



JOURNAL OF Maritime Law and Commerce

In this issue:

Capt. Pete Pedrozo explains why ratification of the Law of the Sea Convention is not necessary for the United States

Kumar Jayasuriya and Melanie Oberlin provide a wrap-up of maritime law articles appearing in non-maritime law publications in 2009

Stephanie Showalter discusses the problems associated with aging dredge spoil disposal areas serving multi-state rivers and harbors

Steve Friedell responds to the admiralty jury trial article printed in our last issue.

Gray Staring looks at admiralty jurisdiction through the lens of Lord Coke and Richard II suggesting that ship building and other "non-maritime" contracts should be maritime.

Qais Mahafzah reviews the Both to Blame clause in bills of lading and charterparties

Edgar Gold reviews a new book: The International Law of the Shipmaster

In an Editorial we examine the future of the Journal of Maritime Law & Commerce

Maritime Law and Commerce

EDITOR

Edward V. Cattell, Jr.
Hollstein Keating Cattell Johnson &
Goldstein, PC

ASSOCIATE EDITOR

Prof. John Paul Jones
University of Richmond

BOOK REVIEW EDITOR

Prof. Michael F. Sturley
University of Texas

BUSINESS EDITOR

Jeffrey S. Moller
Blank Rome, LLP
Philadelphia

JOURNAL OF MARITIME LAW AND COMMERCE (ISSN 0022-2410) (USPS 997-480) is published quarterly in January, April, July, and October during the calendar year by the Jefferson Law Book Company, 2100 Huntingdon Avenue, Baltimore, Maryland 21211. It is printed by Worth Higgins & Associates, Richmond, Virginia. The annual subscription rate in the United States is \$215.00 for individuals and \$250.00 for institutions. Elsewhere, the rate is \$230.00 for individuals and \$265.00 for institutions. Periodical postage is paid at Baltimore, Maryland and additional mailing offices. **POSTMASTER:** Please send address changes to Journal of Maritime Law and Commerce, 2100 Huntingdon Avenue, Baltimore, Maryland 21211.

Library of Congress Catalog No: LC 79-15190

In electronic (pdf) form, the complete texts of works appearing previously in the Journal (beginning with Volume 1) are part of the Law Journal Library available by subscription from the William S. Hein Co., at <http://www.wshein.com>. Works appearing in the Journal are included in the Index to Legal Periodicals, Current Law Index, Social Science Citation Index, LegalTrac, PAIS, Omnifile Full Text, WESTLAW (file name: JMARLC), and LEXIS-NEXIS (file name: MARLWC).

For more information, please consult our web site (<http://www.jmlc.org>) or refer to the directory below.

Manuscripts and editorial correspondence should be sent to:

Edward V. Cattell, Jr.
Hollstein Keating Cattell Johnson & Goldstein, PC
1628 J. F. Kennedy Blvd., 20th Floor
Philadelphia, PA 19103
(215)-320-2073
Fax: (215)-320-3261
E-mail: edward.cattell@verizon.net

Books for review should be sent to:

Prof. Michael F. Sturley
University of Texas
School of Law
727 East Dean Keeton Street
Austin, TX 78705-3299
(512) 232-1350
FAX: (512) 471-6988
E-mail: msturley@mail.law.utexas.edu

Advertising copy should be sent to:

Jeffrey S. Moller
Blank Rome, LLP
One Logan Square
Philadelphia, PA 19103-6998
(215) 569-5792
FAX: (215) 569-5694
E-mail: moller@blankrome.com

New subscriptions, address changes, renewals, and commercial correspondence should be sent to:

Journal of Maritime Law and Commerce
Jefferson Law Book Company
2100 Huntingdon Avenue
Baltimore, MD 21211
(443) 573-3409
FAX: (410) 783-2448
E-mail: jefflaw1@juno.com

Orders for back issues should be sent to:

William S. Hein & Co., Inc.
1285 Main Street
Buffalo, NY 14209-1987
(800) 828-7571 or (716) 882-2600
FAX: (716) 883-8100
E-mail: mail@wshein.com
Web site: www.wshein.com

Members of the Editorial Board are listed on the inside back cover.

Converting the Erie Pier Confined Disposal Facility to a Processing and Reuse Facility: Is an Interstate Compact a Necessary Component?

Stephanie Showalter, Alex Porteshawver, and Jennifer Tahtinen*

I INTRODUCTION

The Duluth-Superior Harbor on Lake Superior ranks the highest for cargo volume among the Great Lakes ports.¹ Duluth-Superior is a critical component of the supply chain for ore, coal, and grain within the Great Lakes region and throughout the country. However, Duluth-Superior can continue to perform this role only if the port's channels are dredged on a routine basis. The U.S. Army Corps of Engineers (Corps) estimates that an average of 150,000 cubic yards of dredged material are removed annually from the Duluth-Superior Harbor.²

Since 1979, ninety percent of the material dredged from the Duluth-Superior Harbor has been placed at the Erie Pier Confined Disposal Facility (Erie Pier CDF).³ A CDF is "an engineered structure for containment of dredged material," which isolates the dredged materials from the adjacent

*Stephanie Showalter (J.D./M.S.E.L., Vermont Law School) is the Director of the National Sea Grant Law Center at the University of Mississippi School of Law. Alex Porteshawver J.D., Marquette University Law School, 2010, and Jennifer Tahtinen, J.D., Hamline University School of Law, 2010, contributed to this article while working as student research assistants at the National Sea Grant Law Center.

¹Duluth Seaway Port Auth., *Port Facts*, <http://www.duluthport.com/seawayfactsus.html> (last visited Aug. 26, 2009).

²U.S. Army Corps of Eng'rs, *Duluth-Superior Harbor*, <http://www.lre.usace.army.mil/who/operationsofficehomepage/dredgedmaterialmanagementplans/status/duluth-superiorharbor-michiganandwisconsin/> (last visited Aug. 26, 2009).

³GREAT LAKES DREDGING TEAM, CASE STUDY SERIES: DULUTH-SUPERIOR HARBOR DREDGED MATERIAL MGMT. PLAN, available at <http://www.glc.org/dredging/case/duluth.html> (last visited Aug. 26, 2009).

water.⁴ Although the 89-acre Erie Pier CDF is located in Minnesota, it serves both the Wisconsin and Minnesota portions of Duluth-Superior Harbor because the Minnesota-Wisconsin state line bisects the port. Unfortunately, the Erie Pier CDF is approaching maximum capacity.⁵ If Erie Pier is filled to capacity, the Corps' alternative disposal options are limited.

The Corps and the Environmental Protection Agency (EPA) have been encouraging states and port authorities to find beneficial uses for dredged material as an alternative to placement in CDFs.⁶ Beneficial use of dredged materials helps the Corps maximize the public benefits of dredging projects through the creation of wetlands, revitalization of brownfields, and enhancement of recreational opportunities.⁷ Dredged materials, especially the finer materials, may require more processing before they can be reused. In general, dredged materials destined for a beneficial use are placed into a storage area or CDF for dewatering and then transported to the project site.⁸ The Erie Pier CDF or a similar facility, therefore, would remain essential to the beneficial use disposal options. Phasing out Erie Pier would limit the Corps' storage options and could increase the costs of beneficial use.

Efforts to encourage the beneficial use of dredged materials at Erie Pier have been underway for some time. By 2003, beneficial use was diverting about twenty to twenty-five percent of the dredged materials from disposal in the Erie Pier CDF.⁹ Some materials have been used for fill for highways and building sites, while others have been tested for use in mine reclamation.¹⁰ The most recent management plan for Erie Pier, released in 2007 and developed by the Duluth-Superior Metropolitan Interstate Council, fully embraces the success of these experimental efforts. The 2007 plan is intended to "facilitate a dredged material reuse program at Erie Pier."¹¹ To accomplish this, the Erie Pier CDF will be transitioned to the Erie Pier Processing

⁴Midwest Hazardous Substance Research Ctr., *Contaminated Sediments*, <http://www.egr.msu.edu/tosc/grandcal/factsheets/Overview%20of%20Contaminated%20Sediments.doc> (last visited Aug. 26, 2009).

⁵METRO INTERSTATE COUNCIL, *ERIE PIER MGMT. PLAN 1* (2007).

⁶See generally U.S. ENVIRONMENTAL PROTECTION AGENCY AND U.S. ARMY CORPS OF ENGINEERS, *IDENTIFYING, PLANNING, AND FINANCING BENEFICIAL USE PROJECTS USING DREDGED MATERIALS: BENEFICIAL USE PLANNING MANUAL* (2007), available at http://www.epa.gov/owow/oceans/ndt/publications/pdf/2007_beneficial_use_manual.pdf.

