Florida Law Review

Volume 26 | Issue 1 Article 2

September 1973

Corps of Engineers Dredge and Fill Jurisdiction: Buttressing A Citadel Under Seige

W. Christian Hoyer

CORPS OF ENGINEERS DREDGE AND FILL JURISDICTION: BUTTRESSING A CITADEL UNDER SIEGE

W. CHRISTIAN HOYER*

The Nation's coastal and estuarine wetlands are vital to the survival of a wide variety of fish and wildlife; they have an important function in controlling floods and tidal forces; and they contain some of the most beautiful areas left on this continent. These same lands, however, are often some of the most sought-after for development. As a consequence, wetland acreage has been declining as more and more areas are drained and filled for residential, commercial, and industrial projects.[1]

All our nation's shorelines and waters are facing actual or impending pollution or development.[2] Uncontrolled, unplanned, and piecemeal dredging and filling of such areas for industrial and residential development can and has resulted in gradual depletion of our aquatic resources.[3] Unspoiled beach and shore areas available for public use are becoming scarce.[4] Adjacent waters and wetlands are being degraded, destroying their value as feeding, nesting, and spawning areas for waterfowl, fish, shellfish, and other dependent wildlife.[5] Unless the need for development is carefully weighed and effectively

---

*B.S. 1970, Rider College (Trenton); J.D. 1973, University of Florida; Member, The Florida Bar.

1. President Nixon's "Environmental Protection" message, submitted to Congress Feb. 8, 1972. H.R. Doc. No. 247, 92d Cong., 2d Sess. 9 (1972).

2. HOUSE COMM. ON GOVERNMENT OPERATIONS, INCREASING PROTECTION FOR OUR WATERS, WETLANDS AND SHORELINES: THE CORPS OF ENGINEERS, H.R. REP. No. 1323, 92d Cong., 2d Sess. 2 (1972) [hereinafter cited as INCREASING PROTECTION FOR OUR WATERS]. Our country's marine environment involves 33,000 miles of shore and river line and 109,000 square miles of water. Porro, *Invisible Boundary — Private and Sovereign Marshland Interests,* 3 NATURAL RESOURCES LAW 512, 513 (1970).

3. Heath, *Estuarine Conservation Legislation in the States,* 5 LAND & WATER L. REV. 351, 352-53 (1970). Marshland near metropolitan areas has become some of the most valuable real estate in the world. FORTUNE, Sept. 1969, at 50.

4. As of 1965 Florida had already lost nearly 10% of its shoreline to small dredge and fill operations. California had already suffered a 67% loss. *Hearings on Permit for Landfill in Hunting Creek, Va. Before the Subcomm. on Conservation and Natural Resources of the House Comm. on Government Operations,* 91st Cong., 1st Sess., pt. 2, at 56 (1969) [hereinafter cited as *Hunting Creek Hearings*].

5. The coastal zone is biologically the most productive of all land or water areas on earth. Seven of the ten most valuable of the species in American commercial fisheries spend all or important periods of their lives in estuarine waters. At least eighty other commercially important fish species are dependent on estuaries. Ludwigson, *Managing the Environment in the Coastal Zone,* 1 ENVIRONMENT REP. — CURRENT DEVELOPMENTS, Monograph No. 3, 1-2 (1970). As of 1965 the United States had lost over 7% (about 750,000 acres) of its total estuarine areas to small dredge and fill operations. *Hunting Creek Hearings, supra* note 4, at 56. Over one-third of the estuarine area of Boca Ciega Bay and Tampa Bay had been filled five years ago. A study of the area by the Bureau of Commercial Fisheries revealed that areas around previously filled and dredged zones were biological deserts even after ten years. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries,* 90th Cong., 1st Sess. 40 (1968).

controlled, most of our prime shores will be irretrievably altered by the year 2000.[6]

The United States Army Corps of Engineers[7] has the major statutory responsibility for most of these waterways, shorelands, and wetlands.[8] Work in the waterways over which the Corps has jurisdiction is subject to Corps approval.[9] Since recent history has witnessed an accelerating expansion of the Corps of Engineers jurisdiction, the Corps has been thrust into a role requiring significant environmental responsibility.[10] Being a developer itself,[11] the Corps has not traditionally been oriented toward resource conservation and is not presently administratively equipped to evaluate ecological factors in coastal dredging projects fairly.[12] Caught in the conflict between traditional functions and broadening environmental responsibility, the Corps is being impaled by environmentalists for its lack of aggressiveness while,[13] at the same time, being criticised by developers for lack of clarity, consistency, and timeliness in defining the boundaries of its regulatory authority.

This article will examine the basis for Corps of Engineers jurisdiction over dredge and fill projects and will trace the expansion of that jurisdiction into the environmental arena. By examining the legal basis and history of this expansion we can more readily project and evaluate the role of the Corps in the future and formulate workable recommendations to protect the coastal environment adequately.

Basis of Corps Jurisdiction

Our form of government necessitates federal control over navigable waters.[14] Although the Constitution does not mention navigable waters, it

---

6. Increasing Protection for Our Waters, *supra* note 2, at 2. Besides the obvious aesthetic loss, Florida suffers a resource loss of $600 per year for each acre of dredged submerged land. 51 Environment Rep. — Fed. Laws 4201 (1970).

7. The civil functions of the Department of the Army are carried out by the Corps of Engineers. 33 C.F.R. §209.120(a)(2) (1972).

8. *See* 33 U.S.C. §§401-65 (1970); 33 C.F.R. §209.120(a)(1) (1972).

9. 33 C.F.R. §209.120 (1972).

10. *See, e.g.,* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971). *See also* Comment, *Protection of the Environment and the Army Corps of Engineers: The Extent of Responsibility,* 1971 Law & Soc. Order 778.

11. The Corps is empowered by Congress to construct federal water development projects. Up to $25 million may be expended yearly on both "small" navigation projects and flood control development wthout special authorization. 33 U.S.C. §577(a) (1970) (navigation); *id.* §701(s) (flood control).

12. *See* Note, *Corps of Engineers — New Guardians of Ecology,* 31 La. L. Rev. 666, 679 (1971). *See also* Liroff, *Administrative, Judicial and Natural Systems: Agency Response to the National Environmental Policy Act of 1969,* 3 Loyola U.L.J. (Chicago) 19, 29-30 (1972).

13. "The Army Corps of Engineers is public enemy number one." Justice William O. Douglas *as quoted in* Saturday Rev., May 1, 1971, at 4. *See also* Atlantic, April 1970, at 51; Field & Stream, Oct. 1970, at 58; Nation, Feb. 14, 1966, at 180; Playboy, July 1969, at 143.

14. It has always been assumed that the sovereign external powers passed corporately and not to the colonies individually. *See* Penhallow v. Doan, 3 U.S. (3 Dall.) 53 (1795); Trelease, Arizona v. California: *Allocation of Water Resources to People, States, and Nation,* 1963 Sup.

vests in Congress the power to "regulate commerce with foreign nations and among the several states."[15] In *Gibbons v. Ogden*[16] it was held that the power to regulate commerce necessarily included the power to regulate navigation. To make this control effective Congress was deemed empowered to keep navigable waters open and free and to provide sanctions for interference.[17]

The regulatory power of the Corps of Engineers over dredge and fill projects is based on section 10 of the Rivers and Harbors Act of 1899,[18] which makes it illegal to fill, excavate, alter, or modify the course, condition, or capacity of waters within the boundaries of a navigable waterway without authorization from the Corps of Engineers. Because the Act limits the Corps' authority to the set boundaries of navigable waters, the scope of the Corps' physical jurisdiction hinges on how many waterways are deemed navigable and the manner in which the boundaries of these waters are determined.

