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The South Carolina Coastal Zone Management Act of 1977

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I. INTRODUCTION

Along this nation's seashore lie some of our most scenic and important natural resources: marshes, estuaries, sand dunes, beaches, and ocean waters. In addition, one out of every two persons lives within fifty miles of the coast.[1] Unfortunately, the concentration of such large numbers of people in this relatively small strip of land has severely strained the resources of the coastal zone. Diking, dredging, and filling have already destroyed hundreds of thousands of acres of salt marsh;[2] pollution has contaminated most of the estuaries;[3] bulldozers have leveled miles of sand dunes to make way for new housing and high-rise developments. As the number of coastal residents continues to increase,[4] the existence of those resources that remain is threatened.

In the 1960's the coastal states began to recognize the need for governmental control over the disordered state of affairs in their coastal zones. By 1972 every state on the Atlantic coast except South Carolina had enacted legislation that established authority over what is perhaps the most critical resource of the coastal zone, the wetlands.[5] In that same year Congress passed

1. S. REP. No. 753, 92d Cong., 2d Sess. 1, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4776, 4777. [Hereinafter cited S. REP. No. 753].

2. From 1922 to 1954, man destroyed over one-quarter of the country's salt marshes. *Id.*

3. *E.g.*, in South Carolina pollution has necessitated the closing of nearly one-third of the state's 183,000 acres of oyster grounds. Letter from M.C. Moore, Public Information Specialist, S.C. Water Resources Comm., to Brad W. Wyche (Dec. 3, 1976).

4. It is estimated that by the turn of the century 80% of the U.S. population will reside within 50 miles of the coasts of the Atlantic, Pacific, Gulf, and Great Lakes. S. REP. No. 753, *supra* note 1, at 4777.

5. CONN. GEN. STAT. ANN. § 22a-28 to -45 (West 1975); DEL. CODE tit. 7, §§ 7001-7013 (1974); FLA. STAT. ANN. § 380.01 to .11 (West 1975); GA. CODE ANN. §§ 45-136 to -147 (1974); ME. REV. STAT. tit. 38, §§ 471-478 (Cum. Supp. 1977); MD. NAT. RES. CODE ANN. §§ 9-101 to -501 (1974); MASS. GEN. LAWS ANN. ch. 130, § 105 and ch. 131, § 40 (West 1974); N.H. REV. STAT. ANN. §§ 483-A:1 to: 5 (1968); N.J. STAT. ANN. §§ 13:19-1 to -21 (Cum. Supp. 1977); N.Y. ENVIR. CONSERV. LAW §§ 25-0101 to -0601 (Cum. Supp. 1977) (McKinney); N.C. GEN. STAT. §§ 113A-100 to -128 (1975); VA. CODE ANN. §§ 62.1-13.1 to .20 (Cum. Supp. 1977). These statutes generally define wetlands as those areas, subject to the ebb and flow of the tide, that are capable of supporting certain species of vegetation.

Since 1972, the South Carolina State Budget and Control Board has administered a permit program for all construction and excavation activities on lands below the mean high-water mark of navigable waters. S.C. CODE ANN. §§ 1-5-40, 49-1-10 (1976).

the Coastal Zone Management Act (CZMA)[6] to encourage the states, through the availability of federal grants, to extend this authority throughout the entire range of their coastal zones.

In South Carolina, as elsewhere, the problems of the coastal zone present some of the most difficult and important environmental issues facing the State. In the midst of considerable public attention, the South Carolina General Assembly labored in vain for nearly a decade to enact a law that would enable the State to resolve the conflicting demands being made upon South Carolina's coastal resources.[7] In 1976 the House and Senate finally agreed on two bills, only to have the Governor veto both.[8] In the 1977 session, however, the General Assembly passed and sent to the Governor a bill acceptable to him, and the South Carolina Coastal Zone Management Act of 1977 became law.[9]

This note summarizes and evaluates the major provisions of the new Act, considers the law in light of the CZMA, explores present and possible future federal-state relations in the area of coastal zone management, considers the relationship of the public trust doctrine to the Act, and examines two constitutional issues that are likely to arise under the Act. Before proceeding to these issues, a brief review of the events that led to the enactment of South Carolina's new coastal zone law will be helpful.

II. HISTORICAL BACKGROUND

A. The Early Emphasis on Tidelands Legislation

Under the rule adopted and repeatedly affirmed by the South Carolina Supreme Court, the State is presumptively the owner of all land between the mean low- and mean high-water

6. Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (codified at 16 U.S.C. §§ 1451-1464 (Supp. V 1975)), *as amended by* Coastal Zone Management Act Amendments of 1976, Pub. L. No. 94-370, 90 Stat. 1013, (codified at 16 U.S.C.A. §§ 1451, 1452-1464 (Cum. Supp. 1977)) [hereinafter cited as the CZMA with textual references to Act sections].

7. *See, e.g.*, S. 744, 98th Gen. Ass., 2d Sess. (1970); S. 221, 99th Gen. Ass., 1st Sess. (1971); S. 977, 99th Gen. Ass., 2d Sess. (1972); S. 260, 101st Gen. Ass., 1st Sess. (1975); H. 1045, 99th Gen. Ass., 1st Sess. (1971); H. 1237, 100th Gen. Ass., 1st Sess. (1973); H. 2012, 100th Gen. Ass., 2d Sess. (1974); H. 2420, 101st Gen. Ass., 1st Sess. (1975). The bills considered prior to 1973, however, dealt only with wetlands.

8. Veto Message of the Governor on H. 2420 (June 18, 1976) [1976] S.C. HOUSE J. 3344; Veto Message of the Governor on H. 2839 (July 1, 1976) [1976] S.C. HOUSE J. 3602.

9. Coastal Zone Management Act, No. 123, 1977 S.C. Acts 224 (codified at S.C. CODE ANN. § 48-39-10 to -220 (Cum. Supp. 1977)).

marks, the tidelands.[10] A private claimant to the tidelands can rebut this presumption only by (1) producing an unbroken chain of title back to an original grant from the sovereign (the Crown, the Lords Proprietors, or the State) and (2) pointing out specific language in the grant evincing an intent to convey to the mean low-water mark.[11] Because the claimants were unable to sustain this heavy burden of proof, however, the State has prevailed in all but one case.[12]

While the presumption in favor of the State is a strong one, it is nonetheless rebuttable; therefore, unless it obtains a judicial determination, the State can never be completely certain whether it owns a particular tract of tidelands. In the 1960's and early 1970's, several bills introduced in the legislature contained provisions aimed at determining the extent of the State's title to the tidelands. Some proposed bills would have created an administrative body to which individual claims of ownership of the tidelands could be presented and determined; others would have allowed persons claiming ownership of tidelands formerly used for rice cultivation to prove title thereto.[13] A bill proposed by the State attorney general would have required all claimants to file notice of their intention to preserve their claims by a certain date.[14] All properties not claimed by that date would have vested

10. State v. Yelsen Land Co., 265 S.C. 78, 82, 216 S.E.2d 876, 878 (1976); State v. Griffith, 265 S.C. 43, 46, 216 S.E.2d 765, 766 (1976); State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972); Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 434, 146 S.E. 434, 436 (1928); State v. Pinckney, 22 S.C. 484, 507 (1884).

Under the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1302, 1311-1315 (1970), South Carolina is the absolute owner of all lands located between the mean low-water mark and the state's jurisdictional limit—the so-called submerged lands. *See generally* Wyche, *The Law of Tidelands in South Carolina,* ENVIRONMENTAL LAW IN SOUTH CAROLINA: SELECTED TOPICS 81, 86-94 (G. Poliakoff ed. 1977) [hereinafter cited as Wyche, *The Law of Tidelands*]; Clineburg and Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina,* 23 S.C.L. REV. 7 (1971).

11. It appears from the cases cited in note 10 *supra* that such an intent can be demonstrated only if the original grant actually contains the words "to low-water mark." Language in the grant describing the tract as bound by the Atlantic Ocean and certain named streams consistently has been held insufficient to signify the requisite intent to convey beyond the mean high-water mark.

12. Lane v. McEachern, 251 S.C. 272, 162 S.E.2d 174 (1968). The claimant succeeded in *Lane* only because the entire tract in question was situated below the mean high-water mark. The grant would therefore have conveyed nothing unless construed as passing title to the low-water mark. *Cf.* Conch Creek Corp. v. Guess, 263 S.C. 211, 209 S.E.2d 560 (1974), *modified,* 265 S.C. 427, 219 S.E.2d 515 (1976).

13. S. 744, 98th Gen. Ass., 2d Sess., §§ 19-22 (1970); S. 221, 99th Gen. Ass., 1st Sess., §§ 19-22 (1971).

14. S. 977, 99th Gen. Ass., 2d Sess., § 22 (1972).

absolutely in the State; conflicting claims would have been resolved by litigation.[15]

The General Assembly, however, enacted none of these proposals, and by 1972 the principal concern of the legislature had shifted from the narrow issue of ownership to the broader and more important concept of coastal zone management.[16]

B. Passage of the Federal Coastal Zone Management Act of 1972

Congress enacted the CZMA "to preserve, protect, develop, and where possible, to restore and enhance, the resources of the Nation's coastal zone for this and succeeding generations."[17] As mentioned previously, the CZMA's basic thrust is to provide financial incentives to the states to encourage them "to exercise their full authority over the lands and waters in the coastal zone."[18] Under section 305 any coastal state is eligible to receive federal funds (up to eighty percent of costs) for the development of a coastal zone management program.[19]

After formulation of its program, the state can submit it to the National Oceanic and Atmospheric Administration (NOAA) for review under the criteria set forth in sections 305(b) and 306(c)-(e); the NOAA administers the CZMA under authority

15. S.C. WATER RESOURCES COUNCIL, S.C. TIDELANDS REPORT 25 (1970). While state ownership certainly facilitates the protection of the tidelands, it is not essential for that purpose. All tidelands owners, the state as well as private persons, are deemed to hold their property in trust for public purposes. *See* Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Stone, *Public Rights in Water Uses and Private Rights in Lands Adjacent to Water,* 1 WATERS AND WATER RIGHTS 177, 197 (R. Clark ed. 1967) [hereinafter cited as Stone, *Public Rights*]; Wyche, *The Law of Tidelands, supra* note 10, at 101-02.

16. Nonetheless, tidelands ownership remained a significant issue in the ensuing legislative debate, particularly in the Governor's office. The Act contains a provision allowing claimants to sue the State to establish title to the tidelands. *See* notes 122-27 and accompanying text *infra.*

17. 16 U.S.C. § 1452(a) (Supp. V 1975).

18. *Id.* § 1451(h). Unlike the federal air and water laws, the CZMA does not impose sanctions on states that either elect not to prepare a management program or prepare inadequate ones. The consequence of noncompliance is simply the loss of federal funds. For detailed discussions of the CZMA, see Ludwigson, *Coastal Zone Management: A Whole New Ballgame,* 4 ENVIR. REP. (BNA) No. 45 (Monograph 18); NATURAL RESOURCES DEFENSE COUNCIL, LAND USE CONTROLS IN THE UNITED STATES, ch. 6 (1977); Zile, *A Legislative-Political History of the Coastal Zone Management Act of 1972,* 1 J. COASTAL ZONE MGMT. 235 (1974); Symposium, *Implementation of the Coastal Zone Management Act of 1972,* 16 WM. & MARY L. REV. 717 (1975).

