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THE NATURAL COST OF THE FEDERAL NAVIGATIONAL SERVITUDE — WHO ULTIMATELY PAYS?

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I. INTRODUCTION

The state of Florida has almost 800 miles of sandy beaches, dissected by seventy-two natural and artificial inlets or channels. These beaches are part of a dynamic transport system in which sand is continuously eroded and accreted by natural forces. Most water-borne sand transportation occurs in the littoral zone, an area extending from the shoreline seaward to just beyond the breaker zone.[1] The wave-generated longshore current transports vast quantities of sand parallel to the shoreline, creating the littoral drift.[2] The interruption of the littoral drift by coastal jetty construction, coastal inlet dredging, and offshore spoil disposal results in loss of sand from the littoral system, with concommitant downdrift beach starvation and accelerated erosion.[3] The Florida Department of Natural Resources (DNR), Division of Beaches and Shores, has been actively documenting the effects of coastal inlet construction and maintenance over the past year at specific sites along the Florida coastline. In the recently released *Proposed Comprehensive Beach Management Program for Florida*, the DNR noted that

> with regard to human-related causes of beach erosion along the east coast of Florida, the dominant cause has clearly been due to inlets. . . . Additionally, early dredging practices too frequently included disposal of large quantities of beach-quality sand at sea, resulting in a loss of this valuable resource to the nearshore system.[4]

According to Dr. Robert Dean, Director of the Division of Beaches and Shores, 80 to 85% of human-related coastal erosion is caused

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1. W. Kolb, Issue Statement — Inlet and Channel Sand Transfer, Governor's Office of Planning and Budgeting 1, (June 7, 1983) [hereinafter Issue Statement].

2. DEP'T OF NAT. RESOURCES, A PROPOSED COMPREHENSIVE BEACH MANAGEMENT PROGRAM FOR THE STATE OF FLORIDA (1986) [hereinafter DNR BEACH MANAGEMENT REPORT] (Report provided courtesy of Dr. Robert Dean, Director, Div. of Beaches and Shores, DNR.)

3. *Id.* at 3. According to this report, *natural* causes of erosion, *e.g.*, sea level rise and short- and long-term fluctuations from storms, inlet migration, changes in current patterns, and sand deposition near inlets, account for one-third to one-half of the total sand loss per year from Florida's coast. *Id.* at 7.

4. *Id.* at 7.

by coastal inlet construction and maintenance.[5]

Inlets and navigational channels are natural sand traps, requiring frequent maintenance dredging to allow navigation and commerce to continue. Of the natural and artificial channels in Florida, thirty-eight are maintained by the federal government, and twelve by both federal and local authorities.[6] Standard federal practice has been to dispose of dredged material by dumping it offshore, unless the state or local governments incur the additional cost of placing the spoil on beaches.[7]

Ocean disposal of dredged sand has led to confrontation between the state of Florida and the federal government. Despite extensive documentation of increased coastal erosion due to coastal inlet construction and maintenance activities, the Army Corps of Engineers (Corps) contends that "[c]oastal erosion is caused by storm events, not dredging."[8] Thus, the state and federal governments have conflicting views as to who should be financially responsible for any spoil placed on beaches to alleviate erosion. Because sand is such a valuable nonrenewable resource, state officials consider the disposal of beach-quality sand beyond the littoral system an inexcusable waste. They say that at the very least, beach-quality sand dredged from inlets should be deposited within the littoral zone, if not directly on the beach.[9] Federal officials, especially those from the Corps, maintain that federal law provides that beach-quality sand dredged from navigational channels may be placed on adjacent beaches only if the state absorbs the additional costs of this mode of disposal.[10] State officials have objected to this position on the ground that state laws require that the Corps comply with state permitting requirements or receive concurrence from state agencies that offshore sand disposal is permissible.[11] Further, the state claims that because inlet maintenance is an established federal responsibility, federal law, which requires that all additional costs of erosion from maintenance be borne by the state, is unreasonable and unjust. The state maintains that such a law, in

5. Interview with Dr. Robert Dean, Director, Div. of Beaches and Shores, Dep't of Nat. Resources, in Tallahassee, Florida (Nov. 21, 1986).

6. Issue Statement, *supra* note 1.

7. *Id.*

8. Stephen Calvarese, Comments From Office of Counsel Regarding Walter Kolb's Resolution Requesting Termination of MOU. (Mar. 25, 1986) [hereinafter Calvarese Comments].

9. Issue Statement, *supra* note 1, at 2.

10. *Id.*

11. Interview with John Bottcher, Deputy General Counsel, Florida Dep't of Envtl. Regulation, in Tallahassee, Florida (Nov. 14, 1986).

effect, requires the state to pay for moving its own property and mitigating the impact of a federal project.[12]

Recently, the dispute has attracted statewide attention. In the summer of 1986, Governor Bob Graham and the Cabinet asked Attorney General Jim Smith to determine whether the state should join a lawsuit filed against the Corps by Sarasota businessman Joseph Penner, alleging accelerated property loss caused by maintenance dredging of New Pass from 1982 to 1985.[13] Secretary of State George Firestone urged that the state join the suit because of similar experiences with the Corps throughout Florida.[14] In the fall of 1986, Palm Beach Countywide Beaches and Shores Council members wrote to the Jacksonville district office of the Corps, objecting to the proposed offshore disposal of 150,000 cubic yards of sand from an inlet dredging project.[15] In October, the Florida Department of Environmental Regulation (DER) issued a "first-ever" citation to the Corps for violating state regulations governing spoil disposal from an inlet dredging project.[16] The project which has created the most friction between state and federal officials is the Navy's dredging of the St. Marys River Inlet to construct a channel for Trident submarines stationed at Kings Bay, Georgia and proposed offshore disposal of beach-quality sand by the Corps. The DNR indicated that it was prepared to file suit to enjoin the federal government's dredging activities.[17] A compromise initially was reached through which the federal government agreed to pay $7,000,000 of the estimated $9,000,000[18] cost of placing the dredged sand on the beaches of Amelia Island.[19] Subsequently, negotiations between the federal government and state officials broke off,[20] and for awhile the state considered initiating legal action

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12. Issue Statement, *supra* note 1, at 2.

13. *Lido Homeowners Get OK for Sea Wall*, Sarasota Herald-Tribune, July 30, 1986, at B1, col. 1.

14. *Id.*

15. Susman, *Corps Making Sand Castles of Molehills?*, Palm Beach Post, Sept. 7, 1986, at B3, col. 1.

16. *State Cites Violations on St. Lucie Inlet Job*, Palm Beach Post, Oct. 3, 1986, at B4, col. 1.

17. *State Vows to Sue Navy Over Sand*, Florida Times Union, Oct. 23, 1986, at B1, col. 1.

18. Interview with Clare Gray, Attorney, Governor's Office of Planning and Budgeting (Nov. 13, 1986). For a discussion of the final agreement forged between the federal government and the state, see *supra* notes 136-45 and accompanying text.

19. *State Vows to Sue Navy Over Sand*, *supra* note 17.

20. Telephone interview with Walter Kolb, Attorney, Governor's Office of Planning and Budgeting (Nov. 20, 1986).

against the federal government.[21] However, a workable solution has been reached so that the project may proceed.[22]

The conflict between the federal government, particularly the Army Corps of Engineers, and the state of Florida, raises three issues: First, what federal laws authorize and limit the federal dredging and filling activities in the surface waters of a state? Second, with what Florida laws, if any, must the federal government comply to dredge and fill within the surface waters of the state of Florida, including the Atlantic Ocean to the seaward limits of the state's territorial boundaries? Third, through what authority may the state of Florida compel a federal entity to dispose of beach-quality sand on state beaches at no cost or reduced cost to the state? This article will explore these issues, examine the King's Bay dredging conflict, and analyze the legal positions adopted by the federal and state governments with regard to these issues.

