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Section 10 of the Rivers and Harbors Act: Jurisdiction Shoreward of the Mean High Tide Line

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Section 10 of the Rivers and Harbors Act: Jurisdiction Shoreward of the Mean High Tide Line

This article deals with the jurisdiction of the United States Army Corps of Engineers to require permits under the Rivers and Harbors Act for dredge and fill activities. The author argues that the United States Court of Appeals for the Fifth Circuit reached the correct result via a new analytic approach, and in the process extended the corps' jurisdiction shoreward of the mean high tide line, to include all activities, without regard to location, which affect the course, condition, or capacity of navigable waters.

Sexton Cove Estates, Inc., as part of a proposed trailer park development on Upper Key Largo, Florida, planned construction of ten artificial canals, each with individual connections to Blackwater Sound, a navigable body of water. Construction had begun, and three of the canals had been dredged and connected to the sound,[1] when the United States Army Corps of Engineers advised the developer that federal law required a permit for such activities. The Corps based its jursidiction on section 10 of the Rivers and Harbors Appropriation Act of 1899.[2] Sexton Cove Estates replied by letter to the Corps that it believed no permit was necessary[3] and continued dredging. Excavation of two additional canals was completed,[4] but

1. These canals ranged in depth from 13.8 to 38 feet. The canals were approximately 600 to 700 feet in length. They were excavated landward of what the developers believed to be the mean high tide line (MHTL) of the sound. Blackwater Sound at the point of connection of these canals was four to five feet deep. One of the three canals was excavated by enlarging a preexisting canal. The preexisting canal was from two feet to eight feet deep with an unspecified length.

2. 33 U.S.C. § 403 (1970). Section 10 provides in pertinent part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, 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.

3. Sexton Cove Estates based its response to the Corps upon advice of its counsel that the Corps' jurisdiction did not extend to activities occurring above the MHTL of navigable waters. *See* United States v. Joseph G. Moretti, Inc., 331 F. Supp. 151, 158 (S.D. Fla. 1971), *vacated in part and remanded*, 478 F.2d 418 (5th Cir. 1973).

4. These two canals were 600 to 700 feet in length and 15 to 45 feet deep. They were both

the canals were not connected to the sound.[5] Subsequently the Corps again advised Sexton Cove Estates that a permit was required for its dredging activities, particularly for any connections of canals to Blackwater Sound. At this point the development company applied to the Corps for an after-the-fact permit for its work.[6] The company continued work, however, and the two additional canals were connected to the sound. In addition, dredging of the remaining canals, except for their connections, was completed.[7] Approximately one year later the after-the-fact permit request was denied.

The federal government then brought suit in the United States District Court for the Southern District of Florida against Sexton Cove Estates and its president, alleging that the defendants had conducted dredge and fill activities which had altered the course, condition, or capacity of navigable waters without the requisite Corps' permit.[8] The Government sought prohibitory injunctive relief restraining further dredging operations and mandatory injunctive relief requiring restoration of the dredged areas.[9] The district court held that the dredge and fill operations conducted by the defendants without authorization by permit were illegal and ordered total restoration of all dredged areas.[10]

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excavated by enlarging two preexisting canals. The preexisting canals were from two feet to eight feet deep with unspecified lengths.

5. The canals were each separated from Blackwater Sound by earth plugs eight or nine feet long that had not been dredged out of the canals' intended courses.

6. At that time, permits for authorization of construction performed without the Corps' approval could be obtained if certain specified conditions were satisfied. 33 C.F.R. § 209.120(c)(1)(iv) (1972). Subsequently, in 1974 the Corps amended its regulations and severely restricted the after-the-fact permit procedure. 33 C.F.R. § 209.120(g)(12) (1976).

7. These canals were the same lengths as the others and had depths from 20 to 40 feet. The trial record did not indicate how long the plugs separating the canals from the sound were. The defendants characterized the plugs as many feet long, while the Government referred to the plugs as narrow strips.

8. Specifically, the Government alleged a violation of 33 U.S.C. § 403 (1970). *See* note 2 *supra*.

9. Statutory authority for such injunctive relief has been judicially implied from the Rivers and Harbors Appropriation Act of 1899, § 12, 33 U.S.C. §§ 403, 406 (1970); *e.g.*, United States v. Joseph G. Moretti, Inc., 478 F.2d 418, 430-31 (5th Cir. 1973). 33 U.S.C. § 406 (1970) provides in pertinent part:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title . . . shall be deemed guilty of a misdemeanor . . . . And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist . . . .

10. United States v. Sexton Cove Estates, Inc., 389 F. Supp. 602 (S.D. Fla. 1975). The

On appeal, the defendants contended, *inter alia,* that the Corps' jurisdiction did not apply to dredge and fill operations which occurred above the mean high tide line (MHTL); that even if Corps' jurisdiction were applicable, there was no alteration of the course, condition, or capacity of navigable waters; and that restoration was not warranted.[11] The United States Court of Appeals for the Fifth Circuit reversed in part, vacated in part, remanded, and *held:*[12] (1) dredge and fill operations shoreward of the mean high tide line of navigable waters are within the jurisdiction of the United States Army Corps of Engineers if those operations alter the course or affect the navigable capacity of navigable waters; (2) only defendant's dredging operations which involved connection of canals to Blackwater Sound altered the course and capacity of the sound; and (3) therefore, construction of those canals which were connected to Blackwater Sound without the Corps' authorization was illegal and warranted some degree of restoration. *United States v. Sexton Cove Estates, Inc.,* 526 F.2d 1293 (5th Cir. 1976).[13]

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restoration order of the trial court was quite extensive. The defendants were ordered to replant all red mangrove trees along the shoreline where they had been destroyed. The defendants also were ordered to refill completely the five landlocked canals using material of the same permeability as that which had been removed. In addition, the defendants were to refill the three preexisting canals to depths of ten feet at the sound entrances sloping up to six feet at their inland ends. Finally, the defendants were to refill the remaining two canals to a depth of six feet at their mouths sloping up to five feet at their inland ends. The defendants estimated that compliance with the restoration order would cost at least one million dollars. Brief for Appellants at 17, United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976).

