

A Costly Standoff

The Hart and Miller Islands Controversy

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I. Introduction

The Hart and Miller Islands controversy of the late 1970s and early 1980s stemmed from an issue that has plagued the Port of Baltimore since its earliest days. The port and its connecting channels in the Chesapeake Bay have needed constant dredging to deepen and maintain shipping channels for ever larger cargo vessels. In generations past, the dredged spoil was simply dumped into other areas of the Chesapeake, but conservationists had begun to argue in the 1960s that it was environmentally irresponsible to dump contaminated spoil from Baltimore Harbor and its industrial surroundings.

Heeding the conservationists' warnings, the Maryland General Assembly in 1975 prohibited unconfined disposal of spoil from Baltimore Harbor into the open waters of the Bay. Dredge spoil from the Harbor was then placed on onshore tracts of land, but this proved to be expensive and unmanageable as available onshore land became scarcer. Meanwhile, there was a plan to deepen the Harbor and connecting channels from 42 feet to 50 feet, which would generate about 52 million cubic yards of spoil. It was decided that the most environmentally and legally sound way to dispose of this spoil involved the construction of a 1,110-acre diked disposal area on Hart and Miller Islands.

Environmental groups and nearby residents resisted this project by filing a lawsuit to prevent construction of this disposal facility.¹ Although their resistance originated from the potential environmental damage that the diked disposal area would cause, they based their legal claims on the narrow interpretation of various statutes and regulations pertaining to the project, which ultimately proved unsuccessful. The litigation caused the project to be delayed for many years and made it more costly. Today, Hart-Miller Island continues to receive spoil from dredging to maintain the 50-foot deep channels, and ironically, part of the island has been converted to a state park that attracts wildlife and recreationists.

II. Background

A. Chesapeake Bay and Early Dredging

The Chesapeake Bay is the largest estuary in the United States. It extends about 200 miles from the Susquehanna River in the north to the Virginia Capes in the south before opening into the Atlantic Ocean. Its width varies from 3.4 miles near Aberdeen, Maryland to 35 miles near the mouth of the Potomac River.² Although the Bay is large in area, its mean depth during the time of the Hart and Miller Islands controversy was only 28 feet, meaning that its width-to-depth ratio was an astounding 3,000:1.³ This peculiar characteristic has often led people to refer to the Bay as a “shallow pan” of water.

Because of the Bay’s lack of depth, there is a long history of dredging to deepen the waterways for passing vessels. The first evidence of dredging is from 1783, when the Ellicott

¹ Hart & Miller Islands Environmental Group, Inc. v. U.S. Army Corps of Engineers, 459 F. Supp. 279 (D. Md. 1978), *rev’d* 621 F.2d 1281 (4th Cir. 1980), *remanded to* 505 F. Supp. 732 (D. Md. 1980).

² Chesapeake Bay Foundation, General Information About the Chesapeake Bay (2006), http://www.cbf.org/site/PageServer?pagename=exp_sub_resources_factsheets_general (last visited Jan. 4, 2008).

³ Maryland Port Administration, Dredging and Spoil Disposal Program for Baltimore Harbor 1 (Jan. 1979). The Chesapeake Bay Foundation, *supra* note 2, states that the mean depth of the Bay is 21 feet.

brothers needed ships to export flour. They used scoops and a “horse-powered windlass” to deepen their wharf on Pratt and Light Streets.⁴ At that time, the water depth was nine feet at mean high tide at the head of the harbor.⁵ The state assumed responsibility for dredging Baltimore Harbor, and in 1790, the state began using a “mud machine,” which involved a horse turning a treadmill that in turn pulled a drag bucket from the floor of the harbor.⁶ These dredging projects were financed through a tax of one penny per ton of cargo entering or leaving the harbor, which was later increased to two cents.⁷

In 1827, the steam engine replaced animals in supplying horsepower to dredging machines, and Senator Sam Smith petitioned Congress for federal help in dredging Baltimore Harbor.⁸ The federal government participated in dredging efforts for the first time in 1836,⁹ which by this time had extended beyond Baltimore Harbor into the waters of the Chesapeake Bay.¹⁰ With the construction of ever larger ships through the years, the Chesapeake Bay channels became deeper and wider. Congress authorized dredging the channel to a depth of 27 feet in 1881, a depth of 37 feet in 1930, and a depth of 42 feet in 1958.¹¹

B. Port of Baltimore

The Port of Baltimore is paradoxically both ideally and unfavorably situated. To its advantage is the proximity of fertile soil to an expansive and protected harbor. Upon its founding in 1706, the Port prospered with the export of grain and tobacco to the West Indies and

⁴ K. Mountford, “Past Is Prologue: History of Dredging Reveals Deeper Need to Understand Bay’s Bottom Line,” *Bay Journal*, Jul./Aug. 2000, available at <http://www.bayjournal.com/article.cfm?article=1322>.

⁵ G. Power et al., *The Real Beneficiaries Of Federal Dredging* 16. There is no copyright or printing date in this publication.

⁶ See picture of mud machine in appendix.

⁷ K. Mountford, *supra* note 4.

⁸ *Id.*

⁹ Act of July 4, 1836, ch. 363, 5 Stat. 128, 130.

¹⁰ Maryland Port Administration, *supra* note 3 at 2.

¹¹ *Id.*

Europe.¹² After the Revolutionary War, the Port's location 150 miles inland proved to be advantageous with the advent of the railroads. Because Baltimore was the closest East Coast port to the Midwest, railroads invested heavily in building a transportation network out of Baltimore to serve the young nation's interior.¹³ Today, with the prevalence of trucking, Baltimore is within an overnight drive to two-thirds of the population of the United States, which is probably the reason why the Port ranks first on the East Coast for roll-on/roll-off cargo.¹⁴

Yet, the Port's geographic location can also be an obstacle to its success. Because Baltimore is near the northern end of the Chesapeake Bay, ships must travel 150 miles from the Bay's opening at the Virginia Capes in order to reach the port.¹⁵ All 150 of these miles must be dredged regularly to maintain its current depths due to the large accumulation of sediments that settle on the floor of the Bay.¹⁶

Despite its advantages (and because of its disadvantages), Baltimore faces major obstacles in its competition against other ports. There is stiff competition from other ports on the East Coast, such as New York, Philadelphia, and Charleston. Competition is also fierce from the Port of Hampton Roads, which shares the Chesapeake Bay with Baltimore as a gate to the Atlantic Ocean. Hampton Roads is only 18 miles from the open sea while also providing rapid access to two-thirds of the U.S. population.¹⁷ As early as in 1984, the Virginia Port Authority launched a public relations campaign that can be encapsulated by a remark in one of its

¹² Power, *supra* note 5 at 15; Maryland Port Administration, <http://www.marylandports.com> (last visited Jan. 4, 2008).

¹³ See Maryland Port Administration, *supra* note 12.

¹⁴ *Id.*

¹⁵ Water Resources Support Center, U.S. Army Corps of Engineers, Port of Baltimore, Maryland 1 (2000). There is a shorter route of 125 miles from the Atlantic Ocean to Baltimore through the Delaware Bay and the Chesapeake and Delaware Canal. The canal's depth is only 35 feet, but it carries 40% of the traffic to Baltimore. Chesapeake & Delaware Canal, <http://www.nap.usace.army.mil/sb/c&d.htm> (last visited Jan. 4, 2008).

¹⁶ About 5 million tons of sediment (clay, sand, soil, and bits of gravel) from eroding tributaries and runoff settle in the Chesapeake annually. K. Blankenship, "Sediment Happens: The Question Is What Are We Going To Do About It?" *Bay Journal*, Jul./Aug. 2002, *available at* <http://www.bayjournal.com/article.cfm?article=699>.

¹⁷ Information on the Port of Virginia, <http://www.vaports.com/AboutThePort.htm> (last visited Jan. 4, 2008).

advertisements: “Every year, many hundreds of ships needlessly enter the Chesapeake Bay and make the long trek up the Baltimore channel.”¹⁸ Today, Hampton Roads has attracted the likes of Wal-Mart, Target, Home Depot, and Cost Plus to establish distribution facilities there,¹⁹ and the Port of Virginia²⁰ handles more cargo than Baltimore in total volume and in dollars.²¹

Along with a shorter distance to the ocean, Hampton Roads also boasts of deeper harbors. Although 50-foot channels serve both ports, Baltimore’s deepest berth is 45 feet, compared to 50 feet at Hampton Roads. This weakness was illuminated on November 7, 2007 when the ‘Michaela’ called on the Port of Baltimore. It was the largest ship to dock in the Port’s history, but it arrived at only one-third capacity. The 45-foot berth would have been too shallow for the ship if it were fully loaded.²² It is estimated that deepening the berth to 50 feet would require \$100 million and at least three years, but there are currently no plans to do so.²³

The state and federal governments continue to invest in dredging projects because Maryland relies heavily on the Port of Baltimore for its economic health. More than 120,000 jobs are linked to the Port’s activities, more than \$4 billion is generated annually in wages, salaries, and business revenues, and almost \$280 million is collected annually in taxes.²⁴ The

¹⁸ A. Muscatine, “War Between Eastern Ports Heats Up: Virginia’s Hampton Roads Challenges Baltimore,” *Washington Post*, Jan. 31, 1985, at A1.

¹⁹ Virginia Port Authority, Comprehensive Annual Financial Report 3 (2007), available at http://www.vaports.com/PDF/2007_CAFR.pdf.

²⁰ The Port of Virginia consists of the 100-mile stretch of harbor in the Port of Hampton Roads along with an inland port in Front Royal.

²¹ In 2006, the Port of Virginia received more than 15 million metric tons of cargo while the Port of Baltimore received more than 7.7 million metric tons. Under these measurements, Virginia captured 20% of the East Coast cargo market, and Baltimore captured 10%. In terms of dollar value of total cargo, Virginia handled more than \$47 billion and Baltimore handled about \$36.5 billion. Virginia Port Authority, *supra* note 19 at 64-66.

²² M. Schuh, “Improvements Planned To Port of Baltimore,” WJZ TV Baltimore News Broadcast, Nov. 7, 2007, available at <http://wjz.com/video/?id=32901@wjz.dayport.com>.

²³ A. Cahall, “Port of Baltimore Takes in Largest Ship in Its History,” *Baltimore Examiner*, Nov. 8, 2007 available at <http://www.marylandports.com/news/POBInTheNews.pdf>. See also C. Wykoff, “Biggest Container Ship To Ever Call On Port Of Baltimore,” WBAL Radio News Broadcast, Nov. 7, 2007, available at <http://wbal.com/news/story.asp?articleid=65374>.

