

5-15-1976

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Recommended Citation

Harry A. Jackson Jr. *The Role of the United States Army Corps Of Engineers in Land Use Control*, 3 Pepp. L. Rev. Iss. 3 (1976)

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The Role of the United States Army Corps Of Engineers in Land Use Control

HARRY A. JACKSON, JR.*

Since July 25, 1975,¹ nationally, and since January, 1972 in the San Francisco Bay Area² the Army Corps of Engineers (the "Corps") has asserted regulatory authority over lands and "waters"³ having no connection with navigation.

For the uninitiated, some explanation of the Corps' role in protecting the navigable waters of the United States is necessary.

I. HISTORICAL PERSPECTIVE

In response to such cases as *Willamette Iron Bridge Co. v. Hatch*,⁴ Congress first passed the Act of September 19, 1890 pro-

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1. 33 C.F.R. § 209.120 (1975).

2. ARMY CORPS OF ENGINEERS, PUBLIC NOTICE 71-22(a) (January 18, 1972).

This is an elaboration of our previous Public Notice No. 71-22, dated 11 June 1971, announcing that the Corps of Engineers is now exercising its regulatory authorities within the area bound by the plane of mean of the higher high water. Permits are required for all new work in unfilled portions of the interior of diked areas below former mean higher high water.

3. 33 U.S.C. § 1344(a), § 1362(7) (1972).

4. *Willamette Iron Bridge Co. v. Hatch*, 123 U.S. 1 (1888). The court

hibiting the creation of any obstruction to the navigable capacity of waters under United States jurisdiction without affirmative legal authorization.

In 1899, Congress enacted a new Section 10 as part of the Rivers and Harbors Appropriation Act⁵ which has remained unchanged since that time. Section 10 provides in relevant part:

... 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, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, 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.⁶

The concept of "navigable waters" has been the subject of considerable judicial imagination over the years, the courts extending the concept from interstate rivers used for commercial travel and shipping⁷ to non-navigable mosquito infested canals and mangrove wetlands above the mean high tide line.⁸

held that Congress had unquestionable power to regulate the navigation of public rivers and to prevent their obstruction. However, until Congress does act to that end, there is no common law which prohibits obstructions and nuisances in the river, except, perhaps maritime law as administered by the courts of admiralty.

5. Ch. 425, § 10, 30 Stat. 1151 (1899).

6. Rivers and Harbor Appropriation Act, ch. 425, § 10, 30 Stat. 1151 (1899).

7. *The Daniel Bell*, 77 U.S. (10 Wall.) 557 (1871).

A different test must, therefore, be applied to determine the navigability of our rivers and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they 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. *Id.* at 563.

8. *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974). As a matter of historical interest the range of definitions evolved over the period of a century. See, e.g., *The Montello*, 87 U.S. (20 Wall.) 430 (1874) which expanded the definition to include waters that were capable of commercial use as well as those in actual use; *Economy Light and Power Co. v. United*

Today, the Corps follows its own definition of navigability as contained in its own regulations:

(h) Time at which commerce exists or determination is made

—(1) Past use. A water body which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in paragraph (g) (2)⁹ of this section) retains its character as 'navigable in law' even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the water body. Once having attained the character of 'navigable in law', the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a water body are nonnavigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(2) Future or potential use. Navigability may also be found in a water body's susceptibility for future use for purposes of interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Nonuse in the past therefore does not prevent recognition of the potential for future use.

(i) Existence of obstructions. A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages,

States, 256 U.S. 113 (1921) which held that, despite obstructions and physical changes such as dams and bridges, a continuous stretch of water (Des-plaines River) remained navigable in law because in its last natural state it had been used historically as a means of commercial transport; and United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) in which a stretch of river (the New River, a watercourse following between Virginia and West Virginia) was declared to be navigable because of its past use for commerce and its suitability for such use in the future by making "reasonable improvements".

9. 33 C.F.R. § 209.260(n)(g)(2) (1975). This legislation deals with nonexistent improvements, past and potential. A water body may also be considered navigable depending on the feasibility of future use for interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvements need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at the time when the improvement would be (or would have been) useful. Thus, if an improvement was "reasonable" at a time of past use, the water therefore became navigable as a matter of law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in at hickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of what constitutes a reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a 'channel' for commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.¹⁰

The Corps defines its jurisdiction in coastal areas as follows:

(k) Geographic and jurisdictional limits of oceanic and tidal waters—(1) Ocean and coastal waters. The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone 3 geographic (nautical) miles seaward from the coast line. Wider zones are recognized for special regulatory powers, such as those exercised over the Outer Continental Shelf.

(i) Coast line defined. Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the coast line from which the distance of 3 geographic miles is measured. On the Pacific coasts the line of mean lower low water is used. The line has significance for both domestic and international law (in which it is termed the 'base-line'), and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the line may have to be drawn to seaward of such bodies.

(ii) Shoreward limit of jurisdiction. Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. However, on the Pacific coasts the line reached by the mean of the higher high waters is used.

Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as the observation of the 'apparent shoreline' which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(2) Bays and estuaries. Regulatory jurisdiction extends to the entire surface and bed of all water bodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (k)(1)(ii) of this section, 'Shoreward Limit') of all such water bodies, even though portions of the water body may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered 'navigable in law', but only so far as the area is subject to inundation

10. 33 C.F.R. § 209.260(h) (1975).

by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.¹¹

If the location of the shoreline shifts due to "natural causes" the "boundaries of the navigable water" are likewise altered. If the change in location is due to artificial forces "intended to produce that change" (presumably diking and filling), the filled area remains "navigable in law" under the regulations.¹²

These latter two subsections have produced one of the most perplexing questions yet to arise in the long history of the United States law of navigable waters. If a marsh adjacent to a bay or estuary was diked off from tidal influence or filled at a time when the Corps required no permit for such activities,¹³ does the area

11. 33 C.F.R. § 209.260(k) (1975).

12. 33 C.F.R. § 209.260(e) (1975). This section concerns geographic limits in terms of shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable water. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a water body which also change the shoreline boundaries of the navigable waters. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water, regardless that they may be dry at a particular point in time.

13. 33 C.F.R. § 209.120(g) (12) (vii) (1975) provides as follows:

Applications will generally not be required for work or structures completed before 18 December 1968, nor where potential applicants had received expressions of disclaimer prior to the date of this regulation; provided, however, that the procedures of paragraph (g) (12) (i) of this section shall apply to all work or structures which were commenced or completed on or after 18 December 1968, and may be applied to all specific cases, regardless of date of construction or previous disclaimers, for which the District Engineer determines that the interests of navigation so require.

The Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-66(c) (1958) required the Corps to consult with the United States Fish and Wildlife Service (then the Bureau of Sports, Fisheries and Wildlife) regarding the impact on aquatic life of a proposed permit to impound, divert, modify or control the water of any stream (except for impoundments of less than 10 acres. This requirement is rarely, if ever, mentioned in the decisions or by the environmental law writers).

On July 13, 1967, a Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army was entered into pledging Corps cooperation with the Interior on the fish and wildlife aspects of proposed dredging, filling and excavation activities subject to corps permits. See 33 C.F.R. § 209.120 (app. B) (1975).

In 1969 the National Environmental Policy Act, 42 U.S.C. §§ 4331-47 (1969) was enacted requiring an Environmental Impact Statement for every

remain "navigable in law" and thus subject to the elaborate permit requirements of the Corps? What if the proposed "filling" activity behind these dikes is on "fast land" or involves no navigable waters?¹⁴

major federal action that may significantly affect the quality of the human environment.

In 1970 the Corps was chided by a subcommittee of the House (H.R. REP. NO. 917, 91st CONG., 2d SESS. (1970)) for failing to assess the environmental impact of applications for permits to fill, dredge, or construct works in navigable waters.

On October 18, 1972, the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1972) was amended to provide that permits for the discharge of dredged or fill material into the United States' navigable waters must be consistent with EPA guidelines and are subject to denial by the EPA on environmental grounds.

14. On March 11, 1976, a Memorandum of Decision by Sweigert, District Judge (N.D. Cal.) in the cases of *Sierra Club v. Leslie Salt Company*, No. 72, 561 WTS and *Leslie Salt Company v. Froehke*, No. 73, 2294 WTS was filed. Judge Sweigert attempted to address these questions by relying upon *Economy Light Co. v. United States*, 256 U.S. 113 (1921), see Note 6, *supra*, to "moderate" the effect of *United States v. Stoeco Homes*, 498 F.2d 597 (3rd Cir. 1974), discussed *infra*. Judge Sweigert holds as follows:

The rules of *Stoeco* and *Economy* are consistent in that under *Economy* the body of water in question remains navigable in law so long as the artificial obstruction is capable of being abated by due exercise of the public authority, whereas *Stoeco* holds, in effect, that the area in question ceases to be navigable in law only if the artificial obstruction has become fast land—i.e., improved solid upland.

The property here in question is not improved solid upland. It is instead unfilled Bay bottom, much if not all of it below the level of MHHW, and much of it still subject to periodic inundation by Bay water for the production of salt, but not now subject to the ebb and flow of the tide (though the latter point is disputed in No. 72-561). The property is such that, if the dikes were broken, it would return to its former natural condition of daily tidal inundation without the removal of any fill or other improvements. The dikes herein are, in short, much more closely akin to artificial obstructions capable of being abated by due exercise of the public authority as in *Economy*, than they are to the improved solid upland supporting streets and houses considered in *Stoeco*.

For the foregoing reasons, we find that the diked areas here in question, which lie within the former line of MHHW in its unobstructed, natural state, are still within the jurisdiction of the Corps of Engineers under both the FWPCA and the Rivers and Harbors Act. Consequently, these areas are subject to regulation by the Corps pursuant both to the Rivers and Harbors Act as indicated in the Corps' Public Announcements 71-22 and 71-22(a), and to the FWPCA.

