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SECTION 10 OF THE RIVERS AND HARBORS ACT: THE EMERGENCE OF A NEW PROTECTION FOR TIDAL MARSHES

JAMES M. KRAMON*

INTRODUCTION

Due in part to recently imposed restrictions on prosecutions under the Refuse Act,¹ in part to growing demands for the use of coastal lands,² and in part to an increasing awareness of the significance and vulnerability of estuarine areas,³ there has lately been a surge of interest in Section 10 of the Rivers and Harbors Act of 1899.⁴ This new attention to Section 10 has had particular significance for the protection of tidal marshes. Although the application of Section 10 to tidal marshes is not evident on its face, three recent developments have encouraged the use of Section 10 in the preservation of marshlands and in the maintenance of the intricate life cycle dependent upon them: judicial recognition of the broad coverage of Section 10; expansion of the scope of inquiry triggered by an application for a Section 10 permit to include factors other than those affecting navigation; and en-


1. See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 402(k), 86 Stat. 883. The Amendments remove from the proscription of the Refuse Act, 33 U.S.C. § 407 (1964), discharges for which a permit has been applied, except under limited conditions. While Refuse Act prosecutions may still be undertaken with respect to the kind of activity discussed in this article — that is, activity customarily consisting of isolated projects for which there is no existing permit application — the overall decrease in Refuse Act prosecutions has removed a substantial workload from Justice Department attorneys involved in environmental protection litigation.


3. See notes 33-48 infra and accompanying text.

largement of the remedies available to a court upon finding a violation of Section 10. This article will examine these developments in the application of Section 10 to tidal marshes and will attempt to articulate some of the remaining questions and to suggest some answers.

The Statute

The Rivers and Harbors Act of 1899 was a substantial reenactment of its precursor, the Rivers and Harbors Act of 1890. From their legislative history, it is apparent that the purpose of the 1890 and 1899 Acts was to prevent obstructions in the nation's waterways, which purpose has been recognized by the courts. Unlike, however, Section 10 of the 1890 Act, which prohibited the creation of such obstructions to the navigable capacity of a waterway unless "affirmatively authorized by law," Section 10 of the 1899 Act required affirmative authorization by Congress so that federal sanction rather than mere state authorization of any construction became necessary. The constitutional authority for this broad prohibition is somewhat ambiguous. Prior case law and Section 10 cases imply that the Commerce Clause is the primary constitutional basis supporting the enactment of such a prohibition. However, courts have also relied upon the Admiralty

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7. See 32 Cong. Rec. 1350-51 (1899) (remarks of Congressman Burton); 21 Cong. Rec. 6352, 9813 (1890). Such obstructions were not prohibited at common law. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).


11. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824), Chief Justice Marshall, speaking for the Court, defined the word commerce: "The word used in the constitution, then, comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word 'commerce.'" See also The Montello, 87 U.S. (20 Wall.) 430 (1874); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

SECTION 10

Clause to support the proscriptions of Section 10.\textsuperscript{13}

Section 10 of the Rivers and Harbors Act consists of three separate clauses:

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 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.\textsuperscript{14}

Although the entire section has been given a generous reading,\textsuperscript{15} the first clause is more inclusive than either the second or third clauses because of the use of the term "any obstruction."\textsuperscript{16} This construction is significant since the problem of protecting tidal


Although the Admiralty Clause does not confer substantive legislative power, ample authority exists to warrant its invocation as a source of legislative power. The Supreme Court has held at least twice that the Admiralty Clause, U.S. CONST. art. I, § 2, presupposes congressional power over that subject matter. Panama R.R. Co. v. Johnson, 264 U.S. 375, 385-86 (1924); In re Garnett, 141 U.S. 1, 12 (1891).


\textsuperscript{15} A classic statement of the broadness of Section 10 is found in United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 708 (1899): "[A]nything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition." Accord, United States v. Republic Steel Corp., 362 U.S. 482, 489 (1960) ("navigable capacity" broader than mere navigation); Wisconsin v. Illinois, 278 U.S. 367, 412-16 (1929). Any diversion of water is prohibited by Section 10. Sanitary Dist. v. United States, 266 U.S. 405, 429 (1925).

marshes is exacerbated by the manifold possibilities for destruction of such areas.\textsuperscript{17}

Although the courts have attached the customary definitions to those words within the second and third clauses specifying the areas included within the purview of navigable waters,\textsuperscript{18} they have given an expansive meaning to the term "channel" in the third clause; this may be significant in Section 10 tidal marsh cases since they may arise where there is no navigable channel.\textsuperscript{19} In spite of the legislative history of the Rivers and Harbors Act of 1899, which indicates that the statute was intended to deal with the channel of navigation or customary route taken by ships,\textsuperscript{20} nearly every case concerned with the definition of the word "channel" defines it as the bed of a stream between the two banks.\textsuperscript{21} In fact, the Supreme Court, within three years after the passage of the 1890 Act, concluded, in another context, "that Congress . . . [could not have] used the word channel to describe the sinuous, obscure and changing line of navigation, rather than the broad and distinctly defined bed of the main river."\textsuperscript{22} At least by implication the cases which afford the term "navigable" in Section 10 an expansive reading\textsuperscript{23} support the broader definition of "channel". One such case concerned an area

\textsuperscript{17} The future existence of tidal marshes has been threatened by the dredging and filling operations that accompany the development of new residential communities. See notes 41-42 infra and accompanying text. Activities which cause deposition of foreign substances are also within the prohibition of Section 10. See United States v. Republic Steel Corp., 362 U.S. 482, 489 (1962) (clogging of channel by inorganic solids). Inadequate sewage treatment poses a substantial danger to tidal regions. See United States v. City of Asbury Park, 340 F. Supp. 555, 564-67 (D. N.J. 1972). Very recently the potentially adverse effects of returning heated water to its source has been the subject of comment and litigation under Section 13 of the Rivers and Harbors Act. See Tripp & Hall, \textit{Federal Enforcement Under the Refuse Act of 1899}, 35 \textit{Albany L. Rev.} 60, 65 n.22 (1970), and citations therein.

\textsuperscript{18} This conclusion is reached not because there have been definitional adjudications of the words in the second and third clauses of Section 10 but because the ordinary definitions have been applied in other types of cases where the particular structure is one having the potential for impeding navigation or for obstructing the navigable capacity. See United States v. Bellingham Bay Boom Co., 176 U.S. 211, 218 (1900).


\textsuperscript{22} Iowa v. Illinois, 147 U.S. 1, 12 (1892).

\textsuperscript{23} These cases are discussed in notes 50-66 infra and accompanying text.
of navigable waters which clearly was not suitable for any significant form of navigation and, therefore, did not possess a "channel" within the more restrictive definition.

Implementation of the provisions of Section 10 is entrusted to the United States Army Corps of Engineers, which determines by the issuance of permits what work may be undertaken within the designated bodies of water. This authority has been exercised in a series of regulations, the most recent of which were promulgated in 1972. The power to issue permits, conferred upon the Chief of Engineers and the Secretary of the Army by the proviso in Section 10, has withstood constitutional attacks grounded upon assertions that the delegation offends the rule forbidding abdication of legislative power, that the discretion vested in the Secretary is excessive, and that the statute as applied to activities not affecting navigation is an invalid exercise of legislative power. In recent years the constitutionality of Section 10 has not been challenged.

The conditions under which a determination is made whether to issue a Section 10 permit have undergone a significant change. Although for many years the Corps of Engineers consid-

24. Cf. United States v. Coates & Gray, Crim. No. 72-0598 (D. Md. Apr. 14, 1973), where the indictment charged that the defendants "did unlawfully alter and modify . . . the course, location, condition and capacity of the channel of a navigable water of the United States . . . ." Since it was stipulated that there did not exist, and never had existed, any commercial use of the tidal area, there was no navigable channel. Nevertheless, pleas of nolo contendere were accepted by the court at the conclusion of the evidence.

In the case of tidal marshes there would, of course, exist no channel of navigation. It would seem, however, that in most tidal marsh cases a defendant could be charged with either a violation of the first clause of Section 10 or a violation of the excavating and filling prohibition in the third clause.

25. 33 C.F.R. § 209.260 (1972). The Corps of Engineers has periodically published pamphlets generally advising permit applicants of the requirements for obtaining Section 10 permits. See Corps of Engineers, Instructions for Preparing Permit Applications for Work in Navigable Waters (1972); Corps of Engineers, Permits for Work in Navigable Waters (1968); Corps of Engineers, Permits for Work in Navigable Waters (1962); Corps of Engineers, Information Circular — Applications for Authority to Execute Work or Erect Structures in the Navigable Waters of the United States (1939).


