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VIII. Environmental Law

curate estimation of a local labor market and therefore the most probative statistical evidence for establishing employment discrimination.[63] By imposing stricter burdens on the prosecution of discrimination claims and scrutinizing statistical evidence more closely, the Fourth Circuit increased the proof required to establish the plaintiff's prima facie case. This result, however, should help to eliminate frivolous plaintiff claims and make employee qualifications and skills essential factors in employment decisions.

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VIII. ENVIRONMENTAL LAW

What is a Dike?

Congress enacted the Rivers and Harbors Act of 1890 (1890 Act)[1] as amended in 1899 (1899 Act)[2] to control the proliferation of bridges and other obstacles which impede commercial river navigation.[3] Sections 9[4] and 10[5] are the enforcement provisions of the Act. Section 9 prohibits the construction of any bridge, dam, dike, or causeway over or in navigable waters[6] without congressional approval.[7] Under section 10, the

[63] *See* text accompanying notes 31-39 & 51-62 *supra.*

[1] Ch. 907, 26 Stat. 426 (1890) [hereinafter cited as 1890 Act].

[2] Ch. 425, 30 Stat. 1121 (1899) (codified at 33 U.S.C. §§ 401-467 (1976)) [hereinafter cited as 1899 Act].

[3] *See* note 37 *infra* (historical development of 1899 Act).

[4] 33 U.S.C. § 401 (1976).

[5] *Id.* § 403 (1976).

[6] Congress has defined navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1976). Courts construe "navigable waters" to mean any body of water that was or is used for transportation and commerce or could be suitable for such use with reasonable improvement. United States v. Appalachian Elec. Pwr. Co., 311 U.S. 377, 407-08, 416-17 (1940); *see* Utah v. United States, 403 U.S. 9, 11 (1971) (Great Salt Lake considered navigable not because involved in commerce but because used in past as highway); *cf.* State Water Control Bd. v. Hoffman, 574 F.2d 191, 194 (4th Cir. 1978) (lake not subject to federal regulations since lake solely within one state). Once deemed navigable, a body of water will always be considered navigable regardless of whether the body of water continues to be used for navigational purposes. 331 U.S. at 408-09. Congress' authority over navigable waters is not limited to navigational purposes, but is "as broad as the needs of commerce." 311 U.S. at 426 (construing U.S. CONST. art. I, § 8, cl. 2).

[7] 33 U.S.C. § 401 (1976). Plans for structures listed in § 9 require the approval of the Army Corps of Engineers (Corps) and authorization by the Secretary of the Army (Secretary). *Id.; see* 33 C.F.R. § 325.1 (1979) (application procedure for permits). Congress delegated to the Secretary the duty of prescribing all regulations for the use, administration, and navigation of the nation's navigable waters except in matters specifically reserved to other executive departments. Rivers and Harbors Act of 1894, ch. 299, § 4, 28 Stat. 362

Army Corps of Engineers (Corps) must authorize construction of any wharfs, piers, dolphins, booms, weirs, breakwaters, or jetties or any excavation or filling of a water body.[8]

Courts have criticized the language of section 9 and 10 as being unclear and ambiguous.[9] The Corps has not interpreted sections 9 and 10 in accordance with the plain meaning of the statutory language. Rather, the Corps has interpreted the Act to require section 9 congressional approval only for structures which completely span a navigable waterway, regardless of what the structure is labelled in the vernacular.[10] Environmental groups have challenged the Corps' practice of issuing section 10 permits for dikes which do not extend across waterways, contending that the construction of any dike requires congressional approval.[11] In *Hart and Miller Islands Area Environmental Group, Inc. v.*

(1894) (codified at 33 U.S.C. § 1 (1976)); *see* National Security Act of 1947, Pub. L. No. 253, § 205, 61 Stat. 495 (1947) (Department of War title changed to Department of Army); note 56 *infra* (approval for construction of bridges, dams and causeways delegated to other executive departments).