EXPANDING CORPS JURISDICTION BY BROADENING THE DEFINITION OF NAVIGABILITY

At common law, all waters subject to the ebb and flow of the tides were deemed navigable.[19] Early in our nation's history this approach, adequate for a country surrounded by tidal waters, such as England, was rejected as too restrictive.[20] Seeing a definition of navigability appropriate to a vast country

---

CT. REV. 158, 176-82. The states still have some jurisdiction over navigable waters. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). *See* United States v. California, 381 U.S. 139 (1965), for a delineation of the scope of state control.

15. U.S. CONST. art. I, §3.

16. 22 U.S. (9 Wheat.) 1 (1824). *See also* Hall v. DeCuir, 95 U.S. 485 (1877); Veazie v. Moore, 55 U.S. (14 How.) 567 (1852); Norris v. City of Boston, 48 U.S. (7 How.) 282 (1849).

17. *See, e.g.,* Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865). Congress has power to regulate commerce in navigable waters if the activity to be controlled has a substantial economic effect on interstate commerce. Wickard v. Filburn, 317 U.S. 111, 125 (1942). This power applies to private riparian submerged land in navigable waters. United States v. Rands, 389 U.S. 121, 127 (1967). *See* 43 U.S.C. §1314(a) (1970).

18. "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port . . . or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 33 U.S.C. §403 (1970). The Supreme Court upheld the validity of the Act's delegation of congressional power to the Secretary and Chief of Engineers in Wisconsin v. Illinois, 278 U.S. 367, 413-14 (1929). For routine permit applications that are unopposed, the Secretary of the Army has delegated his authority to authorize permits to the Chief of Engineers, 33 C.F.R. §209.120(c)(1)(i) (1972), who in turn has delegated his authority to Division and District Engineers. *Id.* §209. 120(c)(1)(iii).

19. *See, e.g.,* Waring v. Clarke, 46 U.S. (5 How.) 441 (1847); Orleans v. Phoebus, 36 U.S. (11 Pet.) 175 (1837); The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).

20. The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 456-57 (1851). It is uncertain whether the "ebb and flow" criterion was replaced by later tests or just incorporated within these broader definitions. Some courts recently have upheld Corps jurisdiction in areas affected by the ebb and flow of an adjacent navigable waterway. Tatum v. Blackstock, 319

with an abundance of inland lakes and rivers, the Supreme Court in 1870 adopted a "navigability-in-fact" test.[21] Under this test waters were deemed navigable when:[22]

> [T]hey form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

This basic definition was enlarged in 1874 to include the capability or potential of public use, rather than merely the extent of actual use.[23]

The breadth of the federal test was again expanded in 1921 when the Supreme Court formulated the "indelible navigability" rule in *Economy Light & Power Co. v. United States*.[24] Under this rule a waterbody's past history or commercial use made it navigable, despite subsequent physical or economic changes preventing present use for commercial purposes.[25] Thereafter, waterways were held navigable for the purpose of federal jurisdiction if in their ordinary condition they were, could be, or had ever in the past been used as part of a highway for interstate or foreign commerce.[26]

The onset of massive federal programs in the 1930's involving flood control, hydroelectric, and reclamation projects demanded an even broader basis for federal regulatory control. Thus, the Supreme Court in *United States v. Appalachian Electric Power Co.*,[27] after affirming that navigability should remain a question of fact, expanded the scope of "navigable waters" to include those that could be made navigable through "reasonable improvements," even though such improvements had not been completed or even authorized.[28] "The power of Congress over Commerce is not to be hampered because of the neces-

---

F.2d 397 (5th Cir. 1963); United States v. Baker, 2 E.R.C. 1849 (S.D.N.Y. 1971). *But see* The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (the ebb and flow of the tide does not constitute "any test at all of the navigability of waters"); Pitship Duck Club v. Town of Sequin, 315 F. Supp. 309 (W.D. Wash. 1970) (federal jurisdiction over lagoon denied because ebb and flow is not a federal test of navigability).

21. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

22. *Id.* at 563.

23. The Montello, 87 U.S. (20 Wall.) 430, 441-42 (1874).

24. 256 U.S. 113 (1921).

25. *Id.* at 123.

26. The floating of a log, if related in some way to interstate commerce, will make a stream navigable under the federal test. *See, e.g.*, St. Anthony Falls Water-Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349 (1897) (upper stretch of Mississippi River deemed navigable even though only logs could traverse some sections); Wisconsin v. FPC, 214 F.2d 334 (7th Cir. 1954) (although never used for ordinary boat traffic the river was deemed navigable under the federal test because of log drives occurring on it from 1876-1924). Logging activities are not always sufficient for federal navigability determination if no relation exists to interstate commerce. Willow River Power Co. v. United States, 324 U.S. 499 (1945); Northern New Hampshire Lumber Co. v. New Hampshire Water Resources Bd., 56 F. Supp. 177 (D.N.H. 1944).

27. 311 U.S. 377 (1940).

28. *Id.* at 408.

sity for reasonable improvements to make an interstate waterway available for traffic."[29] After *Appalachian,* waters obstructed by falls, rapids, sandbars, rock mounds, and debris were not precluded from the grasp of federal jurisdiction.[30]

Appalachian's broad expansion of the definition of "navigable waters" allows all but the most insignificant waterbodies to be deemed navigable. Factual analysis is thus difficult, if not impossible. The present federal test may have become a standard without exception and, therefore, one with little meaning. Realistically, "navigability" is now no more than a base that federal courts feel obligated to touch when clearing the path for the progress of federal policies or programs.[31]

EXPANDING CORPS JURISDICTION BY WIDENING THE RECOGNIZED BOUNDARIES OF NAVIGABLE WATERS

Assuming a body of water is declared "navigable" under the federal test, and therefore subject to Corps of Engineers jurisdiction, one must then determine where such jurisdiction terminates — that is, the boundaries of the waterway. The Corps of Engineers traditionally utilized both naturally and artificially created boundary lines to limit its physical jurisdiction. For example, the Corps has relied upon both the naturally created high water line and the artificially created "harbor lines" to restrict its regulatory authority.

Recognizing that the logical point to separate land from water is the high water mark, most statutes and cases utilize this line in some form[32] — generally to separate public ownership and use of the water and submerged land from private use and ownership of upland.[33] In tidal areas, the Supreme Court has deemed the high tide line the standard for fixing the boundaries of tidelands.[34]

---

29. *Id.*

30. *See, e.g.,* Puente de Reynosa, S.A. v. City of McAllen, 357 F.2d 43 (5th Cir. 1966); Rochester Gas & Elec. Corp. v. FPC, 344 F.2d 594 (2d Cir. 1965); Namekagon Hydro Co. v. FPC, 216 F.2d 509 (7th Cir. 1954); Wisconsin v. FPC, 214 F.2d 334 (7th Cir.), *cert. denied,* 348 U.S. 883 (1954); Wisconsin Pub. Serv. Corp. v. FPC, 147 F.2d 743 (7th Cir.), *cert. denied,* 325 U.S. 880 (1945).

31. Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters,* 5 LAND & WATER L. REV. 391, 436 (1970). *See* §502(7) of the recently amended Federal Water Pollution Control Act, 33 U.S.C. §§1151-60 (1970), which defines "navigable waters" as "the waters of the United States, including the territorial seas." The Corps regulations adopted in 1973 define "navigable waters" as "those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity." 37 Fed. Reg. 18,290 (1972).

32. *See* F. MALONEY, S. PLAGER & F. BALDWIN, WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE 67 (1968); Porro, *supra* note 2, at 518.

33. Gay, *The High Water Mark: Boundary Between Public and Private Lands,* 18 U. FLA. L. REV. 553 (1966).

34. Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10, 26-27 (1935). *See also* Shively v. Bowlby, 152 U.S. 1 (1894); United States v. Pacheco, 69 U.S. (2 Wall.) 587 (1864); Humble Oil & Ref. Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir. 1951), *cert. denied,* 342 U.S. 920 (1952).