11. The defendants also contended that the corporate president could not be held personally liable, that reliance on previous Corps' internal jurisdictional policies was a valid defense, and that all persons owning lots adjacent to the canals were indispensable parties to the action. 526 F.2d at 1295. The Fifth Circuit denied the defendants' reliance argument because the defendants never requested the Corps' opinion as to whether a permit was required and because the defendants continued dredging after the Corps informed them a permit was required. The court also determined that the lot owners were not indispensable parties because the requirements of Federal Rule of Civil Procedure 19 were not met. The court, however, upheld the contention that the corporate president could not be held personally liable based on general corporate principles and an absence of any language imposing such liability in 33 U.S.C. § 406 (1970). 526 F.2d at 1300-01.

12. The court remanded the case so that a full evidentiary hearing might be held to determine the degree of restoration environmentally and practically warranted. *Id.* at 1301.

13. Two companion cases involving similar factual situations were decided the same day. Weiszmann v. District Eng'r, United States Army Corps of Eng'rs, 526 F.2d 1302 (5th Cir. 1976); United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976).

In *Weiszmann* a private developer had brought suit seeking an injunction to restrain the Corps from exercising jurisdiction over two artificially created canals in his residential subdi-

The Fifth Circuit's decision to remove the MHTL as a jurisdictional limit for section 10 of the Rivers and Harbors Act was in direct opposition not only to numerous earlier cases[14] but also to a previous decision of the same court.[15] Thus, it was no surprise when

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vision development. The federal government counterclaimed under 33 U.S.C. §§ 403 and 406 (1970), seeking restoration of the two canals and under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. §§ 1251-1376 (Supp. V 1975), seeking imposition of a civil penalty. Both canals had been dredged landward of the MHTL without a Corps permit. One had been connected to a preexisting canal and the other had been left landlocked. The trial court held that the dredging was illegal and ordered total restoration. In addition, the court imposed a $5,000 fine for violation of the Federal Water Pollution Control Act Amendments of 1972. Weiszmann v. District Eng'r, United States Army Corps of Eng'rs, 7 E.R.C. (BNA) 1523 (S.D. Fla. 1975). The Fifth Circuit affirmed the civil penalty, reversed the judgment requiring restoration of the landlocked canal, and vacated the judgment requiring restoration of the connected canal so that a full evidentiary hearing might be held to determine the degree of restoration warranted.

In *Moretti* the federal government had brought suit against a private land developer seeking an injunction restraining the developer from dredging and filling in navigable waters below the MHTL. The trial court granted injunctive relief and ordered that all fill material placed below the MHTL in navigable waters be removed. United States v. Joseph G. Moretti, Inc., 331 F. Supp. 151 (S.D. Fla. 1971). On appeal, the Fifth Circuit affirmed the trial court's determination that restoration was an appropriate remedy for Moretti's illegal dredging and filling, but vacated the restoration order so that Moretti might apply for an after-the-fact permit. United States v. Joseph G. Moretti, Inc., 478 F.2d 418 (5th Cir. 1973). Subsequently, Moretti sought such a permit, but its request was denied by the Corps, and this denial was affirmed by the courts. Joseph G. Moretti, Inc. v. Hoffman, 387 F. Supp. 1404 (S.D. Fla. 1974), *aff'd*, 526 F.2d 1311 (5th Cir. 1976).

After the Corps' permit denial, the trial court reinstated its restoration order. In addition, on the Government's motion the trial court expanded its restoration order to include dredged and filled canals above the MHTL which were connected to navigable waters. United States v. Joseph G. Moretti, Inc., 387 F. Supp. 1404 (S.D. Fla. 1974). On appeal, the Fifth Circuit affirmed the determination that restoration was appropriate but remanded to determine the degree of restoration warranted. 526 F.2d 1311 (5th Cir. 1976).

14. United States v. Smith, 7 E.R.C. (BNA) 1937, 1938 (E.D. Va. 1975); Leslie Salt Co. v. Froehlke, 7 E.R.C. (BNA) 1311, 1314 (N.D. Cal. 1974) (dictum); United States v. Holland, 373 F. Supp. 665, 671, 676 (M.D. Fla. 1974) (by implication); United States v. Pot-Nets, Inc., 363 F. Supp. 812, 815-16 (D. Del. 1973); United States v. Lewis, 355 F. Supp. 1132, 1137, 1140 (S.D. Ga. 1973).