The case is unique also because it is the first to hold that the Corps of Engineers has a navigational servitude up to the "plane of mean higher high water on the Pacific Coast". In shallow tidal planes this additional area could involve several miles of coastal frontage. It is interesting to

As the Corps evolved its environmental awareness it also gradually expanded its territorial imperative to embrace areas long since removed from (if ever considered within) the scope of the federal navigational servitude. The land use controls contained within the Corps regulatory framework impose a significant constraint upon lands which are considered subject to those regulations. It is, therefore, the purpose of this paper to discuss some of the questions relative to the determination of when federal jurisdiction attaches and what the land use consequences of such jurisdiction are.

II. THE FEDERAL NAVIGATIONAL SERVITUDE

As stated in *Gilman v. City of Philadelphia*:¹⁵

The power to regulate commerce¹⁶ comprehends the control, for that purpose and to the extent necessary, of all navigable waters of the United States For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.¹⁷

This power confers upon the United States a navigational servitude which extends up to, but not beyond, the ordinary high water mark.¹⁸

The ordinary high water mark limit to the servitude is apparently recognized by the Corps in relation to rivers and lakes¹⁹ and in relation to the marshlands of bays and estuaries²⁰ but not with respect to the shoreward limit of coastal waters on the Pacific Coast where the test is "the mean of the *higher* high waters."²¹

note that the "dikes in question" had been erected between 20 and 50 years before the Corps changed its policy.

15. *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, (1865).

16. U.S. CONST. art. I, § 8.

17. *Gilman*, 70 U.S. (3 Wall.) at 724-5.

18. *United States v. Rands*, 389 U.S. 121 (1967) wherein it was held that when the United States condemns riparian land it is not required to pay compensation for the value of the land as a port site; see also, *South Carolina v. Georgia*, 93 U.S. 4 (1876); *Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954).

19. 33 C.F.R. § 209.260(j) (1975).

Geographic and jurisdictional limits of rivers and lakes

(1) Jurisdiction over entire bed. Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable water body, which includes all the land and waters below the ordinary high water mark.

20. 33 C.F.R. § 209.260(k) (2) (1975).

21. See *supra* note 2 which relates to San Francisco Bay and, thus, appears at variance with the distinction between ocean waters and bays and estuaries and the marshlands thereof set forth in 33 C.F.R. § 209.260(k) (2) (1975). See also note 37 *infra*.

No explanation for the distinction between Pacific Ocean marshlands and "coastal" waters is given by the Corps, so one is left to speculate on the rationale. One theory is that the coastal waters have traditionally had more national significance than the marshlands of bays and estuaries which historically have been the concern of the states.²² Another explanation is that in drafting the regulations for marshlands of bays and estuaries reference was made to the coastal water regulations and the Corps deemed it unnecessary to repeat the "higher" high tide language because in view of the specific reference the concept is (arguably) embraced within the more general phrase, "the presence of the mean high tidal waters."

Efforts by the Corps to assert jurisdiction over marshlands above the mean high water mark have met with mixed reactions in the Courts. For example, in *United States v. Cannon*,²³ the court drew the line, as follows:

Finally the government contends that its regulatory jurisdiction extends to any area adjacent to navigable water where filling or excavating activity may 'affect' such waters. This proposition is troubling if it is intended, as it apparently is, to include an assertion that the licensing requirement of the Rivers and Harbors Act encompasses any activity on fast land which, while involving no direct physical intrusion upon navigable waters and no indirect creation of an impediment or obstruction to navigation, may nevertheless affect the ecology of the adjacent body of water. The question, of course, is not whether Congress has the constitutional power under the commerce clause to subject such activity to regulation; the question is whether it has done so. The answer accordingly lies in the Act itself and in an analysis of the particular activities which are there declared to be subject to regulation.

It is clear that Sections 403 and 407 do reach activities on fast land the effect of which is 'the creation of . . . [an] obstruction . . . to the navigable capacity of any [water] of the United States.' Moreover, we can accept as correct those cases which hold that where a permit is required the government may take environmental considerations into account in deciding whether to issue a permit. It does not necessarily follow, however, that an ecological impact on navigable water without more is enough to require a permit under the Rivers and Harbors Act.²⁴

22. See, e.g. 43 U.S.C. §§ 981, *et seq.* (1970), granting swamp and overflowed lands to states, particularly California. The conflict between the navigational servitude in marshland areas and the private rights which have vested under the swamp land grant is discussed.

23. *United States v. Cannon*, 363 F. Supp. 1045 (D.C. Del. 1973).

24. *Id.* at 1050-51.

