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THE FUTURE APPLICATION OF THE PUBLIC TRUST DOCTRINE IN NEW YORK STATE: LEGISLATIVE INITIATIVES AND BEYOND

David L. Markell*

INTRODUCTION

The public trust doctrine is a common law doctrine that is designed to safeguard the public's rights in certain waters and lands underwater.¹ It does so by making each state the "trustee"

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¹ The specific geographic scope of the public trust doctrine in New York State is discussed in more detail *infra* part I.A. For a more full discussion of the public trust doctrine, see WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 2.16 (Supp. 1984); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986). Summarizing this doctrine in a single sentence is not intended to mask its complexity. Writing about the public trust doctrine in his *Handbook on Environmental Law*, Professor Rodgers characterizes the difficulty in defining and understanding this ancient doctrine as follows: "[R]esoundingly vague, obscure in origin and uncertain of purpose; it serves a variety of functions, mimics other doctrines, and for these reasons is not easily researchable." RODGERS, *supra* § 2.16, at 59 (footnotes omitted). Similarly, other commentators have concluded that deciphering the nature of the public trust doctrine is no simple task. For example, Professor Lloyd Cohen believes that analysis of the public trust doctrine is best advanced by treating it as three different doctrines: (1) "*the public trust doctrine that was*" (the English common law that evolved over several centuries); (2) "*the public trust doctrine that is*" (the contemporary American "jumbled body of case law and commentary"); and (3) "*[the] public trust doctrine that ought to be*" (a principle that would prevent destruction of communal property). Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 240 (1992); see also David C. Slade, *Public Trust*

responsible for protecting these rights. This Article identifies a number of issues relating to the future application of the public trust doctrine in New York State. The Article uses New York State's recently enacted Underwater Lands Bill² as a vehicle for identifying several of these issues. Part I briefly summarizes the public trust doctrine itself, as well as its recent partial codification in New York State's Underwater Lands Bill.³ Part II discusses issues relating to the implementation of the Underwater Lands Bill based upon public trust doctrine principles.⁴ Part III identifies a potential downside of the state's property interest in public trust resources.⁵

I. A BRIEF HISTORY OF THE PUBLIC TRUST DOCTRINE AND A SUMMARY OF THE UNDERWATER LANDS BILL

A. *A Brief History of the Public Trust Doctrine*

Under the public trust doctrine, each state is responsible, as a "trustee," for safeguarding public rights in the lands and waters covered by the doctrine for common uses, such as navigation, commerce, and recreation.⁶ Two titles are traditionally vested in these public lands and waters.⁷ A "dominant" title, the *jus publicum*,

Doctrine-101, in THE PUBLIC TRUST DOCTRINE: THE OWNERSHIP AND MANAGEMENT OF LANDS, WATER AND LIVING RESOURCES 55, 55 (Albany Law School Government Law Center ed., 1991) (concluding that the doctrine is "an amazingly complex body of law"); Ted J. Hannig, Comment, *The Public Trust Doctrine Expansion and Integration: A Proposed Balancing Test*, 23 SANTA CLARA L. REV. 211, 212 (1983) (stating that the public trust doctrine is "imbued with as much lore and confusion as were the sea dragons once rumored to exist in the [Roman and English] waters").

² Act of Aug. 7, 1992, ch. 791, 1992 N.Y. Laws 4028 (codified as amended at N.Y. ENVTL. CONSERV. LAW §§ 15-0503(1), (4), 70-0117(5)(a)(iv) (McKinney Supp. 1994); N.Y. EXEC. LAW §§ 911(10)-(11), 915-b, 922 (McKinney Supp. 1994); N.Y. PUB. LANDS LAW §§ 8, 30-a(1), 75(7) (McKinney 1993)). This article refers to Chapter 791 of the New York Laws of 1992 by its informal, unofficial title, the Underwater Lands Bill. This Bill does not have a formal title. It amends the Public Lands Law, the Environmental Conservation Law, and the Executive Law by, *inter alia*, requiring parties to obtain a lease, easement, or permit in order to erect structures over, or to fill, underwater lands. *Id.*, 1992 N.Y. Laws at 4028.

³ See *infra* part I.

⁴ See *infra* part II.

⁵ See *infra* part III.

⁶ DIVISION OF COASTAL RESOURCES & WATERFRONT REVITALIZATION, N.Y. DEP'T OF STATE, PUBLIC ACCESS TO THE NEW YORK SHORELINE 30-32 (1988) [hereinafter PUBLIC ACCESS].

⁷ See *People v. Steeplechase Park Co.*, 113 N.E. 521, 523 (N.Y. 1916); Slade, *supra* note 1, at 63.

represents the public's rights, while a "subservient" title, the *jus privatum*, represents any "private proprietary rights in the use and possession of trust lands."⁸

In its seminal decision on the public trust doctrine, which it issued more than one century ago, the United States Supreme Court defined the scope of a state's responsibilities as trustee of the lands and waters covered by the public trust doctrine to include the authority to convey away the *jus privatum* to private persons, so long as the *jus publicum*, or interests of the public, are not impaired:

[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of peace.⁹

States retain considerable flexibility within this general framework that the Supreme Court articulated in 1892. This flexibility allows states to shape the scope of the public trust doctrine in terms of the precise lands and waters it covers, the nature of the public's rights, and the extent of the state's discretion to convey those rights.¹⁰ As a result, the doctrine has evolved differently in various states.¹¹

⁸ Slade, *supra* note 1, at 63.

⁹ Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892) (holding that the Illinois legislature's conveyance of 1000 acres of submerged and filled tidal lands that were part of the Chicago harbor was revokable because it was inconsistent with the legislature's exercise of its public trust responsibilities).

¹⁰ The authors of *Putting The Public Trust Doctrine to Work* summarize the states' public trust powers and authorities as follows: the power to "govern, manage and protect" public rights in public trust lands and waters; continued "supervision and control" over these lands; authority to define the boundaries and limits of public trust lands; power to convey away the *jus privatum*; revocation power over conveyances which "unduly diminish[] or destroy[] the State's *jus publicum* in public lands"; authority to "require leases for structures" built upon trust lands; and regulation of fishing. David C. Slade et al., *State Powers, Duties, Limitations and Prohibitions Under the Public Trust Doctrine*, in *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES* 213, 215 (David C. Slade ed., 1990).

¹¹ "The variability among state public trust doctrines was acknowledged as early as 1894 by the Supreme Court in *Shively v. Bowlby*." Cynthia Carlson, *Federal Property and the Preemption of State Public Trust Doctrines*, 20 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,003 n.1 (Jan. 1990); see also *Shively v. Bowlby*, 152 U.S. 1, 40 (1894) (holding "that the title and rights of riparian or littoral proprietors in the soil below high water mark . . . are governed by the local laws of the several States, subject . . . to the rights granted to the United States by the Constitution.").

