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CONSTITUTIONAL IMPLICATIONS OF WETLANDS LEGISLATION

*By Joseph W. Gannon, Jr.**

In recent years several states on the Atlantic and Pacific coasts have enacted wetland conservation statutes.[1] Although the statutes vary in detail, they all seek to preserve an important natural resource by imposing restrictions on the uses a person may make of wetlands that he may own. The application of any of these statutes may give rise to constitutional controversies. In *State v. Johnson*,[2] the Supreme Judicial Court of Maine became the first of the nation's highest state courts to hear such a controversy and to strike down an attempt to enforce a wetlands statute. The court held that the application of the Maine Wetlands Act[3] violated the state constitution since it was tantamount to a "taking" of wetlands without just compensation to the affected property owner.[4] It also concluded that the application was not a proper exercise of the state's police power, since it deprived the appellant property owners of reasonable use of their land.[5] Because many states have passed statutes similar to the Maine Wetlands Act, *State v. Johnson* stands as a dangerous precedent. Should it be followed by other state courts, the nation's wetlands will be left unprotected from commercial exploitation.

The Ecological Importance of Coastal Estuaries

Reports and statistics by marine scholars on wetland abuse reveal why wetlands are ecologically critical, and why their disappearance is imminent if legislation such as the Maine Wetlands Act cannot be enforced. Wetlands generally are highly fertile and productive of plant and animal life—more productive usually than either land or sea[6]—and the Atlantic estuarine zone in particular is exceptionally productive.[7] Because of this productivity, the estuarine waters are excellent nursery grounds for

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coastal fishes and thus economically important to the nation's commercial fishing industry. At least two-thirds of the nation's commerical fish and shellfish resources and most of our marine sport species inhabit the estuarine environment during all or part of their life cycle.[8] As a productivity comparison, the average annual crop of shellfish and bait worms harvested from each acre of Maine estuaries had a market value of $33,563 while the market value of farm crops from a good acre of upland interior Maine was only $2,000 per year.[9]

Marshlands have a number of other environmentally important functions: they provide a place for water to be purified and stored for future use;[10] they provide a means for flood control which is more efficient and less expensive than any yet devised by man;[11] they provide sites for the wintering and nesting of waterfowl;[12] and they provide recreational outlets for man.[13]

Dredging and filling activities, however, by residential and commercial developers interested in relatively short-term profits have had, and will continue to have, long-term disastrous effects on these important functions. Statistics compiled from 1947 to 1967 indicate that 7.1 percent of the nation's estuaries were lost as the result of dredging and landfill operations.[14] California alone lost 67 percent of its marshlands in this period.[15] In Maine only eight one-thousandths of one percent of the state's area remains in the form of salt marshes.[16]

Legislative Response to the Problem of Estuary Control

Evidence of the destruction of these estuarine areas has caused coastal states to pass wetland conservation laws. The legislation reflects the determination of the states to effect meaningful environmental protection, even though it be detrimental to private economic interests. Because of this clash of interests many of these wetland laws may lead to litigation centering on the constitutional issue which was analyzed in *Johnson*, that is, whether a state statute which restricts private use of wetlands and makes no provision for compensation is an unreasonable exercise of the state's police power. For example, the Rhode Island wetlands statute,[17] which requires a permit for the filling of wetlands, authorizes the Director of Natural Resources to deny permits when proposed fills "would disturb the ecology of intertidal salt marshes."[18] It should be noted that Rhode Island based its statute on a state constitutional guarantee of free right of

fishery.[19] Thus in the case of a permit denial, one might anticipate a controversy in which this constitutional guarantee would be asserted against the state and federal constitutional guarantees of just compensation to the affected property owner. The Massachusetts Dredge and Fill Act[20] leaves wholly to the discretion of state and municipal authorities[21] the determination of whether a permit to fill land should be issued or denied; it has no provision for compensating affected land owners. Other states in the Northeast, such as Connecticut and New Jersey, have adopted similar legislation for the protection of their coastal areas.[22] On the West Coast, the California legislature recently enacted a law establishing the San Francisco Bay Conservation and Development Commission.[23] The Commission alone has authority to issue permits to persons wishing to "place fill, extract materials, or make any substantial change. . ." on the shorelines of the Bay.[24]

Because of its potential impact on the administration of all of these statutes, the decision in *Johnson* merits careful examination.