²⁴ Maryland Port Administration, *supra* note 13.

Port is now ranked in the top 15 nationally for overall volume and value of cargo that it handles, and it is ranked second in imported forest products and in automobile exports.²⁵

C. United States Army Corps of Engineers, Baltimore District

The Continental Congress created a Corps of Engineers in 1779, but it dissolved after the Treaty of Paris had ended the Revolutionary War. In 1794, Congress organized a Corps of Artillerists and Engineers. Congress later created in 1802 a separate Corps of Engineers and a new military academy in West Point, New York,²⁶ which was the only engineering school in the country for at least twenty years.²⁷

The role of the Corps of Engineers in the Chesapeake Bay began around this time. The Department of War hired French engineers to supervise the fortification of Baltimore Harbor in 1794. They began by improving earthworks on Whetstone Point, which guards the fork of the Patapsco River leading to the Harbor. This project led to the construction of what would later become Fort McHenry, which became all the more important upon the beginning of the War of 1812. Baltimore was a target of a British attack because it was not only an important shipping center, but it was also a haven for privateers who preyed on British ships. When the British approached the city on September 13, 1814, Fort McHenry proved essential in defending the Harbor during the Battle of Baltimore.²⁸

After the war, it was apparent that the lack of reliable defenses had hampered the fight against the British. This was especially evident in the Royal Navy's relative ease in sailing into

²⁵ Id.

²⁶ Act of March 16, 1802, ch. 9, §§ 26, 27, 2 Stat. 132, 137.

²⁷ See US Army Corps of Engineers Brief History, <http://www.hq.usace.army.mil/history/brief.htm#1beg> (last visited Jan. 4, 2008). See also Office of History, U.S. Army Corps of Engineers, *The History of the US Army Corps of Engineers 25-27* (1998).

²⁸ For a more detailed account of the Corps' role in the construction of Fort McHenry and the Battle of Baltimore, see H. Kanarek, *The Mid-Atlantic Engineers: A History of the Baltimore District U.S. Corps of Engineers, 1774-1974 2-8* (1974).

the Chesapeake Bay before the burning of Washington and the attack on Fort McHenry. The Corps constructed fortifications at the mouth of the Bay near Hampton Roads and repaired Fort McHenry. It also added more fortifications toward the mouth of the Patapsco River because Fort McHenry was deemed too close to the inner harbor. One of the new defenses included Fort Carroll.²⁹ Brevet Col. Robert E. Lee, whom the Baltimore District of the Corps often calls its first District Engineer, supervised the construction of this fort.³⁰

The War of 1812 also demonstrated that an improved transportation system was essential in defending against another invasion.³¹ The Corps thus became increasingly involved in civil works projects, and its construction of land and water routes proved to be as beneficial for commerce as it was for defense, especially in the push westward. Although there were many calls for the Corps to be more involved in civil projects, there were weighty arguments against it, especially the fear of unconstitutional federal intrusion into state matters.³² However, the U.S. Supreme Court held otherwise in *Gibbons v. Ogden*:

[I]n regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.³³

With this judicial stamp of approval, Congress passed the General Survey Act of 1824, which authorized the president to survey roads and canals “of national importance, in a commercial or

²⁹ Fort Carroll is now owned privately but abandoned. See A. Pietila, “No Plans Have Taken Wing at Old Fortress,” *Baltimore Sun*, Aug. 2, 2004, at 1B.

³⁰ For an account of the Corps’ defense installations around the Chesapeake Bay after the War of 1812 and Robert E. Lee’s tenure with the Baltimore District, see Kanarek, *supra* note 28 at 27-33.

³¹ Office of History, *supra* note 27 at 37.

³² US Army Corps of Engineers Brief History, *supra* note 27.

³³ 22 U.S. 1, 195, 6 L.Ed. 23, 70 (1824).

military point of view” and “to employ ... such officers of the corps of engineers” to do so.³⁴

One month later, Congress authorized the Corps to improve and remove obstructions to navigation on the Ohio and Mississippi Rivers.³⁵

Thereafter, there was no question as to the legitimacy of the federal government’s role in the construction and improvement of the streams of interstate commerce. The Baltimore District became involved in a flurry of civil projects, including the repair of the Cumberland Road, the construction of the Chesapeake and Ohio Canal and the Chesapeake and Delaware Canal, the laying of the Baltimore and Ohio Railroad, and the dredging of Baltimore Harbor.³⁶

Toward the end of the nineteenth century, friction arose between the federal and state governments over the obstruction of navigable bodies of water. State legislatures had increasingly authorized obstructions such as railroad bridges and dams, and these state initiatives often interfered with the federal government’s navigational improvement projects for rivers and canals. The Corps proposed in 1877 that Congress enact legislation to prevent unauthorized construction that obstructed harbor areas. This proposal became known as the “Dolph Bill,” and it was introduced in Congress many times for more than a decade without success. Meanwhile, the U.S. Supreme Court held in 1888 that the federal government could not stop state projects, even if they obstructed navigation, without “a direct statute of the United States.”³⁷ As a response, Congress incorporated the Dolph Bill into a statute in 1890. Under this act, the construction of any structure or the deposit of any refuse that obstructed a navigable body of water required a permit issued from the Secretary of War, who would in turn delegate this

³⁴ General Survey Act, ch. 46, 4 Stat. 22 (1824). See T. Shallat, *Water and Bureaucracy: Origins of the Federal Responsibility for Water Resources, 1787-1838*, 32 *Nat. Resources J.* 5, 9 (1992) (describing the Act as “the most critical piece of nineteenth century internal improvement legislation”).

³⁵ Act of May 24, 1824, ch. 139, 4 Stat. 32 (1824). This Act was amended numerous times to extend to other rivers. T. Shallat, *supra* note 34.

³⁶ Baltimore District, U.S. Army Corps of Engineers, *History of Baltimore Harbor and Channels*, <http://www.nab.usace.army.mil/projects/Maryland/DMMP/history.html> (last visited Jan. 4, 2008).

³⁷ *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811, 31 L.Ed. 629 (1888).

authority to the Corps.³⁸ However, the 1890 Act encountered judicial resistance. Two federal district cases held that Congress could not delegate to the Secretary of War such power to regulate the construction of bridges across navigable waters.³⁹ Congress then passed a superseding act in 1899, requiring the approval of the Corps, and in some instances the approval of Congress, for the construction of such structures.⁴⁰

Today, the authority of the Corps of Engineers has expanded to include flood control, hydroelectric power production, irrigation, and protection of water quality.⁴¹ Despite these varied responsibilities, one of the greatest roles for the Corps remains the maintenance and improvement of commercial waterways and ports. The Corps currently maintains more than 25,000 miles of navigation channels and about 400 ports, which requires dredging over 400 million cubic yards of spoil each year.⁴² The Baltimore District in particular has within its jurisdiction the majority of the Chesapeake Bay and its tributaries.

D. 50-Foot Harbor and Channel Dredging Plans

When Congress authorized deepening Baltimore Harbor and Channel to 42 feet in 1958,⁴³ the House Public Works Committee sensed that a greater depth was necessary for the

³⁸ Rivers and Harbors Act of 1890 §§ 6, 7, ch. 907, 26 Stat. 426, 453-454. See *infra* note 110.

³⁹ *United States v. Keokuk & H. Bridge Co.*, 45 F. 178 (S.D. Iowa 1891); *United States v. Rider*, 50 F. 406 (S.D. Ohio 1892).

⁴⁰ Rivers and Harbors Act of 1899 §§ 9, 10, 13 (codified at 33 U.S.C. §§ 401, 403, 407 (2000)). For a more detailed account of the history leading to this enactment, see D. Hankey, Sections 9 and 10 of the Rivers and Harbors Act of 1899: The Erosion of Administrative Control by Environmental Suits, 1980 Duke L.J. 170, 174-179; G. Power, The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers, 63 Va. L. Rev. 503, 505-507 (1977). See also Brief of Appellants at 12-13, *Hart & Miller Islands Area Environmental Group, Inc. v. Corps of Engineers*, 621 F.2d 1281 (4th Cir. 1980) (Nos. 78-1911, 78-1912, 79-1037).

⁴¹ Power, *supra* note 5 at 5. See also John Paul Woodley, Asst. Sec. of the Army (Civil Works), Statement to U.S. Senate Committee on Environment and Public Works: U.S. Army Corps of Engineers Roles in the Nation's Water Resource Needs in the 21st Century (Mar. 31, 2004), available at http://epw.senate.gov/hearing_statements.cfm?id=219879.

⁴² C. Kennedy, Presentation to 18th World Congress of Soil Science: History of Dredged Material and Usage in the United States (Jul. 15, 2006), available at <http://crops.confex.com/crops/wc2006/techprogram/P15531.HTM>.

⁴³ River and Harbor Act of 1958, Pub. L. 85-500, 72 Stat 297 (1958).

increasing drafts of ocean vessels.⁴⁴ The committee directed the Corps to report on the Chesapeake's existing and future conditions. During the Baltimore District's study of the issue, it held several public hearings on the matter. All of the interested parties supported further deepening of the channels to 45 feet, and some went further and requested a depth of 50 feet.⁴⁵ These groups drew attention to the steadily increasing drafts of ocean vessels. The average draft for tankers in 1946 was 35 feet, but this figure had risen considerably to 45 feet by 1966.⁴⁶ The Corps recommended further dredging, reporting to Congress in 1970 that although deepening the channels to 50 feet would cost \$72.7 million, the benefit-cost ratio was 2:1 in light of Baltimore's increasing trade.⁴⁷

Congress acquiesced in 1970 and authorized deepening Baltimore Harbor and Channel to 50 feet, pending approval by the Office of Management and Budget (OMB).⁴⁸ However, OMB requested that the Corps consider ways to cut costs, including, among others, dredging narrower channels and convincing "the very few, easily identifiable immediate beneficiaries" to contribute to the dredging effort.⁴⁹ OMB also suggested deepening only the inbound portion of the channel because the majority of vessels requiring 50 feet of clearance carried imports, and outbound ships were usually not weighed down with cargo. Dredging only the inbound portion of the channel was estimated to save \$30 million.⁵⁰

The Corps responded that the original plans remained most optimal. It stated that those in favor of the dredging project found the proposed channel width sufficient, although there was

⁴⁴ J. Arnold, *The Baltimore Engineers and the Chesapeake Bay, 1961-1987* 50 (1988).

⁴⁵ Power, *supra* note 5 at 34 ("All comment was favorable and supported a new depth of at least 45 feet.").