19. 16 U.S.C. § 1454(c) (Supp. V 1975).

delegated to it by the Secretary of Commerce.[20] If the program is approved by NOAA, the state becomes eligible under section 306 to receive grants to implement and administer its management program.[21] In addition, under the 1976 amendments to the CZMA,[22] coastal states are eligible to receive federal grants to study, plan for, and control the impact that outer continental shelf development may have on their coastal zones.[23]

In August 1973, Governor West accepted the challenge of the CZMA and created the South Carolina Coastal Zone Management and Planning Council, designating it the official State agency to receive and utilize the federal funds available under section 305.[24] The Planning Council's main task was to develop a comprehensive coastal zone management program that would meet the requirements of the CZMA and enable the State to receive funding under section 306. Obvious from the start, however, was NOAA's lack of authority to approve any South Carolina program unless the State were given sufficient authority to control land and water uses within its coastal zone.[25] At that time, the State, through its Budget and Control Board, exercised control in the coastal zone only over the tidelands and submerged lands, an authority clearly too limited to meet the mandate of the CZMA.[26] The General Assembly thus set to work in 1973 to enact a law giving the State broader control over the resources of its coastal zone. The law did not emerge until four years later.[27]

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20. *Id.* §§ 1454(b), 1455(c)-(e). Guidelines adopted by the National Oceanic and Atmospheric Administration (NOAA) under the statute may be found at 15 C.F.R. §§ 920-928 (1976), *modified,* 42 Fed. Reg. 22,035 (1977); 42 Fed. Reg. 43,552 (1977).

21. 16 U.S.C. § 1455 (Supp. V 1975). The CZMA also provides for preliminary approval of a state's program that fails to meet the requirements of the CZMA provided the state is working towards correcting such deficiencies. *Id.* § 1454(d).

22. 16 U.S.C.A. §§ 1451-1464 (Cum. Supp. 1977).

23. *Id.* § 1456(a). In 1977 the S.C. General Assembly enacted a law regulating the exploration, drilling, transportation, and production of oil and natural gas within the jurisdictional limits of South Carolina. S.C. CODE ANN. §§ 48-43-10 to -850 (Cum. Supp. 1977).

24. South Carolina has already received and expended four grants, the maximum number permitted under § 305.

25. 16 U.S.C. § 1455 (Supp. V 1975). For a discussion of the Board's authority and procedures, see Wyche, *The Law of Tidelands, supra* note 10, at 121-22.

26. 16 U.S.C. § 1454(b)(4) (Supp. V 1975).

27. S.C. CODE ANN. §§ 48-39-10 to -220 (Cum. Supp. 1977). Ironically, the State's authority under the Act is probably still insufficient to comply with the CZMA. *See* notes 51-63 and accompanying text *infra.*

III. Major Provisions of the Act

A. General Scheme

The Act establishes the South Carolina Coastal Council, an administrative body composed of eighteen legislators and citizens, and charges it with two basic duties: (1) to develop, administer, and enforce a State coastal zone management program and (2) to exercise regulatory control over various activities within certain areas of the coastal zone.[28]

B. Policy

The basic policy of the Act is "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the state."[29] With respect to the critical areas, the only coastal resources over which the Council is given direct, permit-issuing authority,[30] the Act provides:

> Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.[31]

This provision reflects the General Assembly's recognition that the environmental costs of altering or destroying a critical area often will outweigh the more easily quantifiable economic benefits of a particular project.[32] Therefore, preservation of a critical area to the exclusion of its development would be a use consistent with the policy of the Act.

C. Composition of the Council

The new South Carolina Coastal Council consists of eighteen

28. S.C. Code Ann. § 48-39-50 (Cum. Supp. 1977). The Act thus transfers the State Budget and Control Board's regulatory authority over areas below the mean high-water mark to the Council. S.C. Code Ann. § 48-39-210 (Cum. Supp. 1977). The Board's authority over activities in nontidal, navigable waters is not affected.

29. S.C. Code Ann. § 48-39-30(A) (Cum. Supp. 1977).

30. *See* text accompanying notes 35-50 *infra.*

31. S.C. Code Ann. § 48-39-30(D) (Cum. Supp. 1977).

32. *See* text accompanying notes 214-18 *infra.*

members appointed as follows: (1) One member, named by the local county governing body, from each of the eight coastal counties,[33] (2) one member from each of the six congressional districts in the State, elected by the State legislators representing the counties in each district, (3) two State senators, and (4) two members of the House of Representatives.[34]

D. Scope of Authority

1. The Critical Area Concept.—The Act defines "coastal zone" as all lands and waters in the eight coastal counties seaward to the State's jurisdictional limit.[35] The Act, however, gives the Council direct regulatory authority only over the critical areas of the coastal zone.[36] "Critical area" is defined as any of the following: (1) Coastal waters, (2) tidelands, (3) beaches, and (4) primary oceanfront sand dunes.[37] The definitions of these terms determine the extent of the Council's permit-issuing jurisdiction under the Act. Unfortunately, the meanings of the terms are not entirely clear.

"Coastal waters" is defined as "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, [containing at least one part chloride ion per thousand[38]] shoreward to their mean high-water mark."[39] Although the Act fails to define navigable waters of the United States, the legislature is presumably referring to the Army Corps of Engineers' long-standing definition of the term as "those waters that are subject to the ebb and flood of the tide and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce."[40] Under this interpretation, the term "coastal waters" encompasses all tide-influenced waters in the State that have the requisite degree of salinity.

"Tidelands" is defined to include (1) all land below the mean

33. The counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper, and Georgetown.

34. S.C. CODE ANN. § 48-39-40 (Cum. Supp. 1977).

35. S.C. CODE ANN. § 48-39-10(B) (Cum. Supp. 1977).

36. *Id.* § 48-39-200.

37. *Id.* § 48-39-10(J).

38. *Id.* § 48-39-10(E).

39. *Id.* § 48-39-10(F).

40. 42 Fed. Reg. 37,161 (1977) (to be codified in 33 C.F.R. § 329.4). The Corps' definition is based on the federal test of navigable waters established in *The Daniel Ball*, 77 U.S. 557, 563 (1870).

high-water mark and (2) those areas above the mean high-water mark that are (a) contiguous or adjacent to coastal waters, (b) an integral part of an estuarine system, (c) periodically inundated by saline water, and (d) capable of supporting the growth and reproduction of saline water vegetation.[41] Under a literal interpretation of this definition, part (2) does not apply to lands below the mean high-water mark. Consequently, all freshwater wetlands in the coastal zone that lie below this mark would be subject to the Council's authority under part (1). It is unlikely that the General Assembly intended this result. The State Attorney General's Office has opined that requirement (2)(b) applies to lands below the mean high-water mark.[42] Under this interpretation, which seems reasonable, only those freshwater and brackish wetlands that are, in the Council's judgment, "an integral part of an estuarine system"[43] would be deemed critical areas.

"Beaches" is defined as "those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established."[44] This generally refers to the area lying between the mean high-water mark and the primary oceanfront sand dunes. The latter is defined as "those dunes which constitute the front row of dunes adjacent to the Atlantic Ocean."[45] In its final rules and regulations promulgated under the Act,[46] the Council interprets this definition as excluding those primary oceanfront sand dunes located more than 200 feet from the mean high-water mark.[47] In addition, the Council has limited its authority "to the seaward side of any permanent man-made structure which was currently functional in its present form on September 28, 1977, where such structure is located seaward of any primary dune and within 200 feet of mean high-water."[48] Under

41. S.C. CODE ANN. § 48-39-10(G) (Cum. Supp. 1977).

42. Opinion by Keith Babcock, Staff Attorney, S.C. Att'y Gen.'s Office to C. Claymon Grimes, Jr., Member, S.C. Coastal Council (August 15, 1977).

43. S.C. CODE ANN. § 48-39-10(G) (Cum. Supp. 1977).

44. *Id.* § 48-39-10(H).

45. *Id.* § 48-39-10(I).

46. 2 S.C. State Reg. No. 7, 14 (1978). Under § 12 the new Administrative Procedures Act in South Carolina, these rules and regulations take effect ninety days after their submission unless disapproved by the General Assembly. S.C. CODE ANN. § 1-23-120 (Cum. Supp. 1977). The Council's rules and regulations were finalized on June 7, 1978.

47. Rule 30-10(B)(2), 2 S.C. State Reg. No. 7 at 36 (1978). Nearly all of these dunes in South Carolina are located within 200 feet of the mean high-water mark. Telephone interview with Ben Gregg, Staff Attorney, S.C. Coastal Council, Charleston, S.C. (Nov. 28, 1977).

48. Rule 30-10(B)(2)(3), 2 S.C. State Reg. No. 7 at 37 (1978).

this rule, those dunes situated behind existing structures located within 200 feet of the mean high-water mark are not subject to the Council's authority. Nothing in the Act, however, supports the Council's conclusion that the General Assembly intended to exempt from the regulatory program those primary dunes that abut man-made structures. These "backyard sand dunes" are exceedingly vulnerable to further alteration and thus demand the Council's most stringent protection.

The Council has determined the approximate geographic extent of its jurisdiction under the Act;[49] the boundary line generally corresponds to that point in the coastal zone where vegetation changes from predominantly brackish to predominantly fresh. None of the area outside this boundary is subject to the Council's authority.[50]

2. *Compliance with the CZMA.*—The CZMA conditions receipt of federal funds under section 306 on the existence of regulatory authority in the coastal zone to control those land uses that "have a direct and significant impact on coastal waters."[51] Under the Act's definition of "critical area," however, many activities conducted within the coastal zone, activities that directly and significantly affect coastal waters, will not be subject to State control.[52] As long as the activity is located within an upland area, the owner-operator will not be required to obtain a permit from the Council. While NOAA affords the states great leeway in delineating the scope of their authority in the coastal zone,[53] the Council's jurisdiction under the Act, standing alone, is likely to be insufficient to meet the mandate of the CZMA.[54]

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49. Rule 30-10, *id.* at 34.

50. The northern half of South Carolina's shoreline is a much more stable geologic area than the southern half. This accounts for the substantially smaller width of the jurisdictional zone in the northern section.

51. 16 U.S.C. §§ 1453(a), 1454(b)(2) (Supp. V 1975).

52. *E.g.*, the construction of an industrial plant in Charleston. In the coastal zone bill supported by environmentalists, H. 2473, 102d Gen. Ass., 1st Sess. (1977), the Council's authority would have extended to "uplands adjacent," defined as "those lands, activities upon which would have a direct and significant effect on coastal waters, beaches, primary oceanfront sand dunes and tidelands." *Id.* § 3 (G). Enactment of this bill would have given the Council sufficient authority to satisfy CZMA stipulations. Of course, the Council could exert indirect control over those operations that required the location of ancillary facilities in critical areas.

53. 42 Fed. Reg. 43,563 (1977) (to be codified in 15 C.F.R. § 923.31).

54. Telephone interview with Teresa Hooks, Staff Attorney, U.S. Office of Coastal Zone Management, Washington, D.C. (Nov. 28, 1977).