II. Federal Law Governing the Army Corps of Engineers

The Army Corps inlet dredging projects in state waters are authorized and limited by five federal laws: The Rivers and Harbors Act of 1899,[23] the Federal Water Pollution Prevention and Control Act (Clean Water Act) of 1977,[24] the Water Resources Development Act,[25] Section III of the Rivers and Harbors Act of 1968,[26] and the Federal Coastal Zone Management Act of 1972.[27]

A. The Rivers and Harbors Act of 1899: The Federal Navigational Servitude

"Navigational servitude" is the exercise of the state's or federal government's police powers in navigable waters.[28] While both federal and state governments possess the power of the navigational servitude,[29] under the supremacy clause of the United States Constitution[30] federal regulations control in waters "navigable" in the

21. Telephone interview with Andrew Grayson, Asst. General Counsel, Florida Dep't of Nat. Resources (Nov. 20, 1986).

22. Interview with John Bottcher, *supra* note 11.

23. 43 U.S.C. § 1314 (1982).

24. 33 U.S.C. § 1251 (1982).

25. 33 U.S.C. § 426j (1982).

26. 33 U.S.C. § 426i (1982).

27. 16 U.S.C. § 1451-64 (1982).

28. Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915).

29. Comment, *Navigational Servitude as a Method of Ecological Protection*, 75 Dick. L. Rev. 256 (1970).

30. U.S. Const. art. VI, cl. 2. The supremacy clause provides that "the laws of the

federal sense.[31]

The power of the federal government's navigational servitude under the commerce clause of the United States Constitution[32] is embodied in the Rivers and Harbors Act of 1899, which provides:

> The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, *all of which shall be paramount to*, but shall not be deemed to include . . . the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States . . . .[33]

This section grants the federal government authority to control state submerged lands under navigable waterways, and subordinates the state's control of those lands.[34] By virtue of the power granted the Secretary of the Army by 33 U.S.C. section 1, the Corps is charged with upholding the navigational servitude by removal of obstructions, including sediments, from navigable channels.[35]

While the state of Florida does not dispute that the Corps is charged with maintaining navigable waterways, it contends that Corps dredging and filling projects on state submerged lands should be subject to a second (state) tier of review and permitting.[36] The Corps maintains that the United States Supreme Court long ago recognized the paramount nature of its navigational servitude in *South Carolina v. Georgia*.[37] In further support of this po-

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United States . . . shall be the supreme Law of the Land . . . ."

31. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), established the "navigable in fact" standard for determining whether a given waterway is a navigable water of the United States. Navigability in fact must be determined on an ad hoc basis.

32. U.S. CONST. art. I, § 8, cl. 3 provides that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States . . . ."

33. 43 U.S.C. § 1314(a) (1982) (emphasis added).

34. *Id.*

35. Rivers and Harbors Act of 1894, 33 U.S.C. § 1 (1982).

36. Calvarese Comments, *supra* note 8.

37. *Id.*, citing South Carolina v. Georgia, 93 U.S. 4 (1876). In South Carolina v. Georgia, the Court dissolved an injunction restraining the chief and lieutenant colonel of the Army Corps of Engineers from constructing a dam on a fork of the Savannah River at the request of the State of Georgia. The Court expressly recognized the power conferred upon Congress to regulate navigation in navigable waters in the United States. That federal power over navigation and navigable waters is plenary and predominant was recognized in Gibbons v.

sition the Corps cites *Donahue v. Marsh*,[38] a recent federal case which held, in part, that while the Corps, as a federal agency conducting dredging activities in navigable waters, should comply with state requirements as set forth in the Federal Water Pollution Control Act of 1977,[39] that compliance does not waive the paramount navigation authority granted it through the Rivers and Harbors Act of 1899.[40] Accordingly, the Corps contends that it is not bound to comply with state permitting requirements which may conflict with its federal navigational servitude, other than those delineated in federal statutes. Specifically, the Corps has objected to being regulated under chapters 161 and 253, Florida Statutes,[41] which would require that it obtain a permit for dredging on submerged state lands, that it place excavated beach-quality sediment on Florida beaches, and that it apply to the Board of Trustees of the Internal Improvement Trust Fund for an easement or some form of consent prior to dredging on state submerged lands.

B. The 1977 Clean Water Act

Three sections of the Clean Water Act of 1977,[42] sections 313, 401, and 404, control Corps dredging and filling activities in federal and state waters.

Section 313 specifically addresses control of pollution emitted by federal facilities or activities, including dredging and filling activities by the Corps. That section provides that

> [e]ach department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government . . . engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, admin-

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Ogden, 22 U.S. (9 Wheat.) 1 (1824).

38. No. 86-3205 (M.D. Fla. Mar. 21, 1986), *aff'd* 17 ELR 20654 (11th Cir. 1986). In *Donahue*, the Federal District Court for the Middle District of Florida refused to enjoin Corps maintenance dredging of Gordon Pass, despite plaintiffs' claim that such dredging would aggravate erosion of their property. The court noted that Corps compliance with state requirements for discharge of dredged or fill material did not waive or impair its paramount authority to maintain navigation under the commerce clause. *Id.* at 9.

39. 33 U.S.C. § 1341 (1982).

40. 43 U.S.C. § 1314 (1982).

41. *See* Memorandum from Harrison D. Ford, District Council, Army Corps of Engineers, Jacksonville District, to Kevin X. Crowley, General Counsel, Dep't of Nat. Resources (May 27, 1986).

42. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified at 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985)).

> istrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity . . . . The preceding sentence shall apply . . . to any requirement whether substantive or procedural (including . . . any requirement respecting permits and any other requirement, whatsoever) . . . .[43]

Thus, section 313 generally mandates that the Corps, as a federal facility discharging into state waters, must comply with state requirements concerning the control and abatement of pollution, including the securing of state permits as necessary.

Section 401 requires that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . ."[44] The Corps, therefore, is obligated under section 401 to secure water quality certification from DER pursuant to chapter 403, Florida Statutes, to obtain federal permits necessary to undertake general maintenance dredging of inlets along Florida's coast.

Section 404(t) of the Clean Water Act of 1977, under which the Corps issues itself permits for discharge of dredged and fill materials into navigable waters, provides that

> [n]othing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation.[45]

This language was adopted by Congress in the 1977 amendments to the Clean Water Act specifically to overcome the ruling in *Minnesota v. Hoffman*[46] that section 404 exempted the Corps from

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43. 33 U.S.C. § 1323(a) (1982).

44. 33 U.S.C. § 1341(a)(1) (1982).

45. 33 U.S.C. § 1344(t) (1982). Under section 404, the Secretary of the Army, acting through the Chief of Engineers, is authorized to issue permits for the discharge of dredged or fill materials into navigable waters at specified disposal sites.

46. 543 F.2d 1198 (8th Cir. 1976). In *Hoffman*, the State of Minnesota sought to compel

state water quality permitting requirements relating to the discharge of dredged spoil from federal navigation projects.[47] Thus, under the 1977 Clean Water Act, the Corps is bound by the same requirements as any other discharger into public waters and is not exempt from state pollution abatement requirements. Only in cases where the Corps is performing dredging of access channels for critical military vessels could its navigational servitude authority limit section 404(t), as it applies to maintenance dredging.[48]

The Corps does not dispute this, but steadfastly maintains that because the United States Supreme Court held in *Hancock v. Train*[49] that the waiver of federal supremacy should be narrowly construed to apply only to substantive provisions of state statutes having analogous federal statutory provisions,[50] it is neither bound under chapter 161, Florida Statutes, to dispose of dredged beach-quality sand by placing it on state beaches, nor bound under chapter 253, Florida Statutes, to obtain easements from the Board of Trustees for use of state submerged lands.[51] In the Corps' view, because such compliance is not expressly required by federal law, the state has no means of enforcing those statutes against the Corps.[52]

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the Corps to comply with state water quality standards and effluent limitations in the maintenance dredging of a navigational channel in the Mississippi River and harbors on Lake Superior and another navigable lake. The Court of Appeals for the Eighth Circuit examined the legislative history of sections 313 and 404 of the 1972 amendments to the Clean Water Act and declined to subject the disposal of dredge material by the Corps to state law, finding a "clear and unambiguous" congressional mandate that such activity requires state authorization. *Id.* at 1206-07.