⁴⁶ *Id.*

⁴⁷ Arnold, *supra* note 44 at 50-51.

⁴⁸ Maryland Institute for Policy Analysis and Research, University of Maryland, Baltimore County, *A Project Unresolved: Harbor Dredging and the Port of Baltimore 2* (Rev., Dec. 1983) (citing River and Harbor Act of 1970, § 101, Pub. L. 91-611, 84 Stat. 1818 (1970)).

⁴⁹ Power, *supra* note 5 at 22.

⁵⁰ *Id.*

no comment on whether a narrower width would be acceptable.⁵¹ Regarding the suggestion to share costs with private “beneficiaries,” the Corps noted that such a cost-sharing scheme was unprecedented.⁵² Also, because of the large number of parties that would benefit from the deeper channel, the cost-sharing scheme was deemed unnecessary, which might have been a consequence of the deep opposition against this proposal from larger corporate beneficiaries like Bethlehem Steel, Exxon, and the Baltimore and Ohio Railroad.⁵³ Finally, the Corps flatly rejected the recommendation to deepen only the inbound portion of the channel.⁵⁴ OMB ultimately granted approval in 1976.⁵⁵

E. Issue of Spoil Disposal

There was a consensus in Maryland that deepening the Harbor and its approaches to 50 feet was essential to the economic health of the region.⁵⁶ Groups concerned about the environmental health of the Chesapeake Bay were satisfied with the Corps’ assessment that the deepened channels would cause “relatively small” changes in the water’s currents and salinity levels, and they conceded that the project would affect only those parts of the Bay that had already been disturbed by dredging during the course of the previous 100 years.⁵⁷ However, the most worrisome issue turned out to be what to do with the spoil dredged from the project.

⁵¹ Id.

⁵² Id. at 23. This cost-sharing scheme was not totally unprecedented, as provided in the Rivers and Harbors Act of 1920 § 2, ch. 252, 41 Stat. 1010 (codified as amended at 33 U.S.C. § 547 (2000)) (“Every report submitted to Congress in pursuance of any provision of law for a survey ... shall contain ... recommendations as to what local cooperation shall be required.”). Id.

⁵³ Id. at 23-24.

⁵⁴ Id. at 23.

⁵⁵ See Maryland Port Administration, *supra* note 3 at Appendix I.

⁵⁶ “Just about everyone agrees that dredging the harbor is good—like the flag and motherhood.” D. Maraniss, “‘Dredge or Die’: Mud Threatens the Port of Baltimore,” *Washington Post*, Jun. 3, 1979, at A1 (quoting John Starr, geologist at the University of Maryland, Baltimore County).

⁵⁷ Arnold, *supra* note 44 at 51.

Deepening these waterways from 42 feet to 50 feet would generate about 52 million cubic yards of spoil.⁵⁸

In previous generations, spoil from dredging projects was simply dumped overboard into open areas of the Bay.⁵⁹ In the 1960s, conservationists decried such open-water disposal because the bottom of Baltimore Harbor was contaminated from 100 years of chemical dumping.⁶⁰ As a result, the Maryland General Assembly in 1975 prohibited unconfined disposal of spoil from Baltimore Harbor into the open waters of the Bay.⁶¹ Dredged spoil was then placed on onshore tracts of land, but this proved to be unmanageable as available onshore land became scarcer.⁶² It became apparent that another alternative was needed, especially as federal approval for the dredging project was contingent on the state's formulation of a proper disposal plan.⁶³

Before Congress approved the 50-foot channel deepening project, the Maryland General Assembly appropriated \$13 million in 1969 to determine a proper dredge disposal site.⁶⁴ The engineering firms Green Associates and Trident Engineering Associates examined and evaluated 70 potential sites for spoil disposal, and it narrowed the field to five, which in order of preference were: Hart and Miller Islands; Black Marsh; Six-Seven-Nine Mile Foot Knolls; Belvidere Shoal; and Patapsco River Mouth.⁶⁵ All five finalists involved the construction of a dike to contain spoil from the channel dredging project.

⁵⁸ *Id.* at 52; Power, *supra* note 5 at 26.

⁵⁹ Maryland Port Administration, *supra* note 3 at 3.

⁶⁰ Arnold, *supra* note 44 at 51.

⁶¹ Senate Bill No. 28 (1975).

⁶² Maryland Port Administration, *supra* note 3 at 4.

⁶³ Power, *supra* note 5 at 25 (citing River and Harbor Act of 1970, § 101, Pub. L. 91-611, 84 Stat. 1818 (1970)).

⁶⁴ 1969 Md. Laws 1168.

⁶⁵ Maryland Port Administration, *supra* note 3 at 18-22.

F. Hart and Miller Islands

Along with neighboring Pleasure Island, Hart and Miller Islands were once joined together as part of a peninsula as recently as 200 years ago, jutting into the Chesapeake Bay at the mouth of the Back River. Sometime before 1846, the peninsula broke apart from the mainland into two pieces, which became known as Hart and Miller Islands. Hart Island later broke again between 1951 and 1952, and the smaller, southern portion was named Pleasure Island.⁶⁶

By the 1970s, Hart and Miller Islands were mainly wetlands, but there were also forests on a significant portion of Hart Island. Although the islands were privately owned, many people visited Hart Island's sand beach in the summer months. There was also evidence of hunting⁶⁷ and treasure seekers⁶⁸ on Hart Island. The only significant development on the string of islands was in the 1940s when George P. Mahoney and Col. A.T. Miller developed an amusement park on Pleasure Island called New Bay Shore Park, which was accessible to the mainland by a 1,220-foot wooden bridge.⁶⁹ Mahoney had attempted to reverse rapid erosion of the island by

⁶⁶ Id. at 29-31.

⁶⁷ Baltimore District, U.S. Corps of Engineers, Environmental Statement: Permit Application for Diked Disposal Island, Hart and Miller Islands, Baltimore County, Maryland Appendix B (Feb. 1976).

⁶⁸ A legend tells of Joseph Hart, an Englishman who became wealthy by renting out land and operating a tavern in Baltimore in the early nineteenth century. He did not deposit his money in banks because he distrusted them. He was also wary of keeping money on his person or in his house because he had been robbed several times. It is said that he buried about \$15,000 worth of gold on the island before it broke into Hart and Pleasure Islands. See D.C. Ruppert, *The Treasure Trove of Hart Island*, 1971; "Girl Fights State to Save 'Treasure Island,'" *Baltimore Sun*, Dec. 20, 1971, at C10; "New Yorker Plans to Buy Bay Islands," *Baltimore Sun*, Aug. 5, 1933, at 10.

⁶⁹ New Bay Shore Park included a roller coaster, concessions, beach, and even a casino. "Baltimoreans Flock to New Bay Shore Park," *Baltimore (Magazine)*, July 1948. Mahoney intended to expand the amusement park's development into Hart and Miller Islands, but he never did so. He sold the park and the three islands to William F. Chew in 1950 with the understanding that the park would continue in operation and expand into Hart and Miller Islands, but Chew did not develop the two islands either. "Being Razed by Bethlehem Steel Co.: Bay Shore Park Is Doomed," *Baltimore News-American*, Dec. 29, 1964, at 2B; "Mahoney Sells Shore Park To Dealer," *Baltimore Evening Sun*, Apr. 28, 1950, at 42.

New Bay Shore Park was probably named after Bay Shore Park, which the United Railways and Electric Company opened in 1906. Bay Shore Park was located on the mainland at the current site of North Point State Park. Connected by trolley service from Baltimore, Bay Shore Park featured a bowling alley, restaurant, pier, hotel, amusement park, gardens, beaches, and picnic grounds. It closed in 1947 when Bethlehem Steel purchased the land and later methodically set fire to the buildings to clear land for a new plant, which was never constructed.

constructing groins and emplacing 310,000 cubic yards of artificial fill, but all of the fill washed away in a matter of years. The amusement park was later severely damaged by storms, and it closed in 1964 after the bridge collapsed.⁷⁰

Between 1846 and 1967, Hart Island had decreased from 264 acres in area to 94 (including the loss of 26 acres when Pleasure Island broke off). During the same period, Miller Island shrank in area from 124 acres to 33 acres. Erosion was especially pronounced on the west side of the islands facing Back River. Between 1933 and 1969, Hart and Miller Islands lost as much as 3.4 feet of shoreline on their western sides. The islands were eroding so rapidly that the Maryland Geological Survey had predicted that Pleasure Island would disappear by 1991, Hart Island would disappear by 2045, and Miller Island would disappear by 2008.⁷¹ Thus, the Hart and Miller Islands plan was not only to provide a satisfactory dredge disposal site, but it was also to save the islands from washing away.

The most appealing attributes of the Hart and Miller Islands option were distance and cost. The islands were only thirteen miles east of Baltimore City, and although this option was not as cheap as open water disposal or on-land disposal, it was more economical than the alternatives.⁷² On October 18, 1977, the state acquired the reversionary interest of Bethlehem

North Point State Park, Recreation and Wildlife Close to Baltimore, <http://www.dnr.state.md.us/baylinks/5.html> (last visited Jan. 4, 2008); R. Ruszin, Park Profile: North Point Visitor Center, <http://www.dnr.state.md.us/naturalresource/spring2003/parkprofile.html> (2004); K. Brooks, Bay Shore Park: 1906-1947 (1992); F.J. Kreller, "Bay Shore Park Just A Memory, To Follow In Steps Of River View," *Baltimore Evening Sun*, Aug. 20, 1947, at 33; "Being Razed by Bethlehem Steel Co.," *supra*.

⁷⁰ A. Norden, Hart-Miller Island State Park: Creating a Unique Resource Out of Dredged Material (2004), available at <http://www.dnr.state.md.us/naturalresource/summer2004/hartmiller.html>; Brooks, *supra* note 69; Maryland Port Administration, *supra* note 3 at 29.