As of April 1977 only three Pacific Coast states have coastal zone management programs approved by NOAA. While each state approached the problem differently, the

Two alternatives are available to correct this deficiency. The first is simply to amend the Act to extend the Council's authority to those uplands adjacent to coastal waters. Although during its 1977 session the General Assembly indicated its dissatisfaction with such a provision by rejecting the environmentalist bill,[55] possible loss of federal funding could prompt a second look.[56]

The second alternative, which the Council is currently pursuing, is to rely on section 7(A) of the Act, which directs that "[a]ll agencies currently exercising regulatory authority in the coastal zone shall administer such authority in accordance with the provisions of this chapter and rules and regulations promulgated thereunder."[57] The Council interprets this provision as requiring all State and local agencies to comply with the terms of the final approved coastal zone management program.[58] The principal State agencies involved (including their main areas of jurisdiction) are the State Budget and Control Board (nontidal, navigable waters), the Department of Health and Environmental Control (air and water pollution control), the State Department of Highways and Public Transportation (roads and highways), the Land Resources Conservation Commission (mining operations), the Department of Parks, Recreation and Tourism (state parks), the State Ports Authority (ports and harbors), the Water Resources Commission (surface and groundwaters), and the De-

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scope of authority in all three is much broader than that provided for in the Act. In Washington, control extends to all the shorelines of the state and wetland areas (defined as all land within 200 feet of the ordinary high-water mark on streams, lakes, and tidal waters; floodways and floodplains, marshes, bogs and swamps *associated with* the shorelines). WASH. REV. CODE § 90.58.030(2)(B)(f) (Cum. Supp. 1976). *See* Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423, 431-36 (1974). In California, the coastal zone generally extends inland 1,000 yards from the mean high-water mark; however, in "significant coastal estuarine, habitat, and recreational areas it extends inland to the first major ridgeline" or five miles from the mean high-water mark, whichever is less. CAL. PUB. RES. CODE § 30103(a) (1976). The Oregon statute has been repealed. OR. REV. STAT. § 191.110(4) (1974) (repealed 1977).

55. H. 2473, 102d Gen. Ass., 1st Sess. (1977). *See also* note 52 *supra*.

56. The legislature might wish to consider the approach adopted in North Carolina where regulatory authority extends throughout each of the twenty coastal counties. The State exercises direct control over major developments and projects in areas of environmental concern; local county governments, under land use plans approved by the state, have jurisdiction over all other developments. *See,* Schoenbaum, *The Management of Land and Water Use in the Coastal Zone: A New Law Is Enacted in North Carolina,* 53 N.C.L. REV. 275 (1974). The CZMA expressly authorizes this approach. 16 U.S.C. § 1455(e)(1)(A) (Supp. V 1975).

57. S.C. CODE ANN. § 48-39-70(A) (Cum. Supp. 1977).

58. Telephone interview with Ben Gregg, Staff Attorney, S.C. Coastal Council, Charleston, S.C. (Nov. 28, 1977).

partment of Wildlife and Marine Resources (fish, game, and rare and endangered species). The Council is presently attempting to enter into memoranda of understanding with these agencies, under which the agencies agree to administer their programs in accordance with the management program.[59]

NOAA expressly endorses such a "networking" of authority approach in the coastal zone.[60] The regulations state that "the effect of networking is to tie the implementation of these individual authorities into a comprehensive framework that addresses more than the individual responsibilities of each agency and that makes these authorities part of an overall, unified strategy for managing coastal land and water resources."[61] NOAA makes it clear that each agency must be legally bound to exercise its authority in conformity with the management program; otherwise, the networking arrangement will not be acceptable under section 306.[62] Whether the Council will be able to obtain such commitments from all the various State agencies remains to be seen. Even if such commitments were acquired, however, the lack of direct regulatory control vested in the Council over uses in the adjacent uplands still remains. Therefore there is no guarantee that a networking arrangement would give the State sufficient authority to satisfy the requirements of the CZMA.[63]

E. The Permit Program

1. Exemptions.—Section 13(C) provides that as of September 28, 1977, any person desiring to "fill, remove, dredge, drain or erect any structure or in any way alter any critical area" first must obtain a permit from the Council.[64] This subsection, however, contains the following exemption:

> *Provided,* however, that a person who has legally commenced a use such as those evidenced by a state permit, as issued by the

59. The Council has finalized such agreements with the Department of Health and Environmental Control, the Water Resources Commission, and the Department of Wildlife and Marine Resources.

60. 42 Fed. Reg. 43,567 (1977) (to be codified in 15 C.F.R. § 923.42(d)(3)).

61. *Id.* (to be codified in 15 C.F.R. § 923.42(d)(3)(iii)).

62. *Id.* at 43,567-68 (to be codified in 15 C.F.R. § 923.42(d)(4)).

63. The Council's authority is deficient under the CZMA in another aspect as well. The Act does not give the Council the power "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." 16 U.S.C. § 1455(d)(2) (Supp. V 1975).

64. S.C. CODE ANN. § 48-39-130(C) (Cum. Supp. 1977).

> Budget and Control Board, or a project loan approved by the rural electrification administration or a local building permit or has received a United States Corps of Engineers or Coast Guard permit, where applicable, may continue such use without obtaining a permit.[65]

The meaning of this proviso was at issue in *South Carolina State Ports Authority v. South Carolina Coastal Council,*[66] the first case to arise under the Act. By September 16, 1977, the Ports Authority had received from the Budget and Control Board all necessary State permits for construction of the controversial Wando River project at Charleston Harbor.[67] The Council, however, subsequently notified the Ports Authority that these permits would have to be reprocessed under the new coastal zone law. The Ports Authority thereupon sought a declaratory judgment that the proviso contained in section 13(C) exempted the Wando River project from the Council's jurisdiction. The Council maintained that the proviso applies only if two steps have been accomplished on or before September 28, 1977: (1) the acquisition of all necessary permits ["legally"] and (2) the actual undertaking or performance of the activity ["commenced the use"]. Accordingly, the Council was entitled to assert jurisdiction over the project since construction had not begun as of the above date.

The lower court rejected the Council's argument and held that the project had been "legally commenced" within the meaning of section 13(C). The supreme court affirmed, agreeing with Judge Singletary's interpretation that "a state permit as issued by the Budget and Control Board" (as well as any of the items described in the proviso) constitutes not only evidence, but proof, of a legally commenced use.[68] The court added that to allow the Council to review all permits previously issued by the Budget and Control Board "would be disruptive and prohibitively retroactive."[69] Thus, the Ports Authority is entitled to construct the project without having to obtain a permit from the Council.

The Act also contains specific exemptions for the following activities:[70]

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65. *Id.*
66. ___ S.C. ___, 242 S.E.2d 225 (1978).
67. The Corps of Engineers issued a federal permit for the project on Dec. 27, 1977.
68. ___ S.C. at ___, 242 S.E.2d at 227.
69. *Id.*
70. S.C. CODE ANN. § 48-39-130(D)(1)-(9) (Cum. Supp. 1977).

(1) Uses existing as of September 29, 1977;[71]
(2) accomplishment of emergency orders by government officials;
(3) hunting, fishing, trapping, conservation, research and recreational activities, provided that such activities do not cause "material harm" to the resources of the area;
(4) lawful discharges of treated effluent;[72]
(5) dredge and fill activities performed by the U.S. Army Corps of Engineers;[73]
(6) construction of walkways over sand dunes;
(7) emergency repairs to any existing lawfully authorized structure;
(8) maintenance and repair of drainage, sewer, railroad, and utility facilities;
(9) normal maintenance or repair to any pier or walkway, provided dredge or fill is not involved; and
(10) construction and maintenance of a major utility facility which has obtained a certificate under state law.[74]

2. Procedure.—Each permit application must contain the information set forth in section 14(B).[75] Within thirty days prior to application, the applicant must publish notice of his proposal in both a newspaper of general circulation and in a newspaper of the county in which the activity is proposed. Within thirty days of receiving the application the Council must notify in writing all interested parties of the proposed activity.[76] These parties then have thirty days in which to comment on the application if it is

71. *Id.* § 48-39-130(A). Of course, substantial modifications in existing uses would require permits. Section 13(C) states that no person shall alter any critical area without a permit. *Id.* § 48-39-130(C).

72. In June 1975 the U.S. Environmental Protection Agency (EPA) authorized the State of South Carolina, through the Department of Health and Environmental Control (DHEC), to administer the National Pollutant and Discharge Elimination System (NPDES) program established under § 402 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1342 (Supp. V 1975). The Act prohibits the discharge of any pollutant from a point source into waters of the United States unless a permit, based at a minimum on applicable effluent limitations established by EPA, has been obtained. EPA retains authority to veto any NPDES permit issued by DHEC, *id.* § 1342(d)(2), or, after public hearing, to withdraw approval of the state permit program, *id.* § 1342(c)(3).

73. *See* text accompanying notes 140-56 *infra.*

74. These certificates must be obtained from the South Carolina Public Service Commission pursuant to the Utility Facility Siting and Environmental Protection Act, S.C. CODE ANN. §§ 58-33-10 to -430 (1976).

75. S.C. CODE ANN. § 48-39-140(B) (Cum. Supp. 1977); Rule 30-2-B(1)-(6), 2 S.C. State Reg. No. 7 at 22-23.

76. S.C. CODE ANN. § 48-39-140(C) (Cum. Supp. 1977).

deemed necessary.[77] Upon the request of at least twenty residents of the affected county or counties the Council is required to hold a hearing.[78]

The Council must act on a permit application within ninety days of its receipt.[79] It may grant or deny the permit or issue a permit conditioned on the applicant's taking specific measures "necessary to protect the public interest."[80] Reasons for denying a permit application must be stated.[81] Any person whose application is denied or any person "adversely affected" by the issuance of a permit has a right of direct appeal to the Council.[82] The Council's decision is then subject to judicial review.[83]

3. Review and Evaluation.—In determining whether to approve or deny a permit, the Council must examine a number of factors set forth in section 15(A) of the Act.[84] The Act does not require the Council to make specific findings but only to consider "the extent to which" the proposed activity (1) requires a waterfront location or is economically enhanced by its proximity to water, (2) would harmfully obstruct the natural flow of navigable water, (3) would affect marine life, wildlife, and other natural resources, (4) could cause erosion, shoaling of channels, or creation of stagnant water, (5) could affect public access to coastal resources, (6) could affect habitats for rare and endangered species of wildlife[85] or irreplaceable historic and archeological sites, and (7) could affect the value of adjoining property. In addition, the Council is required to compare the economic benefits of the proposed activity with the benefits of preserving the critical

77. *Id.* Time limitations are shorter for permit applications for minor developments, *e.g.*, the construction, maintenance, repair, or alteration of private piers and erosion control structures not involving dredging activities. S.C. CODE ANN. § 48-39-10(N) (Cum. Supp. 1977). Rule 30-2(G), 2 S.C. State Reg. No. 7 at 25 (1978).

78. S.C. CODE ANN. § 48-39-150(B) (Cum. Supp. 1977).

79. *Id.* § 48-39-150(C).

80. *Id.* § 48-39-150(B).

81. *Id.* § 48-39-150(C).

82. *Id.* § 48-39-150(D). The appeal must be in writing and filed with the Council within fifteen days of the final permit decision. Rule 30-6(A), 2 S.C. State Reg. No. 7 at 30 (1978).

83. S.C. CODE ANN. § 48-39-180 (Cum. Supp. 1977).

84. *Id.* § 48-39-150(A).