Whereas, in *United States v. Holland*,²⁵ the court found that the Corps could assert jurisdiction over mangrove wetlands above the *mean high water line*²⁶ to regulate point sources of water pollution under the Federal Water Pollution Control Act.²⁷ The *Holland* case ignored the question of the extent of the servitude and apparently confused point source pollution control under 33 U.S.C. § 1342 (which is the responsibility of the EPA and the states) with 33 U.S.C. § 1344 which retains Corps permit jurisdiction over the discharge of dredged or fill material in navigable waters.

More recently in *Conservation Council of North Carolina v. Costanza*,²⁸ the court held that Corps jurisdiction under § 404 of the FWPCA extends to coastal salt meadows "periodically inundated" but merely required the violator to obtain an "after the fact" permit on the ground that the violation was only a "technical" one "under fast changing, unstable law."²⁹

Cases frequently cited for expanded Corps jurisdiction such as *Zabel v. Tabb*,³⁰ and *United States v. Lewis*,³¹ do not amount to judicial endorsement of jurisdiction above the mean high water mark but stand rather as emphatic authority for the proposition that the Corps must take environmental consequences into consideration in the permit process.

Can the Corps go beyond the federal navigational servitude to regulate filling of lands above the ordinary high water mark? That question was specifically addressed in *United States v. Stoeco Homes*.³² That case involved former tidal marsh in New Jersey which was removed from tidal action and partially filled in 1927 without a Corps permit. The defendant (Stoeco) acquired the property in 1951 and was in the process of developing the site as a water oriented residential community. The development involved dredging channels and filling the adjacent (diked off) area, similar to many bay front developments in California. The Corps obtained an injunction in the District Court because Stoeco had no Corps permit. Stoeco appealed, challenging the Corps assertion of jurisdiction and attacking § 209.260(k)(2). The Court of Appeals stated:

25. *United States v. Holland*, 373 F. Supp. 665 (D.C. Fla. 1974).

26. *Id.* at 674.

27. *Id.* at 675.

28. *Conservation Council of N.C. v. Costanza*, 528 F.2d 250 (1975).

29. *Compare Weiszman v. U.S. Army Corps of Engineers*, 526 F.2d 1302 (D.D.C. 1975).

30. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

31. *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973).

32. *United States v. Stoeco Homes*, 498 F.2d 597 (3d Cir. 1974).

At oral argument the government took the position that even the occupants of homes on the fully developed part of the Stoeco tract remained in occupation only so long as the United States as a matter of grace declined to assert its navigational servitude. This approach is an oversimplification, for the government did not establish that the 1927 filling operation was illegal. Section 10 by its plain language contemplates congressional consent to some encroachments on the navigational servitude, and delegates to the Army Corps of Engineers and the Secretary of the Army authority to grant such consent on its behalf. If the administrative agency gives an express consent by permit in a specific instance, with no reservation of the right to compel removal, surely that consent must be considered to be a surrender of the federal servitude over the fee in question. Section 10 is silent as to the method of giving consent, but textually a blanket consent with respect to a class of properties does not appear to be prohibited. The longstanding administrative practice, at least prior to 1970, was to require consents for encroachments only beyond pierhead or harbor lines. On the record before us we must assume that this was the administrative practice when in 1927 the premises in question became fast rather than tidal land. Thus there is no basis for the district court's conclusion that in 1927 the land was illegally filled. When Stoeco purchased in 1951 what then had been fast land for twenty four years the navigational servitude had long since been surrendered. We reach this conclusion as a matter of statutory interpretation of § 10, mindful that though the Congressional power over the regulation of commerce is far reaching that power is limited by the due process and taking clauses of the fifth amendment. Certainly a construction which would, after government inactivity from 1890 to 1970, cast doubt upon the property status of thousands of acres of former tidal marshes would present problems under that amendment. Cf. *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674, 93 S.Ct. 1804, 36 L.Ed. 2d 567 (1973).

We conclude, therefore, that the broad injunction against any construction whatsoever in the premises in question cannot be sustained on the theory that a § 10 permit is required for such construction. That holding is limited, of course, to tidal marshlands which had become fast land prior to the change in policy of the Army Corps of Engineers. Any work undertaken in estuarine areas which were subject to the ebb and flow of the tide when the Army Corps of Engineers published its new regulations asserting the navigational servitude to its full extent, are, under the terms of these regulations, now subject to the § 10 permit requirement. . . .³³

The Court, in reaching that decision declared:

The federal environmental protection statutes did not, however, by their terms enlarge the jurisdiction of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of

33. *Id.* at 610-11.

1899. If there is no such jurisdiction environmental protection is still a matter primarily of state concern. . . .³⁴

The Court did, however, uphold the Corps' authority to regulate the discharge of "dredge fines in the waters of South Harbor and its tributary lagoons" (which are navigable waters).³⁵

The *Stoeco* case apparently stands alone for the proposition that the navigational servitude can be extinguished through Corps inaction or acquiescence. If followed it would appear to restrict Corps jurisdiction over former marshlands to those areas such as sloughs which remain open tidal channels or inlets.³⁶

No discussion of the servitude should be considered exhausted without mention of what appears to be an entirely inconsistent congressional policy, vital albeit archaic, regarding swamp and overflowed lands.³⁷

Starting in 1850, pursuant to the Swamp Land Act,³⁸ Congress expressly encouraged the states to reclaim land by constructing the

34. *Id.* at 607.