⁷¹ Maryland Port Administration, *supra* note 3 at 3. Pleasure Island, which was not a part of the diked disposal project, still exists today

⁷² In 1979, open water disposal cost between \$3.00 and \$4.00 per cubic yard of dredged spoil, on-land disposal cost \$5.60 per cubic yard, and disposal at Hart-Miller Island was projected to cost \$6.95 per cubic yard. Ocean dumping cost \$10.90 per cubic yard of dredged spoil, disposal on land via rail delivery was estimated to cost \$21.60 per cubic yard, and disposal on land via pipeline was estimated at \$26.50 per cubic yard. Maryland Port Administration, *supra* note 3 at 17. The most comparable alternative was an option for Black Marsh, which was

Steel in Hart and Miller Islands.⁷³ In 1978, the state purchased the two islands for \$550,000 from C.J. Langenfelder and Sons, Inc., which held a long-term lease from Bethlehem Steel.⁷⁴

G. Diked Disposal Area Plan

The plans for the diked enclosure at Hart and Miller Islands are essentially reflected in the structure that exists today, which is much like an enormous container to hold the dredge spoil.⁷⁵ The islands serve as the northwestern wall of the enclosure so that the structure faces the Chesapeake Bay to the east as “an irregular, oblong enclosure.” It measures approximately 12,430 feet by 4,700 feet, covering about 1,110 acres and originally planned to contain about 52 million cubic yards of sediment. The dike wall is constructed of sand deposits, although the wall facing the Bay is riprapped with large stones to protect it from waves and currents. The walls are built with a slope of 3:1 (1 foot of height for every 3 feet of horizontal distance) where there is stone riprap, and where the dike faces dry land the slope is 5:1. Where the wall faces wetland, its slope is 10:1. The two islands are connected together with an artificial beach.

The dredged material is delivered into the diked disposal area by hydraulic pipes from either the dredge point itself or from barges. Because the dike wall is permeable, clear water will filter into the bay after sedimentation. Sluice gates have also been constructed to prevent overtopping. The strength of the structure was tested “in the field, and also the laboratory,” and it was deemed “very safe.” The diked area is divided into two sections: the north cell

actually expected to cost less, but Hart and Miller Islands were projected to hold about 8 million cubic yards more spoil. *Id.* at 21.

⁷³ Maryland Port Administration, *supra* note 3 at Appendix.

⁷⁴ “State Buys Hart And Miller Islands,” *Baltimore Evening Sun*, Feb. 6, 1978, at C24. In 1975, the state’s appraiser had valued the land at \$285,000 while C.J. Langenfelder and Sons, Inc. valued it at \$1.1 million. *Id.* See also “Owner Of Hart Miller Isles Asks Dike, Fill-In Permit,” *Baltimore Evening Sun*, Mar. 14, 1974, at F2. See also S. McKerrow, “State Moves to Acquire Islands,” *Baltimore Evening Sun*, May 28, 1975, at F1.

⁷⁵ The following descriptions of the Hart-Miller Island diked disposal area is gathered from Maryland Port Administration, *supra* note 3 at 23-24, 32-34.

(comprising 800 acres) and the south cell (comprising 300 acres). The only major deviation between the original plan and actual construction is that while the height of the dike was supposed to be 18 feet, it is now 28 feet at the south cell and 44 feet at the north cell.⁷⁶

Upon selection of the site and development of plans, the state applied to the Corps of Engineers in 1972 for a permit to construct the diked disposal area.⁷⁷ The Rivers and Harbors Act of 1899 § 10 required Corps approval for “any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States,”⁷⁸ and the Federal Water Pollution Control Act of 1972 § 404 required Corps approval “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”⁷⁹ During the permit review process,⁸⁰ the Department of Interior expressed concern about the possible elimination of natural wetlands on the islands, and the Environmental Protection Agency criticized the project as a short-term solution because there was no mention of what to do when Hart-Miller Island became full.⁸¹ However, the state and private contractors involved in the project assured the Corps that all environmental concerns were properly addressed, and the Corps approved the application and granted a permit in 1976.⁸²

H. Opposition

Although there were objections against the Hart-Miller Island project from such entities as the Department of Interior and the Environmental Protection Agency, the fiercest opposition

⁷⁶ Norden, *supra* note 69.

⁷⁷ Maryland State Department of General Services, Proposed Dredging and Dike in Chesapeake Bay at Hart and Miller Island in Baltimore County, Maryland (Feb. 25, 1972).

⁷⁸ Codified at 33 U.S.C. § 403 (2000). See *infra* note 105.

⁷⁹ Codified at 33 U.S.C. § 1344 (1976) (amended 1987).

⁸⁰ For an extensive overview and critique of this permit review process during this time, see G. Power, *supra* note 40.

⁸¹ Baltimore District, U.S. Corps of Engineers, Final Environmental Statement: Permit Application for Diked Disposal Island, Hart and Miller Island, Baltimore County, Maryland 94-96 (Feb. 1976).

⁸² Power, *supra* note 5 at 27; Department of the Army, Permit No. NABOP-F/2 (1976).

came from residents along Back River, who likened their community to “a miniature Ocean City.”⁸³ These residents were forcefully backed by their elected representatives: U.S. Representative Clarence D. Long, State Senator Norman R. Stone, and State Delegate Donald Hutchinson. Perhaps the most vociferous among these officials was Congressman Long, who held a Ph.D. in economics and was a member of the faculty at Johns Hopkins University.⁸⁴ He was a member of the Appropriations Committee, and he used this position to block funds for dredging because of its link to dumping sludge into Hart and Miller Islands.⁸⁵ Some even accused him of holding as hostage the entire 50-foot channel deepening project until a site other than Hart and Miller Islands was chosen for spoil disposal.⁸⁶

Long based his opposition on environmental deterioration, including unpleasant odors, the depletion of wildlife on land and under water, degradation of water quality, decrease of property values, and even a possible failure of the dike.⁸⁷ He even went as far as to declare that the project was a result of class discrimination:

In any other part of the United States where there is a beautiful coastline, the wealthy would be living there. But for some reason the working class settled on the eastern coast of our county and never moved. That’s the only reason Hart and Miller [were] considered for this project. People assumed they could dump on the working class with impunity.

It just seems absurd to haul this spoil laden with mercury, cadmium and lead out to a clean part of the bay and dump it there in a dike that could break and create a dreary wasteland. In the valley they don’t understand why these people object.

⁸³ Ocean City is a vacation beachfront barrier island on the Atlantic Coast of southeastern Maryland. See M. Olesker, “Millers Island: A Paradise in Jeopardy?” *Baltimore News-American*, Apr. 23, 1972, at 13-17. The Back River residents confusingly referred to their community as Miller (or Millers) Island. “Miller Island is not actually an island but a tip of the Patapsco River Neck area that reaches out in the bay. There is a real Miller Island farther out in the bay, but it is not inhabited and is used only by fishermen.” L. Cedrone, “Residents Up In Arms At Liquor Board Slur,” *Baltimore Evening Sun*, May 23, 1956.

⁸⁴ Editorial, “Clarence Long,” *Baltimore Sun*, Sept. 20, 1994, at 10A.

⁸⁵ A. Muscatine, *supra* note 18.

⁸⁶ Power, *supra* note 5 at 37.

⁸⁷ See Arnold, *supra* note 44 at 55.

But if they proposed a dump in the valley, they'd come out with a battalion of lawyers that could defeat the Russians.⁸⁸

He also noted consistently that there was already a regional sewage disposal plant along the Back River and that another community should shoulder the burden of spoil disposal.⁸⁹

Long has been credited for blocking the construction of the diked disposal area and deepening of the channels for more than ten years, which agitated people throughout Maryland who were nervous about the potentially irrevocable blow against the economic health of the state. As a result, he made bitter enemies who “usually [dipped] into a ... profane bucket of adjectives” to describe him, and his tactics led Governor Harry Hughes to declare in 1979 that it was time to “dredge or die.”⁹⁰ Long responded that he was merely representing his constituents' interests, and after he died in 1994, the Baltimore Sun acknowledged his “perfected” practice of responding to their needs.⁹¹

III. Legal Challenge

A. Plaintiffs

When Representative Long failed to convince the Corps of Engineers to deny the state's permit application for the Hart-Miller Island project, he and a number of other parties filed suit against the Corps in the federal District Court of Maryland on June 30, 1977. Long was described in the complaint not only as a member of Congress representing the district affected by the project, but also as “a private citizen who together with his family resides in Baltimore County ... and does use and enjoy the Chesapeake Bay and in particular the area in and around

⁸⁸ Maraniss, *supra* note 56. The “valley” referred to wealthier areas in Baltimore County.

⁸⁹ Arnold, *supra* note 44 at 55.

⁹⁰ Maraniss, *supra* note 56.

⁹¹ Editorial, *supra* note 84.

Hart and Miller Islands.”⁹² State Senator Norman Stone also described himself in this language, adding that “[i]n his capacity as State Senator, he is opposed to the use and expenditure of State funds for the proposed project and the desecration of State wetlands and waterways by an ill-conceived proposal.”⁹³

Two environmental groups joined Long and Stone. The first was the Hart and Miller Islands Area Environmental Group, Inc., which was organized in 1977 by residents along the Back River. It claimed to have 400 members who “regularly and periodically visit, use, enjoy and benefit from the Chesapeake Bay in general, and the area known as Hart and Miller Islands in particular, including the waters around and adjacent to those Islands. Such use includes, but is not limited to, fishing, boating, commercial shell fishing, commercial fishing, swimming, skiing, sailing, photography, and picnicking.”⁹⁴ The second environmental group was the Maryland Wildlife Federation, Inc., an affiliate of the National Wildlife Federation whose “thousands” of members were “interested in conserving and preserving wildlife, habitat and recreation areas in that State.”⁹⁵

Finally, there were six individually named plaintiffs whose properties were near Hart and Miller Islands. They alleged that they would “suffer loss of benefit and enjoyment of their properties, as well as a decrease in value caused by odors, dust, turbidity of water, loss of access to affected waterways, and possible flooding caused by failure of the Dike.”⁹⁶

⁹² Complaint for Declaratory Judgment and Injunctive Relief at 3-4, *Hart and Miller Islands Area Environmental Group, Inc. v. Corps of Engineers*, 459 F. Supp. 279 (D. Md. 1978) (No. HM77-973).

⁹³ *Id.* at 4.

⁹⁴ *Id.* at 3.

⁹⁵ *Id.* at 4.

⁹⁶ *Id.* at 4-5.

