PART II

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REAL ESTATE DEVELOPMENT IN THE COASTAL ENVIRONMENT

Sherwood M. Gagliano, Session Chairman

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2. "Recreation Development in the Coastal Environment - the Marco Island Story," Hunter Moss*


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* Paper not available for publication
NATURE AND EXTENT OF DEVELOPMENT IN COASTAL AREAS - PROBLEM DEFINITION

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Paper not available for publication
Abstract

Marco Island real estate development, located south of Naples on Florida's west coast, is being carried out by Deltona Corporation. The total concept of Marco Island encompasses a total of 23,050 acres, all of which is on the coastal fringe and most of which requires a dredge and fill operation to create the final development. A total of 12,170 acres are to be developed and 6,770 acres preserved. When completed Marco Island will be a self-contained community for 35,000 people. It has been under development since 1964, and there has been growing opposition to the continuing of the development concept because of environmental considerations in particular.

The story that will be presented relates primarily to the controversy and emotionally charged issues that have marked the creation of an environmentally sensitive development by a first-class developer who has an enviable reputation for doing things right.

Hunter Moss, who will be making this presentation, is in no way connected with Deltona Corporation. However, he has received their permission to present the story even though they are currently in litigation, having filed a suit against the U. S. Corps of Engineers.

*Paper not available for publication.
1. Introduction

The purpose of this paper is to develop a legal framework in which to explain, evaluate and justify a conservationist's view of coastal zone development by real estate and other activities and the role of recent federal environmental legislation in regulating that development. The coastal zone is defined in this paper to include coastal waters, barrier islands, coastal wetlands, flood plain areas, lakes, streams and estuaries, and upland areas. The conservationist view stresses conservation or restoration of the "biological, physical and chemical integrity" of the water quality and renewable water resources of the coastal zone and stringent control over all activities which claim to be of greater than regional importance, while recognizing that development can occur in coastal areas in a manner which is substantially compatible with the critical environmental resources of such areas.

In recent years, Congress has passed several environmental statutes, the purposes, policies and findings of which reflect a conservationist orientation to coastal zone, as well as other resources. This legislation includes the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq., the 1972 Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1251, et seq., the Coastal Zone Management Act, 16 U.S.C. §1451, et seq., the Flood Disaster Protection Act of 1973, amending the 1968 Act, 42 U.S.C. §4001, et seq., and the Marine Protection Research and Sanctuaries Act, 33 U.S.C. §1401 et seq. Predating all of this legislation by some seven decades was the Rivers and Harbors Act of 1899, in particular Sections 10 and 13, 33 U.S.C. §403 and 407. This federal, conservation-oriented legislation, regulating real estate development and other uses of coastal resources in the coastal zone, may be evaluated from two perspectives: (1) the ineffectiveness of nuisance law in protecting property interests, dependent on conservation of coastal water resources, from the adverse impacts of real estate and other development in the coastal zone, and (2) the social necessity for legislation compensating for the impact of traditional federal water resource, development-oriented legislation which has subsidized and continues to subsidize degradation of coastal water resources.
2. Traditional Nuisance Law — Market Mechanism for Internalizing Externalities of Pollution

The proper role of recent, federal, environmental legislation providing for regulation and conservation of coastal water resources can first be analyzed from the perspective of the efficacy of traditional nuisance law in protecting those resources. A basic concept of Anglo-American property law for centuries has been that no one may use his property in a way which will injure the reasonable use of another person's property or public resources. This concept is fundamental in traditional private and public nuisance law.5

Under traditional private nuisance law, a riparian property owner could bring a damage or injunctive action against an upstream property owner who diverted or polluted water in a manner that demonstrably injured his own reasonable enjoyment and use of water resources adjacent to his property. In any such damage or injunctive action, the injured property owner had to establish that: (1) the upstream use was not reasonable; (2) the upstream use was in fact the cause of the damage which he was suffering; (3) he had a property interest in the use of water which was restricted by the upstream activity; and (4) he was suffering measurable damages.6

In the age before major government social regulation, private and public nuisance law or tort liability law was a major constraint on nontrespassing uses of property by one person which could measurably damage or injure the use of another person's property. Economists sometimes refer to water and air pollution as examples of externalities which the free market does not capture and which are not reflected in market prices and costs. Although this is widely true, traditional nuisance law, to a rather limited degree, could internalize these social externalities through the threat of substantial liability exposure. Needless to say, these externalities could only be internalized by property owners with the financial resources to use the courts to pursue relief.7

