Not available.

Boundary: Not given.

Definition: Not given.

Permit System: No.

Restrictive Orders: No.

ADMINISTRATIVE PROCESS

Not applicable.

ADMINISTRATIVE ORGANIZATION

Agency: Centralized under the Department of Environmental Conservation.

Staff and Funding: For fiscal 1972, rough $32 million. Projected budget for fiscal 1973 is $31 million.

Acquisition: Largely handled at the local level with the help of state funds. The Long Island Wetlands Act enables the municipalities and the counties of Suffolk and Nassau to buy up the wetlands. The state matches the cost to the local governments on a 50-50 basis. If the Environmental Quality Bond Act of 1972 is approved in the November 1972 referendum, $27 million will be available for the purchase and restoration of tidal and freshwater wetlands.

Reclamation: One aspect of the Long Island Wetlands Act is to encourage "habitat restoration".

Penalties: None provided.

Litigation: Citizens Committee for the Hudson Valley v. Volpe, 302 FSupp 1083, 1 ELR 20001, aff'd 425 F2d, 1 ELR 20006, cert' denied, 39 USLW 3242, 400 U.S. 949 (1970).

Held that the U.S. Corps of Engineers exceeded its statutory authority in granting a dredge-and-fill permit for highway construction without the approval of Congress and the Secretary of the Department of Transportation.

The court held that plaintiffs Sierra Club and Citizens Committee had standing to sue, despite their lack of economic interest in the determination. The court ruled that if the purpose of the statute is to provide environmental protection of natural resources, then a congressional intent may be inferred giving standing to groups with such an interest.

New York State Water Resources Commission v. Liberman, 37 A.D. 2 484, 326 NY Supp 2d 284 (1971).

Held injunction against filling in navigable waters without a permit is a valid exercise of the state's police power. The statute under which the state acted is constitutional; the area in question is within the public trust. The state's act was therefore not such an unreasonable exercise of its police power as constituting an unjust taking.

U.S. v. Baker, No. 70 Civ. 2773, (SDNY, July 29, 1971), 1 ELR 20378.

Preliminary injunction granted to halt filling of wetlands and to order removal of previously deposited fill.

Sources: Act 545-1959 (The Long Island Wetlands Act) Section 360(g), Section 394 of McKinney's Consolidated Laws of New York Annotated: Book 10, Conservation Law.

Hardy, E.E. and Shelton, R.L., "Inventorying New York's Land Use and Natural Resources," New York's Food and Life Sciences, Vol. 3, No. 4, October-December 1970.

Squires, Donald F., "Long Island Sound: The Urban Sea," Sierra Club Bulletin, Vol. 57, No. 2, February 1971, p. 12.

Correspondence with James E. Davis, Legislative Legal Counsel, Department of Environmental Conservation and A. G. Hall, Director, Division of Fish and Wildlife.

GENERAL

Plan: A comprehensive plan is now being formulated; the completion date is scheduled for November 1973. Wetlands are presently being protected by several laws.

Inventory: 2.2 million acres.

Boundary: High tide.

Definition: Any salt marsh or other marsh subject to tidal action including wind tides (whether or not the tide waters reach the marshland areas through natural or artificial watercourses), but not to include hurricane or tropical storm tides and on which may grow specified marshland vegetation. The restrictive orders act includes, with the above defined area, such contiguous land as the director deems necessary to affect in order to carry out the purpose of the act.

Permit System: Yes. The state's mosquito control program is exempt.

No charge for fill taken from state-owned land.

Permits issued: January 1, 1970 to July 24, 1971 = 667.

Restrictive Orders: Yes.

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearing: For permits: The initial ruling on applications is made by the state without a public hearing, although the applicant is required to give notice of his application to the adjoining landowners. Upon a ruling having been made, any state agency or the applicant may raise objection (the law does not provide for abutting owners or interested citizens to appeal). The objection is heard by an interagency Review Board, which must hold a public hearing in connection with the matter.

For restrictive orders: Mandatory.

Notice: For permits: Mailed to state agencies and to the applicant. Publication by newspaper not required.

For restrictive orders: Mailed to state agencies and to affected landowners.