Therefore, until recently the Corps accepted this line as the absolute limit of its physical jurisdiction and required no permits even for massive dredging and filling above this line. The legal basis for this restriction, however, has been eroding. Courts are gradually realizing that work done above the mean high water line may violate the Rivers and Harbors Act if the activity can directly "alter or modify" the course or condition of a body of water. Thus, the dredging or filling itself may be outside the apparent limits of federal regulatory control, but if the effects of the work on navigable waters can be shown the Corps of Engineers would have legal justification for extending its physical jurisdiction to abate the violation.[35]

Historically, the Corps also limited its jurisdiction through establishment of "harbor lines."[36] The purpose of these lines, authorized under section 11 of the Rivers and Harbors Act of 1899,[37] is to separate and protect navigable channels and harbor areas from water areas not essential to navigation.[38] Once such lines were established, Corps policy did not require the issuance of a dredge and fill permit for work shoreward of a harbor line. Only if the proposed work was within the channel or area protected by harbor lines was a permit deemed necessary.[39] Until recently, Corps regulations explicitly stated that the establishment of a harbor line "implies consent to riparian owners to erect structures to the line without special authorization."[40] Whatever merit harbor lines may have had for protecting navigation, Corps policy concerning them resulted in large unprotected areas shoreward of submerged lands. House Committee hearings, for example, disclosed that unprotected lands in San Francisco Bay exceeded nineteen square miles.[41]

---

35. *See, e.g.,* United States v. Baker, 2 E.R.C. 1849 (S.D.N.Y. 1971) (filling of marshland enjoined for affecting the navigable waters of the United States). *See also* United States v. President of Jamaica & R. Turnpike Rd., 183 F.2d 598 (E.D.N.Y. 1910). The Corps regulations adopted in 1973 still do not recognize jurisdiction shoreward of the mean high tide line. *See* 37 Fed. Reg. 18,291 (1972).

36. Also called "pierhead lines and bulkhead lines." 33 C.F.R. §209.150 (1972). *See* Clary, *Water Quality Control Yesterday, Today and Tomorrow,* 5 NATURAL RESOURCES LAW. 224, 226-27 (1972).

37. 33 U.S.C. §404 (1970) (Secretary of the Army may establish harbor lines whenever he deems them "essential to the preservation and protection of harbors").

38. The apparent rationale for the Corps' acceptance of harbor lines, and the mean high water mark, as geographical limits upon its jurisdiction was its view, buttressed by existing case law, that its regulatory function under the Rivers and Harbors Act of 1899 involved only the protection of navigation. See text accompanying notes 47-54 *infra.*

39. 33 C.F.R. §209.150(b) (1970). *See* Montgomery v. Portland, 190 U.S. 89 (1903); 27 OP. ATT'Y GEN. 432, 434-36 (1909).

40. 33 C.F.R. §209.150(i)(1) (1970). However, the Corps regulations stated that harbor lines did not imply consent to every kind of operation landward of the lines and mentioned dredging as an example of operations that will "ordinarily require the authorization of the Department to insure that operations are conducted under proper restrictions." *Id.* The district engineers were to "keep informed" of operations landward of the lines. *Id.* §209.-150(i)(2).

41. HOUSE COMM. ON GOVERNMENT OPERATIONS, OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H.R. REP. NO. 917, 91st Cong., 2d Sess. 7 (1970) [hereinafter cited as OUR WATERS AND WETLANDS].

Responding to criticism of this policy,[42] the Corps recently broadened its physical jurisdiction by revising harbor line regulations. After conceding that under the previous policy "there was the danger that work shoreward of existing harbor lines could be undertaken without appropriate consideration having been given to the impact . . . on the environment,"[43] Corps regulations now state that "all existing and future harbor lines are declared to be guidelines" only and that permits will be required "for any work which is commenced shoreward of existing or future harbor lines"[44] after the effective date of May 27, 1970. Significantly, the Corps also broadened its responsibility to the public. Previously, public hearings on harbor line decisions were kept to a minimum and were "the exception rather than the rule."[45] Under new regulations, however, public hearings will be held whenever there is sufficient public interest or when federal, state, or local officials request a hearing.[46]

EXPANDING THE CORPS OF ENGINEERS SUBJECT MATTER JURISDICTION

Expansion of the definition and boundaries of navigable waters considerably broadened the geographical reach of Corps' regulatory authority. And although bringing more areas within the Corps jurisdictional ambit was, in itself, significant, the importance was substantially increased by a recent broadening of subject matter jurisdiction. The Corps, for years concerned solely with protecting the navigable capacity of waters, would ultimately be responsible for guarding the ecology of all areas under its control.

When passing the Rivers and Harbors Act of 1899, Congress was primarily concerned with protecting navigation.[47] Although the Act does not expressly limit the grounds for denying a permit to navigational interferences, the Corps traditionally administered the Act with primary emphasis on the effects on navigation.[48] It seemingly believed that incidental injuries not directly related "to the navigable capacity of the waters or their use" in interstate commerce should not be considered.[49]

---

42. The criticism had a legal basis. The passage of the Fish and Wildlife Coordination Act (F. & W.C.A.), 16 U.S.C. §§661 *et seq.* (1970), made the legality of ignoring shoreward areas questionable. The F. & W.C.A. requires the Corps to review and consult with federal or state agencies having jurisdiction over wildlife resources "whenever the waters of any . . . body of water . . . to be impounded, diverted . . . or . . . modified for any purpose whatever" and makes no exception for areas shoreward of harbor lines. *Id.* §662(a).

43. 33 C.F.R. §209.150(b)(1) (1972).

44. *Id.* §209.150(b)(2). No permit would be required for work commenced before May 27, 1970. *Id.*

45. 33 C.F.R. §209.150(e) (1968).

46. 33 C.F.R. §209.150(c) (1972).

47. 32 Cong. Rec. 2297 (1899). *See* H.R. REP. No. 794, 68th Cong., 1st Sess. 4 (1924) (the use of the words "impeded" or "obstructed" imply a physical hindrance to navigation that does not occur in oil spills. *See also* United States v. Standard Oil Co., 384 U.S. 224, 229 n.6 (1966); S. REP. No. 66, 68th Cong., 1st Sess. 2, 3 (1924).

48. The Supreme Court originally limited the Government's control over navigable waters to navigational purposes. *See* Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873).

49. 27 OP. ATT'Y GEN. 285, 288 (1909). *See also* 34 OP. ATT'Y GEN. 410, 412, 415-16 (1926).

This interpretation of Corps jurisdiction had solid case support.[50] An activity would be deemed illegal only if it could be interpreted as obstructing navigation. *Sanitary District v. United States*[51] typifies the approach employed. There, a diversion of water from Lake Michigan was held to violate section 10 of the Rivers and Harbors Act because "it concerns a change in the condition of the Lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity . . . ."[52] In *Miami Beach Jockey Club, Inc. v. Dern*[53] a permit decision was ordered to be based *"exclusively* on evidence directed to the question whether, in light of present-day conditions with relation to commerce and navigation [the project] will obstruct the navigable capacity of the waterway . . . ."[54]

The potential scope of the Corps' subject matter jurisdiction was broadened with the 1970 passage of the Fish and Wildlife Coordination Act,[55] establishing a national policy of wildlife conservation. Section 2(a) requires all public and private agencies whose projects come within Corps jurisdiction to consult with the Fish and Wildlife Service to determine the project's effect on wildlife resources.[56] The Act provides further that "wildlife conservation shall receive equal consideration . . . with other features of water resource development programs . . . ."[57]

Although this Act seemed to mandate Corps consultations with the Fish and Wildlife Service and considerations of the effects on wildlife before the granting of dredge and fill permits, no affirmative action was taken by the Department of the Army for nine years. In 1967 under Congressional pressure, the Secretary of the Army signed a "Memorandum of Understanding" with the Secretary of the Interior.[58] The Memorandum pledged cooperation between the agencies and bound the Corps to consult with the Department of the Interior concerning potential effects of a project on wildlife preservation.[59]

Following the Memorandum of Understanding, Corps regulations governing permit applications were revised. Thereafter, when the Corps was con-

---

50. *See, e.g.,* United States v. Standard Oil Co., 384 U.S. 224 (1966); Wisconsin v. Illinois, 278 U.S. 367 (1929); United States v. River Rouge Improvement Co., 269 U.S. 411 (1926); Sanitary Dist. v. United States, 266 U.S. 405 (1925); Blake v. United States, 295 F.2d 91 (4th Cir. 1961); Miami Beach Jockey Club v. Dern, 86 F.2d 135 (D.C. Cir. 1936), *cert. denied,* 299 U.S. 566 (1936).