85. Under the S.C. Nongame and Endangered Species Conservation Act, S.C. CODE ANN. §§ 50-15-10 to -90 (1976), the Wildlife and Marine Resources Commission has the authority to issue regulations and develop management programs for protecting nongame and endangered species of wildlife in South Carolina. Several of the endangered species in South Carolina are indigenous to coastal lands or waters, *e.g.*, the eastern brown pelican, sperm whale, and Atlantic leatherback turtle.

area.[86] In conducting this comparison, the Council, must be mindful of the policy directive in section 2(D).[87] After completing this evaluation and considering the views of all interested parties, the Council may issue the permit upon finding that the planned activity does not contravene the policies specified in the Act.[88]

F. Judicial Review

The circuit court of the county in which the affected area is located has jurisdiction to restrain any violation of the Act.[89] The Council, the attorney general, and any person "adversely affected" all have standing to institute suits.[90] The court may order a violator of the Act to restore a critical area to its original condition, "if possible, and environmentally desirable."[91] The court may also require a person seeking to restrain a violation of the Act to post a reasonable bond.[92]

The Act gives the courts a sweeping scope of judicial review. The court is authorized to review the Council's action *de novo* and may even issue a permit itself if the applicant proves "the reasons given for denial to be invalid."[93] In South Carolina, as in most jurisdictions, however, courts have exercised restraint in reviewing the actions of administrative agencies notwithstanding the legislature's authorization of an expansive scope of review.[94]

In *Board of Bank Control v. Thomason*,[95] for example, respondents sought to reverse the Bank Control Board's decision denying them a license to conduct a small-loan business. The applicable statute gave the courts the power "to affirm, modify,

86. S.C. CODE ANN. § 48-39-150(A)(7) (Cum. Supp. 1977).

87. *Id.* § 48-39-30(A). *See* text accompanying note 29 *supra.*

88. S.C. CODE ANN. § 48-39-150(B) (Cum. Supp. 1977).

89. *Id.* § 48-39-160.

90. *Id.* Under § 18, codified at S.C. CODE ANN. § 48-39-180, any applicant whose permit application has been denied, revoked, suspended, or approved may petition for review of the Council's action within twenty days after receiving notice thereof. Under the liberal law of standing in environmental litigation, the phrase "adversely affected" should be construed to allow any South Carolina citizen who uses the state's coastal resources, whether commercially or recreationally, to seek judicial review of the Council's action. *See, e.g.*, United States v. SCRAP, 412 U.S. 669 (1973).

91. S.C. CODE ANN. § 48-39-160 (Cum. Supp. 1977).

92. *Id.*

93. *Id.* § 48-39-180.

94. *See, e.g.*, State Bd. of Medical Registration v. Scherer, 221 Ind. 92, 46 N.E.2d 602 (1943); Warner Valley Stock Co. v. Lynch, 215 Or. 523, 336 P.2d 884 (1959); *In re* Harmon, 52 Wash. 118, 323 P.2d 653 (1958). *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.09 (3d ed. 1972).

95. 236 S.C. 158, 113 S.E.2d 544 (1960).

or set aside" any order or decision of the Board.[96] Relying on this authority, the circuit court directed that respondents be issued a license. The supreme court reversed, finding that it did not have the power to substitute its judgment for that of the Board. Justice Oxner, speaking for the majority stated:

> In order not to offend the constitutional requirement as to separation of powers, statutes undertaking to give the courts *de novo* review of orders of administrative bodies exercising non-judicial functions are generally construed as providing for only a limited review.
>
> It is our view that the function vested by the Act in the State Board of Bank Control of determining whether a license should be issued to an applicant is non-judicial in nature.[97]

The court held that its only obligation was to ensure that the Board's decision was supported by substantial evidence;[98] finding the support present, it reinstated the agency's order.[99]

Clearly the Council performs a function much like that of the Bank Board in *Thomason.* In reviewing permit applications, it must consider the host of factors set out in section 15(B) in light of the policies specified in the Act. No two applications will be exactly the same, and the Council necessarily must exercise discretion in reaching a decision. Its role is clearly ministerial and nonjudicial in nature. Allowing a court to wipe the slate clean and review the Council's action *de novo* would frustrate, if not defeat, the administrative process established for protecting the State's critical areas. As the Maryland Court of Appeals explained:

> In this connection, we cannot refrain from observing that a practice which would permit judges or jurors to substitute, on a de novo basis, their discretion for that of the department's experts, would place this State in the intolerable situation of having as many wetland decision-makers as there are circuit court judges

96. *Id.* at 164, 113 S.E.2d at 547.

97. *Id.* at 165-66, 113 S.E.2d at 547 (citations omitted). The traditional doctrine requiring *de novo* review in cases where a violation of certain constitutional rights is claimed, *e.g.,* a taking of property without compensation, is today rejected by all federal courts and by most state courts. *See* K. DAVIS, *supra* note 94, at § 29.08.

98. The generally accepted definition of substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Edwards v. Celebreeze, 220 F. Supp. 79, 81 (W.D.S.C. 1963).

99. 236 S.C. at 166, 113 S.E.2d at 547. *See also* Carolina Pipeline Co. v. South Carolina Public Service Comm'n, 255 S.C. 325, 331, 178 S.E.2d 669, 672 (1971).

> and juries empaneled for this purpose. If this were to be the case, the result would be a destruction of the effectiveness of the department wetlands of this State, and reduce this agency's power, in this field, as a practical matter, to a nullity.[100]

The South Carolina courts should therefore construe section 18 of the Act as providing for review of the Council's action only under the test prescribed in the State Administrative Procedures Act: "clearly erroneous in view of the reliable probative and substantial evidence on the whole record."[101]

G. The Coastal Zone Management Program

The Act requires that the Council develop and propose a comprehensive management program for South Carolina's coastal zone,[102] to take effect upon approval by the Governor and the General Assembly.[103] In developing this program the Council must hold public hearings[104] and cooperate with affected local governments in the coastal zone.[105] To insure compliance with the CZMA, the Act requires that the program include the following key elements: (1) Establishment of "a regulatory system which the Council shall use in providing for the orderly and beneficial use of the critical areas,"[106] (2) a determination of the present and potential uses, and conflicts in the uses, of each coastal re-

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100. Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 228-29, 334 A.2d 514, 525 (1975). In this case the Maryland Court of Appeals held unconstitutional the statutory provision of a wetlands law which authorized a *de novo* trial on appeal from the department's decision on a permit application.

101. S.C. CODE ANN. § 1-23-380(g)(5) (Cum. Supp. 1977). The reviewing court would find itself in a precarious position where the Council had not deemed a hearing necessary under § 48-39-140(C) and consequently there was no record on the application. In such cases, the appropriate step for the court would not be to undertake a trial *de novo,* but rather to remand the case to the Council to hold a hearing and develop the necessary record pursuant to the APA. *See* S.C. CODE ANN. §§ 1-23-320 to -350 (Cum. Supp. 1977).

102. S.C. CODE ANN. § 48-39-80 (Cum. Supp. 1977). However, unless the Council achieves broader authority in the coastal zone either through legislation or by networking a state authority, it would be more accurate to call it a "critical area management program."

103. S.C. CODE ANN. § 48-39-90(D) (Cum. Supp. 1977). The Act sets no time limit for the submission of this program. The Council expects to have a draft prepared by September 1978. Telephone interview with Ben Gregg, Staff Attorney, S.C. Coastal Council, Charleston, S.C. (Nov. 28, 1977).

104. S.C. CODE ANN. § 48-39-90 (Cum. Supp. 1977).

105. *Id.* § 48-39-100. Any city or county may submit to the Council regulations, ordinances, or codes that apply to the critical areas. Upon review and approval by the Council, these controls may be incorporated into the management program. *Id.* § 48-39-100(B).

106. S.C. CODE ANN. § 48-39-80(A) (Cum. Supp. 1977).

source,[107] (3) an inventory of areas of "critical state concern" within the coastal zone,[108] (4) establishment of "broad guidelines on priority of uses in critical areas,"[109] and (5) an "adequate consideration of the local, regional, state and national interest". involved in the siting of energy and public service facilities "necessary to meet requirements which are other than local in nature."[110] In order to obtain federal approval, however, the Council should include in the program several additional elements that are not specifically mentioned in the Act: (1) "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," (2) a planning process for protecting public beaches and other important public areas and access thereto, and (3) a planning process for energy facilities.[111]

H. Accreted Property

Under the common law, where the shoreline changes gradually and imperceptibly through accretion, reliction, or erosion,[112] the boundary line is extended or restricted in the same manner.[113] The riparian owner thereby acquires title to all additions caused

107. *Id.* § 48-39-80(B)(3).

108. *Id.* § 48-39-80(B)(4). *See* 16 U.S.C. § 1454(b)(3) (Supp. V 1975). The Council has already completed such an inventory. *Draft Report on Geographic Areas of Particular Concern in the South Carolina Coastal Zone,* Office of Coastal Planning, S.C. Coastal Council (Oct. 1977).

109. S.C. CODE ANN. § 48-39-80(B)(5) (Cum. Supp. 1977). *See* 16 U.S.C. § 1454 (b)(5) (Supp. V 1975).

110. S.C. CODE ANN. § 48-39-80(B)(6) (Cum. Supp. 1977). *See* 16 U.S.C. § 1455(c)(8) (Supp. V 1975).

111. 16 U.S.C. § 1455(e)(2) (Supp. V 1975); 16 U.S.C.A. § 1454(b)(7)-(8) (Cum. Supp. 1977).

112. "Accretions" or "accreted lands" consist of additions to land from the gradual and imperceptible deposit by water of sand, sediment or other material. "Reliction" refers to land which formerly was covered by water, but which has become dry land by the imperceptible recession of the water. "Erosion" is the gradual and imperceptible wearing away of land bordering on a body of water by the natural action of the elements. Maloney & Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping,* 53 N.C.L. REV. 185, 225 (1974) [hereinafter referred to as Maloney & Ausness, *Coastal Boundaries*].

113. Intendant and Wardens v. Charleston and W. Carolina Ry., 136 S.C. 525, 134 S.E. 497 (1926); Spigener v. Cooper, 42 S.C.L. (8 Rich.) 103 (1855). *See* Leavell, *Legal Aspects of Ownership and Use of Estuarine Areas in Georgia and South Carolina,* Institute of Government, The Univ. of Ga., 67-68 (1971).

by accretion or reliction and loses soil that is worn away by erosion.[114]

An important provision of section 12(B) alters the South Carolina rule, but the extent of the change is unclear. Those who revel in statutory interpretation are invited to consider the meaning of this provision:

> *Provided, further*, that no person or governmental agency may develop ocean front property accreted by natural forces or as the result of permitted or nonpermitted structures beyond the mean high-water mark as it existed at the time the ocean front property was initially developed or subdivided, and such property shall remain the property of the State held in trust for the people of the State.[115]

Whether this provision passes all accreted lands to the State or only those resulting from development or subdividing is unclear.

The constitutionality of the provision may depend upon the construction adopted.[116] The provision is probably unconstitutional to the extent that it purports to change existing law and pass to the State lands that accreted prior to passage of the Act. The South Carolina Supreme Court has invalidated the retroactive application of laws which deprive persons of vested interests in property.[117] The provision might withstand constitutional attack, however, if it means that the State acquires title only to those lands that accrete after enactment of the law.[118]

Clearly, the above statutory provision is valid to the extent that only lands accreted as a result of development or subdivision pass to the State. As a general rule the riparian does not acquire title to accreted lands caused by artificial conditions for which he

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114. Maloney & Ausness, *Coastal Boundaries, supra* note 112, at 226.

