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Deepwater Port Development in North Carolina: The Legal Context

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DEEPWATER PORT DEVELOPMENT IN NORTH CAROLINA:

THE LEGAL CONTEXT

by

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Foreword

It has been a pleasure to edit this excellent manuscript and to present it as the fourteenth University of North Carolina Sea Grant Publication produced by the Law of the Sea research project at the School of Law of the University of North Carolina. The author Amos C. Dawson III, who receives his J.D. degree in May, 1975, has previously contributed a significant Sea Grant article entitled, "Norwegian Fisheries Policy: The EEC Membership Negotiations and After" to the 1974 Sea Grant publication, UNC-SG-74-01, "Some Aspects of International Fishery Law."

In his present work Dawson sets forth the wide spectrum of existing law which pertains to and must be taken into account in planning for and establishing deep water or off-shore ports. This new and difficult problem of accomplishing effective and safe use of a vital complex of marine resources inevitably arrays the forces responsible for energy development against those of the ecological conservationists, each earnestly supporting what they respectively deem to be in the national interest. It is ideally the function of the law to resolve such conflicts of interest, and to do this by harmonization and accommodation, if possible. Where the conflict arises out of a relatively novel situation, such reconciliation usually takes the form of legislative programs, although judge-made case law also comes into play.

This monograph examines the several sources of law which bear upon this law of the sea problem. The international commitments of the United States, both customary and conventional, must be taken into account. This includes the continuing imponderables as to what may, and may not, be agreed upon at the pending 1975 Geneva Law of the Sea Conference.

A second vital source of applicable law is the Federal Government, both from acts of Congress and federal court decisions. The case of United States v. Maine, et al., decided March 17, 1975, by the Supreme Court of the United States, in the exercise of its original jurisdiction, reaffirmed the position that the sea bed and its contents in the Atlantic Ocean more than three miles from shore are owned by the federal government and not by the respective coastal states. This decision and the Deep Water Port Act, passed by the Congress in December, 1974, resolve some, but by no means all, of the complex federal-state relationship legal problems. The continuous interaction between federal and state laws, and the need for their coordination, in deep water port development is pointed out by the author.

Several existing North Carolina state statutes which do, or may, apply to deep water ports are discussed in some detail and the involvement of local governmental authorities is also considered. It is hoped this study may be helpful to state officials and agencies responsible for planning for, and developing controls over, deep water port activities in the seas adjacent to North Carolina.

This exposition of the historical development of offshore legal doctrine, the international law of the sea, current legislation, both federal and state, applicable to deep water ports, oil-spill control and related problems, while primarily directed to the North Carolina coastal area should be useful to all coastal state planners in establishing state legal controls to complement and implement federal deep water port legislation. Not only lawyers, but

governmental planners, state legislators and concerned members of the general public should find this publication both informative and stimulating. It, of course, does not have all the answers. It does raise most of the questions, contains many of the answers and states helpful guidelines to aid in the resolution of policy and legal decisions remaining to be made in this critical and complex area of sea law.

Thanks are due to Dean Robert G. Byrd of the School of Law of the University of North Carolina, and to Dr. B. J. Copeland, Director, and Dr. William Rickards, Assistant Director of the University of North Carolina Sea Grant Program, for their support of this research.

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Introduction

The construction, operation, and regulation of a deepwater port facility or superport, as such installations are commonly called, involve legal questions of international, national, state, and local scope. The possibilities for jurisdictional conflict are myriad, though the panorama has been significantly limited by the recent passage of the Deepwater Port Act of 1974. This bill provides the legal framework and parameters for the establishment of deepwater ports through a federal licensing program. The program is to be administered by the Secretary of Transportation (the Secretary), who is to coordinate the large number of federal agencies having jurisdictional authority over the various aspects of deepwater port development. Only persons holding licenses issued in accordance with the provisions of the Act may engage in the ownership, construction, or operation of a deepwater port.[1] Generally, the Act establishes the conditions for issuance of a license by the Secretary[2] and sets forth the procedures for issuing regulations governing the construction and operation of the superport facilities themselves.[3] Other provisions of the Act establish environmental and antitrust review criteria and give superports common carrier status.[4] Section 9 of the Act, to be discussed in detail later, defines and establishes the status of "adjacent coastal states." Other important provisions of the Act, also to be discussed in detail, establish remedies and liabilities under the Act,[5] provide for citizen civil actions,[6] dictate the procedure for judicial review,[7] and state the relationship of the Act to other laws.[8]

The legal questions and conflicts associated with superports have been extensively examined by the Federal Government, by the governments of the coastal states, by deepwater port commissions and authorities created pursuant to state laws, by private corporations interested in owning and operating superports, and by a number of legal scholars. With the Deepwater Port Act now before us in its final form,[9] it is at last possible to discuss the legal aspects of deepwater port development in the context of an existing federal regulatory scheme. This paper will attempt to provide a comprehensive and critical examination of the background of the Deepwater Port Act and of the legal framework within which deepwater port development may now proceed, with emphasis upon pertinent North Carolina law.

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[1]The Deepwater Port Act of 1974, § 3(10) defines deepwater port as "any fixed or floating man-made structures other than a vessel located beyond the territorial sea and off the coast of the U.S. and which are used or intended for use as a port or terminal for the loading or unloading and further handling of oil for transportation to any State.... The term includes all associated components and equipment, including pipelines, pumping stations, service platforms, mooring buoys, and similar appurtenances to the extent they are located seaward of the highwater mark. A deepwater port shall be considered a 'new source' for the purposes of the Clean Air Act, as amended, and the federal water Pollution Control Act as amended."

[2]Id., § 4.

[3]Id., § 5.

[4]Id., § 6-8.

[5]Id., § 15-18.

[6]Id., § 16.

[7]Id., § 17.

[8]Id., § 19.

[9]For the purposes of this discussion I have used the version of the Act appearing in the Conference Report to accompany H.R. 10701, Deepwater Port Act, Senate Report No. 93-1360, 93D Congress, 2d Session. (September 16, 1974).

I. The International Legal Context

1. Jurisdiction Over Superports

A basic assumption of the discussion in this study will be that any deepwater port constructed off the coast of North Carolina would be located at a site more than twelve miles out from the shore and would thus be located upon the high seas in international waters. This assumption is based upon the fact that superports must be located in waters with a depth of at least 100 to 110 feet in order to accommodate the larger deep draft supertankers. Studies indicate that such depths exist off the North Carolina coast at distances ranging from a minimum of twelve miles at Cape Hatteras to a maximum of fifty-five miles at the border with South Carolina.[10] A superport constructed off the North Carolina coast would thus be located on the high seas at least as presently defined. This fact raises important questions of international law, for "the high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty."[11] Thus, in order to avoid being in conflict with existing international law, the United States could not assert territorial jurisdiction over a high seas area for the purpose of constructing and operating a deepwater port. Hence a principal issue in the debate over deepwater ports was how the United States was to justify its jurisdictional right to control activities conducted on the high seas, an area open to the use of all nations of the world.

According to customary international law, and as codified in several international conventions, the oceans of the world are divided into the following jurisdictional zones: internal or inland waters, territorial seas, contiguous zones, and the high seas. The internal waters consist of those lying landward of the baseline of the territorial sea, but also include the outermost points of certain bays and harbors.[12] The internal waters of a coastal nation are completely subject to the jurisdiction of that nation and foreign vessels may be totally excluded from these waters.

A nation's territorial sea consists of those waters adjacent to its coast extending from its baseline seaward to the outer limit of the nation's territorial jurisdiction.[13] "The sovereignty of a coastal state extends to the air space over the territorial sea as well as to its bed and subsoil."[14] At the present time there is no general international agreement as to the exact width of the territorial sea. The United States presently claims a territorial sea of three nautical miles, while claims of other nations range anywhere from three to two-hundred miles. At the third United Nations Conference on the Law of the Sea at Caracas in the summer of 1974, there appeared to be a general consensus favoring a twelve mile limit. But no agreement was reached, in large

[10]Robert R. Nathan Assoc. & Coastal Zone Resources Corp., Coastal Plains Deepwater Terminal Study, Draft Final Report, Appendix B, 58 (October 15, 1974); [hereinafter cited as Coastal Plains Deepwater Terminal Study].
[11]Art. 2, Convention on the High Seas; 13 UST 2312; TIAS 5200; 450 UNTS 82; April 29, 1958; [in force, Sept. 30, 1962].
[12]Art. 3-13, Convention on the Territorial Sea and Contiguous Zone; 15 UST 1606; TIAS 5639; 516 UNTS 205; April 29, 1958; [in force, Sept. 10, 1964].
[13]Id., Art. 1.
[14]Id., Art. 2.

part due to United States' objections in regard to the exact nature of such a territorial sea, particularly in respect to the right of passage through international straits.

Under Article 24 of the Territorial Sea Convention, a coastal state may exercise jurisdiction over a zone contiguous to the seaward limit of its territorial sea for certain special purposes, such as enforcement of customs and sanitary regulations. The outer limit of such a contiguous zone may not extend beyond twelve miles from the baseline from which the territorial sea is measured. The United States' contiguous zone extends nine miles seaward from the outer boundary of our three mile territorial sea.

The waters beyond the territorial sea and the contiguous zone are denominated the high seas. The legal status of the high seas has been codified in the Convention on the High Seas and is of course subject to the rules of customary international law based on subsequent state practice.

In addition to jurisdiction over its territorial sea and contiguous zone, a coastal nation also has exclusive jurisdiction over the seabed and subsoil of its continental shelf out to a depth of at least two hundred meters, and beyond to the depth at which natural resources may be recovered.[15] However, the sovereign right of the adjacent coastal nation to explore and exploit its shelf resources does not affect the legal status of the superjacent waters as high seas, nor is the air space above these waters affected.[16] In fact, the Convention on the Continental Shelf concerns only the rights of the coastal state to explore and exploit the natural resources of its shelf, defined inter alia as consisting of "the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to the sedentary species,...."[17]

Article 5 of the Continental Shelf Convention provides that a coastal state is "entitled to construct and maintain or operate on the continental shelf installations or other devices necessary for its exploration and exploitation of its natural resources."[18] But this portion of the Convention, as well as the agreement as a whole, has generally been construed to constitute authority only for construction and operation of installations and facilities related to resource extractive purposes.[19] Thus the Continental

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[15]Art. 2, Convention on the Continental Shelf; 15 UST 471; TIAS 5578; 499 UNTS 311; April 29, 1958; [in force June 10, 1964].
[16]Id., Art. 3.
[17]Id., Art. 2(4).
[18]Id., Art. 5.
[19]See E. Ereli, The Legal Framework Affecting Offshore Oil Terminals, Texas Law Institute of Coastal and Marine Resources, 1-2, (1973), [hereinafter cited as Ereli]; G. Knight, International and State-Federal Aspects of a Gulf of Mexico Superport, 5-15, (1972); and Kreuger, The Background of the Doctrine of the Continental Shelf and Outer Continental Shelf Lands Act, 10 Nat. Res. J. 442, 468-469 (1970).

Shelf Convention does not, on its face, provide a sufficient basis upon which to claim jurisdiction over a deepwater port installation used only for import purposes and not used for the exploration and exploitation of shelf resources.

It is important to note that the number of alternative justifications sufficient under international law to provide a jurisdictional basis for the construction and operation of an offshore port on the high seas was significantly limited by the United States' desire to maintain inviolate its bargaining position at the Third United Nations Conference on the Law of the Sea at Caracas. The United States' position at the conference was basically that of preserving the more traditional notions of high seas freedoms and of limiting the claims of coastal nations to new extensions of sovereignty over the oceans to the economic sphere. This United States' position was greatly influenced by a desire to maintain freedom of navigation through those international straits which might become subject to the territorial jurisdiction of the adjacent littoral nations if an extension of the breadth of the territorial sea were multilaterally approved without reservation of the freedom to transit these straits. The United States considered such a reservation as vital to its national security interests in general and to the effectiveness of its nuclear submarine fleet in particular.

Therefore, in the eyes of the State Department and its Law of the Sea Task Force, any United States' claim of jurisdictional authority to construct and regulate a deepwater port facility on the high seas must not include a unilateral claim of territorial jurisdiction over any part of the high seas. Such a claim would most certainly, it was feared, detrimentally affect the United States' negotiating position at Caracas and might set a precedent resulting in a high seas "land grab" by other coastal nations.