35. The Corps did not rely upon the FWPCA but upon 33 U.S.C. § 407 (1975) instead.

36. Such an interpretation would be consistent with § 407 of the FWPCA which is confined to navigable waters of the United States.

It should be noted that in California such open sloughs, channels or inlets are deemed subject to the public trust for fisheries, navigation and commerce. *See, e.g.,* *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1931); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 281 (1971); and Taylor, *Patented Tidelands: A Naked Fee?*, 47 CAL. ST. B. J., 420 (1972).

The public "easement" can also be lost through estoppel but only under very special circumstances such as existed in *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

37. 43 U.S.C. §§ 981, *et seq.* (1970).

38. Act of September 28, 1850, ch. 84, 9 Stat. 520. For an early discussion of the California statutes implementing the Federal Act, *see* *People v. Morrill*, 26 Cal. 336, 355 (1864).

Swamp and overflowed lands historically constituted marshlands lying above mean high water. Portions lie below mean higher high water. On the Pacific Coast there are two high waters each day, one being higher than the other. Mean high water or ordinary high water is the average height of all high waters over a 18.6 year period. *See, Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935). Mean higher high water on the other hand is the average height of the higher of the two high tides that occur each day. *See, 1 SHALLOWITZ, SHORE AND SEA BOUNDARIES* 300 (1962). The area between mean high water and mean higher high water would be included within the definition of swamp and overflowed lands, for although it is not covered by ordinary high tides, it is subject to periodic overflow caused by some higher high tides. In areas such as parts of the shoreline of San Francisco Bay where the tidal plain is very flat, the difference between the ordinary high water line and the mean of the higher high tide can be as much as 4 miles.

necessary levees and drains to reclaim the swamp and overflowed lands therein.

With respect to these lands the Supreme Court in 1900 had no difficulty in finding that they were eliminated from the servitude. Thus, in *Leovy v. United States*,³⁹ in dismissing a criminal action against Leovy for damming a stream, the Court stated:

While, therefore, it may not be easy for a court to define the size and character of a stream which would place it within the category of 'navigable waters of the United States', or to define what traffic shall constitute 'commerce among the states', so as to make such questions sheer matters of law, yet, in construing the legislation involved in the case before us, we may be permitted to see that it was not the intention of Congress to interfere with or prevent the exercise by the state of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.⁴⁰

If *Leovy* is to be taken seriously, the Corps would have no jurisdiction (derived from the servitude) over former marshlands on the Pacific Coast patented by the federal government and the states as swamp and overflowed lands regardless of whether they were once subject to the mean of the *higher* high tides.⁴¹

It is against this background of interplay between the navigational servitude and the regulatory schemes which reach beyond it that the Corps resisted the Natural Resources Defense Council in *NRDC v. Callaway*,⁴² in their attempt to push Corps jurisdiction

39. *Leovy v. United States*, 177 U.S. 621 (1900).

40. *Id.* at 632.

41. 33 C.F.R. § 209.260(k) (1975). By definition, lands would not be eligible for classification as swamp and overflowed land if they were regularly inundated by the mean high tides. Certain meandering sloughs within the swamps might have, however, been so inundated. Congress in 1850 did not make such a fine distinction and many such sloughs were included within swamp and overflowed patents.

42. *National Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

During the final stages of consideration of the Senate and House bills prior to enactment of the FWPCA, Congress carved out a narrow exception to the overall NPDES program by creating a new Section 404 which provided for the exclusive Federal regulation of discharges of dredged or fill material in navigable waters by the Secretary of the Army, acting through the Chief of Engineers. No provision was made for the transfer of the Section 404 program to the States. The purpose of this Amendment is summarized by Senator Ellender who felt the measure simply retained the au-

beyond the navigable water in connection with filling activities supposedly covered by § 404 of the FWPCA.⁴³

III. THE CORPS MOVES INTO LAND USE

Following *Callaway*, the Corps' final version of the regulations⁴⁴ embraces the following:

- a. Coastal wetlands, mudflats, swamps and similar areas adjacent or contiguous to other navigable waters.
- b. Rivers, lakes, streams, and artificial water bodies up to their headwaters and landward to their ordinary high water mark (undated 25% of the time).
- c. All artificially created channels and canals used for recreational purposes that are connected to other navigable waters.
- d. All tributaries of navigable waters up to their headwaters (the point on the stream above which the flow is normally less than 5 cubic feet per second) and landward to their ordinary high water mark.
- e. Interstate waters.
- f. Intrastate lakes, rivers and streams.
- g. Freshwater wetlands, including marshes, shallows, swamps and similar areas that are contiguous to or adjacent to other navigable waters and that support freshwater vegetation.
- h. Those other "waters" needing to be protected under 40 CFR 230.⁴⁵

thority of the Secretary of the Army which is essential because it is the responsibility of the Secretary to maintain and improve the "navigable waters of the United States."