115. S.C. CODE ANN. § 48-39-120(B)(Cum. Supp. 1977).

116. *See* McKinney v. City of Greenville, 262 S.C. 227, 242, 203 S.E.2d 680, 687-88 (1974) ("It is well-settled by the decisions in this State that a statute will, if possible, be construed so as to render it valid, and courts should not declare a legislative enactment unconstitutional unless its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.")

117. *See* Dunham v. Davis, 229 S.C. 29, 35, 91 S.E.2d 716, 718 (1956); First Presbyterian Church of York v. York Depository, 203 S.C. 410, 423, 27 S.E.2d 573, 579 (1943). *See also* Hughes v. Washington, 389 U.S. 290, 296-97 (1967) ("For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.") (Stewart, J., concurring).

118. Hughes v. Washington, 389 U.S. 290, 295 (1967). *See* Maloney & Ausness, *Coastal Boundaries, supra* note 112, at 227-37.

is directly responsible.[119] While the final answer must await judicial consideration, to insure its constitutionality the courts will probably construe the provision prospectively.

By virtue of its jurisdiction over beaches, the Council now exercises regulatory control over uses of accreted lands. Consequently, even if the State does not succeed in obtaining title to these lands, an adequate degree of protection can probably be achieved through the permit program.

I. Erosion Control

The Act directs the Council to develop and institute a comprehensive beach erosion control policy.[120] To this end, the Council may issue permits for erosion control and water drainage structures in or upon lands below the mean high-water mark; these structures must, however, promote the public health, safety, and welfare and ensure continued use of these lands for public purposes.[121]

J. The Tidelands Ownership Dispute Revisited

A principal reason for the Governor's veto of the 1976 coastal zone bills was the lack of a provision aimed at protecting the rights of private claimants to the tidelands.[122] Accordingly, the General Assembly included section 22[123] in the 1977 Act in an effort to accommodate the Governor's objections.

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119. *See* Annot., 134 A.L.R. 467, 472 (1941). On the other hand, where the artificial condition is not within the control of the riparian, the great majority of courts award him the accreted lands. *See, e.g.*, Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So.2d 209, 211-12 (Fla. Dist. Ct. App. 1973). The California courts take the opposite position holding that accretions caused by an artificial condition do not vest in the riparian, whether or not he is responsible for the condition. *See, e.g.*, People v. Hecker, 179 Cal. App. 2d 823, 837, 4 Cal. Rptr. 334, 343 (1960). Arguably, the Act ascribes to the California position since there is no mention of causation in § 12(B). The State could argue that it acquires all lands that have accreted as a result of development or subdividing, even though the owner on whose property the accretion happens to occur is not responsible therefore. *Cf.* Epps v. Freeman, 261 S.C. 375, 386, 200 S.E.2d 235, 241 (1973) (the court recognized that the law of accretion does not apply where the riparian fills in land under water to create new land).

120. S.C. CODE ANN. § 48-39-120(A) (Cum. Supp. 1977).

121. *Id.* § 48-39-120(F).

122. In his veto message on H. 2420, Governor Edwards declared: "The crucial question in this entire matter is not addressed by this legislation; that is, the establishment of means of validation of ownership of these properties." Veto Message of the Governor on H. 2420 (June 18, 1976), [1976] S.C. HOUSE J. 3344-45.

123. S.C. CODE ANN. § 48-39-220 (Cum. Supp. 1977).

Under this section, any claimant may bring suit against the State to establish an interest in or title to a tract of tidelands.[124] But there is nothing in section 22 or in the Act that alters or in any way affects the rule that the State is presumptively the owner of all lands below the mean high-water mark.[125] Therefore, a section 22 claimant will be required to trace an unbroken chain of title back to the sovereign and to point out specific language in the original grant evincing an intent to convey to the mean low-water mark. Although section 22(B) authorizes trial by jury,[126] in the great majority of cases the claimant, as a matter of law, will be unable to prove these two elements.

While section 22 may lead to a considerable increase in the number of tidelands ownership cases, the State's title to the tidelands will probably remain secure. In any event, under the public trust doctrine it is immaterial who holds the legal title to tidelands for the law imposes on every owner, whoever it may be, the same obligation: to hold the property in trust for the public benefit.[127]

IV. Federal-State Relations in the Coastal Zone

A. *Federal Consistency Provisions*

A second major reason for the veto of the 1976 bills was the Governor's feeling that the legislation represented "a major step toward putting the federal government into regional land-use control of private property."[128] This objection is unsound because it overlooks two basic facts: (1) federal authority in the coastal zone will remain whether or not a state law is enacted, and (2) the federal consistency provisions of section 307 of the CZMA[129]

124. *Id.* § 48-39-220(A). For purposes of § 22, "tidelands" is defined as all lands (except beaches) that are in the eight coastal counties and that lie "between the mean high-water mark and the mean low-water mark of navigable waters, without regard to the salinity of such waters." *Id.* Although the Act does not define "navigable waters," the General Assembly probably intended to encompass within this definition the entire area between the mean high- and mean low-water marks in the coastal counties. Under a literal reading of "navigable waters," however, some portion of the state's tidelands might fall outside the scope of § 22. Note that the exclusion of salinity in the definition of tidelands makes it possible for claimants to non-tidal areas to utilize § 22.

125. S.C. Code Ann. §§ 48-39-190 to -220(C) (Cum. Supp. 1977).

126. *Id.* § 48-39-220(B).

127. *See* note 15 *supra.*

128. Veto Message of the Governor on H. 2829 (July 1, 1976), [1976] S.C. House J. 3603.

129. 16 U.S.C. § 1456 (Supp. V 1975). NOAA's regulations under § 307 are found at 42 Fed. Reg. 43,586 (1977) (to be codified in 15 C.F.R. § 930).

permit states with approved management programs to "substantially influence federal policies and programs that affect their coastal areas."[130]

Following NOAA's approval of a state management program,[131] five provisions of section 307 come into force. First, federal agencies "conducting or supporting" activities that directly affect the state's coastal zone must, to the maximum extent practicable, conduct or support those activities in a manner consistent with the state's program.[132] Second, federal development projects in the coastal zone must be consistent with the state's program.[133] Third, federal licenses or permits for activities in the coastal zone may not be issued unless the state concurs in the applicant's certification that the proposed activity complies with the program.[134] Fourth, federal licenses or permits for activities described in a plan for exploration, development, or production from any area leased under the Outer Continental Shelf Lands Act[135] may not be granted unless the state concurs in the applicant's blanket certification that all activities will be conducted in compliance with the program.[136] Last, state and local government applicants for federal grants must show that the proposed projects are consistent with the program.[137]

Several limitations are, however, placed on the consistency provisions of section 307.[138] The most important of these is the power given to the Secretary of Commerce under section 307 (c) to override a state's denial of certification if he finds that the activity is either consistent with the objectives of the CZMA or otherwise necessary in the interest of national security.[139]

130. Blumm & Noble, *The Promise of Federal Consistency Under § 307 of the Coastal Zone Management Act*, 6 E.L.R. 50,047, 50,065 (1976).

131. Section 307 has no application until the state's program receives federal approval. During development of the program, the state must afford all "relevant Federal agencies . . . the opportunity of full participation." 16 U.S.C. § 1455(c)(1) (Supp. V 1975).

132. 16 U.S.C. § 1456(c)(1) (Supp. V 1975).

133. *Id.* § 1456(c)(2).

134. *Id.* § 1456(c)(3).

135. 43 U.S.C. §§ 1331-1337, 1340-1343 (1970).

136. 16 U.S.C. § 1456(c)(3) (Supp. V 1975).

137. *Id.* § 1456(d).

138. *Id.* § 1453(a) (exempting certain federal lands); *id.* § 1456(f) (subordinating state program to requirements of federal air and water laws); *id.* § 1456(g) (subordinating state program to future federal land use legislation).

139. *Id.* § 1456(c)(3) (Supp. V 1975).

B. *The Corps of Engineers' Regulatory Programs*

Undoubtedly the most pervasive federal presence in the coastal zone is that of the Army Corps of Engineers (Corps), which administers the federal permit program for activities in navigable waters.[140] The Corps' jurisdiction emanates from two federal statutes, the Rivers and Harbors Appropriation Act of 1899[141] and the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA).[142] Under the former,[143] the Corps exercises jurisdiction over all activities in "navigable waters of the United States"; under the latter,[144] the Corps has authority over the discharge of dredged or fill material into "navigable waters," defined as "waters of the United States, including the territorial seas."[145]

The Corps initially sought to limit its section 404 program to the same waters covered under the 1899 Act.[146] But in *Natural Resources Defense Council v. Calloway,* a federal district court ordered the Corps to revise its regulations in accordance with the intent of Congress, as manifested in the definition of "navigable waters," to assert federal jurisdiction over "the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution."[147] The Corps subsequently issued its final regulations under section 404 and extended the agency's jurisdiction well beyond its traditional bounds.[148] The Corps now exercises authority over dredge and fill activities not only in all areas below the mean high-water mark but in all lakes of ten acres or more and streams with flows of five cubic feet per second of more *and*

140. *See generally* Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers,* 63 VA. L. REV. 503 (1977).

141. 33 U.S.C. §§ 401-465 (1970).

142. *Id.* §§ 1251-1376 (Supp. V 1975).

143. The Corps' authority under § 13, known as the Refuse Act, to regulate the discharge of non-municipal pollutants was transferred to EPA by the FWPCAA. 33 U.S.C. §§ 1342, 1345 (Supp. V 1975).

144. 33 U.S.C. § 1344 (Supp. V 1975).

145. *Id.* § 1362(7) (Supp. V. 1975).

146. 39 Fed. Reg. 12,119 (1974).

147. 392 F. Supp. at 686 (D.D.C. 1975). *Accord,* State of Minnesota v. Hoffman, 543 F.2d 1198, 1200 & n. 1 (8th Cir. 1976); Weiszmann v. Corps of Engineers, 526 F.2d 1302 (5th Cir. 1976); Wyoming v. Hoffman, 437 F. Supp. 114 (D. Wyo. 1977). *See generally,* Comment, *Federal Control Over Wetland Areas: The Corps of Engineers Expands Its Jurisdiction,* 28 U. FLA. L. REV. 787 (1976).

148. 42 Fed. Reg. 37,144 (1977) (to be codified in 33 C.F.R., part 323).

"Wetlands" is defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 323.2(c) (1977).

their adjacent wetlands. The Corps' jurisdiction extends into areas far beyond the current authority of the Council. Similarly, the latter's authority reaches into certain areas, such as beaches and sand dunes, over which the Corps has no control. Obviously, in many cases state and federal authority in the coastal zone overlaps.[149]

In case of overlap, the Corps will give great weight to a state's decision, whether or not that state has an approved coastal zone management program. When the state has denied a permit, the Corps will do likewise.[150] When the state has issued a permit, the Corps will issue its permit provided (1) the Secretary of Commerce has not vetoed the state's action, (2) "overriding national factors of the public interest" do not dictate otherwise,[151] and (3) the state has considered the concerns, policies, goals, and requirements of the Corps' regulations and of a number of federal environmental laws.[152]

Since wetlands that are subject to the Corps' jurisdiction include tidelands subject to the Council's authority, the concerns and policies of the Corps with respect to the wetlands should be examined. Specifically noting their important natural functions, the Corps states that "[w]etlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."[153] A permit for activities in these areas will be issued only if "the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration

149. Under the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (amending 33 U.S.C. §§ 1251-1376 (Supp. V 1975)), the Corps' authority over dredge and fill activities in waters other than those meeting the traditional test of navigability, and their adjacent wetlands, can be transferred to states that submit proposed permit programs that are approved by EPA. 33 U.S.C. § 1344(g)-(i) (1977). This delegation is possible, however, only if the state also has authority over the waters involved. *Id.* § 1344(g)(l). Thus, the Council at present could succeed only to the powers the Corps exercises over nonnavigable coastal waters and the tidelands adjacent thereto.