The State Department rejected as too broad the rationale of basing a jurisdictional claim over superports on the "roadstead principle" embodied in Article 9 of the Territorial Sea Convention, because such a rationale would result in an extension of the territorial sea.[20] It was also generally felt that Article 5 of the Continental Shelf Convention, countenancing installations and facilities related to resource extractive purposes, was too narrow to support a jurisdictional basis over superports. Thus the State Department and a Federal Interagency Legal Study Group on Superports apparently decided that the most favorable rationale on which to base a United States' claim to jurisdiction over superport sites on the high seas was that the use of an area of international waters for offshore port purposes was a reasonable use of the high seas and hence allowed under existing international law by the Convention on the High Seas.

This approach was urged upon Congress in October of 1973 by John Norton Moore, Chairman of the National Security Council Interagency Task Force on the Law of the Sea and Counselor on International Law to the United States State Department, in testimony before a Special Joint Subcommittee of the

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[20]Article 9 provides: "Roadsteads which are normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea." See, Hearings on H.R. 5091 and H.R. 5898, before the House Committee on Merchant Marine and Fisheries, 93d Cong., 1st Sess., ser. 93-15, at 69-86 (1973).

Senate Committees on Commerce, Interior and Insular Affairs, and Public Works, which had been formed to oversee the Deepwater Port Bill in the Senate.[21] Professor Moore pointed out that nothing in S. 1751, the Nixon Administration's proposed Deepwater Port Bill, was to be construed as affecting the existing legal status of the high seas, the seabed and subsoil of the continental shelf, or the superjacent air space. The "fundamental approach" was to be that the construction and operation of a deepwater port is a reasonable use of the high seas and therefore permitted under Article 2 of the Convention on the High Seas. Article 2 states:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under conditions laid down by these articles and by other rules of international law. It comprises, inter alia, both for coastal and non-coastal states:
>
> 1) Freedom of navigation;
> 2) Freedom of fishing;
> 3) Freedom to lay submarine cables and pipelines;
> 4) Freedom to fly over the high seas.
>
> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of all other States in their exercise of the freedom of the high seas.[22]

Professor Moore concluded that as long as the use of an area of the high seas for superport purposes did not unreasonably interfere with the high seas' freedoms specifically set forth in Article 2, above, or others, such as scientific research, permitted by international law but not enumerated, then such a use would constitute a reasonable exercise of the freedom of the high seas. The thesis is that there is latitude under the existing international law of the sea for nations to initiate new uses of the high seas which do not unreasonably interfere with other nations' freedom to use international waters.

In this regard, it was further pointed out that superports could be regarded as an integral concomitant of the freedom of navigation and thus an acceptable adjunct for a presently recognized freedom of the seas. In fact, it is argued, superport facilities may actually enhance navigation by reducing the possibility of collision and pollution in the highly congested waters of the territorial sea and by serving as ports of refuge and sites for weather and navigational aid stations. Furthermore, because the superport site would be located on or over the United States' continental shelf, there could be no possible interference with the continental shelf resource rights of foreign nations.

International law currently sanctions the construction of a variety of other types of installations in the high seas, "such as pipelines and their pumping stations, submarine cables, lighthouses and weather stations, radio stations and radar installations, a variety of aids to navigation, as well as

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[21]Department of State News Release, Oct. 2, 1973. See also, Joint Hearings on S. 1751 and S. 2232 before the Special Joint Subcommittee on Deepwater Ports Legislation of the Senate Committees on Commerce, Interior and Insular Affairs, and Public Works, 93d Cong., 1st Sess., ser. 93-59, pt. 1, 605-619 (1973), [hereinafter cited as Joint Hearings on S. 1751].

[22]Art. 2, Convention on the High Seas.

such activities as dredging and the construction of piers, and artificial islands."[23] Thus it is quite logical to construe the operation of a deepwater port facility as an acceptable use of the high seas and to anticipate little protest from foreign nations that it constitutes a violation of their freedom of the seas.[24]

The final version of the Deepwater Port Act of 1974 incorporates this "reasonable use" rationale and also several other State Department recommendations concerning international law implications. Section 2(a)(5) of the Act provides that:

> The Congress declares that nothing in this Act shall be construed to affect the legal status of the high seas, the superjacent airspace, or the seabed and subsoil, including the continental shelf.

As further evidence of the Congressional intent that no claim of territorial sovereignty be implied from the Act, Section 19(a)(1) specifies that:

> Deepwater ports licensed under this act do not possess the status of islands and have no territorial seas of their own.

Other portions of the Act reinforce the basic premise that the establishment and operation of a superport facility will constitute a reasonable use of the high seas. Section 4(c)(4) provides that the Secretary of Transportation may issue a license within the provisions of the Act if "he determine that the deepwater port will not unreasonably interfere with international navigation or other reasonable uses of the high seas, as defined by treaty, convention, or customary international law. Section 4(c)(8) further requires the Secretary to consult with the Secretaries of State, Army, and Defense concerning the impact of a proposed deepwater port on their respective spheres of competence before granting a license.

A requirement of Section 10(a) is that any regulations and enforcement procedures prescribed by the Secretary be subject to recognized principles of international law. The Act also provides that the Secretary shall designate a safety zone around any deepwater port for purposes of navigational safety. Such designation is to be made subject to international law and after consultation with the Secretaries of Interior, Commerce, State and Defense. No other uses inconsistent with the superport activities will be allowed within the safety zone.[25]

Section 11 of the Act, entitled "International Agreements," instructs the Secretary of State, in consultation with the Secretary of Transportation, to seek multilateral agreements and appropriate international rules and regulations pertaining to the establishment of deepwater ports. This section provides a congressional impetus to those portions of the Draft Articles on the Coastal Seabed Economic Area concerning deepwater ports which the United States

[23]Ereli, supra note 19, at 2. See also Johnson, Artificial Islands, 4 Int'l L.Q. 204 (1951); and Hearings on H.R. 5091 and H.R. 5898 before the House Committee on Merchant Marine and Fisheries, 93d Cong., 1st Sess., ser. 93-15, at 79 (1973), [hereinafter, Hearings on H.R. 5091].

[24]See generally, G. Knight, Non-Extractive Uses of the Seabed, Marine Technology Society Journal, v. 6, n. 3, (June 1972).

[25]Deepwater Port Act of 1974, Sec. 10(d)(1) [hereinafter, the Deepwater Port Act shall be cited as DWPA].

submitted at the Caracas Conference. These Draft Articles provided for coastal nations to have exclusive jurisdiction over construction and operation of offshore installations which affect their interests in the Coastal Seabed Economic Area.[26] The outcome of these Draft Articles has yet to be determined, no conclusive action having been taken on them at Caracas. Further action on these articles may be forthcoming, however, when the Third United Nations Conference on the Law of the Sea reconvenes in Geneva in 1975.

Finally, Section 22 of the Act authorizes and requests the President of the United States to conduct negotiations with Canada and Mexico to determine the necessity of bilateral agreements between the United States and its neighbors to the North and South concerning the establishment and operation of deepwater ports and their effect on the environment.

The Deepwater Port Act of 1974 thus appears to provide adequate assurances to other nations that the United States is not attempting to subject portions of the high seas to its territorial jurisdiction. The Act clearly attempts to characterize an offshore port operation as a reasonable use of the high seas and it provides licensing safeguards against unreasonable interference with the rights of other nations to exercise their internationally recognized freedoms of the seas. Thus whether the establishment of superports on the high seas by the United States constitutes a unilateral act[27] or whether it is an action multilaterally authorized by the Convention on the High Seas,[28] there would seem to be little prospect of any significant international protest.[29]

2. Jurisdiction Over Persons and Vessels Associated With Superports

Assuming that the construction and operation of a deepwater port facility does constitute a reasonable use of the high seas, certain questions of international law arise in regard to the authority of the United States to regulate the activities of persons working on such a facility and of vessels using the facility and maneuvering within its safety zone. The issues break down basically into questions of jurisdiction over United States' nationals and vessels and over foreign nationals and vessels. Thus, questions of jurisdiction under both domestic and international law arise.

There is little doubt, under either international law or domestic law, that the United States would have jurisdiction to regulate the activities of its citizens on a deepwater port facility located in international waters. A well-established principle of international law, known as either the "personal theory of jurisdiction" or "jurisdiction over nationals," recognizes that a nation may regulate the conduct of its citizens even when they are outside of its territorial jurisdiction.[30] The "personal theory of jurisdiction" is closely akin to that of "flag state" jurisdiction, which has historically made persons on vessels on the high seas subject to the laws of the flag state.

[26]Department of State News Release, Statement by J. N. Moore to Special Senate Subcommittee on Deepwater Ports, (Oct. 2, 1973).

[27]See, Commentary by G. Knight, Law of the Sea: The Emerging Regime of the Oceans, 240-42 (1973). Here Knight compares such United States' action to the declaration by Canada of a 100-mile pollution zone, an act generally recognized as illegal under existing international law.

[28]Id., Commentary by Ellis at 242.

[29]See note 24, supra.

[30]See W. Bishop Jr., International Law (3d ed., 1971) at 531-535.

Article 6(1) of the Convention on the High Seas codifies the "flag state" rule by providing that "ships shall sail under the flag of one State only and,... shall be subject to its exclusive jurisdiction on the high seas." Although a deepwater port is not a vessel, it would appear that under either the "personal theory of jurisdiction" or under analogy to "flag state" jurisdiction the United States could exercise jurisdiction over the activities of its nationals and vessels within the area of a superport consistently with recognized principles of international law. The holding of the United States Supreme Court in Skiriotes v. Florida[31] recognizes this ability of the United States to control the activities of its citizens beyond its borders. In that case, the Court stated:

> [T]he United States is not debarred by any rule of international law from governing the conduct of its citizens upon the high seas or even in foreign countries when the rights of other nations are not infringed. With respect to such an exercise of authority, there is no question of international law, but solely of the municipal law which establishes the duty of its citizen in relation to his government.[32]

Thus as a practical matter there should be few, if any, problems of jurisdiction over persons working on offshore ports. Since licenses will only be issued to United States citizens,[33] the probability is that there will be few foreign nationals working on superports. Regardless of citizenship, however, the United States' jurisdiction over offshore ports would extend to all persons working on the facility. "Customary international law does not object to the right of a state to exercise jurisdiction over structures on the high seas by its nationals, resisting only the attempt to claim a territorial belt around artificial structures."[34] Here again the situation is analogous to the assertion of flag state jurisdiction. Hence the appropriate United States' laws under Section 19 of the Deepwater Port Act will apply to all persons and property on superports, whether United States or foreign.

Control over the activities of foreign flag vessels using the superport facilities presents a question of a different nature from the exercise of in personam jurisdiction over superport personnel discussed above. As a general rule, vessels on the high seas are subject to the sole and exclusive jurisdiction of the flag state.[35] Section 19(c) of the Act attempts to deal with the jurisdictional problems raised by foreign flag vessels actually using the superport facility, including its safety zone. That section requires that:

> Except in a situation involving force majeure, a licensee of a deepwater port shall not permit a vessel, registered in or flying the flag of a foreign state, to call at, or otherwise utilize a deepwater port licensed under this Act unless (1) the foreign state involved, by specific agreement with the United States, has agreed to recognize the jurisdiction of the United States over the vessel and its personnel, in accordance with the provisions of this Act, while the vessel is located within the safety zone, and (2) the

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[31] 313 U.S. 69, (1941).
[32] Id., at 72. However, federal domestic enabling legislation might possibly be necessary. See, United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950).
[33] DWPA, §§ 4(g) and 3(5).
[34] Ereli, supra, note 19, at 12. See also Hearings on H.R. 5091 at 77.
[35] Id., at 15. See also Convention on the High Seas arts. 6, 11, 22, 24, & 27.

vessel owner or operator has designated an agent in the United States for receipt of service of process in the event of any claim or legal proceeding resulting from activities of the vessel or its personnel while located within such a safety zone.[36]

Absent some specific treaty obligation, foreign merchant and fishing vessels on the high seas not using or intending to use the offshore port facilities would not be subject to any direct enforcement measures by the United States. As a practical matter merchant vessels will probably present fewer problems than fishing vessels. The merchant vessels will be made aware of the location of superport facilities through navigational aids and warning devices established by the United States and promulgated through IMCO, the Intergovernmental Maritime Consultative Organization. In addition, merchant vessels will probably not want to increase the danger of civil liability in the event of an accident by navigating in the area of such structures.

Fishing vessels present somewhat different considerations. It is possible that the superport installations might attract certain species of fish, and hence increase the desirability of fishing in that area. Because fishing is a recognized freedom of the high seas, the United States could not unreasonably interfere with the rights of foreign fishermen to fish in the area around an offshore port. Certainly in case of extreme and imminent danger, the Coast Guard could, under customary international law, take direct measures to protect life and property in the vicinity of the superport. It is possible, of course, that the forthcoming Geneva continuation of the Third United Nations Law of the Sea Conference may establish areas of exclusive fishing jurisdiction for coastal states extending well beyond any presently proposed deepwater port sites. In such case, the problem of foreign fishing vessels interfering in the operations of a superport would no longer be significant since they could then be totally excluded from the area. In any event, within the safety zone of the superport, the United States could effectively control the activities of foreign vessels to the extent necessary to prevent unreasonable interference with its own exercise of high seas freedoms.

