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A LEGISLATIVE HISTORY OF THE COASTAL AREA MANAGEMENT ACT

MILTON S. HEATH, JR.†

I. INTRODUCTION

In 1969, after enacting a program of estuarine-protection legislation featured by the dredge and fill permit law,¹ the North Carolina General Assembly directed that a long-term study be made by the Commissioner of Commercial and Sport Fisheries "with a view to the preparation of a comprehensive and enforceable plan for . . . the coastal zone of North Carolina."² An interim product of this study, enacted in 1971, was the Coastal Wetlands Act, which authorized the use of rulemaking proceedings to regulate land development in salt marshes and other coastal marshes subject to tidal influence.³

In 1970 Governor Scott's administration also considered seeking legislation in 1971 to establish a coordinated state program of coastal area management. At that time the emphasis was almost exclusively on a state administrative structure—on seeking some device, such as the designation of a "lead state agency," for unifying or coordinating state activities. It did not prove feasible to prepare a proposal in time for legislative action in 1971, however, because of the pressure of other commitments for environmental legislation.

In December 1971 a "Comprehensive Estuarine Plan Blue Ribbon Committee" was established by the Commissioner of Commercial and Sports Fisheries as a vehicle for further studies of needed legislation. Composed of 25 members, the Blue Ribbon Committee included lawyers, academicians, governmental officials, environmental scientists and engineers, and industry representatives. Early in the fall of 1973, the Blue Ribbon Committee was augmented by members from two other groups that had been considering coastal management propos-

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1. Law of June 11, 1969, ch. 791, § 1, [1969] N.C. Sess. Law 824 (codified at N.C. GEN. STAT. § 113-229 (Supp. 1973)).

2. Law of June 30, 1969, ch. 1164, § 1, [1969] N.C. Sess. Laws 1343.

3. N.C. GEN. STAT. § 113-230 (Supp. 1973).

als, the Inter-agency Committee on the Environment and the Current Problems Committee of the Marine Sciences Council.⁴

After preparing preliminary statements on problems and goals, the Blue Ribbon Committee, between July and December 1972, considered a series of drafts of a comprehensive coastal management bill. These proposals were as follows (principal drafts italicized):

(1) *The Kane Draft* (July 1972) was a rather brief, generalized proposal, prepared by Thomas Kane of the Attorney General's Office, that served as the starting point for Committee consideration.

(2) *The Schoenbaum Draft* (August 1972) was the first complete draft of a comprehensive coastal management bill, prepared by Professor Thomas Schoenbaum of the University of North Carolina School of Law and his research assistant, Ms. Marianne Smythe. Professor Schoenbaum and the author of this article served in the summer of 1972 as co-chairmen of the Blue Ribbon Committee's Subcommittee on Legislation. When Professor Schoenbaum took a year's leave of absence in September 1972, the author was left primarily responsible for further work on the bill.

(3) A revised working draft (November 14, 1972) reflected changes in the Schoenbaum Draft, hammered out in committee and subcommittee during August, September and October.

(4) *The Linton Draft* (December 7, 1972) was circulated by Dr. Thomas Linton, Director of Commercial and Sports Fisheries, for a final meeting of the Blue Ribbon Committee on December 15. This draft embodied all changes made since the original Schoenbaum Draft—including material changes in state administrative organization, in procedural provisions (*e.g.*, elimination of hearing officer procedures), in implementation machinery (*e.g.*, elimination of permits for developments of regional impact) and in transitional provisions. The Linton Draft and the November 14 Draft were the joint work product of the author of this article and Thomas Kane.

(5) The January 10, 1973 Draft reflected minor changes made at the Committee meeting of December 15. This was the final Blue Ribbon Committee Draft.

4. R. Bode & W. Farthing, Coastal Area Management in North Carolina: Problems and Alternatives 32-34, Feb. 11, 1974 (N.C. Law Center publication).

The revised Linton Draft was delivered to the newly installed Holsouser Administration in January 1973. The new administration approved the draft with some important changes in administrative organization and with an amendment limiting the applicability of the bill's permit system to areas within the hundred-year flood line.⁵ The modified bill was introduced in the 1973 General Assembly on March 27, 1973.⁶

Many features of the 1973 coastal bill were quite similar to the legislation that was finally enacted in 1974. But there were some important differences, notably in the strong emphasis of the 1973 bill on state-level planning and management. When an April 1973 public hearing revealed strong opposition to the bill, especially from local government officials concerned about the role of local government under the bill, a decision was made to hold the bill over for the 1974 session. During the interim between the 1973 and 1974 sessions a series of public hearings was held by joint Senate-House committee in five of the principal coastal area cities,⁷ co-chaired by Senator William Staton, Chairman of the Senate Committee on Natural and Economic Resources, and Representative Willis Whichard, Chairman of the House Committee on Water and Air Resources.⁸

Never before in North Carolina legislative annals had interim public hearings on a proposed bill been taken on circuit by a standing committee. The hearings proved to be a highly successful venture in popular democracy, as the co-chairmen observed a number of times at meetings across the state. Each hearing was well attended, and most of them consumed a full day. An average of twenty-five witnesses asked to speak at each hearing. The general showing of support for a coastal management bill was impressive, as few opponents appeared to testify. Witnesses made a number of useful suggestions for improvements in the bill. Ultimately, the hearings effectively built support for the bill and furnished a convincing response to the claim that interested citizens and local governments had not been adequately consulted on the bill.

In practical terms, the most important information garnered from the hearings was their confirmation of the interest of local officials in

5. These changes are discussed at text accompanying notes 34 & 101 *infra*.

6. S. 614 (H. 949) 1973 N.C. General Assembly, 1st Sess.

7. Elizabeth City, Manteo, Morehead City, Washington, and Wilmington.

8. Similar hearings were also held in four western cities on a companion mountain area management bill, S. 973 (H. 1374) 1973 N.C. General Assembly, 2nd Sess.

greater program involvement for local governments. The hearings plainly signalled a strong view that local government should be involved in planning and implementing the program and should have a voice in the selection of the state or regional governing board for the program.

Guided by the input from the interim hearings and in particular by consensus support for more local involvement, the Joint Committee extensively rewrote the original bill late in 1973 and introduced the rewritten bill on the second day of the 1974 session.⁹ Committee hearings began on the bill immediately in both the Senate Committee on Natural and Economic Resources and the House Committee on Water and Air Resources. From the first committee meeting in 1974 to the last, the coastal area bill was the principal item of business at almost every meeting in both committees.

This formidable background of studies and hearings proved to be only a warm-up for the fireworks to follow in the 1974 General Assembly. Outright opposition, largely muted before the 1974 session, surfaced early in the session and followed the bill tenaciously until its passage. Before the dust cleared, the bill traversed a seemingly endless obstacle course: another public hearing was held in February at the Legislative Building; the Senate Committee on Natural and Economic Resources and the House Committee on Water and Air Resources devoted almost their entire session's activity to consideration of this bill and proposed amendments, with the House committee reporting one committee substitute and both committees later reporting an identical second committee substitute; the bill passed the Senate after a series of tactical delays, with twelve floor amendments attached; the bill then underwent a "filibuster by amendment" in the House, requiring twelve hours of floor debate, and resulting in the approval of another twenty-two floor amendments out of fifty-one that were proposed; the Senate first rejected the House amendments by vote of twenty-four to twenty, only to concur on the following day in an astonishing turnaround vote of thirty-two to nine; final approval of the bill occurred on April 11, 1974, two days from the end of the legislative session, and ratification occurred on April 12, the day before *sine die* adjournment. Chief credit for enactment of the bill belongs to its two floor leaders, Senator Staton and Representative Whichard, who in the words of the *Durham Morning Herald*, "fought

9. S. JOUR. [1974] N.C. General Assembly 16.

for the protective legislation with determination, resourcefulness, patience and persistence."¹⁰

Despite the cascade of amendments, the law that emerged from this gauntlet was surprisingly similar in scope, objectives and basic structure to the original bill¹¹ as introduced in both houses on January 17, 1974. Some significant changes had been made, primarily in the composition of the governing board for the coastal area program, the Coastal Resources Commission. But most of the amendments to the bill were more corrective or refining than substantive, with a majority of the amendments being primarily tactical in nature.

In the remainder of this article, the evolution of the major components of the Act through its legislative history will be reviewed in detail.

II. PREAMBLE AND OTHER PRELIMINARIES

From its earliest 1972 draft, the coastal bill contained a set of legislative findings and a statement of goals. The crux of the findings is that

[i]n recent years the coastal area has been subjected to increasing pressures which are the result of the often conflicting needs of a society expanding in industrial developments, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the coast which make it economically, aesthetically, and ecologically rich will be destroyed.¹²

The thrust of the goals is

[t]o provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic, and aesthetic values; [and]

[t]o insure that the development or preservation of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations.³

As stressed by Schoenbaum, the management system—that is, the plan and the implementing administrative machinery—is the key to resolv-

10. Durham Morning Herald, April 13, 1974, § A, at 4, col. 2.

11. S. 972 (H. 1373) 1973 N.C. General Assembly, 2nd Sess.

12. N.C. GEN. STAT. § 113A-102(a) (1974 Advance Legislative Service, pamphlet no. 3).

13. *Id.* §§ 113A-102(b)(1)-(2).

ing the inherent conflict between conservation or environmental values and developmental values.¹⁴

The findings and goals of the Act crystalized early, in the 1973 bill, and were never seriously challenged or debated thereafter. Only one minor textual change was made after the introduction of the 1973 bill: the addition of the authorization for guidelines for transitional or intensively developed areas. This change reflected the scope of federal guidelines concerning eligibility of state programs for federal grants. It was suggested informally by the Office of Marine Affairs and was approved by Chairmen Staton and Whichard in December 1973 for insertion in the 1974 bill.¹⁵

Pre-1973 drafts contained the essence of the 1973 and 1974 findings and goals.¹⁶ Most of the changes made after the Schoenbaum draft were editorial refinements or elaborations.¹⁷ But a shift in mood is perceptible as one moves from the Schoenbaum draft (August 1972) to the Linton draft (December 1972), to the 1973 bill. Each successive draft recedes slightly from the strong preservationist tone of the earliest draft. The Linton draft eliminated references to the Environmental Bill of Rights of the North Carolina Constitution and to a mandate for preserving the unique and fragile eco-systems of the estuaries, and the 1973 bill deleted from the first sentence a mandate for protection and preservation of coastal lands and waters.

A tactical change conceived within the bureaucracy first appeared in the 1973 bill: the short title is no longer "Coastal Zone Management Act" but the "Coastal *Area* Management Act." The common view that "zoning" is a dirty word apparently prompted an anonymous staff member of the Department of Administration to suggest this verbal softening.

Finally, General Statutes section 113A-101 was added to the 1974 bill at the suggestion of the author of this article. This section, modeled after a similar provision in the Washington State Shoreline Pro-

14. 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).

15. Telephone Conversation with Naomi Pena, Planner, Office of Marine Affairs, Dec. 30, 1973.

16. The general thrust of the findings and goals provisions of the Kane and Schoenbaum drafts was quite similar, and parts of the language of the Kane Draft on this subject were carried forward into the Schoenbaum Draft.

17. Examples are the itemization of the subjects to be covered by the guidelines that first appeared in the 1973 bill and the addition of references to the barrier dune system and the beaches in the management system clause quoted at text accompanying note 13 *supra*.

tection Act,¹⁸ was designed to provide a much needed roadmap for a bill that had tripled in length since its earliest draft. It indicates the respective roles of state and local government in each phase of the coastal management program.

III. ORGANIZATIONAL ISSUES

A. Introduction

In the Federal Coastal Zone Management Act of 1972¹⁹ Congress established three land use management options from which the coastal states could choose in carrying out coastal management programs to qualify for federal aid:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement of compliance;

(B) Direct state land and water use planning and regulation; or

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.²⁰

These options give any state that intends to mount a serious coastal land use management program a broad range of choice. A state could qualify for federal aid by developing either a direct state land use control program, a program of local land use control subject to state guidelines and review, or a program of regional land use subject to state guidelines and review.

North Carolina has at least flirted with the full range of choices permitted by the federal legislation. The first draft of the bill to be considered in 1972 proposed four regional commissions to assist in governing the coastal management program.²¹ The bill that was introduced in the General Assembly in 1973 stressed state action with little explicit local involvement.²² The version finally enacted in the Coastal Area Management Act of 1974²³ embodied a complex mixture of state and local participation.

18. WASH. REV. CODE ANN. § 90.58.050 (Supp. 1973).

19. 16 U.S.C. §§ 1451-64 (Supp. II, 1972).

20. *Id.* §§ 1455(e)(1)(A)-(C).

21. Kane Draft (July, 1972).

22. S. 614 (H. 949) 1973 N.C. General Assembly, 1st Sess.

23. Law of April 12, 1974, ch. 1284, [1973] N.C. Sess. Laws 463.

In approving the 1974 Act, the North Carolina General Assembly agonized and suffered the pains of vigorous constituent pressure during much of two full legislative years. The organizational provisions as finally drafted by the committee are a conglomerate that was never proposed as such by any one person. These provisions have been praised by federal experts as a resourceful blending of state and local interests.²⁴ In the early months of implementation of the Act, the new Coastal Resources Commission apparently has taken to heart its responsibility to work closely with local governments.²⁵ If the compromise of 1974 indeed proves to be workable, it will be a testimonial to the rough-and-tumble of the legislative process.

Material changes were made in the organizational features of every major draft of the bill. The evolution of those changes through seven separate drafts is reviewed below.