29. This change was noted in House Comm. on Gov't Operations, Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution, H.R. Rep. No. 917, 91st Cong., 2d Sess. 2 passim (1970). It was not until 1968 that the Corps of Engineers revised its regulations to indicate that it would evaluate "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife,
ered only the potential effect upon navigation of the proposed work, newly enacted statutes, administrative interpretations and judicial decisions have expanded the inquiry to include the potential environmental impact of projects for which a Section 10 permit is sought. The result has been the transformation of a relatively simple regulatory function into a plenary fact-gathering process which may result in the denial of a permit to do work in marshlands, areas which are clearly not suitable for navigation.

The penalties and remedies which pertain to violations of Section 10 are established by another section of the Rivers and Harbors Act of 1899. They include a fine of from $500 to $2500 per violation, imprisonment not exceeding one year per violation, or both, in the discretion of the court, and, further, an injunction requiring the removal of any structures or parts of structures erected in violation of Section 10. The expansion of the injunctive remedy is a significant aspect of the broadening process which has characterized the recent development of Section 10 and is an important factor in the protection of the life cycle in tidal marshes.

The Ecology Of Tidal Marshes

Tidal marshes are transitional regions, alternately flooded and exposed in each tidal cycle and, in some cases, subject to discharges of fresh water streams as well. A salient feature of conservation, pollution, aesthetics, ecology, and the general public interest" in determining whether to grant a Section 10 permit. 33 C.F.R. § 209.120(d) (1968). See also House Comm. on Gov't Operations, Increasing Protection for our Waters, Wetlands, and Shorelines: The Corps of Engineers, H.R. Rep. No. 1323, 92d Cong., 2d Sess. at 3 (1972).


32. See notes 121-136 infra and accompanying text.

33. See S. Shaw & C. Fredick, Office of River Basin Studies, Fish & Wildlife Service, Wetlands of the United States: Their Extent and Their Value to Waterfront and Other Wildlife (Dept. of Interior, Circ. 39, 1971) at 23-25; Hitchcock & Curtzinger, Can We Save Our Salt Marshes, 141 NAT'L. GEOGRAPHIC 729 (June 1972) [hereinafter cited as Hitchcock & Curtzinger]; Shuster, The Nature of a Tidal Marsh, The N.Y. State Conservationist, Aug.-Sept. 1966 (leaflet no. 145) [hereinafter cited as Shuster]. As used in this article, the terms "tidal marsh", "salt marsh" and "tidal wetlands" are used interchangeably. In strict biological terms, however, there are significant differences and their values vastly differ, S. Shaw & C. Fredick, Office of River Basin Studies, Fish & Wildlife Service, Wetlands of the United States (Dept. of Interior, Circ. 39, 1971) at 23-25; ("shallow fresh marshes", "deep fresh marshes", "open fresh water", "coastal salt flats", "coastal salt meadows", "irregular flooded salt marshes", "regularly flooded salt marshes", and "mangrove swamps" are distinguished).
such regions is the existence of biota requiring both alternate exposure to water and air and at least partial salinity. The finiteness of tidal marshes can be appreciated when it is recognized that the peculiar requirements for these conditions can be met only at the narrowly defined interface of oceans or bays and dry land.

The importance of tidal marshes in the life cycle of living organisms has commended them to such characterizations as "the most productive areas on earth" and as a "'factory' of basic animal and plant nutrients. . . ." A multitude of life forms are indigenous to tidal marshes, and several species of fish and crustacea are dependent upon them for either food sources and breeding places. Various species of land animals as well as insects congregate in such areas and thereby provide food for those birds which are dependent upon them for sustenance.

The educational and environmental values of the estuarial complex are also substantial. Through the examination of core samples, the development of these areas reveals an evolutionary process originating in the Ice Age. The diversity of living things and life processes found in and around the marshes is unequalled in any other area on earth. The cyclical processes which enable life systems to replenish themselves may here be found and examined. Energy and nutrient exchanges, differing degrees of salinity, acidity, water depth, temperature, turbidity, elevation and

34. Hitchcock & Curtsinger at 738.

See also S. Shaw & C. Fredrick, Office of River Basin Studies, Fish & Wildlife Service, Wetlands of the United States (Dept. of Interior, Circ. 39, 1971).
36. Hitchcock & Curtsinger at 738.
37. Id.
40. Shuster at 32.
countless other biological parameters are present in tidal
marshes which cannot be replicated in the laboratory. Since by
their nature they are boundary regions, tidal marshes suggest
with peculiar clarity the conditions within which life forms are
able or unable to exist.

The very characteristics which make tidal marshes
unique— their narrowly defined existence and delicately balanced
life support systems— also make them vulnerable. Alterations of
their natural condition are likely to cause massive disruption and
to destroy the intricate network of systems found in them. Because
of these qualities, tidal marshes are not hospitable to multi-
ple uses or other compromises which seek to adopt the marsh to
artificial improvements.

Since tidal marshes provide neither dry land nor deep water,
most economically motivated undertakings require that their
condition be altered to provide both suitable sites for building
and useful open water. The transformation is accomplished by
what have come to be known as “dredge and fill” projects. As the

41. See House Comm. on Merchant Marine and Fisheries, Estuarine Areas, H.R.
42. Shuster at 32.
43. A study of the effect of dredging and filling in Boca Ciega Bay, Florida, which
is the subject of Zabel v. Tabb, 296 F. Supp. 764 (M.D. Fla. 1969), rev’d, 430 F.2d 199
(5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), is illustrative. The Bureau of Commer-
cial Fisheries Biological Laboratory at St. Petersburg Beach, Florida undertook a compre-
hensive sampling of dredged and undredged portions of Boca Ciega Bay. The samples were
taken both at the surface and at the bottom of the sampling area, and numerous param-
eters such as depth, temperature, salinity, pH, dissolved oxygen, total phosphorous, chloro-
phyll, primary production, and the existence of various life forms were measured and
compared. The conclusions illustrate that, with respect to nearly every parameter mea-
sured, major alterations resulted from the dredging. In particular, predredging life forms
included nearly 700 species of marine plants and animals, while in the deeply dredged
channels less than 20 per cent of that number of species were found to exist. Habitat
destruction was particularly characterized by the absence in dredged areas of bottom
invertebrates and benthic larvae. John L. Taylor & Carl H. Salomon, Fishery Biologists,
Bureau of Commercial Biological Laboratories, St. Petersburg, Florida in Some Effects
of Hydraulic Dredging and Coastal Development in Boca Ciega Bay, Florida, 67 Fishery
Bull. 213, 219-35 (1968) [hereinafter cited as Taylor & Salomon].
44. For example, in their study of the effects of dredging in Boca Ciega Bay, Taylor
and Salomon concluded:
[I]n 10 years, recolonization of canal sediments has been negligible and it appears
doubtful that soft sediments of bayfill canals will ever support a rich or diverse
infauna.
Taylor & Salomon at 235-36.
See also Letter from Congressman Reuss, Chairman of the Conservation and Natural
Resources Subcommittee of the Committee on Governmental Operations, to the Justice
Department, May 15, 1972 (published in House Comm. on Gov’t. Operations, Increasing
Protection for Our Waters, Wetlands, and Shorelines: The Corps of Engineers, H.R.
Rep. No. 1323, 92d Cong., 2d Sess. at 24 (1972)).
name suggests, such activity consists of removing spoil from one area and depositing it upon another, usually adjoining, area. The finished product is no longer a marsh but rather a well-defined coastline with alternating land and water areas. Precisely because marshes are where they are there is particular interest in appropriating them. Ocean and bayfront property is necessarily limited and the cost of converting marshland into saleable lots, frequently with their own waterfront canals, is easily offset by their augmented value. It is no surprise, therefore, that notwithstanding the existence of state legislation designed to curtail dredge and fill projects in tidal marshes, the number and extent of such projects in coastal states continues to increase.

**LIMITS OF NAVIGABLE SERVITUDE**

Since Section 10 concerns navigable waters, it is important to set forth the development of the two basic tests of navigability: the commercial use test and the ebb and flow test. Although both of these tests have been utilized by courts to determine the existence of federal power over a body of water, the two tests of navigability are not completely distinct. Courts have recognized

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45. The primary purposes of dredging and filling, according to the testimony of the Assistant Secretary of the Interior for Fish and Wildlife and Parks, Dr. Stanley A. Cain, to the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, are: navigation, [which] heads the list, [and] commercial developments and housing developments.