3. Other Relevant International Conventions

The relationship of the Deepwater Port Act to the Convention on the High Seas, the Convention on the Territorial Sea and the Contiguous Zone and to the Continental Shelf Convention has been discussed above. There are other international conventions to which the United States is a party and which may be affected by the passage of the Deepwater Port Act. Without going into detail, the other major international conventions which have been or may be affected by the Act will merely be listed here.

The Safety of Life at Sea Convention (1960) (SOLAS) and the International Convention on Loadlines (1966) provide that certain certified standards must be met by vessels using the ports of the contracting states and that vessels not meeting such standards are subject to detention until defects are cured. Because these conventions both appear to base the coastal (port) states' jurisdiction on the exercise of plenary authority, it is arguable that they would not apply to superports unless specifically amended.[37] The International Regulations for Preventing Collisions at Sea, the international rules of the road, would apply to deepwater port areas, but Section 1(c) of the Convention, providing for special rules in certain areas should probably be amended

[36]DWPA, § 19(c).

[37]Hearings on H.R. 5091, at 88.

specifically to provide for applicability to superports.[38]

Existing international law provides only a bare modicum of protection for the marine environment of the high seas. There is some customary international law relating to international liability for extraterritorial damage from pollution,[39] but there are no established criteria or standards for measuring the degradation of the environment nor do any effective enforcement provisions exist. "International customary law at its present level of development is...an unsatisfactory tool for controlling pollution of the oceans."[40]

Several international conventions do exist which would be applicable to deepwater ports constructed by United States citizens. Article 24 of the Convention on the High Seas provides that "Every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject." However, Article 24 of the High Seas Convention does not establish any standards, and since there are none under customary international law either, there are no criteria by which to judge the adequacy of a state's regulations, other than perhaps a test of reasonableness.[41]

The 1954 International Convention for the Prevention of Pollution of the Sea by Oil,[42] as amended, contains provisions concerning discharges of oil into the oceans which would, subject to a broad interpretation, be applicable to superports. A 1971 amendment to the Convention, adopted by the parties but not yet in force, will provide for construction standards for oil transport vessels subject to the Convention. After appropriate bilateral consultations are held between the parties, a contracting state could prohibit access to ports and offshore ports to any tankers not meeting established standards.[43]

The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969)[44] was the international response to such marine disasters as that of the Torrey Canyon. Under the provisions of this Convention, signatory states would have the authority to take sufficient action "to prevent, mitigate, or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences"[45] (emphasis added). A superport would certainly appear to fall within the category of a "related interest" and would thus be covered by the treaty.

The International Convention on Civil Liability for Oil Pollution Damage (1969),[46] not yet in force, provides that the owners of vessels will be

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[38] Id.

[39] Id., at 76, referring to the Trail Smelter Arbitration between the United States and Canada, 3 U.N.R.I.A.A. 1905 (1938), in which liability was imposed for the extraterritorial effects of air pollution causing injury to beneficial users in an adjacent nation.

[40] Teclaff, International Law and Protection of the Oceans from Pollution, 40 Ford. L. Rev. 529, 532 (1972).

[41] Id., at 534.

[42] 3 UST 2989, TIAS 4900, 327 UNTS 3 [1961].

[43] Hearings on H.R. 5091, at 89.

[44] Published in 9 Int'l Legal Materials 25 (1970).

[45] Id., at 26.

[46] Published in 9 Int'l Legal Materials 45 (1970).

liable for any pollution damage resulting from discharges from their ships, wherever the discharges occur, to the territory of a contracting state, and for the cost of measures taken to prevent or minimize such damages.[47] Since a superport located on the high seas would not be part of United States "territory," the Convention would apparently not apply to damage done to the superport itself by discharges from vessels using the superport but would apply to any territorial damage caused by such vessels. The limit of liability, expressed in gold, is equal to about $17 million.[48]

The 1971 Convention on an International Fund for Compensation of Oil Pollution Damage will provide supplementary coverage to the Civil Liability Convention (above), for amounts up to about $35 million when it comes into force. This fund is supported by contributions from oil receivers and will provide compensation where no liability for damages arises under the Civil Liability Convention, where the damage exceeds the limits of the Civil Liability Convention, or where a vessel owner cannot meet his liability under the Civil Liability Convention.[49]

There also exist two voluntary arrangements, supported by contributions from oil owners and transporters, which provide supplemental funds for damages resulting from oil spills. These arrangements are known as TOVALOP (Tanker Owner Voluntary Agreement Concerning Liability for Oil Pollution) and CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution). TOVALOP provides up to $10 million for the cost of removing oil discharges. CRISTAL provides up to $30 million for damages resulting from oil pollution and the cost of preventive measures taken to minimize such damages. The parties to CRISTAL currently carry about 90% of all oil transported by sea.[50]

To conclude our examination of the international legal aspects of deepwater ports one final comment may be appropriate. Since "deepwater port" is defined within the Deepwater Port Act as "any fixed or floating man-made structure other than a vessel, or group of such structures, located beyond the territorial sea and off the coast of the United States...,"[51] it would appear that any agreement reached by the Third United Nations Conference on the Law of the Sea extending the breadth of the territorial sea beyond the three-mile limit currently recognized by the United States would have a significant effect on the Act. For example, a deepwater port facility located elevent miles off the coast of the United States would constitute a deepwater port at the present time. However should an international agreement be reached extending the territorial sea to a breadth of twelve miles, such a facility would no longer be a deepwater port as defined within the Act, since it would no longer be located "beyond the territorial sea." Hence, should the breadth of the United States' territorial sea be increased in the future, an amendment to the Deepwater Port Act might be necessary to make it applicable to deepwater ports located beyond the present territorial sea but within the extended boundaries.

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[47] Ereli, supra note 19, at 32; Hearings on H.R. 5091, at 89.
[48] Id., at 32.
[49] Id., at 33.
[50] Id., at 34-35.
[51] DWPA, § 3(10), emphasis added. See note 1, supra.

II. The State-Federal Legal Relationship

1. Introduction

The federal licensing and regulatory program created by the Deepwater Port Act provides the basic structure for state-federal interaction in regard to deepwater port development. But the 1974 Act does not, of course, exist in a legal vacuum. The full relationship between the state and federal roles in regard to offshore development can thus only be fully appreciated within the broader context of the "pre-Act" legal framework relating to the states' submerged lands and the federal outer continental shelf. Some knowledge of this pre-Deepwater Port Act state-federal status is necessary for an understanding of the Congressional attempt through deepwater port legislation to resolve the more salient state-federal jurisdictional conflicts. The purpose of the Act was undoubtedly to provide a more stable and certain national and international legal framework in which deepwater port development could proceed. Whether this particular goal has been accomplished is yet to be determined; but there can be little doubt that the Act did in fact clarify some of the important national-international and state-federal jurisdictional questions which were effectively holding up concrete decisions on the development of superports.

Having already examined the national-international legal framework, and in the process hopefully having given the reader a background in the area of "sea law," the writer now intends to examine, in the context of the pre-existing state-federal legal structure relating to coastal waters, the state-federal relationship in regard to deepwater port development in North Carolina created by the Deepwater Port Act of 1974.

Simply put, the basic question before enactment of the Bill was: Who could do what and to whom? That is, did the States have jurisdiction to construct and regulate offshore ports or did the Federal Government? And if this authority belonged exclusively to the Federal Government, did the States have the power to prevent unwanted development of superports off their coastal areas? To appreciate the complexity of these legal questions, a general understanding of the pre-existing legal structure is necessary. For the purposes of this study, a brief explication of this extremely complex area of law is presented.[52]

2. The "Pre-Act" Background

In 1953 Congress passed the Submerged Lands Act (SLA)[53] and the Outer Continental Shelf Lands Act (OCSLA).[54] The former granted to the states title and ownership of the lands beneath the navigable waters of the United States within the boundaries of the respective states, and the natural resources within such lands and waters, and the right and power to "manage, administer, lease, develop, and use the said lands and natural resources all in accordance

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[52]A very thorough summary and analysis of the various state-federal conflicts in the coastal waters can be found in, T. Suher and K. Hennessee, State and Federal Jurisdictional Conflicts in the Regulation of U.S. Coastal Waters, UNC Sea Grant Pub. 74-05 (1974); [hereinafter, Suher & Hennessee].

[53]Public Law 31, 83 Cong. 1st Sess., 43 USC 1301-1315, 67 STAT 29, (1953).

[54]Public Law 212, 83 Cong. 1st Sess., 43 USC 1333-1343, 67 STAT 462, (1953).

with applicable state law...."[55] The latter Act, the OCSLA, extended the constitution, laws and jurisdiction of the United States to the "subsoil and seabed of the outer continental shelf,[56] and to all artificial islands and fixed structures...erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer continental shelf were an area of exclusive federal jurisdiction located within a state."[57]

The Submerged Lands Act amounted to a Congressional reversal of the effect of the so-called "Submerged Lands Cases."[58] In these cases the United States Supreme Court held that the Federal Government, and not the States, owned and had "paramount" rights in and powers over the three-mile marginal belt along the coasts of the United States, including full dominion over the resources of the coastal seabed.[59] In the Submerged Lands Act, Congress returned to the States the dominium, or proprietary rights, in the lands beneath the navigable waters out to a distance of three geographical miles from the coastline.[60] But Congress retained for the Federal Government the imperium over this area,[61] by specifically reserving to the United States its constitutional paramount rights and powers to regulate and control the states' submerged lands for purposes of commerce, navigation, national defense, and international relations,[62] as well as the authority to regulate navigational servitudes, flood control, and the production of power in navigable waters.[63] The reserved powers, however, were "not to be deemed to include proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective states...."[64]

In the submerged lands beyond the boundaries of state jurisdiction, constituting the outer continental shelf, the United States was to have exclusive jurisdiction, both in the dominium and the imperium. Thus the two Acts together,

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[55] 43 USC 1311(a).

[56] The outer continental shelf was defined as all submerged lands lying seaward and outside of the area of lands beneath navigable waters within the boundaries of the respective states; 43 USC 1331, 1301.

[57] 43 USC 1333(a)(1).

[58] U.S. v. California, 332 US 19 (1947); U.S. v. Louisiana, 339 US 699 (1950); and U.S. v. Texas, 339 U.S. 707 (1950).

[59] See Suher & Hennessee, supra note 52, at 18-24.

[60] 43 USC 1311, 1312. The Act did allow states to prove judicially claims out to a maximum of three marine leagues in the Gulf of Mexico, 43 USC 1301, 1312. In the subsequent case of U.S. v. Louisiana, et al, 363 US 1 (1960), the Supreme Court held that Florida and Texas were entitled to submerged lands out to a distance of three marine leagues in the Gulf of Mexico based on historical claims. However, the Court rejected similar claims by Alabama, Mississippi, and Louisiana, leaving these states with boundaries of three geographical miles.

[61] See Suher & Hennessee, supra note 52, at 22-24.

[62] 43 USC 1314(a) (1953).

[63] 43 USC 1311(d) (1953).

[64] 43 USC 1314(a) (1953).

the Submerged Lands Act and the Outer Continental Shelf Lands Act, legislatively established the jurisdictional boundaries and rights of the State and Federal Governments in regard to the seabed and subsoil beneath the coastal waters of the United States. The states were to enjoy rights of ownership, including the rights to manage, lease and develop their submerged lands, which in the case of the Atlantic Coastal States extend out to a distance of three geographical miles. The recent United States Supreme Court decision of March 17, 1975, in U.S. v. Maine, et al, rejected historical claims by the Atlantic Coastal States that they were entitled to submerged lands areas beyond the three-mile limit and reaffirmed Federal control of the submerged lands in the Atlantic Ocean beyond the three-mile limit as established in the Submerged Lands Act. The states' rights in their submerged lands were specifically made subject to the reserved paramount federal powers in the Submerged Lands Act.

The area of the outer continental shelf was to be an area of exclusive federal jurisdiction in which the states were to have no direct interest at all. However, Congress did adopt the civil and criminal laws of the adjacent coastal state for the outer continental shelf area, but only to the extent that they were applicable and not inconsistent with the Act or other federal laws and regulations.[65] Such state laws were, however, to be administered by federal officers and courts and not by the states themselves.