[8] 33 U.S.C. § 403 (1976). Section 10 is comprised of three clauses. The first clause prohibits any obstruction to the navigable capacity of the waters unless affirmatively authorized by Congress. *Id.* The second and third clauses list classes of structures or actions that are prohibited unless conducted according to plans recommended by the Corps. *Id.* The second clause requires the Corps' approval for the construction of any wharfs, piers, dolphins, booms, weirs, breakwaters, bulkheads, or jetties. The third clause prohibits any excavation, filling or other acts that would modify a water body without the Corps' approval. *Id. See* Sierra Club v. Morton, 400 F. Supp. 610, 628 (N.D. Cal. 1975), *modified sub nom.* Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979). Although § 10 states that the Corps' plans require the Secretary's approval, the Secretary delegated all § 10 permit authority to the Corps. 33 C.F.R. § 322.5 (1979).

The first clause of § 10 contains the phrase "obstructions to navigable capacity." This phrase refers to the current or future potential of a structure or object to obstruct navigation. 400 F. Supp. at 630 (N.D. Cal. 1975). The classes of structures and actions listed in the second and third clauses of § 10 could be considered "obstructions to the navigable capacity" and thus require congressional consent. The Supreme Court has held, however, that Congress did not intend to limit the Corps' power in the second and third clauses by the broad language of the first clause of § 10. Wisconsin v. Illinois, 278 U.S. 367, 412-13 (1929). In a later opinion, the Supreme Court held that the Corps is not limited to authorizing permits for obstructions listed in the second and third clauses under § 10, but has approval authority over anything which diminishes the water's navigable capacity. United States v. Republic Steel Corp., 362 U.S. 482, 486-88 (1960). *See generally* Powers, *Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503 (1977) [hereinafter cited as Powers].

[9] *See, e.g.*, Wisconsin v. Illinois, 278 U.S. 367, 413 (1929); Citizens' Comm. for Envt'l Protection v. United States Coast Guard, 456 F. Supp. 101, 114-15 (D.N.J. 1978); Petterson v. Resor, 331 F. Supp. 1302, 1306 (D. Or. 1971), *dismissed as moot sub nom.* Citizens Comm. for Columbia River v. Callaway, 494 F.2d 124 (9th Cir. 1974); *see* note 39 *infra* (Congress' failure to review 1899 amendments caused Act's ambiguity).

[10] For judicial opinions demonstrating the Corps' interpretation of § 9 and § 10 see Wisconsin v. Illinois, 278 U.S. 367, 412-13 (1929); Petterson v. Resor, 331 F. Supp. 1302, 1306 (D. Or. 1971).

[11] *See* notes 25, 28 & 58 *infra* (actions where environmental groups have challenged the Corps' issuance of § 10 permits).

Corps of Engineers,[12] the Fourth Circuit recently reviewed sections 9 and 10 of the Act and the statutory meaning of "dike." The court held that the Corps has authority to issue section 10 permits for any construction in navigable waters so long as the structure does not completely span a navigable waterway.[13]

In 1976, the Corps issued a permit to the State of Maryland authorizing the construction of a disposal facility between Hart and Miller Islands in the Chesapeake Bay.[14] The State of Maryland chose to locate the facility on the eastern or bayside of the islands where the Bay is seven miles wide.[15] The proposed facility is rectangular, consisting of four sea walls, one of which will connect the two islands.[16] The facility will extend from the islands and into the Bay approximately two miles and thus will not completely span the Bay.[17] The purpose of the facility is to contain spoil[18] from dredging operations in the Baltimore Harbor and the Harbor's approaching channels.[19]

In 1977, two environmental groups and a number of individuals brought action against the Corps for declaratory and injunctive relief to void the permit.[20] The plaintiffs contended that the Corps lacked author-

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[12] 621 F.2d 1281 (4th Cir. 1980).

[13] *Id.* at 1291.

[14] *Id.* at 1282-83.

[15] 621 F.2d 1281, 1282-84 (4th Cir. 1980).

[16] *Id.* at 1284.

[17] 621 F.2d 1281, 1284 (4th Cir. 1980).