Citizen Participation: The act provides that only a permit applicant or the Department of Natural and Economic Resources may appeal a decision of the Review Board to the superior courts.

Burden of Proof: Upon the party who requests a hearing.

ADMINISTRATIVE ORGANIZATION

Agency: Centralized under the Department of Natural and Economic Resources.

Staff and Funding: Not available.

Acquisition: Handled by the Department of Administration. The state presently has $500,000 marked for the buying of wetlands.

Reclamation: A violator of the wetlands acts may be compelled to restore the injured wetlands. There is no state plan for reclamation.

Penalties: For permit violations: Fine of not more than $500 or imprisonment of not more than 90 days, or both. Injunctive relief is available.

For restrictive orders: Fine of not more than $500 or imprisonment for 6 months, or both. Injunctive relief is available.

Litigation: State of North Carolina v. Brooks, 275 N.C. 175, 166 S.E. 2nd 70 (1960). Involves the state's claim of ownership of marshlands in order to protect estuarine life against trespassers.

U.S. v. Midgett, (Civil No. 933, EDNC, July 21, 1972)(decision pending). Action seeking temporary and permanent injunctive relief from defendant's dredging and filling of wetlands.

Sources: Act 791-1969 (Dredge and Fill Regulations) Section 113-229 of the General Statutes of North Carolina.

Act 1159-1971 (Sections 6 & & of the Dredge and Fill Law, Coastal Wetlands Act) Sections 113-229, 113-230 of the General Statutes of North Carolina.

Morgan, Robert, "On The Legal Aspects of North Carolina Coastal Problems," University of North Carolina Law Review, Vol. 49, 1971, p. 857.

Rice, D., "Estuarine Land of North Carolina: Legal Aspects of Ownership and Control," North Carolina Law Review, Vol. 46, January 1968, p. 779.

Correspondence with Thomas L. Linton, Commissioner of Commercial and Sports Fisheries, Department of Natural and Economic Resources.

GENERAL

Plan: There is no comprehensive plan. The Oregon Coastal Conservation and Development Commission is now developing a plan of administration through regional authorities. The Beach Bill and other laws provide effective protection of coastal areas.

Inventory: 56,000 acres (exclusive of the Columbia River).

Boundary: Mean high tide.

Definition: From the vegetation line seawards is termed the ocean shore. Wetlands themselves are not defined.

Permit System: Yes. The state has a permit system which regulates dredging and filling in submerged lands and one which covers dredging, filling or otherwise altering the shore from the extreme low tide mark to the vegetation line.

Permits issued since September 9, 1971:	Fills only	- 2
	Dredge-and-fill	- 17
	Denied	- 7
Pending:		
	Fills	- 2
	Dredge-and-fill	- 11

Restrictive Orders: Yes. In addition to the regulation of uses of the ocean shore, the State Highway Commission may promulgate rules governing the use of property subject to public rights or easements and of property contiguous to the ocean shore. In addition, the Governor has ordered that all state agencies stop any of their construction or construction-related activities which would alter the coast and that those state agencies with regulatory functions apply their authority in the most stringent way in order to protect the coastal area. Under the Water Resources Act, any agency may request the State Water Resources Board to close one or more waters of the state to the issuance of permits.

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearing: For permits: Upon receipt of an application, the State Highway Engineer is to post notice of the application at or near the site of the proposed improvement. The engineer has also the duty of giving notice of any application, hearing or decision to any person who files a written request with him for such notice. After the required posting of the notice of application, any 10 persons may file a written request with the engineer for a hearing. After a hearing, or if a hearing is not requested, the engineer is to grant the permit, if it is within the public interest.

For restrictive orders: Not required under the Beach Bill provisions governing coastal zone uses. Mandatory under the Water Resources act, which provides for the closing of waters to permit uses.

Notice: For permits: The engineer is required to post notice of a hearing at or near the site of the proposed improvement.

For restrictive orders: Publication by newspaper required.

Citizen Participation: Citizens may bring "class actions." Under the Beach Bill, anyone who wishes to have notice of proposed developments may file a request for such notice with the State Highway Engineer. Anyone may request a hearing on a proposed development.

Burden of Proof: On the individual.