47. A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, Serial No. 95-14, U.S. Government Printing Office (1978), at 361.

48. *Id.* at 475. *See infra* notes 138-45 and accompanying text for a discussion of dredging for the passage of critical military vessels at St. Marys Inlet, Georgia.

49. 426 U.S. 167 (1976). In Hancock v. Train, the Attorney General of Kentucky filed suit in federal district court seeking declaratory and injunctive relief to force EPA and other federal department and agency officials operating federal facilities emitting air pollutants in Kentucky to secure state operating permits. The district court granted defendants' motion for summary judgment, and the Court of Appeals for the Sixth Circuit affirmed. On certiorari, the Supreme Court affirmed, holding that federal facilities operating within state boundaries are not required to secure state operating permits because Congress did not manifest by "clear congressional mandate" that such facilities were intended to be subject to state operational permitting requirements. *Id.* at 179 (citing Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954)).

50. *Id.* at 187.

51. Interview with John Bottcher, *supra* note 11; Interoffice Memorandum, Dep't of Nat. Resources (Mar. 17, 1986); Memorandum from Harrison Ford to Kevin Crowley, *supra* note 41.

52. *But see infra* notes 71-74 and accompanying text, which discusses state statute enforcement via the Florida Coastal Zone Management Plan, chapter 380, Florida Statutes

C. *The Water Resources Development Acts of 1976 and 1986*

Much of the current conflict between the Corps and the state has centered around the question of whether the state has authority to compel the Corps to place sand dredged from navigational inlet maintenance projects on state beaches, at little or no additional cost to the state.

The Water Resources Development Act of 1976[53] provides that the Corps, though the Secretary of the Army, is authorized

> upon request of the State, to place on the beaches of such State beach-quality sand which has been dredged in constructing and maintaining navigation inlets and channels adjacent to such beaches, if the Secretary deems such action to be in the public interest and *upon payment of the increased cost thereof above the cost required for alternative methods of disposing of such sand.*[54]

The Corps relies on this provision to support its position that it is bound by federal law to dispose of all dredge spoils, including beach-quality sand, by the least costly method, usually dumping at sea, unless the state pays the additional costs of pumping the sand onto the beaches. The Corps maintains that the energy costs of additional material handling significantly increase the costs of onshore spoil disposal.[55] According to the Corps, the state must pay if the state wants its beaches renourished.

Historically, the state has attacked this argument on two grounds. First, the state argues that the Corps should consider the costs attributable to beach erosion or starvation resulting from offshore sand disposal in determining its costs under 33 U.S.C. section 426j. According to the state, nothing in the statute's legislative history precludes such an interpretation.[56] Further, the state contends that under the National Environmental Policy Act of 1969,[57]

(1985).

53. Pub. L. No. 94-587, 90 Stat. 2917 (1976) (codified at 33 U.S.C. §§ 426j-m (1982)).

54. *Id.* at 2931 (codified at 33 U.S.C. § 426j (1982)) (emphasis added).

55. Memorandum from Hugh Robinson, Brigadier General, Deputy Director of Civil Works, Army Corps of Engineers, to David Johnson, Governmental Asst. for the State of Florida (June 9, 1980); Memorandum from Harrison Ford, Army Corps of Engineers, to Andrew Grayson, Asst. Gen. Counsel, Dep't of Nat. Resources (July 15, 1986).

56. Memorandum from Andrew Grayson, Asst. Gen. Counsel, Dep't of Envtl. Reg., to Harrison Ford and Lawrence Green, Army Corps of Engineers (June 24, 1986) [hereinafter Grayson Memo].

57. 42 U.S.C. § 4321 (1982).

the Corps is required to consider environmental and economic costs of offshore disposal. In the state's estimation, that analysis would not preclude onshore disposal for sand conservation.[58]

The state also argues that under section 111 of the Rivers and Harbors Act of 1968,[59] the Corps is authorized to construct projects for mitigating shoreline damages attributable to federal navigation works.[60] Under section 111 the cost of installing, operating, and maintaining such projects is borne entirely by the federal government.[61] Despite a $1,000,000 first-cost limitation on such projects, the state maintains that, in many cases, that amount would cover onshore disposal costs.[62] The Corps, however, construes the Act's first-cost limitation as *including* the cost of the entire project, not merely the cost of mitigation.[63] Accordingly, the Corps contends that 33 U.S.C. section 426j and 33 U.S.C. section 426i are consistent, requiring the least costly disposal method for projects costing over $1,000,000, unless Congress expressly authorizes additional money for onshore disposal.[64]

This conflict may have been resolved by the passage of the Water Resources Development Act of 1986,[65] amending the Water Resources Act of 1976.[66] Section 101(c) of the 1986 Act provides that construction costs or costs of measures taken to prevent or mitigate erosion or shoaling damage attributable to federal navigation works are to be shared in the same proportion as the cost-sharing provisions applicable to the project causing the erosion or shoaling. Thus, nonfederal interests will pay ten percent of the cost of construction (or mitigation) of the portion of the project having a depth not exceeding twenty feet, twenty-five percent of the costs of the portion between twenty and forty-five feet deep and fifty

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58. Grayson Memo, *supra* note 56.

59. Pub. L. No. 90-483, 86 Stat. 1459 (1968) (codified at 33 U.S.C. § 426i (1982)).

60. The Corps disputes the state's contention that downdrift beach erosion is caused by inlet construction, maintenance, and offshore disposal. *See* DNR BEACH MANAGEMENT REPORT, *supra* note 2; *see also State Vows to Sue Navy Over Sand*, *supra* note 17; Calvarese Comments, *supra* note 8.

61. 33 U.S.C. § 426i (1982).

62. Grayson Memo, *supra* note 56.

63. Letter from Harrison Ford to Andrew Grayson (July 14, 1986).

64. Given the high costs of dredging, very few projects would fall within the Corps' narrow definition of a 33 U.S.C. § 426i project.

65. Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (1986). This was known as "House Bill 6," until it was signed into law by President Reagan on Monday, November 17, 1986. Telephone interview with Walter Kolb, Governor's Office of Planning and Budgeting (Nov. 20, 1986).

66. Pub. L. No. 94-587, 90 Stat. 2917 (1976) (codified at 33 U.S.C. §§ 426j-m (1982)).

percent of the cost of the portion exceeding a fifty foot depth.[67] State officials are optimistic that under this provision the state will be better able to ensure that beach-quality sand is not lost through offshore disposal.[68]

D. The Federal Coastal Zone Management Act of 1972

Corps activities on state submerged lands are also subject to review under the Federal Coastal Zone Management Act of 1972 (FCZMA).[69] Section 307(c)(1) of the Act requires that each federal agency conducting activities directly affecting the coastal zone conduct those activities in a manner which is, *to the maximum extent practicable*, consistent with approved state management programs. Under the current administration the most economically feasible methods of conducting activities generally prevail, even if those methods are inconsistent with state coastal zone management plans.[70] Thus, as a practical matter, federal agencies conducting coastal zone activities are given considerable latitude in complying with the FCZMA.