B. The Kane Draft

The first proposal considered by the Blue Ribbon Committee was the Kane draft of July, 1972. It proposed the creation of a thirteen-member umbrella State Coastal Resources Commission with authority to establish standards for land and water use in the coastal zone. A unique feature of this draft was its provision for four Regional Coastal Resources Commissions, made up largely of citizens and officials of the four regions of the coastal zone. The Regional Commissions would be advisory to the State Commission and could receive delegated powers from the State Commission. Had these strong regional commissions with local representation been retained, this might have served as the needed bridge between local and state government in the bill, but the concept did not survive review by the Blue Ribbon Committee. The Kane Draft as a whole was discarded at an early date by the Committee largely because of its incompleteness, although some of its elements were carried forward into succeeding proposals and into the Act itself.²⁶

24. Remarks by Robert Knecht, Administrator, National Oceanographic and Atmospheric Administration, at first meeting of the North Carolina Coastal Resources Commission in Morehead City, N.C., July 18, 1974.

25. At its early meetings the Commission has stressed its liaison role with local government and has pushed its staff to make every effort to keep its local fences mended. Commission Vice-Chairman David Stick expressed concern at newspaper stories portraying local and state interests as being in sharp conflict, and admonished the staff to invite Commission members to attend all meetings in the coastal area. Commission members have since responded generously to staff requests for participation in local meetings.

26. Two important features of the Kane Draft that survived in part were portions

C. *The Schoenbaum Draft*

Next to be reviewed by the Blue Ribbon Committee was an important and more fully realized draft presented by its Legislative Subcommittee in August, 1972. The organizational structure of the Schoenbaum Draft envisioned an imaginative split of policy-making power between a Coastal Zone Planning Commission, responsible for preparing a coastal zone management plan²⁷ and designating critical areas, and a Coastal Zone Authority, responsible for implementing the permit system.²⁸ Befitting its limited role, the Planning Commission would go into extended hibernation after performing its initial tasks, to be revived every five years to review the plan.

This draft contemplated little local government involvement in coastal zone management. It prohibited local government officials from serving as at-large members of the Coastal Zone Authority; limited local government membership on the Planning Commission to four representatives of Lead Regional Organizations; and required local ordinances to be coordinated with state law.

D. *The Linton Draft*

The Schoenbaum Draft was thoroughly reviewed by the Legislative Subcommittee and then by the Blue Ribbon Committee itself. The enlarged Blue Ribbon Committee met at length several times during the fall, working from revised drafts at each meeting, until its final product, dated December 7, 1972, was produced and distributed by Dr. Thomas Linton. By this time the unique dual board proposal had been modified to a more conventional single commission with both planning and implementation powers—the nine-member Coastal Resources Commission. There had been added to the bill a provision for an independent Executive Director to head the commission's staff and to be responsible for initial action on permit applications. Mainly

of its excellent statement on legislative findings and goals, and the essence of its provisions concerning the membership of the Coastal Resources Commission. The Commission as proposed by the Kane Draft consisted (as in the 1974 Act) primarily of persons drawn from a variety of disciplines and occupations relevant to coastal area management.

27. Literally, the plan was designated in the Schoenbaum Draft as a "statement"—presumably in an effort to minimize conservative objections to "planning."

28. The Planning Commission was to be located in the Governor's office, and the Coastal Zone Authority in the Department of Natural and Economic Resources. An early version of the Schoenbaum Draft placed the Coastal Zone Authority in the Lieutenant Governor's office, but this proposal was rejected by the Blue Ribbon Committee's legislative subcommittee.

for the purpose of providing a voice for local government, a large (forty-three member) Advisory Council was added to the bill, to consist of representatives selected by each coastal county board of commissioners, representatives of four coastal municipalities, representatives of the coastal area regional planning agencies, and spokesmen for the affected state agencies. The Linton Draft was approved with minor revisions by the enlarged Blue Ribbon Committee at its final meeting on December 15, 1972, and the oft-revised bill was delivered to the new Republican Administration for its consideration.²⁹

The addition of the locally dominated Advisory Council reflected concern among the framers of the coastal bill about the role of local government. Despite suggestions from several committee members, none of the constituent drafting committees included direct representation for recognized spokesmen of local government, such as the League of Municipalities and the Association of County Commissioners. The enlarged Blue Ribbon Committee included a sprinkling of present or former local officials.³⁰ A member of the Marine Sciences Council Subcommittee who was a former county commissioner, David Stick, successfully argued that the Advisory Council should be reshaped as primarily a sounding board for local government. As subsequent events demonstrated, the modest steps taken late in 1972 to involve local government in the spadework on the bill and to ensure a substantial local government role in the program would be too little and too late to lend credibility to the bill in the politically potent circles of city and county government.³¹ The price of these shortcomings was a one-year delay in legislative action on the bill, to allow time for legislative hearings in the coastal region itself and for completely re-drafting the bill to expand the role of local government in all phases of the program.

29. At least two other working drafts were developed during the fall and early winter of 1972, in addition to the Linton Draft. One, dated November 14, closely resembled the Linton Draft except in two respects: its Advisory Council was a nine-member ex officio cabinet-level group, and it did not provide for an Executive Director. The other was the final draft dated January 10, 1973, which made only minor refining changes in the Linton Draft in light of the December 1972 meeting.

30. Local officials on the enlarged committee included a former mayor (Dr. John Costlow), an alderman (James Wallace), a county commissioner (Kenneth Newsome) and former county commissioner (David Stick), a local planner (Neil Mallory), and a county planning board chairman (Jerry Hardesty).

31. It is perhaps some explanation of the failure to involve local government more heavily at an earlier date that there were no legislators on any of the drafting committees, and that the leaders of these groups had no political experience before coming to their state offices. The general confusion attendant upon a changing administration may also have been partly responsible.

E. The 1973 Bill

With the turn of the year, a new element entered the picture: the coming of the Holshouser Administration, the first Republican administration in North Carolina political memory. The new Administration's principal spokesman on environmental matters was Secretary of Natural and Economic Resources, James Harrington. Harrington's background as a resort developer raised questions in the minds of environmentalists about the Administration's commitment to the goals of the coastal bill; his performance in office soon erased most of these questions and made plain the Administration's support of the bill.

The new Administration immediately confronted an underlying administrative problem that had long plagued its predecessors: a serious internal rift between the Department of Natural and Economic Resources (DNER) and the Department of Administration (DOA)—more specifically, between the State Planning Office of DOA and the environmental agencies of DNER. The lack of cooperation between these related agencies reached such proportions that many observers believed there was no solution short of integrating all planning and environmentally related functions in one department, presumably DNER, because of its environmental mission.

Secretary Harrington and Secretary of Administration William Bonduant approached this issue unencumbered by any prior commitments. They made plain to their subordinates their expectation that henceforth the two departments would work together in harmony. Planning would be the province of DOA; regulations, the province of DNER. Predictably, the boss's word was the deed. After initial scepticism had been overcome, formerly warring officials soon were talking and even working together.

The Coastal Area Management Bill was an obvious place to put these ideas to work. The author—who by this time had become the bill's principal draftsman—was instructed by Secretary Harrington to redraft the bill along organizational lines consistent with Harrington's thinking. All administrative responsibility was vested in the two cabinet departments, with planning functions assigned to DOA and permitting to DNER. The provision for an independent Executive Director of the Coastal Resources Commission was eliminated,³² in

32. One reference to the Executive Director of the Coastal Resources Commission was overlooked in this elimination process and remains in N.C. GEN. STAT. § 113A-122 (b)(11) (1974 Advance Legislative Service, pamphlet no. 3).

keeping with Harrington's concept of the on-going reorganization of state government. With the benefit of hindsight, it is easy to see in 1974 that this change in the coastal bill was vital to Harrington's reorganization program for DNER.³³ The Coastal Resources Commission would not be the issuer of permits, but would only review permit actions of the Secretary; it would not designate areas of environmental concern, but would only review and approve or disapprove the Secretary's recommendations. The Advisory Council was retained as a strong link with local government. With these changes, the bill was introduced in the 1973 General Assembly.

In sum, if the Linton Draft was a strong Commission bill, the introduced version was a strong cabinet-department bill that relegated the Commission to more of a quasi-judicial and policy role.

These and other changes reflected in the 1973 bill, notably the addition of the hundred-year flood line concept,³⁴ generated some vigorous criticism, especially from environmentalists who believed that the bill had been seriously weakened. The sharpest edge of criticism was reserved for the enlarged planning responsibilities of DOA, whose leadership had been at odds with the leading environmentalist critics. The controversy has been thoroughly reviewed elsewhere.³⁵ Subsequent events have removed much of its sting. The hundred-year flood line was later eliminated from the bill for technical reasons. Some of the powers removed from the Commission in the 1973 bill were later restored in the 1974 Act. And continuing good relations between DNER and the DOA planners have shown that the existing allocation of functions between DOA and DNER can be workable.

The 1973 bill had solid bipartisan support, including the backing of the Governor, the Lieutenant Governor, and the chairmen of the two legislative committees that were considering the bill. But strong

33. Acting under the 1974 reorganization legislation for DNER, Secretary Harrington has recently projected a reorganization plan under which: (1) administrative and personnel responsibilities are concentrated in the Secretary's office; (2) the former "Offices" of the department are thoroughly reshuffled into six new "Divisions" that are responsible to the Secretary rather than to the commissions and boards they formerly answered to; (3) as rapidly as possible, departmental personnel will be decentralized from Raleigh to field offices, which will have much greater delegated powers than heretofore; (4) a long-term effort is underway to simplify and unify permit systems administered by the Department; and (5) the former boards and commissions (such as the Board of Water and Air Resources, now renamed the Environmental Management Commission) will concentrate on developing policy through rulemaking and adjudications, and will be relieved of purely administrative responsibilities.

34. See text accompanying note 101 *infra*.

35. See R. Bode & W. Farthing, *supra* note 4, at 39-48.

opposition from the coastal region and its legislators was expressed at a public hearing on the bill in April 1973. The opponents included not only developers but also a number of city and county officials who objected both to their lack of involvement in the preparation of the bill and to the limited role for local government under the terms of the bill. The objections of local officials, especially county commissioners, who are one of the more potent lobbying forces in the General Assembly, found enough legislator sympathy to convince the bill's sponsors that coastal area management could not secure legislative approval in 1973. Senator Staton and Representative Whichard decided that a series of interim legislative committee hearings in the affected area might serve to clear the air. They announced their intention not to push the bill in 1973, but to return with a bill in 1974 based on the results of the committee hearings.³⁶

F. The 1974 Bill

After completion of the interim hearings, some members of the Joint Committee visited Vermont and Maine to confer with officials of those states concerning their experience with recently enacted state land use management legislation. Previously, individual committee members had also visited Washington State and Florida, two other pioneers in state land use legislation. All of these visits were productive of ideas that left their imprint on the eventual North Carolina legislation.³⁷ The Joint Committee had previously received memoranda analyzing comparative legislation in other states.

In late November 1973 the Joint Committee met and hammered out the major changes that it wanted made in the bill, leaving the draftsmen³⁸ with instructions to redraft the bill under the general su-

36. See text accompanying notes 7-9 *supra*.

37. For example, the distinction in N.C. GEN. STAT. § 113A-118(d) (1974 Advance Legislative Service, pamphlet no. 3) between "major" and "minor" developments for purposes of determining state or local permit jurisdiction was drawn from the Maine Site Location Law. ME. REV. STAT. ANN. tit. 38, § 482 (Supp. 1973). The strong planning emphasis of the North Carolina Act is a spiritual descendant of the Florida statute. FLA. STAT. ANN. § 380.09 (Supp. 1974). The emphasis on land capabilities in the planning process was derived from the Vermont legislation. VT. STAT. ANN. tit. 10, §§ 6001-91 (1973). And the excellent general organization of the Washington statute served as a model for the North Carolina legislation. WASH. REV. CODE ANN. § 90.58 (Supp. 1973).

38. Philip Green, long-time Institute of Government land use planning lawyer, and the author shared the drafting responsibility for the bill as introduced in 1974. Green drafted Part II, the Planning Processes, and the author drafted the remainder of the bill.

pervision of Co-chairmen Staton and Whichard. The instructions were generally to reorganize the bill and to make some material changes in procedures concerning areas of environmental concern, and significant changes in administrative organization. The latter produced the kind of governmental structure that was enacted in General Statutes section 113A-101:

Cooperative State-local program—This Article establishes a cooperative program of coastal area management between local and State governments. Local government shall have the initiative for planning. State government shall establish areas of environmental concern. With regard to planning, State government shall act primarily in a supportive standard-setting and review capacity, except where local governments do not elect to exercise their initiative. Enforcement shall be a concurrent State-local responsibility.³⁹

Two other organizational changes of moment were included in the redraft. First, in keeping with the testimony at the interim hearings, local government was given a direct voice in policy-setting through the addition of two members to the Coastal Resources Commission, both required to have experience in local government within the coastal area. Second, at the state level, some powers were returned to the State Coastal Resources Commission that had been delegated to cabinet departments in the 1973 bill. The Commission was authorized to prepare and adopt state planning guidelines, to approve local land-use plans (or prepare plans if localities do not act), and to grant permits on behalf of the State.