51. 266 U.S. 405 (1925).

52. *Id.* at 429. *See also* Wisconsin v. Illinois, 278 U.S. 367, 414 (1929).

53. 86 F.2d 135 (D.C. Cir.), *cert. denied,* 299 U.S. 556 (1936).

54. *Id.* at 136. The unwillingness to examine Corps authority outside of navigational concerns has persisted until quite recently. *See, e.g.,* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); United States v. Republic Steel Corp., 362 U.S. 482 (1960); United States v. Ray, 423 F.2d 16 (5th Cir. 1970); Blake v. United States, 295 F.2d 91 (4th Cir. 1961); Chambers-Liberty Counties Navigation Dist. v. Parker Bros. & Co., 263 F. Supp. 602 (S.D. Tex. 1967).

55. 16 U.S.C. §661 (1970).

56. *Id.* §662(a).

57. *Id.* §661.

58. 33 C.F.R. §209.120(d)(11) (1970).

59. *Id.*

fronted with a dredge or fill permit application it pledged to consider "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest."[60]

When the Corps of Engineers applied this new policy of considering ecological effects, it immediately came into conflict with existing case law that limited the Corps to appraising only the effects of a project upon navigation. This conflict between new policy and settled precedent culminated in the landmark decision of *Zabel v. Tabb*.[61]

In *Zabel* two landowners sought a Corps permit to dredge and fill eleven acres of submerged land in Boca Ciega Bay, Florida. The Corps held a public hearing where opposition to the project was expressed.[62] A permit was subsequently denied by the district engineer as being contrary to the public interest.[63] Concurring in the denial, the Secretary of the Army noted that the proposed work would have an adverse effect on the Bay's ecology.[64]

The permit applicants then sought judicial review, the sole issue being the authority of the Corps to deny a permit on purely environmental grounds.[65] The district court, following well-settled precedent, held that the Rivers and Harbors Act did not "vest the Secretary of the Army with discretionary authority" to deny dredge and fill permits where he found no interference with navigation.[66] The Fifth Circuit Court of Appeals reversed and held that Congress had broad powers under the commerce clause to regulate matters with an impact on interstate commerce, including matters relating to environmental

---

60. *Id.* §209.120(d). This regulation revised an earlier version dated Dec. 7, 1967, which read: "The decision as to whether a permit will be issued will be predicated upon the effects of the permitted activities on the public interest including effects upon water quality, recreation, fish and wildlife, pollution, our natural resources, as well as the effects on navigation." 33 C.F.R. §209.330(a) (1968).

61. 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

62. *Id.* at 766. It is Corps policy to refuse issuance of a permit when state or local authorities oppose the work. 33 C.F.R. §209.120(d)(1) (1972). The courts have interpreted Corps power under the Rivers and Harbors Act as preventive, not permissive, and have recognized the states' authority to regulate navigable waters and submerged lands under the shadow of Congress' paramount commerce power. Montgomery v. Portland, 190 U.S. 89 (1903) (state may establish more restrictive harbor lines than those of Corps); Cummings v. Chicago, 188 U.S. 410 (1903) (federal permit holder must obtain state or local authorization prior to building on submerged land). *See also* United States v. Cress, 243 U.S. 316 (1917); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); 22 OP. ATT'Y GEN. 501 (1897).

63. 296 F. Supp. 764, 766 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

64. *Id.*

65. There was a perfect crystallization of issues. The Corps admitted the work would have no substantial impact on navigation, denying permission solely on ecological grounds. *Id.* at 767. The landowners conceded evidence as to environmental harm but alleged that permit decisions must be based on navigational considerations. Zabel v. Tabb, 430 F.2d 199, 201 (5th Cir. 1970).

66. 296 F. Supp. 764, 771 (M.D. Fla. 1969).

stability and to fish and wildlife in estuarine zones.[67] Furthermore, the court ruled that the Secretary of the Army, as the delegatee of Congress under section 10 of the Rivers and Harbors Act, could deny a permit on purely environmental grounds.[68] The Fish and Wildlife Coordination Act and the newly-enacted National Environmental Policy Act[69] were viewed by the court as mandating a consideration of environmental values by the Corps.[70] Although the *Zabel* court's reasoning has been questioned[71] and the decision leaves many questions unanswered,[72] *Zabel* clearly broadened the Corps' sub-

---

67. Zabel v. Tabb, 430 F.2d 199, 201 (5th Cir. 1970). The court rejected the contention that Congress, by enacting the Submerged Lands Act of 1953, 43 U.S.C. §§1301-43 (1970), had relinquished to the states its power to regulate tideland property except for purposes of navigation, flood control, and hydroelectric power (these exceptions being expressly retained in §1311(d) of the Act). The court held that the retention of control over navigation, flood control, and hydroelectric power was designed to eliminate potential federal-state conflicts and that, since §1314(a) of the Act reserves the Congress' commerce power, the federal government retained authority under the Commerce Clause to prohibit a project on land beneath navigable waters solely on environmental grounds. Zabel v. Tabb, *supra* at 205-06. *See* United States v. Rands, 389 U.S. 121, 127 (1967). *See generally* Lewis, *A Capsule History and the Present Status of the Tidelands Controversy*, 3 NATURAL RESOURCES LAW. 620 (1970); Stone, *The Marine Enviroment — Recent Legal Developments*, 3 NATURAL RESOURCES LAW. 26 (1969).

68. 430 F.2d 199, 209 (5th Cir. 1970).

69. 42 U.S.C. §§4331-47 (1970). The Act requires every federal agency to consider ecological factors when dealing with activities that may have an adverse impact on the environment. *Id.* §4332.

70. 430 F.2d 199, 209. Although the National Environmental Policy Act came into effect after the district court's decision, the Fifth Circuit Court of Appeals held that the Secretary's decision to deny the permit must be evaluated by currently applicable standards. *Id. Cf.* Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238, 248 (M.D. Pa. 1970) (Secretary of Treasury not precluded from granting funds for road project that antedated and violated National Environmental Policy Act because Act not retroactive). *See also* Sierra Club v. Hardin, 325 F. Supp. 99, 126-27 (D. Alas. 1971); Brooks v. Volpe, 319 F. Supp. 90 (M.D. Wash. 1970).

71. The court cited two cases as precedent that the Corps has authority to deny a permit for non-navigational factors. In the first, United States *ex rel.* Greathouse v. Dern, 289 U.S. 352 (1933), the Supreme Court refused to issue a writ of mandamus ordering the Secretary to permit construction of a wharf, even though the decision to deny the permit was based on the increased cost to the Government to condemn the property to build a parkway, and not based on obstruction of navigation. Although the *Zabel* court cited *Greathouse* as authority for the proposition that the Corps cannot "wear navigational blinders" when considering an application for a permit, *Greathouse* failed to reach the question of the scope of authority under §10 of the Rivers and Harbors Act to deny permits.

The second case was Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970), in which an injunction ordering the Corps not to issue a dredge and fill permit to the state for construction of an expressway was affirmed. There, however, the decision was based upon the state's failure to secure congressional and Department of Transportation approval for construction of certain structures; and, furthermore, the holding was based primarily on §9, not §10, of the Rivers and Harbors Act.