The ensuing Congressional dialogue and Committee reports pertaining to Section 494 made it clear that Congress was fully aware of the process by which dredge and fill permits were handled and that since a system to issue permits already existed, Congress did not wish to create a burdensome bureaucracy. The legislative history of Section 404 also revealed a Congressional concern that no unreasonable restrictions emanating from the vigorous water quality programs of the FWPCA be imposed on dredging activities essential for the maintenance of interstate and foreign commerce. *See generally*, 1-2 CONGRESSIONAL RESEARCH SERVICE LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENT OF 1972, 93d Cong., 1st Sess. (1974).

In the *Callaway* decision Judge Aubrey Robinson may have been confused by the contradictory legislative history of Section 404. Apparently, in ordering the Corps to expand its regulatory role to reach all "waters", he adopted the 33 U.S.C. § 1362(7) (1972) definition which states that the term "navigable waters" means the waters of the United States and includes the territorial seas.

43. 33 U.S.C. § 1344 (1975).

44. The Corps first published four alternative regulatory formats in the Federal Register of May 6, 1975, but on July 25, 1975, promulgated their "interim final regulations" which remain on the books as of January 1976.

45. 33 C.F.R. § 209.120(d) (2) (1975).

The discharge of dredged or fill material into these "waters" requires a Corps permit. The definitions of dredged material and fill material set forth in the Act in subsection d(5-7) are quite comprehensive with few exceptions.⁴⁶ Under its regulations the Corps could take the position that the continuation of land filling on diked off areas (once within the reach of the tides) or the impoundment and diversion of storm drainage creeks or ponds within such diked areas⁴⁷ would require a permit unless one can prove the applicability of the pre-December 18, 1968 grandfather clause.⁴⁸

The potential sweep of the Corps regulatory authority becomes apparent in light of the historical retroactivity of the doctrine of "once navigable in fact, always navigable in law."

IV. WHAT DOES THE PERMIT PROCESS INVOLVE?

The amount of detail involved in a permit application, while generally covered under § 209.120(h), is a matter which the local

46. 33 C.F.R. § 209.120(d) (5-7) (1975). Fill material is defined as any pollutant used to replace an aquatic area with dry land or for altering the bottom elevation of a body of water. The regulation excluded material resulting from normal operations in farming, silvaculture and ranching and materials used for the maintenance of water control structures.

47. See, e.g., 33 C.F.R. § 209.120(g) (3) (i) (1975) which provides:

(3) Effect on wetlands. (i) Wetlands are those land and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage. Generally included are inland and coastal shallows, marshes, mudflats, estuaries, swamps and similar areas in coastal and inland navigable waters. Many such areas serve important purposes relating to fish and wildlife, recreation, and other elements of the general public interest. As environmentally vital areas, they constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.

If a residential lot is located in a wetlands area, the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 *et seq.* (1968) would require the HUD Report to state that no permit had been granted for the development. See, 33 C.F.R. § 209.120(c) (8) (1975).

48. 33 C.F.R. § 209.120(g) (12) (vii) (1975) which provides:

(vii) Applications will generally not be required for work or structures completed before 18 December 1968, nor where potential applicants had received expressions of disclaimer prior to the date of this regulation; *provided, however*, that the procedures of paragraph (g) (12) (i) of this section shall apply to all work or structures which were commenced or completed on or after 18 December 1968, and may be applied to all specific cases, regardless of date of construction or previous disclaimers, for which the District Engineer determines that the interests of navigation so require.

District Engineer's staff will, for the most part, dictate. If a close question exists with respect to whether the Corps has jurisdiction over the site or the activity involved, an applicant, wishing to preserve his right to contest the Corps' authority might consider a "reservation of rights" clause in his permit application.⁴⁹

When all of the required information has been provided to the District Engineer, the District Engineer will issue what is called a "public notice". The contents of the public notice are prescribed.⁵⁰ In some districts the District Engineer will provide the applicant with a draft of the proposed public notice before it is issued in order to give the applicant an opportunity to make comments and suggested changes.

When the public notice is issued, copies

will be sent to all parties who have specifically requested copies of public notices, to the U.S. senators and representatives for the area where the work is to be performed, the field representatives of the Secretary of the Interior, the regional director of the Bureau of Sports, Fisheries and Wildlife, the regional director of the National Park Service, the regional administrator of the Environmental Protection Agency, the regional director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the head of the state agency responsible for fish and wildlife resources, the district commander, U.S. Coast Guard, and the office of the Chief of Engineers.⁵¹

The public notice will usually call for comments to be received within thirty days⁵² although this time limit is rarely if ever enforced and in fact is contradicted by the seventy-five day period indicated in another section.⁵³

If the District Engineer determines that an environmental impact statement is necessary,⁵⁴ the Corps' environmental branch will prepare one. The expense of such statement may be assessed against the applicant.⁵⁵ If a state environmental impact report was prepared in connection with the applicant's proposed project, the Corps' environmental branch should have the EIR available to assist it in the preparation of its EIS.