Co-chairmen Staton and Whichard supervised the revision and resolved a number of minor drafting questions. But only in the permit-letting area of the bill did the draftsmen find it necessary to seek further instructions from the co-chairmen. The Joint Committee had left instructions to treat permit-letting as for planning. In pursuing these instructions the draftsmen found it difficult to devise processes that would both be feasible for local governments to administer and give the necessary legal protection to substantial rights through quasi-judicial procedures. Informed of the problem, the co-chairmen concluded that the solution lay in limiting the permit-letting authority of local governments to minor projects which could ordinarily be disposed of under

39. The 1974 bill as introduced included the following additional sentence that was eliminated in House Committee because some committee members believed it might sanction broader powers for regional planning agencies: "Regional planning agencies shall coordinate and supplement the activities of local government." S. 972 (H. 1373) 1973 N.C. General Assembly, 2d Sess.

expedited procedures suitable to local administration (subject to a right of administrative appeal to the Commission). They accepted the draftsmen's suggestion that the test of state jurisdiction under the Maine Site Location Statute⁴⁰ be used: that large projects as well as all projects (large or small) already requiring another state environmental permit be subject to exclusive state jurisdiction, and that all other projects be subject to local jurisdiction.⁴¹ The redraft was approved with minor changes by the Joint Committee at its final pre-legislative meeting on January 3, 1974.⁴²

G. *The Working Environment of the Bill in 1974*

Before the actions of the standing committees on the bill during 1974 are examined, some preliminary observations are in order concerning the working environment of the bill. By the time the General Assembly convened in 1974, the great majority of the members of the Senate Committee on Natural and Economic Resources and the House Committee on Water and Air Resources were probably more familiar with the coastal area bill than any other bill they had ever considered.⁴³ The two committee chairmen were fully committed to supporting the bill and had developed a cooperative and easy working relationship with one another. Both were Piedmont Democrats whose constituents strongly supported the bill, and their personal concepts concerning the bill were substantially consistent and well-developed.

Early in 1974 the co-chairmen reached a general agreement on strategy and tactics for the coastal area bill and related proposals.

40. ME. REV. STAT. ANN. tit. 38, § 482 (Supp. 1973).

41. A city or county desiring to issue permits for minor developments can qualify as a permit-letting agency upon approval of its implementation program by the Coastal Resources Commission. N.C. GEN. STAT. §§ 113A-118(b), -121(b) (1974 Advance Legislative Service, pamphlet no. 3).

42. Changes approved at the final meeting of the Joint Committee included: (1) The elimination of a provision for automatic review by regional planning agencies of proposed city and county plans. (However, authority for cities and counties to delegate their planning functions to the regional agencies was left in the bill). (2) Agricultural projects were brought under the definition of "developments" (and therefore were subject to permit controls within areas of environmental concern) in cases where dredging or filling projects affect estuarine or navigable waters. *Id.* § 113A-103(5)(b)(iv).

43. Both committees had considered the bill in 1973 and had attended a fall public hearing on the bill. Also, most of the members had attended a special briefing on the bill at the Governor's mansion. During the summer of 1973 the entire Senate Committee (supplemented by several special appointees of Lieutenant Governor Hunt), and about half of the House Committee had served on a joint interim committee that held five full public hearings on the coastal area bill and four hearings on the similar mountain area bill in the regions to be affected. In addition, the Joint Committee had met two days to review the results of these hearings.

First, they would seek to secure passage of the coastal bill, then the mountain area bill, and only then would they push the third bill in the land use package, the land policy council bill.⁴⁴ Although this plan was generally followed, time ran out on the mountain area bill. Action on the coastal area bill consumed almost the entire session, much longer than had been anticipated, and there was simply no opportunity for consideration of the mountain area bill.⁴⁵ The land policy council bill was pushed through the Senate ahead of the coastal area bill by a coalition that included some of the major opponents of the coastal bill—apparently in the hope that they could persuade the General Assembly that the toothless land policy legislation made the coastal bill unnecessary. This approach did not succeed, however, as the land policy bill was held in the House Committee on Water and Air Resources until after action had been completed on the coastal area bill.

Secondly, the co-chairmen planned to move the coastal area bill to the floor of the legislature first in the Senate and then in the House.⁴⁶ As it developed, an abortive effort was made to move the bill first in the House, when Representative Whichard decided that his committee was ready to act before the Senate Committee. However, this action very quickly generated strong counter-lobbying pressures and the House bill was re-referred to committee almost immediately.⁴⁷ Ultimately, the Senate did pass the bill first, as originally planned.⁴⁸

Thirdly, both the Senate and House committees were to work on the bill simultaneously, to ensure that the second committee to act would be in a position to report the bill promptly to the floor and minimize the hazards of a slowdown. To facilitate this strategy, the committees developed out of necessity a pattern of close coordination. A routine evolved along the following lines: a set of amendments would be considered first in whichever committee was ready to act. If the committee acted favorably, the same amendments would be explained

44. Law of April 12, 1974, ch. 1306, [1973] N.C. Sess. Laws 597.

45. Re-introduction of the mountain area bill is anticipated in 1975.

46. Among the reasons for trying to move the bill first in the Senate were Senator Staton's greater experience and seniority; an educated guess that stronger Democratic Party support would be forthcoming in the Senate than in the House; and a desire both to get the bill out of the Senate early, where environmental legislation had faced some heavy going in 1973, and to get the bill to the House with the momentum of Senate approval. These reasons were obviously rather subjective and were based on judgment that could—and did—change from time to time.

47. H. JOUR. [1974] N.C. General Assembly 1743.

48. S. JOUR. [1974] N.C. General Assembly 611.

at the next meeting of the other committee, usually a day or so later. The majority of the amendments considered in committee had been examined, negotiated and approved by both co-chairmen before being presented to the committee. The author, who served as principal consultant to both committees, usually drafted or approved the drafting of the amendments and explained them to both committees.

When the bill reached the floor, another factor became especially significant: the role of the legislative leadership. As may be inferred from the overnight swing of fifteen votes in the final Senate action on the bill,⁴⁹ there was a large middle ground of votes in the Senate that were not strongly committed one way or the other. A similar situation prevailed in the House. In the Senate nineteen amendments went to a vote, of which twelve were adopted;⁵⁰ in the House fifty-one amendments went to a vote, of which twenty-two were adopted.⁵¹ Under such circumstances, the position of the legislative leadership can be vitally important to the fate of a bill.

Governor Holshouser made plain at a very early date that he firmly supported the coastal area bill as well as its mountain area counterpart. On contested votes in the House, the Republican leaders consistently produced around thirty of their thirty-five votes in favor of the bill. On contested votes in the Senate, the Republican leadership consistently produced twelve or more of their fifteen votes in favor of the bill.⁵²

Lieutenant Governor Hunt, a Democrat, likewise was a supporter of the bill, and his influence was felt at key points, especially on the final vote. But his position was quite different than that of the Republican leaders because his party was sharply divided on the bill. Six of the seven senators representing the coastal area—all six Democrats—often voted with the opponents of the bill.⁵³

Speaker James Ramsey took no public position on the bill, but his reservations about some aspects of it were no secret.⁵⁴ During the

49. See text accompanying note 10 *supra*.

50. S. JOUR. [1974] N.C. General Assembly 482, 494-95, 506, 609-11.

51. H. JOUR. [1974] N.C. General Assembly 1827-29, 1840-43, 1852-57.

52. Among the Republican leaders were House Minority Leader Larry Cobb, Senator George Rountree of Wilmington, Senator Hamilton Horton of Winston-Salem, Senator Charles Taylor of Brevard, and the Governor's legislative liaison George Clark.

53. Senator Philip Godwin of Gates, Senator Harold Hardison of Lenoir, Senator J.J. (Monk) Harrington of Bertie, Senator W.D. Mills of Onslow, Senator D.L. Stallings of Craven, and Senator Arthur Williamson of Columbus. The seventh coastal area senator was Republican George Rountree, a consistent supporter of the bill.

54. In February, Speaker Ramsey requested that Representative Whichard and the

House floor debates, Ramsey exercised the prerogative of the chair to delay consideration of the bill and allowed proposed amendments to the bill to consume an extraordinary total of twelve hours of House debate during the final ten days of the legislative session, in what amounted to a "filibuster by amendment."⁵⁵ Balancing these actions, however, he earlier had initiated steps that led to a resolution of the organizational issues that threatened to derail the bill.⁵⁶

H. *The First House Committee Substitute*

Following the introduction of the revised bill on the second day of the 1974 session, committee review immediately began in earnest in both houses. The House Committee was first to act, as it reported to the floor a committee substitute on January 25 after two meetings.⁵⁷

In this opening round the committees faced the first of several waves of lobbyists who preoccupied their attention during the next three months. The League of Municipalities and the North Carolina Association of Realtors originated the principal changes that were embodied in the House Committee substitute.

On behalf of the Realtors Association, Senator Lynwood Smith proposed amendments in the Senate committee to add two additional members to the Coastal Resources Commission—one expert in financing coastal land development, and one expert in coastal land economics. When preliminary committee reaction seemed favorable to one but not both of these changes, Senator Smith withdrew the latter proposal. Informed of the disposition of the Senate Committee, House

author meet with him to review certain questions on the bill. At this meeting the speaker referred to three issues that had been called to his attention as requiring changes in the bill: the composition of the Coastal Resources Commission; the so-called "takings" issue, *see* text accompanying notes 136-39 *infra*; and the need for more detailed standards in the bill. Most of the debate that was to preoccupy the House in its consideration of the bill raged around these three issues.

55. On at least two occasions late in the session the Speaker delayed consideration of the bill—first, by referring the bill upon receipt from the Senate on March 28 to the Calendar Committee, rather than to the Water and Air Resources Committee, requiring a later re-referral in order to save the bill from a likely deep freeze in the Calendar Committee; and secondly, by listing the bill as Special Order Number Four on the House Calendar of April 5, although Representative Whichard had moved that the bill be made the First Special Order of Business. When the bill reached the floor, the Speaker informed Representative Whichard that he would not be recognized to call the question on the bill until all requested amendments had been considered. Since Representative Whichard was the only member eligible to move the previous question, this meant that the bill would be exposed to the only effective filibuster that is possible under the House Rules—"filibuster by amendment."

56. *See* text accompanying note 61 *infra*.

57. H. Jour. [1974] N.C. General Assembly 1290.

Committee Chairman Whichard proposed that his committee accept an amendment adding to the Commission one person experienced in or actively connected with the financing of coastal land development. The House Committee approved this change, thereby enlarging the Commission to twelve members.

Representative Whichard next presented the League of Municipalities amendments to his committee, which accepted them without objection. The League's spokesman had been the first lobbyist to approach Whichard after the 1974 bill was introduced. Under Whichard's instructions and guidance, the author negotiated with the League a series of changes in the planning and permit provisions that strengthened the position of cities under the bill. The League also requested, and the House Committee approved, the enlargement of the Coastal Resources Advisory Council by four additional members representative of coastal area cities, making a total of eight city representatives on the Council.

After accepting the League's amendments and several technical amendments, the House Committee, as previously noted, reported the bill to the floor as a committee substitute on January 25.⁵⁸ Chairman Whichard had hoped that by taking the offensive he could secure quick House approval of the bill before the opposition could form its battle lines, but the informal response that he received was overwhelmingly negative. He therefore moved that the bill be re-referred to his committee before the House acted upon it.⁵⁹ Subsequent events bear out the wisdom of his judgment.

I. The Senate Committee Substitute

The next period of the legislative history of the bill was to prove a decisive chapter in the long drive for coastal management legislation. During this period the Senate Committee on Natural and Economic Resources reported a substitute bill that, aided by a floor amendment proposed by Senators Godwin and Harrington, would meet the principal remaining local government objections to the bill and would pave the way for ultimate passage.

If this period ended decisively, it began on a very low key. When the House Committee reported its committee substitute, lobbying activities against the bill reached an early peak. Led by banker Lewis Hold-

58. *Id.*

59. *Id.* at 1313,

ing—whose employer (First Citizen's Bank and Trust Company) had major interests in the coastal area—lobbyists succeeded in persuading the Senate and House committees to schedule one more public hearing on the bill.⁶⁰ Essentially a weapon of delay, this hearing predictably generated another showing of strong support for the bill with only scattered opposition. It successfully bought time, however, during which lobbyists prepared amendments and consolidated their position. Conservatively, this last hearing probably set back final action on the coastal bill by at least six weeks. Since this effectively delayed floor action until the waning weeks of the session, it might easily have killed the bill for 1974 but for the tenacious support of the measure by its Administration sponsors and co-chairmen Staton and Whichard. Speaker Ramsey provided an important starting point for renewed progress on the bill by suggesting to Representative Whichard that he and Senator Staton should call together all of the coastal area legislators in an effort to meet their objections to the bill.⁶¹ The co-chairmen responded to this suggestion by arranging a pair of informal caucuses of coastal area legislators prior to the Monday evening legislative sessions. After touching briefly on the "takings question" and the standards issue,⁶² the caucus quickly came to grips with the continuing demands for a larger city-county voice in the selection of the Coastal Resources Commission.

Several options were discussed, each involving a larger commission (fifteen members rather than twelve) with a majority of its members to be appointed by the Governor from local government nominees. The demand for these changes came not only from local government constituents but also from Democratic legislators who did not want to help establish a new Republican-controlled state agency. Thus, the controlling voice that this required for local government nominees would have to be large enough to offset, not only the direct appointees of the Governor, but also those appointees who might be chosen from nominees presented by the three Republican controlled counties in the coastal area.⁶³

60. This hearing was held in the legislative building on February 7, 1974.

61. Conversation with Speaker Ramsey, Representative Whichard, and Representative Watkins.

62. See note 54 *supra*.

63. At this time Republicans controlled a majority of the boards of county commissioners of Brunswick, Carteret and New Hanover counties. So far, Democratic fears of political appointments have not materialized. Ten of the fifteen original Commission appointees were Democrats.