15. In United States v. Joseph G. Moretti, Inc., 478 F.2d 418 (5th Cir. 1973), speaking about activities entirely below the MHTL, the court stated: "And all concede for this case that relief sought depends on the government proving that Moretti dredged or filled bayward of MHTL. For the Corps has no power landward of it to regulate his conduct or force reconstruction of the topography . . . ." *Id.* at 429. Later in the opinion the court stated:

> For where the boundary of its [the Corps'] authority is this elusive line [the MHTL], it should have the first opportunity to determine whether and to what extent the area is or is not within its jurisdiction. . . .
>
> This line limits the jurisdiction of the Corps of Engineers both negatively and affirmatively . . . .

Id. at 432 (citations omitted).

the *Sexton Cove* decision was almost immediately characterized as a "radical foray" into concepts foreign to traditional interpretations of the Rivers and Harbors Act.[16]

At the center of the controversy are the provisions of section 10 which prohibit "the creation of any obstruction . . . to the navigable capacity of any of the waters of the United States" and make it unlawful "to alter or modify the course, location, condition or capacity of . . . the channel of any navigable water of the United States" without prior approval by the Corps.[17] These provisions provide a twofold requirement before the Corps' jurisdiction is applicable.[18] First, the body of water under consideration must be a navigable water of the United States. Second, the activity under consideration must have the potential to affect the navigable water in the manner specified by the statute.

Although the MHTL is generally considered the landward boundary for navigable waters and would thus have a bearing on the first requirement, nowhere in the second requirement is a consideration of the MHTL suggested. Certain courts and the Corps itself, however, have adopted the MHTL as the jurisdictional limit for the second requirement.[19] This adoption arose primarily because the MHTL was the federal boundary for other purposes[20] and secondarily because of a belief that there was only a remote possibility that activities occurring outside the normal range of navigable waters would have an effect upon navigable waters.[21] The Fifth Circuit in *Sexton Cove* concluded, however, that there was "nothing in the language of . . . [the Rivers and Harbors Act] nor in the logic of its implementation" that mandated the continued support of the MHTL as a boundary.[22]

It was perhaps to put this dicta to rest that the Fifth Circuit in *Sexton Cove* removed the MHTL as the Corps' jurisdictional limit since the removal was not vital to the court's eventual decision. The Fifth Circuit could simply have affirmed the Corps' jurisdiction over the canals which were connected to Blackwater Sound by affirming the district court finding that activities in those canals took place below the MHTL.

16. United States v. Commodore Club, Inc., 418 F. Supp. 311, 320 (E.D. Mich. 1976).

17. 33 U.S.C. § 403 (1970). *See* note 2 *supra* for the pertinent text of this section.

18. *See* United States v. Commodore Club, Inc., 418 F. Supp. 311 (E.D. Mich. 1976).

19. *See* cases cited in note 14 *supra*.

20. *E.g.*, Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 22-27 (1935) (the MHTL is the federal boundary for property purposes).

21. *See* United States v. Holland, 373 F. Supp. 665, 670-71 (M.D. Fla. 1974).

22. 526 F.2d at 1298.

A broad interpretation of the jurisdictional limits of section 10 was set forth at an early time by the Supreme Court in *United States v. Rio Grande Dam & Irrigation Co.*[23] That case involved an analysis of section 10 of the Rivers and Harbors Appropriation Act of 1890,[24] the statutory precursor of part of section 10 of the 1899 Act.[25] In construing the former statute, the Court concluded that it was general in its terms and prohibited obstructions to the navigable capacity of the navigable waters of the United States "wherever done or however done."[26] The Court went on to hold that the United States could have the construction of a dam on a nonnavigable river enjoined where the dam would significantly affect the navigable capacity of a navigable river.[27]

Subsequent court decisions have affirmed this broad reading of section 10. The courts involved have held that activities which have occurred outside navigable waters that either caused an obstruction of the navigable capacity of navigable waters, or altered or modified the course, location, condition, or capacity of navigable waters were within the jurisdiction of the Act.[28] Such holdings are certainly supportable under the plain meaning of section 10.

Viewing the *Sexton Cove* case from the standpoint of the two requirements necessary to establish the applicability of section 10 and a violation by Sexton Cove Estates, it is apparent that the

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23. 174 U.S. 690 (1899).

24. Act of September 19, 1890, ch 907, § 10, 26 Stat. 454. The section declared in part "[t]hat the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect to which the United States has jurisdiction, is hereby prohibited."

25. 33 U.S.C. § 403 (1970).

26. 174 U.S. 690, 708 (1899).

27. *Id.* at 709-10.

28. United States v. Republic Steel Corp., 362 U.S. 482 (1960) (discharge of particulates through sewers into a navigable river); Wisconsin v. Illinois, 278 U.S. 367 (1929) (reduction of water level of the Great Lakes by drawing off of water through the Chicago River Drainage Canal); Sanitary Dist. v. United States, 266 U.S. 405 (1925) (same); United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964) (overloading of riparian land caused shoaling in a navigable river); United States v. Banister Realty Co., 155 F. 583 (C.C.E.D.N.Y. 1907) (dictum) (use of private property to effect closing of a navigable channel by deposition of sand); Sierra Club v. Morton, 400 F. Supp. 610 (N.D. Cal. 1975) (drawing off of water from a navigable river by two pumping plants and their respective intake canals); United States v. Sunset Cove, Inc., 5 E.R.C. (BNA) 1023 (D. Ore. 1973) (placement of fill which confined a channel to only part of the area it occupied during its seasonal meanderings), *aff'd*, 514 F.2d 1089 (9th Cir. 1975), *cert. denied*, 423 U.S. 865 (1976). United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972) (excavations from the shoreline of a navigable river).