However, towards the advent of large-scale industrialization in the early to mid-19th century, private and public nuisance law became a decreasingly effective impediment to pollution of water and degradation of water resources. The courts generally sought to encourage economic development and therefore usually condoned many of the adverse social implications of that development.8 Further, large numbers of industries and municipalities began discharging complex wastes into surface waters. It became increasingly difficult for any one injured property owner or even the government to prove that any one pollution source was the cause of the alleged damage. Concomitantly, although pollution might affect property values or public health significantly on a broad scale, the impact on any one person's property or health might be only marginal at any one time.9 As a consequence, no one person could prove damages or would be willing to bear the immense costs of private litigation.
3. Traditional Nuisance Law – Ineffective in Internalizing Costs of Coastal Wetlands Destruction and Water Pollution

Scientific research is demonstrating the value of coastal wetlands, producing food for and providing spawning areas for marine organisms, protecting juvenile fish, providing flood protection and beneficially regulating the complex chemistry of coastal water quality and surface runoff water. Despite these benefits, formidable legal and technical obstacles stand in the way of effective use of traditional nuisance law to control and prevent the degradation of coastal wetlands and water quality, even where that destruction can materially affect the value and productivity of coastal fisheries. All of the standard problems of proving a nuisance are accentuated. In particular, proof of measurable damages and the cause of pollution would be immensely complex.

In addition, private persons generally cannot claim a property interest in the fish and shellfish resources of the coastal waters of the United States. With minor exceptions, all of the bottoms of our navigable coastal waters are in public ownership. Thus, persons whose property, livelihood or health might be adversely affected by coastal wetland destruction or water pollution would have to rely solely on public nuisance law, which requires proof of damages.

In a number of cases, fishermen, unlike other members of the public, have been able to demonstrate special damages and thus obtain standing to sue for damages for a public nuisance, whereas others have not. However, fishermen have successfully brought public nuisance actions for damages or injunctive relief only where they have been able to establish immediate relationship between the defendant’s action, such as direct pollution of commercial fishing grounds by oil, other harmful pollutants or dredging activities and damage to the fishery resources. Fishermen have not brought such actions for damages or injunctive relief relating to coastal wetland destruction or more indirect and nonimmediate water quality pollution.

The states or the United States could assert a broad public interest in coastal fishery and other water resources so as to use traditional nuisance actions to seek damages or injunctive relief against persons who destroy coastal wetlands or degrade coastal water quality for real estate or other development. However, until very recently, most coastal states and the United States have favored development-oriented activities in coastal zones. Their legal posture may reflect the political reality that fishermen have been notoriously unorganized in American society and the fishing industry is highly decentralized compared to other commercial interests which benefit directly from and do not bear the direct costs of coastal wetland and water quality degradation.

Thus, to date, public nuisance law has not been used successfully by commercial fishing or recreational interests to limit
destruction of coastal wetlands and coastal water pollution, except for discharges of pollutants directly into or near commercial fishing grounds. This could change with development of appropriate scientific, public health and economic tools. Research in the fields of ecology, marine biology, water quality modeling and natural resource economics has only very recently begun to develop the tools needed to establish quantitative biological, hydrologic and water quality nexes between the degradation of coastal wetlands or water quality, on the one hand, and reduction in the value of commercial resources, such as fish, shellfish and wildlife resources, flood-prone property and recreational amenities, on the other hand. Ideally, if science and economics could determine such precise quantifiable relationships, public and private nuisance law could internalize many of the externalities arising from adverse uses of coastal water resources. However, science is far from bringing us to this ideal state of knowledge. Even if it does, proof of damages would still be immensely difficult and the cost of private litigation immense.

Finally, public and private nuisance law could be used effectively to deter degradation of coastal wetlands and water quality only if the law facilitates proof of the secondary effects of such degradation on commercial values. The recent decision of the U.S. Supreme Court in Cappaerts et al. v. United States et al., recognizing the secondary hydrologic effects of groundwater pumpage on the water table, could be construed as a step in this direction. Furthermore, limitations on liability for harmful discharges of oil and other toxic substances into coastal waters would have to be restricted or removed and jurisdictional obstacles overcome.

Thus, the inadequacies of nuisance law in capturing the externalities of coastal water resource degradation by developmental activities in the coastal zone explain and justify a conservationist's support of stringent implementation of recent federal environmental legislation and regulations designed to protect, conserve and restore coastal water resources.