No consensus proposal was developed at the coastal legislator caucuses, although at one time the group was close to agreement on the precise compromise that was later to be enacted. Even though the second caucus became rather heated and ended on a note of controversy, the caucuses did lay the foundation for the organizational compromise that ultimately was written into the Coastal Act.

At a meeting of the Senate Committee on Natural and Economic Resources following the coastal legislator caucuses, President Pro Tem Allen and Senator Royall of Durham proposed a compromise that would provide for:

- (1) a fifteen-member Coastal Resources Commission (the original eleven, plus the coastal land financier added by the House Committee substitute, plus three at-large members);
- (2) five of the fifteen members to be appointed directly by the Governor, and ten to be appointed by him from a group of nominees submitted by cities and counties;
- (3) each board of county commissioners in the coastal area to submit to the Governor the names of ten persons meeting specific qualification slots on the Commission;
- (4) each coastal-area city larger than 5,000 in population to submit the name of one person qualified in one of the statutory slots;
- (5) various subsidiary limitations for residences of the commissioners and related matters.

This compromise was accepted unanimously in committee. Along with the other changes described later in this article, it was reported to the Senate floor in a Senate Committee substitute on March 5.⁶⁴ Senators Allen, Royall, and Staton were aware that no meeting of the minds had been reached with the coastal area senators. But they concluded that the time had come, at whatever risk, to test the coastal bill in the Senate itself.

Debate on the second reading was opened in the Senate on March 12 by Senator Staton. As it progressed, the tension grew. A sense of impending doom for the bill was fed by rumors that the bill's supporters did not have the votes. The climax arrived when Senator J. J. "Monk" Harrington was recognized to speak on the bill. A veteran senator from Bertie County, Senator Harrington, along with Senator Philip Godwin of Gates County, represented the fourteen north-

64. See text accompanying note 103 *infra*.

eastern counties of the First Senatorial District, almost three-fourths of the counties in the coastal region. One of the acknowledged powers of the Senate, Harrington rarely engages in floor debate but is content to make his mark behind the scenes and in committee. His statement on the coastal bill was expected to be crucial—perhaps, to save the bill, but more likely (it was thought) to seal its defeat. Senator Godwin had made it plain in conversation with Senator Staton that he would cast his lot with Harrington. Godwin did not plan to run again for the Senate, and did not wish to leave his friend Harrington with the burden of justifying to their constituents a Godwin-Harrington split on the coastal bill. No other Democratic coastal area senator was believed to offer any prospect of support for the bill.

In his opening remarks Senator Harrington emphasized his reservations about the bill and seemed to be on the way to a statement of outright opposition. But as his remarks came to a close they took a new twist. Instead of cementing his opposition, Harrington reopened a possible avenue of reconciliation by recalling his willingness to support the bill if it provided for a Commission whose make-up satisfied his constituents. The Senate chamber buzzed with excitement as Senator Harrington concluded his speech, and second reading was postponed until March 14. Following adjournment, Senator Staton huddled with the two northeastern senators and agreed to make another try at restructuring the Commission.

During the next thirty-six hours, negotiations narrowed the area of differences to a series of calculations.⁶⁵ How many members of the Commission must be selected from persons nominated by local governments? (Probably either eleven or twelve of the fifteen members). How many members, if any, could reside outside the coastal area? (Not more than two). What protection, if any, should be provided against domination of the Commission by any particular county? (Not more than two members could be residents of any one county). How many persons would be nominated by each coastal area county and city? (Probably, three per county and one per city of 5,000 or larger).

A draft along these lines, allocating twelve members to the local nominating process, was readied for introduction as a floor amendment to be proposed by Senator Godwin on March 14. On the ap-

65. The events described in this paragraph and succeeding paragraphs of this section are based upon the author's memory and his notes for use in drafting proposed amendments.

pointed day, the shaky compromise was suddenly wracked by new tensions arising from the aspirations of coastal area cities and towns for a larger number of nominees. Senator Godwin was persuaded by League of Municipalities Executive Secretary Leigh Wilson to accept a provision that each coastal area town larger than 2,000 (rather than 5,000) and every beach town regardless of size would be entitled to nominate one person for appointment to the Commission—a total of thirty-two potential city nominees. Senator Harrington, a legislator whose local government allies were almost exclusively county officials, reacted sharply; not only would he object to this enlargement of city participation, but he was unwilling to support an amendment providing for *any* city participation in the nominations. As the fateful morning progressed, the Governor's Legislative Liaison, George Clark, proceeded to line up Republican Senate votes supporting the Harrington position. The author readied fifty copies (for distribution to every senator) of the Godwin alternative, the Harrington alternative, and the earlier version of three per county—one per city of 5,000. Just before the 2:00 p.m. convening hour, Democratic senators caucused with Lieutenant Governor Hunt and agreed to support the Godwin version. After frantic last-minute negotiations to rally Republican votes to support the Godwin amendment and to salve the frayed nerves of George Clark, the amendment was introduced and explained by Senator Godwin, and then was accepted by the Senate.

In retrospect this hard-won Senate compromise concerning the composition of the Commission proved to be the critical turning point in the long history of the Coastal Area Management Act. Vital roles in the process were played by Speaker Ramsey, Senators Allen and Royall, Senator Staton, Governor Holshouser's Legislative Liaison Officer George Clark, and Lieutenant Governor Hunt. But it is likely that no one affected the result more than Senator Harrington, by his candid and responsible statement on the floor of the Senate, and Senator Godwin, by his resourceful implementation of the Harrington position, steering a course between potentially competitive city and county forces.

J. The Senate and House Floor Amendments

In addition to the Godwin amendment, the Senate considered a total of eighteen other floor amendments, of which eleven were approved. The House sifted through fifty-one proposed floor amendments, approving twenty-two of them. The organizational issues,

however, were resolved. No further changes in this area were adopted either by the Senate or the House.

IV. DEFINITION OF THE COASTAL AREA

A. Introduction

The statutory definition of a region such as North Carolina's coastal area poses difficult choices. On the one hand, considerations such as ease of delineation, familiarity, and "fit" with established political institutions, argue in favor of using existing political boundaries such as county lines. On the other hand, a regional definition that is more responsive to the underlying physical and biological considerations has greater logic and some legal and practical considerations in its favor. The Federal Coastal Zone Management Act contains a relatively narrow definition of the coastal zone based on natural features, but it does not require that the states adopt the same definition.⁶⁶ A state program need only cover approximately as much territory as the federal definition would in order to qualify for the benefits of the Federal Act. The several states that have enacted coastal zone legislation or other state or regional land use laws have defined the inland reaches of their coastal zones and the boundaries of their planning regions in a variety of ways—some based on political boundaries, some based on tidal reaches, and some based on the presence of certain types of vegetation that are vital links in the estuarine food chain.⁶⁷

At an early date in the evolution of the North Carolina Coastal Act, a decision was made to define the coastal area by reference to county lines. Environmental factors would be considered in deciding which counties to include, but the outer boundaries of the coastal area would be county political boundaries. In addition, environmental factors would be crucial in delineating the areas of environmental concern within which the regulatory features of the Act would operate.

Basically, county lines were chosen as the boundaries of the coastal area because of the importance of the planning process in the

66. Under the Federal Act the "coastal zone" is defined "as coastal waters and the adjacent shorelands . . . strongly influenced by each other and in proximity to the shorelines . . . including transitional and intertidal areas, salt marshes, wetlands, and beaches. . . . [and] extending inland only to the extent necessary to control shorelands." 16 U.S.C. § 1453(a) (Supp. II, 1972).

67. Tidal reaches: N.J. STAT. ANN. § 13:9A-2 (Supp. 1974); N.Y. ENVIRONMENTAL CONSERVATION LAW § 25-0103 (McKinney Supp. 1973). Plant growth habits: GA. CODE ANN. § 45-137(a) (Supp. 1973); N.C. GEN. STAT. § 113-230 (Supp. 1973). Political boundaries: VT. STAT. ANN. tit. 10, § 6026 (1973).

North Carolina legislation. Land use planning programs in North Carolina are organized and administered by traditional local governments within their political boundaries, and it was felt that this should be accepted as a fact of life for purposes of the coastal bill. As enacted, the North Carolina Act defines the coastal area as the counties that in whole or in part are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean or any coastal sound.⁶⁸ It then directs the Governor to designate those counties that constitute the coastal area.⁶⁹

B. *Early Versions of the Coastal Act*

The Schoenbaum Draft defined the coastal zone very simply as those counties bounded in whole or in part by the Atlantic Ocean. The Linton Draft reshaped this definition by gearing it to the language of the Federal Coastal Zone Management Act of 1972,⁷⁰ and by listing the counties which constituted this zone.⁷¹ Despite its listing of counties, the Linton Draft was the only major version of the bill that identified the coastal area basically in terms of natural phenomena.

The 1973 bill returned to the county boundary approach. In section 3(2) it defined that coastal area as "the counties that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean or any coastal sound or major river to the end of the zone of tidal influence." The Cape Fear and its tributaries, the Neuse, the Pamlico, the Chowan and the Roanoke Rivers were listed as "major rivers." On each river a "zone of tidal influence" was defined by reference to familiar landmarks (such as a designated highway bridge) that were thought approximately to reflect the tidal reaches of these rivers. In this version of the bill there was no listing of the counties, although one could (with some difficulty) develop such a list using the parameters set forth in the bill.

68. N.C. GEN. STAT. § 113A-103(2) (1974 Advance Legislative Service, pamphlet no. 3). A coastal sound is defined as seven named sounds, and the inland limits of the sounds are defined as the normal limits of sea water encroachment. Some of these inland limits are identified by the Act for working purposes—i.e. unless otherwise determined by the Commission. *Id.* § 113A-103(3).

69. *Id.* § 113A-103(2). Governor Holshouser by Executive Order designated the following twenty counties as the coastal area: Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Gates, Hertford, Hyde, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrrell, and Washington. Executive Order No. 5 (April 24, 1974).

70. See note 66 *supra*.

71. Twenty-six counties in all were listed: the twenty counties that were ultimately designated by Governor Holshouser, as listed in note 69 *supra*, plus Bladen, Columbus, Halifax, Jones, Martin, and Northhampton.

C. *The 1974 Bill and Its Amendments*

Following the interim legislative hearings, both the underlying premises and the practical application of the 1973 bill's coastal area definition were examined more critically. No serious questions were raised concerning the underlying effort to identify approximately the tidewater region. But it became apparent that the definition contained in the 1973 bill was pragmatically vulnerable on at least two counts: its listing of "major coastal rivers" was far from comprehensive, and its reliance on identification of tidal reaches could not be documented because of inadequate data. The Joint Committee was advised by its principal scientific expert, Assistant Secretary of NER Dr. Arthur Cooper, that comprehensive tide gauging data could not be supplied without years of additional monitoring in some waters. However, he suggested, another means of scientifically identifying the tide-water region was available in a series of studies by the U.S. Geological Survey detailing the extent of seawater encroachment into the inland reaches of the coastal sounds. On the basis of this advice, the Joint Committee proposed that the 1974 bill make use of this data concerning seawater encroachment in defining the coastal area. The debatable references to coastal rivers were dropped and the seawater encroachment approach was used in the definition of "coastal sounds" in General Statutes section 113A-103(3). At this stage a listing of counties, twenty-two in all, was reinserted in the bill to clearly advertise this information to the counties likely to be affected.⁷²

An unsuccessful effort was made on the Senate floor to delete two individual counties, but these amendments were defeated after Senator Staton argued that this might make the Act vulnerable to constitutional attack as a local act regulating trade or relating to health, sanitation or the abatement of nuisances.⁷³ Senator Staton went one step further and persuaded the Senate to amend the bill by deleting the list of counties and substituting a direction for the Governor to designate those counties that constitute the coastal area. (A refining amendment, later adopted in the House, added that this designation should be in accordance with the standards set forth in the Act.) By this amendment Senator Staton hoped to minimize the risk of a suc-

72. The counties listed were the twenty counties named by the Governor, as listed in note 69 *supra*, plus Jones and Martin counties. H. 1373 (S. 972) 1973 N.C. General Assembly, 2d Sess.

73. See N.C. CONST. art. II, § 24; Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. REV. 303, 306-13 (1974).

cessful legal attack on the Act as an invalid "local act" since the Act would then on its face be general in form.

The House also rejected proposed amendments to make the Act inapplicable to certain named counties. It adopted three refining amendments to clarify the inland limits of the "coastal sounds" as defined in the Act. In an unusual procedure, the House suspended its rules to allow Dr. Arthur Cooper to come to the well of the House and explain the definition of the "coastal area" to the House with the aid of a large map. Thus, the House was given the benefit of the same information that Dr. Cooper had given to its Committee on Water and Air Resources.⁷⁴

V. THE PLANNING PROCESS

A. Introduction

Part two of the Coastal Area Management Act calls for the preparation of a land use plan for each county within the coastal area.⁷⁵ These plans are mandated; that is, if local governments do not develop plans, the Coastal Resources Commission will do so itself or arrange to have plans prepared by regional planning agencies or others.⁷⁶ Other provisions of part two make it clear that the plans are to be county-wide in their scope and not limited to areas of environmental concern.⁷⁷

It is plain that the State of North Carolina, through the Coastal Area Management Act and available grant funds,⁷⁸ is encouraging the development of basic land use plans covering the entire twenty-county coastal area. The Act is a general framework for local and regional land use planning as well as a vehicle for guiding and controlling de-

74. The House debates reached a rhetorical peak when Representative Chris Barker of New Bern explained his disagreement with one of the bill's seawater encroachment lines. If there were any salt water at this point, Barker was sure that he would know about it. His dog had been drinking water out of the river there all its life, said Barker, and would certainly have complained if it were salty.