150. If the state is operating under an approved coastal zone management program, a permit application will not be considered unless the applicant has certified that his activity complies with the program and the state has concurred in the certification or waived its right to do so. 33 C.F.R. §§ 320.4(h), 325.2(b)(2) (1977).

Certification from the appropriate state water pollution control authority that the proposed activity would not contravene applicable effluent limitations and water quality standards must be obtained before the Corps will consider a permit application.

151. 33 C.F.R. § 320.4(j)(4) (1977).

152. *Id.*

153. *Id.* § 320.4(b)(1).

is necessary to realize those benefits."[154] In making this balance, the District Engineer "shall consider whether the proposed activity is primarily dependent on being located, in or in close proximity to, the aquatic environment and whether feasible alternative sites are available."[155]

Recent action by the Corps indicates these policies are to be interpreted strictly. In denying permits to fill 2,000 acres of mangrove swamps on Marco Island, Florida, the Chief of Engineers, Lieutenant General Gribble, held that the intent of the Corps' wetland policy is to "protect valuable wetland resources from unnecessary dredging and filling alteration to fulfill a purpose for which, in most cases, other alternative sites exist. . . ."[156] Although the State had authorized the project, General Gribble, in denying the request for a federal permit, relied on that provision of the regulations permitting the Corps to reverse a state decision when "overriding national factors of the public interest" so dictate.

V. THREE IMPORTANT DOCTRINES

A. The Nondelegation Doctrine

A possible challenge to the new act may be based on article I, section 8 of the South Carolina Constitution, which requires that the legislative, executive, and judicial powers be kept separate and distinct. The challenger would invoke the nondelegation doctrine and contend that in conferring on the Council the power to control the use of the State's critical areas, the General Assembly unconstitutionally delegated its legislative powers to an administrative agency.[157]

An examination of the relevant case law in South Carolina indicates that a challenge on this ground would stand very little

154. *Id.* § 320.4(b)(4).

155. *Id.* The Council's final regulations under the Act implement a similar policy. The Council will permit dredging and filling for public projects in tideland areas "only if that activity is water-dependent and there are no feasible alternatives." Rule 30-11G(2)(b), 2 S.C. State Reg. No. 7 at 46 (1978).

156. Report on Application for Department of the Army Permit to Dredge and Fill at Marco Island, Florida, 6 E.L.R. 30,020 (Chief of Engineers, April 15, 1976). The Developers have filed suit against the Corps to compel issuance of the permits. Deltona Corp. v. Alexander, No. 76-473-CN-J-C (M.D. Fla., filed July 7, 1976).

157. *See generally,* I. COOPER, STATE ADMINISTRATIVE LAW ch. 3 (1965). *See also* Gold v. S.C. Bd. of Chiropractic Examiners, ___ S.C. ___, 245 S.E.2d 117 (1978).

chance of success. Utilizing the traditional standards test,[158] the South Carolina Supreme Court has upheld sweeping grants of authority to various state agencies. The standards approved by the court in the past have included: "as the board may in its discretion, deem best for the interests of the State,"[159] "any matter declared by the Director of the prison system to be contraband,"[160] and "public convenience and necessity."[161] These cases typify the vast majority of decisions in which the court has rejected challenges based on the nondelegation doctrine.[162]

As discussed previously, the standard provided in the Act is that "if the Council finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit."[163] In addition, the Council is to be guided by the ten general considerations set forth in section 15(A).[164] These standards certainly are no less exacting than those sustained by the court in most of its decisions.

Moreover, a court will examine the nature of the particular circumstances in determining whether the standards are adequate.[165] For example, in zoning cases, most courts have perceived

158. This test has been described as follows:

> [I]t is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.

South Carolina Highway Dept' v. Harbin, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955) (quoting State v. Stoddard, 126 Conn. 623, 628, 13 A.2d 586, 588 (1940)).

159. State *ex rel.* Port Royal Mining Co. v. Hagood, 30 S.C. 519, 523-24, 9 S.E. 686, 688 (1888).

160. Cole v. Manning, 240 S.C. 260, 263, 125 S.E.2d 621, 622 (1962), *appeal dismissed,* 372 U.S. 521 (1963).

161. Atlantic Coast Line Ry. Co. v. South Carolina Pub. Serv. Comm'n., 245 S.C. 229, 235, 139 S.E.2d 911, 914 (1965).

162. *E.g.,* State *ex rel.* Roddey v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951); Davis v. Query, 209 S.C. 41, 39 S.E.2d 117 (1946); Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496 (1943); Gasque, Inc. v. Nates, 191 S.C. 271, 2 S.E.2d 36 (1939); State v. Ross, 185 S.C. 472, 194 S.E. 439 (1937).

One notable exception is South Carolina Highway Dep't v. Harbin, 226 S.C. 585, 86 S.E.2d 466 (1955), where the court struck down a statutory provision authorizing the highway department to suspend or revoke a driver's license "for cause satisfactory" to it as an unconstitutional delegation of legislative power. It is very difficult to reconcile this case with the decisions discussed in the text, and the court has never attempted to do so. *See also* Richards v. City of Columbia, 227 S.C. 538, 555, 88 S.E.2d 683, 691 (1955).

163. S.C. CODE ANN. § 48-39-150(B) (Cum. Supp. 1977).

164. *Id.* § 48-39-150(A).

165. Cole v. Manning, 240 S.C. 260, 265, 125 S.E.2d 621, 623 (1962).

the difficulty of devising meaningful standards and thus have upheld the delegation of broad discretionary powers to zoning boards.[166] As one court observed: "It would have been difficult, if not impossible, to specify in what circumstances permits should be granted and in what circumstances denied. That would depend on numerous unforeseeable factors."[167]

This observation is particularly relevant to the Council's permit-issuing authority over the State's critical areas. Only general standards are possible in a regulatory milieu in which the circumstances of each permit application will always vary. This principle was recognized in three recent decisions in which state critical area legislation was upheld against attacks based on the nondelegation doctrine.[168] If the Act is challenged on this ground, it can be expected the South Carolina courts will reach the same result.

B. The Public Trust Doctrine

The public trust doctrine is rooted in the Roman law concept of *res communes* and provides that because certain lands are so intrinsically important to society, the owner of these lands is deemed to hold his property in trust for public purposes.[169] As the courts are apt to describe it, the owner's legal title, the *jus privatum,* is subject to certain paramount rights of the public, the *jus publicum.* Under the modern view, the *jus publicum* is not limited to traditional navigation and fishing activities, but also

166. I. COOPER, *supra* note 157, at 62-67.

167. Burnham v. Board of Appeals of Gloucester, 333 Mass. 114, 118, 128 N.E.2d 772, 775 (1955).

168. Ceeed v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974); Toms River Affiliates v. Department of Environmental Protection, 140 N.J. Super. 135, 355 A.2d 679 (App. Div. 1976), *cert. denied,* 71 N.J. 345, 364 A.2d 1077 (1976); J. M. Mills, Inc. v. Murphy, 116 R.I. 54, 352 A.2d 661 (1976). *See generally* Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis,* 53 N.C.L. REV. 303, 314-27 (1974) [hereinafter cited as Glenn, *Coastal Area Management Plan*]; Schoenbaum & Silliman, *Coastal Planning: The Designation and Management of Areas of Critical Environmental Concern,* 13 URB. L. ANN. 15, 28-30 (1977).

169. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471, 485-91 (1970) [hereinafter cited as Sax, *The Public Trust Doctrine*]. *See also,* Smith and Sammons, *Public Rights in Georgia's Tidelands,* 9 GA. L. REV. 79 (1974); Schoenbaum, *Public Rights and Coastal Zone Management,* 51 N.C.L. REV. 1 (1972); Wyche, *The Law of Tidelands, supra* note 10, at 95-116; Note, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation,* 58 VA. L. REV. 876, 894-905 (1972) [hereinafter cited as Note, *State and Local Wetlands Regulations*]; Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine,* 79 YALE L.J. 762 (1970).

extends to recreation,[170] protection of environmental quality,[171] and preservation of property in its natural state.[172] Courts have enjoined uses of public trust property that are in derogation of these uses.[173]

On several occasions the South Carolina Supreme Court has announced that lands below the mean high-water mark in this State are held in trust for public purposes.[174] It follows, then, that the public trust doctrine imposes certain limitations on the Council in its regulation of these lands. First, courts require adherence to various procedural safeguards in order to ensure that the consequences of altering trust property have been considered fully.[175]

The second limitation imposed by the public trust doctrine is a substantive one. Courts will set aside any legislative or administrative attempt to transfer public trust property to private persons for private purposes.[176] Such property must be devoted to public purposes, and public bodies must retain control over the area.[177] As one authority explains:

> Public uses must be preserved; limited encroachments that are tolerated must be justified as an enhancement of what remains.

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170. Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972).

171. Just v. Marinette County, 56 Wis. 2d 7, 23-24, 201 N.W.2d 761, 771 (1972). *See* text accompanying notes 204-11 *infra.*

172. Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

173. *Id.*

174. State v. Hardee, 259 S.C. 535, 541, 193 S.E.2d 497, 500 (1972); Rice Hope Plantation v. South Carolina Pub. Serv. Auth., 216 S.C. 500, 530, 59 S.E.2d 132, 145 (1950); Cape Romain Land & Imp. Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 438, 146 S.E. 434, 438 (1928) ("The title to land below the high-water mark on tidal navigable streams, under the well-settled rule, is in the state, not for the purpose of sale, but to be held in trust for public purposes.") *See generally* Wyche, *Tidelands and the Public Trust: An Application for South Carolina,* 7 ECOL. L.Q. 137 (1978). For a discussion of public rights in lands beyond the mean high-water mark, see Note, 29 S.C.L. REV. 627 (1978).

175. *See, e.g.,* Obrecht v. National Gypsum Co., 361 Mich. 399, 105 N.W.2d 143 (1960) (preparation of findings); New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 292 A.2d 545 (1972) (holding of hearings); Texas Eastern Transmission Corp. v. Wildlife Preserves Inc., 48 N.J. 261, 225 A.2d 130 (1966) (consideration of alternatives). *See generally* W. RODGERS, ENVIRONMENTAL LAW § 2.16, at 177 (1977).

176. *See, e.g.,* Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892); County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973); People *ex rel.* Scott v. Chicago Park Dist., 66 Ill. 2d 65, 360 N.E.2d 773 (1976); International Paper Co. v. Mississippi Highway Dep't, 271 So. 2d 395 (Miss. 1972), *cert. denied,* 414 U.S. 827 (1973). *Cf.* Cape Romain Land & Imp. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E. 434 (1928) (upholding the validity of leases by the State of public trust property).

177. Paepcke v. Public Bldg. Comm'n, 46 Ill. 2d 330, 343-44, 263 N.E.2d 11, 19 (1970); State v. Public Serv. Comm'n, 275 Wis. 112, 118, 81 N.W.2d 71, 73-74 (1957).