⁷Id. at 9.

⁸U.S. Army Corps of Eng'rs, *Great Lakes and Ohio River Division, Dredged Material Management in the Great Lakes*, <http://www.lrd.usace.army.mil/navigation/glnavigation/dredgedmaterialmanagement/> (last visited Aug. 26, 2009).

⁹GREAT LAKES COMM'N, *WASTE TO RESOURCE: BENEFICIAL USES OF GREAT LAKES DREDGED MATERIALS* 8 (2003).

¹⁰Id.

¹¹ERIE PIER MANAGEMENT PLAN, *supra* note 6.

and Reuse Facility. Upon conversion, Erie Pier will be used to process dredged materials for beneficial reuse.

This first-of-its-kind conversion of a CDF to a processing-reuse facility raises a number of legal issues including, but not limited to, the ability of the states to control placement of materials into the facility, transportation of dredge materials across state lines, state standards for contaminants, responsibility for long-term maintenance, liability, and allocation of costs. Part II of this article provides an overview of dredged materials management and the traditional role of CDFs. Part III discusses the legal framework governing these two activities and the legal issues raised by the bi-state nature of Duluth-Superior Harbor. Part IV looks at the potential operational liabilities of the various parties with respect to the Erie Pier CDF. Part V discusses the process for turning a CDF over to a local sponsor. Part VI examines whether the costs, benefits, and liabilities associated with the operation of a processing-reuse facility located in a bi-state harbor could be more equitably divided if Minnesota and Wisconsin entered into an interstate compact. Part VII contains some recommendations of future steps the Corps and the states can take to address the legal challenges associated with operating a processing-reuse facility at Erie Pier.

II

ROLE OF CONFINED DISPOSAL FACILITIES IN DREDGED MATERIALS MANAGEMENT

Congress authorized the Corps to undertake navigation projects on behalf of the United States in 1824.¹² Dredging needs are determined by the Corps district offices through communication with commercial and recreational navigation users in the area and local and state agencies responsible for port and harbor facilities.¹³ The Corps also has regulatory authority over the disposal of dredge and fill material into "waters of the U.S." pursuant to § 404 of the Clean Water Act (CWA).¹⁴ When the Corps issues § 404 permits, it must comply with guidelines developed by the EPA (known as "Section 404(b)(1) Guidelines") and the EPA Administrator may "veto" a Corps permit upon a determination that "the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shell-

¹²Lawrence Juda and Richard Burroughs, *Dredging Navigational Channels in a Changing Scientific and Regulatory Environment*, 34 J. MARITIME L. & COM. 171, 185 (2004).

¹³GREAT LAKES DREDGING TEAM, DECISION MAKING PROCESS FOR DREDGED MATERIALS MANAGEMENT 1 (1998), available at <http://www.glc.org/dredging/dmm/decision.pdf>.

¹⁴33 U.S.C. § 1344(a).

fish beds and fishery areas . . . , wildlife, or recreational areas."¹⁵ Although the Corps does not issue § 404 permits to itself, the agency's regulations require it to authorize its own dredged material disposal activities "by applying all applicable substantive legal requirements, including public notice, opportunity for public hearing, and application of the section 404(b)(1) guidelines."¹⁶

States play a significant role in this process. Under § 401 of the Clean Water Act, applicants for federal licenses or permits for activities which may result in any discharge to navigable waters must provide the federal agency with a certification from the state that the discharge is consistent with that state's water quality standards.¹⁷ Like other permit applicants, the Corps is required to seek state water quality certification for its discharges of dredged or fill material into waters of the U.S.¹⁸ Federal agencies may not issue the license or permit until a certification is obtained or the state waives its authority.¹⁹ Denial of water quality certification when exercised by the states can prevent federal actions that are not in compliance with § 404(b)(1) Guidelines.

Until the late 1960s, the Corps' selection of disposal methods was driven by economic considerations.²⁰ As a result, most dredged material was discharged into open water as this was the cheapest disposal method.²¹ Because much of the sediment in the Great Lakes was contaminated from years of industrial activities, open water disposal was not always an option. The Corps constructed CDFs in the Great Lakes solely to provide long-term storage for dredged material that was unsuitable for open water disposal or beneficial use because of contamination.²²

Under federal law, each CDF must have a local sponsor, typically a city, county, or state government agency. The local sponsor must provide all lands, easements, and rights of way to the Corps for the site and contribute twenty-five percent of the construction funds.²³ The Port Authority of Duluth is the local sponsor of the Erie Pier CDF.

¹⁵*Id.* § 1344(c).

¹⁶33 C.F.R. § 336.1(a).

¹⁷33 U.S.C. § 1341(a)(1).

¹⁸33 C.F.R. § 336.1(a)(1).

¹⁹33 U.S.C. § 1341(a)(1).

²⁰JAN A. MILLER, GREAT LAKES & OHIO RIVER DIVISION, U.S. ARMY CORPS OF ENGINEERS, CONFINED DISPOSAL FACILITIES ON THE GREAT LAKES I (1998), available at <http://el.erdc.usace.army.mil/dots/budm/pdf/GreatLakesCDFs.pdf>.

²¹*Id.*

²²*Id.* at 8. Section 123 of the Rivers and Harbors Act authorizes the Secretary of the Army, acting through the Chief of Engineers, to construct, operate, and maintain contained spoil disposal facilities. 33 U.S.C. § 1293a(a).

²³*Id.* § 1293a(c).

Today, the Corps' regulations direct district engineers to consider "all practicable alternatives" for dredged material disposal including upland placement, beach nourishment, confined disposal, open water disposal, and beneficial use.²⁴ Economic factors are still given great weight. "It is the Corps' policy to regulate the discharge of dredged material from its projects to assure that dredged material disposal occurs in the least costly, environmentally acceptable manner, consistent with engineering requirements established for the project."²⁵ This least costly alternative is known as the Federal Standard, which states:

the dredged material disposal alternative or alternatives identified by the Corps which represent the least costly alternatives consistent with sound engineering practices and meeting the environmental standards established by the 404(b)(1) evaluation process or ocean dumping criteria.²⁶

The Corps is not required to limit the selected disposal alternative to the Federal Standard. In 1996, Congress amended the Water Resources Development Act to authorize the Secretary of the Army, with the consent of the non-federal interests, to choose a disposal option that is more expensive than the Federal Standard "if he determines that the additional costs of such disposal are reasonable relative to the environmental benefits, including benefits derived from the creation of wetlands or from efforts to control shoreline erosion."²⁷ The consent of the non-federal interests is required because deviation from the Federal Standard alters the cost-share requirements of the project's non-federal partners.²⁸

III

INTERSTATE MOVEMENT OF DREDGED MATERIAL

In addition to facilitating the beneficial use of dredged materials, the conversion of Erie Pier CDF to a processing-reuse facility will extend the useful life of the CDF and postpone or eliminate the permitting, siting, and construction of a new CDF. The process of selecting a site and constructing a new CDF is quite expensive, time consuming, and often controversial. Therefore, extending the life of an existing CDF provides a significant eco-

²⁴33 C.F.R. § 337.9(a).

²⁵*Id.* § 336.1(c)(1).

²⁶*Id.* § 335.7

²⁷Juda & Burrough, *supra* note 13, at 201.

²⁸EPA AND CORPS, THE ROLE OF THE FEDERAL STANDARD IN THE BENEFICIAL USE OF DREDGED MATERIAL FROM U.S. ARMY CORPS OF ENGINEERS NEW AND MAINTENANCE NAVIGATION PROJECTS: BENEFICIAL USES OF DREDGED MATERIALS, 3 (2007).

conomic benefit. Since the material currently in Erie Pier is not heavily contaminated, the hope is that all of the material will be destined for beneficial use.

Although the Erie Pier CDF is located in Minnesota, more than half the dredging occurs in Wisconsin and dredged materials from Wisconsin have often been placed in the facility. This raises some challenging questions regarding equity between the states. Although both states are receiving benefits from the CDF, the costs are not shared equally. First, it is in Minnesota's best interest to keep the Erie Pier CDF operating for as long as possible. Until it is filled, the facility is maintained and operated by the Corps. Upon closure, responsibility shifts to the local sponsor, the Duluth Seaway Port Authority. In addition to losing the revenue generated by the processing-reuse facility, Minnesota must accept responsibility for long-term maintenance of waste generated in Wisconsin. If, in the future, only Wisconsin dredged materials are placed in the Erie Pier CDF, Wisconsin would receive all the benefit while Minnesota bears the entire burden. If dredged materials from both states are placed in the Erie Pier CDF, but more materials come from Wisconsin, the CDF will fill up faster than if materials were only coming from Minnesota.