72. Questions regarding the discretion allowable in weighing environmental factors still remain. For example, are there times when the Corps would have to deny a permit purely on environmental grounds? Are there other situations in which the Corps could grant a permit in the public interest despite environmental harm?

ject matter jurisdiction by charging it with clearly defined environmental responsibilities.[73]

Thus, *Zabel* recognizes the Corps' duty of examining dredge and fill permits to determine the effect of the proposed project not only on the navigable capacity of the waterway, but also on the general environment. This broad environmental mandate was originally thought to encompass not only the effects of the dredging or filling upon aquatic life and habitat, but also the effects on general water quality. The passage of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA),[74] however, may have removed a portion of the authority for evaluating water quality from the Corps. The FWPCA deals primarily with controlling and regulating pollution. To accomplish its goals a permit program is established to oversee and regulate discharges of pollution.[75] Before a permit will be granted, a certificate must be issued by a state agency attesting to the project's effect on water quality.[76]

Thus, if dredging and filling is deemed to be an activity "which may result in [a] discharge into the navigable waters"[77] a state certification as to water quality must be obtained by the applicant and submitted to the Corps prior to securing the Corps permit.[78] Once such certification is obtained, the determination as to water quality attested by the certificate will be conclusive and cannot be overridden or altered by the Corps of Engineers.[79]

THE CORPS OF ENGINEERS AND THE FUTURE — INADEQUACIES REQUIRING REMEDY

Recent expansions of geographical and subject matter jurisdiction have, unquestionably, better equipped the Corps to protect coastal areas from indiscriminate, haphazard, and uncontrolled development. Use and misuse of this expanded jurisdiction, however, have subjected the Corps to increasingly virulent attacks by both environmentalists and developers. Since the Corps of Engineers has traditionally been involved with its own construction projects, many believe it has not developed the requisite ecological orientation.[80] In fact, the Corps has been accused of summarily ignoring its ecological duty except where a project application contains overwhelming proof of environmental damage.[81] At worst the Corps is guilty of gross negligence by defaulting

73. *See* United States v. Moretti, 331 F. Supp. 151 (S.D. Fla. 1971) (defendant, whose illegal fill damaged ecology, ordered to restore bay). *See also* United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972).

74. Act of Oct. 18, 1972, Pub. L. No. 92-500, §2, 86 Stat. 816.

75. *Id.*, 86 Stat. 880.

76. *Id.*, 86 Stat. 877.

77. *Id.*

78. *Id.*

79. *Id.*

80. *See* Liroff, *Administrative, Judicial and Natural Systems: Agency Response to the National Environmental Policy Act of 1969*, 3 LOYOLA U.L.J. (Chicago) 19, 29, 30 (1972); Note, *Corps of Engineers—New Guardians of Ecology*, 31 LA. L. REV. 666, 679 (1971).

81. *See, e.g.*, Farney, *Meet a Prime Polluter—Uncle Sam*, Wall Street Journal, Sept. 23, 1970, at 14, col. 4; PLAYBOY, July 1969, at 143.

in its duty as guardian of water-related resources; at best it suffers from a crisis of confidence. Whatever the character of its failing, it is nonetheless clear that the people no longer believe the Corps will seriously protect their environmental resources.[82]

Thus, the concerns of environmentalists relate to two specific factors: first, the competency of an agency itself engaged in development to review, objectively and adequately, the ecological consequences of similar projects undertaken by others; second, the adequacy of present Corps regulations to meet its ecological responsibilities.

Some think the Corps of Engineers should get out of the civil works planning business altogether. Believing that the "dredging ethic" is now so ingrained in Corps policy that environmental needs will be given only token consideration, these critics call for vesting the responsibility for preserving the ecological balance of our nation's waters in a separate agency concerned solely with the environment.[83] Only such a body, they contend, could receive the needed insulation from internal pressure and neutrality from conflicting missions to do a proper job.[84]

Absent complete abandonment of civil works planning, some sharing of functions may be in order. Since the Corps is inexperienced (some say negligent) in balancing economic against environmental factors, it could be relieved of the responsibility of determining cost-benefit ratios on federal projects or the environmental impact of private projects.[85]

---

82. The lack of confidence stems from recognition that the Corps has developed strong economic and social ties with the industry it is obligated to regulate. The Water Resources Congress, for example, includes Congressmen, Army engineers and contractors among its 7,000 members. Affiliated with this organization are 50 state groups, water and land development associations, and local government agencies. Liroff, *supra* note 80, at 31. This is hardly surprising considering the Corps was for years charged with a mandate of economic development. Like any organization, the Corps developed a favorable balance of constituencies and predictable relationships for its organizational self-preservation. Environmentalists were insignificant within the framework. Liroff, *supra* note 80, at 27. *See* J. MARCH & H. SIMON, ORGANIZATIONS 141 (1958); J. THOMPSON, ORGANIZATION IN ACTION 90 (1967). *See also* Holden, *"Imperialism" in Bureaucracy*, 60 AM. POL. SCI. REV. 943 (1966).

83. ATLANTIC, April 1970, at 62. Possibly for these same reasons the recently amended Federal Water Pollution Control Act, 33 U.S.C. §§1151-60 (1970), has divested the Corps of its authority to issue discharge permits under the Refuse Act, 33 U.S.C. §407 (1970). The permit program will be administered by the Environmental Protection Agency and ultimately will be relegated to qualified state agencies.

84. Having a civil works mission, it is in the Corps' organizational self-interest to encourage and approve water related projects. Most Congressmen, especially in election years, like such projects approved for their districts: the short-term economic benefits are considerable and employment provided for the construction trades is substantial. The Corps' survival is thus more dependent on economic development than on environmental protection. Liroff, *supra* note 80, at 30. For a general discussion of agencies' inability to adjust adequately to new problems, see D. KATZ & R. KAHN, THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS 225 (1966); J. MARCH & H. SIMON, *supra* note 82, at 225.

85. Water development projects are evaluated on the basis of their cost-benefit ratios; the goal is to produce more than one dollar of gain for each dollar invested. *See* J. SAX, WATER LAW, PLANNING AND POLICY 29-42 (1968). Critics of the Corps allege that this ratio is

If, as seems likely, the Corps is to retain responsibility for both water resources development and environmental evaluation, changes in the underlying policy and implementation of Corps regulations are necessary. Present regulations are insufficient in that they: (1) do not place the burden of proof upon the permit applicant, (2) allow exceptions or "grandfather in" existing violations, (3) do not provide adequate notice to the public concerning proposed projects, (4) do not require Corps decisions to be on the record of a hearing, (5) take a restrictive view of Corps jurisdiction, and (6) do not provide aggressive and consistent enforcement procedures.

The Corps has traditionally placed the burden of proving adverse effects upon the opponents of a dredge and fill permit application. Applications were routinely approved unless the opposition showed clearly that substantial damage to the public interest would result.[86] Although the Corps now prepares and coordinates environmental impact statements under the National Environmental Policy Act,[87] it continues to base its decisions primarily on information and advice received from other governmental agencies and private individuals. Thus, its regulations require very little from the applicant himself. Permit applications need only include "a letter requesting the permit, accompanied by maps and plans of the proposed work."[88] The applicant is required to demonstrate neither the ecological effect of his work nor the manner in which the project would benefit the public interest.[89]

The Corps' practice of including "grandfather clauses" in its regulations is also questionable. For example, when the Corps amended its regulations to make permits necessary for construction shoreward of harbor lines,[90] a clause exempting work commenced before May 27, 1970, was incorporated.[91] The

---

"recomputed" when necessary to justify a project that has strong political support. ATLANTIC, *supra* note 83, at 56; FIELD & STREAM, Oct. 1970, at 58. Since each Congressman wants his project approved, even if the cost-benefit ratio is of dubious validity, he will not seriously challenge questionable projects of others. Liroff, *supra* note 80, at 30. Another shortcoming of the cost-benefit ratio as presently applied stems from the inability to express ecological destruction in monetary terms, thus understating the potential "costs" of a project. *See* Krutilla & Cocchetti, *Evaluating Benefits of Environmental Resources with Special Application to the Hells Canyon,* 12 NATURAL RESOURCES J. 1 (1972). Cost-benefit analysis, useful when dealing with relatively simple "closed" systems, is questionable when used by the Corps on highly complex "open" systems having substantial ecologic impact. ATLANTIC, *supra* note 83, at 56; *see* A. MAASS, MUDDY WATERS: THE ARMY ENGINEERS AND THE NATION'S RIVERS (1951); Muckleston, *Water Projects and Recreation Benefits,* in CONGRESS AND THE ENVIRONMENT (R. Cooley & G. Wandesforde-Smith eds. 1970); Watkins, *Crisis on the Eel,* in THE POLITICS OF ECOSUICIDE (L. Roos, Jr. ed. 1971).