From a second perspective, the conservationist assesses recent federal, environmental legislation, regulating use of coastal water resources, as a necessary, social response to traditional, commercially-oriented, federal water resource development legislation. In recent years, Congress has recognized that the destruction of coastal wetlands and pollution of coastal waters by private and public development practices is destroying a renewable resource endowment that is indispensable to the long-term quality of the nation's life. In order to evaluate this recent, conservation-oriented legislation and its role in federal resource policy, it is necessary to consider the historical role of
federal water resource development legislation in the degradation of coastal water resources.

5. History of Expansion of Federal Jurisdiction over Coastal and Inland Water Resources to Encourage Economic Development

The role of the federal government in the development of coastal water resources has expanded significantly since 1800. In the 19th century and continuing unabated until very recently, the federal government has used its powers and subsidies to further the goals of commercial interests, i.e., draining, dredging, filling and channelizing coastal and inland wetlands and bottomland hardwood forests throughout the Mississippi River Valley, in order to open up coastal areas for residential, agricultural and commercial development and navigation. The courts supported this expansion of the federal role in order to encourage innovative commercial development and exploitation of fresh water and coastal resources. Nineteenth century, development-oriented, commercial interests thus frequently argued for an expansionist definition of navigability and the federal government's role in regulating activities in navigable waters.

Now that the federal government has decided, in part, under the aegis of recent environmental legislation, to protect some of these coastal water resources, development interests are questioning the jurisdiction and legal power of the federal government to regulate their activities in coastal areas above the mean high water line under the Interstate Commerce Clause of the U.S. Constitution. The focus of this debate is Section 404 of the 1972 Federal Water Pollution Control Act Amendments.

The power of the federal government to regulate activities affecting coastal water resources has never been limited just to activities below mean high water. Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. §407, extends federal jurisdiction to all discharges of refuse into waters which are nonnavigable in the traditional navigability sense, if such pollution would affect navigable waters. Similarly, Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403, prohibits, without a Corps of Engineers permit, a range of activities, which may alter the course, condition, or capacity of the navigable waters. An extension of federal jurisdiction under Sections 10 and 13 of the Rivers and Harbors Act of 1899, as well as Section 404 of the 1972 Amendments, to regulate all activities throughout the entire coastal zone, whether or not those activities take place above or below mean high water, therefore logically evolves from developing hydrologic and ecological information about coastal systems.
6. Traditional Federal Subsidies of Real Estate and Other Development in the Coastal Zone

Since the latter part of the nineteenth century, a wide range of federal programs has encouraged, supported and subsidized residential, commercial and agricultural development throughout coastal wetland and flood plain areas. In the process, these programs have subsidized and nurtured the degradation of coastal wetlands, fisheries and wildlife and pollution of coastal waters. The most obvious federal development subsidies, which continue today, include Congressionally-authorized Corps of Engineers flood control and navigation projects, Soil Conservation Service drainage projects and federal flood insurance and disaster assistance in coastal wetland and flood plain areas.

Congress itself has now recognized that federal flood control projects induce intensified development in flood prone areas and that federal disaster aid has risen rapidly at the same time that the country has been pouring billions of dollars into federal flood control projects. Cognizant of these facts, Congress passed the Flood Disaster Protection Act of 1968, as amended in 1973, in an effort to tie the availability of federal flood insurance to land use controls on development in such flood prone areas. Unfortunately, this Act is providing increased amounts of federally subsidized flood insurance, and many local communities have been able to satisfy the flood plain regulations with generally innocuous land use ordinances which do not realistically inhibit significant development in flood prone areas. This situation may change as the 100-year flood maps get completed.

Other federal programs more subtly subsidize and induce real estate and other development in the coastal zone than direct flood control and navigation programs. These include the federal interstate highway program which, until recently, has financed construction of highways through coastal wetland areas which entail the filling in and destruction of these wetlands and induce secondary development pressure in wetland areas.217

These federal subsidies, which have traditionally encouraged commercial development of coastal water resources and thus led to degradation of coastal wetlands and water quality, justify countervailing federal legislation. The recent federal, conservation-oriented legislation, the purposes of which are to conserve coastal water resources, in large measure offset and compensate for some of the degradation effects of these federal subsidies. Thus, the degree and scope of recent federal environmental legislation can be assessed and justified in terms of both the ineffectiveness of traditional nuisance law to capture the externalities of coastal water resource degradation and the effectiveness of federal, water resource, development subsidies programs in inducing such degradation.
7. Conflicts Between Old Economic Legislation and New Environmental Legislation Regarding Coastal Water Resources

