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United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974)

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curtailing growth, especially among small communities on the fringe of urban sprawl, and for the development of comprehensive land use planning to protect the environment. This interest suggests that the courts will be called upon more frequently to consider the constitutional questions raised by local ordinances designed to meet these ends. Thus, while *Belle Terre* gives a green light to increased governmental control of land use, it also extends the constitutionally acceptable boundary of zoning regulation. But the decision does not delineate this boundary; that will have to await another case.

Federal Jurisdiction—WATER POLLUTION CONTROL—FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 REACH POLLUTING ACTIVITIES OCCURRING ABOVE MEAN HIGH-WATER LINE.—*United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974).

Without a federal permit Langston Holland and his associates were filling mangrove wetlands and man-made canals in preparation for future development of a 281 acre tract known as Harbor Isle, adjoining Papy's Bayou on Tampa Bay.[1] The United States, through the Environmental Protection Agency, alleged that this operation violated both the Federal Water Pollution Control Act Amendments of 1972[2] and the Rivers and Harbors Act of 1899,[3] and sought an order pro-

1. The Court detailed the inter-tidal nature of the area:

2. For the purposes of the preliminary injunction hearing the Court accepted defendants' determination that the mean high water line is one foot above sea level.

3. Tide data, visual observation and classification of vegetation established that a substantial number of tides exceed two feet above sea level.

(a) The United States Geological Survey tide gauge data indicated that 50-100 tides exceed two feet in the subject water each year.

4. The parties stipulated to the accuracy of a land survey introduced by defendants. . . .

(a) Most of the property is interlaced with artificial mosquito canals containing water.

(b) The water in the mosquito canals is connected to Papy's Bayou.

(c) The elevation of much of the property is less than two feet.

. . . .

6. Defendants would continue to discharge sand, dirt, dredged spoil and biological materials until the fill created has effectively displaced tidal waters, thereby eliminating the normal ebb and flow of tides over the subject property.

United States v. Holland, 373 F. Supp. 665, 667 (M.D. Fla. 1974).

2. 33 U.S.C.A. § 1311(a) (Supp. 1974).

3. 33 U.S.C. §§ 403, 407 (1970).

hibiting further filling and requiring restoration of mangrove wetlands.[4] The defendants argued that the 1972 Amendments, like the Rivers and Harbors Act,[5] apply only to "navigable waters," and contended that no federal permit was required since their land fill did not directly affect such waters. The United States District Court for the Middle District of Florida dismissed defendant's reading of the 1972 Amendments and held that the Amendments prohibit filling activities without a permit even on land only "periodically inundated by tidal waters."[6] In reaching its decision the court rejected the mean high-tide line as a limit on federal jurisdiction under the Water Pollution Control Act; the court reasoned that the line "has no rational connection to the aquatic ecosystems which the FWPCA is intended to protect."[7]

Even today the Rivers and Harbors Act of 1899 (RHA) remains an important federal law for combating water pollution.[8] Federal jurisdiction under the RHA, however, is limited to those cases in which the water body involved is "navigable."[9] The generally accepted test holds that "a waterway is navigable and subject to federal regulation if (1) it is *presently* being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* by reasonable improvements for transportation and commerce."[10] It seems difficult to imagine a water body of any significant size that would not satisfy one of these criteria; but marshes, wetlands and smaller feeder streams often have been

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4. United States v. Holland, 373 F. Supp. 665, 667 (M.D. Fla. 1974).

5. 33 U.S.C. §§ 403, 407 (1970). The term "navigable waters" is discussed at notes 8-11 and accompanying text *infra*.

6. 373 F. Supp. at 676.

7. *Id.*

8. The Supreme Court has observed that one-third of all oil pollution prosecutions are brought pursuant to the RHA. *See* United States v. Standard Oil Co., 384 U.S. 224, 226 (1966). Although there was considerable confusion as to whether pollution suits should be instituted under the RHA or under the predecessor of the Water Pollution Control Act, 74 suits for injunctive relief were filed pursuant to the RHA between March 1970 and January 1972. Druley, *The Refuse Act of 1899*, ENV. REP.—MONOGRAPHS, Monograph No. 11, at 6-10 & n.123 (1972).