B. Defendants

The U.S. Corps of Engineers and its various officials⁹⁷ were the only named defendants when the case was first filed. As the case progressed, the State of Maryland and the Steamship Trade Association of Baltimore, Inc. (STA) were granted motions to intervene as defendants. The State of Maryland sought to intervene as the main “proponent of the project” with various agencies directly affected by it.⁹⁸ The STA was “made up of steamship agents, owners, contract stevedores, marine and terminal operators, affiliated service organizations, and other concerns doing business in and around the Port of Baltimore.”⁹⁹ It claimed standing because:

Neither the present Defendants nor the State of Maryland (which is also seeking leave to intervene) will suffer the direct and substantial adverse economic effects as will STA and its members if the Plaintiffs succeed in causing the Hart-Miller disposal project to be delayed or cancelled... Any interference with such dredging will cause ocean-going vessels to be diverted from Baltimore and will result in a substantial loss of revenue to STA and its members.¹⁰⁰

Although the STA successfully became a defendant party, its counsel did not seem to play an active role in much of the litigation.¹⁰¹

The Chamber of Commerce of Metropolitan Baltimore also moved to intervene as a defendant, claiming that it represented the interests of businesses that directly or indirectly

⁹⁷ The officials included: Clifford L. Alexander, Secretary of the Army; Lt. Gen. John W. Morris, Chief of Engineers of the U.S. Army; and Col. G.K. Withers, District Engineer, Baltimore District, U.S. Corps of Engineers. *Id.* at 5.

⁹⁸ Motion for Leave to Intervene as Defendant, *Hart and Miller Islands Area Environmental Group, Inc. v. Corps of Engineers*, 459 F. Supp. 279 (D. Md. 1978) (No. HM77-973). The state attorney general who signed this motion was Francis B. Burch.

⁹⁹ Motion to Intervene as a Defendant at 1, *Hart and Miller Islands Area Environmental Group, Inc. v. Corps of Engineers*, 459 F. Supp. 279 (D. Md. 1978) (No. HM77-973). Today, the STA claims 23 member companies. Steamship Trade Association of Baltimore, Inc., Member Companies, <http://www.sta-balto.com/MemberCompanies.aspx> (last visited Jan. 4, 2008).

¹⁰⁰ Motion to Intervene as a Defendant, *supra* note 99 at 2.

¹⁰¹ Joshua I. Schwartz, who represented the defendants from the Solicitor General’s office, does not recall interacting with the STA’s counsel, and he supposes that the STA intervened merely to be certain that the Corps and the State defended the matter in good faith. Interview with Joshua I. Schwartz, Professor of Law, The George Washington University Law School, in Washington, DC (Nov. 9, 2007).

depended on the trade at the Port of Baltimore.¹⁰² However, the District Court denied this motion.

C. Summary of Procedural History

Plaintiffs filed eleven counts in their complaint against the defendants.¹⁰³ All parties filed cross motions for summary judgment on all issues, and the District Court granted summary judgment to the plaintiffs based on the first count, declining to decide on the rest of the counts. Defendants appealed to the Court of Appeals for the Fourth Circuit, which reversed. Writ of certiorari to the Supreme Court was denied.¹⁰⁴ The District Court then reviewed the remainder of the eleven counts and held in favor of defendants, upon which construction of the Hart-Miller Island diked disposal area was allowed to proceed. Plaintiffs did not appeal this final ruling.

D. First Count: Violation of Rivers and Harbors Act of 1899

1. Arguments

In their first count, plaintiffs alleged that the state had no authority to build the dike at Hart-Miller Island even with the Corps' permit under § 10 of the Rivers and Harbors Act of 1899.¹⁰⁵ Instead, they argued that § 9 of the Act was controlling, which in pertinent part

¹⁰² Motion of the Chamber of Commerce of Metropolitan Baltimore to Intervene as a Party Defendant, *Hart and Miller Islands Area Environmental Group, Inc. v. Corps of Engineers*, 459 F. Supp. 279 (D. Md. 1978) (No. HM77-973).

¹⁰³ All eleven counts are detailed in Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 92 at 10-23.

¹⁰⁴ 449 U.S. 1003, 101 S.Ct. 544, 66 L.Ed.2d 300 (1980).

¹⁰⁵ 33 U.S.C. § 403 (2000), which in its entirety provides:

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 build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the

provided: “It shall not be lawful to construct or commence the construction of any ... dike ... in any ... navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained ...”¹⁰⁶

Plaintiffs urged that when considering what exactly constitutes a “dike,” it must be construed from the plain meaning of the statute.¹⁰⁷ They argued that because the Hart-Miller Island project involved the construction of a dike in the Chesapeake Bay, which all parties conceded was a navigable body of water that does not “lie wholly within the limits of a single State,” the state was unauthorized to proceed with the project because there was no approval from Congress. Furthermore, plaintiffs drew attention to the fact that the Corps and the State themselves referred to the structure as a “dike” from the earliest stages of the project.¹⁰⁸

Army; 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.

¹⁰⁶ 33 U.S.C. § 401 (2000), which in its entirety provides:

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: And provided further, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

¹⁰⁷ Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 7, *Hart & Miller Islands Environmental Group, Inc. v. U.S. Corps of Engineers* 3-9, 459 F. Supp. 279 (D. Md. 1978) (No. HM77-973). See also Brief of Appellees at 9, *Hart & Miller Islands Environmental Group, Inc. v. U.S. Corps of Engineers*, 621 F.2d 1281 (4th Cir. 1980) (Nos. 78-1911, 78-1912, 79-1037).

¹⁰⁸ Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, *supra* note 107 at 7. See also Brief of Appellees, *supra* note 107.

Defendants countered that the legislative history and eighty years of the Corps' execution of the Act showed the need for Congressional consent only for structures resulting in the "blocking of an interstate navigable waterway by spanning that waterway."¹⁰⁹ They noted that the original enactment¹¹⁰ called for the Secretary of War to approve construction of all bridges and other such structures over navigable waters.¹¹¹ This statute was amended in 1892, but the most pertinent language remained the same: the construction of "any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any ... navigable waters of the United States" required the approval of the Secretary of War.¹¹² Defendants observed that all of the structures listed in the 1890 and 1892 acts completely spanned waterways. When § 7 of the 1892 Act was moved to § 9 of the Rivers and Harbors Act of 1899, terms designating "parts" of bridges were deleted (i.e. bridge piers and bridge draws), and they were replaced by the words

¹⁰⁹ Motion for Summary Judgment at 8-16, *Hart & Miller Islands Environmental Group, Inc. v. U.S. Corps of Engineers* 3-9, 459 F. Supp. 279 (D. Md. 1978) (No. HM77-973); Brief of Appellants at 9, *Hart & Miller Islands Environmental Group, Inc. v. U.S. Corps of Engineers*, 621 F.2d 1281 (4th Cir. 1980) (Nos. 78-1911, 78-1912, 79-1037).

¹¹⁰ Rivers and Harbors Act of 1890 § 7, ch. 907, 26 Stat. 426, 454, which in its entirety provided:

That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and *it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War*, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: Provided, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such state.

(Emphasis added.)

¹¹¹ Motion for Summary Judgment at 11, *supra* note 109; Brief of Appellants, *supra* note 109 at 13.

¹¹² Act of July 13, 1892 § 7, ch. 158, 27 Stat. 110. See Motion for Summary Judgment at 11-12, *supra* note 109; Brief of Appellants at 13-14, *supra* note 109.

“dike” and “dam.”¹¹³ Under the rule of *ejusdem generic*,¹¹⁴ defendants concluded that Congressional approval¹¹⁵ should be needed only for the class of structures that completely span a navigable waterway.¹¹⁶ Thus, defendants concluded that there was no need for Congressional approval of the Hart-Miller Island project because it did not completely span a waterway

2. Analysis and Decision of District Court

The district court approached the issue in two steps. It first attempted to decide whether the Hart-Miller Island structure constituted a dike “within the meaning of Section 9,” and if the structure were indeed a dike, whether it was to be placed “over or in any ... navigable water of the United States.”¹¹⁷ The court approached the inquiries by analyzing the case law, the legislative history, and the Corps’ past administrative practice regarding the Act in question.

The court began the analysis by reviewing three other federal district court cases. The first involved the use of artificial fill to extend the eastern shore of Manhattan further into the Hudson River for the construction of an expressway.¹¹⁸ The Corps had granted a § 10 permit for the construction of a wall to separate the fill from the river, but plaintiffs contended that such a

¹¹³ Motion for Summary Judgment at 12, *supra* note 109; Brief of Appellants at 15, *supra* note 109.

¹¹⁴ Black’s Law Dictionary (8th ed. 2004) defines “*ejusdem generic*” as:

A canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. • For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animal*, the general language *or any other farm animal* -- despite its seeming breadth -- would probably be held to include only four-legged, hooved mammals typically found on farms, and thus would exclude chickens.

¹¹⁵ The need for the consent of Congress for such structures replaced the consent of the Secretary of War in light of *United States v. Keokuk & H. Bridge Co.*, *supra* note 39, which held that it was unconstitutional for Congress to delegate its authority to approve the construction of bridges. Brief of Appellants at note 2, *supra* note 109; Power, *supra* note 40 at 21.

¹¹⁶ See *infra* note 128.

¹¹⁷ *Hart & Miller Islands Environmental Group, Inc.*, 459 F. Supp. at 283.

¹¹⁸ *Citizens Committee for the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff’d*, 425 F.2d 97 (2d Cir. 1970). About 9.5 million cubic yards of fill were to extend as much as 1,300 feet into the river.

project required a § 9 permit because the structure was a dike to be built “in or over” a navigable river. The district court in *Hudson Valley* observed that the permit, plans, and construction bids for the project all contained references to a “dike.” Defendants in that case argued that the term “dike” held a different meaning from the ordinary use of the term, stating that the term as used in the 1899 Act meant: “a wall or embankment of timber, stone, concrete, fascines, or other material, built as a training works for a river so as rigidly to confine flow within definite limits over the length treated.”¹¹⁹ According to this definition, the Corps contended that a “dike” for the purposes of § 9 must “substantially affect navigation.” Nevertheless, the district court concluded that the Corps’ reference to the project as a “dike” was enough to make it so, and Congressional consent was thus required for this expressway project. “Statutes are to be construed by attributing its ordinary meaning to the language used. ... [I]f Congress meant to confine its jurisdiction to only those dikes that substantially affect navigation, it would have said so.”¹²⁰ Defendants appealed this judgment, but the Second Circuit affirmed.

Next, there was a case that involved the extension of an airport runway into the Columbia River.¹²¹ This project involved the removal of islands in the river to create fill for the runway, for which the Corps granted a permit under § 10. The court in that case observed that the removal of islands would actually improve navigability. It further stated that the Corps provided sufficient legislative history to show that the 1899 Act was a response to the need for keeping navigable bodies of water clear from obstructions. Thus, § 9 requires the consent of Congress only when there is obstruction to navigation, and labeling a structure a dike does not necessarily

¹¹⁹ See 459 F. Supp. at 284 (citing Chambers Technical Dictionary 273 (3d. Rev. ed., Supp. 1958)).

¹²⁰ 302 F. Supp. at 1088-1089.