Regarding the geographic scope of the public trust doctrine following the American Revolution, the states assumed title to public trust lands under navigable waters and tidelands that had not been conveyed away by the British through grants or patents.¹² In New York, as the United States Supreme Court noted in 1894 in *Shively v. Bowlby*, the "State succeeded to all the rights of the Crown and Parliament of England in lands under tide waters"¹³ While no official estimates are available as to the precise acreage or square mileage of public trust land within New York State,¹⁴ it is clear that the public trust doctrine covers considerable lands underwater. For example, large navigable lakes such as Onondaga Lake, Seneca Lake, Cayuga Lake, and Lake George are covered by the public trust doctrine.¹⁵ Similarly, the Supreme Court has held that the public trust doctrine also applies to the portions of the Great Lakes from the low water mark to the international boundary with Canada or the boundary with another state.¹⁶

Individual states have also defined, as a matter of state law, the protected public trust uses of lands and waters covered by the public trust doctrine. Over time, the doctrine has been held to protect an expanding list of public uses.¹⁷ New York courts have pro-

¹² See David C. Slade et al., *Lands, Waters and Living Resources Subject to the Public Trust Doctrine*, in *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK*, *supra* note 10, at 13, 16-17. In England, the definition of "navigability" was construed to mean waters subject to "the ebb and flow of the tide." *Illinois Cent. R.R.*, 146 U.S. at 435. American courts, however, labeled the terms "navigable waters" and "tidelands" synonymously since "in England no waters are navigable in fact which are not subject to the tide." *Id.*

¹³ *Shively*, 152 U.S. at 20-21; see also N.Y. PUB. LANDS LAW § 4 (McKinney 1993) (providing that all lands belonging to the Crown before July 9, 1776, are vested in the people of the State of New York). Prior to the Revolution, the British had conveyed large sections of New York to individuals and local governments. See *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 403 (1842). For a detailed history of the geographic scope of the public trust doctrine on Long Island, see William L. Sharp, *Long Island Colonial Patents and the Public Trust Doctrine*, in *THE PUBLIC TRUST DOCTRINE: THE OWNERSHIP AND MANAGEMENT OF LANDS, WATER AND LIVING RESOURCES*, *supra* note 1, app. For a detailed discussion of the geographic scope of the public trust doctrine's application in New York State, see *PUBLIC ACCESS*, *supra* note 6, at 142-46.

¹⁴ Telephone Interview with William L. Sharp, Senior Attorney, New York Department of State (Aug. 27, 1993).

¹⁵ Patricia E. Salkin, *Overview of the Public Trust Doctrine in New York*, in *THE PUBLIC TRUST DOCTRINE: THE OWNERSHIP AND MANAGEMENT OF LANDS, WATER AND LIVING RESOURCES*, *supra* note 1, at 73, 76.

¹⁶ *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 436-37 (1892).

¹⁷ See David Brower, *The Public Trust Doctrine: An Overview*, in *THE PUBLIC TRUST DOCTRINE: THE OWNERSHIP AND MANAGEMENT OF LANDS, WATER AND LIVING RESOURCES*, *supra* note 1, at 1, 10-12.

tected the traditional public trust uses of commerce, navigation, and fishing.¹⁸ Additionally, New York courts have held that the state may use its public trust powers to protect recreational uses such as lounging, reading, and even pushing baby strollers on the foreshore.¹⁹ Finally, one New York lower court has expanded the public trust doctrine to encompass ecological concerns: "The public interest demands the preservation and conservation of this vital natural resource and the enforcement of protective measures against infringements by nominal owners, be they private or governmental."²⁰ "The entire ecological system supporting the waterways is an integral part of them . . . and must necessarily be included within the purview of the trust."²¹

¹⁸ *Smith v. City of Rochester*, 92 N.Y. 463, 482 (1883) ("The sovereign right . . . was based upon the public benefits in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water as public highways for the common use of the people."); *see also* *Lawton v. Steele*, 23 N.E. 878, 879 (N.Y. 1890) (upholding the state's right to protect and regulate fishing in public waters), *aff'd*, 152 U.S. 133 (1894); *People v. Johnson*, 166 N.Y.S.2d 732, 735 (Sup. Ct. 1957) ("At common law, the public ordinarily had the right to hunt and fish in waters subject to the public right of navigation.").

¹⁹ *Tucci v. Salzhauer*, 336 N.Y.S.2d 721, 723 (App. Div. 1972), *aff'd*, 307 N.E.2d 256 (N.Y. 1973). The gathering of seaweed as a public trust right, however, has been explicitly rejected in New York. *People v. Brennan*, 255 N.Y.S. 331, 335 (Sup. Ct. 1931) (noting that "[i]t has long been settled law that the public cannot gather seaweed from the foreshore.").

²⁰ *People of Smithtown v. Poveromo*, 336 N.Y.S.2d 764, 775 (Dist. Ct. 1972), *rev'd on other grounds*, 359 N.Y.S.2d 848 (Sup. Ct. App. Term 1973).

²¹ *Id.* Various other states similarly have added protection of environmental and scenic beauty as well as simple existence value to the roster of valid public uses that the doctrine encompasses. *City of Berkeley v. Superior Court*, 606 P.2d 362 (Cal.), *cert. denied*, 449 U.S. 840 (1980), for example, expands the public trust doctrine to include the tidal lands' preservation "in their natural state as ecological units for scientific study." *Id.* at 365. Other expansive applications of the public trust doctrine include its use to invalidate the grant of a lease of public parkland for use as a ski resort development, *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114, 116 (Mass. 1966), the protection of a lake's scenic views and use for bird habitat, *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 711 (Cal.) (en banc), *cert. denied*, 464 U.S. 977 (1983), and the restoration of non-residents' public access to municipally-owned beaches, *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369 (N.J.), *cert. denied*, 469 U.S. 821 (1984). *See also* *Lazarus, supra* note 1, at 632 ("Tantamount to an academic call to legal arms on behalf of the natural environment, the public trust thesis has borne judicial fruit. In circumstances radically beyond the trust doctrine's historical confines, courts over the last fifteen years have repeatedly invoked the doctrine in litigation brought to halt environmentally destructive activities."); *Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970) (characterizing the public trust doctrine as the most promising legal tool to prevent destruction of natural resources). Professor Sax noted: "Of all the concepts known to American law, only the public trust doctrine

Debate continues concerning the extent to which New York courts should sanction state conveyances of underwater lands that terminate the state's *jus publicum* interest.²² While the New York courts have not sanctioned conveyances that totally abdicate public trust responsibilities,²³ they have allowed conveyances of lands out of the public trust when, in their view, doing so furthers the public interest.²⁴ In *People v. Steeplechase Park Co.*,²⁵ for example, the New York Court of Appeals upheld an unrestricted conveyance of foreshore and submerged lands to a Coney Island amusement park that had absolutely excluded the public.²⁶ The only restriction upon this conveyance, as well as upon thousands of other pre-existing conveyances, was that it "c[ould] be done without substantial impairment of the public interest[]." ²⁷

B. *The Underwater Lands Bill*

The 1992 Underwater Lands Bill is a good place to begin the

seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems." *Id.*

²² Compare Leslie Allan, *Government Conveyances of Trust Lands: Can the Public's Interest Ever Be Extinguished*, in AFTER Lucas: The Public Trust Doctrine and Public Nuisance Law in New York 49 (Albany Law School Government Law Center ed., 1993) with Sanford Strenger, *Government Conveyances of Trust Lands: Can the Public's Interest Ever Be Extinguished*, in AFTER Lucas: The Public Trust Doctrine and Public Nuisance Law in New York, *supra* at 59.

²³ *Coxe v. State*, 39 N.E. 400, 402 (N.Y. 1895) ("[A] trust is ingrafted upon . . . [the seacoast and shores of tidal rivers] for the benefit of the public, of which the state is powerless to divest itself.").

²⁴ In *Coxe*, the court held that the state could not surrender or alienate its title "except for some public purpose." *Id.* at 402; see Salkin, *supra* note 15, at 84-85. For a review of restrictions placed by other states on conveyances of public trust lands, see David C. Slade et al., *The Conveyance of Public Trust Land and the Nature of the Remaining Servitude*, in PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 10, at 175, 175-80.

²⁵ 113 N.E. 521 (N.Y. 1916).

²⁶ *Id.* at 526.

