1-1-1976

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Robert I. Reis
University at Buffalo School of Law

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The ebb and flow of the tide marks only the surface of biological and legal flux in the coastal zone. The physical and biological revelations of the 1960's and 1970's, and the attempted responses of the legal system to the imperatives thereby postulated, have given rise to a set of legal, ethical, and processual questions even more difficult to conceptualize than their physical counterparts —the realities of the coastal zone that prompted them.

Coastal area decisionmaking involves a set of institutional norms that have long informed perceptions of coastal area processes, but that no longer respond to or serve contemporary needs. This is not surprising, since the "wastelands" of the 1950's and early 1960's have become the priceless ecological gems[1] of the 1970's—"wetlands," "mudflats," "swamps," and "bogs" have become synonymous with values of a status almost beyond questioning. Belated recognition of the enormous ecological value of these areas has led to frenetic, crisis-born attempts to stave off their destruction.[2] During the late

Robert I. Reis is Faculty Director, Sea Grant Law Center; Professor of Law, State University of New York at Buffalo, Faculty of Law and Jurisprudence.

1. This concept of wetlands as wastelands was reflected in two separate but equally interesting situations. The first was in testimony before the National Commission on Urban Problems by Ozmore, in his *Plea For Wetlands Protection:*

   > At one time not too many years ago, the marshlands of our country were referred to as "wastelands." Nothing could be further from the truth. Our wetlands literally teem with life, from the lowest form of amoebic animals to the fur-bearing mammals which have meant millions of dollars to our population. They are the nursery grounds for most of our protein supply from the sea.

   3 HEARINGS BEFORE THE NATIONAL COMMISSION ON URBAN PROBLEMS 204 at 205 (July-August 1967). *Cf.* Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973) wherein the Corps was ordered by the court to re-evaluate the Wallisville and Trinity River projects and prepare a new Environmental Impact Statement concerning the project. The prior report could be characterized as evidencing a bias toward minimizing the value of and impact on the affected wetlands and fisheries. The decision is a delightful disclosure of the machinations of inner decisionmaking and traditional weightings inherent in Corps cost benefit studies.

2. A limited insight into the depth of feeling evoked by wetlands preservation can be gleaned from the following quotation:

1960's and early 1970's, statutes were enacted by the legislative bodies of several states, and the flow of case law increased to a cascade exceeding all expectation.[3] Congress enacted a steady progression of laws: the Coastal Zone Management Act,[4] the Land and Water Conservation Fund Act,[5] the National Estuarine Act,[6] and the Federal Water Pollution Control Act[7] and Amendments.[8]

The new mythology of coastal area values was so firmly rooted in emerging public policy that the pronouncements of state and federal legislation read like codifications of the postulates of biological imperative and impending irretrievable resource loss. Wetlands preservation and coastal zone management are premised on real and demonstrable ecological values,[9] and the process of legitimating these values through legislation was undertaken in the haste that such critical values require. If the postulates were justified, no time should be lost in implementing measures designed to preserve wetlands and protect them from further despoliation, needless destruction, and loss.

> The earth, its habitats, and its inhabitants are all of one piece. But if a person were forced to select the most important natural habitat on earth, the answer would have to be the estuary—where most of the land is under water, where the river is no longer river, the ocean not yet ocean, but where life thrives as nowhere else.
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> It is often said rather vaguely that life began in the sea.... It is much more likely that the birthplace of life was an estuary, a highly enriched environment where the wastes of the continents, silts, clays, dissolved solids and gases could be combined in the presence of gently ebbing and flowing tides that kept nutrients supplied and wastes diluted.

Hearings on H.R. 25 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 90th Cong., 1st Sess., 442, 443 (1967). *See also* Heath, *Estuarine Conservation Legislation in the States,* 5 LAND & WATER L. REV. 351, at 351, 352 (1970). The Supreme Court of Connecticut in Brecciaroli v. Commissioner of Environmental Protection, 36 CONN. L.J. 5 (1974), noted "both... the importance of wetlands as natural resources and... their imminent demise at the hands of man." *Id.* at 6. The Rhode Island Supreme Court was somewhat called upon in Mills, Inc. v. Murphy, 352 A.2d 661 (1976), to distinguish between Freshwater and Tidal Wetlands Acts and procedures. In doing so, the court noted the different pressures and policies attendant on different forms of environmental regulation as follows:

> The Coastal Wetlands Act envisions affirmative action on the part of the Department of Natural Resources to the end of establishing a statewide plan for the protection of wetlands. The instant Act, on the other hand, sets out a permit procedure whereby the landowner is required to initiate the proceedings. This difference in overall approach is susceptible to a variety of reasonable explanations: the greater development pressure on coastal wetlands suggests the need for immediate state action while the situation regarding fresh water wetlands might not be so pressing; the high incidence of state-ownership in coastal wetlands might facilitate centralized action while the almost exclusively private ownership of fresh water wetlands would tend to hinder such an approach; the probable interdependence and interactions of coastal wetlands could necessitate unitary state action while the more random pattern of fresh water wetlands might thwart such an attempt.
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> Having in mind the need for significantly different approaches to the regulation of fresh and salt water wetlands, the Legislature could reasonably conclude that the two methods of regulation posed dangers of differing magnitude to the rights of private individuals. Thus they may have decided that a statewide program of affirmative action, being less sensitive to individual circumstances, required the inclusion of prior hearings and a provision for compensation, while a procedure that envisioned the processing of a series of individual applications required only the availability of judicial review to ensure the protection of all constitutional rights, including that of just compensation. In these circumstances, we cannot say that the classifications created by the Legislature lack all rational basis.

Id. at 668-69.

3. *See generally* Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1973); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); State v. Johnson, 365 A.2d 711 (Me. 1970); MacGibbon v. Board of Appeals, 356 Mass. 635, 255 N.E.2d 347 (1970); Commissioner of Natural Resources v. S. Volpe, Inc., 349 Mass. 204, 206 N.E.2d 666 (1965).
4. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (1974). *See also* U.S. Dep't of the Interior, *National Estuarine Pollution Study,* S. DOC. No. 58, 91st Cong., 2d Sess. (1970).
5. Land and Water Conservation Fund Act, 16 U.S.C. §§ 4601-4 to 4601-11 (1974). For an analysis of expenditures under the Act see *National Outdoor Recreation Programs and Policies, Hearings before the Subcommittee on National Parks and Recreation of the Comm. on Interior and Insular Affairs,* H.R.,93d Cong., 1st Sess., at 383-400 (1973).
6. National Estuarine Act, 16 U.S.C. §§ 1223-26 (1974).

   § 1221. Congressional declaration of policy.

   Congress finds and declares that many estuaries in the United States are rich in a variety of natural, commercial, and other resources, including environmental natural beauty, and are of immediate and potential value to the present and future generations of Americans. It is therefore the purpose of this chapter to provide a means for considering the need to protect, conserve, and restore these estuaries in a manner that adequately and reasonably maintains a balance between the national need for such protection in the interest of conserving the natural resources and natural beauty of the Nation and the need to develop these estuaries to further the growth and development of the Nation. In connection with the exercise of jurisdiction over the estuaries of the Nation and in consequence of the benefits resulting to the public, it is declared to be the policy of Congress to recognize, preserve, and protect the responsibilities of the States in protecting, conserving and restoring the estuaries in the United States.
7. Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-75 (1970).
8. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1975).
9. However real and demonstrable ecological values have been, absorbing them into a workable legal context has been a traditional problem. At least a partial solution may be seen in the work of Odum & Skjei, *The Issue of Wetlands Preservation and Management: A Second View,* 1 COASTAL ZONE MANAGEMENT J. 150 (1974), wherein the authors attempt to quantify some of the ecological values of wetlands. Some form of quantification of ecological values is necessary for the balancing of conflicting interests in any decisionmaking context. This is particularly appropriate for agency or judicial decisionmaking affecting wetlands development. Thus, one could say that the development of a legal context involves the integration of ecological and economic analysis. A significant problem arises at this point, in that the traditional legal/economic context has involved the impact of agency restrictions on the *use value* of property to private individuals. To justify the integration of economic/environmental values, one must be concerned with *public sector values.*

   It is only recently that a balancing of public sector outcomes has been proposed as an integral part of the administrative or judicial process which determines the validity of police power regulations. The court in Rykar v. Gill, the first and withdrawn opinion of which appears at 6 E.R.C. 1333 (Conn. Super. 1973), acknowledged this recent standard when it remanded the case to the Commissioner of Environmental Protection as follows on July 18, 1975:

   > The plaintiff's application and alternative proposals are to be considered in light of the rule that in the regulation of private property *the welfare of the public, rather than private* [*sic*] *gain is of paramount consideration* provided that the regulation does not so restrict the use of private property for any reasonable purpose as to result in a "practical confiscation."