¹²¹ *Petterson v. Resor*, 331 F. Supp. 1302 (D.C. Or. 1971), *remanded as moot sub nom. Citizens Committee for Columbia River v. Callaway*, 494 F.2d 124 (9th Cir. 1974).

make it so for the purposes of § 9.¹²² On appeal, the Ninth Circuit remanded, directing the lower court to vacate the case as moot because the plan to extend the airport runway had by that time been abandoned. Thus, the district court in *Hart & Miller Islands* considered this case only as an advisory opinion.¹²³

The last district court case involved a canal that was deemed to constitute a dike under § 9.¹²⁴ The matter arose from a § 10 permit to build a canal across a river so that the river would be dammed. That court adopted the “ordinary meaning” standard from *Hudson Valley* for determining whether a structure is a dike under § 9. The canal was indeed a “barrier preventing the flow of water” that was “in” a navigable river.¹²⁵

The *Hart & Miller Islands* court then turned its attention to two Supreme Court cases. Without describing the facts of those cases, the court provided excerpts from those opinions that apparently supported the view that the intent of Congress was indeed to include a “dike” under the purview of § 9 as it is ordinarily defined.¹²⁶

Observing that numerous documents referred to the Hart-Miller Island project as a “dike” and that “the whole purpose of the structure is to hold back the waters of the bay from intrusion into the area in which the dredged spoil will be placed,” the district court held that the structure is indeed a “dike” under § 9. Furthermore, the court held that the Corps’ view that a “dike” requires Congressional only if it completely spans a navigable waterway was incorrect. Citing

¹²² *Petterson*, 331 F. Supp. at 1306. The district court in *Petterson* noted that the Corps’ explanation of the legislative history was beyond what was provided in the *Hudson Valley* case. *Id.* However, the district court in *Hart & Miller Islands* criticized the *Petterson* court for not illustrating exactly how the Corps argued the legislative history. 459 F. Supp. at 285. But see Hankey, *supra* note 40 (“The *Hart & Miller* court itself declined to seek any guidance from the history of either the 1890 Act or the 1899 Act.”).

¹²³ *Id.* at 285-286 (“the jurisdiction of the federal courts requires that a case or controversy exist in fact”).

¹²⁴ *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1975).

¹²⁵ *Id.* at 626-627.

¹²⁶ 459 F. Supp. at 287 (citing *Wisconsin v. Illinois*, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426 (1929) and *United States v. Arizona*, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935))

another Supreme Court case,¹²⁷ the court found that the terms “any obstruction” in § 10 “must be given a broad sweep.” Thus, the Corps’ regulation¹²⁸ that a dike is a structure that completely spans a navigable waterway for the purposes of section 9 was deemed beyond the reach of its authority. The language of the Act was very clear that Congressional approval was needed for a dike “over or in ... any navigable water.” Because the Hart-Miller Island structure was to be “in” the Chesapeake Bay, a navigable water, the district court ruled that the project needed the consent of Congress under § 9.¹²⁹ Defendants appealed this decision.

3. Analysis and Decision of the Circuit Court

The Fourth Circuit began its analysis by accepting the contention that since the adoption of the Rivers and Harbors Act of 1899, the Corps had interpreted § 9 as requiring the consent of Congress only for structures that completely span a navigable body of water.¹³⁰ Interestingly, the court supported this point by citing the same excerpt from *Wisconsin v. Illinois* that the district court had cited in its decision against the Corps. However, the circuit court cited two additional paragraphs from the case that the district court had ignored, which stated in part: “The construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. ... The Secretary of War acted on this view ... about two months after the passage of the Act.”¹³¹

¹²⁷ *United States v. United States Republic Steel Corp.*, 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960), *rehearing denied*, 363 U.S. 858, 80 S.Ct. 1605, 4 L.Ed.2d 1739 (1960).

¹²⁸ 33 C.F.R. 321.2(b) (2007) (“The term ‘dike or dam’ means, for the purposes of section 9, any impoundment structure that *completely spans* a navigable water of the United States and that may obstruct interstate waterborne commerce.”) (emphasis added).

¹²⁹ For a criticism of this decision and of the strategy of using the 1899 Act by environmental groups, see Hankey, *supra* note 40 (“While this [strategy] may achieve short-term environmental victories, these interpretations threaten long-term environmental harm by destroying the Corps’ statutory powers to conduct environmental reviews of certain projects.”)

¹³⁰ *Hart & Miller Islands Environmental Group, Inc.*, 621 F.2d at 1285.

¹³¹ 621 F.2d at 1285 (citing *Wisconsin*, *supra* note 126).

The court then turned to the same three federal district cases that the district court had reviewed: *Hudson Valley*, *Petterson*, and *Sierra Club*. The circuit court considered the Corps' argument that there was insufficient legislative and administrative history provided for a proper judgment in *Hudson Valley*. The court also noted that the *Petterson* case had become moot, but it made no mention of the need to consider this case only as an advisory opinion as the district court had done.¹³² Finally, the court characterized the canal in *Sierra Club* as a dike under § 9 because it “would cross and completely dam and obstruct a navigable river,”¹³³ which differed from the conclusion that the canal was a dike because it fit the term's ordinary meaning and was “in” a navigable river.¹³⁴

The circuit court looked at one additional case: *Citizens Committee for Environmental Protection v. U.S. Coast Guard*,¹³⁵ which resembled the *Hudson Valley* case in that it involved the use of fill to construct a highway extension. The *Citizens Committee* court rejected the contention that the fill was a dike because its impact on navigation was “negligible,” ruling that the Corps acted properly in granting a § 10 permit.

Unable to extract a plain meaning of dikes from the case law, the circuit court then turned to legislative history. The circuit court recounted a confusing string of events leading to the enactment of the Rivers and Harbors Act of 1899, which was supposed to be a mere recodification of the 1890 Act. In short, Congress enacted the 1899 Act “without carefully examining its provisions, on the strength of representations that the Act made no significant change in existing law.”¹³⁶ Paralleling the arguments of the Corps,¹³⁷ the circuit court found that

¹³² See *supra* note 123.

¹³³ 621 F.2d at 1286.

¹³⁴ See *supra* note 120.

¹³⁵ 456 F. Supp. 101 (D. N.J. 1978)

¹³⁶ 621 F.2d at 1287-88. For another account of how Congress was “deceived” in the passage of the 1899 Act, see Hankey, *supra* note 40 at 180-181.

¹³⁷ See *supra* nn. 109-116.

the original enactment, § 7 of the 1890 Act,¹³⁸ provided for the approval of the Secretary of War for “any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any ... navigable waters.” The amendments in sections 9 and 10 of the 1899 Act to require the approval of Congress for certain structures were apparently in response to the *Keokuk* and *Rider* decisions.¹³⁹ The circuit court observed that *Keokuk* and *Rider* both involved the issuance of permits for bridges that completely span a river, and it also saw that section 9 of the 1890 Act replaced terms for parts of bridges with “dams” and “dikes”:

In all events, this is a perfectly reasonable construction of the statutes, and it has been so construed by the Corps since its passage. Taking the view of the structures listed in Section 9 of the 1899 Act, two are works which, by definition, span waterways (bridges and dams). Dikes as used in that section, according to this construction, should be interpreted to include only dikes that span waterways.¹⁴⁰

The circuit court continued by citing various officials in support of deference to the Corps in its interpretation of § 9,¹⁴¹ including Congressional testimony by Secretary of War Lindsley M. Garrison in 1916¹⁴² and a lecture to army engineers in 1926¹⁴³. The court also quoted an affidavit from the Chief of the Miscellaneous Civil Branch of the Corps of Engineers:

It has been my interpretation and that followed by my predecessors in office, that the term “dike” and “causeway” as used in Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. 401, refer to a structure which results in the closure of a navigable waterway by extending completely across same so as to block navigation if no provision is made for its passage.¹⁴⁴

¹³⁸ *Supra* note 110.

¹³⁹ *Supra* note 39.

¹⁴⁰ 621 F.2d at 1290.

¹⁴¹ *Supra* nn. 109-116.

¹⁴² Brief of Appellants at 26, *supra* note 109 (citing Lindsley M. Garrison, Secretary of War, Hearings on General Dam Legislation Before the House Committee on Interstate and Foreign Commerce, 64th Cong., 1st Sess. (1916)).

¹⁴³ Brief of Appellants at 27, *supra* note 109 (citing Judge G.W. Koonce, Lecture to Company Officer’s Class, Engineer School, Fort Humphreys, Va.: Federal Laws Affecting River and Harbor Works (Apr. 23, 1926)). The exact identity and position of Koonce was a mystery to the parties. “His first name could have been ‘Judge’ for all we knew.” Interview with Joshua I. Schwartz, *supra* note 101.

¹⁴⁴ Brief of Appellants at 27, *supra* note 109 (citing Affidavit of James E. DeSista).

Plaintiffs argued that all of these statements were merely opinions of individuals who had no proof of such application of § 9,¹⁴⁵ but the court remarked that the Corps had “special familiarity” with the 1899 Act, which it had drafted.¹⁴⁶ Finally, the court turned its attention to the fact that while deliberating over the Federal Water Pollution Control Act, “Congress was not only aware of, but approved and encouraged the Corps’ practice of issuing permits for diked disposal areas, without specific Congressional approval.”¹⁴⁷ Thus, the court concluded that the Hart-Miller Island project was not a dike under § 9 of the 1899 Act, and Congressional approval for its construction was unnecessary. The Corps acted properly by granting the state a § 10 permit.

E. Remaining Counts

Upon the circuit court’s reversal of the first count, the case returned to the district court for a judgment on the remaining ten counts. The district court began its analysis by reviewing the sixth count,¹⁴⁸ which alleged that the Corps had failed to comply with its own regulations requiring federal, state, and/or local authorization before granting the permit for Hart-Miller Island.¹⁴⁹ Plaintiffs believed that the Corps had not complied with state statutes requiring approval from the state Secretary of Health and Mental Hygiene to operate a “landfill refuse disposal system,” compliance with zoning and land use requirements, and approval of the county’s legislative body.¹⁵⁰ It was noted that “the County Council of Baltimore County has

¹⁴⁵ Brief of Appellees at 16-20, *supra* note 107.

¹⁴⁶ 621 F.2d at 1290.

¹⁴⁷ *Id.*

¹⁴⁸ 505 F. Supp. at 738-742.

¹⁴⁹ “Permits will not be issued where certification or authorization of the proposed work is required by Federal, State and/or local law and that certification or authorization has been denied.” 33 C.F.R. § 320.4(j)(6) (1979), amended and renumbered, 33 C.F.R. § 320.4(j)(1) (2007).