75. N.C. GEN. STAT. § 113A-106 (1974 Advance Legislative Service, pamphlet no. 3).

76. *Id.* § 113A-109.

77. *Id.* § 113A-110.

78. *Id.* § 113A-112 authorizes the Secretary of Natural and Economic Resources to make planning grants to local governments, and substantial federal and state funds are already available for planning grants. Out of an initial federal grant of \$300,000 to the N.C. Coastal program, an initial state appropriation of \$200,000, and other available funds, it is hoped that upward of one half million dollars will be available in fiscal year 1974-1975 for planning grants.

velopment within areas of environmental concern in the twenty counties.⁷⁹

The structure of the planning process contemplated under the Coastal Area Management Act is as follows:

- (1) County-wide plans are to be prepared for the twenty coastal area counties.
- (2) The plans are to serve as one of the criteria for evaluating permit applications under the Act, and they are to serve in their own right as county-wide plans.
- (3) There is to be local initiative in preparing plans, subject to State guidelines and review.
- (4) The county government normally will serve as the planning agency for the coastal area county plans, with cities entitled to prepare their own plans in coordination with the county. The State will serve as the planning agency only as a last resort.
- (5) Regional planning agencies (lead regional organizations) are to prepare plans when this function is delegated to them.

The Act reflects the interest of state government in the coastal land use planning process in three principal ways—in the previously mentioned mandate for planning, in the Commission's broad authorization to prepare state guidelines for local planning, and in the Commission's authority to approve each plan before it becomes effective.⁸⁰ In various early drafts of the bill, the State itself (acting through the Commission or a cabinet officer) was vested with the coastal area plan-making function, but this is not the case in the Act as finally adopted. Unless there is a wholesale default by local governments in exercising their planning authority, the State will leave its mark on the coastal area plans only through the guidelines and the review processes.

Consistency is a watchword of this planning process. Under the Act development permits must be consistent with plans; plans and per-

79. Of course it remains to be seen how vigorously the coastal area planning program will be implemented.

80. N.C. GEN. STAT. § 113A-110(f) (1974 Advance Legislative Service, pamphlet no. 3). Although the Act does not literally give the Commission the authority to veto a county plan, it gently implies as much. Under section 113A-110(f) the Commission is to review the plan "in light of . . . objections and comments [of interested persons], the State guidelines, the requirements of this Article, and any generally applicable standards of review adopted by the Commission." Following this review the Commission is authorized to return any proposed plan to the county with a notification of "the specific changes which must be made in order for it to be approved." *Id.*

mits must be consistent with the guidelines; plans, permits and guidelines must be consistent with the goals and policies of the Act; policies concerning use of state-owned lands and land classification systems developed under the State Land Policy Act⁸¹ must be consistent with the guidelines; and local ordinances affecting lands within areas of environmental concern must be consistent with the local land use plans.⁸²

When all is said and done, however, it is difficult to predict the shape and content of the plans to be developed under the Act. That content will not come from a settled body of planning concepts because professional land use planners do not agree among themselves on the fundamental nature and role of the land use plan. It will not come from the legislative history, which is quite limited on this aspect of the Act. It will not come from the various consistency requirements of the Act because that consistency is not anchored to any settled or clearly identified philosophy or policy.⁸³ It is too early to predict the effect on the State's guidelines and review upon the content of the plans.

B. The Pre-1973 Bills and Proposals

From the beginning, the planning concept was a central feature of the movement for coastal management legislation. Thus, the principal objective of the 1969 study resolution was the development of a "plan" for the estuaries and the coastal zone.⁸⁴ Appropriately enough, the Blue Ribbon Study Committee itself was commonly referred to as "the Estuarine Plan Committee."

The first reference to planning in the early working drafts came in the Schoenbaum Draft. Its planning provisions—which, curiously, referred to the plan as a "statement"⁸⁵—were relatively brief and simple. They provided as follows:

- (1) The preamble (in words that were to be carried through every draft into the legislation itself) made a legislative finding

81. Law of April 12, 1974, ch. 1306, [1973] N.C. Sess. Laws 597.

82. N.C. GEN. STAT. §§ 113A-107, -108, -111, -120(a)(8) (1974 Advance Legislative Service, pamphlet no. 3).

83. Viewing the Act as a land use lawyer, Professor Philip Green believes that the plans called for by the Act, at least for designated areas of environmental concern, should be more like the typical zoning ordinance than the typical city or county plan. This interpretation would fit easily with the consistency requirements of the Act, but it remains to be seen whether any of the planning units will actually share this view.

84. See text accompanying notes 1-2 *supra*.

85. See note 27 *supra*.

of the need for "a comprehensive plan for the protection, preservation, orderly development and management of the coastal region of North Carolina."⁸⁶

(2) The Coastal Resources Planning Commission was directed to prepare, after public hearings and thorough consultation with all interested parties, persons, and agencies at all levels of government, a "statement" which, in essence, was a comprehensive plan for the development of lands and waters within the coastal zone.

(3) The contents of the statement were specified by Section 6 in a detailed list that was eventually to find its way, almost unchanged, into the Act's preamble listing of policies, guidelines, and standards to be established as goals of the coastal area management system. The listing contemplated, among others, provisions for economic development, preservation and conservation of resources, transportation and circulation patterns, and recreational facilities.

(4) The statement also included what has come to be known as a "land classification system" covering lands in the coastal area but outside of environmentally critical areas. The Schoenbaum Draft established a very simple dual classification system: all land outside critical areas would be designated either as "urban-developmental" or "rural." The rural designation would be accompanied by "rules stating those uses of land which will not be permitted in areas designated rural."⁸⁷ In other words, the Schoenbaum Draft included a rudimentary land use control system for rural areas to supplement its critical area permit system.

(5) Local governments were directed, in developing land use regulations, to "take into consideration any recommendations, rules, and guidelines developed by the Coastal Resources Planning Commission."⁸⁸ The Governor was directed to arbitrate between local policies and the policies of the Coastal Zone Authority.

86. Schoenbaum Draft, § 2 (August, 1972), *reprinted in* 51 N.C.L. REV. 1, 31 (1972). The word "region" was changed to "area" in the 1974 version of the bill and in the Act. N.C. GEN. STAT. § 113A-102(a) (1974 Advance Legislative Service, pamphlet no. 3).

87. Schoenbaum Draft, § 6(2) (August, 1972), *reprinted in* 51 N.C.L. REV. 1, 35 (1972).

88. Schoenbaum Draft, § 12 (August, 1972), *reprinted in* 51 N.C.L. REV. 1, 40-41 (1972).

The general structure of the planning provisions remained unchanged through the several working drafts that followed the Schoenbaum Draft in 1972. The Linton Draft deleted one significant provision, the land classification procedure that had been proposed in the Schoenbaum Draft. It also abandoned the reference to a "Statement" in favor of the more generally accepted term, "Plan." Another minor clarifying change was the addition of express requirements for consultation on the Plan with the Coastal Resources Advisory Council and the Marine Sciences Council.

C. *The 1973 Bill*

The 1973 bill brought one material change in the administration of the planning process: responsibility for preparing the plan, though still at the state level, would be shifted from the Commission to the Secretary of Administration. Incidental to this change, the provision for an independent Executive Director was eliminated.⁸⁹ Other changes in the 1973 bill included a shortening of the deadline for completion of the plan (two years instead of three years) and some minor changes in the bill's description of the plan and of its function.

D. *The 1974 Bill and Its Amendments*

Following the interim legislative hearings of the summer of 1973, the Joint Committee resolved to reshape thoroughly the planning provisions of the bill. Local government was brought bodily into the process, if willing, and the State's role receded to that of guidance and review. A redraft along these lines was prepared by Professor Philip Green of the Institute of Government. The resulting product, part two of the bill, substantially resembled what has already been described in the introduction to this section.⁹⁰

Although the enacted version of part two closely resembles part two in the 1974 bill as introduced, some amendments were adopted in committee and on the floor that should be briefly noted.

The principal changes after introduction occurred in the first House Committee Substitute, and took the form of amendments to General Statutes section 113A-110(c). As a result of these changes, which were developed by the House Committee on Water and Air Resources,⁹¹

89. See text accompanying note 32 *supra*.

90. See text accompanying notes 75-83 *supra*.

91. See text accompanying notes 57-59 *supra*.

any coastal area city can insist upon the right to make its own plans within its zoning jurisdiction if it can persuade the Commission that the city possesses adequate professional staff⁹² and is currently enforcing its zoning ordinance, its subdivision regulations and the State Building Code.⁹³

Also affected was General Statutes section 113A-111. This section in the original bill provided that no local ordinance or regulation should be adopted that was inconsistent with the applicable local land use plan. The House Committee amendment limited the application of this prohibition to areas of environmental concern. As to land within the county or city but outside of areas of environmental concern, it substituted a direction that the Coastal Resources Commission review ordinances and regulations for consistency with land use plans and transmit to the appropriate local government recommendations for modifications of any ordinances or regulations that are inconsistent with the plan.

At two stages in the consideration of the bill during 1974, amendments were adopted that were designed to ensure that the State Planning Guidelines would be brought to the attention of the General Assembly. An amendment to General Statutes section 113A-107(e) in the House Committee Substitute required that copies of the original guidelines be filed with the Senate and House Principal Clerks, presumably for the use of legislators. A House Floor amendment to General Statutes section 113A-107(f) required that copies of future amendments to the guidelines be mailed to all members of the General Assembly. These two procedural changes were the only tangible results of a series of efforts dating from the earliest 1972 working drafts of the bill, to expand legislative control over the guidelines—ranging from informational requirements, to more detailed standards, to legislative approval of the guidelines.⁹⁴

92. The requirement that the city possess adequate professional planning staff was later deleted by a House Floor Amendment.

93. Under the original 1974 bill, it was left to the discretion of the board of county commissioners to decide whether to delegate the responsibility to the city or merely to receive recommendations from the city concerning the plan.

94. The Schoenbaum Draft proposed that amendments to the guidelines "be proposed to the General Assembly." Schoenbaum Draft § 6(5) (August, 1972), *reprinted in* 51 N.C.L. Rev. 1, 35-36 (1972). A proposal was made by Representative Purrington at the final meeting of the Joint Committee on January 3, 1974, that the guidelines not become effective until they had been presented to the General Assembly and a period of time had been allowed to elapse thereafter. A suggestion was made by Representative Watkins at the meeting in Speaker Ramsey's office referred to in note 61 *supra*, that more detailed standards be spelled out for the guidelines. All of these suggestions and

Finally, an amendment contained in the Senate Committee Substitute was designed to make it clear that the scope of the planning provisions had not been narrowed by exemptions to the permit provisions contained in amendments previously adopted.⁹⁵

VI. AREAS OF ENVIRONMENTAL CONCERN

A. Introduction

A prime objective and motivation of the current movement for land use legislation is protection of environmentally sensitive areas. To accomplish this objective most of the recent land use laws and proposals include a mechanism for identifying and protecting environmentally sensitive areas. Many of these measures are modeled, in this respect, on the "critical area" provisions of the Model Land Development Code of the American Law Institute or on the version of these provisions that is incorporated in the pending National Land Use Policies Act (the Jackson Bill).⁹⁶ Part three of the North Carolina Coastal Area Management Act is addressed to the problem of identifying "areas of environmental concern" (AEC's). It directs the Coastal Resources Commission to identify AEC's in two stages: interim AEC's and permanent AEC's. The interim designations provide a means of obtaining information concerning development within environmentally sensitive areas pending the implementation of the permit-letting machinery, and of delineating these areas experimentally subject to further refinement.⁹⁷ The permanent designations will delineate the areas to be subject to the permit requirements of part four.

criticisms were repeated one or more times during the Senate and House debates on the bill. The several suggestions were resisted by supporters of the bill for various reasons—administrative awkwardness or impracticality; an unwise intrusion of the legislative branch into essentially executive matters; and the unworkability of devising more detailed standards for the guidelines at this early date.

95. The following explanation of these amendments was offered in the House Committee on Water and Air Resources by the author serving in his capacity as consultant to the Committee: A series of amendments adopted by the Joint Committee in early January and, more recently, by the House and Senate Committees have somewhat enlarged the partial exemptions from permit requirements for agricultural, forestry, and private utility activities. This has been accomplished by expanding the exceptions from the defined term "development." The stated purpose of these changes was to restrict the scope of the permitting process, not the planning process, under the bill. This amendment would eliminate reference to "development" in the planning provisions of the bill, so as to allow for comprehensive investigations and plans to be made regarding *all* land uses—not merely those land uses that constitute "developments," as defined in this bill.