THE DECISION IN STATE V. JOHNSON

The controversy in *Johnson* arose when the appellants, complying with the terms of the Maine Wetlands Act,[25] applied for a permit to fill and build on coastal marsh area which they owned. Acting under authority of the Wetlands Act,[26] the Wetlands Control Board denied approval of this permit for the reason that the requested fill would "threaten the public health and would be damaging to the conservation of wildlife and estuarine and marine fisheries."[27] On its face, this action was consistent with two stated purposes of the Wetlands Act.[28] The appellants sought judicial review on the grounds that the denial of their application amounted to an unconstitutional taking of their land without just compensation, and was thus an unreasonable exercise of the state's police power.[29] After an initial hearing, the lower court determined that the constitutionality of the Wetlands Act was a matter to be reviewed by the Supreme Judicial Court.[30] However, the Supreme Judicial Court, did not decide this issue but instead remanded the case to the lower court in order to obtain evidence as to the nature of the land involved and to determine more precisely the benefits or harm to be expected from the denial of the permit.[31]

Prior to any decision by the lower court on remand, the ap-

pellants began filling operations on their marshlands. The state thereupon sought and obtained an injunction prohibiting further filling. The appellants again appealed to the Supreme Judicial Court.[32] They argued that by granting the injunction the lower court had sanctioned an unconstitutional taking of property by the state;[33] in the original case, it should be noted, the appellants had argued that the taking resulted from the Board's denial of their application.[34] The Supreme Judicial Court decided to consolidate the original case with the appeal from the injunction.[35] It was stipulated that the evidence presented with respect to the appeal from the injunction would also be determinative of the original case.[36]

The court perceived the principal issue to be a conflict between the public interest in thwarting the "insidious despoliation of our natural resources . . . on the one hand, and the protection of appellants' property rights on the other. . . ."[37] The court found that appellants' land was a "valuable natural resource of the state of Maine"[38] and that it was important to the "conservation and development of aquatic and marine life, game birds and waterfowl."[39] However, the court also found that for appellants' purposes the land would have "no commercial value whatever" if left unfilled.[40] Weighing the ecological and economic factors, the court concluded that the denial of the appellants' application was an unreasonable exercise of the police power. The court reasoned that the denial of the Johnsons' permit application left them with land that was commercially worthless and, consequently, forced them to bear an unreasonable large burden of the cost of the state's wetland conservation program.[41] The court said: "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[42]

It is submitted that the court's decision was in error for four reasons. First, the court underestimated the fundamental importance of coastal estuaries as a natural resource. The importance of coastal estuaries has been recognized not only by marine scholars and scientists, but also by several state legislatures on the Atlantic and Pacific coasts. Second, the major environmental cases cited by the court in support of its holding are significantly distinguishable from *Johnson*, and thus do not justify the court's decision. Third, analogous cases decided both before and after *Johnson* indicate that conflicts between police power and prop-

erty rights have often been resolved in favor of police power. Recent decisions, especially, have recognized the need for extensive police controls over crucial environmental matters. These cases, then, would support a holding contrary to the one announced in *Johnson*. Fourth, the court ignored possible compromise solutions to the parties' controversy.

The remainder of this article analyzes the cases on which the *Johnson* court relied as well as the cases which militate against the court's decision. Additionally, an alternative judical approach to the *Johnson* controversy is offered.

THE CITED AUTHORITIES

The *Johnson* court relied most heavily on *Pennsylvania Coal Co. v. Mahon*[43] to justify its holding that the Wetlands Act unduly infringed on the Johnsons' property rights without according them just compensation. The *Mahon* case involved an attempt by appellee to enjoin the Pennsylvania Coal Company from mining under property in which appellee had only surface rights.[44] At the basis of Mahon's defense was the Kohler Act,[45] which prohibited the mining of anthracite coal when mining would tend to cause a subsidence of the surface. The United States Supreme Court ruled against Mahon, finding the Kohler Act to be an overextension of the state's police power.[46] According to the Court, the Act deprived the Pennsylvania Coal Company, the owner of the mining rights under the Mahon residence, of any commercial return on its investment.[47] The Court stated that such a deprivation was equivalent to destroying or appropriating the property outright.[48]