Government could have proceeded in either of two ways. First, Blackwater Sound could have been established as a navigable body of water,[29] and then the defendant's dredge and fill activities detailed in terms of their effect on this body of water. Second, the Government could have contended that the ten canals were navigable bodies of water,[30] and then analyzed the defendant's dredge and fill operations to show their effect on these canals.

At trial, it appeared that the Government either was not aware that there were two possible approaches or was unsure which one to use. As a result, its presentation was weak and only a limited amount of evidence was introduced showing possible effects of defendant's dredge and fill activities on either Blackwater Sound or the canals.[31] The district court remedied this defect, apparently through judicial notice,[32] and held that the ten canals were navigable waters of the United States and that the defendant's dredging operations "altered or modified the course, condition, location, or capacity" both of the canals and of Blackwater Sound.[33]

On appeal, the Fifth Circuit limited its analysis solely to consideration of Blackwater Sound as a navigable body of water and the effects on it from the dredging operations.[34] The court specifically

29. The parties stipulated that Blackwater Sound was a navigable water of the United States. United States v. Sexton Cove Estates, Inc., 389 F. Supp. 602, 605 (S.D. Fla. 1975).

30. With the exception of the three preexisting canals, this contention would present the problem of ascertaining and establishing at what point in time the artificially constructed canals became navigable waters. In order to establish that the dredge and fill operations affected navigable waters, it would be necessary to show that the canals became navigable waters before the dredging and filling ceased. *See generally* Brief for Appellants at 27-28.

31. The weakness of the evidence adduced by the Government at trial is apparent from the efforts the Government made in its brief on appeal to have numerous facts accepted by judicial notice. For example, the Government contended that it had "been judicially established that excavation of canals removes the peat natural to the bottom and exposes the underlying sand or rock" and that "[n]either sunlight nor tidal flushing action can effectively penetrate the lower reaches of canals which are as narrow and as deep as the canals excavated by Sexton Cove Estates." Brief for Appellee at 12-13.

32. 389 F. Supp. at 606-09.

33. *Id.* at 607-09.

34. For the three preexisting canals the court stated that it was unnecessary to resolve whether they were navigable waters. 526 F.2d at 1299 n.11. For the other seven canals the court implied that they were not navigable waters while the dredging was going on. *Id.* at 1299-1300.

Subsequently in Weiszmann v. District Eng'r, United States Army Corps of Eng'rs, 526 F.2d 1302 (5th Cir. 1976), the court held that a canal very similar to the preexisting canals in *Sexton Cove* was a navigable body of water. The court noted that the mere capability of being used in commerce together with evidence of previous personal or private use by boat

held that the district court finding that the five canals directly connected to the sound "alter the course of the Sound because they changed its shoreline" was supported by the record.[35] In addition, the court noted that the canals served "as access to the Sound for numerous lot owners whose boats affect the navigable capacity of the area."[36]

Both of the Fifth Circuit's conclusions are amply supported by testimony that established that each of the five canals was connected to Blackwater Sound by a continuous body of water when the plug for each was removed.[37] From this evidence it was logical to conclude that the connections altered the course of Blackwater Sound. In fact it would seem to be virtually impossible to connect a canal directly to a navigable body of water by a surface connection without modifying the course of the navigable body of water.[38]

For the landlocked (plugged) canals the Fifth Circuit summarily reversed the finding of the district court that the canals affected Blackwater Sound.[39] The court noted that the finding of Corps' jurisdiction has no evidentiary support and was clearly erroneous.[40]

The court gave no indication whether its conclusion that the Corps did not have jurisdiction over the landlocked canals resulted because there was insufficient proof that the dredging of the canals affected "the course, condition, location or capacity of Blackwater Sound"[41] or because of its belief that "[t]he Corps jurisdictional fingers do not reach that far."[42] However, in light of the rationale

established navigability. *Id.* at 1305. The three preexisting canals in the *Sexton Cove* case would appear to satisfy these liberal requirements since one witness testified it was possible to get into the canals with a small boat. Trial Record at 37-38.

35. 526 F.2d at 1299. It is of interest to note that the language of section 10 does not prohibit alteration of the course of a navigable water but rather alteration of "the course . . . of the *channel* of any navigable water." 33 U.S.C. § 403 (1970) (emphasis added). A literal definition of channel, however, has long since been read out of the Act. Kramon, *Section 10 of the Rivers and Harbors Act: The Emergence of a New Protection for Tidal Marshes*, 33 MD. L. REV. 229, 232-33 (1973); *see* United States v. Republic Steel Corp., 362 U.S. 482, 486 (1960).

36. 526 F.2d at 1299.

37. Trial Record at 52-56.

38. *See* Weiszmann v. District Eng'r, United States Army Corps of Eng'rs, 526 F.2d 1302, 1305 (5th Cir. 1976); United States v. Whichard, No. 797 (E.D.N.C., filed Feb. 7, 1974); *cf.* Booker v. Rochelle, 23 F.2d 493 (5th Cir. 1928).

39. 526 F.2d 1299.