The country today, therefore, has two conflicting sets of federal, legal, economic and environmental statutes and regulations governing utilization of coastal water resources. One has been grafted on top of the other without any effective effort at reconciliation by the U.S. Congress. The first set consists of all the federal, water resource infrastructure development and insurance subsidies which encourage and induce widely dispersed real estate and commercial development in coastal areas and reduce many of the risks of investments in such developments. These subsidies have increasingly weakened coastal economic arrangements characterized by a small number of large, centralized coastal ports and urban centers and centralized transportation nodes in coastal areas.

The second consists of the more recently enacted federal, environmental statutes which reflect a national need for protection and restoration of water resources, energy conservation and preservation of the country's dwindling renewable resource base. These latter statutes, including the National Environmental Policy Act, the 1972 Federal Water Pollution Control Act Amendments, in particular Section 404, and the Coastal Zone Management Act, seek to control and limit the environmentally destructive aspects of the federal water resource development program. All of these statutes emphasize the importance of "balanced" development, utilization and conservation of coastal water resources. However, none of them deals directly with the underlying economic causes for the very kinds of degradation of coastal resources which they seek to control.

Although federal Congressional and state legislative majorities can be found to endorse and enact environmental legislation designed to protect coastal resources, legislative majorities cannot generally yet be found in Congress to modify substantially the older economic programs and policies which have promoted commercial exploitation and degradation of these same resources. The result is confusion, conflict and uncertainty as to what the rules of the game are.

8. Role of Courts - The Search for a Rational Jurisdictional Principle in the Face of Conflicts

When these kinds of deepseated social, economic and environmental conflicts occur in American society, they often cannot be resolved by the U.S. Congress or state legislatures during periods of transition from one set of values to another. Thus, all concerned parties look to administrative agencies and then the courts to resolve these conflicts on the basis of some rational judicial principle. That judicial principle may reflect the values of (a) the sanctity of property, (b)
the unbridled discretion of government agencies to evaluate a broad range of factors in any way which they see fit or (c) the maintenance and restoration of the chemical, physical and biological integrity of the nation's coastal water resources. During such a period with two conflicting sets of social legislation, real estate and other would-be developers of coastal water resources maintain that their property is being taken as a result of government regulations, without regard to the degree to which the value of their property depends on pro-development federal programs and the failure of traditional nuisance law to compel them to absorb the real costs of coastal water resource degradation. Whether representing a pro-development or pro-conservation agency position against a claim of arbitrariness, the U.S. Justice Department argues that a federal agency must have broad discretion in its decision making process if it is expected to consider every relevant social factor. Conservationists argue that no one has a right to destroy coastal water resources and degrade water quality, although the federal economic incentives for water resource degradation are still virulent.

9. The Marco Island Decision

These conflicts are clearly illustrated in the Marco Island decision. The U.S. Corps of Engineers has been and still is one of the traditional federal instruments supporting and subsidizing economic development of the country's riverine and coastal wetlands and flood plains. On the other hand, Congress has assigned the Corps the authority to regulate dredge and fill activities in coastal and other wetland areas under Section 404 of the 1972 Federal Water Pollution Control Act Amendments. Corps' regulations recognize the function of wetlands in fulfilling the objective of the 1972 Amendments of maintaining and restoring the integrity of the nation's waters.

In its first major decision under Section 404, regarding applications by the Deltona Corporation for permits to fill in more than 2000 acres of coastal wetlands for finger-fill canal private housing developments at Marco Island, Florida, the Corps of Engineers denied two of the three requested permits. In construing its regulations which require consideration of "whether the proposed activity is dependent upon the wetland resources," the Corps concluded that private real estate development is generically not dependent upon wetland resources.

In that decision, Lieutenant General W. C. Gribble, Jr., stated:

"(4) It is my position that a housing/recreational development of the type envisioned in both of these permit applications, which will result in almost total destruction of these wetland areas, is an
unnecessary destruction of this wetland resource. I recognize that these two applications involve part of an overall, master planned development, and that it has been suggested that the location of this particular housing development with its related facilities is dependent on being located in this particular wetlands resource in order to complete the overall planned development. Such, however, is not the intended interpretation of this wetlands policy as the Corps perceives it. The intent, instead, was to protect valuable wetland resources from unnecessary dredging and filling operations to fulfill a purpose such as housing, which generally is not dependent on being located in the wetlands resource to fulfill its basic purpose and for which, in most cases, other alternative sites exist to fulfill that purpose."