ADMINISTRATIVE ORGANIZATION

Agency: Fragmentation of responsibilities. Under the Water Resources Act, the State Division of Lands supervises dredge-and-fill permits; appeal from a permit denial, though, is made to the State Water Resources Board. Commercial development is planned by the Coastal Conservation and Development Commission. Other responsibilities rest with the Department of Environmental Quality. The State Highway Department has the authority to carry out the regulations of the Beach Bill.

Staff and Funding: Not available.

Acquisition: Handled by the State Parks Commission. No funds are specifically marked for wetlands acquisition. The state Attorney General recently ruled that the State Parks Division could use park funds to purchase tidal wetlands for recreation areas if a shell fishery exists. No funds as yet have been appropriated.

Reclamation: No provision.

Penalties: Violations under the Water Resources Act are to be prosecuted as constituting a public nuisance. The State Water Resources Board is empowered to make such orders and to take such action as is necessary. Under the Beach Bill, violations are punishable by a fine of not more than $500 or by imprisonment in the county jail for 6 months, or both. Each day of a continuing violation is to be treated as a separate offense.

Litigation: State ex rel. Thornton v. Hay, 254 Or 584, 462 P2d 671, (1969)

Held that the state had the right as guardian of the public trust existing in the ocean shore to prevent defendants' construction on the dry sand area. The public has an easement through custom on this land to protect it for the benefit of all.

Bruno v. Hay, No. 68-300, (D. Ore., June 6, 1972) 2 ELR 20383.

Held that state statute, section 390. 610(1), declaring the ocean shore from the vegetation line seawards to be in the public trust and subject to the granting of a permit for construction is constitutional. Plaintiffs claimed that the application of this statute constituted such an interference with property to be an unjust taking. The court held that this was not a taking, because the public's right of easement to the shore lands was open and notorious.

Oregon v. Fultz, (Sup. Ct., Dec. 22, 1971) 491 P2d 1171, 2 ELR 20381.

Held that the state had constitutional authority to deny a permit for road construction on the dry sand area of the ocean shore on the basis that the customary use of that area had created a public easement for recreational purposes.

Oregon v. Kappler, No. 358-969 (Cir. Ct., Multnomah Co., 1971).

Held that the defendant should be permanently enjoined from further filling in the submerged land adjacent to his upland property, unless he should be able to obtain a permit to do so.

Oregon v. Corvallis Sand and Gravel Co., No. 21512, (Cir. Ct., Benton Co., 1972).

Held that the defendant was liable for damages totalling $82,500 for fill taken from state owned submerged land. Defendant claimed title to the land from which he had dredged the fill. This land was between mean high and mean low tide marks and thereby belonged to the state.

State ex rel. Johnson v. Bauman, Or App., 492 P2d 284 (1971).

Action for injunction against shorefront development, on grounds that the land in question was subject to a public easement. The case was not decided on the merits. The court held the Attorney General could not bring such an action; the law authorized the State Highway Commissioner to do this.

The federal district courts of the Ninth Circuit have made the issue of standing to sue one of importance.

Citizens Committee for the Columbia River v. Resor, Civil No. 69-498 (D Ore., Sept. 4, 1969) 1 ELR 20206.

Held that plaintiffs could not sue for alleged illegal dredging by the U.S. Army Corps of Engineers because plaintiffs lacked standing for lack of a real interest in the controversy. In a subsequent and related case, Petterson v. Resor, (D Ore., Oct. 1971); 331 F Supp 1302, 2 ELR 20013, 1/ the same plaintiffs brought suit as "property owners", but not for a threatened injury to their navigational rights, rather to their environmental and recreational rights. The court held that this was sufficient to give plaintiffs standing, but decided in favor of the Corps on the basis that the dikes constructed by the Corps would not interfere with navigation.

Sources:

Act 601-1967, Ocean Shores: State Recreation Areas, (The Beach Bill), Sections 390-605 et. seq. of the Oregon Statutes.

Coastal Conservation and Development Commission Act of 1971, Chap. 608, of the Oregon Statutes.

Water Resources Act of 1971, Chap. 754, of the Oregon Statutes.