Statements of Dr. Stanley A. Cain, Assistant Secretary of Interior for Fish and Wildlife and Parks, reported in *Hearings on Estuarine Areas Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess. at 31 (1967).

46. In a fast developing county on Maryland's Eastern Shore, for example, it is not uncommon for the value of bayfront property to increase as much as 300% when riparian canals of a depth of five to six feet are created. Telephone conversation with Joseph G. Harrison, Supervisor of Assessments, Worcester County, Maryland, on March 23, 1973.


48. Typical of such developments is Harbour Towne, a planned resort community intended to comprise at least 3,200 acres and to support an eventual population of 40,000. The site of Harbour Towne is the western shore of Chincoteague Bay, a shallow, extremely productive estuary in Maryland. The current population of the county in which the site is located is 26,000. Newsletter, Worcester County, Maryland Environmental Trust, May 1, 1973.

49. For purposes of this article, the term “navigable servitude” refers to the measure of federal power over a body of water.

this interdependence in cases in which tidal marshes are not within the commercially useful portions of a body of water but are within the ebb and flow of a waterway, a portion of which is commercially useful. While formulating a viable test of navigability in early cases, however, the Supreme Court did recognize a clear distinction between the tests. Although an early Supreme Court case followed the English doctrine that navigability extended as far as the ebb and flow of the tides, within thirty years the Court in The Daniel Ball introduced a new federal test of navigability:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel are or may be conducted in the customary modes of trade and travel on water.

What thereby may be termed a three-pronged test—past, present, or future susceptibility for commercial use—has since been accepted as the prevailing determination of navigability. Once

53. 77 U.S. (10 Wall.) 557 (1870).
54. Id. at 563. By the time of The Daniel Ball it was established that navigation is commerce in the constitutional sense. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 8-9 (1824).
55. The Second Circuit stated the rule as being that a body of water is navigable if, in the commercial context,

(1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements.

Rochester Gas & Elec. Corp. v. Federal Power Comm'n, 344 F.2d 594, 596 (2d Cir.), cert. denied, 382 U.S. 64, 76, 82 (1931); Economy Light & Power Co. v. United States, 256 U.S. 113, 121-22 (1921); Leovy v. United States, 177 U.S. 621, 631 (1900); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899). A number of recent Section 10 cases have applied this "susceptibility" test.

Id. at 441-42. See also United States v. Utah, 283 U.S. 64, 76, 82 (1931); Economy Light & Power Co. v. United States, 256 U.S. 113, 121-22 (1921); Leovy v. United States, 177 U.S. 621, 631 (1900); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899). A number of recent Section 10 cases have applied this "susceptibility" test.
a body of water has been in commercial use or has been determined to be navigable, it remains so notwithstanding the fact that it is no longer used for commercial purposes. Of course, if a body of water is presently in commercial use, there is no question of navigability. For example, present commercial use can be established by demonstrating the use of the waterway for the transportation of logs.

While it is not entirely clear when a body of water is susceptible of future commercial use, courts have utilized an optimistic appraisal of the potential uses of a waterway. This principle seems to follow both from a recognition that a determination of non-navigability permanently precludes the exercise of federal dominion and from the notion that proof of commercial susceptibility does not require proof that the particular body of water is amenable to an economically feasible form of commerce.


Commercial disuse resulting from changed geographical conditions and a Congressional failure to deal with them, does not amount to an abandonment of a navigable river or prohibit future exertion of federal control.

To establish commercial use the transportation of logs must be related to interstate commerce. United States v. Underwood, 344 F. Supp. 486, 490 (M.D. Fla. 1972). Although logging operations alone have been held insufficient to make a stream navigable for federal purposes, Northern New Hampshire Lumber Co. v. New Hampshire Water Resources Bd., 56 F. Supp. 177 (D.N.H. 1944), Willow River Power Co. v. United States, 101 Ct. Cl. 222, rev'd, 324 U.S. 499 (1944), where the size of the operation places it within the scope of interstate commerce, the use of the waterway for logging has been held sufficient to establish navigability.

See also Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926); Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366 (1922).


Courts have frequently held that the passage of small boats, including pleasure boats, is persuasive evidence of susceptibility for commercial use. A convincing demonstration of the commercial usefulness of a body of water in its unaltered condition is also unnecessary to establish navigability. As the Supreme Court in United States v. Appalachian Electric Power Co. has noted, "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aides [sic] must make the highway suitable for use before commercial navigation may be undertaken." Perhaps as a corollary to this doctrine, many courts have concluded that bodies of water are navigable although they possess existing obstructions to navigation and although their depth is insufficient, in their unimproved condition, to permit the passage of boats. Moreover, the commercial


It is not, however, . . . "[e]very small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."


The Supreme Court in Appalachian Electric Power Co. suggested that a cost-benefit analysis is germane to a determination of whether there exists navigability based upon susceptibility for commercial use:

[T]here are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful.


65. As recognized by the Supreme Court in Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251, 263 (1915) when it said:

When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent upon the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed.

See also United States v. California, 381 U.S. 139, 171 (1965); Saint Anthony Falls Water-Power Co. v. Saint Paul Water Comm'rs, 168 U.S. 349, 359 (1897).
use test apparently does not require that a body of water be open to navigation throughout the year.\textsuperscript{66}

While tidal marshes almost never are or have been used for any of the commercial purposes contemplated by the Supreme Court in \textit{The Daniel Ball}, their susceptibility to future commercial use could depend partially on whether the cost of any necessary improvements could be justified.\textsuperscript{67} However, these difficulties have been obviated by the application of the ebb and flow test in Section 10 tidal marsh cases;\textsuperscript{68} within the ebb and flow test tidal marshes are navigable waters as a matter of law, since by definition, they are within the tidal range of the oceans.\textsuperscript{69} Although rejected as a necessary condition for navigability in \textit{The Daniel Ball},\textsuperscript{70} the ebb and flow test has been considered a sufficient condition for the assertion of federal dominion over a waterway, at least where some portion of the contiguous body of water satisfies the commercial use test.\textsuperscript{71} The concept of contiguity also

\begin{footnotesize}
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\item \textsuperscript{66} Economy Light \& Power Co. v. United States, 256 U.S. 113, 122 (1921).
\item \textsuperscript{67} See United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).
\item \textsuperscript{69} Traditionally, the question of navigability has been considered a question of fact. Crowell v. Benson, 285 U.S. 22, 55 (1932); Arizona v. California, 283 U.S. 423, 452 (1931). While the three-pronged commercial use test poses obvious questions of fact, the only question of fact which might exist when the ebb and flow test is applied is whether the area in question is subject to tidal influence.
\item \textsuperscript{70} 77 U.S. (10 Wall.) 557 (1870). When one considers the posture in which the navigability issue arose in \textit{The Daniel Ball}, it is apparent that the Supreme Court did not reject the ebb and flow test but, rather, held that with respect to bodies of water not within the tidal range of the oceans another test must apply. \textit{The Daniel Ball} was a libel to recover penalties levied against a vessel which had been carrying passengers and cargo without being inspected and licensed as required (by federal law) of vessels operating in navigable waters of the United States. When arrested the vessel had been operating on the Grand River in Michigan, an inland river not subject to tidal influence. The defendant interposed a defense based upon the lack of navigability of the Grand River. The Supreme Court, after noting that the English test of navigability depended upon the existence of the ebb and flow of the tides, stated that "in England . . . no waters are navigable in fact . . . which are not subject to the tide . . . . But in this country the case is widely different. Some of our rivers are as navigable for many hundred miles above as they are below the limits of tidewater . . . ." 77 U.S. (10 Wall.) at 563. Since neither the libellant nor the libellee in \textit{The Daniel Ball} was concerned with waters within the tidal range of the oceans, the test was clearly not rejected with respect to them.
\item \textsuperscript{71} This conclusion is suggested by those cases which hold that the navigable servitude extends to the high water mark. See United States v. Kansas City Life Ins. Co., 339 U.S. 799, 804-05 (1950); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 629 (1961); United States v. Chicago, M., St. P. \& P.R.R. Co., 312 U.S. 592, 596-97 (1941). Although these cases use the terms "ordinary" and "mean" high water interchangeably,
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pervades those decisions in which federal dominion is extended beyond navigable waters to adjacent areas when activity in such areas would affect the nearby navigable waters.\textsuperscript{72}

The case of \textit{Zabel} \textit{v. Tabb}\textsuperscript{73} exemplifies the existence of federal dominion over tidal marshes, which generally are found at the edge of waterways capable of satisfying the commercial use test. The Fifth Circuit upheld a denial of a federal permit to perform dredging and filling activities in Boca Ciega Bay near St. Petersburg, Florida. Without discussion, the court found that the submerged riparian land was a navigable water of the United

determination of the "mean" high water requires measurements of the twice-daily tides over an 18.6 year period. Thus, any high water mark test implies the existence of an ebb and flow.