Florida has an approved coastal zone management plan, authorized and summarized in sections 380.21 through 380.23, Florida Statutes, which was developed and approved pursuant to the requirements of section 305 of the FCZMA. Accordingly, under section 307(c)(1), in order to dredge in Florida's coastal zone the Corps must certify in its application for Clean Water Act certification that its project is consistent with Florida's program. The Corps also must provide DER, as lead coastal management agency, a copy of this certification. The Department, along with other agencies through the state's clearinghouse, then determines whether the Corps' proposed activities are indeed consistent with those authorized in the state program. DER is not authorized to issue state permits or water quality certification under section 401 of the Clean Water Act if any network agency finds the proposed activity inconsistent with the state program. The Corps may appeal to the Secretary of Commerce to override the state's inconsistency determination upon finding that the activities are consistent

67. *Id.*

68. Interview with John Bottcher, *supra* note 11.

69. Pub. L. No. 92-583, 86 Stat. 1280 (1972).

70. Interview with Clare Gray, *supra* note 18. The Federal Coastal Zone Management Office currently takes the position that only economic factors should be considered in a consistency determination, unless environmental results of a proposed project would be egregious. *Id.*

with FCZMA objectives or that they are otherwise necessary in the interest of national security.[71]

DER is the state agency which actually issues the consistency concurrence or denial.[72] However, since Florida's coastal zone plan consists of a "network" of twenty-five statutes,[73] each agency authorized to administer and enforce statutes which are part of the approved coastal management program may determine that the proposed activity is inconsistent with the approved program. In this situation, DER may not agree that the activity is consistent.[74]

Currently, DNR contends that because chapter 161, Florida Statutes, is included in the Coastal Management Plan network and the Corps' proposed dredging and spoil disposal is inconsistent with the requirements of that chapter, the Corps must be denied water quality certification. Thus, while the Corps refuses to acknowledge that DNR has authority to compel onshore disposal of beach-quality sand, the DNR does have some means of control via the consistency program.

In summary, the Corps, as a federal agency conducting dredging and spoil disposal in navigable waters of the United States, has a paramount navigational servitude under 43 U.S.C. section 1314. The Corps must comply with state and federal water quality requirements under sections 401 and 404(t) of the Clean Water Act of 1977, but is not required to comply with other state permitting standards in the absence of an express waiver of federal supremacy. Thus, since the Corps engages in dredging pursuant to a federal navigational servitude, the state cannot mandate that the Corps bear the cost of onshore disposal of beach-quality sand. Until recently, federal law required that the Corps dispose of dredge spoil in the least costly manner, unless an involved nonfederal party bore the entire additional cost of onshore disposal. However, the recently enacted Water Resources Development Act of 1986 provides for sharing of mitigation costs, including costs of onshore sand disposal to alleviate beach erosion and starvation. This legislation should facilitate onshore sand disposal in the future. Under the Federal Coastal Zone Management Act of 1972, the Corps, as a federal agency, must comply with the consistency requirements set forth in section 307(c)(1) of that Act; section 307(c)(1) allows a

71. Pub. L. No. 92-583, 86 Stat. 1280 (1972)(codified at 16 U.S.C. § 1456(c)(3)(a) (1982)).

72. FLA. STAT. § 380.23(2) (1985).

73. FLORIDA COASTAL MANAGEMENT PROGRAM, FINAL ENVIRONMENTAL STATEMENT (Aug. 1981) [hereinafter FINAL ENVTL. STATEMENT].

74. FLA. STAT. § 380.23(2) (1985).

state consistency check which may only be overridden in two aforementioned instances.

II. State Regulation of Dredging and Filling by the Army Corps

The state regulates dredging and filling, including that done on sovereign lands and in waters of the state, through chapters 403, 161, and 253, Florida Statutes.[75] While the Corps recognizes that it must obtain state water quality certification under chapter 403, Florida Statutes, it has steadfastly objected to the state's position that it also is required to obtain permits or authorization under chapters 161 and 253, Florida Statutes.[76]

Nevertheless, in April of 1986, the Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund, determined it to be in the state's best interest to undertake a formal review pursuant to chapters 161 and 253, Florida Statutes, of all Corps dredging activities in Florida waters where beach-quality sand is not to be placed upon the state's sandy beaches or otherwise used for beach renourishment.[77] This section explores the legal basis for the state's position in this conflict.

A. Department of Environmental Regulation's Authority to Regulate Army Corps Dredging in Waters of the State

Under sections 401 and 404(t) of The Clean Water Act of 1977 and the FCZMA, the Corps must meet state water quality standards to be permitted to dredge and fill in waters of the state, including state submerged lands.[78]

Section 403.913, Florida Statutes, provides that "[n]o person shall dredge or fill in, on, or over surface waters without a permit from the department, *unless exempted by statute or department rule.*"[79] Thus, the Corps must comply with rules and regulations setting forth permitting requirements for dredging and filling activities for surface waters, including the Atlantic Ocean out to the

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75. Cloud & Sellers, Jr., *Federal, State and Local Environmental Control Agencies*, 1 Fla. Envtl. & Land Use L., 1-1, 1-21, 1-26 (1986).

76. 1979 Memorandum of Understanding (MOU) between DER, DNR, Trustees, Army Corps; 1983 Supplement; Position Paper: Proposal to Terminate MOU (Corps, 1986); Memorandum from Harrison Ford to Kevin Crowley (May 27, 1986); Letter from Col. Charles Myers, Army Corps of Engineers, to Gov. Bob Graham (Aug. 29, 1986).

77. Board of Trustees Agenda, Oct. 21, 1986, at 6-7, item 8.

78. *See supra* notes 42-45, 65-74 and accompanying text.

79. Fla. Stat. § 403.913(1) (1985) (emphasis added).

seaward limit of the state's territorial boundaries, plus rivers and natural tributaries.[80]

For the Corps to secure the necessary water quality certification, it must provide DER with "reasonable assurance" that water quality criteria and standards will not be violated by its activities.[81] The criteria and standards are set forth in chapter 17-3, Florida Administrative Code.[82]

The Corps concurs with the state's insistence that water quality certification must be secured for its dredging activities only because sections 401 and 404 of the Clean Water Act of 1977 and section 307(c)(1) of the FCZMA so provide. The Corps and the state have divergent views regarding the extent of Corps compliance required by the Clean Water Act. The Corps contends that water quality certification under chapter 403 cannot be made contingent upon compliance with chapter 161 requirements mandating coastal construction permits for maintenance dredging and use of beach-compatible sediment for renourishment.[83]

However, under the 1984 Henderson Wetlands Act,[84] amending chapter 403, the state may consider whether a project will adversely affect navigation or water flow, or will cause harmful erosion or shoaling in determining whether a project is "not contrary to the public interest," as required under section 403.918(2), Florida Statutes. Thus, DER now may address at least some concerns covered by chapter 161 in determining whether to issue water quality certification for coastal inlet dredging and spoil disposal.

Under Florida's Coastal Zone Management Plan,[85] DER is the lead agency. The Department is granted authority to concur that an activity requiring a permit or license subject to federal consistency review is consistent with the state's approved program.[86] The Corps must submit to consistency review and obtain state water quality certification when dredging and filling in waters of the state because those activities require permits under sections 401

80. FLA. ADMIN. CODE ANN. r. 17-12.030(1) (1985).

81. FLA. STAT. § 403.918(1) (1985).

82. FLA. ADMIN. CODE ANN. r. 17-3 (1985).

83. 1979 MOU and 1983 Supplement; Letter from Col. Charles Myers to Gov. Bob Graham, *supra* note 76.

84. 1984 Fla. Laws ch. 84-79, § 4 (amending FLA. STAT. § 403.906, codified at FLA. STAT. § 403.918(2) (1985)). For a comprehensive discussion of the Henderson Act, see Smallwood, Alderman, & Dix, *The Warren S. Henderson Wetlands Protection Act of 1984: A Primer*, 1 J. LAND USE AND ENVTL. L. 211 (1985).