[18] Spoil dredged from the floor of the Bay contains toxic chemicals, heavy metals, oil, grease, and other substances. *Id.* The spoil falls under the definition of pollution under § 502(g) of the Federal Water Pollution Control Act (FWPCA). 33 U.S.C. § 1362(6) (1976). Therefore the discharge of the spoil into navigable waters is subject to FWPCA regulations under § 404. *Id.* at § 1344 (1976). Section 404 authorizes the Corps to issue permits for the discharge of pollution at disposal sites specified by the Corps. *Id.* The purpose of containing the Bay's spoil in a diked disposal area is to remove and destroy any pathogenic bacteria that might be in the mud. 621 F.2d at 1284. The bacteria is destroyed through sedimentation, filtration, and the long period of time the spoil remains in the facility. *Id.* at 1284-85. The dredged spoil from the Baltimore Harbor previously was dumped into the open waters of the Chesapeake Bay, causing pollution of the Bay. *Id.* at 1284. In 1969, the State of Maryland realized the deleterious environmental effects caused by open water dumping and authorized funds for the design and construction of disposal containment facilities. *Id.* at 1284 n.5. In 1975, Maryland prohibited any discharge of spoil into the Baltimore Harbor unless placed in disposal facilities. *Id.*

Congress was also aware of the possible adverse effects of open water dumping of dredged materials. Congress authorized funds for dredging the Baltimore Harbor on condition that the State of Maryland provide a Corps-approved disposal facility. Rivers and Harbors Act of 1970, Pub. L. No. 91-611, § 101, 84 Stat. 1818 (1970); *see* 621 F.2d at 1284 n.4.

[19] 621 F.2d 1281, 1284-85 (4th Cir. 1980). The Baltimore Harbor required dredging to deepen the Harbor to accommodate the entry of large cargo vessels. Hart & Miller Islands Area Envt'l Group, Inc. v. Corps of Eng'rs., 459 F. Supp. 279, 281 (D. Md. 1978).

[20] 621 F.2d at 1283. Although the Rivers and Harbors Act does not provide for judicial review of Corps actions expressly, one district court has granted jurisdiction to private persons under the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1976). Citizens Comm.

ity to issue the permit because the disposal facility constituted a "dike" which requires section 9 congressional approval.[21] The district court granted plaintiffs' motion for summary judgment, holding that the facility was a dike within the meaning of section 9 of the Act and, therefore, the Corps was without authority to issue the permit.[22]

On appeal, the Fourth Circuit reviewed judicial precedent to determine whether the disposal facility was subject to section 9 or 10 of the Act.[23] The court found conflicting judicial interpretations of the sections.[24] Previous court decisions adopted two approaches in construing the term "dike" under the Act. Under one approach, courts have interpreted sections 9 and 10 according to the plain meaning of the sections.[25] The dic-

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for Hudson Valley v. Volpe, 302 F. Supp. 1083, 1090-91 (S.D.N.Y. 1969). Section 702 gives the right of judicial review of agency action to persons aggrieved by that agency's action. 5 U.S.C. § 702 (1976). Courts that deny review reason, however, the APA is not sufficient authority on which to grant review because the Rivers and Harbors Act does not create an independent basis of jurisdiction that would allow judicial review of agency action. Loveladies Prop. Owners Ass'n, Inc. v. Raab, 430 F. Supp. 276, 281 (D.N.J. 1975), *aff'd*, 547 F.2d 1162 (3d Cir. 1976); *accord* Califano v. Sanders, 430 U.S. 99, 104-107 (1977) (APA does not provide courts with independent basis of jurisdiction). For further examples of denials of judicial review under the Rivers and Harbors Act see Red Star Towing & Transp. Co. v. Department of Transp., 423 F.2d 104, 105-06 (3d Cir. 1970); Citizens' Comm. for Envt'l Protection v. United States Coast Guard, 456 F. Supp. 101, 112 (D.N.J. 1978). *See generally* Note, *Jurisdiction To Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980 (1975).

[21] 459 F. Supp. 279, 283 (D. Md. 1978).

[22] *Id.* at 291.

[23] 621 F.2d 1281, 1285-87 (4th Cir. 1980).

[24] *Id.* at 1287.