For example, Section 10 has been held to apply to a private canal which is connected to an interstate waterway. Dow Chem. Co. \textit{v. Dixie Carriers, Inc.}, 330 F. Supp. 1304, 1307-08 (S.D. Tex. 1971).

Proof that the area in question is within, or adjacent to, an area within the ebb and flow of the tides is not difficult. The customary method of proof is to install a tidal datum at or above the area where the work was done and obtain readings which show varying heights of water conforming to the local tides. Where this procedure is impracticable either because of the nature of the marsh or because of the size of the project, a substantially accurate mean high water line may be found in many coastal regions by having a biologist observe the interface between spartina alterniflora and spartina patens. The former plant requires twice-daily saline inundation by the lunar tides while the latter requires only occasional saline inundation by meteorological phenomena. Studies in Florida indicate that the high water mark in marsh areas conforms closely to that interface. Telephone conversation with Larry R. Shanks, Annapolis, Maryland Area Supervisor, Bureau of Sport Fisheries and Wildlife, U.S. Department of Interior, on March 20, 1973. The Soil Conservation Service of the United States Department of Agriculture has prepared maps denoting regions of tidal marsh as part of a soil survey conducted by it in cooperation with state agencies.

The existence of a passage to the open sea is a factor which generally is extremely persuasive of navigability. See Davis \textit{v. United States}, 185 F.2d 938, 942 (9th Cir. 1950), \textit{cert. denied}, 340 U.S. 932 (1951); United States \textit{v. Underwood}, 344 F. Supp. 486, 491-92 (M.D. Fla. 1972). \textit{But cf.} Pitship Duck Club \textit{v. Town of Sequim}, 315 F. Supp. 309, 310 (W.D. Wash. 1970). Since access to the open sea, at least in marshes, almost always assures the existence of an ebb and flow from a contiguous body of water meeting the commercial use test, it would appear that such access could be considered conclusive of navigability.

States since it constituted an arm of the Gulf of Mexico.\textsuperscript{74} Although the area in question in \textit{Zabel} was not specifically identified as marshland, the court's discussion of the potential environmental harm indicates that it was.\textsuperscript{75} Therefore, contiguity with a body of water satisfying the commercial use test was deemed sufficient to permit the application of Section 10 to the tidal marsh in question. The result is consistent with an earlier Fifth Circuit decision which held that the dredging of an artificial channel on a submerged tidal flat was an activity which required a Section 10 permit.\textsuperscript{76}

The authority of the Corps of Engineers over a tidal marsh within the ebb and flow of the tides from an adjacent commercially useful waterway was also confirmed in \textit{United States v. Baker}.\textsuperscript{77} On the question of navigability, the district court stated:

\textit{[T]he area in question is a wetland marsh . . . . It is a tidal area, and I find . . . . that as a matter of law the area is within the navigable waters of the United States.}

\textit{. . . . I am persuaded by the affidavits in support of the motion and by the arguments put forward in the Government's brief and cases cited therein that these waters, being tidelands which are defined by determining whether the water within the area is equal in ebb and flow to that of the river which is concededly navigable, that under those circumstances the waters are considered navigable waters within the statute and within the Constitution, and the Court has jurisdiction to redress the grievances of the Government which arise under the Act referred to.}\textsuperscript{78}

Finally, in \textit{United States v. Joseph G. Moretti, Inc.},\textsuperscript{79} both the district court\textsuperscript{80} and the Fifth Circuit\textsuperscript{81} recognized that the tidal

\textsuperscript{74} See 430 F.2d at 201, 203-06.
\textsuperscript{75} Id. at 201, 206, 209-10.
\textsuperscript{76} Tatum v. Blackstock, 319 F.2d 397, 399 (5th Cir. 1963).
\textsuperscript{77} 1 E.L.R. 20378 (S.D.N.Y. 1971).
\textsuperscript{78} Id. at 20379.
\textsuperscript{79} 331 F. Supp. 151 (S.D. Fla. 1971), vacated in part on other grounds, 478 F.2d 418 (5th Cir. 1973).
\textsuperscript{80} The District Court for the Southern District of Florida stated:
Florida Bay, at Hammer Point, Key Largo, Florida, is a navigable water of the United States. The federal test of whether a body of water is navigable depends on whether it is capable, in its natural form or with reasonable modifications, to sustain commerce or transportation. Davis v. United States, 185 F.2d 938, 943 (9th Cir.) cert. den., 340 U.S. 932, 71 S. Ct. 495, 95 L. Ed. 673 (1950). Under the federal test, there can be no question that Florida Bay at Hammer Point, Key Largo, is a navigable water of the United States. See Miami Beach Jockey Club v. Dern, (1936)
\textsuperscript{81}
marsh area in question\textsuperscript{82} was within the protective purview of Section 10, because of its location at the edge of the Florida Bay. Addressing itself specifically to the relationship of this shallow bay area to the larger navigable waterway, the district court concluded that if the entire body of water meets the commercial use


The authority of the United States over navigable water extends to the ordinary high water mark and any work done below this line without prior authorization is illegal. United States v. Kansas City Life Insurance Company, 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277 (1950); United States v. Chicago M., St. P. & Pac. R. R., 312 U.S. 592, 313 U.S. 543, 61 S. Ct. 772, 85 L. Ed. 1064 (1941). When excavation or filling is undertaken without authority from the Secretary of the Army as delegated to the Chief of Engineers, that constitutes a violation of Title 33, United States Code, Section 403. The Chief of Engineers has delegated authority to the District Engineers to issue certain types of permits and has set forth criteria for obtaining permits. These criteria are published commencing at Section 209.120, Title 33, Code of Federal Regulations.

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) specifically states that work in navigable waters must be recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning same.

\textsuperscript{331} F. Supp. at 157-58.

\textsuperscript{81} On the question of navigability, the Fifth Circuit noted:

Florida Bay is located at the southern tip of the Florida peninsula and merges with the Gulf of Mexico on its western boundary. On the east, Florida Bay is adjacent to Biscayne Bay which leads to the Port of Miami. The length of Florida Bay is traversed by the Intracoastal Waterway which runs from the Gulf and enters Biscayne Bay through Florida Bay. Although the record did not reveal the precise distance of appellant’s property from the Intracoastal Waterway, it is clear that it is in close proximity to this Waterway. The Coast and Geodetic Survey Chart shows that at its nearest point the Intracoastal Waterway is less than one-half mile from Hammer Point.

Navigability, even at a time when its requirements were more stringent, was simply a question of whether the waterway “in its natural and ordinary condition affords a channel for useful commerce.” The Daniel Ball, 10 Wall. 557, 19 L.Ed. 999 (1871). Accessible as it is to both the Gulf of Mexico and Biscayne Bay, and traversed lengthwise by the Intracoastal Waterway, Florida Bay is a natural passage for commerce and easily meets even the historical-literal test of navigability. Of course, as with most bodies of water, there comes a point where the depth of water is minimal as the bottom slopes up to the bank. But one would hardly contend that the Mississippi is any less navigable simply because a pirogue would go aground at the water's edge.

Questioned directly as to the navigability of Florida Bay the Resident Engineer for the Corps testified unequivocally that Florida Bay is a navigable water. Indeed, if Florida Bay were unnavigable Moretti’s development of his property including finger slips and canals so that his mobile home park would be a “live-in marina” would be incomprehensible and obviously wasteful and a deception to purchasers who expected a waterborne access to the sea, not the restricted movement in a short landlocked pond.

\textsuperscript{478} F.2d at 428.