96. S. 268, 93d Cong., 2d Sess. (1974).

97. N.C. GEN. STAT. §§ 113A-114, -115 (1974 Advance Legislative Service, pamphlet no. 3).

General Statutes section 113A-113 directs the Commission to designate AEC's and to specify their boundaries by rule. It then enumerates at length a series of categories that may be selected by the Commission as AEC's. In the wording of the statute, the Commission may designate "any one or more of the following, singly or in combination"⁹⁸:

- (1) Two categories that are particularly relevant to the North Carolina coast, "coastal wetlands" and "estuarine waters," as defined in existing statutes.
- (2) Three umbrella categories whose language was modeled after the Jackson bill: renewable resource areas; fragile or historic areas and other areas containing environmental or natural resources of more than local significance; and natural hazard areas. Each of these three general categories is followed by an enumeration of subcategories that, where possible, are tied to existing North Carolina statutory procedures or that are to be identified by experts in the relevant field.⁹⁹
- (3) One very general category that speaks in terms of legal concepts: first, the common law concept of "public trust" areas and "areas to which the public may have rights or access"; and secondly, a North Carolina constitutional concept—areas that the State "may be authorized to preserve, conserve, or protect under Article IV, Section 5 of the North Carolina Constitution" (the Environmental Bill of Rights).
- (4) One final category of an entirely different nature: "areas which are or may be impacted by key facilities." The term

98. The listing in General Statutes section 113A-113(b) of potential AEC categories might be read as authorizing designation of particular tracts or properties (*e.g.*, a particular site) or as authorizing designation of only general categories (*e.g.*, all historic sites in the coastal area) or both. In his proposal for interim AEC's, Secretary of Natural and Economic Resources Harrington, acting on the advice of the Attorney General's office and of a memorandum prepared by the author and his colleague Professor William Campbell, has chosen to follow the "category" interpretation as a general guide. This judgment was reached both on the basis of the wording of the statute and of underlying constitutional issues (equal protection and delegation of powers). The advice given to Secretary Harrington recognized that some portions of the section 113 listing are more susceptible to the "particular tract" interpretation than others, thus leaving open this avenue for future consideration.

99. An example of a subcategory tied to an existing statutory procedure is capacity use areas that have been declared pursuant to N.C. GEN. STAT. § 143-215.13(c) (1974). An example of the expert designation category is prime forestry land, as identified by the North Carolina Forest Service. Both of these subcategories are specified in *id.* § 113A-113(b)(3) (1974 Advance Legislative Service, pamphlet no. 3).

"key facilities" is defined in General Statutes section 113A-103(6) to include major *public* facilities (major airports, major highway interchanges, major frontage access roads, and major recreational facilities), and certain major *private* facilities (facilities for generating or transmitting energy).

The interim AEC's proposed by Secretary Harrington draw upon the first three general sources of authority, but do not draw directly upon either the third or fourth category.¹⁰⁰

B. Pre-1973 Drafts through 1973 Bill

The concept of designating environmentally sensitive areas originated in the Schoenbaum Draft, which included a procedure for designation of critical areas similar to the provision of the Act itself (without distinguishing between interim and permanent designations). Each list of categories eligible for designation resembled, but was much less elaborate than, the list in the Act.

This segment of the bill was one of its more stable elements. Terminology changed several times—from "critical areas" in the Schoenbaum Draft, to "areas of particular public concern" in the Linton Draft, to "areas of environmental concern" in the 1973 bill. But otherwise, the only material changes through the 1973 bill were that:

1. Administrative responsibility went through several gyrations before reaching its final resting place. In the Schoenbaum Draft, the Coastal Resources Planning Commission was given the authority to designate areas; in the Linton Draft, the Coastal Resources Commission; and in the 1973 bill, this was changed to the Secretary of Natural and Economic Resources with the approval of the Commission.
2. The 1973 bill introduced the short-lived proposition that AEC's should be limited to areas lying below the hundred-year flood line. This was eliminated in the 1974 bill because

100. The interim areas proposed by Secretary Harrington at public hearings held during the period August 29 to September 13 in Wilmington, Jacksonville, Morehead City, Washington, Elizabeth City and Manteo were: all coastal wetlands; all estuarine waters; the entire Outer Banks and barrier islands; all state and national parks and forests in the coastal area; all state or federally owned wildlife refuges, preserves and management areas in the coastal area; and all historic places in the coastal area. After these hearings, Secretary Harrington revised his proposal to the Commission to add waters and waterways in which the public may have rights of navigation, access or other public trust rights,

of testimony at the interim legislative hearings that the hundred-year flood line could not be delineated fully without substantial further studies.

3. Each draft made some minor changes in the descriptions of the areas subject to designation. The wording of the lead-in clause was modified from "shall be designated for" (Schoenbaum) to "may include but are not limited to" (1973 bill).¹⁰¹

C. *The 1974 Bill and Its Amendments*

In the 1974 bill, as introduced, responsibility for designation of AEC's was once more returned to the Commission. The procedure for interim designation was added as a partial response to suggestions for a telescoping of the implementation schedule or for the imposition of a moratorium on development pending the arrival of the new permit system. And the listing of categories eligible for designation as AEC's was expanded along lines previously indicated.¹⁰²

After introduction, the 1974 bill was revised once more in committee and amended in two respects on the floor of the House. The Senate Committee Substitute made a series of verbal changes. "Their net effect," in the words of a memorandum presented to the committees by the author, was "to tighten and clarify the affected standards in several respects, but to make very little change of substance."¹⁰³ These verbal changes were part of a continuing effort to elaborate and

101. The broadening phrase "but are not limited to" was eliminated before enactment.

102. See text accompanying notes 98-100 *supra*.

103. The author's explanatory memorandum went on to say: "The only clearly *substantive* change proposed is the elimination of one basis for designating an AEC: 'areas that are suitable for more than two simultaneous organic uses.' It has been pointed out that this probably would cover the major portion of tidewater North Carolina.

In summary, the other changes proposed are as follows:

(a) The reference on page 22, lines 2-4 to 'estuarine waters' is spelled out and tied to the existing document that identifies these waters.

(b) Each of the general classifications of AEC's on pages 22-25 is tied more closely to the listings that follow by substituting the reference 'which may include' for 'such as.'

(c) The reference to 'proposed' areas that may be included in an AEC are tightened in one of two ways. In some cases the word 'proposed' is deleted, and an equivalent existing statutory procedure is substituted (for example, instead of a proposed watershed, there is substituted an area classified by the Board of Water and Air Resources for water supply use). In other cases, such as State Parks, the categories are subdivided into existing parks, sites already acquired for new parks, and proposed sites that have been 'formally designated for acquisition' (a term that is defined on page 11 of this set of amendments).

(d) The period during which an AEC may remain effective if based on a proposed location has been shortened from 5 years to 3 years (page 11)."

refine the standards prescribed by this portion of the bill. The chief proponent of these changes was Representative Herbert Hyde of Buncombe. On the House floor an amendment was adopted that eliminated a reference to "prime agricultural land" from the listing of AEC eligibles.¹⁰⁴ Another House amendment added a subsection (d) to General Statutes section 113A-103, providing that "additional grounds for designation of areas of environmental concern are prohibited unless enacted into law."¹⁰⁵

VII. PERMIT-LETTING

A. Introduction

The teeth of the Coastal Area Management Act are contained in part four, which establishes a permit system covering developments within areas of environmental concern. The permit system will become effective on a date to be set by the Secretary of Natural and Economic Resources, not later than October 1, 1976. Thereafter, one must obtain a permit under this Act before undertaking a development within an AEC. This permit will be in addition to any other required local or state permit.

Developments that require a permit include not only construction projects, but a variety of excavation, filling, clearing, and bulkheading activities, and alteration of natural features, such as sand dunes, shores and bottoms. There are a number of exemptions from the definition of the term "development."

A "major development" permit must be obtained from the Coastal Resources Commission, after full-scale quasi-judicial procedures. A minor development permit will ordinarily be obtained from local authorities, pursuant to expedited and simplified procedures, if the local government has qualified as a permit-letting agency.¹⁰⁶

104. The effect of this deletion may not be clear, because the amendment did not delete the preceding language that authorizes designation of "renewable resource areas where uncontrolled development . . . could jeopardize future water, food or fiber requirements of more than local concern." In light of this, the deletion of the specific reference to "prime agricultural land" could be explained equally well as based on a decision to eliminate agricultural land entirely from the AEC eligibles, or on dissatisfaction with the general descriptive language that accompanied this reference ("at least 50% of which can be farmed with normal management practices").

105. The meaning of this amendment is not entirely clear. It could be interpreted as precluding Commission action that would add further *general categories* to the AEC eligibles list. Or it could be interpreted as also precluding Commission action that would specify further *sub-categories* under the general headings of "renewable resource areas," "fragile or historic areas," or "national hazards areas."

106. Major developments include those that occupy more than twenty acres, or more

The permit system of the Coastal Act evolved in two chapters. During the formative stages of the bill, attention was centered on basic structural issues, such as "what kind of a permit system?" and "who will administer it?" Later, especially after the bill was referred to committee in 1974, more attention was given to the impact of the permits on particular groups and interests, such as farmers, utilities and "the little man." There was continuing concern for developing a simplified permit system.

B. The Evolution of the Permit System

(1) The Working Drafts and the 1973 Bill

The first appearance of a permit system in the working drafts came in the Schoenbaum Draft,¹⁰⁷ which established two kinds of permits: permits for development within critical areas, and permits for developments of regional impact. Both permits would have been administered by the Coastal Zone Authority proposed in this draft. To assist in the administration of these controls, provision was made for a professional hearing officer corps.

As discussions of the Schoenbaum Draft proceeded in the fall of 1972, two elements were seriously questioned—though more on grounds of expediency than of principle—the permits for development of regional impact, and the hearing officer corps. Some members of the Blue Ribbon Committee argued pragmatically that simultaneous legislative approval of two new permit systems could not reasonably be anticipated, and that inclusion of the regional development permits in the bill might jeopardize approval of the more vital permits for critical areas. It was also argued that, while hearing officers might well be needed to administer this program, it would be premature to mandate a hearing officer corps by statute.¹⁰⁸ Both of these argu-

than sixty thousand square feet of structure; or that involve excavation of natural resources, or that already require a state environmental permit from any of seven listed agencies. "Minor developments" are all developments other than major developments. N.C. GEN. STAT. §§ 113A-118(d)(1)-(2) (1974 Advance Legislative Service, pamphlet no. 3).

107. The Kane Draft did not explicitly establish a permit system. Rather, it authorized the Commission to establish standards for land and water use to be administered at the state level, or delegated to local or regional implementation. Administration of the dredge and fill permits, the Coastal Wetlands Act, and the sand dune permits would also have been vested in the Commission.

108. In fact hearing officers are being utilized by the Department of Natural and Economic Resources, but the General Assembly has not yet explicitly authorized this practice,

ments were accepted and the Linton Draft deleted the regional development permits and the hearing officer provisions. The Linton Draft also transferred responsibility for issuing permits under the Act from the policy board (the Coastal Zone Authority) to a full-time Executive Director.

As already noted,¹⁰⁹ the provision for an Executive Director was slated for an early demise. It was deleted in the 1973 bill, amid some controversy. The 1973 bill also eliminated two grounds for denial of permits, inadequate project financing and inadequate housing for potential employees. And the 1973 bill further refined the permit provisions by establishing a two-step procedure. Initially, a permit application would be evaluated and determined by the Secretary of Natural and Economic Resources, in some cases with the help of an informal public hearing.¹¹⁰ Thereafter, if requested, a full-scale quasi-judicial hearing would be held before the Commission.

(2) The 1974 Bill

Following the interim legislative hearings of the summer of 1973, the permit provisions were overhauled along the lines previously indicated.¹¹¹ This revision responded mainly to the strong expression of interest at the interim hearings in greater local government involvement.

The structure of the new permit provisions proved to be quite durable. A few clarifying and refining amendments were adopted in committee and on the floor.¹¹² On the House floor a variance procedure was added (General Statutes section 113A-120(c)). But, other than the special interest changes to be described below, no further substantial amendments were adopted.

109. See text accompanying note 32 *supra*.

110. The informal public hearing could be held at the discretion of the Secretary, and must be held if requested by fifty land owners in the county. N.C. GEN. STAT. § 113A-121 (1974 Advance Legislative Service, pamphlet no. 3).

111. See text accompanying note 106 *supra*.

112. In the first House Committee Substitute a clarifying change was adopted to make clear that the AEC permits would be supplemental to existing local as well as state permits. N.C. GEN. STAT. § 113A-118(a) (1974 Advance Legislative Service, pamphlet no. 3). In the Senate Committee Substitute several changes were made to tighten the standards for denial of permits contained in section 113A-120, primarily by providing that various developments "will result" (rather than are "likely to result") in certain consequences. And a sentence was added to section 113A-116 to allow a city or county to become a permit-letting agency after the original deadline for filing a letter of intent had expired.

C. *Exemptions and Special Treatments*

Proposals for new regulatory laws are routinely scrutinized by lobbyists or special interest groups who, though not wishing to attack the proposals frontally, want a little exemption or escape clause for their interest group. The Coastal Area Management Act was no exception to this practice. Indeed, its course through the 1974 General Assembly was accompanied by veritable waves of lobbyists tending faithfully to the interests of their employers. First came the League of Municipalities, as previously noted.¹¹³ As the word got around that the coastal bill might be for real, there followed in close succession the utilities (primarily the power companies), trailing in their wake the telephone companies and railroads; the forestry industry (*i.e.* the large lumber companies); organized agriculture; the resort area developers; and the ever-present petitioners for a grandfather clause to protect pending projects. Hardly needing organized lobbyists was the collection of interests often referred to as "the little man."