²⁷ *Id.* New York State's prerogative to convey trust lands to private hands has been recognized by the Supreme Court:

[U]nder the law of New York when these cases were decided, whenever the legislature deemed it to be in the public interest to grant a deed in fee simple to land under tidal waters and exclude itself from its exercise as sovereign of the *jus publicum*, that is, the power to preserve and regulate navigation, it might do so; but that . . . conclusion that it had thus excluded the *jus publicum* could only be reached upon clear evidence of its intention and of the public interest in promotion of which it acted.

Appleby v. City of New York, 271 U.S. 364, 383-84 (1925).

process of considering future legislative developments involving the public trust doctrine because it represents the New York State legislature's latest thinking on the doctrine. The Bill partially codifies the public trust doctrine by providing explicitly that the state's authority to convey interests in lands underwater is limited to situations in which it is in the public interest to do so:

This section authorizes grants, leases, easements, and lesser interests . . . for the use of state-owned land underwater . . . *consistent with the public interest in the use of state-owned lands underwater* for purposes of navigation, commerce, fishing, bathing, and recreation; environmental protection; and access to the navigable waters of the state²⁸

It appears that the decision to partially codify the public trust doctrine stemmed, at least in part, from the recognition that the state needed to improve its practices in conveying underwater lands to ensure that in doing so, it furthered and protected the public's interest in those lands. As Governor Mario Cuomo stated in his approval memorandum:

[T]he Governor's Task Force on Coastal Resources . . . urged that State procedures for real property transactions in lands now or formerly under water be improved to ensure that the public's interest in those lands is fully considered.

The bill, part of my 1992 legislative program, will address those needs

Given the absence of sufficient control, there are increasing numbers of inappropriate in-water projects, and projects with limited water frontage and disproportionate in-water development. Fre-

²⁸ Act of Aug. 7, 1992, ch. 791, § 3, 1992 N.Y. Laws 4028, 4029 (emphasis added) (codified as amended at N.Y. PUB. LANDS LAW § 75(7)(a) (McKinney 1993)); see also Memorandum from Cheryl Parsons Reul, Special Counsel to the Secretary of State, to Elizabeth D. Moore, Counsel to the Governor (Aug. 5, 1992) [hereinafter Reul Memorandum] (on file with author) ("[T]he measure would codify in many respects the common law 'public trust doctrine' which recognizes that the State, as sovereign, holds the tidelands and navigable waters in trust for the use and enjoyment of the public. The new statutory obligation is reinforced by a new paragraph f. of section 75 which requires the Commissioner to consider the public trust and other factors when promulgating rules for the issuance of leases, easements and other interests. Grants of underwater lands, including conversion grants, may be made only in exceptional circumstances and consistent with the public purposes of the section."); Memorandum from Hudson River Sloop Clearwater, Inc., to Senator Ralph Marino, New York State Senate (July 17, 1992) (on file with author) ("Hudson River Sloop Clearwater strongly supports this bill because of the much needed protection it provides for the natural resource values of underwater lands, and the public's long standing rights and interests in these lands, as provided by the Public Trust Doctrine.").

quently, this development is wholly at odds with the character of adjoining lands, infringes the legitimate interests of existing private landowners, and is inconsistent with the public interests in safety, coherent development, environmental preservation, and fair compensation for a public resource

The bill [is] our first major step in solving these problems²⁹

The legislature establishes two primary mechanisms in the Underwater Lands Bill to ensure that conveyances of state-owned lands underwater do not impair the public's interest in such lands underwater. First, the Bill requires that *any* conveyance contain conditions necessary to protect the public interest:

In making any grant, lease, permit, or other conveyance, the commissioner of general services shall, upon administrative findings, and to the extent practicable, reserve such interests or *attach such conditions to preserve the public interest in the use of state-owned lands underwater and waterways* for navigation, commerce, fishing, bathing, recreation, environmental protection and access to the navigable waters of the state, with due regard for the need of affected owners of private property to safeguard their property.³⁰

Second, the bill severely restricts the state's ability to make *grants* of lands underwater by limiting such grants to "extraordinary circumstances": "The commissioner [of OGS] . . . shall promulgate . . . regulations [that] shall include . . . limitations on grants . . . with respect to underwater lands . . . limiting such

²⁹ Memorandum from Gov. Mario Cuomo filed with the Senate Bill No. 8947-A (Aug. 7, 1992) (on file with author); *see also* Budget Report on Bills, N.Y.S. 8947-A, 1992 Sess. 3 [hereinafter Report on Bills] (on file with author) ("[T]his legislation is aimed at controlling the potential 'overdevelopment' of shoreline real property by marinas and by other types of commercial enterprises in ways that are detrimental (a) to the environment, (b) to the value of surrounding properties, and (c) to scenic and other forms of enjoyment by members of the general public."); Memorandum from Orin Lehman, Commissioner, Parks, Recreation and Historic Preservation, State of New York, to Elizabeth D. Moore, Counsel to the Governor 2 (Aug. 12, 1992) (on file with author) ("[T]he bill provides a much-needed scheme for the control of rapidly proliferating docks in the State's waters in a way that addresses the many competing interests."); Reul Memorandum, *supra* note 28, at 1 ("The bill fulfills several of the legislative recommendations of the Governor's Task Force on Coastal Resources. In its report, the Task Force recommended that management of state owned underwater lands be improved; that procedures be instituted to ensure that environmental and public trust factors be considered in decisions concerning state owned under water lands These objectives are accomplished in the proposed legislation.").

³⁰ Act of Aug. 7, 1992, § 3, 1992 N.Y. Laws at 4029 (emphasis added) (codified as amended at N.Y. PUB. LANDS LAW § 75(7)(f) (McKinney 1993)).

grants to *exceptional circumstances*”³¹

Other important features of this law, from a public trust perspective, include the following:

1. In authorizing the Office General Services to convey various interests in state lands underwater, the Underwater Lands Bill:

(a) requires the Commissioner of Environmental Conservation and the Secretary of State to review such proposed conveyances;³²

(b) requires the Commissioner of Environmental Conservation to recommend conditions to protect the environment and natural resources;³³ and

(c) requires the Commissioner of General Services to incorporate these conditions in any lease, easement, permit, or other interest “giving due regard . . . to the recommendations of the Secretary of State with respect to coastal issues” or to deny the proposal if the Commissioner of Environmental Conservation “determines that the environmental or natural resources cannot be adequately protected.”³⁴

2. It authorizes the Commissioner of General Services to impose a fee in connection with the issuance of any interest in public lands.³⁵

3. It authorizes the Commissioner of General Services to transfer jurisdiction over state-owned lands underwater to another state agency “for the purpose of protecting environmentally sensitive lands underwater.”³⁶

4. It requires the Commissioner of General Services to promulgate such regulations with respect to the issuance of any interest in public lands as the Commissioner deems “reasonable and necessary” to protect the interests of the people in such lands underwater.³⁷ These regulations are required to address the following issues, among others: the fees to be charged; the environmental impact of the pro-

³¹ *Id.*, 1992 N.Y. Laws at 4032 (emphasis added) (codified at N.Y. PUB. LANDS LAW § 75(7)(f)). The Office of General Services’ (OGS) regulations to implement the Underwater Lands Bill were proposed on September 1, 1993. 15 N.Y. St. Reg. 16-18 (Sept. 1, 1993). They were still in proposed form as of December 31, 1993. The proposed regulations fail to define the term “extraordinary circumstances.” See generally *id.* They do, however, provide that “[g]rants of land [underwater shall be] limited to exceptional circumstances” and only to those conveyances that will not impair the public interest in the lands and waters remaining, based upon factors set forth in Section 270-3.2. *Id.* at 16.

³² Act of Aug. 7, 1992, § 3, 1992 N.Y. Laws at 4030 (codified at N.Y. PUB. LANDS LAW § 75(7)(d)(i) (McKinney 1993)).