¹⁵⁰ Md. Ann. Code art. 43, §§ 394, 394A (1971), *recodified and amended at* Md. Code Ann., Envir. § 9-210, 212 (2007).

gone on record on several occasions with resolutions stating their opposition to the Hart and Miller Island facility.”¹⁵¹ Plaintiffs added that the project involved a “landfill refuse disposal system” because it involved the dumping of industrial waste from Baltimore Harbor and the placement of that waste on the surface of parts of Hart and Miller Islands.

The court looked to the definition of “solid waste acceptance facility” in other sections of the Maryland Code and North Carolina’s definition of a “sanitary landfill,” contrasting it with the Corps’ description of the diked disposal area. It then accepted the affidavit of the official responsible for the enforcement of the statutes in question. This official stated that a diked disposal area was not construed to be a solid waste acceptance facility.¹⁵² The court also looked at the statutes’ legislative history, which had been amended to include a “sludge composting facility” among the projects needing approval from the Department of Health and Mental Hygiene. This amendment occurred in 1979, which was before the Corps’ approval of the Hart-Miller Island project, and this demonstrated that the state legislature knew that the statute prior to the amendment did not apply to the project.¹⁵³ The court sided with defendants and held that the diked disposal area did not constitute a landfill requiring state approval.

Plaintiffs also claimed within the sixth count that because Hart and Miller Islands were zoned for agricultural use, the Corps had failed to obtain a zoning exception from Baltimore County. However, the court cited a Maryland Court of Appeals decision holding that the state was not subject to a county or city’s zoning ordinances because the state itself had granted such authority. “[I]t is a long-standing principle of statutory construction that the State is not deemed to be bound by an enactment of the General Assembly unless the enactment specifically names

¹⁵¹ Complaint for Declaratory Judgment and Injunctive Relief at 19, *supra* note 92.

¹⁵² 505 F. Supp. at 750 (citing Affidavit of Walter A. Miles, Chief of the Division of Solid Waste, Maryland Department of Health and Mental Hygiene).

¹⁵³ 505 F. Supp. at 738.

the State or manifests a clear intention that the State is to be bound...¹⁵⁴ Thus, the court granted summary judgment to the defendants on the sixth count.

The rest of the counts rested primarily on the National Environmental Policy Act (NEPA),¹⁵⁵ which provided in relevant part that when federal agencies are involved in major actions “significantly affecting the quality of the human environment,” they must include a detailed statement on the environmental impact of the action, alternatives to the proposed action, the relationship between local short-term, and any “irreversible and irretrievable commitments of resources.”¹⁵⁶ The court prefaced the review of these counts by stating: “[I]t is clear that in cases brought pursuant to NEPA, this court’s role is limited and its scope of review is narrow[.]”¹⁵⁷ The court sorted the remainder of the counts into five categories and analyzed them in the following order: possible construction failures, alternatives, adverse and cumulative environmental effects, abuse of discretion, and bad faith.

¹⁵⁴ 505 F. Supp. at 741.

¹⁵⁵ 42 U.S.C. §§ 4321 et seq. (1976)

¹⁵⁶ 42 U.S.C. § 4332(2)(C) and (E) (1976), which provided in its entirety:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * *

(E) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

¹⁵⁷ 505 F. Supp. 743 (“[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences[.]”).

Concerning possible construction failures, plaintiffs based their arguments on the Rivers and Harbors Act of 1899 § 10,¹⁵⁸ which defendants conceded required rigorous examination of structures to be constructed in navigable waters, and NEPA, which required the Corps to address possible construction failures. The court summarized plaintiffs' allegations against defendants as: "failure to complete once started, failure or inability to close the dike, failure to hold spoil, failure to retain pollutants, and any other breaching of the dike."¹⁵⁹ It then stated again that the court's scope of review was narrow once an agency made a decision pursuant to NEPA. In this light, the court dismissed most of the allegations because it ruled that the Corps had considered the possible failures that the plaintiffs feared. "Consideration of the issues is all that this court can properly require of the Corps[.]"¹⁶⁰ The court added that it "cannot substitute its judgment for that of the Corps of Engineers nor determine who among competing experts presents the most reliable information or reaches the most correct conclusions."¹⁶¹ As for other possible failures, the court found that the plaintiffs had presented no evidence that they would occur. "In the absence of evidence that a contrary result is likely to ensue, plaintiffs' suggested failures must be deemed purely speculative, and the [Environmental Impact Statement] cannot be faulted for failure to discuss them."¹⁶²

The court then turned to the counts related to the absence of considering alternative projects. Plaintiffs urged that the Corps' review of the project was "in such a cursory manner ... to the extent that it is arbitrary, capricious and an abuse of discretion"¹⁶³ and that the Corps did not consider the relative cost of Hart-Miller Island compared to alternative projects.¹⁶⁴ The court

¹⁵⁸ *Supra* note 105.

¹⁵⁹ 505 F. Supp. at 644.

¹⁶⁰ 505 F. Supp. at 747.

¹⁶¹ *Id.*

¹⁶² *Id.* at 748.

¹⁶³ Complaint for Declaratory Judgment and Injunctive Relief at 15, *supra* note 92.

¹⁶⁴ See NEPA, 42 U.S.C. § 4332(2)(E) (1976), *supra* note 156.

first established that the requirement of considering alternatives under NEPA was subject to a “rule of reason.”¹⁶⁵ After considering the Corps’ various studies on the matter, including the Trident-Green report that reviewed seventy different options,¹⁶⁶ the court stated:

The real thrust behind plaintiffs’ assertions of failure to consider alternatives is that the Corps was wrong in selecting the Hart and Miller Islands site as the most favorable for the dike project. ... [P]laintiffs misconceive the role of the court. ... Upon ascertaining that alternatives to the proposed project were given reasonable consideration by the Corps, this court has completed its task[.]”¹⁶⁷

Defendants’ motions for summary judgments on these counts were granted.

Regarding the counts regarding adverse and cumulative environmental effects from the diked disposal area, the court again raised the “rule of reason” standard, stating that the Corps’ environmental impact statement “need not be exhaustive to the point of discussing all possible details bearing on the proposed action[.]”¹⁶⁸ Thus, the plaintiffs’ arguments about adverse effects from dredging to allow an access channel to Hart-Miller Island, expansion of the diked disposal area, or the disturbance of wildlife were all found to be lacking because there was no certainty about executing these plans. These concerns were either speculative or sufficiently addressed by the Corps, which was all that was necessary under the “rule of reason.”

There was one count alleging abuse of discretion that relied on a federal statute. The statute provided that a reviewing court must set aside agency actions that are, among other things, “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”¹⁶⁹

¹⁶⁵ 505 F. Supp. at 748-749.

¹⁶⁶ See *supra* note 65.

¹⁶⁷ 505 F. Supp. at 751-752.

¹⁶⁸ *Id.* at 752.

¹⁶⁹ 5 U.S.C. § 706 (1976) (amended 2007), which in its entirety provided:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and

Plaintiffs presented an undated memorandum from the Chief Counsel of the Army Corps of Engineers that expressed doubts about the legal strength of the § 10 permit for the Hart-Miller Island project.¹⁷⁰ However, the court reasoned that it had already found in the analysis of the previous counts that the Corps' actions were not arbitrary, capricious, or an abuse of discretion, and the legal reasoning of the memorandum was persuasive at best.

Finally, the court reviewed plaintiffs' allegation that the Corps had engaged in bad faith in two regards: the Corps had withheld information from the Department of the Interior in order to gain its approval; and the Corps had "malign[ed] the character and reputation of those in opposition to the Dike."¹⁷¹ The court remarked that there was no evidence to support either claim. It further observed that the Corps had allowed the Interior Department to review and comment upon the plans from an early stage, and the Corps had also elicited feedback from those opposed to the project through public fora and acceptance of written complaints. Citing Rule 56(e),¹⁷² the court granted defendants' motion for summary judgment on these counts.

-
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

¹⁷⁰ Memorandum from E. Manning Seltzer, Chief Counsel of the U.S. Army Corps of Engineers (undated).

¹⁷¹ Complaint for Declaratory Judgment and Injunctive Relief at 22, *supra* note 92.

¹⁷² Fed. R. Civ. P. 56(e) (1976) (amended 1987 and 2007), providing in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

With summary judgments in their favor on all counts, defendants were able to proceed with the Hart-Miller Island project. Plaintiffs did not appeal this decision. After having spent \$20,000 for this lawsuit, they were unable to raise \$5,000 more for the appeal.¹⁷³

IV. Construction of Hart-Miller Island

The lawsuit caused a delay not only in the construction of the diked disposal area, but it also prevented dredging for the channel deepening project because there was nowhere to place the spoil. By the time that the legal dispute ended in December 1980, about five years had passed since the Corps granted the § 10 permit for Hart-Miller Island, and ten years had passed since Congressional approval of deepening the channels from 42 to 50 feet.

Construction of the diked disposal area began in 1981 and was completed in 1983. However, the channel deepening project continued to stall because President Ronald Reagan had by that time cut back on federal spending and had pushed for local governments to shoulder more of the financial burden for such projects.¹⁷⁴ Senator Charles Mathias Jr. (R-Md.) was able to include the channel deepening project in a water projects bill that Congress passed in October 1984, but Reagan vetoed it.¹⁷⁵ After another two years, the state and Corps of Engineers agreed in 1986 that the state would pay about 40% of the costs, which had decreased from \$326 million to \$242 million after various cost-saving measures, including narrowing the planned widths of the channels.¹⁷⁶ The agreement was included in the Water Resource Development Act of

¹⁷³ Arnold, *supra* note 44 at 56.

¹⁷⁴ *Id.* at 56.

¹⁷⁵ See A. Muscatine, "Md. Officials Dredging Support; 14-Year Effort for Baltimore to Continue," *Washington Post*, Dec. 19, 1984, at C4.

¹⁷⁶ "Baltimore Dredging Pact Signed," *Washington Post*, Jun. 18, 1986, at C4; Arnold, *supra* note 44 at 56.