40. *Id.*

41. *Id.*

42. *Id.* The Corps and the district court both based the Corps' jurisdiction over the landlocked canals in part on the fact that the canals exhibited tidal fluctuations. The court

the court put forth in its elimination of the MHTL restriction to the Corps' jurisdiction, the insufficiency of evidence was in all likelihood the determining factor.[43] Certainly the court would not have removed one artificial barrier, the MHTL, to the Corps' jurisdiction and created another, the plugs in the canals. The logical conclusion is simply that the evidentiary proof submitted by the Government was insufficient, not that the court was unwilling as a general rule to extend jurisdiction to landlocked canals.[44]

Other than evidence of tidal fluctuations, the only evidence the Government introduced at trial to show an effect by the plugged canals on Blackwater Sound was testimony given by a marine zoologist. He testified that if he were to have constructed the canals, he would have dredged them to a depth of ten feet or less for maximum biological productivity.[45]

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of appeals, rather than seriously analyzing this concept, attempted to quickly dispose of the problem by using a syllogism designed to reduce the concept to an absurdity. The court used as its major premise the contention that the Corps' jurisdiction could be based on tidal fluctuations (the ebb and flow of the tide). As its minor premise the court through judicial notice adopted the fact that every hole dug in South Florida would fill with water and exhibit tidal fluctuations. The court's conclusion then was that if the Corps' jurisdiction were based upon ebb and flow of the tide, then the Corps would have jurisdiction over every hole dug in South Florida. This conclusion in turn was intended to point out the obvious fallacy of the major premise. The court overlooked one fact in its syllogistic approach, however. The absurdity in the conclusion could have just as easily resulted from a faulty minor premise. In fact, this was the case. The court's judicial notice of the minor premise was ill-advised. It is true that every hole dug in South Florida will fill with water, since the water table is quite close to the surface. *See* G. PARKER, G. FERGUSION & S. LOVE, WATER RESOURCES OF SOUTHEASTERN FLORIDA 199 (Geological Survey Water-Supply Paper 1255, 1955). However, in only a very small strip of land along the coasts of Florida will this water exhibit tidal fluctuations. In fact, the maximum distance from the shore at which a tidal influence has been detected is 6,680 feet. At that point the tidal fluctuation was approximately .02 foot. *Significant* tidal fluctuations would only occur much closer to shore. *See* Parker & Stringfield, *Effects of Earthquakes, Trains, Tides, Winds, and Atmospheric Pressure Changes on Water in the Geological Formations of Southern Florida*, 45 ECON. GEOLOGY & BULL. SOC'Y ECON. GEOLOGISTS 441, 448 (1950).

This discussion merely points out the superficial nature of the analysis used by the Fifth Circuit to "examine" the ebb and flow jurisdictional concept.

43. 526 F.2d at 1298. Especially persuasive is the court's language that "[w]e find no locality assigned to its [section 10's] prohibitions. . . . There is nothing in the language of the statute nor the logic of its implementation which creates this barrier [the MHTL] beyond which the Corps is ubiquitously powerless." *Id.*

44. *See* Weiszmann v. District Eng'r, United States Army Corps of Eng'rs, 526 F.2d 1302, 1305 (5th Cir. 1976) ("We agree that Canal #2 [a plugged canal] is beyond the jurisdiction of the Corps because there was no evidence of causal impact of that landlocked canal upon navigable waters.").

45. Trial Record at 47.

Using this testimony and, apparently, judicial notice, the district court concluded that the waters of Blackwater Sound were being diverted into the plugged canals and then recirculated back out into the sound as "anoxic, polluted" waters.[46] The testimony of the marine zoologist was simply not sufficient to support such a conclusion.[1] In fact there was no scientific evidence, other than a general assumption, that the water filling the plugged canals did come from Blackwater Sound.[47]

If the Government had been able to demonstrate adequately that the water in the plugged canals came entirely from Blackwater Sound,[48] it would have presented an arguable case that that fact alone established an alteration or modification of the condition and capacity of the sound; a change in the condition of the sound might constitute an obstruction to navigability.[49] Proof would still be necessary, however, to show the amount of the diverson since courts have always required that the effect on navigable condition or capacity be substantial.[50]

It also appears that the Fifth Circuit would have accepted ecological damage as an effect on the condition and capacity of Blackwater Sound if the proper proof had been presented. In a case decided the same day as *Sexton Cove*, the Fifth Circuit in *United States v. Joseph G. Moretti, Inc.*,[51] departed from the traditional

46. 389 F. Supp. at 607.

47. At trial the following exchange took place between the defendant's attorney and an employee of the Corps:

Q. Do those canals right there that are not connected up in any way modify the course, condition, or capacity of Blackwater Sound?

A. Well, I really don't know. I just don't know. They are not connected to the water. So —

Q. But they are full of water, aren't they?

A. Right.

Q. Do you know where that water came from?

A. I presume it came through the rocks from Blackwater Sound.

Trial Record at 52.

48. For a case in which scientific methods such as dye tests, water budget analyses, salinity measurements, and geographic evaluations were used to establish a pattern of water circulation, see PFZ Properties, Inc. v. Train, 393 F. Supp. 1370, 1379-80 (D.D.C. 1975). *See also* H. SVERDRUP, M. JOHNSON & R. FLEMING, THE OCEANS 359-61, 366-68 (1942).

49. *E.g.*, Sanitary Dist. v. United States, 266 U.S. 405, 428 (1925); Sierra Club v. Morton, 400 F. Supp. 610, 623 (N.D. Cal. 1975).

50. *See* Sierra Club v. Morton, 400 F. Supp. 610, 629 n.22 (N.D. Cal. 1975), where the court determined that a withdrawal of 10,900 cubic feet of water per minute from a navigable river had a substantial effect on navigable capacity.