The *Johnson* court erred in relying upon this decision as *Mahon* is distinguishable on its facts. In *Mahon*, the Court found that it was not the purpose of the Kohler Act to provide for the safety of the public at large; rather the Act was to protect only a particular class of individuals, the surface owners.[49] The threatened damage to such owners was not a matter of general public interest and was not "sufficient to warrant a destruction of the coal company's constitutionally protected rights."[50] Furthermore, the Court maintained that since Mahon had purchased only the surface rights to the land from the coal company, he had assumed the risk of the company's continuing to mine beneath the surface.[51] The dangers incident to such a risk could not later be eliminated through resort to the police power. The Court denied

Mahon's request for an injunction on the ground that the Kohler Act unconstitutionally served only a select class of persons, that is, surface owners like Mahon, and extended to them "greater rights than they bought."[52]

Since the *Johnson* court, unlike the *Mahon* Court, could not assert that the statute before it served no general public purpose, it confronted a problem more difficult than that which the *Mahon* Court had to decide. The rationale applied in deciding the *Mahon* case was, therefore, not readily transferable to the *Johnson* case, and it would seem then that the *Johnson* court erred in applying the *Mahon* rationale.

The *Johnson* court also cited two Massachusetts cases, *Commissioner of Natural Resources v. Volpe*[53] and *MacGibbon v. Duxbury*,[54] as reinforcement for its decision. The court deemed it significant that the fact situations of the three cases were parallel.[55] *Volpe* involved an application of the Massachusetts Dredge and Fill Act, which, as mentioned above, has purposes similar to those of the Maine Wetlands Act.[56] *MacGibbon* involved wetland restrictions imposed by a town zoning ordinance. The *Johnson* court analogized *MacGibbon's* zoning laws to the Maine Wetlands Act.[57] It stated that zoning regulations, like the wetland statute, emanate from the governmental police power and are intended to advance the public's health and safety.[58]

Both *Volpe* and *MacGibbon* involved plaintiff property owners who sought to fill their marshlands for commercial development. The reviewing authorities in each case denied the plaintiffs permits to fill.[59] The denials were considered necessary to preserve the ecological benefits of the salt marshes in question.[60] Both courts, like the *Johnson* court, were asked to review the alleged arbitrariness of the permit denials as well as the denials' effect on the marshlands' value to the property owners. The *MacGibbon* court remanded the case to the Duxbury Board of Appeals for further findings as to the potential damage from the landfill and the prospective loss to the landowner.[61] The *Volpe* court, after reversing a lower court injunction against further landfill, likewise remanded.[62] It directed the lower court to reassess the controversy in light of such pertinent data as the practical uses of the land in its natural state, the market value of the land both with and without the fill restrictions, and the town zoning laws.[63]

Since neither *Volpe* nor *MacGibbon* resulted in a final decision as to the constitutional issue arising from the permit denials,

it was inappropriate for the *Johnson* court to cite either case in support of its conclusion that the Johnsons' property rights had been violated through an unreasonable exercise of the police power. *Volpe* and *MacGibbon* simply held that prior to the court's passing on the issue of unconstitutional use of police power, a study should be conducted as to alternative uses for the land in question. Had the *Johnson* court been as investigative as the *Volpe* court, that is, had it requested specific data on remand, conceivably it might have been persuaded to decide the case otherwise.

Johnson cited two other conservation cases as examples of unconstitutional takings. In the first case, *Dooley v. Town Plan and Zoning Commission*,[64] the plaintiff owned property which had recently been rezoned as a flood plain area.[65] The zoning change prohibited most excavation and filling, and permitted use of the land only for such purposes as parks, playgrounds, wildlife sanctuaries and agriculture.[66] It had been plaintiff's original intention to develop the land for residential purposes. The court held that the zoning change was unreasonable and confiscatory.[67] Close as it may appear to the *Johnson* dispute, this case is also distinguishable. First, in *Johnson* the Wetlands Board found that the proposed filling of the Johnson property would endanger public health and safety.[68] There was no such finding in *Dooley*. Second, in *Johnson*, the evidence indicated that filling of plaintiffs' marshland would cause substantial damage to the ecology of the wetlands. By contrast, the evidence in *Dooley* indicated that much of the plaintiff's property was situated on unexceptional high land[69] and that, therefore, its development would not be ecologically disastrous.