9. *See* 373 F. Supp. at 670. As one observer aptly noted, " 'navigability' is now no more than a base that federal courts feel obligated to touch when clearing the path for the progress of federal policies or programs." Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing a Citadel Under Seige*, 26 U. FLA. L. REV. 19, 23 (1973) (footnotes omitted).

10. Rochester Gas & Elec. Corp. v. Federal Power Comm'n, 344 F.2d 594, 596 (2d Cir.), *cert. denied*, 382 U.S. 832 (1965); *accord*, United States v. Pot-Nets, Inc., 363 F. Supp. 812, 815 (D. Del. 1973) (footnotes omitted), *citing* United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

denied federal protection because the determination of navigability is a question of fact in each instance.[11]

Once a body of water is deemed navigable under the RHA it still must be determined how far the boundaries of that body extend. Federal jurisdiction is coextensive with those boundaries. Therefore, the regulations of the Army Corps of Engineers, which specify the boundaries of navigable water bodies, also establish the limits of RHA jurisdiction.[12] In coastal areas this jurisdiction "extends to the line on the shore reached by the plane of the mean (average) high water."[13] Jurisdiction over bays and estuaries is further delineated:

> Regulatory jurisdiction extends to the entire surface and bed of all water bodies subject to tidal action. Jurisdiction thus extends to the edge . . . of all such water bodies even though portions of the water body may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore *the presence of the mean high tidal waters . . .*.[14]

By interpreting the 1972 Amendments to extend federal authority over water pollution beyond the mean high-tide line, the *Holland* court departed significantly from the traditional constraints of the "navigable waters" test for federal jurisdiction. Although the prohibitory provisions of the 1972 Amendments do include the phrase "navigable water,"[15] the court found that Congress had intended to remove the navigability requirement from the definition of that phrase.[16] The

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11. The court in United States v. Kentland-Elkhorn Coal Corp., 353 F. Supp. 451, 455 (E.D. Ky. 1973), found that "[s]ince the decision made in The Daniel Ball . . . , the question [of navigability] has been one of fact." *See* United States v. Cannon, 363 F. Supp. 1045 (D. Del. 1973); United States v. Pot-Nets, Inc., 363 F. Supp. 812, 816-17 (D. Del. 1973).

12. Under the RHA the enforcement of the Act and the processing of permits was delegated to the Secretary of the Army and to the Chief of Engineers. *See* 33 U.S.C. §§ 401-07 (1970).

13. 33 C.F.R. § 209.260(k)(1)(ii) (1973).

14. *Id.* § 209.260(k)(2) (emphasis added).

15. For example, after declaring unlawful "the discharge of any pollutant by any person . . . ," 33 U.S.C.A. § 1311(a) (Supp. 1974), the Amendments proceed to define "discharge" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C.A. § 1362(12) (Supp. 1974).

16. 373 F. Supp. at 671. Legislative history supports the court's finding that Congress did not intend to limit the protective scope of the 1972 Amendments to those waters traditionally defined as "navigable." *See* note 21 *infra*. *Accord*, United States v. Ashland Oil & Transp. Co., No. 73-2161 (6th Cir. Nov. 1, 1974). *But cf.* Save America's Vital Environment, Inc. v. Butz, 347 F. Supp. 521 (N.D. Ga. 1972).