[25] Hart and Miller Islands Area Envt'l Group, Inc. v. Corps of Eng'rs, 459 F. Supp. 279, 284 (D. Md. 1978); Sierra Club v. Morton, 400 F. Supp. 610, 626-27 (N.D. Cal. 1975); Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083, 1089 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), *cert. denied sub nom.* Parker v. Citizens Comm. for Hudson Valley, 400 U.S. 949 (1970). In *Hudson Valley*, two conservation groups and an unincorporated village brought action against the Corps because the plaintiffs opposed the construction of an expressway. The plaintiffs contended that the Corps exceeded its authority by issuing a § 10 permit for the construction of a dike as part of the expressway project. 302 F. Supp. at 1087. The New York district court construed § 9 according to its plain meaning, and held that the "dike" required § 9 congressional approval since Congress expressly retained approval power over "any dike" that is "over or in" navigable waters. *Id.* at 1088-89.

In *Sierra Club*, two environmental groups and two individuals challenged the validity of the Corps' issuance of a § 10 permit. The Corps issued the permit to allow construction of a canal for the California Water Project. The plaintiffs contended that since the canal would completely dam the river, the canal constituted a dike under the dictionary definition and thus required congressional approval. Sierra Club v. Morton, 400 F. Supp. at 626-27. The *Sierra Club* court, relying on *Hudson Valley*, determined that the canal requires § 9 approval under either of two alternative plain meaning constructions of the sections. *Id.* at 607. First, the district court determined that because the "canal" will have the effect of a "dike" and because the structure is "in" the river, the canal is the type of structure that requires § 9 congressional approval. *Id.* Second, the court reasoned that Congress used the word "any" in § 9 to reserve the power to determine whether a particular structure is an unreasonable obstruction to navigation. *Id.* The *Sierra Club* court held that the canal was

tionary defines a "dike" as any embankment that holds back or controls waters in oceans or rivers.[26] Courts following the plain meaning approach hold that "any dike" requires congressional approval since the structure is "over or in" navigable waters.[27]

Under the second approach, courts have adopted the Corps' administrative interpretation of the Act which requires section 9 congressional approval only for structures that completely span navigable waterways.[28] The courts have observed that the Corps' interpretation of sections 9 and 10 has been historically consistent.[29] As a general rule, courts have placed great emphasis on an agency's consistent interpretation of a statute to determine the proper construction of an ambiguous statute.[30]

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subject to § 9 congressional approval under either construction of the section since the canal would completely obstruct navigation. *Id.*

Although the *Sierra Club* court construed § 9 and § 10 according to the plain meaning of the statutory language, the court's interpretation of the sections is consistent with the Corps' interpertation. The Corps contends that § 9 congressional approval is required only for structures that obstruct navigation by completely spanning waterways. *See* note 28 *infra* (decision upholding Corps' interpretation of § 9 and § 10).

[26] Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083, 1089 (S.D.N.Y. 1969) (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 403 (2d ed. 1976)).

[27] Sierra Club v. Morton, 400 F. Supp. 610, 626-27 (N.D. Cal. 1975); Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083, 1088-89 (S.D.N.Y. 1969).

[28] Citizens' Comm. for Envt'l Protection v. United States Coast Guard, 456 F. Supp. 101, 114-15 (D.N.J. 1978); Petterson v. Resor, 331 F. Supp. 1302, 1306 (D. Or. 1971). In *Petterson*, individuals owning property on or near the riverfront of the Columbia River challenged a proposed airport expansion that involved placing fill in the river. 331 F. Supp. at 1303. The plaintiffs alleged that the Corps lacked authority to authorize a fill project for the extension of a runway, because the fill constituted a dike within the meaning of § 9 and thus required congressional approval. 331 F. Supp. at 1303-04. The *Petterson* court looked to the legislative history of the Act and determined that the Corps' interpretation of § 9 and § 10 was consistent with Congress' intent to prevent unreasonable obstruction to navigation. *Id.* at 1306. The Oregon district court upheld the Corps' issuance of a § 10 permit for the fill. *Id.* The *Petterson* court determined that the fill was not a "dike" under § 9 because the structure did not completely span the river and did not obstruct navigation. *Id.*

