

WATER LOG

A Newsletter for the Mississippi-Alabama Sea Grant Consortium

Volume 1, No. 3

Sea Grant Legal Program

July-Sept. 1981

PORTS: CHALLENGE AND OPPORTUNITY

This is a critical time for our nation's ports. The increasing quantity of coal being delivered to U.S. ports for export overseas has created an immediate need for expansion and deepening at many port facilities. Changes in ship size, speed and drafts require ports to provide specialized capital-intensive facilities to accommodate the new vessels. At the same time, public concern for fragile coastal areas is growing. All of this is occurring in the context of Administration proposals to adopt user-fees and cost-recovery mechanisms which will completely change the way ports have traditionally done business.

Congress is currently considering legislative proposals for deepening and expanding ports and for expediting permit procedures and curtailing the environmental review process for dredging harbors and channels. This legislation is part of the Administration's effort to streamline federal regulatory and administrative procedures. Many groups and individuals have voiced opposition to the proposed legislation, arguing that the proposals would virtually eliminate the environmental impact statement process and could result in unsound and environmentally damaging port development projects.

The federal government is vested with constitutional authority to regulate interstate commerce and navigation in this country. State regulation of ports is permissible, as long as it doesn't interfere or conflict with federal programs and policies. This issue of the WATER LOG reviews port legislation, existing and proposed, at the federal and state level. If a comprehensive, effective port policy is to be developed, it is important for all interested persons to understand the legal framework within which ports operate and to understand the issues which must be resolved. It is hoped that this issue will contribute to that understanding.

FEDERAL PORT LEGISLATION

The federal government is primarily responsible for regulation of port construction and operation. It has long been settled that Congress has extensive authority over the Nation's waters under the Commerce Clause of the Constitution. It was determined early in the country's history that the power to regulate commerce necessarily included power over navigation. Congress' regulatory authority over national waters is pervasive and includes authority to regulate ports.

This authority has been exercised through four major pieces of legislation: the Rivers and Harbors Act of 1899, the Ports and Waterways Safety Act of 1972, the Deepwater Port Act of 1974, and the Ports and Tanker Safety Act of 1978.

The Rivers and Harbors Act of 1899. Under section 10 of the Rivers and Harbors Act, a permit is required for dredging and filling operations and construction in navigable waters. Section 13, commonly referred to as the "Refuse Act," prohibits the dumping of refuse into navigable waters without a permit. The Army Corps of Engineers administers the permit system.

Jurisdiction under the Rivers and Harbors Act was originally limited to those waterways that were "navigable" in fact, and permits could only be denied if the proposed project would interfere with navigation in some way. A series of court cases over the years extended the Corps' jurisdiction, however, and established that the Corps could consider ecological and environmental factors in deciding whether or not to grant a permit.

The Corps' jurisdiction was also extended by the Water Pollution Control Act of 1972. Section 404 of the WPCA requires a permit for the discharge of dredged or fill material into

"navigable waters," which are defined broadly as "waters of the United States, including the territorial seas." Again, the Corps administers the permit system.

The Corps' power to demand compliance with section 10 and section 404 extends to "wetlands," which are defined by the Corps' regulations as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typical of life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." (emphasis added.)

Because of their unique siting requirements, almost any port construction, expansion, or channel maintenance project will necessarily affect navigable waters or wetlands. As a result, port officials are constantly presented with section 10 and section 404 permitting problems.

The Ports and Waterways Safety Act of 1972. This legislation was designed "to protect the environmental quality of ports, waterfront areas and navigable waters of the United States." To achieve this, Congress employed a dual approach by establishing marine traffic controls and improving the vessels themselves. In waters that were frequently subjected to congested shipping the Coast Guard was vested with broad authority to regulate marine traffic. This was to be accomplished through the establishment of vessel traffic systems and the prescribing of safety equipment and procedures. Vessel traffic systems are being used to relieve problems in the Puget Sound, San Francisco, New Orleans, Houston-Galveston, Valdez, Alaska, and Berwick Bay, La. areas. This Act also authorizes comprehensive

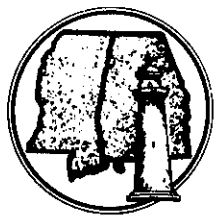
regulations for the design, construction, maintenance and operations of vessels which transport certain bulk cargoes which might harm the marine environment.

The Deepwater Port Act of 1974. Pursuant to this legislation, the Department of Transportation, through the Coast Guard, may issue licenses to facilities which are owned by state or local governmental entities. The EPA and other agencies participate in the Coast Guard's decision regarding permits.

The governors of any adjoining coastal states must approve a deepwater port project, and EPA may veto the issuance of a license if the project's plan conflicts with the Clean Air Act, Water Pollution Control Act, or Marine Protection, Research and Sanctuaries Act. There has been no specific international authorization to the U.S. to grant title to and regulate ports in international waters. However, such authorization might be implied from the 1955 Convention on the Continental Shelf which authorized coastal nations to erect structures for the purpose of exploiting mineral resources.

The Ports and Tanker Safety Act of 1978. The purpose of this legislation was to strengthen the programs instituted by the Ports and Waterways Safety Act of 1972. Although port congestion was somewhat reduced, there was still a problem in some offshore waters. Accordingly, the 1978 statute granted additional authority to the Coast Guard to supervise and control vessels in offshore areas. Regulatory authority was extended to include a cooperative program with neighboring nations in boundary areas as well as lightering operations conducted in offshore waters. The statute authorizes speed limits for vessels, extensive operator qualifications and a federal licensing program for pilots.

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