While denying the requested permits the Corps noted that it would reconsider applications for permits for alternative development plans which would not destroy wetlands.

This decision is consistent with the objective of maintaining and restoring the integrity of the nation's waters set out in the 1972 Amendments and is justified by the ineffectiveness of private or public nuisance law in limiting the destruction of coastal wetlands, despite their importance for coastal fisheries, water quality and flood control. However, it accentuates the conflict between a national policy which severely restricts private residential development in coastal wetlands in order to protect such water resources and a policy which subsidizes residential and other development via federal water resource development projects.

The logic of the Marco Island decision, moreover, points to a more general conflict between water resource conservation policies of the 1972 Amendments and the Coastal Zone Management Act and federal water resource development programs, which subsidize degradation, since housing is not the only activity which is generally not dependent on coastal wetland resources. Agricultural and most commercial and industrial development is not dependent on coastal water resources since it can readily go elsewhere. Even commercial activity, such as navigation, shipbuilding and coastal oil development, which is dependent on coastal water resources, can frequently be concentrated, if justified on economic grounds, in already developed coastal areas, thus minimizing degradation of productive coastal wetland areas.

Thus, federal flood control, drainage and navigation projects, which encourage and subsidize private developments not generically dependent on coastal water resources, should logically be re-evaluated.
Such projects which, intentionally or not, serve to disperse waterborne commerce and residential and industrial development throughout coastal zones may be in furtherance of water resource objectives quite at variance with those enunciated in the Marco Island decision and the 1972 Amendments. These conflicts in federal coastal water resource policies could be resolved in many instances if federal projects were designed to facilitate concentration of development activities along a limited number of waterway arteries, coastal ports and developed areas. In the process, such a federal water resource development policy might gradually lead to the kind of coastal economic arrangements which would evolve if private and public nuisance law became an effective tool for preventing degradation of coastal fisheries, water quality and other water resources.
Footnotes


3. Section 306(c)(8) and (e) of the Coastal Zone Management Act, 16 U.S.C. §1455(c)(8) and (e).


"Private nuisance historically has been and is a tort related to an unlawful interference with a person's use or enjoyment of his land. The concept of a private nuisance does not exist apart from the interest of the land owner. Hence a private nuisance is a civil wrong, based on a disturbance of some right or interest in land...

"The concept of a public nuisance developed as an entirely separate principle based upon an infringement of the rights of the state or the community at large..."

Caldwell v. Abbott Construction Company, Inc., continues:

"The problem of distinguishing between public and private nuisances is further complicated by the fact that sometimes an individual may sustain an injury from a public nuisance which differs in kind from that sustained by the community in general. In that situation the injured citizen may maintain an action and recover damages for
his particular injury... Today it is uniformly held that a private individual has no action for the invasion of a purely public right, unless his damage is in some way to be distinguished from that sustained by other members of the public."

See also The Restatement (Second) of Torts, Section 821B, for a definition of public nuisance. The existence of a federal law of public nuisance was recognized in Illinois v. City of Milwaukee, 406 U.S. 91 (1972).


8. The unwillingness of courts to use traditional nuisance law to restrict industrial activity in order to protect water and air resources is brought out in a recent decision, City of Chicago v. Commonwealth Edison Company, 24 Ill. App. 3rd 624, 321 N.E. 2d 412 (1974). In that decision, the court held as follows:

"A public nuisance is an unreasonable interference with a right common to the general public. Earlier cases recognized that the public had a right to clean, unpolluted air and that any deprivation of that right was actionable as a private injury and indictable as a public wrong. (Seacord v. The People, 121 Ill. 623, 13 NE 194). However, the notion of pure air has come to mean clean air consistent with the character of the locality and the attending circumstances. Whether smoke, odors, dust or gaseous fumes constitute a nuisance depends on the peculiar facts presented by the case (City of Chicago v. Fritz, 36 Ill. App. 2d 457, 184 NE 2d 713). As a result of industrial expansion, the courts have utilized several factors in determining whether an industrial operation is an unreasonable
interference with a right to clean air. One of those factors is the extent of injury or harm incurred to the public health, safety, peace or comfort. Another is a comparison of the operation's methods or effects to proscribed standards outlined by applicable federal, state, or local regulations. A third factor is the suitability of the industry's location. A fourth factor involves balancing the gravity of the harm done to the public against the utility of the defendant's business to the community as a whole.