In *Citizens' Committee*, environmentalists challenged the Corps' authority to issue a § 10 permit for the placing of fill in a river. 456 F. Supp. at 111. The project required fill for the construction of a highway. *Id.* at 105. The plaintiffs alleged that the fill constituted a dike according to the dictionary definition, and, therefore, required congressional consent under § 9. *Id.* at 113. The New Jersey district court rejected the plain meaning construction of § 9 and § 10. *Id.* Relying on *Petterson*, the court instead determined that the congressional intent of the Act is to prevent unreasonable obstruction to navigation. *Id.* Since the "dike's" effect on navigation in the *Citizens' Committee* action was negligible, the district court held that the Corps properly issued a § 10 permit for the fill project. *Id.* at 113-14. *See generally* Comment, *Dikes and Causeways in Navigable Waters: The Rivers and Harbors Act of 1899 and Its Conflicting Interpretations in Citizens Committee for the Hudson Valley v. Volpe and Petterson v. Resor* [1972] 2 ENVT'L REP. (ELI) 10019.

[29] Citizens' Comm. for Envt'l Protection v. United States Coast Guard, 456 F. Supp. 101, 114-15 (D.N.J. 1978); Petterson v. Resor, 331 F. Supp. 1302, 1306 (D. Or. 1971).

[30] *E.g.*, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 382 (1969); Wisconsin v. Illinois, 278 U.S. 367, 413 (1929); United States v. Minnesota, 270 U.S. 181, 205 (1926); Swendig v. Washington Water Pwr. Co., 265 U.S. 322, 331 (1924).

Moreover, courts that apply the Corps' interpretation have concluded that the Act's legislative history supports the Corps' construction of sections 9 and 10.[31]

The Fourth Circuit, finding the conflicting judicial precedent indicative of the ambiguity of sections 9 and 10, chose to adopt the Corps' interpretation.[32] In reaching its decision, the Fourth Circuit relied heavily on the Supreme Court's opinion in *Wisconsin v. Illinois*.[33] The *Wisconsin* Court found the language of sections 9 and 10 ambiguous and consequently stressed the importance of the Corps' interpretation in construing the sections.[34] The *Wisconsin* action, however, did not involve the statutory interpretation of "dike." Rather, the issue raised in *Wisconsin* was whether the Corps had authority to authorize the diversion of water from Lake Michigan into a nearby river under section 10.[35] Thus, the Fourth Circuit had to examine the legislative history of the Act to determine whether the Corps' interpretation of sections 9 and 10 was consistent with congressional intent.[36]

The 1890 Act gave the Corps full authority to approve, deny, or alter any structure that might obstruct navigation or the navigable capacity of the waters.[37] The 1899 Act removed the Corps' authority to issue a

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[31] Citizens' Comm. for Envt'l Protection v. United States Coast Guard, 456 F. Supp. 101, 114-15 (D.N.J. 1978); Petterson v. Resor, 331 F. Supp. 1302, 1306 (D. Or. 1971).

[32] 621 F.2d at 1287.

[33] *Id.* at 1285, 1287-90 citing Wisconsin v. Illinois, 278 U.S. 367 (1928).

[34] 278 U.S. at 413.

[35] *Id.* at 409-10. In *Wisconsin v. Illinois*, six states sought injunctive relief to prohibit the diversion of water from Lake Michigan into the Chicago River. *Id.* at 399. The plaintiffs challenged the validity of the Corps' issuance of a § 10 permit for the diversion, arguing that the subsequent lowering of the lake's water level constituted an obstruction to navigation which requires congressional consent. *Id.* at 410-11. The Court recognized that Congress intended to prohibit unreasonable obstructions to navigation and the navigable capacity of the water. *Id.* at 413. The Court reasoned, however, that having listed specific structures in § 9 that require congressional consent, Congress authorized the Corps to determine what classes of cases listed in the second and third clauses of § 10 are an unreasonable obstruction. *Id.* at 412-13. The *Wisconsin* Court upheld the Corps' interpretation of § 10 and the Corps' issuance of a permit authorizing the diversion of the water. *Id.* at 413-14.