86. OUR WATERS AND WETLANDS, *supra* note 41, at 6.

87. 33 C.F.R. §209.120(d)(5) (1972).

88. *Id.* §209.130(a)(1).

89. Applicants for dredge and fill permits that may have a "pollution impact" on a waterway are required to furnish information on the type and quantity of solids to be removed or deposited along with alternate methods of disposal and impact of the alternate methods of disposal "on the economy of the industry and the environmental effects on the waterway." *Id.* §209.130(b)(18)(ii).

90. See text accompanying notes 42-46 *supra.*

91. 33 C.F.R. §209.150(b)(2) (1972).

word "commenced," as used in this regulation, was interpreted by district engineers to mean that no permit was required when the person engaging in dredging and filling had, prior to May 27, 1970, merely: (1) announced his plans, or (2) prepared drawings and detailed plans, or (3) obtained state zoning variances, site plan approval, et cetera, or (4) moved his equipment to the site, or (5) begun some site preparation. In none of these cases had any real dredging and filling work actually "commenced."[92]

Even where dredging and filling had actually started, the loose wording of the grandfather clause could allow developers to circumvent the regulation's intent. For example, a large amount of refuse is being dumped into diked units in San Francisco Bay shoreward of harbor lines. There are no defined ultimate limits to the site because, when one diked segment becomes filled, an adjoining area is diked to prepare for additional dumping. The Corps has not required a permit for the work because the original fill work was commenced prior to May 27, 1970.[93]

Although the Corps recently broadened its responsibility to the general public and permit applicants through a more liberal hearing policy,[94] much work still escapes public scrutiny. For years district engineers have, without public notice, issued "letters of permission" for "minor" work done in navigable waters.[95] These letters of permission, amounting to a de facto Corps permit, are given when, in the Corps' opinion, the proposed dredging and filling will not have a significant impact on environmental values and the project involves either minor work in unimproved waterways or minor work in areas of improved waterways that are away from navigation routes.[96]

Although letters of permission are ostensibly given only for minor work, the lack of Corps guidelines for the issuance of such letters has spawned wide divergence in practices among various district engineers. While some districts do not issue the letters, other districts issue 400-500 letters of permission annually.[97] Although this procedure is usually employed for very small projects, letters of permission have been given for a project to dredge 290,000 cubic yards and to fill three acres for a marina.[98]

---

92. INCREASING PROTECTION FOR OUR WATERS, *supra* note 2, at 33.

93. *Id.* at 34.

94. *See* 33 C.F.R. §209.120(g) (1972).

95. *Id.* §209.120(d)(7). The regulation states that this procedure may be utilized when, in the opinion of the district engineer, "there could be no opposition and authorization [that] would unquestionably be given." *Id.* The regulation does not state how the district engineer is able to determine if there is no opposition if no public notice is issued.

96. *Id.*

97. *Hearings on Protecting the Nation's Estuaries: Puget Sound and the Straits of Georgia and Juan deFuca Before the Subcomm. on Conservation and Natural Resources of the House Comm. on Government Operations,* 92d Cong., 2d Sess. 699-700 (1971) [hereinafter cited as *Puget Sound Hearings*].

98. *Id.* at 700. The procedures for issuing letters of permission, even for truly "minor" projects, are legally questionable. The Fish and Wildlife Coordination Act, 16 U.S.C. §§661 *et seq.* (1970), requires the Corps to consult with appropriate federal and state agencies whenever any waterway is planned or authorized to be diverted, deepened, or otherwise modified for any purpose whatever under a federal permit. *Id.* §662. The law, which makes

The Corps' formal decisionmaking process is also questionable. Materials submitted at a hearing are considered with matters submitted afterward[99] and an applicant is advised of all substantive objections and given an opportunity to reply.[100] None of these procedures, however, insure or require that the decision to grant or to deny a permit be based solely on the record.

Although the Corps has gradually increased its jurisdictional ambit and attendant responsibilities, it still limits the scope of its power in a way that some view as overly conservative.[101] The Corps still does not take jurisdiction over waters that, although navigable under modern criteria, do not "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by waters."[102] This regulation has removed many water areas from Corps scrutiny. For example, Lake Chelan, Washington, 55 miles long and 2 miles wide, was deemed non-navigable because navigation on Lake Chelan "cannot form a part of either the interstate or international system."[103] Arguably, such a narrow interpretation of federal power is not mandatory. There is no constitutional restriction limiting the congressional commerce power to waterways crossing a state boundary.[104] It should be sufficient if the waterway in question serves as a link in the commerce chain among the states as it connects with other channels of transportation.[105]

---

no distinction between "major" and "minor" projects that modify a waterway, requires consultation before the Corps acts on a permit. Although the Corps recently instituted a practice of giving copies of letters of permission to the Bureau of Sport Fisheries and Wildlife, *Puget Sound Hearings, supra* note 97, at 697-98, the procedure falls quite short of the requirement of prior consultation with appropriate state and federal agencies. Furthermore, §21(b) of the Federal Water Pollution Control Act, 33 U.S.C. §1181(b)(1) (1970), requires an applicant for a federal permit for construction that might result in a discharge into navigable waters to provide the Corps with state certification giving reasonable assurance that applicable water quality standards will not be violated. Some dredging and filling for which letters of permission are granted result in discharges of material into navigable waterways and thereby affect water quality standards. And, since this Act does not distinguish between major and minor projects, Corps letter of permission policy would violate these requirements.

99. *Id.*

100. *Id.* §209.120(f)(9).

101. *See, e.g.,* INCREASING PROTECTION FOR OUR WATERS, *supra* note 2, at 30.

102. 33 C.F.R. §209.260(a) (1972). The wording of the regulation was taken from dictum in The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

103. INCREASING PROTECTION FOR OUR WATERS, *supra* note 2, at 30.

104. *See, e.g.,* The Katie, 40 F. 480, 484 (S.D. Ga. 1889). A ship can "ply the waters of a lake embosomed in the central territory of a state, and be wholly engaged in interstate commerce." *Id.*

105. Arguably, if goods come from, or go to, another state or serve to aid the flow of commerce, the part of the transportation that is on the waterway will become part of the flow, bringing the waterway, by virtue of the commerce clause, within the concept of navigable waters of the United States. *Cf.* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); United States v. Sullivan, 332 U.S. 689 (1948); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The gist of the federal test is the waterway's use *as* a highway,

Moreover, it has been argued that Corps jurisdiction should be sustained in coastal wetland areas and feeder stream systems that are clearly not navigable.[106] The test for determining whether Congress has power to regulate the use of private property is whether the activity regulated has a substantial effect on interstate commerce.[107] As the *Zabel* court noted: "[T]he destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce."[108] Dredge and fill work, even when conducted in remote tributaries, can set off a chain of destruction, culminating in sufficient effects to justify jurisdiction at the federal level.[109]

The Corps is in need of an aggressive and consistent enforcement policy. Strong enforcement tools are at its disposal. Illegal dredging and filling is a misdemeanor punishable by a fine not exceeding 2,500 dollars or by imprisonment not exceeding one year, or both.[110] Moreover, injunctions compelling removal of all, or part of, any unauthorized structures are statutorily authorized.[111]

---

not whether it is part of a navigable interstate commercial avenue. Utah v. United States, 403 U.S. 9, 11 (1971). *See also* United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972).