51. 526 F.2d 1306 (5th Cir. 1976). For a synopsis of this case *see* note 13 *supra*.

navigability concepts of section 10 and held that an alteration and modification of the condition and capacity of a navigable water could be brought about by ecological damage.[52] The court in *Moretti* simply could have followed its *Sexton Cove* decision in finding a violation of section 10 since the canals involved in *Moretti* were artificial canals which had been dredged and connected to a navigable body of water.[53] The court chose, however, to ground its decision upon the effect of ecological damage:

> On review we have a voluminous record containing extensive evidence of damaging ecological effects upon navigable waters from Moretti's dredging of canals above MHTL. In light of the pervasiveness of this evidence, there can be no doubt that these activities have altered and modified the condition and capacity of Florida Bay in violation of Section 10 of the Rivers and Harbors Act.[54]

By applying this rationale to the *Sexton Cove* fact pattern, it becomes even more apparent that if the proper evidentiary base had been developed by the Government, the Fifth Circuit would have held that the Corps' jurisdiction applied to the landlocked canals.

The final basis that the district court used to assert the Corps' jurisdiction over the landlocked canals was the evidence of their tidal fluctuations.[55] The district court adopted the theory that waters subject to the ebb and flow of the tide were navigable waters of the United States.[56] Thus, the court apparently reasoned that once the canals began to exhibit tidal fluctuations as they were being

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52. 526 F.2d at 1310.

53. *Id.* at 1308-09.

54. *Id.* at 1310. The Fifth Circuit used as its authority for this interpretation of section 10 its previous decision in Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). In *Zabel* the Fifth Circuit had held that the Secretary of the Army Corps of Engineers, in considering whether to grant a permit under section 10, might make that decision for ecological reasons. *Id.* at 214. The developer in *Zabel* had not challenged the jurisdiction of the Corps over his project but rather the right of the Corps to deny him a permit when the Corps had admitted his project would have no adverse effect on navigation. *Id.* at 201.

From *Zabel*, the *Moretti* court determined that if the Corps could refuse a permit solely because there would be an adverse ecological impact, then it necessarily followed that the Corps could exercise jurisdiction over any activity that would ecologically affect the condition and capacity of navigable waters. *But see* United States v. Cannon, 363 F. Supp. 1045, 1051 (D. Del. 1973).

55. 389 F. Supp. 607. *See also* Weiszmann v. District Eng'r, United States Army Corps of Eng'rs, 7 E.R.C. (BNA) 1523, 1525 (S.D. Fla. 1975).

56. For a discussion of the ebb and flow theory for determination of navigable waters, see text accompanying notes 61-70 *infra*.

dredged, the Corps' jurisdiction attached and further dredging required a permit. The Fifth Circuit reversed this jurisdictional determination of the district court[57] and dismissed the ebb and flow issue in a cursory manner.[58]

A closer examination is necessary to determine if, as the district court concluded, tidal fluctuations in the canals made them navigable waters within the meaning of section 10. No definition of navigable waters is included in the Rivers and Harbors Act. Thus, the judicial definition in use at the time of the passage of the Act was adopted.[59] At that time in history only one definition of navigable waters had been judicially set forth, the definition used to delineate admiralty jurisdiction.[60]

Admiralty jurisdiction, as it was originally adopted in the United States, was confined to the seas and all waters within the ebb and flow of the tide.[61] Subsequently, and prior to enactment of the Rivers and Harbors Act, the United States Supreme Court in a case arising on the Great Lakes extended admiralty jurisdiction to all "navigable" waters of the United States.[62] The Court did not indicate, however, whether the test for admiralty jurisdiction thus became navigability for all waters of the United States or navigabil-

57. 526 F.2d at 1299 & n.14.

58. The court noted that the ebb and flow test was used to determine only whether existing waters were navigable, but that "that is different from creating waters where none previously existed and which do not 'alter' or 'modify.'" *Id.* at 1299 n.14. The ebb and flow test has never been so qualified and has been used simply to determine whether *any* body of water is navigable. *See* text accompanying footnotes 61-70, *infra.*

59. *E.g.*, Hardy Salt Co. v. Southern Pac. Transp. Co., 501 F.2d 1156, 1168 (10th Cir. 1974).

60. *See* Guinn, *An Analysis of Navigable Waters of the United States,* 18 BAYLOR L. REV. 559, 563 (1966); MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water,* 3 FLA. ST. U.L. REV. 511 (1975).

61. *E.g.*, Waring v. Clarke, 46 U.S. (5 How.) 441, 464 (1847); Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175, 183 (1837); The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825). If the influence of the tide were at all present, admiralty jurisdiction existed. Peyroux v. Howard, 32 U.S. (7 Pet.) 324, 343 (1833).