85. FLA. STAT. ch. 380 (1985).

86. FLA. STAT. § 380.23(1) (1985).

and 404 of the Clean Water Act.[87] DER may not determine that an activity is consistent with the state coastal management plan if any other agency with significant analogous responsibility determines that the activity is inconsistent with the state program.[88] Thus, with regard to the instant conflict, chapter 380 provides a means by which DNR can block the issuance of water quality certification by DER for Corps navigational projects in coastal waters if it can demonstrate that the proposed activities are at odds with chapter 161.[89]

To date, despite the tension between the state and the Corps, DER has managed to maintain a relatively cooperative working relationship with the Corps.[90] For a period of time in late 1986, it appeared that the relationship would sour when the Department issued an intent to deny the Corps water quality certification in connection with the St. Marys Inlet (King's Bay) dredging on determination that the project was inconsistent with the state coastal management program, specifically those requirements under chapter 161 relating to beach renourishment.[91] However, the parties forged an agreement,[92] thus avoiding a lawsuit.

B. Department of Natural Resources' Authority to Regulate Army Corps Dredging Activities on State Sovereignty Lands

The state maintains that the Corps is bound legally to comply with the requirements of chapter 161, Florida Statutes, as administered by the Department of Natural Resources.[93]

DNR relies on section 161.041, Florida Statutes, which provides:

> If any . . . *public agency* desires to make any coastal construction or reconstruction or change of existing structures, or any construction or physical activity undertaken specifically for . . . *ex-*

87. FLA. STAT. § 380.23(3)(c)(3) (1985).

88. FLA. STAT. § 380.23(2) (1985).

89. Chapter 161 is one of twenty-five state statutes composing the Coastal Zone Management Plan Network. FINAL ENVTL. STATEMENT, *supra* note 73.

90. Interview with John Bottcher, *supra* note 11.

91. Telephone interview with Walter Kolb, *supra* note 20.

92. *See* Second Supplement, Memorandum of Understanding Among the United States Army Corps of Engineers, State of Florida Department of Environmental Regulation, State of Florida Department of Natural Resources, and The Board of Trustees of the Internal Improvement Trust Fund; National Environmental Policy Act Final Record of Decision to Proceed Modification to St. Marys River Entrance Channel Dredging Program, Fleet Ballistic Missile Submarine Support Base, King's Bay, GA, 51 Fed. Reg. 44,938 (1986).

93. 1979 MOU and 1983 Supplement, *supra* note 73; Proposed MOU to replace 1979 MOU Supplement, *supra* note 73.

> *cavation or maintenance dredging of inlet channels*, or other deposition or removal of beach material . . . upon sovereignty lands of Florida, a coastal construction permit *must* be obtained from the Department of Natural Resources prior to the commencement of such work.[94]

According to DNR, the Corps' dredging of coastal inlets is clearly within the purview of section 161.041. Furthermore, section 161.042, Florida Statutes, authorizes the Department to

> direct that any person, or *any public body or agency, responsible for the excavation of sandy sediment* as a result of any activity conducted to *maintain navigable depths within or immediately adjacent to any coastal barrier beach inlet within sovereignty lands* shall, after receipt of written authorization from the Department of Environmental Regulation relating to the deposition of spoil material from the excavation pursuant to chapters 253 and 403, *use such sediment for beach nourishment as prescribed by the division.*[95]

Thus, under sections 161.041 and 161.042, DNR maintains that the Corps must obtain coastal construction permits and must replenish beaches adjacent to inlets with dredged beach-quality materials. DNR cites in support of its position[96] the new law passed during the 1986 Regular Legislative Session requiring such replacement *at no cost to the state* in a quantity equaling the natural net annual longshore sediment transport.[97] However, the Corps refuses to recognize the state's authority under chapter 161,[98] arguing that the waiver of supremacy embodied in section 401 of the Clean Water Act is to be construed narrowly to require that the Corps only need obtain state water quality certification.[99]

DNR recognizes that even if the Corps does not obtain coastal

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94. FLA. STAT. § 161.041 (1985) (emphasis added).

95. FLA. STAT. § 161.042 (1985) (emphasis added).

96. *See Kings Bay Dredging Worries Graham*, Florida-Times Union, July 15, 1986, at B1, col. 1. Governor Graham, in a letter to Capt. A.K. Riffey, head of the channel construction project at King's Bay, "cited [the] law passed by the 1986 Florida Legislature that requires sand dredged from inlets to be replaced on downdrift beaches at no cost to the state." *Id.* at B3, col. 1.

97. FLA. STAT. § 161.142 (Supp. 1986).

98. Memorandum from Harrison Ford, to Kevin Crowley, *supra* note 41.

99. Interview with John Bottcher, *supra* note 11; *see* Hancock v. Train, 426 U.S. 167 (1976), in which the Supreme Court stated that "authorization of state regulation is found only when and to the extent . . . specific congressional action makes this authorization . . . clear and unambiguous." *Id.* at 179.

construction permits, DNR can still influence the issuance of water quality certification by DER under sections 162.042 and 380.23(2), Florida Statutes. Section 161.042 provides that DNR is authorized to direct onshore disposal of inlet dredging spoils upon issuance of water quality certification by DER, and section 380.23(2) provides that DER will not concur if an agency with significant analogous responsibility makes a determination of inconsistency. Thus, DNR does have statutory means to obtain Corps compliance, although it maintains that the Corps actually must obtain coastal construction permits under chapter 161.[100]

C. Authority of The Board of Trustees of the Internal Improvement Trust Fund Over Army Corps Dredging Activities on State Submerged Lands

Title to all sovereign tidal lands is vested in the Board of Trustees of the Internal Improvement Trust Fund pursuant to chapter 253, Florida Statutes.[101] Sovereign tidal lands include all coastal and intercoastal waters of the state.[102] Accordingly, the Board of Trustees is charged with the management, control, conservation, and protection of state tidal lands,[103] and has the authority to require that parties excavating those lands obtain a lease, license, easement, or other form of consent authorizing the excavation.[104]

The Board of Trustees maintains that these sections bind the Corps as they would any other person; therefore, the Corps must obtain some form of consent from the Trustees to maintain channels on sovereign tidal lands.[105] The Corps does not recognize the Trustees' authority for the same reason it refuses to comply with chapter 161: the federal navigational servitude is paramount law which Congress must expressly and specifically waive in order for

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100. Interoffice Memorandum from Andrew Grayson, Asst. Gen. Counsel, Dep't of Nat. Resources, to the Governor and Cabinet (Mar. 17, 1986). It must be noted that in order for the Corps to meet the federal consistency requirement of section 307 of Federal Coastal Zone Management Act and section 380.23, Florida Statutes, authorizing Florida's Coastal Zone Management Plan, the Corps must only comply with the requirements of the 1983 statutes, without regard to later amendments. Thus, the Beach Renourishment Act, chapter 86-138, amending section 161.042, Florida Statutes, may *not* be enforced against the Corps through the consistency requirement.

101. FLA. STAT. § 253.03(1)(d)(e) (1985).

102. FLA. STAT. § 253.12(1) (1985).

103. *Id.*

104. FLA. STAT. § 253.77 (1985).

105. Memorandum from Andrew Grayson, *supra* note 100.

the Corps to be bound by state law.[106]

The Board of Trustees, like DNR, has some statutory control over Corps activities through the consistency requirements of the federal and Florida coastal zone management programs, because chapter 253 is one of the statutes comprising Florida's network plan. Thus, DER may, at some point, refuse to issue water quality certification to the Corps for maintenance dredging unless it complies with the requirements of chapter 253.[107]

The conflict continues over the comparative authority of federal and state law concerning the Corps' inlet maintenance dredging projects on state submerged lands. The state argues that the Corps must obtain permits pursuant to sections 403.913, 161.041, 161.042, and 253.77, Florida Statutes, to conduct these dredging projects. More recently, the argument has focused on the section 161.042 beach replenishment requirements in an effort to compel the Corps to dispose of beach-compatible spoils onshore, at no cost or reduced additional cost to the state. The Corps advances the paramount nature of the federal navigation servitude as the basis for its refusal to comply.