> It is not enough that the invasion be conducted with care and damage kept to a minimum. The encroachment must be justified by necessity and perhaps only upon the proffer of an adequate substitute. If there is no substitute for an irreplaceable resource, the invasion is unacceptable. The pattern that emerges comes very close to a doctrine that can be described as no significant deterioration of public rights in public resources.[178]

Unfortunately, the Act contains no explicit recognition that lands below the mean high-water mark are held in trust for public purposes. The Council's final rules and regulations, however, reflect an awareness of the limitations imposed by the public trust doctrine on the use of these lands. The Council states that all applications to fill in wetlands and submerged lands for the purpose of creating commercial and residental lots "strictly for private gain" will be denied.[179] Moreover, applications for dredge and fill permits in wetland areas will be considered only if the activity is water dependent and no feasible alternatives are available.[180] Finally, the Council notes that "[n]o permit shall be construed as alienating public property for private use. . . ."[181]

The role of a reviewing court should be to ensure that the Council's actions are consistent not only with its own regulations but also with the procedural and substantive limitations of the public trust doctrine as discussed above. When it is determined that the Council has issued a permit, the effect of which would

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178. W. RODGERS, *supra* note 175, § 2.16 at 82.

179. Rule 30-12(G)(2)(a), 2 S.C. State Reg. No. 7 at 46 (1978). Regretably, the Council has retreated from the position it took in its draft rules and regulations. There it stated that the "creation of commercial and residential lots for private gain is not a legitimate justification for the dredging and filling of tidelands. Permits for the dredging and/or filling of tidelands for these purposes will be denied." Rule 30-9(G)(2)(a), 1 S.C. State Reg. No. 13 at 63-64 (1977). The regulations for such activities exclude dredging and insert the adverb "strictly" to modify "private gain." Dredging, however, can be as destructive of tidal areas as filling and should not be permitted when proposed for private purposes. Conceivably, the phrase "strictly for private gain" might be relied on by the Council in allowing the commercial development of a tidal area on the grounds of a claimed benefit to the public through additional employment and economic improvement. But this type of argument was expressly rejected in People *ex rel.* Scott v. Chicago Park Dist., 66 Ill. 2d 65, 73, 360 N.E.2d 773, 781 (1976), where the Illinois Supreme Court invalidated a legislative grant of submerged lands to the U.S. Steel Corporation as violative of the public trust doctrine.

Ideally, the Council should return to its prior position on dredge and fill activities in tidal areas, as set out in the draft regulations.

180. Rule 30-12(G)(2)(b), 2 S.C. State Reg. No. 7 at 46 (1978).

181. Rule 30-4(F), *id.* at 27.

be to cause "significant deterioration"[182] of the *jus publicum*,[183] a court should not hesitate to invalidate the permit.

C. *The Takings Doctrine*

For purposes of illustration, assume that *X* applies to the Council for a permit to undertake a development in a critical area. The Council determines that the application is contrary to the policies specified in the Act and denies the permit. *X* begins suit under section 18 of the Act,[184] claiming the Council's action deprives him the "existing practical use" of his property and thus constitutes a taking of private property in violation of both the South Carolina[185] and United States constitutions.[186] This type of suit is very likely to arise under the Act.

The basic principle is well understood: just compensation is required in the case of a taking, but not in the case in which private loss results from the proper exercise of the police power.[187] Great difficulty arises in attempting to determine in a particular fact situation whether government has overstepped the line at which "regulation ends and taking begins."[188] In searching for this line, courts have utilized a wide variety of tests, three of which appear to be followed most widely.

Foremost among them is "the diminution of value theory" propounded by Justice Holmes in his famous decision in *Pennsylvania Coal Co. v. Mahon*.[189] Under this theory, the court asks whether, and to what extent, the owner's ability to earn a profit from his property has been impaired. If the profit-making capacity has been severely reduced, a taking is said to have occurred and the owner is constitutionally entitled to just compensation.[190]

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182. W. RODGERS, *supra* note 175.

183. A clear example would be the issuance of a permit to a private developer to fill in a tract of public trust property for the construction of a private resort.

184. S.C. CODE ANN. § 48-39-180 (Cum. Supp. 1977).

185. S.C. CONST. art. 1, § 13 provides that "private property shall not be taken . . . for public use without just compensation being first made therefore."

186. U.S. CONST. amend. V: "[N]or shall private property be taken for public use, without just compensation." This requirement has been held incorporated in the fourteenth amendment, hence applicable to the states. Chicago, B & Q R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

187. South Carolina State Highway Dep't v. Wilson, 254 S.C. 360, 365, 175 S.E.2d 391, 394 (1970).

188. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

189. 260 U.S. 393 (1922).

190. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 151 (1971)

The second approach involves a balancing analysis, in which the court weighs the potential public benefit from enforcement of the regulation against the private loss. A taking occurs when the latter is found to outweigh the former.[191]

Under the third approach, the noxious uses test, the court focuses on the nature of the private activity to which the regulation applies. If the activity is deemed to be harmful, noxious, or the equivalent of a nuisance, private losses sustained in complying with the measure are noncompensable.[192]

Because a high degree of interdependence exists among the tests,[193] a court may apply all three to the facts of a given case. For example, the dimunition of value in the property affected is relevant in balancing the competing interests. Similarly, the noxiousness of the private use is pertinent in determining the public benefit to be derived from upholding the regulation. Because the three tests are so flexible and interrelated, courts can easily manipulate them to reach a desired result. It becomes exceedingly difficult to construct an analytical framework within which the taking cases can be evaluated.[194] In the final analysis, as Justice Holmes observed, "the question depends upon the particular facts."[195]

For this reason, attorneys confronted with a takings issue "generally look for precedents involving similar fact situations."[196] Hence, an examination of those cases in which govern-

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[hereinafter cited as Sax, *Takings*].

191. The Supreme Court probably relied on such a test in Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962): "[T]o evaluate the reasonableness [of the ordinance] we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance."

192. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (Upholding city ordinance prohibiting operation of brickyard in city limits even though effect was to reduce the value of petitioner's property by over 90%).

193. Three other approaches can be discerned in the cases: (1) the invasion theory, which requires the actual physical appropriation of property (of no relevance today); (2) the cause of the harm test, discussed in Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 46-50 (1964); and (3) the government enterprise rule, which requires compensation where a landowner is coerced into using his property essentially for governmental purposes, discussed in Note, *State and Local Wetlands Regulations*, *supra* note 169, at 888. A fourth approach is the one adopted in Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). *See* text accompanying notes 204-11 *infra*.

194. Professor Sax has observed that "[f]ew legal problems have proved as resistant to analytical efforts as that posed by" the takings issue. Sax, *Takings*, *supra* note 190, at 149.

195. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

196. F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 139 (1973) [hereinafter

mental controls on the use of wetlands have been challenged under the takings doctrine would be helpful.[197] Initially, the courts were sympathetic to the claims of the private landowners.[198] In *State v. Johnson,*[199] the leading case of this group, the Maine State Wetlands Control Board denied appellants' application for a permit to fill in an area of salt marsh. Relying on the guiding principle of *Pennsylvania Coal,*[200] the Supreme Judicial Court of Maine held that refusal to issue the permit left appellants with "commercially valueless land"[201] and constituted an unreasonable exercise of the police power.

Since *Johnson*, however, a "quiet judicial revolution"[202] has been occurring in which the courts generally sustain the application of wetland protection laws against challenges based on the takings doctrine.[203] The Wisconsin Supreme Court sparked the revolution with its decision in *Just v. Marinette County.*[204] In that case, landowners sought a declaratory judgment that the county's shoreland zoning ordinance, which prohibited the filling of their property (freshwater wetlands), was unconstitutional. Unlike the

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cited as BOSSELMAN].

197. For more extensive discussions, see BOSSELMAN, *supra* note 196; *The Use of Land: A Citizens Policy Guide to Urban Growth* (W. Reilly ed. 1973); Binder, *Taking Versus Reasonable Regulations: A Reappraisal in Light of Regional Planning and Wetlands,* 25 U. FLA. L. REV. 1 (1972); Sax, *Takings, supra* note 190; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 S. CAL. L. REV. 1 (1970); Note, *State and Local Wetlands Regulations, supra* note 169; Comment, *The Wetlands Statutes: Regulation or Takings?,* 5 CONN. L. REV. 64 (1972); Comment, *Recent State Wetlands Cases: The Continuing Battle Over the Proper Scope of Regulation,* 6 E.L.R. 10, 125 (1976).

198. *See, e.g.,* Bartlett v. Zoning Comm'n, 161 Conn. 24, 282 A.2d 907 (1971); Dooley v. Town Plan & Zoning Comm'n., 151 Conn. 304, 197 A.2d 770 (1964) (combined flood plain zoning and wetlands ordinance); State v. Johnson, 265 A.2d 711 (Me. 1970); Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965); Morris County Land Imp. Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963). *But see, e.g.,* Candlestick Properties, Inc. v. San Francisco Bay Conserv. & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970) (upholding prohibition on deposit of fill in bay).

199. 265 A.2d 711 (Me. 1970).

200. 260 U.S. 393 (1922).

201. 265 A.2d at 716.

202. BOSSELMAN, *supra* note 196, at 212.

203. *See, e.g.,* Brecciaroli v. Connecticut Comm'r of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975); Potomac Sand & Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241 (1972); Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972); *cert. denied,* 409 U.S. 1108 (1973) (flood plain zoning ordinance); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). *Contra,* Lemp v. Town Bd. of Islip, 394 N.Y.S.2d 517 (Sup. Ct. 1977). *See also* MacGibbon v. Board of Appeals, 344 N.E.2d 185 (Mass. 1976).

204. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

Johnson court, the *Just* court focused on the adverse effects the proposed activity would have on environmental quality and the public interest therein. The court took judicial notice 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."[205] The landowners desired to undertake a use of their property that would upset this balance and thereby injure the public.[206] Consequently, the ordinance did not exceed the limits of the police power since its purpose was to restrain conduct harmful to the public.

The court distinguished its prior decisions awarding compensation as involving excessive restrictions on the natural uses of the land. The court concluded:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others . . . [W]e think it is not an unreasonable exercise of [the police power] to prevent harm to public rights by limiting the use of private property to its natural uses.[207]

The approach adopted in *Just* differs significantly from the three tests traditionally applied by other courts. The court framed the test of compensability in terms of a distinction between restrictions placed on property to restrain conduct harmful to the public and those designed to secure a benefit not presently enjoyed by the public. Only in the latter situation would the state be compelled to pay compensation.[208] Under this analysis, the diminution in value of the landowner's property becomes a minor, if not irrelevant, factor.[209] Moreover, virtually no balancing test exists since the court ascribes such great weight to the public interest in environmental quality.[210] In short, if the restriction

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205. *Id.* at 17, 201 N.W.2d at 768.

206. *Id.*

207. *Id.*

208. *Id.* at 16, 201 N.W.2d at 767. *See also* 86 HARV. L. REV. 1582, 1584-85 (1973).

209. The court purported to apply the diminution of value test but refused to take into account the value of the property in a filled state. *Id.* at 23, 201 N.W.2d at 771. Nonetheless, "its finding that the filling of wetlands was a harmful use essentially predetermined its outcome under that test." 86 HARV. L. REV. at 1585.

210. BOSSELMAN, *supra* note 196, at 264. Balancing tests, heavily weighted in favor of the public interest in the wetlands, were also applied in Brecciaroli v. Connecticut Comm'r of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975), and in Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975).

prevents a use of property that would result in a certain degree of harm to the public interest,[211] no taking occurs.