62. Propellor Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851). The *Genesee Chief* case involved a collision on the Great Lakes and a constitutional challenge to a statute which had extended admiralty jurisdiction to the Great Lakes. The Court upheld the statute by concluding that ebb and flow of the tide was simply a descriptive phrase for navigable waters and that, therefore, admiralty jurisdiction validly extended to all navigable waters. *Id.* at 455. For an argument that this equating of ebb and flow of the tide with navigable waters was simply a convenient fiction created by the Court, see MacGrady, *The Navigability Concept in the Civil And Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water,* 3 FLA. ST. U.L. REV. 511, 569-77 (1975).

ity for waters above the intertidal area,[63] and ebb and flow for tidal waters.[64] In a later opinion,[65] the Supreme Court went on to define what constituted navigable waters under this new test and noted in passing that "[t]he doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters."[66]

This case was the final decision of any significance in terms of defining navigable waters prior to enactment of the Rivers and Harbors Act. After passage of the Act, courts took opposite views as to whether the ebb and flow of the tide had any significance in the determination of what were navigable waters under the Act. One group of courts followed strictly the Supreme Court's final pronouncement and held that ebb and flow of the tide had no significance at all.[67] Other courts distinguished the statement of the Su-

63. The term "intertidal area" will be used to refer to that portion of a waterway near the coast which lies between the high water mark and the low water mark. It is used synonymously with the term "tidal waters."

64. There are implications in the *Genesee Chief* opinion to support both positions. At several points the Court spoke of determining whether jurisdiction should be extended above the ebb and flow of the tide. 53 U.S. (12 How.) at 456-57. The Court also noted the unreasonableness of measuring admiralty jurisdiction by the ebb and flow of the tide. *Id.*

Realistically, since the Court considered ebb and flow of the tide and navigability as synonymous tests in intertidal areas, there was no need for the Court to choose between the two. If the Court had felt it necessary to replace the ebb and flow test in intertidal areas, the Court would have expressly overruled all of its previous decisions which had upheld the ebb and flow test. But the Court did not, and overruled only one case, The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825). *Id.* at 458-59.

The *Thomas Jefferson* was the first case in which the Supreme Court addressed the geographic scope of admiralty jurisdiction. Conover, *The Abandonment of the "Tidewater" Concept of Admiralty Jurisdiction in the United States*, 38 ORE. L. REV. 34, 44 (1958). The case involved a suit for seaman's wages brought in admiralty for a voyage on the Missouri River. The Court, in a perfunctory opinion, held that admiralty jurisdiction would not lie since the action occurred chiefly above the ebb and flow of the tide. Thus, when the Court in the *Genesee Chief* overruled the *Thomas Jefferson* decision, it was overruling only the principle that admiralty jurisdiction could not exist above the ebb and flow of the tide and not the ebb and flow test itself.

65. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

66. *Id.* at 563. The *Daniel Ball* case involved a libel filed against a ship engaged in commerce solely upon a river in Michigan. The Court held that admiralty jurisdiction was proper for the action. The Court did not analyze the validity of the ebb and flow test for intertidal waters, but simply dismissed the test outright without providing any authority for rejecting it. *See* Kramon, *Section 10 of the Rivers and Harbors Act: The Emergence of a New Protection for Tidal Marshes*, 33 MD. L. REV. 229, 241 n.70 (1973).

67. United States v. American Cyanamid, 354 F. Supp. 1202, 1204 (S.D.N.Y. 1973); Pitship Duck Club v. Town of Sequim, 315 F. Supp. 309, 310-11 (W.D. Wash. 1970); *cf.* Davis

preme Court as dictum since the case had involved only activities occurring above intertidal waters. These courts concluded that ebb and flow of the tide was still the valid test for intertidal areas.[68] The United States Court of Appeals for the Third Circuit expressed the view that the latter approach is the more logical of the two rationales when it noted:

> Stoeco would have us read *The Daniel Ball* and *The Genesee Chief* as both an expansion and a contraction of admiralty jurisdiction; an expansion to non-tidal waters and a contraction, in tidal waters, to areas of actual or reasonably potential navigability. There is no reason to believe that anything other than an expansion was intended, however. Subsequent decisions of the Supreme Court do not suggest any contraction . . . .[69]

Applied to the facts in the *Sexton Cove* case, the ebb and flow test would appear to establish that the waters in the landlocked canals became navigable waters within the meaning of section 10 when they first began to exhibit tidal fluctuations. Historically, however, ebb and flow of the tide has had the connotation of a direct surface connection and influence from the sea.[70] In turn, the potential for maritime vessels to move in and out with the tide has also always existed. Although the issue has never been considered, it would thus be a logical conclusion that waters exhibiting tidal fluctations, but without this direct connection to the sea, would not conform to the traditional concepts of ebb and flow.

The plugged canals in *Sexton Cove*, by the very existence of their plugs, did not have a direct surface connection to the sea. Thus, without distorting the ebb and flow concept beyond its histor-

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v. United States, 185 F.2d 938, 942 (9th Cir. 1950) (dictum) (ebb and flow of the tide is no limitation or commerce clause power), *cert. denied*, 340 U.S. 932 (1951); Mintzer v. North American Dredging Co., 242 F. 553, 560 (N.D. Cal. 1916) (held that ebb and flow of tide does not *necessarily* demonstrate navigability of waterway), *aff'd* 245 F. 297 (9th Cir. 1917); Chisolm v. Caines, 67 F. 285, 292 (C.C.S.C. 1894) (test for navigability of stream is whether it can be used as a highway of commerce); Iowa-Wisconsin Bridge Co. v. United States, 84 F. Supp. 852, 866 (Ct. Cl. 1949) (dictum) (use as highway of commerce, not ebb and flow of tide, determines navigability), *cert. denied*, 339 U.S. 982 (1950).