The Congressional rationale behind the Outer Continental Shelf Lands Act appears to have been based on the same factors which the Supreme Court considered so important in announcing the "doctrine of paramount powers" in the Submerged Lands Cases to provide judicial justification for Federal sovereignty over the submerged lands. These factors included: "the necessity of uniform regulation of interstate and international commerce, the importance of the United States being unhindered in its conduct of foreign affairs and international relations, and the paramount interest of the federal government in the conduct of military affairs."[66]

The rationale behind the Congressional action in the Submerged Lands Act, however, appears to have been based legally upon the states' historical claims to a proprietary interest in their submerged lands, and also upon "considerations of fairness, and the feeling that the states had acquired some vested rights during the long period of federal inactivity in the area."[67] Politically, the return of control over the submerged lands within the three-mile limit to the states appears to have been a compromise between the "states' rights" and "Federalists" factions of Congress as they existed at the time.

[65]It should be noted here that the Deepwater Port Act amends the OCSLA in regard to adoption of state law. Section 4(a)(2) of the OCSLA provided that state law, "as of August 7, 1953," the effective date of the Act, was to be the law of the United States. The reason for limiting applicable state law to that in effect in 1953 was that at the time the Bill was passed there was some doubt as to whether Congress could delegate to the states the power to "make" Federal law by enacting or amending state law. This uncertainty was resolved by the U.S. Supreme Court in U.S. v. Sharpnack, 355 U.S. 286 (1958), when it upheld such a Federal delegation to the states in the Assimilative Crimes Act of 1948. Thus the Deepwater Port Act amends the OCSLA by substituting the words, "now in effect or hereafter adopted, amended, or repealed," for the words "as of the effective date of this Act." [See DWPA, § 19(f)]

[66]Suher & Hennessee, supra note 42, at 25. "One may note that these same considerations were the reason for the exclusive grant of admiralty jurisdiction to the federal courts contained in the Constitution." Id.

[67]Id.

This brief introduction into the realm of state-federal conflicts over the management of coastal and offshore resources makes clear that the "paramount powers doctrine" raised some rather substantial questions in regard to jurisdictional control of offshore port development.

Prior to the passage of the Deepwater Port Act, there seemed to be a general agreement that the states had, subject principally to the paramount federal powers over navigation and commerce, the jurisdictional authority to construct and to regulate a deepwater port facility located within the boundaries of the state's submerged lands.[68] Even absent a direct and contemporaneous assertion of paramount federal powers, however, numerous existing federal laws would be applicable to any superport facilities constructed in state waters, thus restricting the latitude of the states to authorize such offshore development. For example, the power of a state to authorize the placing of any structure in its navigable waters would be subject, as an obstruction to navigation, to approval by the Chief of Engineers and the authorization of the Secretary of the Army under the Rivers and Harbors Act of 1899.[69] Furthermore, the decision of the Fifth Circuit in Zabel v. Tabb[70] established the power of the Corps of Engineers to deny a permit for dredging and filling in navigable waters on the basis of substantial ecological reasons, even though a proposed project[71] would not interfere with navigation.

A multitude of other federal laws would also be applicable to any superport facility or component part thereof located within the states' territorial waters. Among the more notable and recent of these would be: the Ports and Waterways Safety Act of 1972,[72] the Federal Water Pollution Control Act Amendments of 1972,[73] the Marine Protection, Research, and Sanctuaries Act of 1972,[74] and the Coastal Zone Management Act of 1972.[75] Additionally, any permit letting or other substantial activity by an involved federal agency would be subject to the demands of the National Environmental Policy Act of 1969,[76] under which an environmental impact statement must be prepared for proposed major actions significantly affecting the quality of the environment.

Thus, subject specifically to federal laws and regulations, including those mentioned above, and to the "paramount" federal powers generally, the states were felt to possess the authority to regulate development of deepwater ports within their existing jurisdiction under the Submerged Lands Act. However, since there were virtually no suitable superport sites located within the boundaries of the respective coastal states,[77] this power seemed of little avail

[68] See Ereli, supra note 19, at 5 and generally, G. Knight, International and State-Federal Aspects of a Gulf of Mexico Superport (1972).
[69] 33 USC 403 (1899).
[70] 430 F. 2d 199 (5th Cir., 1970), cert. denied 401 U.S. 910. See also Ereli, supra note 19, at 10, and 49 N.C.L. Rev. 857 (1971).
[71] The proposed project in Zabel was the filling of privately owned submerged lands covered by navigable waters in Florida's Boca Ciega Bay for the purpose of constructing a trailer park.
[72] P.L. 92-340, 86 STAT 424, (1972).
[73] P.L. 92-500, 86 STAT. 816, (1972).
[74] P.L. 92-532, (1972).
[75] P.L. 92-583, 86 STAT. 1280, (1972).
[76] 42 U.S.C. 4321 et seq., (1969).
[77] See discussion note 10, supra.

to those states, principally on the Gulf of Mexico, which were seriously interested in superport development due to the already substantial role of the petroleum industry in their economies. At any rate, there was little likelihood that the huge amounts of capital necessary for superport development would be forthcoming without some form of at least tacit federal approval.

It was also generally conceded in the "pre-Deepwater Port Act era" that the Federal Government had the power under international law, if not actually to authorize construction of a deepwater port beyond the limits of the United States territorial sea, at least to prevent anyone else from doing so under the authority of the Outer Continental Shelf Lands Act[78] and under the judicial rationale of United States v. Ray.[79] Assuming, however, that the Federal Government did have the power under international law to authorize the construction of superports on the high seas, a more important legal question, before passage of the Deepwater Port Act in 1974, was whether the states had the power to prevent unwanted superport development off their coasts. On the face of it, the powers granted to the states under the Submerged Lands Act and the ability of the states to control through local legislation such land-based superport facilities as tank farms and refineries seemed to provide the states an effective legal, as well as practical, veto power over any federally authorized deepwater port development on the outer continental shelf.[80] It must be remembered, however, that the states' proprietary rights in their submerged lands were subject to the important superior federal powers over navigation and commerce. Furthermore, traditional forms of local land use control might prove ineffectual in regulating land-based superport facilities in view of the fact that some localities might favor the economic benefits associated with such development even though other localities, and perhaps the State Government, too, were opposed to it. And even though many coastal states had begun coastal zone management programs in response to the Federal Coastal Zone Management Act of 1972,[81] the possibility of substantial gaps in state authority to regulate the use of private property in coastal areas was still quite real. Delaware, at one time thought to be a prime location for an East Coast superport, proved an exception to this general situation when it passed a bill in 1971 prohibiting any new industrial development, including port facilities, in the state's coastal area.[82]

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[78] See especially § 1333(f) which extends the authority of the Secretary of the Army to prevent obstructions to navigation to "artificial islands and fixed structures on the Outer Continental Shelf."

[79] 423 F. 2d 16 (5th Cir., 1970). In this case the Court granted the U.S. an injunction to prevent a group of investors from constructing an artificial island on coastal reefs outside of territorial waters off the coast of Florida, holding that under national and international law the area was subject to the jurisdiction and control of the United States.

[80] See Robert R. Nathan Assoc., Inc., Institutional Implications of U.S. Deepwater Port Development for Crude Oil Imports, Institute for Water Resources Report 73-4, at 46 (June 1973); [hereinafter cited as Institutional Implications].

[81] See Joint Report of the Senate Committees on Commerce, Interior and Insular Affairs, and Public Works, Deepwater Port Act of 1974, Senate Report No. 93-1217, 93rd Cong., 2d Sess., at 12 (1974); [hereinafter, Senate Report No. 93-1217].

[82] Institutional Implications, supra note 80, at 53.

It is thus significant, if not surprising, to note that the authors of the Deepwater Port Act felt that the Federal Government did have the power to force superport development on an unwilling recipient state. This view was expressed in the Joint Report on the Deepwater Port Act of the Senate Committees on Commerce, Interior and Insular Affairs, and Public Works, which asserted: "[S]tate powers over territorial waters could be preempted by the Federal Government for the purposes of licensing and regulating necessary components of a port (i.e., pipelines)."[83]

A study prepared for the United States Army Engineers Institute for Water Resources on the institutional implications of superport development had reached a similar conclusion:

> [T]he Federal Government has one instrument to eliminate the veto power of a State.... If [it]...decided that a deepwater port were essential to serve national public interest objectives, it could call upon its power under the commerce clause of the Constitution to override any state objections. Although it has such ultimate authority, the Federal Government would clearly choose to exercise it only as a very last resort, if at all.[84]

These views seem consistent with the rationale of Zabel v. Tabb.[85] In that case the Court explicated the nature of the reserved federal powers under the Submerged Lands Act as follows:

> The Federal Government's traditional concern with navigation, ...flood control, [and] hydroelectric power production raised specific problems calling for accommodation of the (i) sweeping Federal divesture and (ii) the continued fulfillment of the Federal Government's role in these activities. Thus for example, the States' rights to grant exploration privileges, determine the location and spacing of development wells or drilling platforms posed prospects of maritime hazards. Without imposing its own notions of how development ought to be conducted, restricted, expanded or controlled, the Federal Government had to have, and reserved expressly this power even to prohibit a drilling rig platform at a particular location. These specific reservations eliminated these frequent and extensive activities as a source of further State versus national controversy.[86]

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[83]Senate Report No. 93-1217, supra note 81, at 11. Based on personal research, the real author of the Deepwater Port Act appears to have been the Senate Committee on Interior and Insular Affairs, even though most of the work was done under the auspices of the Special Joint Subcommittee on Deepwater Ports Legislation which also included the Senate Commerce and Public Works Committees. There was also a House Bill, H.R. 10701, but based upon a reading of the Conference Report it appears that the final Act was substantially the Senate's version. See Conference Report to accompany H.R. 10701, Deepwater Port Act, Senate Report No. 93-1360, 93d Cong., 2d Sess., (Dec. 16, 1974).

[84]Institutional Implications, supra note 80, at 47.

[85]See note 70 supra.

[86]430 F. 2d 199, at 205.

The Zabel Court further stated that the reservation in Section 1314(a) of the Submerged Lands Act to the Federal Government of its rights and powers of regulation for purposes of commerce "makes it clear that Congress intended to and did retain all its constitutional powers over commerce and did not relinquish certain portions of the power by specifically reserving others."[87]

3. State-Federal Relationships Under the Deepwater Port Act

With such considerations of paramount federal powers in mind, the drafters of the Deepwater Port Act decided to give the "adjacent coastal states" an absolute veto power. Accordingly, Section 9(b)(1) of the Act provides the Governor of any coastal state designated by the Secretary of Transportation as an "adjacent coastal state" with an absolute veto over any request for a license to develop a deepwater port in the coastal area of such a state. To be designated as an "adjacent coastal state," a state must be directly connected by pipeline to the proposed deepwater port or be located within fifteen miles of any proposed superport.[88] A state may also be designated as an "adjacent coastal state" if, upon request, the Secretary determines, after receiving the recommendations of the Administrator of the National Oceanic and Atmospheric Administration (NOAA), that there is a risk of environmental damage to that state equal to or greater than the risk to a state directly connected to the superport facility by pipeline.[89]

After any state is designated as an adjacent coastal state, the Governor of that State must receive a copy of the completed license application for the superport facility proposed to be located in the area of that state. The Secretary cannot issue any license without the approval of the Governor. Furthermore, if the Governor would otherwise approve an application but finds it inconsistent with any state environmental, land and water use, or coastal zone management program, he may so notify the Secretary. The Secretary is then required to place such conditions upon the license as are necessary to make it consistent with the state's programs.[90]

The significance of the Deepwater Port Act's sensitivity to state interests cannot be overstated. Federal deferral to the states in an area of such national significance as Energy Policy is truly noteworthy. No less significant is the fact that this portion of the Act in effect gives the states the power to affect activities on the outer continental shelf, heretofore an area of exclusive federal jurisdiction. This veto power accorded the states seems a tangible manifestation of the realization by Congress that offshore development of all types in the coastal waters of the United States requires extensive state-federal cooperation and coordination.

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[87] Id., at 206.

[88] DWPA, § 9(a)(1).

[89] Id., § 9(a)(2). The Department of the Interior opposed this section of the Act because, "[t]he responsible Federal Agency (NOAA) would be pressured to designate all states which may be remotely affected by an oil spill as 'adjacent coastal states' in order to avoid criticism in the event of a spill. To avoid the same criticism officials from states which would not benefit from a deepwater port and which were designated as 'adjacent coastal states' would be pressured into disapproving the license application." (Senate Report 93-1217, supra note 81, at 69.)

[90] DWPA, § 9(b)(1).