   Unreported remand (emphasis added). The italicized language is an adaption of the language of the court in Brecciaroli v. Commissioner of Environmental Protection, 36 CONN. L.J. 5 (1974). Therein, the Supreme Court of Connecticut worked a progression of reasoning from the Connecticut General Statutes §§ 22a-33, which sets forth the general public policy of "public health and welfare" considerations, through the aforenoted language in the remand order, culminating in the court's upholding the denial of the landowner's application for a permit to develop because "it merely prohibited one specific use which presumptively was not reasonable *when balanced against the public harm it would create." Id.* at 8 (emphasis added).

   The implications of both the quantification and balancing process are great strides forward in the realization of these goals or objectives which are "premised on real and demonstrable ecological values."

However, the quantum shift from zero value to enormous value occurred so suddenly and unexpectedly that the normal process of judicial and legislative maturation in response to changes in contemporary values and beliefs could not occur. The small, deliberate, incremental changes in traditional definitions and conceptions of private property, the expansion of the bounds of police-power regulation, and the emergence of mechanisms for the acquisition of coastal area lands and the vesting of control over them in the public sector never occurred in the orderly fashion that characterizes most legal change.[10]

10. To some extent the tone of legal analysis reflects some of this difference in the process of judicial and legislative change of basic values. A position is often assumed in regard to the subject of analysis which does not necessarily reflect the underlying nature of the change that is advocated. *See generally* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973); Jaffee, *The Public Trust Doctrine is Alive and Kicking in New Jersey Tidalwaters: Neptune City v. Avon-by-the-Sea—A Case of Happy Atavism?*, 14 NAT. RES. J. 309 (1974). The most interesting analysis is found in 1 & 2 V. YANNANCONE & B. COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES (1971), wherein the authors advocate that these concepts must be argued in every court of the land. They note in the midst of their public trust discussion:

> The Trust Doctrine must be urged in as many courts in the land as will listen. Suits must be brought each time a smoke stack spewing forth sulphur dioxide threatens to degrade the quality of the air that belongs to all of us; each time the waste from a paper mill pollutes the water we drink; each time a pesticide or herbicide contaminates the air, water or vegetation we own in common; each time a "fastbuck" developer landfills a wetland or estuary to the detriment of the important balance of our food chain; and each time a governmental authority callously decides to build a road or other public project in such manner as to threaten the integrity of the ecosystem involved.

1 *id.* at 17.

On the question of the future of private property, the authors are equally purposeful in their advocacy:

> There need be no hesitation on the part of the environmental advocate to seek to curtail the private use of any property which is cloaked with the public interest. The landowner's right to just compensation for property given by the due process provisions of the Fifth Amendment to the Constitution must be balanced against the right of the people to the full benefit, use and enjoyment of national and natural resource treasures as trusts for the People, not only of this generation, but of those generations yet unborn.

And,

> [t]here is ample precedent for the taking of private property in the absence of eminent domain proceedings and without just compensation. The regulation and control of the uses to which property may be put often constitutes a taking where the effect of such regulation is so complete as to deprive the owner of all or most of his interest in the property.

Id. at 43.

As distinguished from the result-oriented analysis of the above works, note the objectivity of Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971).

For a traditional example of progressional change, see generally Euclid v. Ambler Realty, 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1927).

Several excellent articles are contained in a Symposium Issue of the North Carolina Law Review. Particularly notable are: Maloney and Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C.L. REV. 185 (1974); 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); Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. REV. 303 (1974).

During this transition time, a set of seemingly irreconcilable opposites occupied the public eye. Coastal area issues proliferated in number and were increasingly cast in the extremes of discontent. Processes of deliberation, compromise, and reasoned decisionmaking had not yet caught up with these issues, and discussion was phrased in terms of stark contrasts: "preservation" *or* "development," "regulation" *or* "confiscation." Conservationists and developers alike perceived the issues thus framed as both explosive and implosive and each group devoured its own kind as well as the opposition in the attempt to legitimize and ensure the realization of its particular goals and strongly held beliefs.[11]

A quandary so fundamental that it affects basic social and environmental values presents few solutions from within. Time is the obvious neutral factor in the reconciliation of these conflicts. Only time can transmute extremes into reasoned legal doctrine. Equally important, time is necessary for an external analysis of possible alternative systems of control and allocation of coastal area resources. Such analysis is absolutely necessary, but to be valid it must, so far as possible, assume neither the givens nor the goals of the present controversy. An external analysis must approach, *ab initio,* all questions affecting the structuring and allocating of coastal area resources.[12]

A series of interrelated questions can be used to illustrate the extent to which external considerations should be imposed on such an inquiry. Should any form of private property exist in the coastal area?[13] If so, what are the desirable sets of expectations based on property rights that could conceivably be created in the private sector, and how do these compare with property rights now in existence?[14] Particular emphasis must be given here to the recognition of all relevant values in the allocative process and the dislocation (if any) which would occur in the event of a transition from one set of property expectations

11. A recent victim of the process of being devoured both by his own kind and by others is exemplified by the Commissioner of Environmental Conservation in New York, who resigned in 1976. Courier Express (Buffalo), May 1976, at 13, 16.