To protect its interest in the Erie Pier CDF, Minnesota could refuse to accept dredged materials from Wisconsin or place other restrictions on the placement of out-of-state dredged materials. Whether Minnesota can refuse solid waste from Wisconsin or any other state would depend on whether such a ban would violate the Commerce Clause of the U.S. Constitution.

The Commerce Clause grants broad powers to Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."²⁹ The Supreme Court has affirmed Congress' authority not only to directly regulate interstate commerce, but to also regulate activities that have a substantial effect on interstate commerce.³⁰ Congress may delegate its Commerce Clause powers to federal agencies that are better suited to making highly technical or specialized decisions.³¹ As mentioned above, with respect to CDFs, Congress has delegated substantial authority to the Corps to regulate commerce by granting it power to construct, operate, and maintain CDFs to deal with the storage of dredged materials.

If, for instance, the Corps decided to restrict the flow of dredged materials from Wisconsin into the Erie Pier CDF, the federal government would be directly regulating interstate commerce—the sale and disposal of dredged

²⁹U.S. CONST. art. I, §. 8, cl. 3

³⁰See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (granting Congress power to regulate activity that substantially affects interstate commerce).

³¹See generally Evan J. Criddle, *Chevron's Consensus*, 88 BUFF. UNIV. L. REV. 1271 (2008).

materials. Dredged material is classified as "solid waste" in Wisconsin³² and "other wastes" in Minnesota.³³ Disposal of waste, which includes processing and recycling, is an activity the Supreme Court has long recognized as "well within Congress' authority under the Commerce Clause."³⁴

The Commerce Clause is both an affirmative grant of authority to Congress and a limitation on the power of the states. This clause expressly limits the powers of the states to regulate commerce when Congress has passed federal laws and also implies limitations on the states. Courts often invalidate state laws that burden interstate commerce, even in the absence of federal regulation.³⁵ This limitation is known as the "dormant commerce clause," a common law, or judge-made, doctrine that prohibits states from passing laws and regulations that place an undue burden on interstate commerce.

While Congress' Commerce Clause powers are quite broad, they are not without limits. In the 1990s, the Supreme Court began to limit Congress' authority by holding that Congress may only regulate channels of commerce, travel, and activities that have a substantial relationship to interstate commerce.³⁶ More recently, however, the Supreme Court appears inclined to allow an expansion of Congress' authority under the Commerce Clause by allowing Congress to regulate activity that is economically motivated.³⁷ These decisions have had little effect on Congress' ability to regulate waste, however, which has long been considered an article of commerce.

With respect to Erie Pier, Minnesota may wish to restrict the placement of dredge materials from Wisconsin into the Erie Pier CDF. There are two possible means for doing so. First, it could pass a state law that banned or

³²Id.

³³MINN. STAT. ANN. §115.01 (2008). The definition of "other wastes" includes "solid waste."

³⁴New York v. U.S., 505 U.S. 144, 160 (1992).

³⁵See generally David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. REV. 1 (2007). It is also important to note that Congress has attempted to pass comprehensive legislation that would regulate the interstate movement of solid waste. The Solid Waste Interstate Transportation Act of 2009 was last referred to the House Committee on Energy and Commerce. H.R. 274, 111th Cong. (2009), GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-274> (last visited June 22, 2009). This bill would authorize states to establish limits on the amount of out-of-state municipal solid waste (MSW) received. H.R. 274, 111th Cong. § 4011(f) (2009). It would also require that all new or expanded facilities include an annual limitation of not less than twenty percent of the total quantity of out-of-state MSW. Id. at § 4011(g)(2). If this bill were to become law, Minnesota would have to comply with this and the dormant commerce clause would no longer apply.

³⁶See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (limiting Congress' power to regulate gun-carrying activity because it was not an economic activity nor did it substantially affect commerce in the aggregate).

³⁷See generally *Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding that growing marijuana for personal medicinal use was economically motivated and therefore could be regulated by Congress).

restricted the transport of out-of-state dredged materials into Minnesota. Second, because the federal government is operating the facility via the Corps, Minnesota could seek to influence the agency's operational policies.

A. State Ban or Restriction

The U.S. Supreme Court has developed a two-step approach to its dormant commerce clause analysis. First, a reviewing court looks to whether the state law is per se invalid, e.g. motivated by simple economic protectionism. If the state law does not discriminate against out-of-state interests on its face and there are legitimate legislative objectives, courts use a balancing test delineated by the Supreme Court in *Pike v. Bruce Church, Inc.*³⁸ In *Pike*, the Court held, "[w]here the statute regulates even-handedly . . . and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."³⁹ While no court has directly addressed the interstate transport of dredged materials, the dormant commerce clause cases with respect to the transport of solid waste are instructive as most Great Lakes states classify dredged materials as solid waste.

The Supreme Court first addressed the issue of solid waste management in *Philadelphia v. New Jersey*.⁴⁰ New Jersey had prohibited the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State."⁴¹ The law was passed to preserve New Jersey's limited landfill space. Operators of private landfills in New Jersey and several cities in surrounding states challenged New Jersey's waste import ban claiming it discriminated against interstate commerce.⁴² Out-of-state generators of waste were no longer able to ship their waste to New Jersey landfills, but in-state generators could continue to do so.⁴³ This law imposed a burden on out-of-state generators, who now had to find other and potentially more expensive landfills to deliver to, and New Jersey landfill operators, who were presumably receiving less waste and losing income.

After concluding that solid waste or garbage is "an article of commerce," the Court began its inquiry by asking whether the New Jersey waste import ban was basically a protectionist measure, and therefore per se invalid, or a law directed towards legitimate local concerns. The Court held that the New

³⁸397 U.S. 137 (1970).

³⁹Id. at 142.

⁴⁰437 U.S. 617 (1978).

⁴¹Id. at 618-19.

⁴²Id.

⁴³Id.

Jersey regulation was per se invalid because the law "discriminated on its face" against out-of-state waste.⁴⁴ The Court held that New Jersey may not accomplish its goal of saving landfill space "by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."⁴⁵

The Court noted, however, that "New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills."⁴⁶ The Court appears to suggest that a ban on all waste to preserve landfill space would have passed the *Pike* test. The Court also suggested that if New Jersey had a legitimate reason for discriminating against out-of-state waste, the regulation might have been upheld.⁴⁷

Michigan experienced similar difficulties with respect to its Solid Waste Management Act (SWMA). In *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, the Supreme Court struck down the SWMA, which included provisions that prevented landfills and other waste disposal operators from accepting solid waste that was not generated in the county in which the disposal area was located, unless explicitly authorized in that county's approved solid waste management plan.⁴⁸ Although the statute treated waste from different counties in Michigan the same as it treated out-of-state waste, the court held that a state could not curtail the movement of articles of commerce, here solid waste, into the state.⁴⁹ Because the Court found that the restriction facially discriminated against commerce, Michigan bore the burden of proving that the regulation furthered health and safety concerns that could not be adequately served by other nondiscriminatory alternatives.⁵⁰ Michigan, however, failed to meet that burden.⁵¹

What do these rulings mean for Minnesota? They obviously limit Minnesota's options. Minnesota, for instance, could not ban the importation of dredged materials from Wisconsin to preserve space in the Erie Pier CDF, because, as seen in *Philadelphia*, that would facially discriminate against interstate commerce and be struck down as a protectionist measure. Nor could Minnesota prohibit the disposal of dredged materials generated outside of both Minnesota *and* within Minnesota, but outside of Duluth,

⁴⁴Id. at 622-23, 628.

⁴⁵Id. at 663.

⁴⁶Id. (Emphasis in original).

⁴⁷Id.

⁴⁸504 U.S. 353, 357 (1992).

⁴⁹Id. at 361.

⁵⁰Id. at 366.

⁵¹Id. The Court held that although the state passed this restriction to ensure adequate and safe disposal of future solid waste, it could have done so by limiting the amount of waste landfill operators may accept each year, instead of limiting the amount of out-of-state waste. Id. at 366-67.

because while evenhanded, a similar law was invalidated in *Fort Gratiot*. These principles apply equally to the movement of dredged materials within, out of, and into Wisconsin. As the success of Erie Pier depends on the unrestricted movement of materials across state lines, the Commerce Clause plays a facilitative role by preventing one state from blocking a regional project.