Amendments, without qualification, define "navigable waters" as "waters of the United States including the territorial seas."[17] Invoking this broad definition, the *Holland* court had no difficulty in determining that the Amendments should reach discharges into mangrove wetlands and man-made mosquito canals.[18] Under the navigability criteria of the RHA this conclusion would have been debatable, even though the canals were permanent bodies of water and would conduct pollutants into navigable waters. Thus, the court's interpretation of the 1972 Amendments enables the government to prevent the *entry* of pollutants into navigable waters by recognizing federal authority to act when offensive matter is discharged from any "point source."[19] Officials no longer will be required to wait until a navigable body of water actually is being polluted before seeking civil or criminal sanctions.[20]

In support of its determination that the protective scope of the 1972 Amendments reaches wetlands above the mean high-tide line, the court looked to the history of the new legislation,[21] as well as its stated

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17. 33 U.S.C.A. § 1362(7) (Supp. 1974).

18. *See* 373 F. Supp. at 673-74.

19. "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C.A. § 1362(14) (Supp. 1974).

20. Heretofore the government has been required to wait until a navigable water body actually was being polluted before instituting legal action. *See* Druley, *The Refuse Act of 1899*, ENV. REP.—MONOGRAPHS, Monograph No. 11 (1972); Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1116, 1121-22 (1970).

21. *See* 373 F. Supp. at 671-72. The legislative history of the 1972 Amendments clearly seems to support the *Holland* court's expansion of the traditional "navigability" concept. The Committee of Conference explained its deletion of the word "navigable" from the statutory definition, *see* note 17 and accompanying text *supra*, of the phrase "navigable waters": "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." 373 F. Supp. at 672, *quoting from* COMM. OF CONFERENCE, JOINT EXPLANATORY STATEMENT, S. REP. No. 92-1236, 92d Cong., 2d Sess. (1972). Elaborating further on the Committee's intention, Representative Dingell explained:

> "The Conference bill defined the term 'navigable waters' broadly for water quality purposes. . . . It means 'all waters of the United States' in a geographic sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." . . .
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> "Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill."

purpose.[22] The court did not accept this purpose as conclusive proof of congressional intent to extend federal jurisdiction beyond its traditional limits; nonetheless, the court noted that "these sections do reveal . . . a sensitivity to the value of a coastal breeding ground."[23] In order to combat threats to this coastal environment, the court observed, Congress had "broadened its jurisdiction to encompass 'all waters of the United States.' "[24]

In condoning this broad exercise of federal jurisdiction under the 1972 Amendments, the *Holland* court relied on the power of Congress to control polluting activities that affect interstate commerce.[25] The commerce clause, of course, now reaches any activity that has even a remote impact on interstate commerce.[26] Thus the federal government properly may intervene if pollutants are introduced into waters of the United States regardless of the location of the polluting activity. The relationship between water pollution and interstate commerce was recognized by the Fifth Circuit in *Zabel v. Tabb*,[27] wherein the court held that the Army Corps of Engineers may deny dredge and fill permits for solely ecological reasons.[28]

Although the *Holland* opinion upholds broad congressional power to eliminate polluting activities even when they affect water bodies

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373 F. Supp. at 672, *quoting from* 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 250 (1973). The Corps of Engineers apparently was not impressed by Representative Dingell's remarks. *See* note 36 and accompanying text *infra*.

22. *See* 373 F. Supp. at 673-74.

23. *Id.* at 674.

24. *Id.* at 675.

25. *See id.* at 673. The Environmental Protection Agency's definition of "navigable waters" under the 1972 Amendments extends federal jurisdiction considerably further than did the navigability concept under the RHA, and includes:

(1) All navigable waters of the United States;
(2) Tributaries of navigable waters of the United States;
(3) Interstate waters;
(4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
(5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
(6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

40 C.F.R. § 125.1(o) (1973).

26. *See, e.g.*, Perez v. United States, 402 U.S. 146, 150-55 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

27. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

28. *Id.* at 204. *Accord*, United States v. United States Steel Corp., 482 F.2d 439, 445-46 n.8 (7th Cir. 1973); Kalur v. Resor, 335 F. Supp. 1, 11-13 (D.D.C. 1971).

only indirectly,[29] and suggests that the purpose of the Amendments can be achieved only by controlling some land-based operations,[30] the holding of the case is limited to the discharge of pollutants onto land periodically inundated by tides.[31] Limited to its facts, *Holland* merely expands the domain of federal control from the mean high-tide line to the line of the highest normal tide. Arguably, the Rivers and Harbors Act might already have protected these intertidal wetlands,[32] in which

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29. *See* notes 15-20 and accompanying text *supra*.