³³ *Id.*, 1992 N.Y. Laws at 4031 (codified at N.Y. PUB. LANDS LAW § 75(7)(d)(i)).

³⁴ *Id.*

³⁵ *Id.* (codified at N.Y. PUB. LANDS LAW § 75(7)(e)(i) (McKinney 1993)).

³⁶ *Id.*, 1992 N.Y. Laws at 4029 (codified as amended at N.Y. PUB. LANDS LAW § 75(7)(a)).

³⁷ *Id.*, 1992 N.Y. Laws at 4032 (codified at N.Y. PUB. LANDS LAW § 75(7)(f)).

ject; the values for natural resource management, recreational uses, and commercial uses of the pertinent underwater land; and the effect of the project on the natural resource interests of the state in the lands.³⁸

II. ISSUES RELATING TO THE UNDERWATER LANDS BILL

A. *The Functional Allocation of Responsibilities*

The functional allocation of responsibilities in the 1992 Underwater Lands Bill raises several important issues. First, in several different ways, it raises an issue concerning the appropriate relationship between the state's position as trustee for public resources and the state's exercise of its police power. The police power provides the states with legal authority to protect the public health, safety, and welfare of its citizens.³⁹ On the other hand, the public trust doctrine has been a source of government power protecting public interests specific to lands beneath "navigable waters."

The Underwater Lands Bill continues the allocation of these two different functions to different agencies. At the same time, however, the Bill requires a convergence of these functions, and recognizes the possibility of their further institutional consolidation in the future. Thus, the Bill recognizes OGS remains responsible for administering public trust lands.⁴⁰ It also gives OGS responsibility and authority to convey various types of interests in these lands.⁴¹ The Underwater Lands Bill, however, also gives the state's environmental regulatory agency, the New York State Department of Environmental Conservation (DEC), a role to play in ensuring that such conveyances do not inappropriately or unnecessarily jeopardize the state's environment or natural resources.⁴² DEC's role is not merely a consultative one. In addition to retaining its regulatory responsibilities, DEC essentially has veto power over OGS' exercise of its trustee responsibilities.⁴³

³⁸ *Id.*

³⁹ *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

⁴⁰ See generally N.Y. PUB. LANDS LAW § 75(7) (McKinney 1993).

⁴¹ *Id.* § 75(7)(a).

⁴² *Id.* § 75(7)(d)(i).

⁴³ See *id.* The law provides that the Commissioner of General Services shall incorporate DEC conditions in any conveyance or shall deny a proposal "if the Commissioner of Environmental Conservation . . . determines that the environment or natural resources cannot be adequately protected." *Id.* As one example of DEC's retention of regulatory power, the law expressly provides that OGS' juris-

Additionally, the law promotes the possibility of further consolidation of responsibility for public trust lands by explicitly recognizing that it may be appropriate for OGS to transfer the trustee responsibilities to another agency, such as DEC, for the purpose of protecting environmentally sensitive lands underwater.⁴⁴

It is worth exploring the dimensions of this issue in more detail. First, does it make sense for the state to maintain divided responsibility for public trust lands? Is a structure that provides for multiple agency reviews of proposed conveyances the most efficient structure for achieving the Bill's purposes? The Division of the Budget raises this issue in its comments on the Bill, noting:

[B]y requiring that DEC and [the Department of State,] as well as OGS review each application to build a new structure on underwater land to which the State holds nominal title, it could be argued that enactment of this measure would establish an unwarranted, highly inefficient, and relatively costly layer of government regulation affecting various types of parties who build docks and other structures on underwater lands in New York State.⁴⁶

diction does not extend to discharge or intake pipes, pipelines, cables, or conduits. *Id.* § 75(7)(b). By creating a central role for DEC that empowers DEC to evaluate, condition, and even deny conveyances, the Underwater Lands Bill takes a big step toward avoiding the potential conflict of interest that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. §§ 4321-4370d (West 1977 & Supp. 1993), creates.

The federal Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988), takes an approach similar to that adopted in the Underwater Lands Bill. The Endangered Species Act also requires the agency that approves an action to consult with an expert agency before doing so. *Id.* § 1536. Under the Endangered Species Act, the "expert" agency is brought into the process at two junctures. First, the proponent agency must ask the Fish & Wildlife Service whether any threatened or endangered species may be present. *Id.* § 1536(a)(2). If the answer is affirmative, the burden shifts to the proponent agency to conduct a "biological assessment" to determine whether such a species is "likely to be affected" by the action. *Id.* § 1536(c)(1). If the assessment concludes that the species is likely to be affected, the Fish & Wildlife Service is called on again, this time to prepare a formal "biological opinion." *Id.* If the biological opinion concludes that the species would be jeopardized by the action or its critical habitat destroyed or adversely modified, it will be very difficult for the proponent agency to go forward.

⁴⁴ N.Y. PUB. LANDS LAW § 75(7)(c). As DEC Executive Deputy Commissioner J. Langdon Marsh pointed out in his paper for the 1991 Albany Law School Government Law Center Public Trust Conference, in addition to OGS' administration of public trust resources, DEC currently administers certain such resources as well. These include underwater lands where "natural resource values . . . predominate." J. Langdon Marsh, *Protection of Natural Resources, in THE PUBLIC TRUST DOCTRINE: THE OWNERSHIP AND MANAGEMENT OF LANDS, WATER AND LIVING RESOURCES*, *supra* note 1, at 101, 103.

⁴⁶ Report on Bills, *supra* note 29, at 5.

Second, what role should each agency play if responsibilities remain divided? If, in recognition of DEC's expertise in protecting the environment and natural resources of the state, DEC has been assigned responsibility for ensuring that conveyances of interests in such resources are acceptable from an environmental perspective, what should be OGS' role? It appears that, at a minimum, there is a need for close coordination among DEC, OGS, and the Department of State in the regulation-drafting process, given the statutory mandate that such regulations require conveyances to incorporate natural resource and environmental protection concerns, which appear to be primarily within the purview of DEC.

Third, assuming that this framework of divided functions is retained, thought should be given to the proper implementation of the statutory authorization for OGS to transfer jurisdiction in certain instances. The statute is silent on this issue, other than its direction that OGS may transfer jurisdiction for the purpose of protecting environmentally sensitive lands underwater.⁴⁶ The concept of "environmentally sensitive lands" is not defined in the statute. Similarly, the Underwater Lands Bill fails to provide guidance as to the criteria OGS should use in deciding whether such a transfer is warranted.

The proposed regulations to implement the Underwater Lands Bill do not define "environmentally sensitive lands." The proposed regulations suggest, however, that in practice, the transfer of lands to another agency will be limited.⁴⁷ First, it appears that the proposed regulations do not provide for OGS *sua sponte* to determine that certain lands underwater are "environmentally sensitive" and therefore should be transferred to another state agency.⁴⁸ Instead, the proposed regulations appear to contemplate that such lands underwater will be transferred only if the "recipient" agency requests the transfer.⁴⁹

Second, the proposed regulations provide that lands underwater

⁴⁶ N.Y. PUB. LANDS LAW § 75(7)(a).

⁴⁷ See 15 N.Y. St. Reg. 16-18 (Sept. 1, 1993).