In the second case, *Morris County Land Improvement Co. v. Town Plan and Zoning Commission*,[70] a zoning change was effected to aid in the control of floods and to provide for open spaces.[71] The change permitted property owners to make only certain uses of their land, and these uses were to be conservationist in character.[72] The court struck down the zoning law as a taking of private property without just compensation and as therefore an overextension of the police power.[73] This decision, however, is also distinguishable from *Johnson*. Although floods may certainly visit damage upon the public, the public does recover from floods. As to the conservation and enjoyment of open space, the public may have several choices available to it

and thus need not look exclusively to any single area. With respect to wetlands, however, the public interest is more vulnerable to critical harm. If they are filled, the ecological loss is virtually unrecoverable. The loss of wetlands, moreover, is not comparable to the loss of ordinary open space. Apart from differences in ecological functions, wetlands must be distinguished from ordinary open space in terms of geographic occurrence; wetlands are far more rare.[74]

Each of the above cases, then, may be distinguished from *Johnson* either on their facts or on their disposition. None of them, consequently, lends significant support to the holding announced in *Johnson.*

OTHER AUTHORITIES

There have been a number of other decisions, both before and after *Johnson*, which have upheld police power restrictions on property uses that threaten the public interest, even though the restrictions caused economic losses to the property owners. *Mugler v. Kansas*,[75] decided in 1887, involved the alleged right of a brewery owner to receive compensation from the state for property devaluation which resulted from a newly enacted state law forbidding the sale and manufacture of liquor.[76] Justice Harlan, writing the opinion for the United States Supreme Court, denied the plaintiff compensation for his loss on the ground that the statute did not appropriate property. He reasoned that the statute imposed only a limitation on the property's use, which use the state had deemed to be harmful to the public:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.[77]

In other decisions, the Supreme Court reacted as it did in *Mugler* and subordinated private economic loss to the right of the state to regulate noxious activity of property owners.[78] It is submitted that the *Johnson* court should have regarded the Johnsons' filling of their marshland as such a noxious activity. The filling was deleterious to the public well-being since it was totally destructive of a unique natural resource. Consequently, the state's attempt to regulate and preserve the property should have been upheld.

Relatively recent decisions in environmental controversies have similarly upheld police power restrictions on private property interests. For example, in the New York case of *A. E. Nettleton Co. v. Diamond*,[79] the State Court of Appeals decided that a statute prohibiting the sale of skins or hides of endangered species of wild animals was a valid exercise of the police power.[80] The court overruled the lower court decision which held that the statute unconstitutionally interfered with the property rights of the plaintiff.[81] It stated that the wild animals which were listed as endangered were a vital asset to the people of New York (even though many obviously were not indigenous to the state) and that "the protection of these animals [was] essential for the welfare of our society."[82] In contrast, although one of the express intentions of the Maine Wetlands Act was similar to the principal intention of the New York statute, i.e., the intention to protect wildlife,[83] the Maine Supreme Judicial Court placed private economic interest in ascendancy over state police power. It might be argued that the decision to uphold the regulation in *Nettleton a fortiori* should have resulted in a similar decision in *Johnson* since the threatened natural resources in *Johnson* were strictly endemic.

Another recent case, *Adams v. Shannon*,[84] upheld a California statute prohibiting the importation and possession of piranha fish. The statute was held to be a valid exercise of the police power to protect local species of aquatic life, regardless of the economic interest of tropical fish dealers.[85] As compared with *Adams*, *Johnson* would again seem to have been an easier case to decide in favor of the environmentalist viewpoint. It seems likely that local marine life would be more extensively harmed by destruction of their habitats than by occasional encounters with predator fish like the piranha. The predator rarely if ever destroys all of its existing prey. The destruction of habitat, however, not only may devastate present generations but also may prevent the very existence of future generations. The regulation attempted in *Johnson* thus would seem to have been more imperative than that effected in *Adams*.

The holding of another California case which was decided after *Johnson* contrasts sharply with the holding of the Maine case. The fact situations in the two cases were strikingly similar and the issues raised for decision were the same. Yet the courts differed dramatically in their resolution of the conflict between police power and private property rights. In *Candlestick Proper-*

ties, Inc. v. San Francisco Bay Conservation and Development Commission,[86] plaintiff was the owner of tidal land which abutted the Bay. Plaintiff had purchased the land with the intent of filling it for commercial uses, and, as in *Johnson*, plaintiff argued that the property had no value if it could not be used commercially.[87]

The legislation in question in *Candlestick* was the McAteer Petris Act,[88] which had provisionally established the San Francisco Bay Conservation and Development Commission (BCDC), whose purpose was to prepare a comprehensive plan for the conservation of San Francisco Bay.[89] The BCDC was also empowered to issue or deny permits for dredging or filling in the Bay.[90] In *Candlestick*, the BCDC denied the plaintiff's permit to fill, and the plaintiff appealed claiming that the BCDC's permit power was an unconstitutional extension of the state's police power since it involved taking of property without just compensation.[91] Although the issue, therefore, was the same as that involved in *Johnson*, the two courts reached contrary results.