\textsuperscript{82} The area was described as one in which mangrove plants, which are indigenous to the Florida Keys, were growing in a peaty bottom covered by sea grasses and inundated by the tides. 331 F. Supp. at 156-57.
test, the dredging and filling of the tidal marsh area below the ordinary high water mark is subject to regulation under Section 10.83

The conclusion reached by the courts in Zabel, Baker and Moretti is consistent with the presupposition embodied in two reports concerning Section 10 issued by the House Committee on Government Operations that tidal marshes are themselves within the purview of Section 10. The discussion in a 1970 Report indicates that the Committee assumed that tidal marshes are within the navigable servitude.84 In language highly critical of the permit policy of the Corps of Engineers, the Committee stated that it

. . . believes that the Corps' largely laissez-faire policy concerning landfills and construction on submerged lands and tidelands . . . violated its statutory responsibility to protect all aspects of the public interest in those lands.85

In its conclusion to a 1972 Report, the subject of which was enforcement of Section 10, the House Committee on Government Operations noted that

. . . works in wetland areas, particularly estuarine areas . . . are often carried out in an uncoordinated and haphazard manner, and the result is the piecemeal destruction of valuable wetlands, marshes, and coastal estuarine areas.86

The obvious predicate to this statement is that Section 10 applies to estuarine regions. This is borne out by the fact that the same Report criticizes the official in charge of a regional subdivision of the Corps of Engineers for stating that the jurisdiction of the Corps extended only to those waters in fact capable of being used for navigation. Moreover, the Committee approved a new policy "of asserting jurisdiction over shallow tidelands" subject to dredge and fill activities.87

In its most recent regulations, the Corps of Engineers apparently responded to the deficiency articulated by the Committee on Government Operations, as well as to the "new policy" ap-

84. HOUSE COMM. ON GOV'T OPERATIONS, OUR WATERS & WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION & POLLUTION, H.R. REP. No. 917, 91st Cong., 2d Sess. at 6 passim (1970). Much of the Report concerns the considerations which ought to govern the determination by the Corps of Engineers whether to issue Section 10 permits, particularly for work in estuarine areas.
85. Id. at 7.
86. HOUSE COMM. ON GOV'T OPERATIONS, INCREASING PROTECTION FOR OUR WATERS, WETLANDS, & SHORELINES: THE CORPS OF ENGINEERS, H.R. REP. No. 1323, 92d Cong., 2d Sess. at 7 (1972).
87. Id. at 27-29.
proven in the 1972 Report. While these regulations state that the authority of the Corps of Engineers over inland waterways will continue to be dependent upon the three-pronged commercial use test, they further indicate that with respect to tidal waterways, the Corps’ jurisdiction

... extends to the [shoreward limit] of all such water bodies, even though portions of the water body may be extremely shallow, or obstructed by shells, vegetation, or other barriers. Marshlands and similar areas are thus considered “navigable in law,” but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not [the three-pronged commercial use test], which generally applies to inland rivers and lakes.

This apparent abandonment by the Corps of Engineers of the requirement of contiguity may go farther than the decided cases by suggesting that the ebb and flow test has independent vitality with respect to tidal waters. These new regulations, the two Reports of the House Committee on Government Operations and the Section 10 tidal marsh cases, therefore, confirm the applicability of Section 10 to tidal marshes.

CRITERIA FOR ISSUANCE OF PERMITS

Section 10 forbids the creation of obstructions in, or alteration of, the features of a navigable waterway without the requisite recommendation by the Chief of Engineers and authorization by the Secretary of the Army. However, this Section does not define the factors which should be considered during the permit

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89. This test was stated to be that navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future, susceptible for use for purposes of interstate or foreign commerce.
33 C.F.R. § 209.260(c) (1972).
90. 33 C.F.R. § 209.260(k)(2) (1972) (emphasis added).
91. This proscription is explicated in clauses two and three of Section 10. See text accompanying note 14 supra. The duties of the Secretary of the Army and of the Corps of Engineers under this Section are enunciated in 33 C.F.R. § 209.120 (1972). According to those regulations the Chief of Engineers, who commands the Corps of Engineers, is responsible for advising the Secretary of the Army of the appropriateness of issuing permits for any activities within the purview of Section 10, 33 C.F.R. § 209.120(a)(2)(i) (1972).
The organization of the Corps of Engineers corresponds with the division of the United States and its possessions into 11 "Divisions" which are subdivided into 37 "Districts". A Division Engineer, to whom the District Engineers are responsible, supervises each Division, 33 C.F.R. 209.120(a)(2)(ii).
Nevertheless, subsequent legislative enactments and
administrative actions have introduced ecological factors into the determination of whether to grant a Section 10 permit. The primary legislative enactment is the Fish and Wildlife Coordination Act, which clearly requires the Corps of Engineers to con-

subject to judicial review by persons "aggrieved by agency action," Administrative Procedure Act, 5 U.S.C. § 702 (1946), notwithstanding the absence of review provisions in the Rivers and Harbors Act. The application for a Section 10 permit, which is addressed to the District Engineer with jurisdiction over the navigable waterway within or adjoining the site of the proposed work, must include a letter identifying the applicant, the location of the waterway, the identity of adjoining property owners and a description of the proposed work. See Instructions for Preparing Permit Application in Work in Navigable Waters, prepared by the Department of the Army, Baltimore District Corps of Engineers (April 1972).

93. The philosophy of the National Environmental Policy Act, 42 U.S.C. §§ 4331-4347 (1970), supports the inclusion of ecological considerations in the permit process:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.


94. 16 U.S.C. §§ 661-66(c) (1964). The legislative purpose of the Fish and Wildlife Coordination Act is codified in Section 661 which states:

For the purpose of recognizing the vital contribution of our wildlife resources to the
sider environmental factors in determining whether to issue a Section 10 permit. The pertinent language provides that

... whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States or by any public or private Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of sections 661-666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of said sections.

16 U.S.C. § 661 (1964). The Senate Report on the Fish and Wildlife Coordination Act not only shows that ecological factors are primary considerations in the permit process, but also indicates that applications for dredge and fill permits in tidal marshes are to be carefully scrutinized in light of the potential environmental destruction that could result from such activity:

Finally, the nursery and feeding grounds of valuable crustaceans, such as shrimp, as well as the young of valuable marine fishes, may be affected by dredging, filling, and diking operations often carried out to improve navigation and provide new industrial or residential land.

* * * * * * * * *

Existing law has questionable application to projects of the Corps of Engineers for the dredging of bays and estuaries for navigation and filling purposes. More seriously, existing law has no application whatsoever to the dredging and filling of bays and estuaries by private interests or other non-Federal entities in navigable waters under permit from the Corps of Engineers. This is a particularly serious deficiency from the standpoint of commercial fishing interests. The dredging of these bays and estuaries along the coastlines to aid navigation and also to provide land fills for real estate and similar developments, both by Federal agencies or other agencies under permit from the Corps of Engineers, has increased tremendously in the last 5 years. Obviously, dredging activity of this sort has a profound disturbing effect on aquatic life, including shrimp and other species of tremendous significance to the commercial fishing industry. The bays, estuaries, and related marsh areas are highly important as spawning and nursery grounds for many commercial species of fish and shellfish.

agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.\(^95\)

In recognition of this statutory coordination responsibility,\(^96\)


\(^{96}\) United States v. Joseph G. Moretti, Inc., 478 F.2d 418, 424 (5th Cir. 1973), suggests that Executive Order No. 11288 may also have motivated the issuance of the Memorandum discussed at note 97 infra and accompanying text. This Order has been summarized in 33 C.F.R. 209.120 (d)/(8) (1972):