"...Courts of equity have traditionally been reluctant to enjoin an industrial operation unless it is clearly and satisfactorily proven to be a nuisance."

The Court found that Commonwealth Edison's Indiana facility "is located in a highly industrialized area. The character of the locality necessitates that unpleasant odors, smoke and filth will exist. These conditions in an industrial area have generally not been considered to be public nuisances."

9. In the City of Chicago case, ibid, n. 8, the court found that the city had failed to answer the threshold question of whether Commonwealth Edison's electric generating facility in Hammond, Indiana, caused substantial harm "so as to constitute an actionable invasion of a public right. In order to be entitled to injunctive relief, a substantial harm or injury must be clearly demonstrated..." The court also found that "the city could not clearly establish that the Edison plant was the direct cause of harmful pollution in Chicago, distinguishing the facility from other emission sources located in the area."


11. Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Maine 1973). In that case, the court found that plaintiff fishermen had suffered damages peculiar to them and could thus sue to recover damages incurred as a result of the discharges into coastal waters of
100,000 gallons of bunker C oil from a tanker. On the other hand, the court found that owners of tourist resorts along the polluted beaches had no such peculiar interests.

12. Hampton v. North Carolina Pulp Company, 223 N.C. 535, 27 S.E. 2d 538 (S. Ct. N.C. 1943). In that case, the court held that owners of upstream fisheries could maintain an action for wrongful interference with the migratory passage of fish to their fisheries caused by discharge of toxic chemicals.

13. Potomac River Association, Inc. v. Lundeberg Maryland Seamanship School, Inc., 402 F. Supp. 344 (D. C. Md. 1975). In that case, the court found that plaintiff fishermen had standing to sue for relief from direct damages to their commercial fishing areas as a result of a dredge and fill operation, insofar as it was not permitted by the Corps of Engineers.

14. Cappaerts et al. v. United States et al., 96 S. Ct. 2062 (1976). Although dealing explicitly with concepts of water appropriation law, this decision points the way to potential expansion of nuisance law to deter destruction of coastal wetlands so as to protect coastal fisheries. In that case, the groundwater underneath a ranch owned by the Cappaerts was hydrologically connected to water in Devil's Hole, a deep cavern on federal land in Nevada containing an underground pool inhabited by unique species of fish, known as the pupfish. The court held that the Cappaerts could not pump the groundwater under their land below a certain level necessary to preserve the fish in Devil's Hole.

15. Limitations on liability for the discharge of oil and other toxic substances into waters of the United States and the contiguous zone are established under Section 311(b)(2) and (f) of the 1972 Federal Water Pollution Control Act Amendments, 33 U.S.C. § 1321(b)(2) and (f), and the Limitation of Liability Act, 46 U.S.C. 181 and 183.


17. For a discussion of the jurisdiction basis for federal control over coastal and other wetland areas, see Taft, P. R., The Legal Basis for the Exercise of Congressional Control over Wetland Areas, Land and Natural Resources Division Journal, U.S. Department of Justice (December 1976).
18. Section 404 of the 1972 Federal Water Pollution Control Act Amendments, 33 U.S.C. §1344 authorizes the Secretary of the Army to grant permits for dredge and fill activities in navigable waters of the United States. EPA is granted authority to deny proposed disposal sites to protect fish and shellfish areas, wildlife habitats, water supplies and recreational amenities under Section 404(c), 33 U.S.C. §1344(c).

19. Section 13 of the Rivers and Harbors Act, 33 U.S.C. §403 provides in pertinent part:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers in passing therefrom in a liquid state, into any navigable waters of the United States, or into any tributary of any navigable water, from which the same shall float or be washed into such navigable water;..."

Thus, under this statute, federal jurisdiction extends to activities in tributaries of traditionally navigable waters if "refuse" discharged into any such tributary may float or be washed into such navigable waters. For a discussion of this statute, see Tripp and Hall, "Federal Enforcement Under the Refuse Act of 1899," 35 Albany Law Review 60 (1970), Environmental Law Review (1971), p. 529.


21. For litigation dealing with an interstate highway which was designed to traverse coastal wetland areas, see Ecology Center of Louisiana v. Coleman, 8 ERC 1169 (5th Cir. July 11, 1975).