106. *See* INCREASING PROTECTION FOR OUR WATERS, *supra* note 2, at 27. Arguably, the Corps has the legal justification for assuming jurisdiction over wetland areas adjacent to navigable waterways that are subject to the ebb and flow of the tide. See note 20 *supra*. Such assumption of jurisdiction may be crucial. For example, in early 1971 a determination that Corps jurisdiction over San Francisco Bay extended only to the part capable of being used for navigation eliminated from its protective scrutiny about 40% (300 square miles) of the 800 square miles of Bay lands subject to tidal action. INCREASING PROTECTION FOR OUR WATERS, *supra* note 2, at 27.

107. Wickard v. Filburn, 317 U.S. 111, 125 (1942). The commerce power has been used to abate pollution. *See* United States v. Bishop Processing Co., 237 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 298 U.S. 904 (1970); Edelman, *Federal Air and Water Control: The Application of the Commerce Power To Abate Interstate and Intrastate Pollution*, 33 GEO. WASH. L. REV. 1067 (1965).

108. Zabel v. Tabb, 430 F.2d 199, 204 (5th Cir. 1970). *See* S. REP. No. 1981, 85th Cong., 2d Sess. 5 (1958); Little, *New Attitudes About Legal Protection for the Remains of Florida's Natural Environment*, 23 U. FLA. L. REV. 459, 462 (1971): "[A] simple Florida illustration will suffice. If the owner of tidewater marshlands bulkheads his property, dredges the tidal body, and fills the flats to build houses, he destroys the spawning grounds of shrimp, fish, and other creatures of the sea. Consequently, fishermen catch fewer of these creatures, thereby hurting their trade; fewer anglers are attracted to Florida, thereby damaging the tourist trade; fewer fish are marketed, thereby reducing the food supply, fewer shore birds can be supported, thereby diminishing the bird population, and on *ad infinitum*." *See also* B. COMMONER, SCIENCE AND SURVIVAL 26 (1963).

109. *See* cases cited note 105 *supra*. For an example of how relatively insignificant the nexus between the activity sought to be regulated and interstate commerce has become, *see* Daniel v. Paul, 395 U.S. 298 (1969). *See also* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426 (1940).

110. 33 U.S.C. §406 (1971).

111. *Id.* It is the duty of the United States attorneys to prosecute all offenders. 33 U.S.C. §413 (1971). The injunctive power can be quite potent. *See* United States v. Moretti, 331 F. Supp. 151 (S.D. Fla. 1971) (defendant ordered to restore bay to original condition and enjoined from selling land until illegal fill removed). *See also* United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972).

Notwithstanding this clear legislative prohibition, illegal dredging and filling continues with prosecutions and remedial actions being applied inconsistently.[112] Present Corps procedure in handling violations does little to encourage compliance; actually the procedure encourages violation. If violators are caught, they are generally required to apply for an "after-the-fact" permit,[113] which is usually granted.[114] Therefore, it is worth the risk not to apply for a dredge and fill permit, especially if objections would be raised. Even if caught, a violator can obtain a permit without prejudice from the Corps, usually by maintaining that his work was innocently done. Illegal activity therefore actually rewards a developer, since he can commence work without troubling himself about environmental or public interest criteria while the law-abiding applicant may have to modify or abandon his construction to meet the requisite conditions.

Even where violations are identified and an after-the-fact permit is denied, it is presently Corps policy not to recommend prosecution unless it is clearly a willful violation.[115] The necessity for *scienter* has not yet been determined as to illegal dredging and filling. Nevertheless, it has been held that *scienter* is unnecessary for a conviction under the Refuse Act[116] because: "The public is injured just as much by unintentional pollution as it is by deliberate pollution and it would have been entirely reasonable for Congress to attack both."[117] Arguably, the same reasoning could apply to "unintentional" dredging and filling.

Where the Corps does prosecute, the case is not immediately referred to the appropriate United States attorney, but is first channeled through a lengthy system of review.[118] As a result, United States attorneys receive reports of violations months and even years after irreparable harm has taken place.[119]

---

112. Experiences in the Puget Sound are illustrative. As of 1971 it was estimated that possibly 80% of the works in place in the navigable waters of the Sound were constructed without a Corps permit. *Puget Sound Hearings, supra* note 97, at 421. This amounts to an estimated 50,000 illegal structures and fills. *Id.* at 710.

113. After-the-fact permits are authorized to be given for work that has already been commenced or completed. 33 C.F.R. §209.120(c)(1)(iv)(a) (1972). Approval is given if the work was innocently done and no objection has been received. *Id.* §209.120(c)(1)(iv)(a)(1). The applicant is then told to apply before beginning construction in the future. *Id.* §209.120(c)(1)(iv)(a)(7).

114. *Puget Sound Hearings, supra* note 97, at 421.

115. *Id.* at 263-64.

116. 33 U.S.C. §407 (1971).

117. United States v. United States Steel Corp., 328 F. Supp. 354, 356 (M.D. Ind. 1970). *See also* The President Coolidge, 101 F.2d 638 (9th Cir. 1939); United States v. Interlake Steel Corp., 297 F. Supp. 912 (N.D. Ill. 1969); United States v. Bigan, 170 F. Supp. 219 (W.D. Pa. 1959).

118. Litigation reports and requests for prosecution now go from the district engineers to the division engineer. Then the requests and reports are forwarded to the Corps' general counsel in Washington, D.C. After being reviewed by the general counsel they are referred to the Department of Justice which in turn forwards the file to the appropriate United States attorney if action is deemed appropriate. INCREASING PROTECTION FOR OUR WATERS, *supra* note 2, at 23.

119. The delay not only bodes potential disaster for the area involved, but also works

PROPOSED REMEDIES

If the Corps is to retain responsibility for comprehensive water-resource planning and development, it must shed the onus of environmental neglect. The Corps cannot effectively combat widespread dredging and filling with grudging, piecemeal policy alterations. To fulfill its environmental role while laying the foundation for rational development, basic changes in Corps policy and philosophy are needed. Implementation of the following recommendations would reflect an environmental commitment compatible with present Corps structure.

(1) The Corps regulations should be amended to require permit applicants to carry the burden of proving that their proposed work is in accord with the public interest. Obviously, some dredging and filling might be in the public's best interst; much of it, however, may result in desecration of valuable coastal resources. Such a requirement would save time and expense by forcing the applicants to commit some of their resources to evaluating environmental impact and alternative projects before receiving a permit. By creating, in effect, a rebuttable presumption that dredging and filling is not in the public's best interest, only those developers who commit the necessary resources to planning and evaluating their projects could overcome this protective hurdle.

(2) When the Corps amends regulations to require higher environmental standards and broader responsibilities, it should cease the practice of tacking on "grandfather clauses." The actual and potential abuses generated by the grandfather clause in the harbor line regulation created a major loophole, frustrating in part the purpose of that regulation. The grandfather clause should be stricken from the harbor line regulation and should not be employed in the future to dilute progressive revisions.

(3) The Corps of Engineers should provide the public with adequate notice and a reasonable opportunity to be heard concerning all dredge and fill projects. The present procedure of issuing "letters of permission" for "minor" work without public notice should be discarded. All projects should meet the formal requirements for a Corps permit. The public should be notified of any application being considered. If the costs of a hearing are prohibitive for a minor project, then guidelines should be issued to define what constitutes a "minor" project and to implement a more abbreviated public evaluation procedure – possibly receiving written objections from opponents. Hundreds of "minor" incursions into valuable estuarine breeding grounds can no longer be dismissed as harmless and approved *ex parte*.