(8) Executive Order 11288 specified the responsibilities of all Federal agencies to improve water quality through prevention, control, and abatement of water pollution from Federal Government activities in the United States. The provisions of this order are applicable to the pollutional aspects of all dredging operations including the disposal of dredged material. In compliance therewith and insofar as practicable and consistent with the interests of the United States within available appropriations, the Corps of Engineers cooperates with the Secretary of the Interior and with State and interstate agencies and municipalities in preventing or controlling water pollution. District Engineers consult with regional representatives of the Federal Water Pollution Control Administration on pollution problems associated with those dredging projects having a water pollution impact and avail themselves of the technical advice and assistance which may be provided by the Federal Water Pollution Control Administration. District Engineers likewise cooperate with responsible State Water pollution control agencies having similar jurisdiction. These provisions in no way eliminate or negate responsibilities with respect to other ecological effects covered by other competent authorities and laws. Consideration must be given to the pollutional aspects of dredging operations including the disposal of spoil and measures to control the toxic, bacterial, biological, chemical, physical, and other pollutional characteristics inherent in these operations. Pollution control for dredging under navigation permits issued under authority of Section 10 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403), will be accomplished by adding the desired control as a condition to the permit. The establishment of sampling procedures to enforce State and/or Federal standards and the subsequent proof of violation of the regulations and/or standards are considered to be the responsibility of the Secretary of the Interior through the Federal Water Pollution Control Administration and/or the State agency having jurisdiction over water pollution. State regulations will be considered guidelines until Federal standards are prescribed. District Engineers will add the following condition to such permits: “That the permittee shall comply promptly with any regulations, conditions, or instructions affecting the work hereby authorized if and when issued by the Federal Water Pollution Control Administration and/or the State water pollution control agency having jurisdiction to abate or prevent water pollution. Such regulations, conditions, or instructions in effect or prescribed by the Federal Water Pollution Control Administration or State Agency are hereby made a condition of this permit.”
the Secretaries of the Interior and Army entered into a *Memorandum of Understanding* which provides for consultation and coordination between the various organizational levels of the two Departments and further provides that the Secretary of the Interior will appraise the particular project for which a permit is sought and will make a determination with respect to the potential environmental damage which may result from the proposed work.\(^97\) One commentator has observed that while the Fish and Wildlife Coordination Act requires that District Engineers consult with the Fish and Wildlife Service of the Department of the Interior, the *Memorandum of Understanding* requires them to coordinate their activities with Regional Directors of the Secretary of the Interior.\(^8\) He concludes that this alteration of the coordination process is significant in its potential for politicizing that process, since the Regional Directors of the Interior Department and their superiors are "political appointees" while the Fish and Wildlife Service is a "career oriented, non-political division of [the Department of the Interior]."\(^99\) Whether the process will in fact be politicized can not yet be determined, although the Fish and Wildlife Service and not the Department of the Interior has promulgated guidelines concerning the function of the Department of the Interior in the permit issuing process.\(^100\) The importance of avoiding an institutional arrangement that responds to

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97. 33 C.F.R. § 209.120(d)(11) (1972):

1. It is the policy of the two Secretaries that there shall be full coordination and cooperation between their respective Departments [with respect to their responsibilities under the Fish and Wildlife Coordination Act] at all organization levels . . . Accordingly, District Engineers of the U.S. Army Corps of Engineers shall coordinate with the Regional Directors of the Secretary of the Interior on fish and wildlife, recreation, and pollution problems associated with dredging, filling, and excavation operations to be conducted under permits issued under the 1899 Act in the navigable waters of the United States. . . .

2. . . . If the Secretary of the Interior advises that proposed operations will unreasonably impair natural resources or the related environment, including the fish and wildlife and recreational values thereof, or reduce the quality of such waters in violation of applicable water quality standards, the Secretary of the Army in acting on the request for a permit will carefully evaluate the advantages and benefits of the operations in relation to the resultant loss or damage, including all data presented by the Secretary of the Interior, and will either deny the permit or include such conditions in the permit as he determines to be in the public interest, including provisions that will assure compliance with water quality standards established in accordance with law.


99. *Id.* at 15-16.

considerations other than those apolitical factors required by the appraisal function should be obvious.\textsuperscript{101}

While the Fish and Wildlife Coordination Act as well as subsequent regulations promulgated by the Corps of Engineers\textsuperscript{102} mandate the consideration of ecological factors in the permit process, none of them expressly provide for the denial of a permit on purely ecological, rather than navigational, grounds.\textsuperscript{103} That question arose in \textit{Zabel v. Tabb},\textsuperscript{104} a case in which the petitioner proposed to construct a bulkhead and a bridge and to dredge and fill to form an island in the Boca Ciega Bay in Florida. The respondent, the District Engineer, found that there existed "virtually unanimous opposition to the proposed work" and that "approval of the work would not be consistent with the intent of Congress as expressed in the Fish and Wildlife Coordination Act" and denied the petitioner's request for a permit.\textsuperscript{105} The district court, however, found that Section 10 of the Rivers and Harbors Act, even if read in conjunction with the Fish and Wildlife Coordination Act, did not authorize the Secretary of the Army to deny an application for a dredge and fill permit for reasons other than those relating to navigation.\textsuperscript{106} The rationale of this decision was a tortured one. The court disregarded not only the legislative purpose of the Fish and Wildlife Coordination Act,\textsuperscript{107} but also the belief embodied in a House Report concerning a particular dredge and fill project in a marshland area that the Corps of Engineers had authority to deny permits for valid environmental reasons.\textsuperscript{108}

\textsuperscript{102} The general policy of the Corps of Engineers on issuing permits is the following: (1) The decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest except that in the case of permits for fixed structures or artificial islands on outer continental shelflands under mineral lease from the Department of the Interior, the decision will be based on the effect of the work on navigation and national security. . . .
\textsuperscript{33} C.F.R. 209.120(d)(1) (1972).
\textsuperscript{103} Although the denial of a permit on the basis of ecological considerations would seem to follow from the inclusion of ecological factors in the determination of whether to grant a permit, the district court in \textit{Zabel v. Tabb}, 296 F. Supp. 764 (M.D. Fla. 1969), rev'd, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), did not agree.
\textsuperscript{105} 430 F.2d at 202.
\textsuperscript{106} 296 F. Supp. 764 (M.D. Fla. 1969).
\textsuperscript{107} See note 94 \textit{supra}.
\textsuperscript{108} \textit{The Permit for Landfill in Hunting Creek: A Debacle in Conservation}, H.R. Rep. No. 4, 91st Cong., 1st Sess., at 40 (1969). It is clear that Congress felt that the Fish
The Fifth Circuit in a landmark decision reversed and held that

... nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasureable loss from a silent-springlike disturbance of nature's economy.

Considering the congressional command of the Fish and Wildlife Coordination Act, the legislative history preceding it, and the administrative interpretations thereof, one is hard pressed to differ with the Fifth Circuit. If, however, there remained any lingering doubt concerning the intent of Congress to authorize and to encourage denial of Section 10 permits for ecological reasons, it was dispelled by the passage of the National Environmental Policy Act, a purpose of which was to render federal undertakings such as the issuance of Section 10 permits subject to prior consideration of their anticipated environmental impact.

and Wildlife Coordination Act was violated by the failure of the Corps of Engineers to deny a permit for ecologically valid reasons.

109. 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). This decision will, no doubt, become a Section 10 analog of Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir.), cert. denied, 384 U.S. 941 (1956). In Scenic Hudson the Second Circuit held that the Federal Power Commission had an affirmative duty to consider the public intervenors' contention that the construction of a power plant posed the threat of serious environmental harm. 354 F.2d at 615-20.

110. 430 F.2d at 201.

111. Section 102(a)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (1970) provides: The Congress authorizes and directs that, to the fullest extent possible: ... (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 the 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.

Particularly in the Fifth Circuit, but elsewhere as well, district courts have exhibited heightened sensitivity to the environmental harm that results from dredging and filling activities in estuarine areas. This sensitivity is reflected in United States v. Joseph G. Moretti, Inc., in which the court reviewed the environmental damage caused by the defendants’ dredging and filling to create a trailer park:

The immediate result of the development in this area was the complete removal and destruction of all living mangrove plants. With the loss of mangroves, which are indigenous to the shores of the Florida Keys, went all wading and shore birds previously found in this area. The excavation of the access channels and canals by the defendants removed the peat natural to the bottom and exposed the underlining sand or rock.

Defendants’ extensive dredging of canals done without protective measures being taken, releases large amounts of silt, which is composed of crushed rock and sand. This silt is spread about the bay by tide, wave action and wind and as it is dispersed, settles back upon the bay bottom. This creates a situation where once the sand and rock was covered by the peat bottom, the silt covers the peat. In effect, this acts to suffocate the peat and other living vegetable forms. Further, as all plants require sunlight to carry out the process of photosynthesis, the clouding of the water by silt through the dredging operations blocks off sunlight, which impedes and injures the growth of plant life in the bay. The destruction of peat, besides the effects already mentioned, also results in the killing of sea grasses, another form of vegetation in this area which serves to protect and nourish forms of animal life.
Finally, in *United States v. Lewis,*\(^{116}\) a case involving dredge and fill work to construct a causeway on an island in a navigable creek, the district court noted the environmental impact of destruction of marsh areas:

There was evidence that the causeway caused a fairly sized area of spartina to die because it became matted down by other wind-driven marsh grass and lacked the tidal flow of salt water to be regenerated.