The *Candlestick* court accepted the legislature's determinations on the basic ecological issues:

> [T]he Legislature has determined that the bay is the most valuable single natural resource of the entire region and changes in one part of the bay may also affect all other parts; that the present uncoordinated, haphazard manner in which the bay is being filled threatens the bay itself and is therefore inimical to the welfare of both present and future residents of the bay area; and that a regional approach is necessary to protect the public interest in the bay. In order to protect the bay during the formulation of the conservation and development plan for the bay the Commission must have the power to regulate any proposed project that involves placing fill in the bay. [Citations omitted.][92]

The court was of the opinion that the police power regulations should not be summarily overturned.

> It is a well settled rule that determination of the necessity and form of regulations enacted pursuant to the police power "is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity?" [Citation omitted]. Furthermore, even if the reasonableness of the regulation is fairly debatable, the legislative determination will

> not be disturbed [Citation omitted]. . . . In view of the necessity for controlling the filling of the bay, as expressed by the Legislature in the provisions discussed above, it is clear that the restriction imposed does not go beyond proper regulation. . . .[93]

It is submitted that *Candlestick* properly resolved the constitutional issue inherent in wetlands legislation. Since wetlands are acknowledged to be an invaluable natural resource with unique ecological significance to the public, wetlands legislation seems to be not merely an acceptable exercise of the police power but an imperative exercise thereof. *Candlestick*, together with *Nettleton* and *Adams*, is evidence of a judicial trend toward the acceptance of increased police activity in environmental matters, and *Mugler* gives this current movement important historic support. Regrettably, however *Johnson* defies this enlightened trend.

An Alternative Approach

It should be recognized that *Candlestick* does not offer the only reasonable solution to the problem of wetlands abuse by private landowners. An alternative solution might be to urge a compromise between the wetlands owner and the regulatory agency. Yet even this alternative was avoided in *Johnson*. The court did not suggest that a reasonable accommodation be made between the Johnsons and the Wetlands Board, even though such an accommodation could have been grounded on the statutory provision which allows the applicant to amend his proposal.[94] It would have been within the court's province to urge the plaintiffs to submit a compromise application, whereby they would have filled only specified portions of their land or would have used special construction methods in order to avoid severe ecological damage. The *Johnson* court would have found precedent for such action in *Vartelas v. Water Resources Commission*.[95] In that case the court upheld a police power restriction upon the construction of a concrete building in a flood plain zone.[96] However, in consideration of the landowner's economic interests, the court allowed that an alternative structure would be acceptable.[97] Unlike the *Vartelas* court, however, the *Johnson* court took an all-or-nothing approach, and, having done so, arrived at the worst possible decision.

Conclusion

The reasoning of the *Johnson* court was too narrowly framed. The court underestimated the significance of the environmental

data and policy reflected in the statute. Moreover, it did not thoroughly examine the facts of the cases on which it purported to base its decision. It also failed to evince the environmental sensitivity of the courts which decided the *Adams*, *Nettleton*, and *Candlestick* cases. And finally, the court did not actively explore the possibility of a compromise solution to the controversy before it.

Cases involving environmental regulation based on the state police power require the courts to be attentive to new scientific information and to shifting societal values.

> [T]he police power, as such, is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public . . . as a commonwealth develops . . . , the police power likewise develops . . . to meet the changed and changing conditions. . . ."[98]

❖ Staff member, *Environmental Affairs*.

[1] The statutes specifically referred to in this note are: Me. Rev. Stat. Ann. §§12–4701 to –4709 (Supp. 1971); Mass. Gen. Laws ch. 130, §27A (Supp. 1971); N.H. Rev. Stat. Ann. §§483:A:1–5 (1968), *as amended*, (Supp. 1970); R.I. Gen. L. Ann. §11–46. 1–1 (Supp. 1970); Conn. Gen. Stat. Ann. §22–7 (h) to (o) (Supp. 1971); N.J. Stat. Ann. §13:9A–1 to –10 (Supp. 1971); Cal. Gov't. Code §§66600 *et seq.* (West Supp. 1971), *amending* Cal. Gov't. Code §§66600 *et seq.* (West 1966).