The similarities between this aspect of the state-federal relationship in the Deepwater Port Act and the approach taken by Congress in the Coastal Zone Management Act of 1972 cannot be overlooked.[91] In fact the framers of the Act were quite aware of the similarities and apparently intended the Deepwater Port Act to complement the Coastal Zone Management Act in the general area of coastal management. The Deepwater Port Act thus provides:

> The Secretary shall not issue a license unless the adjacent coastal state to which the deepwater port is directly connected by pipeline has developed, or is making reasonable progress toward developing an approved coastal zone management program pursuant to the Coastal Zone Management Act of 1972 in the area to be directly and primarily impacted by land and water development in the coastal zone resulting from such deepwater port. For the purposes of this Act, a state shall be considered to be making reasonable progress if it is receiving a planning grant pursuant to Section 305 of the Coastal Zone Management Act.[92]

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[91]The Federal Coastal Zone Management Act, P.L. 92-583, § 307(3) (1972), provides that upon final approval by the Secretary of Commerce of a State Coastal Zone Management Program, any applicant for a required federal license or permit to conduct an activity affecting land or water uses in a state's coastal zone must provide certification that the proposed activity will be conducted in a manner consistent with the state's program. Thus to the extent that development on the Federal Outer Continental Shelf would have an effect on land and water uses in the states' coastal zones (defined in the Act as extending to the outer limit of the U.S. territorial sea), the Coastal Zone Management Act gives the states the ability to affect such proposed uses of the Outer Continental Shelf through local land and water use programs. The basic approach of the Act is that management of the coastal zones is primarily a state prerogative subject to overriding national interest in certain areas.

But while ostensibly giving the states primary authority over their coastal areas, the Federal Coastal Zone Management Act is not without its own reservation of paramount federal powers. Section 307 authorizes the Secretary of Commerce to issue a permit even without state certification if he determines that the proposed activity is consistent with the objectives of the Act or otherwise necessary in the interest of national security, (see Ereli supra note 19, at 30). The Act also provides in § 306(8) that before the Secretary of Commerce approves a State Coastal Management Program he must find that the State Act "provides adequate consideration of the national interest in the siting of facilities necessary to meet requirements which are other than local in nature." (Ereli supra note 19, at 30). The Senate report on the Coastal Zone Management Act further states that the Act is not intended "to convey, release, or diminish any rights reserved or possessed by the Federal Government under the Submerged Lands Act or the Outer Continental Shelf Act...." [Senate Report No. 92-753, 92d Cong., 2d Sess., at 9 (1972).]

[92]The Joint Report of the Senate provides important legislative history on this requirement. "It is however, in no way intended that the coastal state have its Coastal Zone Management Programs in place and functioning in order for a deepwater port to be approved, nor is it intended that this would be a continuing condition of the license." (Senate Report 93-1217, at 12). North Carolina has received a Section 305 planning grant, and thus would meet the requirements of this section of the Act.

The provisions of the Act affording "adjacent coastal states" an absolute veto power raise some interesting issues in regard to possible superport development off the coast of North Carolina. The feasibility of deepwater port development off the southeastern coast of the United States has been examined jointly by the States of North Carolina, South Carolina, and Georgia through the Coastal Plains Regional Commission (CPRC). A study prepared for the CPRC by Robert Nathan Associates of Washington, D.C., indicates that all three states have acceptable potential offshore port sites and that in each of the states there is considerable interest in obtaining the economic benefits associated with deepwater ports and their related land-based processing facilities.[93] The possibility thus exists that competition might arise among these three states as to which one should obtain the economic benefits of having a superport located off its coast. Conversely, one state might be opposed for environmental reasons to any deepwater port development off the coast of any of the three states.

The fact that the Deepwater Port Act gives the Governor of each adjacent coastal state an absolute veto over any license application thus becomes potentially quite significant. For example, an application for a license to establish a deepwater port facility off the southern coast of North Carolina, but within fifteen miles of South Carolina, could be vetoed by the Governor of South Carolina. Even if such a proposed location was not within fifteen miles of South Carolina, South Carolina still might be able to qualify as an "adjacent coastal state" and exercise a veto, if upon request to the Secretary it was determined that the risk of damage to South Carolina's coastal environment was just as great as the risk posed to North Carolina.[94]

The provisions of Section 9 of the Act, not to mention other good and sufficient reasons, would thus seem to dictate a regional approach to deepwater port development in order to insure that the interests of all states of the Atlantic Coastal Plains are protected. It would also seem to behoove the Governor of any coastal state which might be potentially affected in any manner by a proposed deepwater port to request to have his state designated as an "adjacent coastal state" under the provisions of Section 9(a)(2), just to keep his options open, if not actually to provide him with a measure of bargaining power in relation to his sister states. This would also seem to be an expedient method of obtaining scientific data on the potential dangers to that state of superport development in a neighboring state at the Federal Government's (NOAA's) expense.

A further interesting point in regard to the state veto power relating to North Carolina in particular is the fact that it is the Governor and not the Legislature of the "adjacent coastal state" who is given the veto power. In North Carolina, at present, the Governor is a Republican while the State Legislature is overwhelmingly dominated by Democrats;[95] and in North Carolina the Governor does not have a veto power over legislative acts. Thus while it would not appear probable as a practical political matter, it is not beyond the realm of possibility that the Governor could say "yes" to a superport application opposed by a majority of the State Legislature. In such a case, if

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[93]Robert R. Nathan Associates, Inc. and Coastal Zone Resources Corp., Coastal Plains Deepwater Terminal Study, Draft Final Report, at I-7 and A-7, (oct. 15, 1974); [hereinafter cited as Coastal Plains Deepwater Terminal Study].

[94]See note 89 supra.

[95]A comparable political situation also exists in South Carolina at this time.

the Legislature attempted to block a federal license approved by the Governor through legislation at the state level, interesting questions of "paramount" Federal powers might arise. As a practical matter, though, it would appear unlikely that a potential licensee would consider investing billions of dollars in any state with a hostile political environment.

4. Applicability of State Law

Another area in which there was considerable doubt about the state-federal relationship prior to the passage of the Deepwater Port Act was the extent to which state laws would be applicable to deepwater ports located on the high seas and to their component parts. The Deepwater Port Act dealt generally with this question in Section 19. Section 19(a)(1) extends the Constitution, laws and treaties of the United States to any deepwater port licensed under the Act and to any activities directly related thereto. Section 19(a)(2) establishes that, unless otherwise specifically provided, nothing in the Act shall change in any manner the authorities and responsibilities of the State and Federal Governments within the territorial waters of the United States. Hence, Section 19(a) basically preserves the state-federal legal structure existing under the Submerged Lands Act and the Outer Continental Shelf Lands Act.

In Section 19(b) Congress makes state law, where appropriate, applicable to deepwater ports. That Section provides:

> The law of the nearest adjacent coastal state, now in effect or hereafter adopted, amended, or repealed is declared to be the law of the United States, and shall apply to any deepwater port licensed pursuant to this Act, to the extent applicable and not inconsistent with any provision or regulation under this Act or other Federal laws and regulations now in effect or hereafter adopted, amended, or repealed.[96] All such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. For purposes of this subsection, the nearest adjacent coastal state shall be that state whose seaward boundaries, if extended beyond three miles, would encompass the site of the deepwater port.[97]

For purposes of further discussion, the effect of the adoption of state law in the Deepwater Port Act on existing North Carolina law can be divided into two areas of significant concern: environmental regulation and economic regulation.

4.A Environmental Regulation

The Deepwater Port Act specifically provides that Section 18 of the Act, which deals with liability for discharge of oil into the marine environment[98] from a deepwater port or vessel within a safety zone, of from a vessel

[96] See note 64 supra.

[97] DWPA, § 9(b).

[98] Marine environment is defined in § 3(11) to include the "coastal environment," waters of the contiguous zone, and waters of the high seas; the fish, wildlife and other living resources of such waters; and the recreational and scenic values of such waters and resources. "Coastal environment," defined in § 3(6) means the navigable waters (including the lands therein and thereunder) and the adjacent shorelines (including waters therein and thereunder). The term includes transitional and intertidal areas, bays, lagoons, salt marshes, estuaries, and beaches; the fish, wildlife, and other living resources thereof; and the recreational and scenic values of such lands, waters and resources.

which has received oil from another vessel at a superport, "shall not be interpreted to preempt the field of liability or to preclude any state from imposing additional requirements or liability for any discharge of oil from a deepwater port, or vessel within any safety zone."[99] Thus, in regard to liability for discharges from deepwater ports, including their component parts, and from vessels within a safety zone, Section 18(k) answers affirmatively the question left open by the Supreme Court in American Waterways Operators, Inc. v. Askew[100] as to whether a state could impose higher limits of liability for cleanup costs than those in existing Federal legislation.[101] That this provision was intentionally inserted in the Deepwater Port Act with the Askew decision in mind is shown by the following recommendation by the Senate Committee on Public Works that the amendment adding the present Section 18(k)(1) to the Act be adopted:

> The Committee on Public Works agrees with the principle that state laws defining liability for oil spills or setting higher liability limits than those in this bill should not be preempted. This principle is contained in Section 311 of the Federal Water Pollution Control Act, the basic law establishing liability for cleanup costs for oil spills in the navigable waters or the contiguous zone. The principle of allowing states to establish higher limits for the liability of certain parties has been accepted in recent litigation (Askew v. American Waterways Operators, Inc., et al, 411 U.S. 325, April 1973).
>
> In that case, in discussing the powers of the State of Florida to impose liability for losses suffered by state or private interests, the Supreme Court notes that this is appropriate under State Police power and is not a matter of exclusive Federal Admiralty Jurisdiction....
>
> It is the belief of the Committee on Public Works...that such a principle should be clearly stated in the legislation.... Therefore the Committee recommends an amendment to section 18(k) of the bill... dealing with this subject.
>
> This amendment specifies that state law with respect to imposing liability without regard to fault or establishing any additional requirements, including higher limits of liability, is not preempted. The Committee recognizes that the existence of the Deepwater Port Liability Fund established under this bill would guarantee each private claimant full payment of any damages and full satisfaction of any cleanup costs, regardless of the limits of liability on vessel owners or operators or deepwater port licensees.
>
> A state may legitimately choose, however, to protect its coastal environment or the economic life of its citizens by imposing a higher standard of liability on oil handling operations within its waters. This should include vessel operations and pipeline segments associated with a deepwater port. In addition, any person who alleges damages as a result of a discharge of oil or natural gas from a deepwater port operation should have the option of seeking recovery for such damages either from the responsible party under state law, or from the vessel owner or operator or the licensee and the Fund in Federal courts.[102]

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[99] DWPA, § 18(k)(1). Section 18(k)(2) prevents any person from recovering double compensation for the same damages under both state and federal law.

[100] 41 U.S. 325 (1973).

[101] See Suher & Hennessee supra note 52, at 65.

[102] Senate Report No. 93-1217, supra note 81, at 31, (emphasis added).

Thus, under the provisions of Section 18(k) of the Deepwater Port Act, North Carolina's Oil Pollution Control Act of 1973[103] would be fully applicable to any damage resulting from a discharge from any deepwater port facility and its component parts or from a vessel within a safety zone. In point of fact, the Section of the North Carolina Oil Pollution Control Act providing for liability to the State Government for cleanup costs and damages to public resources specifically limits the total recovery for such damages to the "applicable limits prescribed by federal law with respect to the United States Government on account of any such discharge."[104] Thus the State of North Carolina in an action for cleanup costs and damages to public resources against the owner or operator of a vessel discharging oil in a safety zone or against the licensee of a deepwater port for discharges from his facilities would be entitled to recover only amounts within the liability limits established by Sections 18(d) and 18(e) of the Deepwater Port Act. Section 18(d) sets a liability limit of $150 per gross ton or $20,000,000, whichever is less, for the owner and operator of a vessel and 18(e) sets a limit of $50,000,000 for a licensee of a deepwater port. However, the State could, as pointed out in the comment by the Senate Committee on Public Works above,[105] recover without limit from the Deepwater Port Liability Fund established pursuant to Section 18(f) damages sustained in excess of those compensated for under Sections 18(d) and 18(e).[106]

The North Carolina Oil Pollution Control Act does provide for unlimited liability without regard to fault for damages to private persons and property caused by oil discharges entering state waters.[107] Therefore, any private claimant suffering injury to person or property in North Carolina from discharges from deepwater ports or vessels within safety zones could recover actual damages from the responsible parties without limit in either state or federal courts.[108] Any amounts unrecoverable from the liable parties could be recovered from the Deepwater Port Liability Fund in the federal district

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[103] N.C.G.S. § 143-215.75 et seq. (1973).

[104] N.C.G.S. § 143-215.89. This provision of the North Carolina Act was enacted after the decision in the Askew case, to prevent any possible conflict with federal limits imposed on liability for discharges in the Federal Water Pollution Control Act.