A marine biologist testified that the entire fill should be removed in order to permit natural restoration of the area. Both he and another witness were of the opinion that any application for a fill would be rejected by federal and state authorities, there being an alternative method to the one used, namely a dock on pilings.\(^{117}\)

Therefore, on the basis of these decisions it is apparent that future decisions will not only scrutinize a proposed project and uphold the denial of a Section 10 permit, especially in a case involving tidal marshes when the environmental impact would be

\(^{117}\) *Id.* In *United States v. Baker,* 1 E.L.R. 20378 (S.D.N.Y. 1971), the district court without a hearing granted a preliminary injunction against the filling of a tidal marsh by the New York National Guard:

In the first place, there is no doubt about the value of the area in its original wetlands conditions, that is, the value of having it in that condition. There are ecological values which are intended to be protected by the Act which confers jurisdiction here and by recent Acts enacted by the Congress which are referred to in the papers of the Government.

There is educational value to the wetland condition of the area as is established by the affidavit in support of the motion on the part of educators who have actually used the marsh for that purpose and others whose backgrounds are such as to make it clear that there is such value. There is economic value to the wetlands which, as I understand it from the papers—this is undisputed—help to cleanse the ecological system of the river itself. One of the affidavits indicated that such a cleansing system may be valued at something between $10,000 and $30,000 a year. There are values as to wildlife which, of course, fall within the ecological subhead that I have mentioned but which should be specified, namely, certain types of fish which spawn and breed in the area—I recall shad and I think bass, but I’m not sure of the latter—which have economic value in themselves. There are other types, birds which nest in the area and there are various forms of plant life which can only be found in such areas.

There is no doubt, to proceed to a further factor, that the marsh has been damaged by the fill and that if it were to continue in its present condition the damage would be literally irreparable.

Furthermore, the affidavit of Mr. Buckley, I believe it is, in support of the motion offers the opinion, which is not refuted, that if the fill is left in the marsh it will be impossible to revive the ecological characteristics of the marsh after the end of August, 1971. That is about one month from now.

1 E.L.R. at 20379.
adverse, but will also be cognizant of the environmental harm that a properly followed permit process might have averted.

A question remains, however, whether the burden of demonstrating potential environmental harm rests upon the Corps of Engineers and the Department of the Interior or whether the permit applicant must demonstrate the absence of such harm. The House Committee on Government Operations has twice indicated that it

believes that the Corps of Engineers must make an about-face in its handling of applications for new landfills, dredging, or other work in navigable water. The Corps has often routinely approved such applications unless the opponents of the permit clearly showed that substantial damage to the public interest will result. The committee believes that the corps should place on the applicant the burden of proving that the filling, dredging, or other work is indisputably in accord with the public interest. The corps should be sure that the environment will not be substantially harmed; or that there is no feasible and prudent alternative to such work and that all possible measures will be taken to minimize the resulting harm.\(^\text{118}\)

The recent guidelines promulgated by the Fish and Wildlife Service for Federal Permit Applications in Navigable Waters also embody the principle that the burden should be on the applicant for a permit:

The . . . Fish and Wildlife Service will require evidence with each and every permit application . . . that environmental damages are not significant. If significant evidence is not demonstrated by the applicant, and Fish and Wildlife Service investigations and review indicate probability of fish and wildlife losses, denial of the permit will be requested to the Corps of Engineers . . . .\(^\text{119}\)

When the possible losses to both developers and society are weighed, it is obvious that the burden should be on the developer. For him, the possible loss from his failure to carry the burden of


persuasion is that of a profitable project, while for society, the possible loss is resources which may not exist again for centuries, if ever. Congress apparently recognized the relative losses when it passed the National Environmental Policy Act which imposed the impact statement requirement as a condition precedent to a wide range of federal undertakings. That requirement is a plain expression by Congress that activities which involve the federal government should not go forward until their potential harm to the environment is appraised. It is implicit that weighty environmental objections which surface in impact statements should militate against the project under consideration.

The broadened criteria for determining the issuance of permits under Section 10 can be an effective deterrent to ill considered destruction of tidal marshes. Courts have already moved in this direction by recognizing the appropriateness of denying Section 10 permits on ecological grounds and by broadly considering environmental consequences with respect to the existence of, and sanctions accompanying, violations of Section 10. Therefore, the Fish and Wildlife Coordination Act together with the Fifth Circuit's decision in Zabel v. Tabb not only have restructured the permit issuing process but also have significantly advanced the enforcement of Section 10.

**INJUNCTIVE REMEDIES**

There is specific authority in the Rivers and Harbors Act of 1899 for injunctive relief requiring "the removal of any structure or parts of structures erected in violation of the provisions of [Section 10]." However, this statutory authority does not approach the breadth of the prohibitions in Section 10 which apply to the creation of "any obstruction" (in the first clause) and

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120. See note 111 supra and accompanying text.

121. The statutory authority for injunctive relief is found in Section 12 of the Rivers and Harbors Act, 33 U.S.C. § 406 (1970), which states:

Every person and every corporation that shall violate any of the provisions of sections 401, 403 [Section 10] and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of [inter alia Section 10] may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.
to the excavating, filling, altering or modifying "the course, location, condition, or capacity of" various portions of bodies of water (in the third clause). Therefore, it is not surprising that the existence and scope of injunctive relief to remedy violations of Section 10, other than the creation of structures in navigable waters, has been the subject of litigation.

The Supreme Court in United States v. Republic Steel Corp.\textsuperscript{122} established the existence of injunctive relief beyond that provided by statute. In that case three companies deposited industrial solids in the Calumet River, an outlet of Lake Michigan. The District Engineer ordered the companies to remove the deposits, the shoaling from which had reduced the depth of the channel. The district court determined that liability for the deposits existed under both Section 10 and Section 13\textsuperscript{123} and apportioned responsibility among the three companies; the court also enjoined the three companies from participating in any further filling activities.\textsuperscript{124} On appeal, the Seventh Circuit, holding that there was no equitable remedy for the violation,\textsuperscript{125} dismissed the complaint. The Supreme Court, reversing the court of appeals, held that the deposit of industrial solids which resulted in reducing the depth of the channel created an "obstruction" to the

\textsuperscript{122} 362 U.S. 482 (1960).
\textsuperscript{123} Section 13 of the Rivers and Harbors Act, 33 U.S.C. § 407 (1970), states:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed; Provided, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

\textsuperscript{125} United States v. Republic Steel Corp., 264 F.2d 289, 304 (7th Cir. 1959).
"navigable capacity" of the Calumet River within the meaning of the first clause of Section 10.126 The Court further stated:

[As we have seen [33 U.S.C. § 413 provides that] "the Department of Justice shall conduct the legal proceedings necessary to enforce" the provisions of the Act, including § 10. It is true that § 12 [33 U.S.C. § 406] in specifically providing for relief by injunction refers only to the removal of "structures" erected in violation of the Act . . ., while § 10 of the 1890 Act provided for the enjoining of any "obstruction". . . . Section 10 of the present Act defines the interest of the United States which the injunction serves. . . . Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.127

While the factual situation in Republic Steel did not concern tidal marshes or dredge and fill projects, the principle the opinion articulates has supported injunctive relief in several cases concerning dredging and filling in marshland areas.128 Although dredge and fill projects generally entail two violations of Section 10—the removal of spoil from navigable waters and the placing of spoil upon navigable regions or adjoining areas—129 injunctive decrees generally have been limited to ordering the removal of the

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126. 362 U.S. at 489.
127. Id. at 491-92.
128. In United States v. Perma Paving Co., 332 F.2d 754, 757-58 (2d Cir. 1964), the court, while recognizing that an injunction was a proper remedy for unlawfully placed fill, noted that the government had already removed the fill, and ordered the defendant to reimburse the government for the cost of removal. The district court in United States v. Underwood, 344 F. Supp. 486, 494 (M.D. Fla. 1972), similarly concluded that it was within its power to order either removal or payment of costs therefor.