30. The Court states: "Getting at the source of pollution is going beyond the confines of a high water line. It cannot be doubted that most of the damage to marine life results from land-based and not sea-based activities." 373 F. Supp. at 675.

31. *See id.* at 675-76.

32. This is by no means a necessary conclusion, however. Plaintiffs did argue that defendants' dredge and fill activities had violated the RHA. *See* 373 F. Supp. at 676. Section 13 of the RHA might be read to support plaintiffs contention:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed . . . .

33 U.S.C. § 407 (1970).

Several courts have interpreted § 13 to proscribe two distinct types of activity: (1) the discharge of refuse into navigable water, regardless of whether that refuse obstructs navigation; and (2) the depositing of refuse on the bank of a navigable water body, where that refuse would obstruct or impede navigation if washed into the water. *See* United States v. Esso Standard Oil Co., 375 F.2d 621, 623 (3d Cir. 1967); United States v. Ballard Oil Co., 195 F.2d 369, 370 (2d Cir. 1952); La Merced, 84 F.2d 444, 445 (9th Cir. 1936). "Obstructions" within the meaning of the RHA may be found where accumulations of sediments reduce navigable capacity, United States v. Republic Steel Corp., 362 U.S. 482, 489 (1960), and it is not necessary that the discharge of solid particulate matter be permitted to go unchallenged until a major obstruction is created. United States v. Kentland-Elkhorn Coal Corp., 353 F. Supp. 451, 456 (E.D. Ky. 1973). The court in United States v. Cannon, 363 F. Supp. 1045, 1051 (D. Del. 1973), conceded that the RHA does reach "activities on fast land" that create obstructions to navigation. But the court refused to determine at the summary judgment stage whether, if such activities have an impact on the environment, an RHA permit is required.

Section 13 might be interpreted to apply to activities such as those of the *Holland* defendants, if sediment from the filling operations washed below the mean high-tide line. If § 13 were not interpreted to proscribe such activities a riparian owner could deposit piles of sand several feet from the mean high-tide line and allow rain and higher tides to wash the sand into the water, thereby increasing his acreage. Although the *Holland* court did not pass on the question, the court might not have interpreted the RHA to reach the landbased operations of the defendants: "Just as it was not surprising

case the holding is a confirmation rather than an expansion. Of greater significance are the enlightened discussion of estuarine ecosystems and the establishment of the fact that the smallest feeder stream is protected by the Water Pollution Control Act Amendments. *Holland* marks a significant step in the battle against water pollution in Florida[33] and is refreshing in its perception of the vital function the coastal wetlands perform in our life support system.

The impact of the *Holland* decision may be limited by what seems to be an inherent difficulty in enforcing environmental legislation.[34] The Army Corps of Engineers, entrusted with the responsibility of issuing dredge and fill permits under the Amendments,[35] disagrees with the *Holland* court and has concluded that the traditional "navigable waters" and the Amendments' "waters of the United States" should be interpreted synonymously.[36] The importance of this interpretation remains to be seen since the Environmental Protection Agency (EPA) is the primary enforcement agency under the Amendments[37] and the Administrator of EPA has veto power over the issuance of fill permits.[38]

Holland leaves several questions unanswered. It is not clear whether the 1972 Amendments protect land-locked bodies of non-navigable water such as small lakes and streams feeding into them. Additionally, it is not certain whether the Amendments would apply to pollutants that filter through soil or through an aquifer into bodies of water.[39]

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that Congress limited the Rivers and Harbors Act to navigable waters, it was not surprising to have limited enforcement under the statute to navigation-impeding activities taking place *in* the water." 373 F. Supp. at 670.