68. United States v. Stoeco Homes, Inc. 498 F.2d 597, 609-10 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); United States v. Kaiser Aetna, 408 F. Supp. 42, 50 (D. Hawaii 1976) (dictum); *see* United States v. Baker, 2 E.R.C. (BNA) 1849, 1850 (S.D.N.Y. 1971).

69. United States v. Stoeco Homes, Inc., 498 F.2d 597, 610 (3d Cir. 1974).

70. *See* Waring v. Clarke, 46 U.S. (5 How.) 441, 464 (1847); Peyroux v. Howard, 32 U.S. (7 Pet.) 324, 343 (1833).

ical underpinnings, these canals could not be classified as navigable waters. Although this is the same result as reached by the Fifth Circuit,[71] the difference in analysis is of no little significance.[72]

Section 10 has undergone an extensive reshaping in terms of its judicial construction as a result of the Fifth Circuit decision in *Sexton Cove*. Especially noteworthy is the removal of the MHTL as a limitation on the Corps' jurisdiction over navigable waters. Based on *Sexton Cove*, the Corps now has permit authority over all activities which will effect, either because of ecological or navigational damage, the course, condition, or capacity of navigable waters.

The significance of these changes, however, might be dismissed by some as purely academic in light of the passage of the 1972 Amendments to the Federal Water Pollution Control Act[73] and the judicial constructions given to those Amendments.[74] Under these Amendments the discharge of dredged or fill material into the waters of the United States, including the territorial seas, is prohibited unless authorized by issuance of a Corps permit.[75]

The courts have given an expansive meaning to these prohibitions and have held that they are not limited to the traditional Rivers and Harbors Act concepts of waters that are navigable in fact and waters that are subject to the ebb and flow of the tide.[76] Thus, in recent cases involving challenges to the Corps' jurisdiction over dredge and fill activities where the challenges were based both on the Amendments and section 10 of the Rivers and Harbors Act, the

71. 526 F.2d at 1299.

72. Consider, for example, a shallow intertidal bay which by its nature is not navigable in fact and could not reasonably be made navigable, but is connected by a narrow opening to a navigable bay. Using the Fifth Circuit's analysis, construction activities could take place in the shallow bay and alter the condition, capacity or course of it, and no Corps permit would be required under section 10 of the Rivers and Harbors Act. The Fifth Circuit would require a Corps' permit as a prerequisite to the construction activities only if those activities would have an effect on the outer navigable bay. Such a requirement would entail a substantial burden of proof.

Under the ebb and flow test, however, the shallow intertidal bay would be considered a navigable body of water within the meaning of section 10. Thus, the burden of proof to establish the Corps' jurisdiction would require only a showing of effect by the construction activities on the shallow bay.

73. 33 U.S.C. §§ 1251-1376 (Supp. V 1975).

74. *E.g.*, United States v. Holland, 373 F. Supp. 665, 673 (M.D. Fla. 1974); United States v. Ashland Oil & Transp. Co., 364 F. Supp. 349, 350 (W.D. Ky. 1973).

75. 33 U.S.C. §§ 1311(a), 1344, 1362(6), (7), (12) (Supp. V 1975).

76. *E.g.*, Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

courts have based their affirmations of jurisdiction solely on the Federal Water Pollution Control Act Amendments.[77] Under these analyses, the permit authority under section 10 of the Rivers and Harbors Act, although still a valid requirement, has been relegated to a secondary status because of its narrower scope.[78]

The backup status could suddenly change, however, in view of legislative amendments currently under consideration by Congress.[79] In a bill passed in June of 1976 by the House of Representatives, the definition of navigable waters for purposes of the Federal Water Pollution Control Act would be changed to limit the Corps' dredge and fill jurisdiction to waters presently used or capable of being used in interstate or foreign commerce and to their adjacent wetlands.[80] Although the Senate has not accepted this bill, it has passed a bill of its own which would also restrict, though to a lesser extent, the Corps' jurisdiction under the Federal Water Pollution Control Act.[81] Thus, both branches of Congress intend to restrict to some extent the Corps' jurisdiction under the Federal Water Pollution Control Act. If this does occur, section 10 of the Rivers and Harbors Act will receive renewed emphasis and *Sexton Cove* will be at the forefront of judicial interpretations of its scope.

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77. Leslie Salt Co. v. Froehlke, 7 E.R.C. (BNA) 1311, 1314-15 (N.D. Cal. 1974); United States v. Holland, 373 F. Supp. 665, 676 (M.D. Fla. 1974).

78. *Id.*; *see*, Comment, *Wetlands' Reluctant Champion: The Corps Takes a Fresh Look at "Navigable Waters,"* 6 ENVT'L L. 217 (1975); Note, *Federal Control of Wetlands: The Effectiveness of Corps' Regulations Under § 404 of the FWPCA*, 51 NOTRE DAME LAW., 505 (1976).

79. For an extensive discussion of these proposed amendments see Caplin, *Is Congress Protecting Our Water? The Controversy Over Section 404, Federal Water Pollution Control Act Amendments of 1972*, 31 U. MIAMI L. REV. 445 (1977) (this issue).

80. H.R. 9560, 94th Cong., 2d Sess., 122 CONG. REC. H5280 (1976). *See* COASTAL ZONE MANAGEMENT NEWSLETTER, June 9, 1976, at 6.

81. S.2710, 94th Cong., 2d Sess., 122 CONG. REC. S15185 (1976). *See* COASTAL ZONE MANAGEMENT NEWSLETTER, Sept. 8, 1976, at 2.