⁴⁸ *Id.*

⁴⁹ See Office of Gen. Servs., N.Y. Executive Dep't, Draft Regulations, Lands Underwater: Grants, Easements, Leases, Permits 33 [hereinafter Draft Regulations] (to be codified at N.Y. COMP. CODES R. & REGS. tit. 9, § 270-9.1) (on file with the *Albany Law Journal of Science and Technology*) ("[U]pon the application of any State department or a division, bureau or agency thereof, or upon the application of any State agency, the Commissioner may transfer to *such* State department State-owned lands underwater to *such* agency for the purpose of protecting environmentally sensitive lands underwater.") (emphasis added).

must be of “*unique* environmental sensitivity” to qualify for transfer.⁵⁰ The state’s Open Space Plan recommends an alternative approach, indicating that “all underwater lands in State ownership should be reviewed and those underwater lands where natural resource values clearly predominate should be transferred to DEC or [the] Office of Parks, Recreation and Historic Preservation [(OPRHP)] for management.”⁵¹ The involved state agencies need to work closely together, along with the affected communities, in order to develop a coherent and sensible answer to this issue.

B. Fees and Valuation of Natural Resources Within the Context of the Public Trust Doctrine

Another significant set of issues relates to the methodologies for determining: (1) whether, in light of the “value”⁵² of a particular parcel of state-owned underwater land, a conveyance should be granted;⁵³ (2) the “environmental impact” of the project and the “effect of the project on the natural resource interests of the state”;⁵⁴ (3) the conditions, if any, which should be placed on the project to protect the environment and natural resources;⁵⁵ and (4) the monetary fee to be charged for conveying an interest in the parcel.⁵⁶ The governing legislation provides little guidance regard-

⁵⁰ *Id.* (emphasis added).

⁵¹ DEPARTMENT OF ENVTL. CONSERVATION & OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, CONSERVING OPEN SPACE IN NEW YORK STATE: PLAN AND FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT 184 (1992) [hereinafter CONSERVING OPEN SPACE] (emphasis added). In formulating this plan, state agencies worked through regional advisory committees comprised of knowledgeable citizens who made recommendations on regional land acquisition priorities. The regional advisory committee structure was created through 1990 amendments to Article 49 of the Environmental Conservation Law. N.Y. ENVTL. CONSERV. LAW § 49-0209 (McKinney Supp. 1994).

⁵² For a discussion of approaches to “valuing” resources and the impact upon them, see *infra* notes 76-110 and accompanying text.

⁵³ Section 75(7) of the Public Lands Law authorizes DEC to require OGS to deny a request for a conveyance upon a determination that the environment or natural resources cannot be adequately protected. N.Y. PUB. LANDS LAW § 75(7)(d)(i). OGS, in exercising its authority, also has the discretion to condition or even to disallow the use of a state resource based on environmental or other relevant impact, subject to judicial review based on the rational basis standard. *Schwartz v. Hudacs*, 566 N.Y.S.2d 435, 439-40 (Sup. Ct. 1990). DEC has similar discretion in exercising its regulatory authority. N.Y. COMP. CODES R. & REGS. tit. 6, § 621.9 (1988).

⁵⁴ N.Y. PUB. LANDS LAW § 75(7)(f).

⁵⁵ *Id.* § 75(7)(d)(i).

⁵⁶ *Id.* § 75(7)(f).

ing the first three of these issues. Concerning the fourth, the legislation establishes artificial limits that may result in state subsidization of the use of its public trust resources.⁵⁷

The state needs to determine whether there are certain circumstances under which it should "reserve" its underwater lands and deny any request for conveyances. As noted above, both the Underwater Lands Bill, itself, and the case law authorize the state to reserve lands underwater in appropriate circumstances.⁵⁸ In implementing this law, the state should establish criteria to help it make this judgment.

The Governor's Task Force on Coastal Resources provides a proposed criterion, recommending that the sale or lease of public lands be limited to instances in which no adverse impact on coastal water quality or natural resources will occur.⁵⁹ OGS should consider the work of other groups as well. A significant market in undeveloped lands with the intent of preservation of such lands for their scenic, wilderness, habitat, or recreational characteristics is currently developing.⁶⁰ Various groups have begun to develop "relatively comprehensive and sophisticated procedures for identifying and prioritizing properties for acquisition."⁶¹ Moreover, the Nature Conservancy has developed a structure to identify and design nature reserves in order to protect the land and provide for long term

⁵⁷ See *id.*

⁵⁸ See *supra* notes 17-27 and accompanying text.

⁵⁹ GOVERNOR'S TASK FORCE ON COASTAL RESOURCES: NOW AND FOR THE FUTURE: A VISION FOR NEW YORK'S COAST 40-46 (1991) [hereinafter GOVERNOR'S TASK FORCE]. The Commission makes numerous additional recommendations in the areas of: (1) enhancement of coastal water quality, *id.* at 40, (2) protection of coastal habitats, including "net gain" in quality and quantity of wetlands, coordination of state and federal agencies in reference to habitat management, and improvement of wetlands data, *id.* at 47, (3) participation in the North American Waterfowl Management Plan, and protection of significant habitats, *id.* at 49, (4) the management of fishery resources (coordinated interstate management, fishing license revenues used to finance protection of fisheries, and the adoption of a comprehensive fisheries management policy), *id.* at 51, and (5) natural features protection, including protection of dunes, bluffs, steep shore areas and barrier beaches, a strategy of retreat in coastal hazard areas, minimum development setbacks, limitations of subsidies for building in coastal hazard areas, proper dredging disposal, higher priority on enforcement of environmental laws in coastal areas, and recovery of natural resource damages monies, *id.* at 55.

⁶⁰ *Id.* at 49-50. Government agencies such as the U.S. Forest Service, the U.S. Fish and Wildlife Service, and state agencies have been supplemented by conservation organizations such as the Natural Conservancy, the Trust for Public Lands, and the rapidly growing number of local land trusts nationwide. *Id.* at 45.

⁶¹ *Id.* at 63.

management.⁶² OGS may be able to learn some valuable lessons from these groups in terms of identifying underwater lands that should be reserved and not be available for sale or lease.

In conclusion, regardless of the standards it adopts, the state should develop criteria for determining whether it is appropriate to convey any interest in a parcel. Further, the state should identify biologically rich underwater land areas, as well as those sheltering important natural resources (e.g., threatened or endangered species) as a critical first step in fulfilling this initial responsibility of determining whether to consider conveying certain parcels.⁶³

Second, in determining whether to make conveyances and the appropriate scope of such conveyances, the state should require evaluations of the environmental impact of proposed conveyances.⁶⁴ In its recent report, the Governor's Task Force on Coastal Resources specifically recommended that open space values—natural resource, scenic, public, or recreational values—be incorporated into a review process for state transactions in lands now or formerly underwater in coastal areas.⁶⁵

Third, part of this analysis of the appropriate scope of conveyances of state-owned lands underwater should include the appropriateness of placing conditions on the proposed use. As the Open Space Plan notes: "The environmental review process now in place should be expanded to insure that sensitive parcels are not leased

⁶² Working with state organizations such as DEC, the Conservancy has worked to develop natural heritage inventories in all fifty states, including New York. See generally NEW YORK NATURAL HERITAGE PROGRAM & N.Y. STATE DEP'T OF ENVTL. CONSERVATION, ECOLOGICAL COMMUNITIES OF NEW YORK STATE (1990). This natural resource inventory assigns ecological communities and rare species of New York an "element rank" consisting of global and state rank. *Id.* app. A at 78. The rarity of the element throughout the world is reflected in the element's "global rank," while the state rank is a reflection of relative rarity in New York. See *id.* Originally developed to assess and protect the state's biodiversity, the Natural Heritage Program classification system has developed a standardized set of terms and concepts for natural resource managers' use in the environmental valuation of wildlife habitats.

⁶³ A complication in dealing with marine resources is that despite the designation of protected areas, pollutants are able to be transported in water environments. See DANIEL L. BOTTOM ET AL., MANAGEMENT OF LIVING MARINE RESOURCES: A RESEARCH PLAN FOR THE WASHINGTON AND OREGON CONTINENTAL MARGIN 12 (1989) (prepared for the Oregon Department of Fish and Wildlife).