22. For an excellent and comprehensive discussion of efforts by federal administrative agencies and the courts to develop rational decision-making principles in the face of conflicting Congressional mandates, see Stewart, "The Reformation of American Administrative Law," 88 Harv. L. Rev. 1669 (1975).
23. The breadth and range of factors which a federal administrative agency, like the U.S. Corps of Engineers, feels obliged to consider in light of conflicting federal economic development and environmental legislation can be seen in any public notice issued under Section 404 of the 1972 Federal Water Pollution Control Act Amendments, 33 U.S.C. §1344. Such a typical public notice regarding a private application for a 404 permit circulated by the New Orleans District of the Corps of Engineers provides:

"The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered; among those are conservation, economics, aesthetic, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use classification, navigation, recreation, water supply, water quality and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest."

24. The Corps of Engineers' 404 regulations relating to proposed private dredge and fill activities, 33 CFR §209.120(g)(3), provide:

"As environmentally vital areas, they [wetlands] constitute a productive and valuable public resource the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest."

The Corps' 404 regulations which relate to the Corps' own dredge and fill projects include a similar provision, 33 CFR §209.145(e)(3), as do the EPA guidelines, 40 CFR §230.4(a)(I).

25. Decision on the "Application for Department of Army Permits to Dredge and Fill at Barfield Bay, Big Key and Collier Bay, Marco Island, Collier County, Florida, Permit Numbers 73 G-0496, 0497, 0498 (April 15, 1976) (General W. C. Gribble, Jr.).

26. The Corps' 404 regulations require denial of a dredge or fill permit for work in viable wetlands unless the public interest requires otherwise. They provide, 33 CFR §209.120(g)(3), that a permit may issue that would result in the destruction of wetlands only if the benefits of the proposed alteration outweigh the damage to the wetlands resource and that the proposed alteration is "necessary" to realize those benefits. In determining whether a particular alteration is necessary, the Corps' regulations require that it consider "whether the proposed activity is dependent upon the wetland resources and whether feasible alternative sites are available."
27. At the Marco Island 404 hearing in Naples, Florida, held on September 2nd and 3rd, to consider the application of the Deltona Corporation, the Environmental Defense Fund, the National Audubon Society, the Florida Audubon Society and Collier County Conservancy, with the assistance of an environmental management planning firm in Boston, Massachusetts, Sasaki Associates, presented evidence of the feasibility of an environmental management development plan for the three permit areas, Collier Bay, Barfield Bay and Big Key. The objective of such a plan would be accommodation of most or all property owners and protection of all coastal mangrove swamps. The Corps' decision is the subject of litigation, Deltona Corporation v. Hoffman et al., Civil Action No. 76-473-CIV-JT (M.D. Fla. 1976) and Deltona Corporation v. United States, No. 370-76 (U.S. Ct. Claims 1976).

28. The Corps of Engineers, Lake Pontchartrain, Louisiana, and Vicinity, Hurricane Protection Project (EIS, New Orleans District, Corps of Engineers, August, 1974), is an example of an ongoing federal subsidy to induce real estate development in coastal wetlands. The economic analysis for this project includes flood reduction benefits relating to proposed, but unpermitted, real estate development in coastal wetlands in New Orleans East, Louisiana and land intensification benefits relating to wetlands in St. Bernard Parish, Louisiana.
Traditionally, the role of government in real estate development has been one of telling the developer how to develop, but rarely where to develop. This role is changing through the impetus of the Federal Coastal Zone Management Act of 1972 (CZMA) as local and state governments attempt to control uses which can have a direct and significant impact on coastal waters. Real estate development has been interpreted in most states to be such a use.

Most of my remarks will be concerned with real estate development in Louisiana. However, the principles enunciated here are applicable in other states.

The coastal zone of Louisiana is a vast, broad, low relief area extending many miles inland. It is composed of vast expanses of marsh, large swamps and extensive water bodies. The coastal area of Louisiana will probably be larger than that of any other state in the nation, with the possible exception of Alaska.

This vast acreage of coastal zone encompasses approximately 25 percent of the contiguous 48 states' wetlands. The combined states of Massachusetts and Delaware could be put in Louisiana's coastal zone with room to spare.

In Louisiana's coastal area, 98 percent of the state's sport and commercial fish and shellfish are nurtured. It is no coincidence that Louisiana is the largest seafood producing state in the nation in terms of total tonnage. The next nearest competitor produces half the tonnage.

Within Louisiana's coastal zone resides 41 percent of the state's population with most of the population centered around the New Orleans Metropolitan area. Other urban areas in the coastal zone are the cities of Houma, Morgan City, and Thibodaux.