III. THE MEMORANDUM OF UNDERSTANDING: AN ATTEMPT AT REASONABLE COMPROMISE

This conflict between the state and the Corps is not new. Despite their resolute positions, in 1979 DER, DNR, the Board of Trustees, and the Corps entered into a Memorandum of Understanding (MOU) in an attempt to reach a working solution to the problem.[108] The MOU was supplemented and revised in 1983.

The original MOU provided an extensive procedure through which the Corps would obtain state approval before commencing activities within the territorial waters of the state of Florida.[109] Under the terms of the MOU, the Corps agreed to apply for water quality certification and other appropriate state permits or author-

106. Memorandum from Harrison Ford to Kevin Crowley, *supra* note 41; letter from Col. Charles Myers to Gov. Bob Graham, *supra* note 76.

107. To date, the Corps has never been denied water quality certification for refusal to obtain consent from the Board of Trustees under chapter 253. However, statutory basis for such denial does exist via chapter 380, Florida Statutes, through the consistency determination. FLA. STAT. ch. 380 (1985).

108. 1979 MOU, *supra* note 76. The MOU expressly stated that it was executed in the spirit of intergovernmental cooperation, and that the parties involved did not waive their legal positions. *Id.* at 2, par. 4.

109. *Id.* at 2-4.

ization.[110] However, neither the necessary permits nor authorization were specifically enumerated in the MOU. Although the Corps did not formally apply for chapter 161 and chapter 253 permits, it was required to pay the application fees.[111] The original MOU provided for field meetings between the Corps, DER, and other affected agencies to assist the Corps in completing the necessary applications and to review impacts of a proposed project.[112] Initially, applications were submitted only to DER.[113] Under the 1983 Supplement, however, the Corps was required to submit a duplicate package to DNR. Both DNR and the Board of Trustees would notify DER of consent or objection to any portion of the project.[114] As lead agency in the application process, DER was charged with resolving all conflicts that arose. Further, DER summarized biological and physical data provided by the Corps for the project and distributed that information to other governmental entities.[115] Under the 1983 Supplement, the Corps was obliged to furnish DER with a statement of consistency with the state coastal zone management program. Issuance of water quality certification by DER indicated concurrence that the proposed activity was consistent with the FCZMP.[116] Finally, the 1979 MOU as amended by the 1983 Supplement provided that the Corps and DER undertake joint notification of the public and property owners within one thousand feet of the proposed activity.[117] However, since 1979, and especially recently, the MOU proved inadequate in avoiding conflict. The MOU's failure was due, in part, to lack of cooperation by both sides. It also was due to the state's increasing awareness of the severity of its beach erosion problems and its decreasing patience with what it had perceived as an unresponsive attitude on the Corps' part.[118]

In a continuing effort to foster cooperation, the state drafted another MOU which would have required the Corps to apply for permits under sections 403.913, 161.041, 161.042, and 253.77, Florida Statutes, for a variety of dredging and construction activities

110. 1979 MOU, *supra* note 76.
111. *Id.* at 3.
112. *Id.*
113. *Id.*
114. 1983 Supplement to 1979 MOU, *supra* note 76.
115. *Id.*
116. *Id.*
117. *Id.*
118. Interview with Thomas Tomasello, Attorney, Office of the Secretary of State of Florida (Nov. 13, 1986).

within Florida's territorial waters and submerged sovereign lands.[119] That MOU was rejected by the Corps for requiring it "to obtain state permits and real estate licenses for congressionally authorized work."[120]

For awhile, a lawsuit over the numerous proposed and ongoing Corps dredging projects seemed unavoidable.[121] However, in December 1986, the parties drafted a Second Supplement to the 1979 MOU,[122] which purportedly is mutually agreeable but remains unsigned.[123] That Supplement alters the original MOU and 1983 Supplement only with respect to inlet maintenance dredging where beach-quality sand is not proposed to be placed on state beaches or used for beach renourishment. For those projects, within sixty days of receipt of the application, DNR agrees to submit to DER and the Corps an analysis of the material to be dredged, including information on its beach compatibility, suggested best location for spoil placement, and an assessment of the parties' relative responsibilities for additional costs of recommended site disposal. If, after meeting to discuss the report, the parties cannot reach an amicable solution, the Corps has agreed to submit a written report to DER and DNR detailing its position. Ultimately, the Corps may be called upon to explain its position to the Governor and Cabinet.[124] While the purpose of that provision is to include the state's top executive officers in the negotiation process, the practical ramifications of that inclusion are as yet undetermined.[125]

IV. THE KING'S BAY PROJECT: IS A LAWSUIT IMMINENT?

The proposed deepening of the St. Marys Inlet to create a navigational channel for Trident submarines bound for the King's Bay Naval Base has caused serious disagreement and intense negotiation between the Navy, the Corps as contractor, and the state.[126]

The Navy and the Corps initially proposed offshore disposal of almost all of the spoil material, including an estimated 3.1 million

119. Draft of Proposed MOU to replace the 1979 MOU and 1983 Supplement.

120. Letter from Col. Charles Myers to Gov. Bob Graham, *supra* note 76.

121. Interview with Clare Gray, *supra* note 18.

122. Second Supplement to 1979 MOU, *supra* note 92.

123. Interview with John Bottcher, Deputy General Counsel, Florida Dep't of Nat. Resources, in Tallahassee, Florida (Feb. 3, 1987).

124. Second Supplement to 1979 MOU, *supra* note 92.

125. Interview with John Bottcher, *supra* note 123.

126. Interview with John Bottcher, *supra* note 11; *see State Vows to Sue Navy Over Sand*, Florida Times-Union, Oct. 23, 1986, at B-1, col. 1.

cubic yards of beach-quality sand.[127] The state objected to this plan, maintaining that the sand should be placed on the severely eroded beaches at the southern end of Amelia Island. Further, the state maintained that the federal government should pay at least part of the cost of the onshore disposal since changes in the St. Marys Inlet's morphology have caused an enormous loss of sand from the littoral system,[128] and the state could ill afford to lose another 3.1 million cubic yards to offshore disposal.

In an effort to reach a workable solution, the Navy, Corps, DER, DNR, and Board of Trustees drafted a King's Bay specific MOU in 1979, extensively paralleling the general 1979 MOU. However, that MOU was never signed. Until late November 1986, it appeared that a compromise solution had been reached which would provide that the federal government pay $7,000,000 of the estimated additional $9,000,000 needed to pump the sand onto south Amelia Island beaches; the state would pay the remaining $2,000,000 in disposal costs.[129] However, the Corps decided that this was not a viable solution,[130] and the state considered several avenues of legal recourse.[131] Counsel for DER indicated that the state was prepared to seek a preliminary injunction in federal court to halt the dredging while the suit was litigated.[132] The state was prepared to argue that the Navy did not comply with the National Environmental Policy Act,[133] in that it failed to consider environmental as well as economic factors in drafting its Environmental Impact Statement. The state was also prepared to argue that "requirements" under section 401 of the Clean Water Act of 1977 means that the Navy and Corps must adhere to state permitting requirements in a comprehensive sense; that is, they must obtain permits under both

127. Final Third Supplement to the Environmental Impact Statement for Preferred Alternative Location for a Fleet Ballistic Missile Submarine Support Base at Kings Bay, Georgia St. Marys Entrance Channel (Sept. 1986); *see State Vows to Sue Navy Over Sand*, Florida Times-Union, Oct. 23, 1986, at B-1, col. 3.

128. DNR BEACH MANAGEMENT REPORT, *supra* note 2, at 7-8. Hydraulic peculiarities resulting from inlet modification and jetty construction at the St. Marys entrance have resulted in an ebb tidal shoal volumetric increase of approximately 120 million cubic yards, or enough sand to build a beach 17 feet deep, 120 feet wide, and 300 miles long.