⁶⁴ The proposed regulations require such evaluations. Draft Regulations, *supra* note 49, at 5-7 (to be codified at N.Y. COMP. CODES R. & REGS. tit. 9, § 270-3.2).

⁶⁵ See GOVERNOR'S TASK FORCE, *supra* note 59, at 62-63. An important part of this process involves identifying appropriate conditions in order to balance development with preservation.

or are leased only with appropriate environmental restrictions.”⁶⁶

Finally, assuming that the state decides to make a particular conveyance, it should set an appropriate fee for the conveyance based upon the impact a proposed project will have on the state’s resources and on the value of those resources. The Underwater Lands Bill, however, establishes arbitrary limitations on the amount of the fee that the state may charge for a conveyance.⁶⁷ Section 75(e)(ii) of the Public Lands Law, passed under the Underwater Lands Bill, limits the annual fee for leases and other conveyances for commercial use to a maximum of 2% of the “user’s net annual . . . income for structures not in existence on the effective date” of the law.⁶⁸ Section 75(e)(iii) limits the annual fee for residential use even more, to either \$100 or \$20 per slip, whichever is less.⁶⁹ These arbitrary limitations have the potential to short-change the state and allow users of state resources to reap a windfall.

The legislative history for the Underwater Lands Bill does not provide a rationale for the fee structure the legislature adopted.⁷⁰ Instead, it raises questions concerning the adequacy and potential constitutionality of this fee structure.⁷¹ The Division of the Budget commented on the low fees that this fee structure would produce:

[T]he two percent of net income limit on the amounts which OGS could charge for leases and easements pertaining to underwater land on which new structures are built is extremely low in comparison to the flat rates of nine and seven percent of gross income which other states such as California and Florida charge for comparable conveyances.⁷²

In its comments on the Bill, the Department of Environmental Conservation indicated that the fee structure might need to be revisited if it resulted in prohibited gifts of state resources:

Since OGS has a constitutional obligation to charge a fee that is sufficient to avoid the issue of conveying an interest at a price which

⁶⁶ CONSERVING OPEN SPACE, *supra* note 51, at 184.

⁶⁷ See N.Y. PUB. LANDS LAW § 75(7)(e).

⁶⁸ *Id.* § 75(7)(e)(ii).

⁶⁹ *Id.* § 75(7)(e)(iii).

⁷⁰ See generally Report on Bills, *supra* note 29, at 3-4; Memorandum from Langdon Marsh, Executive Deputy Commissioner to the Department of Environmental Conservation, to Elizabeth D. Moore, Counsel to the Governor (Aug. 10, 1992) [hereinafter Marsh Memorandum] (on file with author).

⁷¹ See Report on Bills, *supra* note 29, at 5.

⁷² *Id.*

amounts to a prohibited gift of State resources, OGS will need to monitor the fee caps to determine when and if a legislative adjustment is required.⁷³

In promulgating its regulations under the Underwater Lands Bill, OGS should, to the maximum extent possible, link the amount of the fee it charges to the impact on the resource of the proposed use.⁷⁴ Under such a regulatory scheme, instead of receiving subsidies through such arbitrary limitations, users of state resources would be required to pay the full cost of such use. Again, this would be done by linking the fee the user must pay to the impairment in the value of the resource that its use will cause.⁷⁵

A critical issue in creating a fee structure that results in the internalization of costs involves valuation of the public trust lands and waters, as well as valuation of the injuries these resources may sustain from their use through conveyances. Several commentators have discussed the issue of valuing damages to natural resources in the context of two federal environmental laws, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁷⁶ and the Oil Pollution Act of 1990 (OPA).⁷⁷ Under CER-

⁷³ Marsh Memorandum, *supra* note 70, at 3.

⁷⁴ See Thomas A. Campbell, *Natural Resource Damage Assessments: A Glance Backward and a Look Forward*, 45 BAYLOR L. REV. 221, 222 (1993) ("To place a fair value on resources that have previously not been valued is a way of logically and rationally protecting our environment."). For a discussion of the role of the environmental laws in requiring parties to internalize costs, see David L. Markell, *Internalizing the Costs of Pollution: Trends in U.S. Environmental Policy*, 1 J. CORP. ENVTL. STRATEGY 43 (1993).

⁷⁵ See Christine M. Augustyniak, *Economic Valuation of Services Provided by Natural Resources: Putting a Price on the "Priceless"*, 45 BAYLOR L. REV. 389, 390 (1993) (referring to such an approach as "creating a more efficient use of scarce resources.") (footnote omitted).

⁷⁶ 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991). In CERCLA, Congress directed the President to promulgate regulations relating to natural resource damages. *Id.* § 9651(c). In Executive Order 12,580 of January 23, 1987, the President delegated this authority to the United States Department of the Interior (DOI), Exec. Order No. 12,580, 3 C.F.R. 193 (1988), *reprinted in* 42 U.S.C. § 9615 (1988), which issued such rules. *E.g.*, 52 Fed. Reg. 9042 (Mar. 20, 1987) (Type A rules); 52 Fed. Reg. 2923 (Jan. 23, 1987); 51 Fed. Reg. 27,674 (Aug. 1, 1986) (Type B rules). The District of Columbia Circuit Court of Appeals invalidated portions of these rules in 1989. *Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 438 (D.C. Cir. 1989); *Colorado v. United States Dep't of the Interior*, 880 F.2d 481, 483 (D.C. Cir. 1989); see Raymond J. Kopp et al., *Natural Resource Damages: The Economics Have Shifted After Ohio v. United States Department of the Interior*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,127 (Apr. 1990); Erik D. Olson, *Natural Resource Damages in the Wake of the Ohio and Colorado Decisions: Where Do We Go From Here?*, 19 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,551 (Dec. 1989).

⁷⁷ 33 U.S.C. §§ 2701-2737 (Supp. II 1990).

CLA and OPA, the federal and state governments are considered to be stewards or trustees of natural resources.⁷⁸ Recognizing the analogy, one commentator has called the natural resource damage provision in CERCLA “[the] statutory analog . . . [of] the . . . public trust doctrine.”⁷⁹ The analogy is equally applicable to OPA.

In his article, *Natural Resource Damage Valuation*,⁸⁰ Professor Cross discusses three analytically different approaches for valuing natural resources: use value,⁸¹ existence value,⁸² and intrinsic value.⁸³ “Use value is . . . the worth of natural resources to people who use them.”⁸⁴ It includes both consumptive uses of natural resources, such as fishing and hunting, farming, and mining, and non-consumptive uses, such as bird watching or relaxing.⁸⁵ Determining actual use of specific natural resources is one technique for valuing such resources.⁸⁶

There are several potential flaws associated with relying exclusively on “use value.” First, some properties may actually decrease in “environmental value” and monetary value as public use in-

⁷⁸ See 33 U.S.C. § 2704(d) (allowing the President to set liability limits); 42 U.S.C. § 9651(c) (authorizing the President to promulgate regulations). Since the district court's decision to invalidate portions of these regulations, both DOI under CERCLA and the U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) have been engaged in rulemaking proceedings to promulgate regulatory schemes for valuing natural resource damages that will address the court's concerns. See, e.g., 59 Fed. Reg. 1062 (Jan. 7, 1994) (to be codified at 15 C.F.R. § 990). As of January 1994, NOAA had published eight Federal Register notices since 1990 requesting comments on valuing natural resource damages. *Id.* The U.S. Department of Interior also reopened its comment period for a proposed rule on July 22, 1993. 58 Fed. Reg. 39,328 (July 22, 1993) (to be codified at 43 C.F.R. § 11).