49. A reservation clause could be drafted which states generally that by filing the application the applicant does not concede either the Corps' jurisdiction over his property or its authority to regulate the proposed activity and that the applicant expressly reserves the right to contest assertions of jurisdiction and authority.

50. 33 C.F.R. § 209.120(i) (1) (ii) (1975).

51. 33 C.F.R. § 209.120(i) (1) (ii) (1975).

52. 33 C.F.R. § 209.120(j) (1) (viii) (1975).

53. 33 C.F.R. § 209.120(i) (3) (ii) (1975).

54. 33 C.F.R. § 209.120(i) (1) (iv) (1975).

55. 33 C.F.R. § 209.120(h) (2) (vi) (1975).

If a public hearing⁵⁶ is to be held on the permit application, the "proposed final environmental impact statement must be completed prior to the hearing."⁵⁷

If the proposed activity requires a water quality certification from the local water quality board or from the EPA, the application will not be processed until such certification has either been obtained or waived. If the certifying agency fails to respond within three months after a valid request for such certification, the District Engineer can consider that the requirement of certification has been waived.⁵⁸

If the proposed activity is to be located in the coastal zone of the state, the District Engineer shall obtain from the applicant a certification that the activity conforms to the coastal zone management program of the state.⁵⁹

In evaluating a permit, the District Engineer is authorized to take into consideration a variety of factors which are essentially the same kinds of elements involved in the local land use and planning process. Thus, the regulations provide that the decision to issue a permit will be based on an evaluation of the probable impact on the *public interest* of the proposed activity and its projected use.⁶⁰

56. Federal Water Pollution Control Act § 404(a), 33 U.S.C. § 1344(a) (1975) requires a public hearing if "waters are being filled." Section 404(c) requires the EPA to hold a "hearing" if it intends to "veto" the Corps' permit on environmental grounds.

If purely a Rivers and Harbors Act § 10, 33 U.S.C. § 403 (1899) matter, then a hearing is subject to the discretion of the District Engineer under 33 C.F.R. § 209.120(i) (1) (v) (1975).

Since 33 U.S.C. § 1342(a) (5) (1975) requires all permit applications for discharges under old Refuse Act of 1899 to be processed under the Federal Water Pollution Control Act § 404, 33 U.S.C. § 1344 (1975), it is likely that a public hearing will be required in all cases because of the broad definitions of "fill", *supra* at note 45. The July 25, 1975 regulations make it difficult to conceive of an activity "purely" within the Rivers and Harbors Act.

57. 33 C.F.R. § 209.120(i) (1) (iv) (1975).

58. 33 C.F.R. § 209.120(i) (2) (i) (b) (1975).

59. 33 C.F.R. § 209.120(i) (2) (ii) (1975).

60. 33 C.F.R. § 209.120(f) (1) (1975) includes the following factors:

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work.

(ii) The desirability of using appropriate alternative locations

What weight will the District Engineer give to the fact that the project has been approved by the local jurisdiction in which it is situated?

The Regulations provide:

Where officially adopted State, regional or local land-use classifications, determinations or policies are applicable to the land or water areas under consideration they shall be presumed to reflect local factors of the public interest and shall be considered in addition with the other national factors of the public interest identified in paragraph (f) (1), above.⁶¹

However, no state or local endorsement of a project will be allowed to override "national factors of the public interest," the EPA guidelines⁶² or any of the following statutes: the National Environmental Policy Act,⁶³ the Fish and Wildlife Coordination Act,⁶⁴ the Historical and Archeological Preservation Act,⁶⁵ the National Historic Preservation Act,⁶⁶ the Endangered Species Act,⁶⁷ the Coastal Zone Management Act,⁶⁸ the Marine Protection Research and Sanctuaries Act of 1972,⁶⁹ and the Federal Water Pollution Control Act.⁷⁰

The District Engineer must also consider the recommendations of the regional directors of the U.S. Fish and Wildlife Service, the regional director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the regional administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture and the head of the appropriate state agencies concerned with similar policies.⁷¹

and methods to accomplish the object of the proposed structure or work.

(iii) The extent and permanence of the beneficial and/or detrimental effects that the proposed structure or work may have on the public and private uses to which the area is suited.

(iv) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated structures or work in the general area.

61. 33 C.F.R. § 209.120(f) (3) (i) (1975).

62. 40 C.F.R. § 230 (1975).

63. 42 U.S.C. §§ 4321-44 (1969).

64. 16 U.S.C. §§ 661-66 (1934).

65. 16 U.S.C. § 469, *et seq.* (1964).

66. 16 U.S.C. § 470 (1966).

67. 16 U.S.C.A. § 1536 (1973).

68. 16 U.S.C.A. § 1456 (1976).