[36] 621 F.2d at 1287-89.

[37] Rivers and Harbors Act of 1890, ch. 907, § 7, 26 Stat. 426, 454 (1890); *see* note 8 *supra* (definition of "obstructions to navigable capacity"). Prior to 1890, the railroads and other groups built bridges over navigable rivers without the consent of Congress. *See* 21 CONG. REC. 8603 (1890) (remarks of Senator Vest). These bridges sometimes created obstructions to navigation. *Id.* Congress' only avenue to challenge the continued existence or compel the restructuring of these bridges was through public nuisance actions. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 621, 630-34 (1851) (challenging existence of bridge on Ohio River as obstruction to navigation). Congress, however, considered nuisance actions ineffective, given the lack of private citizens willing to bring actions at their own expense. *See* 21 CONG. REC. 8603 (1890) (remarks of Senator Vest).

An 1888 Supreme Court decision, Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888), spurred Congress into enacting the Rivers and Harbors Appropriation bill, later known as the Rivers and Harbors Act of 1890. In *Willamette*, the Supreme Court held that,

permit when the structure is a bridge, dike, dam, or causeway.[38] The Fourth Circuit found nothing in the Act's legislative history to explain Congress' curtailment of the Corps' authority.[39] The court reasoned, however, that Congress had reacted to two federal district court opinions, *United States v. Keokuk & H. Bridge Co.*[40] and *United States v. Rider*,[41] which were delivered prior to passage of the 1899 Act.[42] The *Keokuk* and *Rider* courts intimated that Congress could not constitutionally delegate authority to approve bridges.[43] The Fourth Circuit in *Hart and Miller Islands* opined that the *Keokuk* and *Rider* decisions

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absent congressional legislation to the contrary, states had the authority to approve or prohibit the construction of structures in navigable waters, regardless of whether the structure obstructed navigation. 125 U.S. at 12. Congress passed the 1890 Act prohibiting any obstructions to navigation without the permission of the Secretary of War unless the obstruction was "authorized by law." 1890 Act, *supra* note 2, § 10.

Despite the fact that the 1890 Act gave the Secretary complete authority over the construction of structures in navigable waters, Congress continued to pass bills authorizing the construction of bridges. *See, e.g.*, Act of July 23, 1894, ch. 153, 28 Stat. 119 (1894) (authorizing construction of bridge across Mississippi River); Act of May 28, 1896, ch. 258, 29 Stat. 190 (1896) (authorizing construction of bridge across Tallahatchie River). In 1896, Congress ordered the Secretary of War to compile the bridge bills and other laws relating to navigation. Act of June 3, 1896, ch. 314, § 2, 29 Stat. 202 (1896). The Secretary complied and the resulting draft became the River and Harbors Act of 1899. 1899 Act, *supra* note 2. *See* Hankey, *Sections 9 & 10 of the Rivers and Harbors Act of 1899: The Erosion of Administrative Control By Environmental Suits*, 1980 DUKE L.J. 170, 174-81 [hereinafter cited as Hankey] (legislative and judicial development of § 9 and § 10); Powers, *supra* note 8, at 505-09 (history of Act).

[38] 33 U.S.C. § 401 (1976); *see* note 37 *supra* (historical development of Act).

[39] 621 F.2d at 1288. The ambiguity in the legislative history of § 9 and § 10 was the result of Congress' failure to review the 1899 amendments to the Act. *See* 621 F.2d at 1288; Hankey, *supra* note 37, at 180-81. The bill's sponsor acknowledged only slight alterations from the 1890 Act in the 1899 amendments, whereupon Congress determined that there was no need to read the amendments aloud. *See* 32 CONG. REC. 2296-97 (1899) (remarks of Senator Frye). The 1899 amendments, however, contained significant changes. Prior to the 1899 amendments, the 1890 Act gave the Corps full approval powers over the construction of structures in navigable waters. 1890 Act, *supra* note 1, § 7. The 1890 Act also prohibited any obstruction to the navigable capacity of the waters unless authorized by law. 1890 Act, *supra* note 1, § 10. The 1899 Act limited the Corps' structure approval powers to specific structures. 1899 Act, *supra* note 2, § 10. Further the 1899 Act altered the phrase "affirmatively authorized by law" in the 1890 Act to "affirmatively authorized by Congress" for structures listed in § 9 of the 1899 Act. *Id.* at § 9; *see* text accompanying notes 40-41 *infra* (Fourth Circuit's opinion of Congress' reasons for amending 1890 Act). For a description of the changes in the 1899 Act from the 1890 Act see Wisconsin v. Illinois, 278 U.S. 367, 412-13 (1929); Hankey, *supra* note 37, at 180-81.