⁷⁹ Anthony R. Chase, *Remedying CERCLA's Natural Resource Damages Provision: Incorporation of the Public Trust Doctrine into Natural Resource Damage Actions*, 11 VA. ENVTL. L.J. 353, 354 (1992); see also John G. Gleeson et al., *Defending Natural Resources Damage Claims: Minimizing the Liability of Responsible Parties*, 70 U. DET. MERCY L. REV. 281, 284 (1993) (“Congress expanded the common law public trust doctrine within the natural resources damages provisions of CERCLA.”).

⁸⁰ Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269 (1989).

⁸¹ *Id.* at 281-84.

⁸² *Id.* at 285-92.

⁸³ *Id.* at 292-97.

⁸⁴ *Id.* at 281.

⁸⁵ *Id.* In terms of the degree of consumptive and non-consumptive use, a United States Department of Agriculture study found that in 1975, Americans devoted 478 million days to sport hunting, and more than 1.6 billion days to the observation of wildlife. *Id.* n.55.

⁸⁶ *Id.*

creases.⁸⁷ For example, heavy use of shore areas uproots bottom plants, erodes shorelines, increases water contamination such as lead and oil contamination, and increases fish disease and death rates.⁸⁸ Second, use value “ignores the reality that natural resources may have worth beyond their [actual] use by humans.”⁸⁹ This value of a resource beyond its use value is known as “existence value.”⁹⁰ Accordingly, to capture fully the value of a natural resource, the valuation process should extend beyond determining use value and include this existence value.

Existence value may be defined as the value which humans receive simply by knowing that a particular resource exists.⁹¹ The New York Court of Appeals recognized the legitimacy of protecting existence value as a basis for governmental exercise of its police power functions, noting that “the police power is not to be limited to guarding merely the physical and material interests of the citizen. His moral, intellectual and spiritual needs may also be considered. The eagle is preserved, not for its use but for its beauty.”⁹²

Natural resource economists have described existence value in three forms: option value, vicarious value, and intertemporal value.⁹³ “Option value,” as adopted from private market “option” concepts,⁹⁴ assigns a value to what individuals will pay for the option of preserving a certain natural resource for some future use.⁹⁵ An example is the amount a person would pay for the option of seeing the Grand Canyon at some point later in life.⁹⁶ A second example, in which a resource’s option value actually was considered in the decision-making process, involved a proposal to flood

⁸⁷ See Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 11-12 (1992).

⁸⁸ *Id.* at 11.

⁸⁹ Cross, *supra* note 80, at 284.

⁹⁰ *Id.* at 285.

⁹¹ *Id.*

⁹² A.E. Nettleton Co. v. Diamond, 264 N.E.2d 118, 123 (N.Y. 1970) (quoting Barrett v. State, 116 N.E. 99, 101 (N.Y. 1917)), *appeal dismissed sub nom.* Reptile Products Ass’n v. Diamond, 401 U.S. 969 (1971). The District of Columbia Circuit Court of Appeals upheld the inclusion of “existence” or “passive-use” values as long as they could be measured reliably. Ohio v. United States Dep’t of the Interior, 880 F.2d 432, 475-76 (D.C. Cir. 1989).

⁹³ Cross, *supra* note 80, at 285-86.

⁹⁴ For example, in the market for various commodities, a private market has developed for the “option or right to [purchase or] use [the] product” in the future. *Id.* at 286.

⁹⁵ *Id.*

⁹⁶ *Id.*

the Hells Canyon portion of the lower Snake River for a hydroelectric project. Hells Canyon was preserved when the natural resource economist John Krutilla developed the concept that:

The value of the option to retain the canyon in its original state in anticipation of its rapidly increasing scarcity and value in the future increased its present value substantially. The "option value" of increasingly scarce, undeveloped lands should be an important component in determining the fee structure and length of any leases for uses of these lands.⁹⁷

"Vicarious value" is an expression of willingness to pay for the existence of natural resources that the individual is unlikely to ever use or even see.⁹⁸ For example, individuals often express a willingness to pay some amount for the protection of endangered species such as whales or wolves.⁹⁹ One commentator has suggested that broad-based membership in environmental organizations may serve as an indirect measure of the vicarious value of environmental concerns.¹⁰⁰

"Intertemporal value" reflects the current generation's concern that resources be preserved for subsequent generations.¹⁰¹ Adherents of intertemporal existence values reject the philosophy that "today trumps tomorrow," thereby discounting environmental quality available to future generations.¹⁰² Instead, they emphasize the continuity of life, and the need to preserve, rather than dissipate, our natural resources for future generations.¹⁰³

Several criticisms of existence value as a basis for measuring the value of natural resources have been made. These criticisms cite potential difficulties in measurement,¹⁰⁴ the fact that although individuals may speculate on what they might pay to preserve a resource, they may not necessarily follow through with actual use and in the end, "put their money where their mouth[] [is],"¹⁰⁵ and

⁹⁷ Victoria Adams & Bill Mundy, *The Valuation of High Amenity Natural Land*, APPRAISAL J. 48, 50-51 (1991).

⁹⁸ See Cross, *supra* note 80, at 287.

⁹⁹ *Id.* at 287-88.

¹⁰⁰ *Id.* at 288 & n.86; see John V. Krutilla, *Conservation Reconsidered*, 57 AM. ECON. REV. 777, 781 (1967).

¹⁰¹ Cross, *supra* note 80, at 288; see HOLMES ROLSTON III, ENVIRONMENTAL ETHICS 277-78 (1988).

¹⁰² ROLSTON, *supra* note 101, at 277-78.

¹⁰³ *Id.*

¹⁰⁴ Cross, *supra* note 80, at 289.

¹⁰⁵ Patrick T. Michael III, Comment, *Natural Resource Damages Under CERCLA: The Emerging Champion of Environmental Enforcement*, 20 PEPP. L. REV.

its focus on value to humans.¹⁰⁶ Despite these criticisms, the concept of existence value captures several reasons why certain natural resources have value. Accordingly, existence value should be used as one tool to value the lands and waters covered by the Underwater Lands Bill, and to determine appropriate fees for such conveyances.

Finally, intrinsic value represents the belief that natural things have inherent worth of their own, independent of their value to humans.¹⁰⁷ "Deep ecologists" believe that "all living things 'have inherent value and . . . moral significance independent of their use by human beings, or even of human existence.'"¹⁰⁸ In order to capture all costs and internalize them, assuming that use of the resource will be permitted, the intrinsic value of the resource should be considered as well.¹⁰⁹

185, 198 (1992).

¹⁰⁶ See Cross, *supra* note 80, at 290.

¹⁰⁷ *Id.* at 293. Some proponents of intrinsic value reject the legitimacy of placing monetary values on natural resources. They argue that the concept of assigning monetary value and even the words "natural resources" reflect the human bias. See *id.* at 293-94. These proponents believe that the word "resource" represents the idea that animals, minerals, or waters, for example, exist only as "resources" for man's use. See *id.* at 294-95.

¹⁰⁸ *Id.* (quoting P.S. Elder, *Legal Rights for Nature—The Wrong Answer to the Right(s) Question*, 22 OSGOOD HALL L.J. 285, 286 (1984)).

¹⁰⁹ Analytically, it appears that this should be the case both for uses of natural resources authorized under the Underwater Lands Bill and for uses authorized under various regulatory programs. As an example of the latter situation, why shouldn't a facility that emits into the air sulfur dioxide that ultimately ends up in a lake, thereby rendering the lake unfit as a habitat for fish, pay for the injury that it has caused to that lake?