129. Interview with John Bottcher, *supra* note 11; interview with Clare Gray, *supra* note 18.

130. Telephone interview with Walter Kolb, Attorney, Governor's Office of Planning and Budgeting (Nov. 21, 1986).

131. Telephone interview with Andrew Grayson, Asst. General Counsel, Florida Dep't of Nat. Resources (Nov. 21, 1986).

132. Interview with John Bottcher, *supra* note 11.

133. 42 U.S.C. § 4321 (1982).

chapters 403 and 161, Florida Statutes.[134] While the state's argument may have been based on solid factual and legal bases, the Corps, as a federal agency, is presumed to have acted reasonably and validly. Thus, the state would have the difficult burden of demonstrating that the agency's actions were arbitrary, capricious, and without rational basis, in order to halt the Corps' proposed activity.[135]

However, in December 1986, the parties drafted and signed another King's Bay-specific MOU, averting what appeared to be an imminent lawsuit.[136] This MOU reflects the state's concern for onshore disposal of beach-quality sand and the Navy's willingness to enter a cost-sharing arrangement with Florida for placing sand on state beaches.[137] The MOU provides that up to 3.1 million cubic yards of beach-quality sand will be deposited along the southern beaches of Amelia Island at the southern beach site, rather than being dumped eighteen to thirty-six feet below the mean low water line in the nearshore disposal area. The additional cost will be shared equally by the Navy and the state. Because the additional funds for beach disposal are not currently available, the actual quantity of sand placed at the southern beach site will depend on the parties' ability to secure the necessary funding. The funding schedule requires that if the state fails to provide its total share by July 15, 1987, the Navy is obligated to place sand on the southern beach site only to the extent that funding is available. This deadline has been set to ensure that the project will be completed before the first Trident submarines arrive at the King's Bay Naval Base.[138] This MOU also provides that the Navy may place the dredged sand at the nearshore disposal area, if necessary, to meet the completion schedule; in that case, the Navy must place at least $2,000,000 worth of sand on the southern beach site during 1987, even if the state has only funded the placement of $1,000,000

134. Interview with John Bottcher, *supra* note 11.

135. *See* 5 U.S.C. §§ 551-559 (1982).

136. Memorandum of Understanding Concerning Dredging of the St. Marys Channel Between the Dep't of the Navy and the State of Florida (adopted Dec. 18, 1986).

137. *Id.* This MOU provides a mechanism for and is complementary to provisions set forth in the National Environmental Policy Act Final Record of Decision to Proceed Modification to St. Marys River Entrance Channel Dredging Program, Fleet Ballistic Missile Submarine Support Base, King's Bay, Ga., signed by the Navy on November 24, 1986 and published in the *Federal Register* on December 15, 1986.

138. Memorandum of Understanding Concerning Dredging of the St. Marys Inlet Channel, *supra* note 136.

worth.[139] Should a third party, through a temporary restraining order, preliminary injunction, or other order, prevent sand placement on the southern beach site, the Navy may place the sand in the nearshore disposal area, if necessary, to meet the dredging schedule.[140] The Navy has agreed to place all of the beach-quality sand recovered from its routine channel maintenance dredging on the beaches of Amelia Island or Cumberland Island, Georgia.[141] Sand will be placed on the north end of Amelia Island unless the state specifies that it be placed on the southern beach site, in which case the additional cost of disposal will be shared equally by the Navy and the state. Further, the Navy has agreed to bear the entire cost of southern beach site disposal if a current study being conducted by the United States Department of the Interior reveals that significant additional erosion to the southern end of Amelia Island is directly attributable to the Navy's dredging of the St. Marys Inlet.[142]

DER agreed to issue water quality certification, coastal construction permits, and required easements for this project pursuant to sections 403.918, 161.041, and 253.77, Florida Statutes.[143] The state also waived any right to sue the Navy on any matter addressed in the MOU, if the latter adheres to all terms of the agreement.[144]

As a result of the forging of this MOU, the Board of Trustees has approved a consent of use and DER has issued the necessary permit authorizing the Navy, with the Corps acting as contractor, to proceed with the dredging of the St. Marys Inlet.[145] The project is expected to be underway in the near future.

V. Analysis of the Conflict

The primary legal issue underlying this conflict involves the extent of the waiver of supremacy embodied in sections 313, 401, and

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139. *Id.*

140. *Id.*

141. Approximately three-fourths of the total maintenance dredging of the St. Marys channel will be ordered by the Navy; the remaining dredging will be ordered and performed by the Army Corps of Engineers as part of its civil works project program conducted under the auspices of the federal navigational servitude. The MOU provision does not cover Corps maintenance dredging. *Id.*

142. If the study fails to reveal such a causal connection, the Navy and state may continue to evenly split the cost of southern beach site disposal. *Id.*

143. *Id.*

144. *Id.*

145. Board of Trustees Agenda, Apr. 2, 1987, at 6, substitute item 8; State of Florida, Dep't of Envtl. Reg., Notice of Permit (Jan. 30, 1987).

404(t) of the Clean Water Act of 1977.[146] It should be noted that section 404(t) contains a savings clause preserving the paramount nature of the navigational servitude beyond any waiver of supremacy in that section.[147] Thus, the conflict concerns the scope of the "state requirements both substantive and procedural" to which the Corps must adhere.[148]

The Corps argues for a narrow interpretation of "requirements" to control dredge and fill activities under the Act, maintaining that only state water quality permits need be obtained since the waiver applies only to those state statutes directly analogous to the federal statute containing the waiver. Thus, the Corps contends that the Clean Water Act provides that only section 403.913 certification is required.[149] Under that narrow interpretation of the waiver of supremacy, the Corps maintains that chapter 161 permits and chapter 253 easements do not have to be obtained, despite the fact that these chapters regulate the dredging and disposal of spoil in and on state lands.[150]

This argument is similar to that recognized by the United States Supreme Court in *Hancock v. Train*.[151] In *Hancock*, the Court interpreted the term "requirements" in section 118 of the Clean Air Act[152] as not requiring that federal facilities emitting substances controlled under federally approved state implementation plans obtain state operating permits.[153] In so holding, the Court noted that "an authorization of state regulation is found only when and to the extent there is a clear congressional mandate [or] specific congressional action that makes this authorization of state regula-

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146. 33 U.S.C. §§ 1323, 1341, 1344(t) (1982). Section 1344(t) provides in relevant part that

> [n]othing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and *each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material* to the same extent that any person is subject to such requirements.

Id. (emphasis added).

147. 33 U.S.C. § 1344(t) (1982) states that "[t]his section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation." *Id.*

148. *Id.*

149. Interview with John Bottcher, *supra* note 11.

150. *See* FLA. STAT. §§ 161.041, 161.042, 253.77 (1985).

151. 426 U.S. 167 (1976).

152. 42 U.S.C. § 1857(f) (1970).

153. 426 U.S. at 180.

tion clear and unambiguous."[154] The Court reasoned that nothing on the statute's face or in its legislative history indicated that Congress declared that federal installations may not perform their activities unless state officials issue a permit; nor could congressional intention to submit federal activity to state control be discerned from the claim that only through the state's permitting system could compliance schedules be enforced.[155]

Similarly, in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*,[156] decided the same day as *Hancock*, the Court held that "requirement[s] respecting control and abatement of pollution" under section 313 of the Clean Water Act of 1972 did not mean that federal facilities were required to obtain state NPDES permits.[157] The Court reiterated that federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous.[158] In that case, the Court found that legislative history of the Clean Water Act of 1972 indicated only that federal facilities operating within the states must comply with the substantive effluent limitations, not that they must comply with state procedural regulations demanding that all sources of discharge obtain state permits. Again, the Court's narrow reading of the term "requirements" left the state with no means to enforce federally approved state effluent limitations against federal facilities that were not operating in compliance.[159]

This position has merit only to the extent that permitting requirements under chapters 161 and 253, Florida Statutes, are procedural, and hence, nonregulatory in nature. In *Department of Environmental Regulation v. Silvex Corp.*,[160] the Federal District Court for the Middle District of Florida followed the Supreme Court's narrow interpretation of "requirements"[161] to construe the federal Resource Conservation and Recovery Act (RCRA).[162] The

154. *Id.* at 179.