1. "Legitimate State Purpose"

Courts have left open the possibility that state laws that discriminate against interstate commerce may be valid if the disparate treatment is not based on the origin of the waste.⁵² Under the U.S. Supreme Court's dormant commerce clause decisions, a state statute that facially discriminates against interstate commerce is unconstitutional unless the state is able to show that two conditions are met: (1) the statute serves a legitimate state purpose, and (2) the purpose is one that cannot be served as well by available nondiscriminatory means.⁵³

In *Maine v. Taylor*, the Court applied this rule and upheld a Maine statute that completely banned the importation of live baitfish into the state.⁵⁴ The legitimate purpose served by the ban was protection against two ecological threats:

[f]irst, Maine's population of wild fish . . . would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways.⁵⁵

Maine was able to satisfy the second necessary condition by showing at trial that there was no scientifically accepted method of inspecting shipments of live baitfish for parasites or co-mingled species.⁵⁶ An outright ban on imported baitfish was the only means available of serving the legitimate state purpose, so the Maine statute was constitutional. At one point in its opinion, the U.S. Supreme Court suggested that it would only invalidate a state regulation if the challenger could establish there was no reasonable purpose for the regulation other than economic protectionism.⁵⁷ After its rul-

⁵²*Philadelphia*, 437 U.S. at 663.

⁵³*Maine v. Taylor*, 477 U.S. 131, 140 (1986).

⁵⁴See generally *id.*

⁵⁵*Id.* at 141 (internal citations and footnotes omitted).

⁵⁶*Id.* at 141-42.

⁵⁷*Id.* at 149.

ing in *Maine*, it seemed that "a state need only assert interests that are plausible and unrelated to economic protectionism . . ." to succeed on a dormant commerce clause challenge.⁵⁸ That, however, is easier said than done.

For example, in *Chemical Waste Management, Inc. v. Hunt*, despite Alabama's claims that it was advancing a legitimate state interest, the Supreme Court struck down a state law that imposed a fee on out-of-state generators of hazardous waste.⁵⁹ Alabama argued that the additional fee served a legitimate local purpose relating to the health and safety of its citizens.⁶⁰ Alabama contended that the following interests were served: (1) protection of the health and safety of Alabama citizens from toxic substances; (2) conservation of the environment; (3) compensation for costs and burdens out-of-state generators impose by dumping waste in Alabama; and (4) reduction of waste flow on highways.⁶¹ The Court accepted that these may be legitimate state interests, but stated that there was no evidence that the waste generated outside Alabama was more dangerous than hazardous waste generated in Alabama.⁶² Finally, the Court reasoned that there were other non-discriminatory means available to accomplish these interests; for example, imposing a general per-ton fee on all hazardous waste or a per-mile tax on all vehicles transporting waste in Alabama.⁶³

The Court in *Hunt* refused to apply the flexible scrutiny test established in *Pike* because the additional fee imposed on out-of-state hazardous waste discriminated on its face and in practice.⁶⁴ The Court applied the *Pike* test in *Maine v. Taylor*, but in that case legitimate legislative objectives were advanced and there was no "patent discrimination."⁶⁵ Furthermore, the fee's effects were more than incidental because the fee targeted only out-of-state hazardous waste.⁶⁶

The Supreme Court applied similar reasoning when it invalidated an Oregon surcharge on out-of-state waste.⁶⁷ Oregon asserted that the surcharge was merely a compensatory tax imposed to make out-of-state generators pay

⁵⁸See James Hinshaw, Student Note, *The Dormant Commerce Clause After Garcia: An Application to the Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511, 546 (1992).

⁵⁹See generally, *Chem. Waste Mngmt. v. Hunt*, 504 U.S. 334 (1992).

⁶⁰*Id.* at 343.

⁶¹*Id.*

⁶²*Id.* at 344. When a regulation or law facially discriminates against interstate commerce, then the state bears the burden of establishing that the discrimination is justified and unrelated to economic protectionism. *Id.*

⁶³*Id.* at 345.

⁶⁴*Chem. Waste Mngmt.*, 504 U.S. at 342.

⁶⁵*Id.* at 343.

⁶⁶*Id.*

⁶⁷*Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of State of Oregon*, 511 U.S. 93, 93 (1994).

their fair share of disposal costs.⁶⁸ The Court held that the surcharge was facially invalid under the dormant commerce clause because it patently discriminated against out-of-state waste and the state was unable to prove that it advanced a legitimate state purpose that could not be met by other nondiscriminatory means.⁶⁹ Oregon therefore had the burden of showing there was a legitimate state interest. The Court did not accept Oregon's argument that it was protecting a natural resource—landfill space.⁷⁰ The Court reasoned that even if landfill space was considered a natural resource, a state may not attempt to isolate itself from a problem that is common to many states by passing regulations that hamper interstate commerce.⁷¹

In *Sporhase v. Nebraska*, the Supreme Court upheld state restrictions on the interstate transport of water.⁷² To preserve its precious groundwater and protect the health and welfare of its residents, Nebraska passed a law that required states wishing to transfer water from Nebraska obtain a permit from Nebraska. Nebraska would only grant the permit if four conditions were met: (1) withdrawal of groundwater requested was reasonable; (2) the withdrawal was not contrary to the conservation and use of groundwater; (3) the withdrawal was not otherwise detrimental to the public welfare; and (4) the requesting state granted reciprocal rights to Nebraska so that it may withdraw groundwater from their state.⁷³ The Court upheld the first three conditions of the Nebraska statute, but struck down the reciprocity requirement as violating the Commerce Clause.⁷⁴

The Court held that a state may impose severe restrictions on the intrastate transfer and use of water to prevent uncontrolled transfer of water outside the state.⁷⁵ In addition, the Court said that it was reluctant to deem as unreasonable measures taken by a state to conserve a natural resource for its citizens in times of severe shortage.⁷⁶ The Court based its conclusion on three realities: the fact that states have historically been permitted to regulate water in times of shortage, the legal expectation that under certain circumstances a state may restrict waters within its borders, and the understanding that a state may favor its own citizens in times of shortage.⁷⁷

⁶⁸*Id.* at 102.

⁶⁹*Id.* at 100.

⁷⁰*Id.* at 107.

⁷¹*Id.* (quoting *Chemical Waste*, 504 U.S. at 339-40).

⁷²See generally *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

⁷³*Id.*

⁷⁴*Id.* at 957-58.

⁷⁵*Id.* at 955.

⁷⁶*Id.* at 956.

⁷⁷*Id.* at 956-57.

It is important to note that the Court refused to recognize water as a natural resource that was exempt from Commerce Clause scrutiny. The Court classified water as an article of commerce so as not to exempt Nebraska groundwater regulation from Commerce Clause scrutiny or prevent Congress from passing comprehensive groundwater legislation. The Court considered the following when it determined that Nebraska was in a period of groundwater shortage: the land in question was designated by the Director of the Nebraska Department of Water Resources as an area with inadequate groundwater supply to meet current and future uses; special rules and regulations governing water use had already been promulgated; defined townships located within the area in question were defined as "critical" because of the decline of water; and the rules and regulations required installation of flow meters and strictly limited transfers of water.⁷⁸

The Court, however, struck down the reciprocity requirement because in practice it would serve as a complete ban on interstate transportation of water.⁷⁹ Furthermore, Nebraska failed to show any evidence that the reciprocity requirement was "narrowly tailored" to effectuate its purpose and that it could not be accomplished by other non-discriminatory means.⁸⁰

In *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*,⁸¹ the Supreme Court again struck down a reciprocity agreement, this time imposed by the state of Mississippi. Mississippi had passed a regulation providing "that milk and milk products from another State may be sold in Mississippi only if the other State accepts milk or milk products produced and processed in Mississippi on a reciprocal basis."⁸² Mississippi argued that the reciprocity agreement served its vital interests in maintaining its health standards.⁸³ The Court held that it did not, because if another state entered into a reciprocity agreement with Mississippi, that state's milk would be admitted into Mississippi even if that state's milk standards were lower.⁸⁴ The Court, therefore, found that the burden on interstate commerce clearly outweighed the local putative benefits.⁸⁵ Mississippi had also argued that this sort of reciprocity agreement was essentially a fair-trade agreement that helped eliminate different inspection standards in different states thereby promoting interstate commerce.⁸⁶ While the court agreed that these sort of agreements are not a per se viola-

⁷⁸Id. at 955.

⁷⁹Id. at 957-58.

⁸⁰Id.

⁸¹424 U.S. 366 (1976).

⁸²Id. at 366.

⁸³Id. at 375.

⁸⁴Id.

⁸⁵Id. at 367.