[105] See discussion supra note 102.

[106] The Deepwater Port Liability Fund established pursuant to § 18(f) is a non-profit corporate entity administered by the Secretary of Transportation, liable without regard to fault for all damages in excess of those compensated for pursuant to §§ 18(d) and 18(e). The Fund is to be financed by a 2¢ per barrel charge on oil imported through the deepwater port facility. If the amount in the Fund at any time falls below the Fund's outstanding liabilities, the Fund is required to borrow funds from the U.S. Treasury sufficient to pay all claims against it.

[107] N.C.G.S. § 143-215.94 (1973).

[108] "Damages" as defined in § 18(m)(2) means all damages (except cleanup costs) suffered by any person, or involving real or personal property, the natural resources of the marine environment, or the coastal environment of any nation, including damages claimed without regard to ownership of any affected lands, structures, fish, wildlife or biotic or natural resources.

Of interest to North Carolina's commercial fishermen would be the holding in Union Oil Co. v. Oppen, 501 F2d 558 (9th Cir., 1974) that under either admiralty law or California State law negligent diminution of aquatic life by oil discharges is a legally compensable injury for which damages may be recovered for loss of economic advantage; e.g., profits lost as a result of a reduction in the commercial fishing potential of the Santa Barbara Channel caused by an oil spill are legally compensable in damages.

courts of North Carolina.[109]

A further point of interest in this regard is the possibility that both state and federal provisions dealing with vessel liability for oil spills might be preempted if the 1969 International Convention on Civil Liability for Oil Pollution Damages,[110] the 1971 Convention on an International Fund for Compensation of Oil Pollution Damage, or both should be ratified by the United States and come into force.[111] Liability under the former Convention does not exceed $17 million,[112] but under the latter, which supplements the Civil Liability Convention, damages may be recovered up to a maximum of $32.4 million.[113] If these international conventions were to supersede the liability limits under the Deepwater Port Act or under state law, it would appear that any damages not collectable from vessel owners or operators liable under the Deepwater Port Act would still be collectable from the Deepwater Port Liability Fund.

4.B Economic Regulation

Section 8 of the Deepwater Port Act provides that superports and their related facilities shall be subject to regulation as a common carrier under the Interstate Commerce Act, as amended. The Act further requires that deepwater port licensees must accept and transport all oil delivered to their ports.[114]

Under Part 1 of the Interstate Commerce Act,[115] as amended, common carriers are required to furnish transportation upon reasonable request and to adopt just and reasonable fares.[116] Carriers are prohibited from giving any undue or unreasonable preference or advantage to any person or company, nor are they allowed to unjustly discriminate against any such entities.[117] Common carriers are required to file rate and fare schedules with the Interstate Commerce Commission (ICC).[118] The ICC is empowered upon its own initiative, or upon request by any person or state, to investigate complaints of unreasonable fares or rates, and after appropriate hearings to establish new rates if it determines that the rates charged by any carrier are unjust or unreasonable.[119] The Interstate Commerce Act also provides both for remedies in damages to any person injured by unlawful acts of carriers and for criminal sanctions.[120]

States may regulate common carriers to the extent that such regulation is intrastate, not in violation of the state constitution, does not deny equal

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[109]Section 19(e) gives U.S. District Courts original jurisdiction of cases arising out of the operation of superports and actions may be brought in the adjacent coastal state or in the district in which the defendant resides.
[110]Published in 9 Int'l Legal Materials 45 (1970).
[111]See State Department Comment on these conventions in Hearings on H.R. 5091, supra note 23, at 89. See also discussion at notes 48, 49 supra; and Suher & Hennessee, supra note 52, at 70-71.
[112]Ereli supra note 19, at 32.
[113]Hearings on H.R. 5091, at 89.
[114]DWPA, § 8(b).
[115]49 USC 1027 (1887).
[116]49 USC 1(4), 1(15).
[117]49 USC 3(1).
[118]49 USC 6(1).
[119]49 USC 13(1), 15(7).
[120]49 USC 8010. See generally, Ereli supra note 19, at 37-39.

protection or due process, directly or materially burden interstate or foreign commerce or conflict with federal law.[121] Pipeline companies in North Carolina are deemed to be public utilities and are subject to regulation as such.[122] Pipeline companies are empowered to exercise the right of eminent domain.[123] North Carolina does not have more stringent requirements than the ICC in regard to pipeline regulations and safety.[124]

An interesting question in regard to economic regulation of deepwater ports by the states is whether North Carolina could impose a state duty on oil transported by pipeline from a deepwater port. The principal issues would undoubtedly be whether the duty directly or materially burdened interstate or foreign commerce, conflicted with federal law, or violated the Import-Export Clause of the United States Constitution.[125] There is a substantial precedent upholding the ability of a state to impose a special duty on imported oil. In Portland Pipeline Corp. v. Environmental Improvement Commission,[126] the Maine Supreme Court upheld a one-half cent per barrel state license fee on petroleum products transferred over water imposed pursuant to Maine's Coastal Conveyance of Petroleum Act.[127] The fee was imposed on "oil terminal facilities" and was to be used to create a Coastal Protection Fund to reimburse the state for clean-up costs and to compensate third parties injured by oil spills.

The Maine Supreme Court found that the license fee did not impose an unreasonable burden on interstate or foreign commerce since it was not a tax on goods in commerce but rather a fee imposed upon "the act of transferring oil over water."[128] The fee was thus not a general revenue tax by the state but instead an adjunct to a regulatory scheme permissible under the state's police power.[129] The Court also held that the license fee did not violate the Import-Export Clause of the United States Constitution. The Court's reasoning on this point was twofold. First, since the license fee was not a fee imposed on imported goods, but rather a fee imposed on an activity related to the importation of oil, it was not sufficiently direct to be considered a tax on imports. Secondly, because the fee was part of an overall regulatory scheme designed to protect the public interest from the dangers of oil pollution, it afforded benefits to those subject to the fee and was thus not a burden on the importers.[130]

Based on the rationale of the holding in Portland Pipeline Corp. it would appear that North Carolina might impose certain types of fees on oil transferred through deepwater port pipelines, if the fees were for proper, regulatory purposes and not general revenue measures. Whether a particular type of duty or fee would withstand attack in the federal courts is a question that would have to be determined under the special facts of each case. In any event, in view of the Deepwater Port Liability Fund established under Section 18 of the

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[121] Addison Ry. Co. v. R. R. Comm. 238 U.S. 380 (1931); see Ereli supra note 19, at 39.
[122] N.C.G.S. § 62-190 (1937).
[123] Id.
[124] Coastal Plains Deepwater Terminal Study, supra note 93, at A-2.
[125] Article I, § 10, clause 2.
[126] 307 A. 2d 1, (1973).
[127] 38 M.R.S.A. § 541 (1970).
[128] 307 A. 2d 1, at 36.
[129] Id., at 37.
[130] Id.; see generally Suher & Hennessee supra note 52, at 67-69.

Deepwater Port Act,[131] it is questionable whether an additional State Coastal Protection Fund like that funded by the license fee in the Portland Pipeline Corp. case would be necessary.

III. The North Carolina Legal Framework

1. Introduction

Assuming that a license was granted for a deepwater port facility off the coast of North Carolina, a question of primary concern would then be whether or not North Carolina has the legal tools necessary to regulate deepwater port development, both offshore and on. In other words, would new legislation dealing specifically with deepwater ports be necessary, or is the existing regulatory framework sufficient? In this respect it should of course be remembered that under Section 9 of the Deepwater Port Act, the Governor of North Carolina could, in the first instance, require the Secretary of Transportation to condition any license granted upon compliance with state programs relating to environmental protection, land and water use, and coastal zone management. Such state programs for regulation of development in the coastal area would thus be doubly important should deepwater port development come to North Carolina, serving first to establish conditions upon the license and then to regulate the actual operation of deepwater port facilities.

Deepwater port development in North Carolina would have significant and perhaps irreversible effects on the environment, on population concentrations and distribution, on the state's economic structure, and on the revenues of the political subdivisions concerned.[132] Conflicts between the state and local jurisdictions would be highly likely to arise, depending upon the relative value each attached to such development. Forces against superport development on environmental grounds would certainly come into conflict with those forces supporting it for economic reasons. Legal action by those opposed to deepwater port development could slow down construction of such ports and add substantially to the final costs of such facilities.[133] The legal framework for offshore port development within the state will thus be of immeasurable importance. With such considerations in mind, a survey of existing North Carolina law of potential significance to superport development is in order.

2. The Coastal Area Management Act

Perhaps the most logical place to look first is to North Carolina's Coastal Area Management Act (CAMA).[134] This Act, which became effective on July 1, 1974, creates what is essentially a cooperative state-local effort aimed at the preservation and management of the coastal areas of North Carolina. The Act creates and places primary responsibility and authority on the Coastal

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[131] See discussion at note 106 supra.

[132] Institutional Implications, supra note 80, at 82.

[133] Section 16 of the DWPA provides specifically for citizen civil actions. Any person may commence a civil action for equitable relief against any person (including the United States and the States, to the extent permitted by the 11th Amendment) alleged to be in violation of a provision of the Act or of a condition of any license granted pursuant to the Act. Suits may also be brought against the Secretary for failure to perform any nondiscretionary action. Court costs and attorneys' fees may be awarded to such persons. Section 16 is not to be construed to restrict any other common law or statutory remedies available to such persons.

[134] N.C.G.S. § 113-100, et seq. (1974 Cum. Supp.).

Resources Commission (CRC or Commission), a fifteen-member body with local government representation charged with developing state policy guidelines, establishing regulations, and adjudicating permit applications. The CRC is responsible for designating areas of environmental concern (AECs) and for reviewing and approving local land use plans. Local jurisdictions have twenty months from July 1, 1974, to adopt an implementation plan and enforcement procedures consistent with state guidelines. After a date designated by the Secretary of the Department of Natural and Economic Resources (DNER), which must not be later than twenty-seven months after July 1, 1974, a permit will be required for any development within an area of environmental concern. Permits for minor development will be obtained from the appropriate city or county agency, and permits for major developments are to be obtained from the Coastal Resources Commission.

A critical examination of North Carolina's Coastal Area Management Act reveals serious questions in regard to the Act's potential usefulness for controlling deepwater port development. A major problem is that "development" as defined in the Act means only development within a designated area of environmental concern.[135] Therefore, any development in an area not designated as an area of environmental concern would not be controlled and no permit would be required.[136] Hence onshore facilities such as refineries or oil terminals would not be directly regulated under the CAMA unless they were to be located in an area of environmental concern, though they might be subject to any applicable local land use plans. Also a pipeline located on the state's submerged lands would not be subject to regulation under the Coastal Area Management Act unless it, too, were in a designated area of environmental concern.

A rather basic solution to this problem, at least in regard to the pipeline portion of the offshore port facility and perhaps to onshore facilities located in or near wetlands as well, would be for the Coastal Resources Commission simply to designate all of North Carolina's submerged land areas as areas of environmental concern. The state's submerged lands easily fall into one or more of the classifications, set forth in Section 113A-113(b), of areas

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[135] Section 113A-103(5)(a). "Development means any activity in a duly designated area of environmental concern...involving, requiring, or consisting of the construction or enlargement of a structure, excavation; dredging; filling; dumping; removal of clay, silt, sand, gravel or minerals; bulkheading, driving of pilings; clearing or alteration of land as an adjunct of construction; alteration or removal of sand dunes; alteration of the shore, bank, or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake or canal." (emphasis added).

[136] Section 113A-118. "Every person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required state or local permit) a permit pursuant to the provisions of this Part." (emphasis added).

which may be designated by the Commission as areas of environmental concern.[137]

It would appear that a logically, if not legally, strong argument could be made that the Coastal Resources Commission should be required, as an agency of the state and thus a trustee of the public trust lands for the people of North Carolina, to designate all of North Carolina's submerged lands as areas of environmental concern in order to insure that the rights of North Carolina citizens in such public trust lands are fully protected.[138] A designation of all submerged lands as areas of environmental concern would have the benefit of subjecting any proposed deepwater port facility, to be located in part or in full on the state's submerged lands, to the quasi-judicial permit procedures for "major development"[139] established pursuant to Section 113A-122. This quasi-judicial procedure provides for public hearings, subpoena power for the Commission, and other similarities to procedures applicable in civil actions generally, thus guaranteeing that any major action affecting submerged lands would receive full and open scrutiny by the Coastal Resources Commission as

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[137]Within § 113A-113(b) the following types of areas, which would appear applicable to submerged lands, may be designated as areas of environmental concern:

- 113(b)(2): Estuarine waters as defined in GS § 113-229(n)(2), that is all waters of the Atlantic Ocean within the boundary of North Carolina and all of the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters,....
- 113(b)(3): Renewable resource areas where uncontrolled or incompatible development...could jeopardize future water, food, or fiber requirements of more than local nature....
- 113(b)(4): Fragile or historic areas, and other areas containing environmental or natural resources of more than local significance....
- 113(b)(5): Areas such as waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights, and areas which the State of North Carolina may preserve, conserve, or protect under Article XIV, Section 5 of the North Carolina Constitution.
- 113(b)(6): Natural hazard areas...which may include:
  - (i) sand dunes along the Outer Banks;
  - (ii) ocean and estuarine beaches and shoreline;
- 113(b)(7): areas which are or may be impacted by key facilities.