In a familiar tactic, most of the lobbying interests waited until the bill was in committee or on the floor in 1974 before letting their wishes be known. Experienced lobbyists rarely waste their efforts on unripened bills. With a complex bill that affects many interests, the result is to clog the legislative works at a very crucial point in the bill's consideration. This vastly complicates the task of the bill's sponsors, who must simultaneously keep the bill moving to avoid losing momentum, keep the main thrust of the bill before the General Assembly, and tend to a hord of lobbyists who dog their footsteps. In the case of the coastal bill, the waves of special interest lobbyists who descended on the Senate Committee on Natural and Economic Resources and the House Committee on Water and Air Resources were a principal factor in keeping the bill in committee in both houses from January 17 to April 2. During this period, hardly a day passed when Senator Staton and Representative Whichard were not negotiating with at least one interest group, and hardly a committee meeting passed that was not preoccupied by consideration of the latest progress report on proposed amendments about to be generated by these negotiations.

D. *The Utilities and Railroads*

In the redraft of the coastal bill for introduction in 1974, a change was made in the list of AEC eligibility factors with full aware-

113. See text accompanying notes 57-58 *supra*.

ness that it might trigger resistance and lobbying from the power companies. The phrase, "areas which are or may be impacted by key facilities," was substituted for language in the 1973 bill reading, "areas significantly affected by, or having a significant effect upon, existing or proposed major public facilities or other areas of major public investment." This change was made in order to make the North Carolina act compatible with the pending National Land Use Policy Act. Since the term "key facilities," by definition,¹¹⁴ brought private power plants and transmission lines directly into the Act for the first time, the co-chairmen anticipated hearing from the power companies at an early date. Their expectations were not disappointed.

Shortly after the convening of the General Assembly in January 1974, power company spokesmen communicated with Co-chairmen Staton and Whichard seeking a general exemption from the bill for their clients.¹¹⁵ The co-chairmen responded that a general exemption would be unacceptable because of the serious constitutional implications under the equal protection clause. There followed several days of negotiations in an effort to find common ground. Out of these negotiations was fashioned a four-part proposal that was presented by the co-chairmen to their committees in a memorandum stating the effect of these amendments to be as follows:¹¹⁶

1. "Upgrading" as well as maintenance and repair of existing rights of way would be exempt under paragraph (ii). (This would mean, for example, that additional lines could be strung on an existing right of way).¹¹⁷
2. "Substations" would be added to the list of properties whose maintenance, repair and upgrading is exempted under paragraph (ii).¹¹⁸
3. The extension of distribution-related facilities to serve development covered by permits under this Act would also be exempted. This would mean that the Coastal Resources Commission (CRC) should take into account the utilities re-

114. See N.C. GEN. STAT. § 113A-103(b) (1974 Advance Legislative Service, pamphlet no. 3).

115. At that time, under the definition of "development," the bill exempted only utility work on existing rights of way. *Id.* § 113A-103(5)(b)(2).

116. Memorandum presented by the author to Senate Committee on Natural and Economic Resources and House Committee on Water and Air Resources.

117. N.C. GEN. STAT. § 113A-103(5)(b)(ii) (1974 Advance Legislative Service, pamphlet no. 3).

118. *Id.*

quired for a development when it approves the development rather than issuing one set of permits for the development and another set of permits for the utilities.¹¹⁹

4. Proposed paragraph (iii) would clarify the relationship between the jurisdiction of the CRC and the jurisdiction of the State Utilities Commission over siting of generating and transmission facilities. It would provide that if the Utilities Commission exercises siting jurisdiction, the CRC shall not. This ensures that there will be one site control process for generating plants and transmission lines, but not dual regulation.¹²⁰

Co-chairmen Staton and Whichard believed that they were on solid legal and policy grounds in recommending these changes. The site control principle would be established by law for the first time; a proliferation of permit proceedings involving utilities and new developments would be avoided; and the bill could proceed on its way without the very troublesome burden of potential opposition of the floor stimulated by the utilities. Their recommendations were accepted by the committees, though not without dispute. Representative Rhodes and others expressed some reservations in the House Committee, but were satisfied when a further amendment was added to make clear that "site controls" included environmental aspects of siting. Senators Hamilton Horton and McNeill Smith resisted the changes vigorously in the Senate Committee and almost succeeded in defeating the "upgrading" amendment.¹²¹ But the amendments ultimately cleared both committees and were never contested again.

Spokesmen for telephone companies kept in close touch with the status of the utilities amendments, hoping to share in whatever benefit accrued to the utilities. Eleventh hour questions raised by their counsel concerning the "fit" of the utilities language to the usual telephone right of way situation raised apprehensions of a deadlock, but Senator

119. *Id.*

120. *Id.* § 113A-103(5)(b)(iii). The utilities also insisted on some verbal changes in the permit section, General Statutes section 113A-118, the net effect of which was to eliminate permit controls over utility sites in one breath (by deleting a reference to the State Utilities Commission) and restoring it in another breath by adding a paragraph at the end of the section. The utilities originally asked merely that the reference to the Utilities Commission be deleted. They were persuaded by the co-chairmen that the additional paragraph should be added.

121. Senator Horton's experience with the utilities amendments prompted him to utter the charming and widely quoted, if exaggerated, observation that the Coastal Act contained "just enough law to hold together the loopholes."

McNeill Smith persuaded the telephone company spokesmen that their concern was more imagined than real.

The debates on the utilities amendments generated an interest on the part of the railroads in similar treatment. Their spokesmen persuaded the Senate and House committees to move the reference to railroads in the definition of "development" from its association with highways in subparagraph (i) of section 113A-103(3)(d) to subparagraph (ii), in company with the utilities. It is of passing interest that no request for special treatment was ever received by the co-chairmen from State highway officials, although the 1974 bill as introduced treated highways on a par with the utilities and railroads.

Once settled in committee, the utility-railroad issues would stay settled. The "interests" were committed to their bargain; the co-chairmen were satisfied as to the soundness of the results; and the opponents of the compromise were so committed in spirit to the bill that they would not run the risk of reviving these issues on the floor.

E. Forestry and Agriculture

Until very recently, North Carolina has been a rural state dominated by the politics of farmers and villagers. It is moving toward the more complex politics that typifies the modern urban-industrial state, but there is some distance yet to be covered. During transitional periods of this nature there is commonly a legislative lag in developing policies suited to the new circumstances. For example, the North Carolina General Assembly has not yet shown itself willing to treat water pollution from agricultural activities or stream siltation from lumber company operations on a par with industrial contamination of the environment. Under these circumstances, when a legislature is considering regulatory measures with broad impact throughout society, one may expect reluctance to apply the measure with equal force to the rural and urban sectors. Sometimes resourceful and imaginative legislative tactics may succeed in scoring a few points, but a mixed record is the most that can realistically be expected.

Such problems are evident in the development of the Coastal Act's treatment of agriculture and forestry. Late in December 1973, Representative Whichard and Secretary Harrington met with the author in Senator Staton's Sanford, North Carolina office. Two urban Piedmont legislators (Staton and Whichard) meeting informally with a former resort area developer (Harrington) found themselves unable

to resolve the question of what to do about the status of agriculture under the coastal bill. Two weeks later the agricultural issue arose again at the January 3 meeting of the Joint Committee. Confronted with the possibility of a total exemption of agriculture from the bill, Senator George Rountree, Republican of New Hanover County, proposed (with Secretary Harrington's concurrence) a compromise that would modify the exemption of agricultural and forestry activities from the designation of "developments." Agriculture or forestry would be exempt *except* when excavation or filling affecting estuarine or navigable waters is involved. Senator Rountree's proposal was accepted. Despite recurring questions concerning its meaning, it remained in the bill and was enacted. The Rountree amendment probably gave as little ground as Rountree and Harrington might have hoped in their effort to preserve some potential control over agricultural and forestry activities.

Forestry issues, as such, first arose in committee after introduction of the 1974 bill. Lumber company spokesmen negotiated with the co-chairmen concerning application of the bill to their industry. After asking for somewhat more (including specific exemption of channelization projects), they settled for three changes in the scope of the exemptions from the term "development," which were described in the following terms by a memorandum delivered to the House and Senate committees:

These three clarifying amendments to the definition of "development" were requested on behalf of the lumbering industry. They specify that activities exempted from the term "development" include the normal and incidental operations associated therewith (including, in the case of forestry, "normal road construction"). They also add a reference to "growing" to the clause that partially exempts forestry activities, in order that the complete process of planting, growing and harvesting will clearly be covered.¹²²

The main thrust of these amendments was to make clear that, if a particular forestry project is exempted from permits (because it does not involve dredging or filling which affects navigable or estuarine waters), then the project as a whole is exempt, not merely certain parts of it. The forestry amendments were sponsored by the co-chairmen, and accepted by the committees with little debate (though some criticism, primarily from Senator Horton). It is of interest that spokesmen for

122. Memorandum presented by the author to the Senate Committee on Natural and Economic Resources and the House Committee on Water and Air Resources.

the forestry industry never asked the co-chairmen or the committees to delete the provision authorizing designation of prime forestry lands as AEC's.

During the latter stages of committee consideration, some lobbyists, primarily representatives of the Farm Bureau, made their presence increasingly felt in and around the committee rooms. Although they never expressed opposition to the bill, their reservations about the bill were obvious. One specific objection finally surfaced, the concern of the North Carolina Pesticide Board about the impact of the provision for coordination of environmental permits on certain pesticide permits and licenses.¹²³

The final chapter of the farm and forestry issues was written during the House floor debates. At the peak of the flood of floor amendments proposed by opponents of the bill, Representative Lilley of Lenoir proposed to delete from the list of areas eligible for AEC designation both prime agricultural land and prime forestry land.¹²⁴ In a tactical move designed to preserve at least the forestry reference, Representative Whichard moved for a division of the amendment into its two parts. Prime agricultural land was then deleted by a vote of sixty-six to thirty-eight, and prime forestry land was retained by a vote of sixty-eight to thirty-six. The uncertain effect of the farm land amendment has already been discussed.¹²⁵

F. Resort-Area Developers

Dating back to the interim legislative hearings, resort area developers showed a consuming interest in the coastal and mountain area bills. One prominent developer appeared through consultants at the Morganton hearing on the mountain area bill to express interest in the bill.¹²⁶

Soon after introduction of the 1974 bill, the same firm and one other, while expressing support of the bill in concept, requested a series

123. An orchestrated campaign on the pesticides issue became evident. Not only did the Farm Bureau take up the cudgels for the Pesticide Board, but several harrassed legislators who were neither members of the key committees nor participants in the floor debates asked the author to explain the coordination of permit procedures to some of their exterminator constituents.

124. House amendment number 43 was proposed on April 9, 1974. H. JOUR. [1974] N.C. General Assembly 1854-55.

125. See note 104 *supra*.

126. *Hearings of the Joint Committee on the Mountain Area Management Bill*, September 17, 1974, Morganton, North Carolina. (Appearance of Sea Pines Plantation through Bernard Harrell (of counsel) and W.C. Dutton, Jr. (planning consultant)).

of amendments to the coastal bill.¹²⁷ Their requests covered many parts of the bill, but concentrated on procedural provisions which they thought would impose undue delays and inconvenience for developers. Five of the changes they sought were recommended by the co-chairmen and approved by both committees without objection. These amendments were explained to the committees as follows:

This is a series of amendments that were proposed by counsel for two luxury resort development firms, Sea Pines Plantations and Venture Management, Inc. The amendments would clarify and speed up the permit procedures without substantive change. In summary, these amendments would:

- (1) Conform the discretionary exemption procedure to the mandatory exemptions (from the defined term "development"), by deleting references to "structures" (page 1 of amendments).
- (2) Specify that the State criteria for local enforcement programs shall emphasize the need for expeditious processing of permits (page 3).
- (3) Specify a time limit of 15 days for making comments on proposed developments (page 4).
- (4) Prohibit permit agencies from requiring applicants to waive the statutory deadlines for processing permit applications (page 5).
- (5) Make it plain that the requirement to notify the CRC of proposed developments during the interim period of the next two years does not require advance notice of planning activities, but only advance notice of construction, installation or other "land disturbing" activities (page 6).¹²⁸

These firms shared an interest with other developer spokesmen in two changes of a more substantial character, shifting the burden of proof from permit applicants (as provided in the 1974 bill) to the agencies, and narrowing standing to appeal permit determinations. The standing provisions were never changed, but a series of efforts was made to shift the burden of proof, with partial success. The Senate adopted a clarifying floor amendment designed to limit the application of the bill's burden of proof provision to its immediate context, so that, by implication, it would not affect other proceedings (such as a test case raising constitutional issues). The House also adopted

127. Letters from representatives of Sea Pines Plantation and Venture Management, Inc. to Co-chairmen Staton and Whichard, February 4 and January 30, 1974, respectively.

128. Memorandum from the author to the Senate Committee on Natural and Economic Resources and the House Committee on Water and Air Resources.

a floor amendment partially shifting the burden of proof, which is described below.¹²⁹

Spokesmen for other developers in the coastal area dogged the trail of the coastal bill until its enactment. Following the final public hearing of February 7 in the Legislative Building, a vigorous campaign against the bill in its then existing form was mounted by developers centered in the New Bern area. A flurry of mailings highly critical of the bill was widely broadcast, including an open letter to all mayors and chairmen of boards of county commissioners in the coastal area.¹³⁰ The campaign reached its peak when the bill was reported to the House for floor debate, where it was to be subjected to a total of fifty-one proposed floor amendments, twenty-two of which were adopted. Although the floor amendments were proposed by a number of legislators from various House districts, the New Bern-centered campaign was the generating force for a majority of the amendments. No stone was left unturned in this marathon amending effort, as can be seen from the following statistics concerning the twenty-nine floor amendments that were defeated:

- (1) One amendment to delete the principal legislative findings.
- (2) Five amendments to narrow the territorial scope of the bill, by exempting individual counties, etc.
- (3) One amendment to require a statewide referendum on the Act, and another amendment to make the Act apply on a statewide basis.
- (4) One amendment to eliminate most of the bases for designation of AEC's and the previously noted amendment to eliminate prime forestry land.¹³¹
- (5) Two amendments to sharply curtail the scope of the planning provisions.
- (6) Three amendments making major changes in permit procedures.
- (7) Two amendments to revise substantially the standing to appeal provision.
- (8) Seven amendments that would have essentially dismembered the civil penalty provisions.