12. The need to so structure these issues and set them forth for the reader's consideration constitutes one of the original reasons for the first Sea Grant Law Journal. *See generally* Tecaff, *The Coastal Zone—Control Over Encroachments into the Tidewaters,* 1 J. MARIT. L. & COM. 241 (1970). See particularly the summary and conclusion appearing at 284-290. An early attempt at management analysis can be found in Knight, *Proposed Systems of Coastal Zone Management: An Interim Analysis,* 3 NAT. RES. LAW. 599 (1970).

13. Although the issues are not phrased in this manner, a broader reading of F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 10, and Jaffe, *supra* note 10, could lead to a reconstruction of their underlying issues as the asking of this question.

14. The decision of the court in Just v. Marinette County, 56 Wisc.2d 7, 201 N.W.2d 761 (1973), could be compared with any of the other three cases cited in note 3 *supra—Johnson, MacGibbon* or *S. Volpe*—as decisions affecting the allocation of wetlands resources which serve to illustrate the dichotomy between positions which exist on the issues of propertied expectations. A more direct comparison might be, however, that of *Just* with the philosophy expressed in Baker v. Normanock Ass'n, 25 N.J. 407, 136 A.2d 645 (1957), which anticipates private ownership. The icing on this cake could be supplied by a reading of RACHLIS & MARQUSEE, THE LAND LORDS (1963). *Baker* and THE LAND LORDS assume the values of fostering private ownership of land and resources in American society.

to another. What public and private institutions is it possible to create to exercise concurrent control over the allocation and use of these resources? Finally, what formal basis of governmental justification should evolve as warrant for its activities in the total coastal area, and what political, legal, and social issues lie concealed within any fundamental change in governmental theory? Further questions could be addressed to the more traditional issues of standing, home rule, state versus federal rights, and to the myriad related constitutional issues. These questions, however, are not sufficiently free of the set of existing normative biases to produce the creative thinking necessary to deal with the fundamental changes wrought by the last decade.

The past decade may be characterized as one of extraordinary governmental frustration in the reallocation of both the power and the duties attendant upon control of the process of coastal zone management. It may be hypothesized that no one anticipated the concurrent pull of the government's simultaneous attempt to avoid the political, economic, and environmental pressures attendant upon such control. State and federal agencies may also have been frustrated by internal problems of personnel limitations and program management, particularly where the thrust of an agency's involvement in the past had been the antithesis of the duties with which it was charged under new legislative and judicial directives. Regulatory jurisdiction also brought with it the concomitant liability of having such regulations found by the courts to be in excess of the constitutional limitations on the police power, and declared to be "takings."

The distinction between proper exercises of the police power and regulatory excesses ("takings") was an uncertain one inasmuch as there was a simultaneous search (1) for some appropriate level of government to exercise jurisdiction and control over the allocation of coastal resources, and (2) for a normative answer to the question of the degree of "privateness" desirable in the coastal area. This uncertainty reflects the rapid transmutation of social values that has occurred in the last decade.

A series of underlying questions involved in any attempt to deal with issues like those just noted must be based on working doctrinal materials to ensure that what is studied has some relation to reality. The received materials with which one must begin bear little relation to contemporary problem solving. The first task, then, is not only to collect existing doctrinal materials, but to begin an analysis of them in the framework of contemporary methods for problem-identification and decisionmaking.

One method of problem-identification is the collection of questions around which there is evidenced the greatest concern. The problems thus identified can form the basis of a unified inquiry into problems of the coastal zone. The inquiry might well be organized as follows: (1) sources and extent of private and public interests in the coastal zone; (2) governmental arrangements for the recognition and allocation of coastal zone resources; (3) processual

questions involving mechanisms for achieving coastal zone values; and, (4) access to governmental and institutional decisionmaking in the coastal zone.

This first issue of the Sea Grant Law Journal is intended both to report on the existing state of legal relations involving those issues considered, and to provoke future studies into coastal zone processes and resources.