Whether § 113(b)(7) would be applicable to deepwater port facilities would depend upon whether such facilities would qualify as "key facilities," defined in § 113A-103(6)(b) as "major facilities on non-federal lands for the development, generation, and transmission of energy."

[138]The North Carolina "Public Trust Doctrine" is discussed more fully infra, at 31.

[139]A "major development" is defined in § 113A-118(d)(1). Any deepwater port facility would clearly fall within the definition there established.

well as by the public.

Though it does not appear highly likely, timing might also prove to be a factor in regard to the applicability of the Coastal Area Management Act to regulation of proposed deepwater port development. Under the provisions of Section 113A-118, permits for development in areas of environmental concern are required only after the date designated by the Secretary of DNER pursuant to Section 113A-125. This date might be as late as twenty-seven months after the effective date of the Act, July 1, 1974. It is thus possible that the permit procedures will not be applicable until the fall of 1976. However, it would appear to be unlikely that construction of deepwater port facilities could begin within the state area prior to that date.

One part of the Coastal Area Management Act which would be immediately applicable to any deepwater port development is Section 113A-108. This section requires that:

> Any state land policies governing the acquisition, use and disposition of land by state departments and agencies shall take account of and be consistent with the state guidelines adopted under this Article, insofar as lands within the coastal area are concerned.[140]

Hence any disposition of a right of way over state-owned submerged lands for the pipeline component of a superport facility would have to be consistent with the provisions of the, "State guidelines" adopted by the Commission,[141] as would any other disposition of state lands for purposes of onshore development related to superports. The "State guidelines" include statements of "objectives, policies and standards to be followed in public and private use of land and water within the coastal area."[142] The "State guidelines" would thus presumably provide a framework for some measure of state regulation of deepwater port facilities even though not located within a designated area of environmental concern.

A large number of state regulatory permits applicable to development in the state's coastal zone, such as dredge and fill permits, already existed prior to the passage of the Coastal Area Management Act. These permits are still required in addition to any permits required by the CAMA itself. Thus there currently exists a considerable amount of state regulatory authority which would be applicable to deepwater port development, and this authority was not altered by the CAMA, though it must now be administered in coordination and consultation with the Coastal Resources Commission.[143] A rather complete listing of existing regulatory permits, many of which would be applicable to various phases of deepwater port development within the state's coastal area, is contained in Section 125(c) of the Coastal Area Management Act.[144]

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[140] N.C.G.S. § 113A-108 (1974).

[141] See § 113A-107.

[142] Id.

[143] N.C.G.S. § 113A-125(b) (1974), provides that "...all existing permits within the coastal area shall be administered in coordination with (but not subject to the veto of) the Commission." (emphasis added).

[144] Section 113A-125(d) of the Act calls upon the Commission to conduct studies addressed to developing a better coordinated and more unified system of environmental and land use permits in the coastal area. A preliminary study on this topic was completed in February of 1975 by the Institute of Government in Chapel Hill, N.C. The study goes to the Coastal Resources Commission which will make recommendations to the 1975 General Assembly concerning coordination of state permit procedures.

3. Disposition of State Lands; Easements in Submerged Lands

The issue concerning the granting of a pipeline easement or right-of-way over state-owned submerged lands, mentioned above, leads us to another area of existing North Carolina law which should briefly be examined, that of the disposition of state-owned lands. Chapter 146 of the North Carolina General Statutes deals generally with the acquisition and disposition of state lands. Within Chapter 146, several terms vital to our discussion of deepwater ports are defined. "Navigable waters" are defined as all waters which are navigable in fact[145] and "submerged lands" are defined as any state lands which lie beneath any navigable waters within the boundary of the state or beneath the Atlantic Ocean to a distance of three geographical miles seaward from the coastline of the state.[146]

Under the provisions of Chapter 146, no state submerged lands may be conveyed in fee, but easements in submerged lands may be granted as provided in Subchapter I of that chapter.[147] Section 146-11 (within Subchapter I) provides that the Department of Administration may grant easements in State lands generally for purposes of cooperating with the Federal Government, utilizing the state's natural resources, or for any other purposes serving the public interest. The Department of Administration is to fix the terms and consideration upon which rights-of-way shall be granted.[148] Any such conveyance must be approved by the Governor and Council of State or their designees.[149]

Section 146-12 immediately follows the more general Section 146-11, and deals specifically with "easements in lands covered by waters." It provides that the Department of Administration, with the approval of the Council of State, may grant an easement in lands covered by any navigable waters, upon such conditions as it deems proper, to "adjoining riparian owners" (emphasis added). But such easements may include only the front of the tract owned by the riparian owner and can extend no further than the deep water.[150] Clearly, Section 146-12 was intended only to provide a means of granting easements to adjacent riparian owners for the purpose of building piers out to the deep water line and not for any broader purposes, as an examination of the case law concerning this section quickly reveals. Section 146-12 would thus not provide statutory authority for the granting of a pipeline right-of-way to a deepwater port licensee, who might or might not be an adjoining riparian owner, over the full breadth of the state's submerged lands.

Since the state statutory provision dealing specifically with easements in submerged lands[151] would not seem to be applicable to the granting of an easement for a superport pipeline, it would appear that the provisions of Section 146-11, dealing with easements and rights-of-way in state lands

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[145] N.C.G.S. § 146-64(4) (1959). See also Swan Island Club, Inc. v. White, 114 F. Supp. 95 (E.D.N.C., 1953).
[146] N.C.G.S. § 146-64(7) (1959).
[147] N.C.G.S. § 146-3. Subchapter I of Chapter 146 deals with "Unallocated State Lands."
[148] N.C.G.S. § 146-11.
[149] Id.
[150] N.C.G.S. § 146-12.
[151] Id.

generally would apply (though this is a matter of statutory construction and thus cannot be stated with absolute certainty). It may actually be a matter of little practical significance which statutory provision would govern the granting of an easement for the pipeline component of a deepwater port, since the state would undoubtedly be able to grant such an easement under its inherent power to administer state lands, even absent any statutory provision. The question seems relevant only because Section 146-3(1) does specify that easements in submerged lands are to be granted as provided in Subchapter I of Chapter 146, and the provision in that subchapter dealing specifically with easements in submerged lands, Section 146-12, would not appear to encompass the granting of an easement for a superport pipeline. The real issue may thus be which agency of the state has the power to grant such an easement and under what conditions.

The granting of the pipeline easement over state-owned submerged lands also raises interesting questions concerning the paramount federal powers which were discussed in depth above. For example, what type of restrictions could the state impose on the granting of a superport pipeline easement to a federal licensee which would not interfere with the Federal Government's imperium powers over commerce and navigation? We will not here again examine the "doctrine of paramount powers"; it is sufficient to point out the possibility of the state's imposing conditions on the granting of a deepwater port pipeline easement as a regulatory tool. In other words, the state could consider exacting certain environmental and safety standards as a quid pro quo for the granting of an easement, instead of, or in addition to, relying on its existing regulatory system. It is my impression that North Carolina has not adopted such a policy in regard to past dispositions of state lands, but the concept, in my opinion, raises interesting possibilities, especially for the state-owned submerged lands which are subject to the public trust.

4. The Public Trust Doctrine in North Carolina

Having referred to the public trust doctrine several times, it is now appropriate to examine briefly that doctrine as it applies to the coastal areas of North Carolina and hence to deepwater port development.

> Generally speaking it can be said that the State holds the lands under the navigable waters of its sounds, rivers, bays, and inlets in trust for everyone. Stated simply, this doctrine of public trust says that every member of society possesses such intrinsically important rights, privileges, and interests in these waters that it is the duty of the State to protect them.[152]

The public trust doctrine then is applicable to all of the state-owned lands beneath navigable waters. As previously mentioned, Chapter 146 of the General Statutes defines navigable waters as all waters which are navigable in fact and submerged lands as any state lands beneath any navigable waters within the boundary of the state or beneath the Atlantic Ocean to a distance of three miles seaward. Hence all of the state-owned submerged lands off the Atlantic Coast are subject to the public trust doctrine, as are those other state-owned lands within the boundary of the state which are covered by waters navigable in fact. The foreshore, the area between the mean high and low tides,

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[152]Comment, Defining Navigable Waters and the Application of the Public Trust Doctrine in North Carolina: A History and Analysis, 49 N.C.L. Rev. 888, 891 (1971).

is also public trust land, it having been decided that in North Carolina no state lands beyond the high tide line can be conveyed in fee.[153]

Though it is no longer possible for the state to convey fee title to submerged lands, this has not always been the case. At different times in North Carolina's history the Legislature has made certain grants of submerged lands, and this practice has been judicially approved.[154] Thus some of North Carolina's submerged lands are subject to valid private claims. In order to determine the extent of such claims the General Assembly passed G.S. 113-205, requiring every person claiming title to any part of the bed lying under navigable waters of North Carolina to register the nature of his claim with the state before January 1, 1970, and any claim not so registered is declared to be null and void. Whether such privately owned submerged lands are subject to the public trust is a question as yet unanswered by the North Carolina Supreme Court.[155] But two federal cases, Swan Island Club, Inc. v. Yarborough[156] and Zabel v. Tabb[157] suggest that such privately owned submerged lands are indeed subject to the public trust, the argument being that the owners of submerged lands take subject to the trust.

It is beyond the scope of this paper to go into detail concerning the varied interpretations of the public trust doctrine which the North Carolina Supreme Court has made. The Court has at different times relied on the common law ebb and flow test,[158] various tests of navigability in fact,[159] and combinations of the two[160] to determine which waters of the state are navigable for the purpose of land title disputes involving public trust lands. The Court has adopted similar tests for obstruction of navigation cases.[161] Subject to certain specific exceptions, lands under waters which are navigable in fact and over which the tide ebbs and flows up to the mean high tide line are public trust lands and subject to the public trust doctrine under North Carolina law.

It is difficult to speculate about what, if any, impact the public trust doctrine would have upon deepwater port development in North Carolina. The doctrine has not been as fully expanded in North Carolina, either judicially or statutorily, as it has in some other coastal states.[162] Thus it is

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[153] Id., at 897-8. See also Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 177 S.E. 2d 513 (1970).

[154] See Tatum v. Sawyer, 9 N.C. 226 (1882); Home Real Estate Loan & Insurance Co. v. Parmele, 214 N.C. 63, 197 S.E. 714 (1938); and generally, 49 N.C.L. Rev. 888 supra note 151, at 899-907 (1971). This article contains a detailed treatment of the public trust doctrine.

[155] 49 N.C.L. Rev. 888, at 916 (1971).

[156] 309 F. 2d 698 (4th Cir. 1954).

[157] 430 F. 2d 199 (5th Cir. 1970).

[158] Tatum v. Sawyer, 9 N.C. 226 (1822).

[159] Wilson v. Forbes, 13 N.C. 30 (1828); Collins v. Benbury, 25 N.C. 277 (1842).

[160] State v. Glen, 52 N.C. 321 (1859).

[161] State v. Twiford, 136 N.C. 603 (1904).

[162] See generally, Florida Statutes, Chapter 161 and Oregon Revised Statutes, Chapter 390. See also Thornton v. Hay, 462 Pac. 2d 671, 254 Ore. 591 (1969); State Highway Commission v. Fulty, 491 P. 2d. 1171 (1971); Gion v. Santa Cruz, 465 P. 2d 50 (1970). Compare N.C.G.S. § 113-14.1 (1969).

likely that any impact which the doctrine might have on offshore port development would be more indirect than direct. As previously suggested, the argument could be made under the public trust doctrine that the Coastal Resources Commission should designate all submerged lands as areas of environmental concern in order to protect public rights in these areas.

Beyond the general principle that any disposition of state-owned submerged or other public trust lands must be made in the public interest, it is difficult to envision a direct application of the public trust doctrine to any specific state actions in regard to offshore port development. Of course, the full applicability of the doctrine to any given situation cannot be determined until the factual circumstances are known. In any event, the full applicability of the doctrine to the area of offshore development would undoubtedly be more fully explored, and perhaps judicially determined, should public interest groups oppose superports on environmental grounds.