[40] 45 F. 178 (S.D. Iowa 1891).

[41] 50 F. 406 (S.D. Ohio 1892), *appeal denied*, 163 U.S. 132 (1896), *rev'd*, 178 U.S. 251 (1900).

[42] 621 F.2d at 1288-89.

[43] United States v. Rider, 50 F. 406, 410 (S.D. Ohio 1892); United States v. Keokuk & H. Bridge Co., 45 F. 178, 183 (S.D. Iowa 1891). Both the *Keokuk* and *Rider* courts held that the Secretary could not order the removal of congressionally authorized bridges. 50 F. at 408-10, 45 F. at 183.

prompted Congress to retain section 9 approval power over structures completely spanning navigable waters.[44] Therefore, the Fourth Circuit found the Corps' interpretation of sections 9 and 10 reasonable.[45]

The Fourth Circuit stressed that as a general rule courts defer to an agency's interpretation of a statute if Congress charged that agency with administration of the statute and the agency's interpretation is rational.[46] Therefore, the Fourth Circuit determined that since the Corps is responsible for administering the Act and because the Corps' construction is a rational interpretation of sections 9 and 10, the Corps' interpretation of the Act deserved deference.[47] The Fourth Circuit found the Corps' interpretation entitled to particular deference because the Corps was involved intimately in drafting the 1899 Act[48] and had interpreted sections 9 and 10 consistently for over eighty years.[49] Moreover, the court reasoned that because Congress never interfered with the Corps' practice of assuming approval authority for all structures that do not span navigable waters, Congress indirectly approved the Corps' interpretation.[50]

The Fourth Circuit also reasoned that Congress implicitly sanctioned the Corps' practice of issuing permits for diked disposal facilities by

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[44] 621 F.2d at 1288-89. The Fourth Circuit reasoned that Congress relied on the *Keokuk* and *Rider* district courts' dicta which expressed the opinion that Congress' delegation of bridge approval authority was an unconstitutional delegation of legislative power. 621 F.2d at 1288; *see* note 43 *supra* (*Keokuk* and *Rider* holdings). The Fourth Circuit determined that in response to the dicta, Congress removed the Corps' bridge approval authority as well as the Corps' authority over other structures that completely span waterways such as dikes, dams and causeways. 621 F.2d at 1288-89; *see* Petterson v. Resor, 331 F. Supp. 1302, 1306 (D. Or. 1977) (Congress' reliance on *Keokuk* and *Rider* dicta); Powers, *supra* note 8, at 507 (discussing Congress' reliance on *Keokuk* and *Rider* dicta); *cf.* Sisselman v. Smith, 432 F.2d 750, 753-54 (3d Cir. 1970) (Congress delegated all bridge approval authority to Secretary of Transportation and did not reserve congressional supervisory powers over bridges previously approved by Congress); note 56 *infra* (Congress delegated all bridge and causeway approval authority to Department of Transportation in 1966).

[45] 621 F.2d at 1289.

[46] *Id.* at 1290; *see* Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 381 (1969) (agency interpretation of statute entitled to deference); *cf.* National Resource Defense Council, Inc. v. Berklund, 609 F.2d 553, 557-58 (D.C. Cir. 1979) (court refused to defer to Secretary of Interior's interpretation of statute because past administrative interpretation inconsistent).

[47] 621 F.2d at 1290.

[48] *Id.* at 1290; *see* note 37 *supra* (Secretary of War drafted 1899 Act).