Executive Order No. 01-070-07 (Coastal Construction Moratorium), March 3, 1970.

Oregon's Submerged and Submersible Lands, published by the Advisory Committee to the State Land Board, 1969-1970.

Correspondence with Cecil L. Edwards, Executive Assistant to the Advisory Committee to the State Land Board.

1/ See Comments, "Dikes and Causeways in Navigable Waters: The Rivers and Harbors Act of 1899 and Its Conflicting Interpretation in Citizen's Committee for the Hudson Valley V. Resor and Petterson v. Resor, 2 ELR 10019 - 100 25.

RHODE ISLAND

GENERAL

Plan: There is no comprehensive management plan, but several laws give effective protection.

Inventory: Not available.

Boundary: Mean high water mark

Definition: Any salt marsh bordering on the tidal waters, on which may grow specified salt marsh vegetation and such uplands as extend 50 yards inwards from the salt marshes. In addition, the Coastal Resources Management Council has authority over any land above the high water mark which it is necessary to include in order to carry out the purpose of the act.

Permit System: Yes.

Restrictive Orders: Yes.

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearing: For permits: Not required.

For restrictive orders: Mandatory.

Notice: Mailed.

For permits: Mailed to affected landowners. Publication by newspaper not required.

For restrictive orders: Mailed to affected landowners. Publication by newspaper not required.

Citizen Participation: None guaranteed.

Burden of Proof: On the state.

ADMINISTRATIVE ORGANIZATION

Agency: Overall supervision is now with the Coastal Resources Management Council; actual administration of the provisions pertaining to wetlands protection remains with the Department of Natural Resources.

Staff and Funding: Not available.

Acquisition: Handled by the Department of Natural Resources. No specific funds are marked for wetlands acquisition.

Reclamation: A violator of the permit law may be required to restore the damaged land to its original condition. There is no state plan for reclamation.

Penalties: Fine of not more than $500 plus cost of restorations. Fine of $50 a day for continuing violations. Injunctive relief is available.

Litigation: The state is now in the process of working out a plan to make use of the public trust doctrine.

Sources: Act 26-1965 (The Intertidal Salt Marshes Act,) Section 11.46-1 of the General Laws of Rhode Island.

Act 440-1963, (The Coastal Wetlands Act), Section 2-1-13 - 2-1-17 of the General Laws of Rhode Island.

Act 279-1971 (Coastal Resources Management Council Act), Sections 46-23-1 - 46-23-12; 42-17-4 of the General Laws of Rhode Island.

Correspondence with C.F. Replinger, Acting Chief, Division of Coastal Resources, Department of Natural Resources.

VIRGINIA

GENERAL

Plan: There is a comprehensive plan. Under the Wetlands Act of 1972, primary control over wetlands management is given to local governments with provision for appeal to the state Marine Resources Commission. The local governments may formulate zoning regulations for wetlands, based on the guidelines furnished by the Commission. In the event that a local government does not choose to provide regulations, the Commission will manage those wetlands directly.

Inventory: 393,452 acres of tidal wetlands, of which 176,500 acres are marshland.

Boundary: Mean low tide.

Definition: All land lying between mean low tide and 1.5 times the mean tide range at the site of the proposed project, and upon which may grow specified salt marsh vegetation.

Permit System: Yes. Exemptions include normal maintenance of existing structures, agricultural work, public utilities--related work and shellfish cultivation and harvesting. A "grandfather clause" exempts all projects begun before the effective date of the act.

Restrictive Orders: Yes. Zoning ordinances, incorporating a permit system, are to be published by local governments.

ADMINISTRATIVE PROCESS

Impact Statement: Yes.

Hearing: Mandatory in connection with permit applications.

Notice: By mail to the applicant, to interested government agencies and to affected landowners. General publication by newspaper is required. The cost of such publication is to be borne by the applicant.

Citizen Participation: The law provides that 25 or more freeholders of the locality in which the proposed project is to be may petition the Marine Resources Commission for a review of the local board's decision.

Burden of Proof: On the individual.

ADMINISTRATIVE ORGANIZATION

Agency: Overall supervision is by the Marine Resources Commission, while regular management is left to the local governments.