5. The Oil Pollution Control Act

A piece of legislation of great potential significance to the onshore facilities of any proposed deepwater port in North Carolina is the Oil Pollution Control Act of 1973.[163] The applicability in coastal waters of the liability provisions of the Act was discussed above.[164] The Act also contains provisions regulating oil discharges on land and Part 3 of the Act deals specifically with "Oil Terminal Facilities."[165]

Under Section 143-215.83, it is unlawful to discharge oil into or upon any waters, tidal flats, beaches, or lands within the state. The liability provisions of the Oil Pollution Control Act would thus be applicable to land-based facilities associated with a superport, though at least one of the liability provisions[166] appears to apply only to damages caused by oil which enters "the waters of the state." The Board of Water and Air Resources is authorized to conduct any inspections and investigations necessary to insure compliance with the provisions of the Act, and has the authority to enter upon any public or private land or vessel to effectuate such inspections.[167]

As a regulatory tool, Part 3 of the Oil Pollution Control Act is most important in regard to development connected with offshore ports.[168] Part 3 deals with oil terminal facilities, broadly defined therein to include "any facility of any kind and related appurtenances located in, on, or under the surface of any land, or water, including submerged lands, which is used or capable of being used for the purpose of transferring, transporting, storing, processing, or refining oil"[169] (emphasis added).

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[163] N.C.G.S. § 143-215.75 et seq. (1973). See, Maxwell, The North Carolina Oil Pollution Control Law: A Model For State Efforts to Curb Pollution of the Sea, in Emerging Ocean Oil and Mining Law, Sea Grant Publication, UNC-SG-74-02 (1974), at 51-59.

[164] See text supra.

[165] N.C.G.S. § 143-215.95-99 (1973).

[166] N.C.G.S. § 143-215.92.

[167] N.C.G.S. § 143-215.79.

[168] Part 3 of the Act was apparently added as an afterthought when the Oil Pollution Control Act was enacted in 1973. It is abbreviated and calls upon the Secretary of DNER to recommend further legislation concerning oil terminal facilities to the General Assembly.

[169] N.C.G.S. § 143-215.77(11). "Oil terminal facility" does not include any facility having a storage capacity of less than 500 barrels. Vessels can be considered oil terminal facilities under certain circumstances.

Specifically in regard to oil refineries, the Act provides that no oil refining facility can be initiated or constructed prior to July 1, 1975, without a permit from DNER.[170] A permit is to be denied for such construction if the Department finds:

1) the facility will have "substantial adverse effects" on wildlife, fresh water and estuarine or marine fisheries;
2) that the operation of the refinery will violate air and water quality standards;
3) that the refinery would have a substantial adverse effect on public park, forest, or recreation areas; or
4) that the benefits of the facility do not outweigh its adverse effects on the public health, safety, and welfare.[171]

Absent such findings, a permit is to be granted.[172]

The Department of Natural and Economic Resources is thus given extensive control over where and under what circumstances oil refineries can be located within the state. The criteria established in Section 215.99 of the Oil Pollution Control Act would appear to give DNER a good deal of leeway to deny permits both on environmental grounds and under the "catch-all" standard that the benefits of a projected refinery must outweigh any adverse effects on the public health, safety, and welfare generally.

A careful reading of the Oil Pollution Control Act reveals one apparent inconsistency which, if amended, might provide a further useful tool for regulating offshore port development. As mentioned above, "oil terminal facility" is defined broadly to include the facility and "related appurtenances."[173] The term "oil terminal facility" would thus encompass both a deepwater port-related refinery and the pipeline connecting it to the superport itself. The Act requires that "oil terminal facilities" be registered with the Secretary of DNER.[174] Yet permits, under Section 215.99 of the Act, are required only for oil refineries and not for oil terminal facilities.

Thus on its face, the Act would appear to require a deepwater port licensee to obtain a permit only for the construction of the refinery and not for the pipeline running over submerged lands. If Section 215.99 were amended to read "oil terminal facility permits" vice "oil refinery permits," a permit would also be required for construction of the pipeline portion of the deepwater port running over state submerged lands. This would insure that the pipeline construction would not have substantial adverse effects on estuarine or marine fisheries, on public parks and recreation areas, or on the public health, safety, and welfare.[175]

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[170] N.C.G.S. §§ 143-215.99 (1974 Cum. Supp.). As originally enacted this section provided that a permit be obtained for refineries to be constructed prior to July 1, 1974. It was subsequently amended to extend the date to July 1, 1975. It can be expected that this date will continue to be extended, and that further amendments to Part 3 may be forthcoming after the General Assembly has studied the recommendations of the Secretary of DNER. See note 167 supra.

[171] Paraphrased from N.C.G.S. §§ 143-215.99 (1973).

[172] N.C.G.S. §§ 143-215.99 (1973).

[173] N.C.G.S. §§ 143-215.77(11) (1973).

[174] N.C.G.S. §§ 143-215.96 (1973).

[175] It is possible, however, that since the Act does not specifically define "oil refinery," that this term could be construed to include related appurtenances including pipelines. If this were the case, any permit issued for the refinery would also include the pipeline.

6. The Question of State Deepwater Port Legislation; Existing Models.

The preceding discussion has examined only those laws which appear to be potentially most significant to North Carolina deepwater port development. A substantial legal framework already exists within which such development could be regulated. The discussion has also hopefully made it apparent that with a few minor changes this regulatory framework could be made more fully applicable to the unique characteristics of this development.

However, should deepwater port development become a present reality for North Carolina, the important question still remains whether new legislation dealing specifically with offshore ports should be enacted. Models for such legislation exist. The States of Louisiana and Texas enacted bills relating to deepwater ports in June and December of 1973, respectively.

The Louisiana legislation is the more comprehensive of the two. Act 444 of the Louisiana Acts of 1972 (La. R.S. 34:3101-14) created the Deep Draft Harbor and Terminal Authority[176] and gave it exclusive authority to promote, plan, finance, develop, construct, control, operate, manage, and maintain a deep draft harbor and terminal within the State of Louisiana. The Louisiana Act is therefore significant in that it provides a central role for the State Government in all phases of superport development and operation, rather than mere passive response to initiatives from the private sector. The Act also contemplates a goal of economic self sufficiency in that the users of the port facilities would bear all of the economic, environmental, and social costs. Furthermore the Act establishes rigid environmental procedures at all stages of port devleopment to protect the resources of the coastal zone. The authority must prepare and maintain an environmental protection plan[177] under the direction of two leading state environmentalists and the port's Executive Director.[178]

The Texas Legislature, partially as a competitive response to the Louisiana Act, considered a draft bill late in 1972 which was very similar to the Louisiana Act. The legislation which Texas finally enacted however was substantially different from that of Louisiana. House Bill 52, 4th called Session, 62nd Legislature, created a nine member Texas Offshore Terminal Commission. The Commission was given a mandate to study all phases of deepwater port development and to recommend a plan for such development to the Texas Legislature.[179]

The Texas Offshore Terminal Commission submitted its plan on January 24, 1974. The plan called for development of an offshore oil unloading facility off the coast of Brazoria County, Texas. In order to insure the least cost to the ultimate consumers of petroleum products, the Commission recommended that the facility be publicly owned and financed by the sale of revenue bonds issued by the state. The Commission further recommended that the Legislature create an appropriate governmental agency to regulate the facility, with enabling legislation sufficiently broad to permit it to conduct all functions necessary

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[176]This name was subsequently changed to "Offshore Terminal Authority," effective August 1, 1974.

[177]See, Environmental Protection Plan of the Deep Draft Harbor and Terminal Authority State of Louisiana, January 15, 1974.

[178]See generally, Institutional Implications, supra note 80, at 58-59.

[179]Id., at 60.

to develop, construct, and operate the offshore port.[180]

Also in 1972 Alabama and Mississippi established a non-profit corporation called Ameraport to investigate the possibilities of offshore port development in their respective coastal areas. Ameraport has studied the feasibility of terminal sites up to twenty-five miles off the coast of Mobile.[181] There have also been substantial initiatives in the Gulf Coast by the private sector. The Louisiana Offshore Oil Port (LOOP), a consortium of fourteen companies and Seadock, a consortium of nine companies, are studying possible offshore port sites in both Louisiana and Texas.[182]

Thus should a concrete offshore port development project arise in North Carolina, the initiatives of the Gulf Coast States, particularly of Texas and Louisiana, could provide valuable information on the legislative, administrative, financial, and environmental aspects of deepwater port development. It must be recognized, however, that the political and economic climate in the Gulf Coast States has been markedly more conducive to offshore port planning than that of the Atlantic Coast States in general. The obvious reason for this is that the petroleum industry and known petroleum resources already play an important role in the socio-economic structure of the Gulf Coast States. While environmental concerns have been recognized and even emphasized, the Gulf Coast States generally consider them to be more compatible with appropriately designed facilities than do the East Coast States.

For these reasons the Louisiana and Texas legislative models might be considered somewhat inappropriate for North Carolina's particular needs. It would appear unlikely, for example, that North Carolina would want to finance publicly the cost of constructing the offshore terminal itself, as the Texas Offshore Terminal Commission recommended be done in Texas. However, the concept of having one state agency to regulate, or at least coordinate the regulation of, deepwater port development would appear to have substantial merit. As the preceding discussion of state law has indicated, the existing legal framework capable of regulating superport development is diffused and incomplete. Furthermore, as previously noted, the nature of the Federal Deepwater Port Act in regard to designation of "adjacent coastal states" is such that a regional approach to superport development may be a necessity and is, at any rate, certainly desirable. Any new state legislation dealing specifically with deepwater ports could thus provide for regional coordination of development. Therefore, an early and necessary major policy decision regarding offshore port development in North Carolina is whether the state needs new regulatory legislation to deal specifically with deepwater ports.

7. Alternatives and Recommendations

Should the State Government find such new legislation unnecessary, undesirable, or unobtainable, then at least one other viable alternative not previously mentioned does exist. The North Carolina State Port Authority already has the power:

> ...to engage in promoting, developing, constructing, equipping, maintaining, and operating the harbors and seaports within the State,

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[180]Texas Offshore Terminal Commission, Plan for Development of a Texas Deepwater Terminal, 1-3, (January 24, 1974).
[181]Institutional Implications, supra note 80, at 60.
[182]Id., at 56.

> or within the jurisdiction of the State, and works and internal improvements thereto...; and in general to do and perform any Act or function which may tend to be useful toward the development and improvement of harbors, seaports, and inland ports of the State of North Carolina, and to increase the movement of waterborne commerce, foreign and domestic, to, through, and from said harbors and ports. The enumeration of the above purposes shall not limit or circumscribe the broad objective of developing to the utmost the port possibilities of the State of North Carolina.[183] (emphasis added)

If the pipeline and oil terminal components of a deepwater port could be construed to be a harbor or seaport within the jurisdiction of the State then it would appear that the North Carolina Ports Authority already possesses some jurisdictional authority to regulate such development. If superport component facilities on state lands could not be statutorily construed to fall within the jurisdiction of the State Ports Authority, the powers of the Ports Authority could be amended to encompass regulation of any deepwater port facilities within North Carolina.

Short of creating a new state agency to oversee deepwater port development or of specifically delegating that responsibility to the Ports Authority, other "lower key" alternatives do exist for "shoring up" the state's existing regulatory authority to handle superports. In the writer's opinion, three alternatives, suggested in the preceding discussion of North Carolina State law, appear particularly attractive.

First, the Coastal Resources Commission could designate all of North Carolina's submerged lands as areas of environmental concern. Such a designation would have the effect of requiring a deepwater port licensee to obtain a permit for the construction of a pipeline running over state submerged lands from the Coastal Resources Commission in a quasi-judicial permit proceeding, thus providing thorough governmental and public review of any proposed superport development.

Second, Part 3 of the North Carolina Oil Pollution Act could be amended to require permits for "oil terminal facilities" instead of merely for "oil refineries." This would insure comprehensive scrutiny by DNER over the construction of any pipeline facilities on submerged lands under the permit provisions of General Statutes 143-215.99.

Third, the state could condition the granting of a pipeline easement over state-owned submerged lands upon continuing compliance with the highest environmental standards and all other state environmental and land and water use programs.

That difficult and important policy decisions regarding the role of the State Government in the regulation of a North Carolina deepwater port remain to be made is manifest. Hopefully this research will be of use in formulating a comprehensive approach to the regulation and control of deepwater port development, should a North Carolina site be selected for a superport location.

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[183] N.C.G.S. §§ 143-217 (1945).