⁸⁶Id. at 378.

tion of the Commerce Clause, Mississippi was not allowed to force its own judgments as to the adequate level of milk sanitation on neighboring states and effectively ban the interstate flow of commerce in milk.⁸⁷

With respect to the Erie Pier processing-reuse facility, the applicability of *Sporhase* is questionable. First, it involved groundwater, not solid waste. More importantly, it was aimed at preventing the out-of-state transfer of water during time of severe shortage. Second, Minnesota would be seeking to control the importation of solid waste into Minnesota—not the transfer of dredged materials to another state. Minnesota, however, could assert that the restriction was passed to conserve a valuable resource, the CDF, in a time of severe shortage. The regulatory context of Erie Pier, however, is much different. First, there is no history of allowing states to regulate landfill sites in times of shortage. Second, history has not dictated a legal expectation that a state may restrict landfill sites under certain circumstances; in fact, the Supreme Court has set the opposite expectation.⁸⁸ Third, although states may favor its own citizens in times of shortage, precedent indicates that even during those times prohibitions on out-of-state waste violate the Commerce Clause.

For Minnesota to take advantage of the *Maine* exception, the dredged materials from Wisconsin would have to be different from those in Minnesota and pose a threat to the health, safety, or both of Minnesota's citizens. Suppose, for the sake of argument, that dredged materials from Wisconsin are contaminated by purple loosestrife, an invasive species⁸⁹ (discussed in greater detail in § IV(B)), but dredged materials from Minnesota are not. The Wisconsin materials, therefore, pose a threat to Minnesota's environment. A ban on the importation of Wisconsin materials would serve the legitimate purpose of protecting Minnesota from a non-native plant invasion. If this purpose cannot be served by a non-discriminatory means, such a ban might be upheld. Unfortunately for Minnesota, in this hypothetical there are probably non-discriminatory means available to accomplish the legitimate purpose. Dredged materials could be treated to eliminate the presence of the weed or shipments could be inspected and rejected only if contaminated.

The availability of other non-discriminatory means of accomplishing a legitimate state interest is probably the largest hurdle Minnesota would have

⁸⁷Id. at 380.

⁸⁸See generally *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill v. Mich. Dept. of Natural Res.*, 504 U.S. 353 (1992).

⁸⁹An invasive species is "a species that is (1) non-native (or alien) to the ecosystem under consideration and (2) whose introduction causes or is likely to cause economic or environmental harm or harm to human health." Executive Order 13112, 64 Fed. Reg. 6183 (Feb. 8, 1999).

to overcome if it wanted to pass a law restricting the placement of Wisconsin dredged materials in Erie Pier. In *Chemical Waste Management*, despite the existence of legitimate state interests and the fact that the chosen regulation furthered that interest, the regulation was struck down because it could be accomplished by other non-discriminatory means. This line of reasoning also prevented Indiana from placing restrictions on out-of-state wastes arguably to protect the health and safety of its citizens.⁹⁰ Under both *Chemical Waste Management* and *Government Suppliers Consolidated Services*, other non-discriminatory means included applying the existing regulation evenhandedly by imposing it on both in-state and out-of-state waste generators and haulers. If Minnesota could establish that restricting Wisconsin dredged materials served the legitimate state interest of protecting the health and safety of its citizens or conserving the environment and natural resources, a regulation that slowed the flow of all dredged materials coming from both Minnesota and Wisconsin, not just Wisconsin, would probably have the most chance of success.⁹¹

Furthermore, any sort of reciprocity requirement would likely violate the Commerce Clause. For instance, Minnesota could not pass a statute that allowed Wisconsin to dispose of dredged materials, only if they grant reciprocal rights to Minnesota to deposit a certain amount of dredged materials in Wisconsin. Minnesota might be able to give Wisconsin the opportunity to enter into a reciprocity agreement, but it may not pass any sort of law or regulation that would require Wisconsin to do so. According to *Cottrell*, these types of agreements are not per se invalid, but they may in practice serve as a complete ban on the interstate flow of commerce.⁹² Therefore, Minnesota could not require that Wisconsin enter into a reciprocity agreement in order

⁹⁰In *Government Suppliers Consolidating Services, Inc. v. Bayh*, the District Court for the Southern District of Indiana struck down a state regulation that restricted the amount of out-of-state waste that could be disposed of at in-state landfill sites. 753 F. Supp. 739 (S.D. Ind. 1990). The court applied a modified *Maine* test and held that an increased tipping fee protected the health and welfare by establishing a hazardous substance response fund; however, because out-of-state waste haulers could no longer afford to dump waste in Indiana, no money would be flowing into this fund. *Id.* at 769-70. The court also held that a flat fee could be charged to slow all waste disposal or the state could pay the increased disposal costs, but not the haulers. *Id.* The court found that the health officer certification protected the health and safety of Indiana citizens, but concluded that Indiana could have instead required all waste haulers to provide the certificate. *Id.* at 773-74. Finally since the hauler certification was applied evenhandedly to in-state and out-of-state haulers the Court applied the *Pike* test, and determined that although the protecting the health and safety was a legitimate state interest, the regulation furthered that interest only to a small degree. *Id.* at 779.

⁹¹Alternatively, Minnesota might choose to impose a "compensatory tax" like Oregon attempted in *Oregon Waste Systems, Inc.* However, such a tax would have to be similar to any tax that is imposed on Minnesota residents, otherwise the court is likely to find that it is not a compensatory tax, and instead is an impermissible burden on interstate commerce. See generally *Oregon Waste Systems Inc.*, 511 U.S. 93.

⁹²*Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 378 (1976).

to deposit dredged materials into the Erie Pier CDF, and if it did not agree to enter into the agreement, prohibit Wisconsin from depositing materials, as this would be a ban on the flow of commerce.

2. Market Participant Exception

In limited circumstances, a state may escape Commerce Clause scrutiny if it is acting as a market participant and not a market regulator. This is known as the "market participant" exception. This exception allows states to pass discriminatory legislation so long as the state is participating in the market.⁹³ Because the Corps, and not the state of Minnesota, is the operator of the facility, this exception is probably not applicable. However, a brief overview is included as background.

In *Reeves, Inc. v. Stake*, the Supreme Court held that South Dakota, as a seller of cement, was a market participant.⁹⁴ South Dakota built a cement plant and began producing cement. Although demand for cement rose, the state's production slowed and the state started favoring in-state buyers over out-of-state buyers.⁹⁵ While the Court refrained from deciding how such state action was to be analyzed under the Commerce Clause,⁹⁶ it did recognize that South Dakota was entitled to favor its own citizens and provide them with benefits paid for by their tax dollars.⁹⁷

The Supreme Court has not set out specific criteria to determine when a state is acting as a market participant in the context of solid waste regulation. A few lower federal courts and state courts have attempted to provide some guidance, however. In *Lefrancois v. Rhode Island*, the Rhode Island District Court upheld a state regulation that prohibited disposal of out-of-state waste at a state-subsidized landfill.⁹⁸ The court reasoned that Rhode Island entered the market for landfill services, not landfill sites (which it considered a natural resource), and that the state was providing a service to those who wish to dispose of waste.⁹⁹ Therefore, the state has no duty to deal with out-of-state customers.¹⁰⁰ Unlike the statute in question in *Philadelphia*, Rhode Island was not preventing others from purchasing landfill sites and

⁹³Treg A. Julander, *State Resident Preference Statutes and the Market Participant Exception to the Dormant Commerce Clause*, 24 WHITTIER L. REV. 541, 544 (2002). The "market participant exception" allows the state to favor its own citizens in absence of Congressional action. *Id.* at 544-45.

⁹⁴*Reeves, Inc. v. Stake*, 447 U.S. 429, 440 (1980).

⁹⁵*Id.* at 431-33.

⁹⁶*Id.* at 438. The Court said that inquiry was better left up to Congress. *Id.*

⁹⁷*Id.* at 436. The Court also reasoned that it did not matter that in the beginning out-of-state buyers benefited from state dollars, and now they did not. *Id.*

⁹⁸*Lefrancois v. Rhode Island*, 669 F. Supp. 1204, 1205 (D.R.I. 1987).

⁹⁹*Id.* at 1211.