The 10 million acre area within Louisiana's coastal zone is composed of 2.4 million acres of saline marsh, 2.9 million acres of brackish marsh, 1.6 million acres of fresh marsh, 1.5 million acres of swamp, and about 1.5 million acres of dry land. This last figure is extremely important.
when considering real estate development in Louisiana's coastal zone for there is not a great deal of dry land available.

In the past, real estate development in Louisiana's coastal area occurred along the highlands bordering the natural streams in Louisiana such as the Mississippi River, the Atchafalaya River, Bayou Lafourche, Bayou Teche, and others, or along cheniers (stranded beach ridges) in the western half of the coastal zone. Today all of the high land along the natural levee ridges and cheniers is being utilized for urbanization, industrialization and agriculture. As a result, the question of real estate development in the Louisiana coastal zone becomes one of wetlands modification.

In many other states the question of real estate development in the coastal zone was one of second home or leisure home development. That is not generally the case in Louisiana. There are only a few places along the Louisiana coast where access to the Gulf of Mexico is available. Second home development occurs in places such as Grand Isle, Louisiana but that is the exception rather than the rule. Real estate development in Louisiana's wetlands is a matter of camp location and urban expansion into wetlands from existing metropolitan areas.

If we are to do a reasonable job of balancing development with conservation, as the CZMA intends, there are a number of questions which the state must ask itself. The first of these is who controls the siting of real estate developments. In Louisiana, at the present time, the Army Corps of Engineers is the major agency permitting activities which modify wetlands for real estate development. The user makes his application for a permit to the Corps, the Corps then sends copies to other relevant federal agencies such as the Environmental Protection Agency, the Fish and Wildlife Service, National Marine Fisheries Service, and the Bureau of Land Management, and asks for their comments. They also request comments from state agencies and local governments on the project. The response from state and local agencies of government is called "a letter of no objection" in which local governments or state agencies respond to the proposed use. The major agency at the state level is the Louisiana Wildlife and Fisheries Commission which processes some 300 permits per month for various specialized applications. At the local level, the parish council or police jury (county commissioner board) responds to the request for comments. If one of these agencies, either at the state or at the local level, objects to the project, generally the Corps will not permit the project. The Corps also receives comments from other federal agencies and sometimes halts projects because of objections by federal agencies. So, at the present time, the Corps of Engineers, under Section 404 of the federal Water Pollution Control Act and under the Rivers and Harbors Act of 1899 and subsequent Acts, permits activities in Louisiana's wetlands.
If the State of Louisiana obtains an approved coastal zone management plan then some of this permit control should shift to state and local agencies of government. The Corps has indicated they would go along with the decisions of state and local governments concerning wetlands as long as there is no conflicting overriding national interest. Thus, the question of who makes the decisions about siting of real estate development may change under Coastal Zone Management if the state gets an approved plan. Federal Consistency provisions of the CZMA lend authority to that statement.

Since the State of Louisiana has no wetlands legislation as yet, I must engage in a bit of crystal ball gazing to determine just how the permitting process would work under an approved Coastal Zone Management Plan. My feeling is that the applicant would apply to the parish (county) government and to a state clearinghouse. Local government would make the decision about the siting of real estate developments unless there was an overriding state interest involved. I realize that this merely begs the question, but perhaps "overriding state interest" defines the question better. It is envisioned that under a coastal zone management plan the state would develop guidelines for the siting of real estate developments and local governments would implement the state guidelines with some discretion of their own. These guidelines would specify "overriding state interest" and develop a procedure as to how local government would implement the state guidelines. Overriding state interest could involve things such as:

1) Projects which would involve two or more parishes
2) Projects within a parish which affect another parish
3) Large projects which would result in large scale modifications of the environment.

How would state and local governments best site new real estate development in Louisiana's coastal area? As a start, the best technical information would be made available to state and local governments. The Louisiana State Planning Office is mapping a number of parameters which will go a long ways toward providing an answer to the how of siting real estate development. We are preparing atlases for use at both state and local level (at different scales) which include all of the parameters which are generally used in assessing intrinsic suitability. We hope to complete our work by the time a CZM program is ready for implementation in Louisiana. In addition to mapping the normal parameters such as vegetation, soil, elevation, flood prone areas, etc., the State Planning Office has attempted to gather information relevant to specific problems in Louisiana. For this reason land loss potential due to channel construction and soil subsidence potential have been mapped.