The Act itself contains support for the approach taken by the *Just* court. Section 18 provides that a taking occurs whenever "the Council's action so restricts or otherwise affects the use of the property so as to deprive the owner of its existing practical use."[212] It is submitted that "existing" refers only to those uses for which the critical area is suited in its natural state, uses such as swimming, fishing, and hiking. Uses requiring substantial changes in the natural condition of the property would not be deemed "existing" within the meaning of section 18. As the court stated in *Just:* "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."[213]

The term "practical," it is suggested, refers only to those uses that do not harm the public. While dredging and filling in critical areas probably do not amount to noxious uses under the traditional test, these activities nonetheless cause substantial harm to the public.[214] In their natural state, tidelands and coastal waters provide essential habitat for most commercial and sports fisheries, protect adjacent highlands, and act as filters in absorbing

211. An obvious question under *Just* is what constitutes a sufficient level of harm to sustain a restriction on the use of property. The answer lies somewhere between the minimal effects associated with the construction of a private pier and the noxious effects of a polluting factory in a residential community. Professor Sax suggests that noncompensable uses are those that "physically restrict a neighbor, burden a common, impose on the community an affirmative burden of providing public services, or adversely affect some interest in health or well-being." Sax, *Takings, supra* note 190, at 163. The indirect effects of dredging, filling, or substantially altering a critical area certainly would fall within the categories enumerated by Sax. Such activities burden the estuarine and ocean waters, a resource common to all, and adversely affect the public interest in environmental quality.

212. S.C. CODE ANN. § 48-39-180 (Cum. Supp. 1977). If the court finds that a taking has occurred, it may itself issue the permit to the applicant or direct that just compensation be paid.

213. 56 Wis. 2d at 22, 201 N.W.2d at 770. *See also* Sibson v. State, 115 N.H. 124, 129, 336 A.2d 239, 243 (1975): "The board has not denied plaintiffs' current uses of their marsh but prevented a major change in the marsh that plaintiffs seek to make for speculative profit."

214. In Richards v. City of Columbia, 227 S.C. 538, 547, 88 S.E.2d 683, 687 (1955), the South Carolina Supreme Court stated that "[r]egulations and restrictions upon the manner in which a property owner may use his property when necessary for the general welfare are properly a part of the police power of legislative bodies and, *if reasonable, are valid in so far as they tend to prevent harm to the public and to promote the public good.*" (emphasis added) (quoting 9 AM. JUR. *Buildings* § 3 (1937)).

sediment and pollution that emanate from upland areas.[215] The beaches and sand dunes represent "an extremely dynamic system" that maintains shoreline stability and serves as a protective barrier to inland areas.[216] When these areas are converted into foundations for residential and industrial structures, the inevitable result is increased pollution, greater storm and flood damage, loss of marine life, and reduced recreational opportunities. As the Council notes with respect to developments on sand dunes: "If these fragile dunes and their natural shifting sands are unduly disturbed, upland property can be exposed to direct erosion, the harmful spray intrusion and the full impact of storm surges."[217] A proposed activity that would result in such adverse effects should be deemed impractical for purposes of section 18. As a result, private losses sustained by not being permitted to undertake the activity would be noncompensable.[218]

When the property in question is located below the mean high-water mark, reliance on this suggested approach may be unnecessary. First, the individual claimant would face the almost insuperable obstacle of proving title to the tract vis-à-vis the State.[219] Even if such proof were possible, the Council would still be correct in asserting that the property is subject to the *jus publicum,* absent express legislation extinguishing the trust.[220] Therefore, in denying a permit application to alter a tidelands tract, the Council would be merely protecting the paramount rights of the public in the property.[221]

Those critical areas located beyond the mean high-water mark are beyond the traditional purview of the public trust doc-

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215. Rule 30-1(A), 2 S.C. State Reg. No. 7 at 19-21 (1978). *See also* E. ODUM, FUNDAMENTALS OF ECOLOGY, ch. 13 (3d ed. 1971); D. RANWEL, ECOLOGY OF SALT MARSHES AND SAND DUNES (1975); Laurie, *Salt Marsh: A Question of Survival,* 22 S.C. WILDL. MAG., no. 2 at 21 (1975).

216. Rule 30-1(B), 2 S.C. State Reg. No. 7 at 21-22 (1978). *See also* D. RANWEL, *supra* note 215.

217. Rule 30-11(B), 1 S.C. State Reg. No. 13 at 76 (1977).

218. One commentator has recommended a similar construction of the North Carolina coastal zone law. Glenn, *Coastal Area Management Plan, supra* note 168, at 327-38.

219. *See* text accompanying notes 10-12 *supra.*

220. *See* Marks v. Whitney, 98 Cal. Rptr. 790, 491 P.2d 374, 6 Cal. 3d 251 (1971).

221. *See* Note, *State and Local Wetlands Regulations, supra* note 169, at 898-99. It is well settled that the sovereign, in the exercise of the navigation servitude, may take private property below the mean high-water mark without obligation to compensate therefore. *See, e.g.,* United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Chicago, M., St. P. & P.R.R., 312 U.S. 592 (1941); Early v. South Carolina Pub. Serv. Auth., 228 S.C. 392, 406-07, 90 S.E.2d 472, 478-79 (1955); Rice Hope Plantation v. South Carolina Pub. Serv. Auth., 216 S.C. 500, 528, 59 S.E.2d 132, 144 (1950).

trine. In these cases, the *Just* approach, which is at least arguably authorized by section 18, affords a sound basis for determining whether a taking has occurred.[222]

VI. SUMMARY AND CONCLUSION

A decade of debate among legislators, citizens, and environmentalists culminated in passage of the South Carolina Coastal Zone Management Act of 1977. The Act creates a new State agency, the Coastal Council, to develop a coastal zone management program and to regulate the use of the State's most valuable natural resources, the coastal waters, tidelands, beaches, and sand dunes. Today a person wishing to undertake a substantial activity in any of these critical areas must first obtain a permit from the Council.

The Act is not without its weaknesses and problems of statutory interpretation. Vast areas of the coastal zone, most significantly, those uplands adjacent to the critical areas, are beyond the Council's jurisdiction. Its scope of authority is probably too limited to meet the mandates of the CZMA; consequently, the State may be unable to receive federal funding to implement its

222. The takings cases in South Carolina provide little indication how the supreme court would approach this issue under the Act. On the one hand, the court has sustained municipal ordinances requiring permits to construct a filling station, Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940); to keep cows in the city limits, Ward v. Town of Darlington, 183 S.C. 263, 190 S.E. 826 (1937); and to operate a livery stable, Douglass v. City Council of Greenville, 92 S.C. 374, 75 S.E. 687 (1912). On the other hand, the court has invalidated ordinances requiring permits to erect billboards within the city limits, Schloss Poster Advertising Co. v. City of Rock Hill, 190 S.C. 92, 2 S.E.2d 392 (1939), and to build structures within 200 feet of a railroad crossing, Henderson v. City of Greenwood, 172 S.C. 16, 172 S.E. 689 (1933).

Despite the apparent inconsistency among these cases, it is possible to distinguish the latter two as involving "interest group favoritism in the formal trappings of community welfare legislation." Van Alstyne, *supra* note 197, at 10. In *Henderson,* the court found that the sole purpose of the ordinances was to impair, if not destroy, the appellant's business, 172 S.C. at 25, 172 S.E. at 692, and in *Schloss Poster,* the ordinance was being administered "so as to give exclusive profits or privileges to particular persons." 190 S.C. at 95, 2 S.E.2d at 394. In *Gasque,* stating that taking ordinarily requires "a positive act or aggressive step," the court found that the council had committed only "a negative act" by refusing to grant appellant a permit. 194 S.C. at 23, 8 S.E.2d at 874. Apparently, the court was relying on the now discredited physical invasion theory. *See* note 193 *supra.* In *Douglass* and *Ward,* the court applied the noxious uses test in finding the permit denials to be reasonable exercises of the police power.

These cases, however, will be of little precedential value in deciding a takings challenge under the Act. They all involve the application of local ordinances to the use of properties that clearly lack the statewide significance of the critical areas. In short, there are no obstacles in the case law to the supreme court's adherence to the *Just* approach.

management program. The General Assembly could cure this deficiency by amending the Act to extend the Council's jurisdiction. Absent such legislation, the Council may be able to broaden its powers sufficiently through an arrangement with various State and local agencies that would permit a "networking of authority."

The Act purports to give the courts authority to review *de novo* actions taken by the Council. The courts, however, will likely construe this provision as permitting judicial review only under the clearly erroneous substantial evidence test. This construction would prevent the court from substituting its own judgment for that of the Council, thereby preserving the viability of the administrative process established for protecting the State's critical areas.

The Act also purports to transfer to the State title to all oceanfront property formed by the process of accretion. Again, the courts will probably adopt a construction that does not pose a difficult constitutional issue. In doing this, the courts will retain the common-law rule with respect to lands accreted by natural forces prior to passage of the Act; all other accreted property would pass to the State. All these areas, of course, would remain subject to the Council's authority.

Under section 22[223] of the Act, a party may bring suit against the State to establish title to lands below the mean high-water mark. The section does not, however, alter the well-settled rule that the State comes into court with a heavy presumption of title in its favor. While section 22 may lead to an increase in the number of ownership disputes, the State's title to the tidelands will probably remain secure.

The principal federal authority in South Carolina's coastal zone is the Army Corps of Engineers. While the Corps' authority encompasses areas well beyond the Council's jurisdiction, the State's tidelands and coastal waters are now subject to the control of both agencies. In these areas, the Corps will defer to the State's determination on a permit application unless "overriding factors of national interest" dictate otherwise. The actions of all federal agencies in the coastal zone become subject to the terms of the State's management program once it receives federal approval.

223. S.C. CODE ANN. § 48-39-220 (Cum. Supp. 1977).

The nondelegation and takings doctrines pose constitutional issues the courts will soon have to face. The former doctrine, which concerns the Act in its entirety, would stand little, if any, chance of success; the latter, which concerns specific action taken by the Council under the Act, presents a more difficult problem. The question for the court will be whether the Council's refusal to issue a permit deprives the applicant of the "existing, practical use" of his property. The court should interpret and apply this standard in light of the immense value of the State's critical areas, the alteration of which can cause serious harm to the public interest in health, safety, and environmental quality. Consequently, when the applicant seeks to undertake a publicly harmful use for which the property is not suited in its natural state, the Council's denial of the permit would be a proper exercise of its police powers.

The South Carolina Supreme Court has recognized that the public trust doctrine applies to lands below the mean high-water mark in this State. This doctrine imposes on the Council the duty to insure that these lands remain devoted to public purposes and subject to public control. Therefore, the Council lacks the authority to transfer public trust property to private persons for private purposes.

The Act is couched in broad language and vests considerable discretion in the Council. The Council is directed, for example, to "duly consider" the environment,[224] "to balance" economic interests,[225] and to provide "adequate environmental safeguards."[226] While the public trust doctrine and availability of judicial review clearly impose some limits on the Council's discretion, whether the Act becomes a blank check for development, or a strong check against it, depends primarily on the predelictions of the administrators. The Council should strive to preserve and protect the critical areas of our coastal zone not only for this generation but also for those to come.

Bradford W. Wyche

224. *Id.* § 48-39-30(B)(1).
225. *Id.* § 48-39-20(F).
226. *Id.* § 48-39-30(B)(1).