¹⁰⁰*Id.*

operating additional landfills; it was merely operating its own facility in the open marketplace.¹⁰¹

In *County Commissioners of Charles County v. Stevens*, the Maryland Court of Appeals held that a regulation that prohibited the disposal of solid waste originating outside of the county at a county-operated landfill facility did not violate the Commerce Clause because the county was operating as a market participant.¹⁰² The court reasoned that the statute did nothing more than limit the benefits of this service to the county taxpayers who paid for it, and it applied to only one participant in the market.¹⁰³ It did not restrict the disposal of waste collected outside of the county in any other landfill within the county.¹⁰⁴

B. Options Available to the States

As a federal agency operating under federal statutes, the Corps of Engineers is not restricted in its actions by the dormant commerce clause. As a result, placement equity could be dealt with by the Corps through its policies, guidelines, and management and operational plans. For instance, the Corps could determine, based on anticipated dredging needs, an appropriate ratio to guide the acceptance of materials. If Wisconsin or Minnesota reached its limit, the dredged materials would have to be sent somewhere else to preserve space for the other state. Alternatively, the Corps could establish such policies by entering into a Memorandum of Agreement (MOA) with the states. Because Congress only requires the Corps to update CDF management plans every five years,¹⁰⁵ the parties might be able to act more quickly through a MOA.

While Minnesota may not act unilaterally in a manner that substantially affects interstate commerce, it is free to enter into agreements with other states to achieve similar goals. As discussed in more detail below in Section VI, interstate compacts provide states with the authority to impose a burden on interstate commerce, which would otherwise be impermissible under the Commerce Clause if the state were acting on its own. To do so, however, the compact must expressly state how state action will burden commerce so that Congress can adequately contemplate the burden and explicitly approve it.¹⁰⁶

¹⁰¹Id. at 1212.

¹⁰²County Comm'rs of Charles County v. Stevens, 473 A.2d 12, 19 (Ct. App. Md. 1984).

¹⁰³Id.

¹⁰⁴Id. at 20.

¹⁰⁵33 U.S.C. § 1268(a)(11)(C).

¹⁰⁶Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts and Marketing Water Across State Boundaries*, 46 NAT. RESOURCES J. 601, 627 (2006).

If Minnesota and Wisconsin were to enter into a compact that set specific prohibitions on the amount of dredged materials that can be stored at the Erie Pier CDF, those restrictions would be exempt from Commerce Clause scrutiny upon Congressional approval.

IV

DREDGED MATERIAL MANAGEMENT AT THE NEW ERIE PIER PROCESSING-REUSE FACILITY

The Erie Pier CDF will operate differently than a traditional CDF. Instead of dredged materials being placed permanently in the CDF for disposal, materials will be processed at Erie Pier and subsequently removed for use in projects such as beach renourishment, residential and commercial development, and various environmental restoration projects. In the best-case scenario, the facility would never reach full storage capacity. Achievement of this goal, however, depends on the suitability of the dredged materials placed at Erie Pier for beneficial use directly or after processing and the demand for such materials. Dredged material management at Erie Pier is complicated because Minnesota and Wisconsin have different standards for the beneficial use of dredged materials.

A. Minnesota's Beneficial Use Standards

The Minnesota Pollution Control Agency (MPCA) regulates the management and disposal of dredged material pursuant to authority granted by the Minnesota Water Pollution Control Act.¹⁰⁷ Dredged materials are classified as "waste" and "other waste material."¹⁰⁸ In many cases, a National Pollution Discharge Elimination System (NPDES) and/or State Disposal System (SDS) permit is required to store, treat, dispose, or reuse dredged materials on land.¹⁰⁹

The MPCA characterizes dredged materials into three management levels based on the type and level of pollutants in the materials in comparison to establish Soil Reference Values (SRVs).¹¹⁰ Level 1 dredged materials are suitable for use on residential and recreational properties.¹¹¹ Level 2 dredged

¹⁰⁷MINN. STAT. ANN. § 155.03, subd. 1(e).

¹⁰⁸MINNESOTA POLLUTION CONTROL AGENCY, MANAGING DREDGED MATERIALS IN THE STATE OF MINNESOTA 2 (June 2009), available at <http://www.pca.state.mn.us/publications/wq-gen2-01.pdf> (last visited Oct. 27, 2009); *See also*, MINN. STAT. ANN. § 115.01

¹⁰⁹Managing Dredged Materials, *supra* note 109, at 3.

¹¹⁰*Id.* at 15.

¹¹¹*Id.* at 25.

materials are suitable for use on industrial properties.¹¹² Level 3 dredged materials, due to the level of contamination, are not considered suitable for reuse and must be disposed of at an appropriate solid waste facility.¹¹³

The SRVs are listed in table format in a guidance document published by the MPCA in June 2009, entitled "Management of Dredged Materials in the State of Minnesota."¹¹⁴ Using copper as an example, albeit a simplistic one, dredged materials containing less than 100 mg/kg of copper would be classified as Level 1. If the material had more than 100 mg/kg of copper, but less than 9,000 mg/kg, it would be classified as Level 2. If the copper concentration exceeded 9,000 mg/kg it would be classified as Level 3 and rendered unsuitable for beneficial reuse without processing to reduce the copper concentration.

B. Wisconsin's Beneficial Use Standards

Dredged materials are classified as "solid waste" in Wisconsin.¹¹⁵ The Wisconsin Department of Natural Resources (WDNR) encourages reuse of dredged material to "minimize environmental harm resulting from a dredging project"¹¹⁶ and therefore the disposal of most dredged material is exempted from normal solid waste regulation.¹¹⁷ The laws, regulations, and guidance documents of the Wisconsin solid waste program provide WDNR employees with significant discretion to determine when dredged materials are suitable for reuse and where and how they may be used.

Applicants for dredging permits are required to collect and analyze data on the project's sediments in accordance with WDNR rules.¹¹⁸ For dredging projects where upland disposal is planned, the results of sediment sampling are to be compared to the state's solid waste disposal standards.¹¹⁹ WDNR also compares the sampling results with "consensus-based sediment quality guidelines" to determine the sediment's relative level of concern and whether additional investigation of risk is warranted.¹²⁰

¹¹²Id.

¹¹³Id.

¹¹⁴Id. at 17.

¹¹⁵WISC. DEPARTMENT OF NATURAL RESOURCES, THE STATE OF WISCONSIN APPROVAL PROCESS FOR DREDGING OF COMMERCIAL PORTS: GUIDANCE FOR APPLICANTS AND WDNR STAFF 17 (Feb. 2004), available at <http://dnr.wi.gov/org/aw/wm/publications/solid/commercialdredge.pdf> (last visited Oct. 27, 2009); See also, WISC. STAT. ANN. § 289.01(33).

¹¹⁶WIS. CODE. ANN. NR § 347.01.

¹¹⁷See, WIS. STAT. ANN. § 289.43(8); WIS. ADMIN. CODE NR § 500.08(3).

¹¹⁸Id. § 347.06(1).

¹¹⁹WIS. ADMIN. CODE NR § 347.07(5).

¹²⁰WIS. DEPARTMENT OF NATURAL RESOURCES, GUIDANCE FOR APPLYING THE SEDIMENT SAMPLING AND ANALYSIS REQUIREMENTS OF CHAPTER NR 347, WISCONSIN ADMINISTRATIVE CODE 20 (Dec. 2003), available at http://dnr.wi.gov/org/water/wm/sms/NR347_Guidance_Final.pdf (last visited Oct. 27, 2009).

The WDNR's Contaminated Sediment Standing Team issued its recommended "Consensus-based Sediment Quality Guidelines" (CBSQG) in 2003 "to serve as benchmark values for making comparisons to the concentrations of contaminant levels in sediments at sites under evaluation for various reasons," including dredging projects.¹²¹ The CBSQG is a classification scheme with four "Levels of Concern" utilizing consensus-based "threshold effect concentration" (TEC) and "probable effect concentration" (PEC) as a predictive measure of the absence or presence, respectively, of sediment toxicity.¹²² These guidelines reflect a much lower level of acceptable risk than Minnesota's SRVs. For example, the CBSQG TEC for copper is 32 mg/kg and the PEC is 150 mg/kg.¹²³ The WDNR recommends classifying sediments with copper concentrations below the TEC as "Level 1 Concern." Those sediments with copper concentrations above the PEC would be classified as "Level 4 Concern."

It is unclear from the guidance documents what a "Level 4 Concern" label would actually mean for dredged materials destined for beneficial use in Wisconsin. The sediment data are used primarily by DNR to determine the extent of approvals required under state law, whether additional information and sampling is necessary, and whether an environmental assessment or environmental impact statement should be prepared.¹²⁴ The WDNR has not developed a specific beneficial reuse code applicable to dredged materials.¹²⁵ As a result, there are no hard-and-fast rules identifying when a dredged material becomes unsuitable for beneficial reuse.

This is especially true for dredging projects in some parts of Wisconsin where background (naturally occurring) levels of arsenic, copper, lead, mercury, and other heavy metals exceed the TEC. WDNR's Sediment Sampling Guidance acknowledges this reality. When sediment is from areas with no obvious point source or historic land use that would explain the elevated heavy metal levels, the Guidance recommends that "the background or ubiquitous concentration should override the CBSQG TEC value in assessing the sediment quality."¹²⁶ In other words, the background concentrations become the basis for evaluating contamination, not the TEC.