155. *Id.* at 180.

156. 426 U.S. 200 (1976).

157. *Id.* at 213.

158. *Id.* at 211.

159. *Id.* at 213.

160. 606 F. Supp. 159 (M.D. Fla. 1985).

161. *See* Hancock v. Train, 426 U.S. 167 (1976), construing § 118 of the Clean Air Act, 42 U.S.C. § 1857(f) and EPA v. California, 426 U.S. 200 (1976), construing § 313 of the Clean Water Act, 33 U.S.C. 1323.

162. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. 6901-6991i (1982 & Supp. III 1985)).

court held that "requirements" was synonymous with state objective regulations. Thus, the Corps might argue by analogy that the permitting requirements under chapters 161 and 253 are not objective, ascertainable state pollution control standards,[163] and therefore, are not within the definition of "requirements" under section 313 of the Clean Water Act.

The state counters by arguing that under section 404 of the Clean Water Act, regulating the discharge of dredged material by a federal facility, the Corps must comply with both substantive and procedural state requirements controlling dredging and discharge into state waters by a federal navigational project. The state's position is based on the 1977 Amendments to the Clean Water Act, which added subsection (t) to section 404 to expressly so provide.[164]

The legislative history of those amendments indicates that the Corps, like any other federal agency, in performing maintenance dredging or undertaking other activities, is to comply with state substantive and procedural requirements.[165] Thus, in amending section 404, Congress legislatively overruled *Minnesota v. Hoffman*[166] to clarify that the Corps must obtain state permits when mandated and "make every reasonable effort to comply with state requirements."[167]

Accordingly, the state maintains that sections 161.042 and 253.77, Florida Statutes, contain "requirements" regarding the discharge of dredged or fill materials into state waters. Thus, under section 404(t), the Corps must obtain chapter 161 permits and chapter 253 licenses.[168] Further, the state contends that the 1977 amendments to section 313 of the Clean Water Act also clarified

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163. *Id.* The court noted that "requirements" under *Hancock* and EPA v. California have been narrowly construed to include only substantive pollution control standards, such as state emissions limitations, compliance schedules, and control requirements. *Id.*

164. 33 U.S.C. § 1344(t) (1982).

165. A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, *supra* note 47. The amendments clarify that federal facilities must comply with *both* substantive and procedural requirements of federal, state, interstate, and local pollution control laws. The amendments eliminated the federal agency exception from state water quality certification requirements embodied in section 401, and were revised to clarify that dredge and fill activities of any federal agency are carried out in compliance with state, local, or interstate requirements. Further, the legislative history of the amendments indicate that section 404(t) was enacted to overrule the holding in Minnesota v. Hoffman that the Corps was exempt from state requirements relating to the discharge of dredge spoil from a federal navigational project. *Id.* at 362.

166. 543 F.2d 1198 (8th Cir. 1976).

167. A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, *supra* note 47.

168. Interview with John Bottcher, *supra* note 11.

that all federal facilities, including the Corps, must comply with all substantive and procedural requirements of state law.[169]

The state's argument for a broader interpretation of "state requirements both substantive and procedural" to control discharge of dredged or fill material is based on the explicit language contained in the legislative history of the 1977 amendments to the Clean Water Act, and is supported by cases interpreting the Resource Conservation and Recovery Act (RCRA),[170] in which state requirements have been construed broadly to include state solid waste disposal standards that are at least as stringent as, but not necessarily identical to or consistent with, federal regulations.[171] This argument is quite compelling in that in enacting RCRA and the Clean Water Act Congress specifically provided for concurrent state authority in many sections. Thus, RCRA may provide a closer template for interpreting Clean Water Act "requirements" than does the Clean Air Act.[172]

Even if the Corps ultimately prevails on the preemption issue, the state may attack the Corps' Environmental Impact Statements filed for Water Resources Development Act[173] projects. The state might successfully argue that the Corps' failure to consider environmental impacts of offshore disposal renders the EIS inadequate under the National Environmental Policy Act.[174] This argument is especially compelling given that the state ultimately will seek congressional funding of beach renourishment projects for beaches severely eroded from inlet maintenance projects and offshore sand

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169. A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, *supra* note 47; Pub. L. 95-217, 91 Stat. 1597 (codified at 33 U.S.C. § 1323 (1982)).

170. 42 U.S.C. § 6902 (1982 & Supp. III 1985).

171. *See* General Electric v. Flacke, 461 N.Y.S.2d 138 (1982) (regulations regarding discarded marterials promulgated by the State Department of Environmental Conservation were valid, even though they were more strict than regulations developed under RCRA). *See also* California v. Walters, 751 F.2d 977 (9th Cir. 1984) (holding that section 6001 of RCRA did not clearly and unambiguously waive sovereign immunity for state *criminal* sanctions for the illegal disposal of infectious waste from a Veterans Administration hospital, but that 6001 does plainly waive sovereign immunity for sanctions imposed to enforce *injunctive* relief). For a comprehensive discussion of waiver of sovereign immunity under RCRA, see Kenison, Donovan & Mulligan, *Enforcement of State Environmental Laws Against Federal Facilities*, NAT'L ENVTL. ENFORCEMENT J. 3, 6 (Nov. 1986).

172. Note, *The Preemptive Scope of the Comprehensive Environmental Responses, Compensation and Liability Act of 1980: Necessity for an Active State Role*, 34 U. Fla. L. Rev. 648 (1982). The Clean Air Act is a federal statute that expressly preempts the field. *Id.*

173. 33 U.S.C. § 426(j) (1982).

174. 42 U.S.C. § 4321-4370a (1982 & Supp. III 1985). *See* Sierra Club v. U.S. Army Corps of Engineers, 614 F. Supp. 1475 (D.C.N.Y. 1985).

disposal.[175]

Finally, the state may condition water quality certification under chapter 380, Florida Statutes, on compliance with the statutes comprising the State Coastal Zone Management Plan, including chapters 161 and 253, by relying on *Norfolk Southern Corp. v. Oberly*.[176] Under *Norfolk Southern*, the District Court for the district of Delaware held that the state's coastal management plan was immune from commerce clause attack to the extent that it prohibited inconsistent activities in the coastal zone, because the plan had been approved according to FCZMA procedures by the Secretary of Commerce. This case has important implications for the continued viability of all state coastal management programs. If the Supreme Court grants certiorari and ultimately reverses the district court, the future appears bleak for effective coastal zone management at the state level.[177]

The resolution of this conflict will ultimately ride on economic, environmental, and equitable considerations. As a practical matter, the federal government probably will bear much of the cost of state beach renourishment, whether through separately authorized beach renourishment projects or through direct onshore disposal of sand from federal dredging projects.

The state contends that seeking separate Congressional authorization for dredging and offshore disposal, followed by authorization of federal funding for state beach renourishment is unnecessarily costly, inefficient, duplicative, and environmentally unsound. Thus, it maintains that beach-compatible sand should be placed onshore as it is dredged from coastal channels and inlets.

Finally, equity dictates that the Corps play an active role in solving erosion problems that inlet maintenance projects and offshore spoil disposal often create. However, since Florida's beaches generate billions of dollars annually for the state through tourism, the state also has some responsibility to maintain and renourish its own beaches. Rather than wasting time and money in protracted lawsuits, the parties should negotiate a workable compromise that will benefit Floridians and other United States citizens. Sharing the costs of navigational servitude will ensure that the ultimate price—the loss of Florida's sandy beaches—is never paid.

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175. Interview with John Bottcher, *supra* note 11.

176. 632 F. Supp. 1225 (D. Del. 1986). The decision has been appealed to the Third Circuit and a decision is pending.

177. Interview with Clare Gray, *supra* note 18.