[2] 265 A.2d 711 (Maine Sup. Jud. Ct. 1970).

[3] Me. Rev. Stat. Ann. §§12–4701 to –4709 (Supp. 1971).

[4] 265 A.2d at 716.

[5] *Id.*

[6] Hearings on Estuarine Areas before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 90th Cong., 1st Sess. 29 (1967) [hereinafter cited as Hearings on Estuarine Areas].

[7] For example, the Sapelo Marshes of Georgia produce proportionately nearly seven times as much organic matter as the water of the Continental Shelf, twenty times as much as that of the deep sea, and six times as much as average wheat producing land. Hearings on Estuarine Areas, *supra* note 6, at 249. (Statement of Dr. Lionel Walford, marine biologist.)

[8] House Comm. on Merchant Marine and Fisheries, Estuarine Areas, H.R. Rep. No. 989, 90th Cong., 1st Sess. at 6 (1967).

[9] Niering, The Dilemma of the Coastal Wetlands: Conflict of Local,

National and World Priorities, in The Environmental Crisis 143, 147 (H. Helfrich, jr. ed. 1970). This average annual value of shellfish represents the harvest from a scientifically managed estuarine acre. However, even estuarine acreage that is not managed is still about eight times more productive than Maine farmland. *Id.*

[10] Hearings on Estuarine Areas, *supra* note 6, at 393. (Statement of H. W. Moeller, marine scientist, Southhampton College, Southhampton, Long Island, New York).

[11] *Id.*

[12] *Id.* at 30.

[13] *Id.* Wetlands offer opportunities for such activities as hunting, fishing, boating, camping, swimming and nature study.

[14] *Id.*

[15] *Id.*

[16] Brief for Appellant at 26, State v. Johnson.

[17] R.I. Gen. L. Ann. §11–46.1–1 (Supp. 1970).

[18] *Id.*

[19] R.I. Const. Art. 1, §17, *as amended*, (Supp. 1970), states in part: "The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore. . . ."

[20] Mass. Gen. Laws ch. 130, §27A (Supp. 1971).

[21] These authorities are the board of selectmen in a town, the licensing authority in a city, and the state departments of public works and marine fisheries.

[22] In October 1969, Connecticut passed new legislation calling for the survey and preservation of Connecticut's coastal wetlands from indiscriminate dumping and filling. Conn. Gen. Stat. Ann. §22–7(h) to (o) (Supp. 1971). New Jersey, as of November 1970, also has a new wetlands control law giving the State Commission of Environmental Protection power to regulate and, where necessary, to forbid any further wetland development deemed harmful to the region's ecological balance. N.J. Stat. Ann. §13:9A–1 to –10 (Supp. 1971).

[23] Cal. Gov't Code §§66600 *et seq.* (West. Supp. 1971), *amending* Cal. Gov't Code §§66600 *et seq.* (West 1966).

[24] *Id.* §66632(a) (West Supp. 1971).

[25] This act provides for review by municipal officers and a state agency, the Wetlands Control Board, of all permit applications by private or municipal landowners to alter coastal wetlands in any way. The statute explicitly states that "approval may be withheld . . . [from any application that] would threaten the public safety, health or welfare, would adversely affect the value or enjoyment of the property of abutting owners, or would be damaging to the conservation of public or private water supplies or of wildlife or freshwater, estuarine or marine fisheries". Me. Rev. Stat. Ann. §12–4702 (Supp. 1971).

The statute also provides for appeal by the property owner to the state courts upon denial of a permit application to determine whether this denial "deprives the owner of the reasonable use [of his property], and is therefore an unreasonable exercise of the police power, or . . . the equivalent of a taking without compensation." *Id.* §12–4704.

[26] Me. Rev. Stat. Ann. §12–4705 (Supp. 1971).

[27] This conclusion of the Wetlands Board was quoted in the decision from the Johnsons' first appeal to the Maine Supreme Judicial Court, Johnson v. Maine Wetlands Control Board, 250 A.2d 825, 826 (1969).

[28] Me. Rev. Stat. Ann. §12–4702 (Supp. 1971). *See* note 25 *supra* for the specific statutory language.

[29] Johnson v. Maine Wetlands Control Board, 250 A.2d at 826.

[30] *Id.*

[31] *Id.* at 826–27.