In United States v. Joseph G. Moretti, Inc., 331 F. Supp. 151 (S.D. Fla. 1971), vacated in part on other grounds, 478 F.2d 418 (5th Cir. 1973), the district court permanently enjoined the defendants from any further filling of the Florida Bay at Hammer Point, Key Largo, below the mean high water mark. The court also ordered the removal of the deposits which were deemed to be obstructions within the purview of Section 10 and restoration of the navigable capacity of the waterway. See also United States v. Little Duck Key Corp., Civil No. 72-1475 (S.D. Fla. Apr. 23, 1973) (defendant ordered to replace earthen material unlawfully removed between inland boat basin and navigable waterway); United States v. Sunset Cove, Inc., Civil No. 71-313 (D. Ore. Feb. 13, 1973); United States v. Benton, Civil No. 1530 (E.D.N.C. July 6, 1972).

unlawfully placed spoil.\textsuperscript{130}

Although \textit{Republic Steel} established the availability of injunctive relief other than that specifically provided by statute, the extent of its availability remains in question. An argument could be made that injunctive relief in aid of Section 10 should be as broad as the statutory proscription of all three clauses. The Supreme Court in both \textit{Republic Steel} and in a case arising under another section of the Rivers and Harbors Act\textsuperscript{131} has fashioned injunctive remedies from the general proscriptions of the Rivers and Harbors Act and, in particular, from the mandate to the Department of Justice found in that Act.\textsuperscript{132} In so doing, the Court has noted that the naked criminal sanction may be insufficient to forestall the activities which the statute is intended to forbid.\textsuperscript{133}


Restorative remedies have also been imposed as a condition of probation in at least two criminal cases. In one case the condition required removal of a landfill to the line of the mean high tide. United States v. Mentor, Crim. No. 52254 (W.D. Wash. Oct. 8, 1957). In the other case the court required restoration of unlawfully altered channels of navigable waters insofar as practicable. United States v. Coates & Gray, Crim. No. 72-0598 (D. Md. Apr. 14, 1973). The use of such conditions upon probation is consistent with many cases which uphold special probationary conditions. See, e.g., Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935); Burns v. United States, 287 U.S. 216, 220-21 (1932). Probationary conditions provide a severe sanction in addition to, or in the place of, incarceration; where a defendant corporation is involved, restoration provides a sanction of substantial deterrent value since it is not only entails great cost but also makes the defendant's undertaking unrealizable.


\textsuperscript{132} Section 17 of the Rivers and Harbors Act, 33 U.S.C. § 413 (1970), provides in pertinent part:

\begin{quote}
The Department of Justice shall conduct the legal proceedings necessary to enforce the Provisions of [Section 10] of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated . . . . \end{quote}

See generally Tripp and Hall, \textit{supra} note 17, at 77-80.


The inadequacy of the criminal penalties provided by . . . the Rivers and Harbors Act is beyond dispute. \textit{[It] contains only meager monetary penalties. In many cases, as here, the combination of these fines and the Government's in rem rights would not serve to reimburse the United States for removal expenses. . . . .}

The relief to which the government is entitled is the "remedy that insures the full
Additional support for the full utilization of injunctive relief in aid of Section 10 is found in the Fish and Wildlife Coordination Act\(^\text{134}\) and in the National Environmental Policy Act.\(^\text{135}\) The thrust of these legislative enactments is that environmental factors must be considered in the issuance of a Section 10 permit.\(^\text{136}\) If an applicant may undertake work in navigable waters and thereby create permanent alterations, even with the possibility of incurring criminal penalties, a central purpose of the Fish and Wildlife Coordination and National Environmental Policy Acts—to implement a comprehensive program of prior appraisal—may be evaded. Therefore, injunctions should be available not only to prevent unauthorized work for which a Section 10 permit is required but also to require undoing, insofar as practicable, work which has been completed without a permit.

A problem which does not concern the substantive availability of injunctive relief in aid of Section 10 but which involves the time at which relief is available has arisen as a result of the after-the-fact permit authority implemented in the Regulations of the Corps of Engineers.\(^\text{137}\) The question of timeliness was considered in \textit{United States v. Joseph G. Moretti, Inc.}\(^\text{138}\) The defendant had engaged in dredge and fill activities in Florida Bay at Hammer

\begin{footnotes}
\footnote{134. 16 U.S.C. § 661 et seq. (1970).}
\footnote{135. 42 U.S.C. § 4331 et seq. (1970).}
\footnote{136. See notes 91-120 supra and accompanying text.}
\footnote{137. 33 C.F.R. § 209.120(c)(1)(IV) (1972). Construction and Other Work Performed Without Prior Authority.}
\footnote{(a) District Engineers are authorized to approve plans for structures and work of the classes for which they are authorized to issue permits when the application for approval is submitted after the commencement or completion of the structures or work subject to the following:}
\footnote{(1) Approval will be limited to those cases where the necessary primary authority, State or Federal as the case may be, validly exists, when the work was innocently constructed, and when there is no objection to the work,}
\footnote{(2) The applicant will submit the plans in the prescribed form,}
\footnote{(3) Notice of the application will be duly issued,}
\footnote{(4) The approval will be issued in the prescribed form, ENG FORM No. 96c, W.D., Eng.,}
\footnote{(5) The approval will be signed and recorded as prescribed for permits,}
\footnote{(6) Application for approval of plans for work which has been completed requiring actions by higher authority will be reported as prescribed for permit applications, and}
\footnote{(7) When forwarding approval, the applicant will be informed that the law contemplates prior approval, and that, in the future, plans must be submitted in ample time for their consideration by the Chief of Engineers before construction is started.}
\footnote{138. 331 F. Supp. 151 (S.D. Fla. 1971), \textit{vacated in part on other grounds}, 478 F.2d 418 (5th Cir. 1973).}
\end{footnotes}
Point on Key Largo prior to his applying for a permit under Section 10. After a substantial portion of the work was completed, the defendant applied for a Section 10 permit and continued to dredge while the Corps of Engineers and the Department of Interior were considering his application. After the district court enjoined any further dredge and fill activities by the defendant and ordered restoration of the navigable capacity of the waterway, Moretti appealed to the Fifth Circuit and argued that, after having been warned of the unlawfulness of his project, he had applied for an after-the-fact permit but that his application had not been acted upon, because the government had initiated judicial action.

In considering this argument, the Fifth Circuit found that the Corps of Engineers had chosen not to act on the application and held that

while we find ample jurisdiction, and on the record a set of facts which would otherwise authorize the stringent mandatory injunction of restoration, this part of the Court's order must be vacated to permit the further proceedings on the application for an after-the-fact permit.

The court also noted, “Of course the action or non-action of the Department of the Army is judicially reviewable under the Administrative Procedures Act . . . .”

The Fifth Circuit's decision obviously poses a serious threat to employment of injunctive remedies for violations of Section 10, since it may effectively postpone such relief for a considerable time. However, the rationale of the decision that the Corps must follow its own regulations and not pretermit an avenue provided by the regulations by its seeking injunctive relief is sound.

There are, however, several ways to avoid the problem. The most obvious is for the Corps to follow a recommendation of the House Committee on Government Operations that the availability of after-the-fact permits be limited to cases in which their issuance is clearly in the public interest. It is also possible that

139. 331 F. Supp. at 155.
140. Id. at 158.
142. Id. at 432. See note 92 supra and accompanying text. It is not, however, required that a hearing be held with respect to issuance of a permit. Sisselman v. Smith, 432 F.2d 750, 754 (3d Cir. 1970); Gables by the Sea, Inc. v. Lee, Civil No. 73-752 (S.D. Fla. Oct. 16, 1973).
143. HOUSE COMM. ON GOV'T OPERATIONS, INCREASING PROTECTION FOR OUR WATERS,
such permits could be abolished altogether. Another possibility is for the Corps of Engineers to accelerate the consultation with the Fish and Wildlife Service required by the Fish and Wildlife Coordination Act, at least in cases where injunctions are, or will be, sought, and to act promptly upon the permit application. In the latter procedure, it is obvious that, in an appraisal of the environmental damage of a totally or partially completed project for which no permit has been granted, any uncertainty occasioned by the defendant’s or prospective defendant’s unlawfully completed work should be resolved against the defendant. Nevertheless, elimination of after-the-fact permits is the preferable solution, since it removes an uncertainty to the enforcement of Section 10, which is necessary in light of its clear proscription against commencing forbidden conduct without a permit from the Corps of Engineers.

CONCLUSION

Congress, federal agencies and courts have awakened, more or less simultaneously, to the possibility that without immediate corrective action the cycle of life dependent upon tidal marshes may soon be broken. This collective recognition has crystallized in a reappraisal of Section 10 of the Rivers and Harbors Act.

In retrospect, the principles which are being articulated are not entirely novel. Some very early cases suggest the construction of the term “navigable” which has enabled courts to find marshland areas to be within the scope of Section 10. The newly implemented authority of the Corps of Engineers to deny permits on other than navigational grounds is suggested in a Supreme Court decision in 1933. And the creation of equitable remedies in fur-

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145. See notes 14 and 91 supra and accompanying text.

therance of statutory expressions of public policy is built upon established principles. Therefore, the development of Section 10 should not be seen as the creation of an entirely new set of standards but as the application of a rather old statute to a major environmental problem within its purview.