As noted above, some members of the environmental community are not prepared to concede the appropriateness of a party's paying to destroy or impair a natural resource. See, e.g., Cross, *supra* note 80, at 305. If, however, the alternative is to allow such destruction or impairment to occur without requiring the actor to internalize its costs, the better approach appears to improve the methodology that is used so that it fully recovers for the harm that an act has or will cause. Another alternative is to bar the activity.

In at least one statute, Congress has recognized the impossibility, in most instances, of "monetizing" the value of natural resources or their destruction. See generally Endangered Species Act, 16 U.S.C. § 1531-1544. In the Endangered Species Act, Congress found that the benefits of maintaining species were "incalculable," and therefore it was impossible to conduct a meaningful cost-benefit analysis. H.R. REP. NO. 412, 93d Cong., 1st Sess. 4 (1973). As the Supreme Court held in the famous "snail darter" case, *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), if a project jeopardizes the continued existence of an endangered species or will result in the destruction or modification of its critical habitat, the project may not go forward. *Id.* at 173. The project was subject to an absolute bar. *Id.* at 172. However, this bar was relaxed somewhat in the 1982 amendments to the Endangered Species Act, which allowed the proponent of an action barred by

In sum, although no single approach is definitive in terms of natural resource valuation, the field of natural resource damage economics identifies several approaches that OGS should consider in setting monetary fees for the use of public trust lands in New York State. The important analytical point is that the fee that a party is charged to use a resource should reflect the impact on the value of the resource that the use will have.¹¹⁰ In fulfilling its responsibility under the Underwater Lands Bill, OGS should consider these lessons from CERCLA-based natural resource damages economics theory.

C. *A Miscellaneous Feature of the Underwater Lands Bill*

One feature that the Underwater Lands Bill lacks that warrants further scrutiny by the legislature is a citizen suit provision. Citizens can play an important role in protecting natural resources. This is especially true in difficult fiscal times such as that New York has experienced in recent years. And it seems particularly appropriate to provide express statutory authority that empowers citizens to act to protect public trust resources.¹¹¹

III. A FINAL RECENT DEVELOPMENT AFFECTING PUBLIC TRUST LANDS WHICH DESERVES CAREFUL CONSIDERATION

An issue that has received virtually no attention in the public trust literature, so far as this author is aware, relates to the CERCLA liability that a state may be exposed to in its capacity as owner of public trust resources.¹¹² CERCLA makes four categories

a "jeopardy" determination to seek an exemption from the Cabinet-level Endangered Species Committee. 16 U.S.C. § 1536(g).

¹¹⁰ See N.Y. CONST. art. VII, § 8; Marsh Memorandum, *supra* note 70, at 3.

¹¹¹ For a discussion of citizen suit provisions relating to natural resources damages actions under CERCLA, see Olson, *supra* note 76, at 10,552-53.

¹¹² Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991), four classes of persons are *strictly* liable for Superfund sites: (1) the present owner or operator of such sites; (2) persons who owned or operated such sites at the time of disposal of hazardous substances; (3) persons who arranged for the disposal, treatment, or transport of hazardous substances at the sites; and (4) persons who accept or accepted hazardous substances for transport to such sites. *Id.* § 9607(a)(1)-(4). These persons are liable for a wide variety of costs set out in 42 U.S.C. § 9607(a)(4)(A)-(D), including the costs for "damages for injury to, destruction of, or loss of natural resources . . ." *Id.* § 9607(a)(4)(C). Congress intended this statutory scheme to be very strict and "hoped [it] would give the government a very strong hand in deciding 'who pays' for cleaning up Love Canal

of parties liable for hazardous substances sites, including owners of such sites and, in some situations, previous owners of the sites.¹¹³ The Supreme Court held in *Pennsylvania v. Union Gas Co.*¹¹⁴ that in CERCLA, Congress waived the sovereign immunity of states to suit.¹¹⁵ A recent district court decision from Pennsylvania held the State of Pennsylvania liable for a Superfund site due to its status as owner of a navigable water.¹¹⁶ While the decision did not so state explicitly, it appears that the state's ownership of the water stemmed from the public trust doctrine, that is, from the fact that the water, as a navigable water, was covered by the public trust doctrine and therefore was owned by the state.¹¹⁷ The water became contaminated and required cleanup.¹¹⁸ The Court held the state liable for 25% of the costs of remediation.¹¹⁹ Accordingly, states may face liability under CERCLA for contamination of state-owned lands and waters.¹²⁰

IV. CONCLUSION

Despite its centuries-old history, issues relating to the appropriate scope and uses of the public trust doctrine continue to percolate.¹²¹ The recently enacted Underwater Lands Bill raises many of

and similar sites." David L. Markell, *The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship*, 18 WM. & MARY J. ENVTL. L. 1, 12 (1993).

¹¹³ 42 U.S.C. § 9607(a)(1)-(4).

¹¹⁴ 491 U.S. 1 (1989).

¹¹⁵ *Id.* at 13.

¹¹⁶ *United States v. Union Gas Co.*, 35 Env't Rep. Cas. (BNA) 1750, 1757 (E.D. Pa. 1992).

¹¹⁷ *See id.* at 1751-52.

¹¹⁸ *Id.* at 1754.

¹¹⁹ *Id.* at 1758.

¹²⁰ *E.g.*, *United States v. N.L. Indus.*, 36 Env't Rep. Cas. (BNA) 1372, 1373 (S.D. Ill. 1992) (holding that a bank, as the trustee of an Illinois land trust, is not the owner of a facility under CERCLA, 42 U.S.C. § 9607(a), and therefore is not subject to CERCLA liability). The district court found that, in the bank's capacity as trustee of an Illinois land trust, the bank did not control the management of the land and received no benefit from the land. *Id.* at 1374. Instead, the bank only had power to convey title to the land with the authorization of the beneficiary. *Id.* The court held that because an "owner" of a facility under CERCLA must have some amount of control over, or receive some benefit from the land, the defendant bank was not liable under CERCLA. *Id.* at 1376.

¹²¹ Professor Rodgers' statement in 1984 that "[t]he public trust doctrine continues to be a subject of fascination to the commentators" holds true today. RODGERS, *supra* note 1, § 2.16, at 59. Since the release of Rodgers' 1984 supplement, the pace of academic activity promoting, interpreting, and criticizing the public trust doctrine has continued to be fast and furious.

these issues in a concrete context. New York should use the opportunity that this statute presents to consider carefully how best to integrate its public trust and police power responsibilities in order to operate as efficiently and effectively as possible.

Furthermore, the state should systematically evaluate which of its resources should be "reserved." It also needs to address how best to value use of its resources, and it needs to decide to what extent it is appropriate to link the fees it charges for use of these resources to the value of the resources and to the injuries that such use causes. Developments in natural resource damages economics under CERCLA and the Oil Pollution Act of 1990¹²² should help the state to make progress in exercising both its public trust and police power responsibilities in this area.

Third, especially in the context of public trust resources, the state needs to actively pursue approaches for further democratizing its system of government by empowering citizens to act to protect such resources.

In closing, the recent *Union Gas* decision¹²³ highlights the importance of integrating "public trust" and "police power" functions. If the state risks CERCLA and other liability due to its status as the owner or former owner of public trust resources, it needs to exercise its public trust and police power responsibilities so as to minimize the likelihood of such exposure. In that sense, this recent decision may be an incentive to build on the steps toward integration of these functions begun by the Underwater Lands Bill. In this author's view, this decision will have furthered an important public interest if it does so.

¹²² 33 U.S.C. §§ 2701-2737 (Supp. II 1990).

¹²³ *United States v. Union Gas Co.*, 35 Env't Rep. Cas. (BNA) 1750 (E.D. Pa. 1992).