1986,¹⁷⁷ and President Reagan approved the bill on November 17, 1986.¹⁷⁸ The dredging project began on June 2, 1987.¹⁷⁹

V. Dredging and Hart-Miller Island Today

Although the 50-foot channel deepening projects have long been completed, Hart-Miller Island continues to receive spoil. Dredging continues in the channels because sediments constantly settle on the floor of the Chesapeake Bay. Every year, 4 million cubic yards of spoil is removed to *maintain* the channels' 50-foot depth.¹⁸⁰ In this regard, the Port of Baltimore and its channels require more maintenance than any other in the country.¹⁸¹

Because there was no other repository for the spoil until 1999, the state raised the walls of the Hart-Miller Island dike from their original 18 feet to 28 feet in 1988, much to the dismay of nearby residents. At the time, members of the state General Assembly promised “never again” to raise the dike walls. However, the state broke this promise when it decided to raise the walls of the North Cell to 44 feet in 1996. This increase in height allowed another 30 million cubic yards to be stored in the diked disposal area, which was estimated to lengthen its life by twelve years.¹⁸² The state’s arguments for this broken promise echoed those made in favor of the project in the 1970s: it was imperative to maintain deep channels in order to keep the Port of Baltimore alive, which in turn supported tens of thousands of Marylanders. To placate the

¹⁷⁷ Pub. L. 99-662, 100 Stat. 4082 (1986), codified at 33 U.S.C. § 2201, et seq. (2000) and other sections.

¹⁷⁸ S. Evans, “Funding Advances for Va., Baltimore Harbor Dredging,” *Washington Post*, Oct. 10, 1986, at B9.

¹⁷⁹ Arnold, *supra* note 44 at 56.

¹⁸⁰ Editorial, “Dredge or Die; Hart-Miller Island: State Must Use Site to Keep Port of Baltimore’s Channels Open,” *Baltimore Sun*, Jun. 10, 1996, at 6A. See *supra* note 16 (about 5 million tons of sediment settle in the Chesapeake Bay annually).

¹⁸¹ “[W]ith 126 miles of waterway [at a depth of 50 feet] feeding the port, its dredging needs are greater than any in the country.” S. Wootton, “An Open Channel; Shipping Out: Baltimore’s Position as a Leading East Coast Port is Threatened by Difficulties Disposing of the Growing Amount of Dredge Produced by Maintaining the Sea Lanes,” *Baltimore Sun*, Jan. 7, 1996, at 1D. See also Editorial, “Hart-Miller Island: State Must Use Site to Keep Port of Baltimore’s Channels Open,” *Baltimore Sun*, Jun. 10, 1996, at 6A.

¹⁸² S. Wootton, “Bay-Spoil Problem Eased for Moment: Dikes To Be Raised at Hart-Miller Containment Facility,” *Baltimore Sun*, Jun. 6, 1996, at 1C.

residents' anger about this development, the state reportedly "compensated" Baltimore County \$8 million to be used for area schools and other projects.¹⁸³

The North Cell of the island was projected to close in 2009, so the state began looking for other disposal sites. It hoped to use two locations: Poplar Island on the north end of the Chesapeake Bay, and an area called Site 104 for open-water dumping near Kent Island and the Bay Bridge. Site 104 was clearly the more financially cost-effective choice at between \$1 and \$4 for disposal of each cubic yard compared to \$11 for Poplar Island.¹⁸⁴ However, Site 104 was disapproved when it was found that toxins in the dredge spoil would harm the Bay's ecosystem if it were dumped in open waters.¹⁸⁵ The plans for Poplar Island were authorized, and it was expected to receive 30 million cubic yards in total over twenty years, after which the island would be converted into 1,100 acres of wildlife refuge.¹⁸⁶

Today, the South Cell of Hart-Miller Island is a popular state park for boating, camping, and fishing with 3,000 feet of sandy beaches.¹⁸⁷ It is also restored for a wildlife habitat, which the National Audubon Society includes on its list of Important Bird Areas.¹⁸⁸

¹⁸³ J. Nawrozki, "Dumping on Island Angers Eastside: State's Latest Decision for Hart-Miller Called Another Broken Vow," *Baltimore Sun*, Jun. 16, 1996, at 1C.

¹⁸⁴ J. Morley, "Restoring What Nature Wore Away: Island in the Bay Gets a 2nd Chance," *Washington Post*, Mar. 1, 1999, at B01.

¹⁸⁵ A. Huslin, "Glendening Rejects Bay Dredging: Toxins Cited," *Washington Post*, Jul. 1, 2000, at B01; K. Blankenship, "Plan to Use Site 104 Dropped After Toxics Found in Dredged Material," *Bay Journal*, Jul./Aug. 2000, available at <http://bayjournal.com/article.cfm?article=1314>.

¹⁸⁶ Morley, *supra* note 184.

¹⁸⁷ Hart-Miller Island State Park, <http://www.dnr.state.md.us/publiclands/central/hartmiller.html> (2006); "Outings," *Baltimore Sierran*, May 2007, at 16, available at <http://maryland.sierraclub.org/baltimore/newsletters/2007May.pdf> ("Hart Miller Island (built from dredge spoil) is a favorite hangout for boaters, and has a small park, campground, observation tower, and floating vendors of snowballs and lunch food.").

¹⁸⁸ "Recognized IBAs in Maryland and DC," http://www.audubonmdcc.org/SciCon_IBAs_sitedescriptions.html (last visited Jan. 4, 2008); Project Sites, Department of Transportation, <http://www.mpasafepassage.org/projects/projects.htm> (last visited Jan. 4, 2008).

VI. Conclusion

It is indeed ironic that the Hart-Miller Island opponents' gloomy forecast of dike failures not only failed to transpire, but an environmentally-friendly park appears to be emerging. Of course, this is not to say that an environmentally hazardous accident will certainly not occur in the future. As one resident stated, "They said the Titanic wouldn't sink either."¹⁸⁹

These residents faced the difficult task of convincing the public that the Hart-Miller Island project would adversely affect a large geographic area when it was apparent that they were narrowly concerned about their own community. Very few people outside their community noticed their plight. The few who noticed their plight probably ignored them because they did not want to assume such a dredge spoil project near their own homes. In the courts, the plaintiffs' strongest legal arguments relied on obscure language from a nineteenth-century statute and an environmental act that granted low-level scrutiny to the federal government. As one writer noted, "From the beginning, it was a losing battle."¹⁹⁰ And to add insult to injury, the residents got little, if anything, in return for having to live with the diked disposal area beyond their backyards.

However, it was a losing battle for the other side as well. While the environmentalists faced a formidable foe in economic necessity, the state found a formidable foe in "NIMBYism."¹⁹¹ Although the state successfully dredged the 50-foot shipping lanes and purportedly saved the Port of Baltimore, it turned out that the residents cost the state a decade and millions of dollars because of the delay in deepening the shipping channels.

¹⁸⁹ Nawrozki, *supra* note 183.

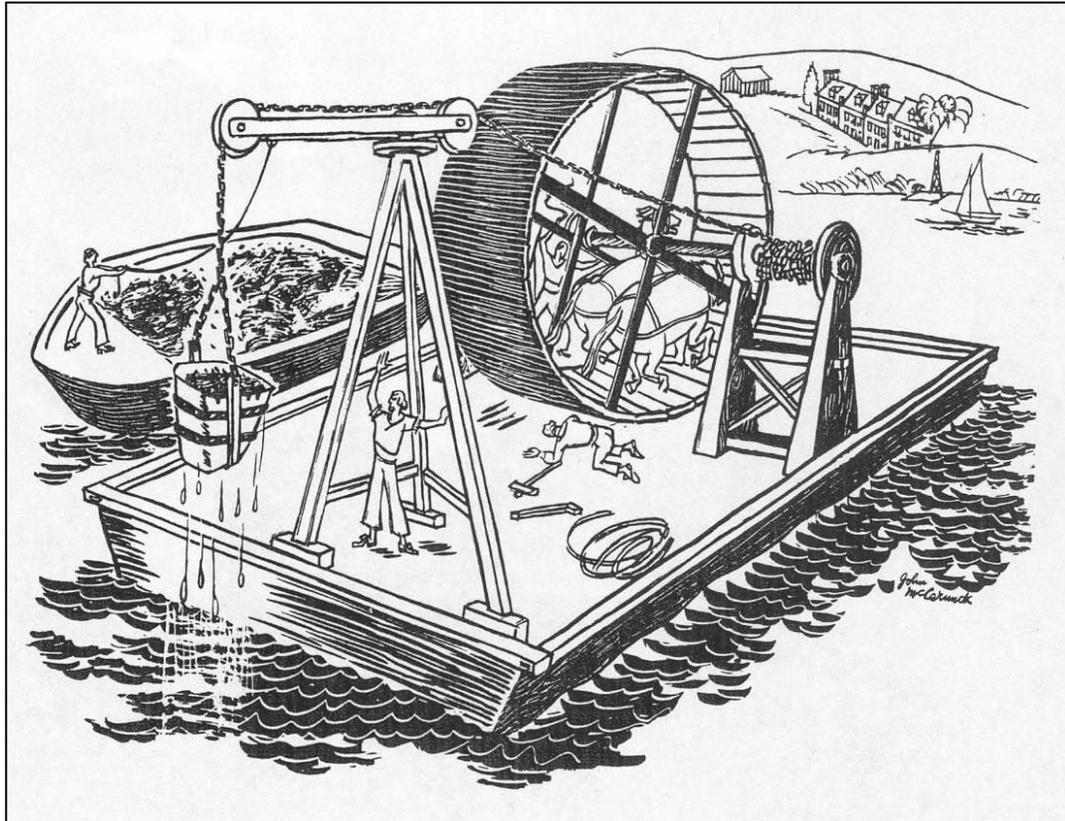
¹⁹⁰ B. Burton, "Burton Changes His Mind," *Bay Weekly* (Issue 40, 1995), <http://www.bayweekly.com/1995/95iii40.html>.

¹⁹¹ "NIMBY" is an acronym for "Not in my backyard," the sentiment that property owners oppose losing their property to public projects.

When there is a standoff over large public works projects, both environmentalists and governmental entities must look beyond the mere success or failure of litigation when calculating their costs. Environmentalists must realize that they often fight losing battles, but perhaps they can extract large concessions or “compensation”¹⁹² from the state for accepting a large project. State and local governments, on the other hand, might find it beneficial to consider providing such concessions or compensation to environmentalists and NIMBY activists. In the Hart and Miller Islands controversy, the state might have used the money that it ended up spending in the courts and negotiating with the Reagan administration to win over the Back River residents. Even if the state did not end up saving money this way, it would have saved ten years in dredging the 50-foot channels to the Port of Baltimore. In this light, it is imperative that governmental authorities include the costs of delays from litigation when planning for large projects in general and defending against lawsuits in particular.

¹⁹² See *supra* note 183.

Appendix



R. Keith, Baltimore Harbor: A Pictorial History 218 (3d ed. 1991).