[32] 265 A.2d at 713.

[33] *Id.* at 713–14.

[34] 250 A.2d at 826.

[35] 265 A.2d at 713.

[36] *Id.* at 713.

[37] *Id.* at 716.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 715 *quoting* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[43] 260 U.S. 393 (1922).

[44] *Id.* at 412.

[45] PA. Stat. Ann §§52–661 to –671 (1966).

[46] 260 U.S. at 414.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 413.

[50] *Id.* at 414.

[51] *Id.* at 416.

[52] *Id.*

[53] 349 Mass. 104, 206 N.E. 2d 666 (1965).

[54] 255 N.E. 2d 347 (Mass. 1970).

[55] 265 A.2d at 716.

[56] Both statutes specifically purport to preserve the ecology of the wetlands and protect marine fisheries. Me. Rev. Stat. Ann. §12–4702 (Supp. 1971); Mass. Gen. Laws ch. 130, §27A (Supp. 1971).

[57] 265 A.2d at 715.

[58] The comparable effect of zoning and statutory regulations as ex-

ercises of the police power is noted in Heath, Estuarine Conservation Legislation in the States, 5 Land and Water Rev. 351, 361 (1970).

[59] 349 Mass. at 106, 206 N.E.2d at 668; 255 N.E.2d at 348.

[60] 349 Mass. at 106, 206 N.E.2d at 666; 255 N.E.2d at 351.

[61] 255 N.E.2d at 351–52.

[62] 349 Mass. at 111, 206 N.E.2d at 671.

[63] *Id.* at 111–12, 206 N.E.2d at 671–72.

[64] 151 Conn. 304, 197 A.2d 770 (1964).

[65] 151 Conn. at 306, 197 A.2d at 771.

[66] *Id.*

[67] *Id.* at 314, 197 A.2d at 775.

[68] 250 A.2d at 826.

[69] 151 Conn. at 311, 197 A.2d at 773.

[70] 40 N.J. 539, 193 A.2d 232 (1963).

[71] *Id.* at 553, 193 A.2d at 240.

[72] *Id.* at 545, 193 A.2d at 236.

[73] *Id.* at 555–57, 193 A.2d at 241–42. The court stated:

While the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basin or open space.

[74] The total productive estuarine area in this country amounts to only 8,000,000 acres of which already over 7 percent has been destroyed. Hearings on Estuarine Areas, *supra* note 6, at 31.

[75] 123 U.S. 623 (1887).

[76] *Id.* at 664.

[77] *Id.* at 668–69.

[78] *See, e.g.*, Gardner v. Michigan, 199 U.S. 325 (1905), and Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[79] 27 N.Y. 2d 182, 315 N.Y.S. 2d 625 (1970).

[80] *Id.* at 193–94, 315 N.Y.S. 2d at 633.

[81] A. E. Nettleton Co. v. Diamond, 63 Misc. 2d 885, 313 N.Y.S. 2d 893 (1970).

[82] 27 N.Y. 2d at 194, 315 N.Y.S. 2d at 633.

[83] Me. Rev. Stat. Ann. §12–4702 (Supp. 1971); N.Y. Agriculture and Markets Law §358-a (McKinney Supp. 1971).

[84] 7 Cal. App. 3d 427, 86 Cal. Rptr. 641 (1970).

[85] *Id.* at 432, 86 Cal. Rptr. at 644.

[86] 11 Cal. App. 3d 557 (1st Dist. 1970), *petition for rehearing denied* by the California Supreme Court, November 24, 1970).

[87] *Id.* at 562.

[88] Cal. Gov't Code §§66600 *et seq.* (West 1966).

[89] *Id.* §66603. The completed plan and the permanent establishment

of the BCDC was later permanently established into law. Cal. Gov't Code §§66600 *et seq.* (Supp. 1971).

[90] *Id.* §66603 (West 1966).

[91] 11 Cal. App. 3d at 570, 572.

[92] *Id.* at 571, 572.

[93] *Id.*

[94] Me. Rev. Stat. Ann. §12–4702 (Supp. 1971).

[95] 146 Conn. 650, 153 A.2d 822 (1959).

[96] *Id.* at 657, 153 A.2d at 825.

[97] *Id.* at 657–58, 153 A.2d at 825–26.

[98] 11 Cal. App. 3d at 571, *quoting* Miller v. Board of Public Works, 195 Cal. 477, 484, 234 P. 381, 383 (1925).