In addition to the CBSQC, WDNR also evaluates the dredged materials based on standards, referred to as "Table 1B" standards, developed for the

¹²¹WISC. DEPARTMENT OF NATURAL RESOURCES, INTERIM GUIDANCE, CONSENSUS-BASED SEDIMENT QUALITY GUIDELINES: RECOMMENDATIONS FOR USE & APPLICATION 1 (2003), available at http://dnr.wi.gov/org/aw/tr/technical/cbsqg_interim_final.pdf (last visited Oct. 27, 2009).

¹²²*Id.* at 7.

¹²³*Id.* at 17.

¹²⁴State of Wisconsin Approval Process, *supra* note 116, at 8.

¹²⁵*Id.* at 20.

¹²⁶Sediment Sampling Guidance, *supra* note 121, at 21.

beneficial use of industrial byproducts.¹²⁷ These standards are based on the state's drinking water standards and primarily concerned with preventing contamination of groundwater.¹²⁸ If contaminant levels in dredged materials are below the Table 1B standards, WDNR considers it safe or non-hazardous.¹²⁹

Beneficial use projects utilizing less than 3,000 cubic yards of nonhazardous dredged materials are exempt from Wisconsin solid waste regulations provided the facility complies with specified performance standards.¹³⁰ The performance standards prohibit projects that will, among other things, cause a significant adverse impact on wetlands or a detrimental effect on any surface water or groundwater quality.¹³¹ Beneficial use projects utilizing more than 3,000 cubic yards may be exempted by WDNR from solid waste regulation on a case-by-case basis, pursuant to a low-hazard exemption.¹³²

C. Effect of Different State Standards

Despite the discretionary aspects of Wisconsin's program, the differences between the state standards suggest that dredged materials with similar levels of contaminants would be subject to much greater scrutiny in Wisconsin. As mentioned above, dredged materials in Minnesota with levels of copper around 150 mg/kg would be classified as Level 2 dredged materials and considered suitable for use on industrial properties. Those same dredged materials in Wisconsin, however, could be classified as the highest level of concern. While each state's standards will control for beneficial use projects being carried out in that state, the bi-state nature of the Duluth-Superior Harbor and associated dredging operations again raise questions of equity with respect to how these standards will affect operations at Erie Pier.

Consider the following scenario. Dredged materials from Wisconsin are placed in Erie Pier that are unsuitable for use in Wisconsin. Wisconsin, in essence, would be using Erie Pier for disposal, not beneficial reuse. There are, however, beneficial use projects planned for Wisconsin using materials processed at Erie Pier. Let's assume that only materials dredged from Minnesota can meet Wisconsin's standards. In such a situation, Minnesota will have provided Wisconsin with both a disposal site and dredged materials for beneficial use projects, while gaining little in return unless the

¹²⁷Erie Pier Management Plan, *supra* note 6, at 21. See also, WISC. ADMIN. CODE NR 538, App. I.

¹²⁸Interview with James Ross, Waste Mgt. Specialist, Wisconsin Department of Natural Resources, in Madison, Wisc. (Nov. 2, 2009).

¹²⁹*Id.*

¹³⁰WISC. ADMIN. CODE NR § 500.08(3). The performance standards can be found in § 504.04(4).

¹³¹*Id.* § 504.04(4).

¹³²WISC. STAT. ANN. § 289.43(8).

dredged materials from Wisconsin are suitable for use in Minnesota. If they are not, the Wisconsin materials will remain in Erie Pier thereby reducing its capacity.

For the Erie Pier processing-reuse facility to reach its full potential, the state standards for beneficial use of dredged materials will likely have to be aligned. In addition to improving the planning process, similar standards would ensure that dredged materials processed in Erie Pier could be used for beneficial use projects in both states. Without that assurance, questions of fairness will inevitably arise.

Aligning the state standards would not be easy because the differences are the result of each agency's acceptable level of risk.¹³³ For example, WDNR's Table 1B standards related to carcinogens are based on an excess lifetime cancer risk not to exceed 1 in 1,000,000, whereas Minnesota's standards are based on an excess lifetime cancer risk not to exceed 1 in 100,000.¹³⁴ Both agencies, however, have sufficient permitting flexibility and authority to develop policies to guide operational decisions at Erie Pier.

MPCA and WDNR should work with the Corps and other interested agencies to develop a guidance document or joint policy to guide decision-making with respect to beneficial use projects utilizing dredged material processed at Erie Pier. The document or policy should address sampling requirements, dredge material classifications based on testing results, and the beneficial use options for each classification. By establishing standards and a review process that is acceptable to both states, the agencies will infuse the planning process with greater certainty and ensure that dredged materials from Erie Pier can be used in either state.

V

OPERATIONAL LIABILITY

Erie Pier was first constructed as a facility for the permanent disposal of dredged material. Dredged material was not originally intended to leave Erie Pier CDF. With its transition to a processing-reuse facility, material will now be leaving Erie Pier on a routine basis. This operational change raises an interesting question: are the operators of Erie Pier liable if contaminants are not properly removed and the use of contaminated material in beneficial use projects causes environmental damage?

¹³³Erie Pier Management Plan, *supra* note 6, at 21.

¹³⁴*Id.*

A. Hazardous Waste

Duluth-Superior Harbor is located within the lower estuary of the St. Louis River, one of 43 Great Lakes Areas of Concern (AOCs).¹³⁵ Contaminated sediment in the lower St. Louis River has degraded bottom-feeding invertebrate communities, increased the incidence of fish tumors, resulted in fish consumption advisories, and restrictions on dredging in some areas.¹³⁶ Contaminants of concern include mercury, polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), and a variety of metals.¹³⁷ If concentrations of these contaminants are high enough, the dredged materials could be considered hazardous waste.

Although the transportation and disposal of hazardous waste is stringently regulated under federal law, it is unlikely that the dredged materials processed at Erie Pier would be subject to the Resource Conservation and Recovery Act (RCRA),¹³⁸ the primary federal law governing hazardous waste. Dredged material that is subject to a permit issued by the Corps under §404 of the Clean Water Act is excluded from the definition of hazardous waste.¹³⁹ Dredging permits usually cover both the dredging and the disposal of the dredged materials.

A much larger concern for the operators of Erie Pier and the Port Authority of Duluth, as the local sponsor, is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), known as Superfund. The dredging and disposal of contaminated sediments may result in strict liability for releases of hazardous substances under CERCLA.¹⁴⁰ CERCLA is a remedial statute meant to facilitate cleanup of waste disposal sites.¹⁴¹ CERCLA is "designed to impose liability for past conduct with present effects."¹⁴² The Environmental Protection Agency (EPA) iden-

¹³⁵An AOC is "a geographic area that fails to meet the [objectives of the Great Lakes Water Quality Agreement of 1978] where such failure has caused or is likely to cause impairment of beneficial use or of the area's ability to support aquatic life." Great Water Quality Agreement of 1978, Annex 2, <http://www.epa.gov/glnpo/glwqa/1978/annex.html#ANNEX%202>.

¹³⁶Minnesota Pollution Control Agency, *Contaminated Sediment Studies: St. Louis River Area of Concern*, <http://www.pca.state.mn.us/water/sediments/studies-stlouis.html> (last visited Nov. 4, 2009).

¹³⁷ENVIRONMENTAL PROTECTION AGENCY, SURVEY OF SEDIMENT QUALITY IN THE DULUTH/SUPERIOR HARBOR: 1993 SAMPLE RESULTS, EPA-905-R97-005, 1 (1997), available at <http://proteus.pca.state.mn.us/water/sediments/93mud.pdf>.

¹³⁸42 U.S.C. §§ 6901, *et seq.*

¹³⁹40 C.F.R. § 261.4(g).

¹⁴⁰Gregory A. Bibler, *Contaminated Sediments: Are there Alternatives to Superfund?*, 18 NAT. RES. & ENV'T 56, 56 (2003).

¹⁴¹*Town of Oyster Bay v. Occidental Chemical Corp.*, 987 F. Supp. 182, 196-97 (E.D.N.Y. 1997).