129. See text following note 132 *infra*.

130. Letter from A.D. Ward, Esq., of Ward and Ward Attorneys at Law, to mayors and chairmen of boards of county commissioners, February 15, 1974.

131. See text accompanying notes 122-25 *supra*.

- (9) One amendment concerning the composition of the Commission and one amendment concerning the composition of the Advisory Council.
- (10) One amendment to delete a key element of the utilities compromise.
- (11) Two amendments to require three-member hearing panels.
- (12) One amendment to grandfather all subdivisions approved prior to adoption of the state guidelines.

G. *"The Little Man"*

Concern about the impact of the coastal bill on small land owners in their individual transactions was regularly expressed by legislators throughout the long consideration of the bill. A series of steps was taken in response to these altogether natural expressions on behalf of the "little man." The principal changes made prior to the introduction of the 1974 bill can be briefly summarized. The draft that was presented to the Joint Committee on January 3, 1974, added the following provisions:

- (1) An exemption for "emergency maintenance and repairs" to the accessory building exemption that had been carried forward from the earliest drafts. General Statutes section 113A-103(5)
- (b). Various alternatives had been discussed at length—notably a flat exemption for all structures below a specified size—but rejected as unworkable.
- (2) The discretionary authority of the Commission to define and exempt certain classes of minor maintenance and improvements based on such factors as size and likelihood of environmental damage.¹³²
- (3) The provision authorizing local government jurisdiction over permit applications for minor developments. It was hoped that local permit proceedings would be simpler and more convenient for small land owners in their minor transactions.

132. A request that this provision be invoked has already been made at the Wilmington hearing on designation of AEC's, August 29, 1974. Spokesmen for Brunswick County beach developers urged that the Commission exercise this authority so as to exempt minor single lot transactions from the notice requirement for developments in interim AEC's.

The efforts of the Joint Committee largely succeeded in resolving these questions. The issue was raised in several forms during the House debates, however, and one final blow was struck for the little man by Representative Herbert Hyde. He proposed an amendment to shift the burden of proof to the Secretary of NER (from "the person at whose instance the hearing is being held") in connection with appeals to the Commission from local decisions on minor development permits. His argument that this would help the small land owner fight the bureaucracy persuaded the House to approve the amendment. Hyde's amendment also struck a skillful and telling blow on behalf of the opponents to the bill. Representative Whichard had opened the House debate by announcing his determination to resist all further amendments, and he was successful in his effort until the advent of the Hyde amendment.

H. The Grandfather Clause

Surprisingly enough, the coastal bill reached the floor of the Senate in 1974 without a grandfather clause in any form. But during the Senate debates Senator Hardison presented Senator Staton with a very broadly worded proposed amendment that would have exempted a large and indefinite class of pending projects.¹³³ After discussions between the two senators, a more limited and more closely defined grandfather clause was drafted that restricted the exemptions to completion of developments covered by outstanding building, zoning, or subdivision permits, or developments involving existing loan commitments for which pending building or zoning permits were approved by July 1, 1974. As a precaution, Senator Staton requested, and Senator Hardison agreed, that a special severability clause be added to protect the Act as a whole against the risk of invalidation on equal protection grounds because of the grandfather clause or any of the other exemptions from the definition of "development." With Senator Staton's support, the revised grandfather clause was approved by the Senate. As noted earlier, an unsuccessful effort was made on the floor of the House to expand this exemption once again.¹³⁴

133. The Hardison amendment as originally proposed would have added the following language to the bill: "The provisions of this Article shall not apply to any development or development activity within any development or any modification or addition thereto which does not enlarge the total acreage within said development which development is in being at the time of the final adoption of the State plan pursuant to the provisions of this Article."

134. See text accompanying notes 130-31 *supra*.

I. A Simplified Permit System

The desirability of working toward simplification of development permits, preferably a single permit for development, was often stressed at the public hearings and committee meetings on the coastal bill. The 1973 bill and all subsequent versions contained a requirement in General Statutes section 113A-125 for all existing state regulatory permits in the coastal area to be administered in coordination and consultation with the Coastal Resources Commission after the Coastal Act's development permit system is activated. Until the bill reached the Senate floor, this was coupled with a provision that would have automatically merged existing dredge and fill permits, sand dune permits and coastal wetland orders with the Coastal Act's development permits.

Modifications of three kinds were made in these provisions by committee amendments during 1974. First, the merger-of-permits provision was eliminated in Senate committee by request of the bill's chief backers who had become concerned about the possible adverse impact of the pending amendments concerning the organization of the Commission upon the dredge and fill, wetland and sand dunes controls. Secondly, minor clarifying changes were secured in House committee by some regulated groups (mainly, public utilities). For example, the bill was amended to make it clear that the coordination provision does not give the Commission a veto power over other permit-letting agencies. Thirdly, another regulated group (pesticide users) persuaded the Senate committee to add a requirement that the Commission report its recommended procedures for implementing the coordination provisions to the 1975 General Assembly, thereby guaranteeing another legislative review of the subject.

A unified or "one-stop" permit system remains a long-term objective of the Coastal Act. However, the Act does not directly achieve this objective even for state permits alone, but only sets the stage for further efforts in this direction. Beyond the unification of state permits lies the more ambitious goal of meshing state, local and federal permits.

VIII. REMEDIES AND ENFORCEMENT

A. Enforcement Methods Available Under the Act

The Coastal Act makes available to its administering units (both local and state) a set of rather standard enforcement tools to use against violators of the Act or of regulations, rules or orders adopted

thereunder: criminal penalties, injunctive relief and civil penalties to be assessed initially by the Commission. The civil penalties are a departure from earlier traditions, but are typical of recent environmental legislation.

Of these three sanctions, only the civil penalties (which were first inserted in the 1974 bill) proved controversial. On the floor of the House, a number of amendments were offered by critics of the bill. As previously noted,¹³⁵ the House rejected seven of these amendments, most of which would have seriously weakened the civil penalty procedure. The House accepted several amendments that elaborated and refined some procedural aspects of the civil penalty section.

In the earlier stages of consideration of the bill, the only other controversy concerning enforcement procedure involved the Schoenbaum Draft. That Draft contained some novel provisions that (1) authorized the payment of up to half of any fine levied to informers, and (2) encouraged the citizens of North Carolina "to keep a vigilant watch" for violations of the Act by establishing a procedure for filing and processing citizens' complaints. These provisions were eliminated by the Blue Ribbon Committee, which believed their exotic quality (in terms of North Carolina traditions) might be bad for the health of the bill as a whole.

B. The "Takings" Procedure

If the coastal bill would have remedies for the enforcers, then its instinct for balance would ensure remedies for the regulated land owner. Enter, then, the "takings procedure."

During the February meeting between Representative Whichard and Speaker Ramsey,¹³⁶ one of the issues identified by the Speaker as needing attention was the concern of some coastal land owners that the bill would freeze their rights to develop the land, which would amount to a taking of their property. Representative Whichard had come prepared. He indicated his willingness to support an amendment that would establish an expedited procedure for raising questions in court and ensuring the land owner of either ultimate payment for his losses or of freedom from undue agency-imposed restrictions on the use of his property. Similar procedures already existed under the

135. See text accompanying note 131 *supra*.

136. See note 54 *supra*.

Coastal Wetlands Act,¹³⁷ and this precedent would be helpful. Speaker Ramsey indicated that the approach seemed promising.

Representative Whichard presented a "takings" amendment to his committee which approved the amendment after allowing it to lay over for one committee meeting.¹³⁸ The proposal met with rougher sledding in the Senate committee, where Senator Horton especially lamented the amendment,¹³⁹ but it was finally approved.¹⁴⁰

137. N.C. GEN. STAT. § 113-230 (Supp. 1973).

138. The "takings" amendment was described by the author in a memorandum to the Senate and House committees reading as follows:

Expedited Procedure for Raising "Takings" Questions

This amendment gives a landowner access to the courts to raise the question: was an order of the Commission so restrictive of property rights as to be the equivalent of a taking of property for public use without just compensation?

If governmental action does have this effect, it would violate constitutional just compensation requirements. The bill already expresses (in G.S. 113A-128) the intent not to authorize any actions that would amount to a "taking" of property. This amendment simply provides a machinery for implementing the original intent of the bill.

Under the amendment, "takings" questions could be raised in Superior Court within 90 days after a landowner is notified of an order of the Commission. The Court would be directed to expedite the trial of these cases. If the court finds the Commission's order to be so restrictive of property rights as to amount to an unconstitutional "taking", the Court would direct the Commission to exclude the plaintiff's land from its order. The Commission could then institute condemnation proceedings, if it wished, or could reconsider the scope or nature of its order.

The procedure proposed by this amendment is identical to one established by existing law, under the Coastal Wetlands Act (G.S. 113-230).

139. Senator Horton raised questions similar to those that had been raised on the national scene, as to the philosophical and interpretative underpinnings of the argument that property can be taken by regulatory action. See F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKINGS ISSUE* (1973).

140. The takings provision of the coastal bill, as finally approved in committee, was a duplicate of sections 113-230(f) and (g) of the Coastal Wetlands Act except in the following respects:

- (1) Minor adaptations were made where necessary to fit the context of the coastal bill (e.g., references to the Coastal Resources Commission or the Secretary of NER in lieu of references to the Board or Director of Conservation and Development).
- (2) The right to bring an action to contest an alleged taking was limited to persons whose interests are affected by a "final decision or order," rather than merely an order (quoted phrase added by committee amendment).
- (3) The persons entitled to bring such an action may include persons having an interest "by operation of law," as well as a record interest or registered claim to the affected land (quoted phrase added by committee amendment).
- (4) The phrase "being not otherwise authorized by law" was added to the first sentence of the amendment, modifying the reference to orders of the Commission that deprive a landowner of the practical uses of his land and therefore amount to a taking without compensation. This phrase was added in order to make it plain that the benefits of the takings procedure are not available in cases where, for any reason, a "taking" is authorized by law. (The term "law" here should be taken to mean law in the broad sense—e.g., the constitution, legislation, case law, etc.).

The "takings" amendment received one last review on the floor of the House, where Representative Davenport pelted it with a series of amendments, several of which were adopted. Most significantly, the burden of proof was explicitly placed upon the Commission to prove that its order is not an unreasonable exercise of the police power, and a jury trial was guaranteed on issues of fact.

IX. DENOUEMENT

The enactment of the North Carolina Coastal Area Management Act was an object lesson in legislative persistence. After years of background study, capped by the labors of the Blue Ribbon Study Committee, followed by the frustrations of the 1973 bill and the extraordinary interim legislative hearings, and then by the hectic and seemingly endless deliberations of the 1974 sessions, the bill finally received the approval of the House with twenty-two amendments and was sent to the Senate for concurrence, only to be met at the threshold by a shattering development. The Senate, which had earlier approved the bill by a vote of thirty to eleven, now refused to concur in the House amendments by a vote of twenty-four to twenty and directed that a conference committee be requested of the House. In context, this could only have meant certain death for the bill. It was Wednesday, April 10, and final adjournment of the General Assembly was anticipated on Friday or Saturday of that week. In the waning hours of this legislature no conference committee would be likely to meet, much less resolve the issues and secure Senate and House concurrence.

The supporters of the coastal bill did not permit themselves the luxury of despair. Overnight Senator Staton, Governor Holshouser and Lieutenant Governor Hunt rallied their forces and girded themselves for a motion to reconsider the Senate's failure to concur. Thursday morning came, and there were cautious expressions of optimism for the success of this move.

If the supporters were in earnest, the opposition was equally in earnest. Steadfast opponent, Senator William Mills of Onslow, learning of the move afoot for reconsideration, took the bull by the horns and himself moved to reconsider the failure to concur, timing his mo-

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- (5) As a precautionary measure, Bill Section 2 was added to the coastal bill, to insure that authority would clearly exist for exercise of condemnation power in those cases where the Commission's action is found to amount to a taking. This section amends the basic state condemnation statute, *id.* § 146-22.1 (1974), by adding a reference to lands necessary for acquisition of all or part of an area of environmental concern.

tion for a lull in Senate action when he thought that a majority of the Senators present might be coastal bill opponents. The Mills strategy misfired, and the motion to reconsider was approved.¹⁴¹

Shortly the motion for concurrence in the House amendments was back on the Senate calendar. Long time coastal bill critic, and formidable debater, Senator Julian Allsbrook of Halifax, rose to debate the first of the amendments up for concurrence. Forty-five minutes and eight amendments later, sensing the growing resistance of the Senate to hearing any more of the matter, Senator Allsbrook reluctantly abandoned his last-ditch efforts to find yet one more toe-hold for the opposition somewhere in the welter of House amendments. The remaining House amendments were approved in one motion by the Senate; both Houses had finally agreed on the same bill; and that bill was on its way to ratification as the Coastal Area Management Act of 1974.

141. S. JOUR. [1974] N.C. General Assembly 450.