[49] 621 F.2d at 1290. For other decisions construing the Corps' consistent interpretation of the Act as support for deferring to the Corps' interpretation of the Act see Wisconsin v. Illinois, 278 U.S. 367, 413 (1929); Citizens' Comm. for Envt'l Protection v. United States Coast Guard, 456 F. Supp. 101, 114-15 (D.N.J. 1978); Petterson v. Resor, 331 F. Supp. 1302, 1306 (D. Or. 1971).

[50] 621 F.2d at 1291. In Boesche v. Udall, 373 U.S. 472, 483 (1963), the Supreme Court held that because Congress had not interfered with an agency's administrative practice, the Court could assume that Congress considers the practice consistent with the Mineral Leasing Act of 1920.

passage of legislation subsequent to the 1899 Act.[51] The court noted that section 404 of the Federal Water Pollution Control Act authorizes the Corps to issue permits for discharge of dredged or fill material[52] at disposal sites chosen by the Corps.[53] Similarly, the Fourth Circuit determined that in the 1970 legislation authorizing the dredging of the Baltimore Harbor, Congress strongly indicated that further congressional approval was not needed for a diked disposal facility to contain the Harbor's dredged materials.[54]

The Fourth Circuit's decision to adopt the Corps' interpretation of sections 9 and 10 is rational. The Corps' consistent interpretation of the Act coupled with the court's observation that Congress has not interfered with the Corps' application of sections 9 and 10 provides a strong basis for the Fourth Circuit to defer to the Corps' construction of the sections. Nevertheless, the plain meaning approach is also rational. As a general practice, courts have construed statutes by applying the ordinary meaning to the statutory language.[55] Neither approach, however, resolves the ambiguity of sections 9 and 10. Thus, Congress should amend the Act to clarify the meaning of these sections.

Congressional legislation enacted subsequent to the 1899 Act provides a further reason for Congress to amend sections 9 and 10. Since passing the 1899 Act, Congress has delegated its approval powers for bridges, causeways, and dams to the Corps and Secretary of Transportation.[56] The delegation of the majority of Congress' section 9 approval

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[51] 621 F.2d at 1290.

[52] According the Corps, "dredged materal" is material "that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(k) (1979). "Fill material" is any material used to raise the bottom elevation of a waterbody, including raising the bottom until it becomes dry land. 33 C.F.R. § 323.2(m) (1979).

[53] 621 F.2d at 1290 (citing 33 U.S.C. § 1344 (1976)). Congress enacted the Federal Water Pollution Control Act (FWPCA) to restore the nation's waters to and maintain them in their natural state. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 101, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1376 (1976 & Supp. II 1978)); *see* note 18 *supra* (§ 404 applied to dredging operations of Baltimore Harbor). Although Congress indicated approval of diked disposal facilities by passing § 404(a) of the FWPCA, construction of diked facilities for the containment of dredged materials still requires § 9 or § 10 approval. 33 C.F.R. § 323.2 (1979). The Fourth Circuit reasoned, however, that diked disposal areas under § 404(a) do not require specific congressional approval. 621 F.2d at 1290. The court cited remarks of Representative Vanik and Senator Muskie in the Congressional Record that demonstrated that Congress encouraged the Corps to issue permits for diked disposal facilities in order to end open water dumping. *Id.*

[54] *Id.* at 1290-91; *see* note 18 *supra* (legislation authorizing dredging of Baltimore Harbor).

[55] *E.g.*, Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-10 (1975); Browder v. United States, 312 U.S. 335, 338 (1941); United States v. American Trucking Assoc., Inc., 310 U.S. 534, 543-44 (1940).

[56] *See* Federal Power Act of 1920, ch. 285, § 4(e), 41 Stat. 1063 (1920) (codified at 16 U.S.C § 797(e) (1976)); Department of Transportation Act, Pub. L. No. 89-670, § 6(g)(3), (6), 80 Stat. 931 (1966) (codified at 49 U.S.C. § 1655(g)(3), (6) (1976)). The construction of bridges, causeways, and dams no longer requires congressional approval. Under the Federal Power