33. For other recent anti-pollution decisions affecting the State of Florida, see United States v. Joseph G. Moretti, Inc., 478 F.2d 418 (5th Cir. 1973); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972); Yonge v. Askew, 293 So. 2d 395 (Fla. 1st Dist. Ct. App. 1974).

34. *See, e.g.*, Jaffe, *Ecological Goals and the Ways and Means of Achieving Them*, 75 W. VA. L. REV. 1, 18 (1972); Note, *The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management*, 2 FLA. ST. U.L. REV. 736, 755 (1974).

35. *See* 33 U.S.C.A. § 1344 (Supp. 1974).

36. 39 Fed. Reg. 12,115 (1974). Recently, however, the Department of Justice urged the Corps of Engineers to relax its narrow interpretation of federal jurisdiction under the Amendments and to adopt jurisdictional guidelines "that will provide for the protection of the entire ecosystems dependent upon unpolluted and undisturbed waters, rather than just that part arbitrarily delineated by mean high water." Letter from Wallace H. Johnson to Manning E. Seltzer, August 16, 1974.

37. *See* 33 U.S.C.A. § 1251(d) (Supp. 1974).

38. 33 U.S.C.A. § 1344(c) (Supp. 1974).

39. This problem could arise in a number of circumstances. Some chemicals, such as detergent sulfonates, may travel at full strength through filters and soil. S. GROVA, URBAN PLANNING ASPECTS OF WATER POLLUTION CONTROL 43 (1969). Leakage from deep injection wells used to discard industrial wastes is another possibility. Evans & Bradford, *Under the Rug*, in OUR WORLD IN PERIL: AN ENVIRONMENTAL REVIEW 224 (1971). In Great Britain the Water Resources Act of 1963, c.38, § 72, makes it an offense to put

Would federal jurisdiction extend to a case in which surface runoff carries pesticides from a farmer's field to a marsh, and months later pollutes a distant water body? While *Holland* does not address these issues, the language of the Amendments and their purpose, as interpreted by the court, should support the exercise of federal control in such situations.

Real Property—DOCTRINE OF CUSTOMARY RIGHTS—CUSTOMARY PUBLIC USE OF PRIVATELY OWNED BEACH PRECLUDES ACTIVITY OF OWNER INCONSISTENT WITH PUBLIC INTEREST.—*City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974).

Defendant corporation McMillan and Wright, Inc., was the record owner of 15,300 square feet of dry-sand waterfront property in Daytona Beach.[1] The corporation obtained a permit to build an observation tower intended for operation in conjunction with an amusement pier on the property. The Attorney General of Florida and Tona-Rama, Inc., the operator of an existing observation tower, claimed the defendant was infringing on a public easement and sought to enjoin the construction. The trial court refused to issue a temporary injunction and the tower was completed. The court then entered summary judgment for plaintiffs, finding that because defendant's land was servient to a public prescriptive easement, the City of Daytona Beach had improperly granted the building permit. The corporation was ordered to remove its tower.[2]

The district court of appeal affirmed[3] the finding of the trial court, despite defendant's contention that public use of the dry sand area

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"trade effluents, sewage effluent or other poisonous, noxious or polluting matter" by means of any "wells, bore-hole, pipe or other work, into any underground strata within a river authority's area . . . ."

1. Private ownership of Florida beaches extends only as far as the line of mean high water. The area above this line is known as the dry sand area. The state owns the land seaward of the mean high-water line. This area is referred to as the foreshore or wet sand area. *See* Florida Coastal Mapping Act, Fla. Laws 1974, ch. 75-56, § 4; Commentary, *The High Water Mark: Boundary Between Public and Private Lands*, 18 U. FLA. L. REV. 553 (1966).

2. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 74-75 (Fla. 1974).

3. City of Daytona Beach v. Tona-Rama, Inc., 271 So. 2d 765 (Fla. 1st Dist. Ct. App. 1972).