Staff and Funding: Not available.

Acquisition: Handled by the Department of Conservation and Economic Development and the Department of Game and Inland Fisheries. In addition, counties and municipalities may purchase wetlands. There are no funds specifically marked for wetlands acquisition.

Reclamation: No provision.

Penalties: Violations will be treated as misdemeanors with a separate charge for each day of a continuing violation. Penalties have not yet been determined.

Litigation: The act is too new to have yet been tested.

Sources: Wetlands Act of 1972, Title 62.1, Chapter 2.1, of the Virginia Statutes.

Correspondence with Dr. Kenneth L. Marcellus, Associate Marine Scientist, Virginia Institute of Marine Science.

WASHINGTON

GENERAL

Plan: There is a comprehensive plan now in effect. Two plans are before the voters at the November 1972 elections. One plan, the Shoreline Management Act of 1971, is currently in effect. Under this Act, responsibility for developing a master management plan for the coastal region rests on local governments. The local governments must produce their master plans by November 1973, or the Department of Ecology will develop a master plan.

Inventory: Total acreage of tidal wetlands is not determined. The state owns 832,000 acres.

Boundary: Mean high tide.

Definition: Under present law, wetlands are defined as the lands extending landward for two hundred feet in all directions from the ordinary high water mark and all marshes, bogs and swamps subject to tidal action.

Inventory: Total acreage of tidal wetlands is not determined. The state owns 832,000 acres.

Boundary: Mean high tide.

Definition: Under present law, wetlands are defined as the lands extending landward for two hundred feet in all directions from the ordinary high water mark and all marshes, bogs and swamps subject to tidal action.

Permit System: Yes. Under the Shoreline Management Act local governments must establish a permit program, overseen by the state, in order to regulate development. Normal maintenance or repair of existing structures or developments and construction of normal protective bulkheads common to single family residences (provided that a residence does not exceed a height of 35 feet above average grade level) are both excepted from the permit program.

Restrictive Orders: Yes. The measure attempts to use the master plan concept to regulate prospective land uses in the coastal area.

ADMINISTRATIVE PROCESS

Impact Statement: No.

Hearing: For permits: Not required.

For restrictive orders: Mandatory under both measures.

Notice: By newspaper publication.

Citizen Participation: Citizens have the opportunity to present statements and views at the hearings. Citizens are allowed to sue violators of the act. The prevailing party may be awarded attorney's fees and court costs in addition to damages sufficient to restore the area.

Burden of Proof: On the individual.

ADMINISTRATIVE ORGANIZATION

Agency: Centralized under the Department of Ecology.

Staff and Funding: 270 persons; $12.7 million, for the biennium 1971-73 (for the entire Department). The Department has $21.6 million in state and federal grants.

Acquisition: Primarily handled by the Department of Game, although the Department of Parks and Recreation and the Department of Ecology may also acquire lands. No funds are specifically marked for the purchase of wetlands.

Reclamation: A violator is required to restore the damaged land to its original condition. There is no state plan for reclamation.

Penalties: Under the present law, there is a fine of not less than $25 nor more than $1000 or imprisonment in the county jail for 90 days, or both. Upon the third and all subsequent violations within any 5 year period, the fine increases to not less than $500 nor more than $10,000. Violators may be liable for the cost of restoration. Injunctive relief is available.

Litigation: Bach v. Sarich, 74 Wash. 2d 575, 445 P.2d 648 (1968).

Held that an apartment which would extend from its upland site into lake waters did not constitute a riparian use but was an encroachment on plaintiff's common rights to use lake surface for enjoyment. Defendant enjoined from further construction and ordered to remove existing fill deposited in pre-trial work.

Wilbour v. Gallagher, 77 Wash. 2d 307, 462 F.2d 323 (1969), cert. denied, 39 U.S.L.W. 3180, 1 ELR 65065 (1970).

Held that a developer was prohibited from placing fill in navigable waters since the fill interfered with the public's rights of navigation and recreation. Injunctive relief was granted.

Sources: Act 286-1971, The Shorelines Management, Chap. 286 of the Washington Annotated Codes.

Correspondence with John A. Biggs, Director, Department of Ecology.

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