(4) The Corps should base decisions granting or denying permits solely on matters of record, incorporating substance brought forth at the hearing. This would protect applicants and insure that the public interest has been adequately considered. Moreover, the Corps should be required to prepare a brief statement of its findings and conclusions, describing the conflicting environmental and economic factors, delineating how the public interest weighed in

---

inestimable harm on innocent buyers who may have invested in residential and business sites on illegally filled land.

the equation, and explaining the rationale for its conclusion. Requiring decisions to be based on the record would encourage the Corps to seek recommendations and findings from agencies and individuals with pertinent expertise. Thus, conflicting proposals and opinions, being a part of the record, would be subject to scrutiny and challenge by the opposing parties. Such a complete record, accompanied by the Corps' statement of findings and conclusions, would relieve reviewing courts from the substantial burden of crystallizing issues and would remove the stigma of arbitrariness.

(5) Recognizing that environmental harm is not localized, but rather climbs an ecological chain, the Corps should broaden its physical jurisdiction to encompass more coastal wetland areas. The Corps largely focuses regulatory attention on projects within the boundaries and neglects much of the adjacent wetlands. As noted previously, such a limitation of its power is not mandatory. The Corps should also amend its regulations to encompass all navigable waters and feeder stream systems. Presently the Corps does not assume jurisdiction over waters that, although navigable, do not form by themselves or by uniting with other waters a continued highway over which interstate commerce may be carried. The gist of the federal jurisdiction test, however, is the waterway's use *as* a highway, not whether it is part of a navigable interstate waterway system.[120]

(6) To complement the expansion of Corps responsibility, an aggressive and consistent enforcement policy is in order. Present Corps enforcement policy has, in many districts, proved ineffective and has established undesirable precedents. If the worst penalty a developer can expect for carrying on unauthorized dredging or filling is an "after-the-fact" permit, the violations will continue undeterred. Issuance of after-the-fact permits should be authorized only after the illegal work is halted and examined with the same scrutiny applied to an original application.

Presently, prosecution of violators is not recommended by the Corps unless it is certain the violator knowingly broke the law. If there is to be a realistic enforcement policy, however, ignorance of the law should be no excuse. The Corps' duty is to identify and prosecute violations; any mitigating circumstances can be considered and incorporated by the United States attorney in

120. Recently revised Corps regulations may give rise to this recommended jurisdiction. After defining navigable waters as those that may be susceptible for use for purposes of interstate or foreign commerce, 37 Fed. Reg. 18,290 (1972), the regulations considerably broaden the jurisdictional interpretation of such commerce: "Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same State. It is only necessary that goods may be brought from, or eventually be destined to go to, another State." *Id.* The regulations continue: "A water body may be entirely within a State, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one State. Nor is it necessary that there be a physically navigable connection across a State boundary. Where a waterbody extends through one or more States, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the States, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction." *Id.*

his decision to prosecute or by the court in its disposition of the case. Even if *scienter* is required for violation of the Rivers and Harbors Act, the determination as to the existence of legal knowledge should not be a Corps function.

The Corps should also streamline procedures used to transfer cases to the litigation branch of government. The lengthy referral system now employed is a bureaucratic anachronism. Coordination with the United States attorney's office should allow referral from the Corps directly to the local United States attorney.

(7) The Corps should expand the use and scope of the conditional permit. Although permits with conditions attached are presently authorized and utilized, the conditions usually deal with problems of navigation, burden for costs, and liability for damages.[121] A policy of granting permits with special conditions encompassing environmental protection should be adopted.[122] The district engineers could evaluate objections to a project brought forth in public hearings and independent agency reports, then fashion the objections into special permit conditions.[123] The economic benefits in proceeding with a borderline project would not be fatally "balanced out" by the expected ecological harm. The decision to proceed would then shift to the applicant, who must weigh the costs and benefits of working under special environmental constraints. Once such a permit is issued the district engineer would have authority, as now, to supervise the work to insure compliance with the permit. If, on final inspection, he determines there is noncompliance with the conditions imposed, he is authorized to make a demand for compliance or, receiving none, resort to criminal or injunctive action.[124]

Conclusion

Over the last decade the public has become aware of a view formerly held only by ardent conservationists: unregulated landscape alteration can bode disaster. Legislators, after a predictable time lag, have echoed this concern. Yet, even as the movement toward environmental awareness gathered momentum, no clear ecological mandate arose from the public clamor. The bulk of the citizenry adopted an environmental ambivalence, speaking with genuine environmental concern, while demanding new waterfront homes, hotels, and recreation complexes. Congress underscored this contradiction by enacting laws to protect fish and wildlife in the same sessions that spawned huge appropriations for water development projects.

---

121. 33 C.F.R. §209.130(c)(2) (1972).

122. Regulations now mandate a condition to require conformance with federal and state water pollution regulations, but proof of noncompliance is the responsibility of the agency possessing water pollution jurisdiction. *Id.* §209.120(d)(8).

123. The regulations allow special conditions to be imposed if they are regarded as necessary. *Id.* §209.130(c)(3)(i). The "exact wording of the recommended conditions" must be given to the applicant, accompanied by the reasons for the condition, and the applicant has the opportunity to state his grounds for objection. *Id.*

124. *Id.* §209.130(m).

It seems fitting that within this ambivalent atmosphere the Corps of Engineers, for years the embodiment of the "dredging ethic," should emerge with primary responsibility for environmental evaluations of dredge and fill projects. Considering the Corps' background, it is not surprising that later improvement came slowly and haphazardly.

While ecological battlelines were being drawn, the Corps stuck to its inveterate practice of protecting only navigation. The expansion of federal jurisdiction was no hardship. If the Corps had more areas to regulate, it necessitated only larger commitments of manpower, not changes in orientation. Even the mandate of the Fish and Wildlife Coordination Act was insufficient to force an immediate change in Corps policy. Ultimately it was the judiciary that shoved the Corps, an unlikely and awkward gladiator, into the environmental arena.

But since the Corps was never given, and had never taken, the opportunity to equip its administrative apparatus with uniform, effective, or appropriate environmental policies, it had to rely on piecemeal regulatory amendments and judicial mandates to crystallize its responsibilities. Unfortunately, obeying divergent judicial opinions and tacking environmental clauses onto navigation-oriented regulations results in rather chaotic policy and ironic consequences. The Corps, carrying its new environmental banner, could be found suing to enjoin illegal development while, in another court, it was being sued for damaging the ecology with its own projects.

Whether desirable or not, it seems likely that the Corps of Engineers will retain jurisdiction over dredge and fill projects. It is clear that the Corps must give due consideration to the environment in its decisions on permit applications. Balancing ecological and economic interests will unquestionably be difficult. Moreover, current regulations do not provide clear standards to decide where the public interest lies in this balance. The loose wording of the regulations coupled with informal and inconsistent procedures promotes suspicion, breeds unfairness, and forestalls accurate review of Corps determinations.

The Corps must accept its environmental responsibility and revise its policies and procedures to foster a reasoned balancing of values. This balancing must be done in an open, consistent, and impartial manner geared to provide procedural fairness to both the developer and the public. Environmentalists are not blind to the demands of a burgeoning, affluent population for development and construction. Responsible developers, as citizens and businessmen, do not belittle the value of environmental integrity.

Spotty and inconsistent enforcement policy is not only unfair to both sides, but it also breeds suspicion, anger, and senseless litigation. Lax enforcement not only damages the environment, but also penalizes the developer who has committed his time and resources to make his project environmentally sound.

Such recommendations will not require a drastic overhaul of Corps procedure or funding requirements. They will require a larger commitment of time. Time to reflect and evaluate. Time to prepare and coordinate more meaningful records and statements of findings. Time for more surveillance and consistent enforcement. But certainly the time spent prior to project decisions

will pay valuable dividends not only in public confidence but also in saving the waste of post-commencement litigation. The possibility of some delay in project approval generated by these recommendations may ultimately be the largest asset of these policies:[125]

> The longer we delay meeting our environmental responsibilities, the longer the growing list of interest charges in environmental deterioration will run. The cost of getting on to a sound basis for the future will never again be less than it is today.

125. S. REP. No. 296, 91st Cong., 1st Sess. 16-17 (1969).