69. 33 U.S.C.A. §§ 1412-13 (Supp. 1976).

70. 33 U.S.C.A. § 1411 (Supp. 1972). *See also*, 33 C.F.R. § 209.120(f) (3) (iii) (1975).

71. 33 C.F.R. § 209.120(f) (4) (1975).

If the proposed activity involves wetlands⁷² (or former wetlands if the local District Engineer intends to assert the doctrine of historical navigability),

no permit shall be granted . . . unless the District Engineer concludes . . . that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits . . . (a) In evaluating whether a particular alteration is necessary the District Engineer shall primarily consider whether the proposed activity is dependent upon the wetland resources and environment and whether *feasible alternative sites* are available. . . (b) The applicant must provide sufficient data on the basis of which the availability of *feasible alternative sites* can be evaluated. (emphasis added)⁷³

If the proposed activity involves a canal or other artificial waterway to be connected to navigable waters, the fact that the applicant has undertaken substantial work to dredge the canal prior to connecting it to navigable waters "will not be allowed to weigh favorably in evaluation of the permit application."⁷⁴

V. REFERRAL TO HIGHER AUTHORITY

When an unresolved objection to the proposed permit by another federal agency exists⁷⁵ when the recommended decision is contrary to the stated position of the governor of the affected state or of a member of Congress, when substantial doubt exists as to authority, law, regulations, or policies applicable to the proposed activity, when higher authority requests the case to be forwarded for decision, when the case is recognized to be highly controversial or litigation is anticipated, or when the proposed activity would affect the baseline use for determination of the limits of the territorial sea,⁷⁶ the matter must be referred by the Division Engineer to the Chief of Engineers in Washington.

72. "Wetlands are those *land* and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage." 33 C.F.R. § 209.120(g) (3) (1975) (emphasis added).

73. 33 C.F.R. § 209.120(g) (3) (iv) (1975) (emphasis added).

The Department of Interior will uniformly object to any permit for a project in wetlands unless the public interest requires it, no alternative upland site is available and mitigation is provided. See, *Review of Fish and Wildlife Aspects of Proposals in or Affecting Navigable Waters*, 40 Fed. Reg. 55811 (December 1, 1975).

74. 33 C.F.R. § 209.120(g) (11) (ii) (1975).

75. The EPA of the U.S. Fish and Wildlife Service, principally; see, 33 C.F.R. § 209.120(p) (1) (ii) (1975).

76. 33 C.F.R. § 209.120(p) (2) (ii) (A) (1975).

Since there are no guidelines to govern the disposition of the matter at the sub-cabinet or cabinet level, the applicant should consider that his permit is going to be denied.

The breadth of reasons which require the District Engineer to decline issuance of a permit and refer the matter to the Chief of Engineers makes it virtually impossible for an applicant to proceed with a project, regardless of how meritorious or desirable it might be from a local land use standpoint. If the project's opponents can make it sufficiently controversial, threaten litigation, or prevail upon a member of Congress to oppose it a permit will almost certainly be denied.

If the applicant in frustration be tempted to proceed without a Corps permit, he should be reminded of the consequences which could include restoration,⁷⁷ fines up to \$25,000 per day, and imprisonment for up to one year.⁷⁸

CONCLUSION AND RECOMMENDATIONS

Is the public interest really served by imposing upon the Corps water quality, environmental and land use responsibilities which that agency is not structured to carry out? What particular expertise exists within the Corps to make the evaluations which the regulations state are necessary and requisite to the issuance of a permit? What purpose is served by the obvious duplication of effort to control point source pollution in remote water bodies, drainage channels and streams in light of the national pollution discharge elimination system established under FWPCA and ably administered by the Environmental Protection Agency and the state certification process? Finally, are not all the questions relating to the desirability of land fill operations in areas which have been removed from navigable waters more properly the subject of state and local policy making?

Congress alone can clarify the situation by amending § 404 of the Federal Water Pollution Control Act along the following lines:

1. Confine Corps jurisdiction to navigable waters currently used, or subject to use for transporting interstate and foreign commerce;
2. Abolish Corps jurisdiction over land fill operations;
3. Prohibit Corps jurisdiction over navigable waterways identified as such purely on the basis of historical use alone; and

77. 33 U.S.C. § 406 (1970); Weiszman v. U.S. Army Corps of Engineers, 526 F.2d 1302 (D.D. Cir. 1975).

78. 33 U.S.C.A. §§ 1311(a), 1319(c) (Supp. 1976).

4. Permit the Corps to waive the requirements for oversight jurisdiction in those instances where the state or a political subdivision is capable of performing regulatory functions.

On June 3, 1975, S. 1843 (Dole) was introduced in the Senate to make the foregoing amendments. Since it stands little chance of passage, the ambiguities created by the current language of the FWPCA will fall upon the federal courts to resolve. The judiciary hardly seems to be the proper branch of government to articulate the policies necessary to bring clarity to this confused situation.