¹⁴²JOHN S. APPEGATE AND JAN G. LAITOS, ENVIRONMENTAL LAW: RCRA, CERCLA, AND THE MANAGEMENT OF HAZARDOUS WASTE 129 (2006).

tifies sites where hazardous waste poses a threat to human health or the environment, pays for cleanup at those sites, identifies potentially responsible parties (PRPs), and seeks recovery costs.¹⁴³ Liability under CERCLA is strict, joint and several, so a party that was responsible for only a portion of a hazardous waste problem could end up paying for the entire cleanup.¹⁴⁴ In addition to cleanup costs, PRPs may also be liable for "damages for injury to, destruction of, or loss of natural resources . . ."¹⁴⁵

To establish liability under CERCLA, the plaintiff, usually the EPA, must prove four elements in court: (1) the site in question is a "facility;" (2) the defendant is a responsible "person;" (3) a release or threatened release of a "hazardous substance" has occurred; and (4) the release has caused the plaintiff to "incur response costs."¹⁴⁶ "Hazardous substance" is defined very broadly and includes a wide range of pollutants, contaminants, and wastes that are considered harmful to human health or the environment.¹⁴⁷ "Facility" is also defined broadly and includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."¹⁴⁸ If PCBs, heavy metals, or other contaminants were to leach from Erie Pier, there will have been a release¹⁴⁹ of a hazardous substance from a facility. If contaminated materials from Erie Pier are utilized in a beneficial use project, that project site would also qualify as a "facility."

If a release occurs and the EPA or other agency incurs response costs, there are four categories of Potentially Responsible Parties (PRPs). Section 107 of CERCLA imposes liability on (1) the owners or operator of a facility; (2) "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"; (3) "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment" (arrangers); and (4) "any person who accepts or accepted any hazardous substances for transport" to facilities or sites for disposal or treatment (transporters).¹⁵⁰

There are three possible CERCLA liability scenarios with respect to Erie Pier: (1) a release occurs while Erie Pier is operating as a processing-reuse

¹⁴³42 U.S.C. §§ 9601, et seq.

¹⁴⁴See generally Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299, 324-343 (1995).

¹⁴⁵42 U.S.C. § 9607(a)(4)(C).

¹⁴⁶Applegate, *supra* note 143, at 179.

¹⁴⁷See 42 U.S.C. § 9601(14).

¹⁴⁸*Id.* § 9601(9).

¹⁴⁹Release is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . ." *Id.* § 9601(22).

¹⁵⁰*Id.* § 9607(a)(4).

facility; (2) a release occurs after Erie Pier has been closed; and (3) materials from Erie Pier were used at a project site where a release occurs. In each of these scenarios, a wide-range of entities could potentially find themselves classified as a PRP. Because liability is strict and joint/several, this would be a frightening prospect as any one of them could be held responsible for the entire cost of cleanup.

1. Hazardous Release while Erie Pier is Operational

If hazardous materials were to leach from Erie Pier while it was operating as a processing/reuse facility, the first PRP identified would be the Duluth Seaway Port Authority as the owner. "A current owner is liable under § 107(a)(1) so long as that owner holds title in fee simple absolute."¹⁵¹ Current landowners are liable for response costs, "regardless of their degree of participation in the subsequent disposal of hazardous waste."¹⁵²

Municipalities are not exempt from CERCLA liability, although amendments in 2002 have helped to reduce municipal exposure to CERCLA liability.¹⁵³ There is a "secured creditor" exemption for situations where a city has purchased land in order to stimulate economic activity, then retains the title to secure its investment.¹⁵⁴ In such a case, the municipality has the burden of proof to show that they are only the titleholder, and not an owner/operator of the site.¹⁵⁵ Unfortunately for the Port Authority, this exemption is not applicable to Erie Pier.

The Corps of Engineers would be a potential PRP as the operator of Erie Pier. The Supreme Court has stated that "under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility."¹⁵⁶ The Eighth Circuit has held that an entity "may not be held liable as an "operator" under [§ 107(a)(2)] unless [it] (1) had authority to determine whether hazardous wastes would be disposed of and to determine the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks."¹⁵⁷ The Corps has the authority to determine what dredged materials are processed at Erie

¹⁵¹Applegate, *supra* note 144, at 185.

¹⁵²U.S. v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988).

¹⁵³Pub. L. 107-118, 115 Stat. 2356 (2002).

¹⁵⁴42 U.S.C. § 9601(20)(A) (2006).

¹⁵⁵See *In re Bergsøe Metal Corp. v. East Asiatic Co.*, 910 F.2d 668, 670-72 (9th Cir. 1990) (port authority not considered an "owner" under CERCLA as it did not run the recycling plant, but rather held title to the land in order to protect its security interest).

¹⁵⁶U.S. v. Bestfoods, 524 U.S. 51, 66 (1998).

¹⁵⁷U.S. v. Gurley, 43 F.3d 1188, 1193 (8th Cir. 1994).

Pier and the agency exercises that authority either by personally conducting the dredging operations or permitting the dredging of others.

Federal agencies are normally protected from liability by the doctrine of sovereign immunity, which provides that governments may not be sued without their consent. Section 106(a)(1) states, however, that "[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent . . . , as any nongovernmental entity, including liability under [§ 107.]"¹⁵⁸ The Corps is therefore potentially liable for response costs to the same extent as a non-governmental operator.

Any entity that arranged for the disposal of hazardous substances at Erie Pier would also be liable as a PRP under § 107(a)(3) in the event of a release or threatened release. The most common scenario of arranger liability is when a generator of waste hires a transporter to haul that waste.¹⁵⁹ For example, if a private dredging company arranged to have the dredged materials it generated transported to Erie Pier, it would be considered an arranger. A generator is liable for response costs even if there is no proof that the generator's waste was released. Liability may be imposed on a generator if its wastes were disposed of at the site in question and at the time of the release "hazardous substances 'like' those contained in the generator defendants' waste were found at the site."¹⁶⁰

Finally, in limited circumstances, entities that transported the dredged materials to Erie Pier could be considered PRPs under § 107(a)(4). The mere transport of hazardous substances to a site is not enough to trigger CERCLA liability. The Third Circuit has held that a transporter must either select the disposal facility or site or "actively participate[] in the disposal decision to the extent of having had substantial input into which facility was ultimately chosen."¹⁶¹ For example, if a private dredging company chooses Erie Pier as the disposal site and then contracts with a trucking company to transport that material to Erie Pier, the trucking company would not be a PRP. However, if the trucking company selects Erie Pier for the dredging company or actively participates in the selection of Erie Pier it might become a PRP.

2. Hazardous Release Occurs after Erie Pier is Closed

If a release or threatened release of a hazardous substance occurs after Erie Pier has been filled to capacity and operations cease, the PRPs would

¹⁵⁸42 U.S.C. § 9620(a)(1).

¹⁵⁹Applegate, *supra* note 143, at 194.

¹⁶⁰*U.S. v. Monsanto*, 858 F.2d 160, 170 (4th Cir. 1988).

¹⁶¹*Tippins Inc. v. USX Corp.*, 37 F.3d 87, 94 (3rd Cir. 1994).

remain the same. The Port Authority is still the owner of Erie Pier. Anyone who arranged for the disposal of hazardous substances or transported such substances to Erie Pier would qualify as a PRP. And even though the Corps of Engineers is no longer operating the Erie Pier facility, CERCLA liability extends to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of."¹⁶²

If hazardous substances migrate from Erie Pier and contaminate nearby property, the landowners would likely blame the Corps of Engineers, as the designer and operator of the CDF, for their misfortunes. As mentioned above, in general, the doctrine of sovereign immunity protects the United States and its federal agencies against lawsuits in federal court without its consent.¹⁶³ The Federal Tort Claims Act (FTCA), however, waives federal governmental immunity for the negligent or wrongful act or omissions of federal employees occurring within the scope of their employment "in the same manner and to the same extent as a private individual under like circumstances."¹⁶⁴ Only claims "for injury or loss of property, or personal injury or death" may be brought against the federal government under the FTCA and the only remedy is money damages.¹⁶⁵

The FTCA is a limited waiver of sovereign immunity, however. There are several exceptions to the waiver that, if met by the government, prohibit litigation by injured parties. The FTCA exception most relevant to the discussion of liability at Erie Pier is the "discretionary function" exception. The FTCA bars "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."¹⁶⁶ To receive the benefit of the discretionary function exception, the government action must (1) "involv[e] an element of judgment or choice" and (2) be based on considerations of public policy.¹⁶⁷ The exception, however, does not "apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."¹⁶⁸

Even if a hazardous release was the result of a design or construction failure at Erie Pier attributable to the Corps, injured parties would be unlikely to clear the discretionary function hurdle. For example, a New Jersey district court in 2007 ruled that the discretionary function exception barred the

¹⁶²42 U.S.C. § 9607(a)(2).

¹⁶³Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 8 (2002).

¹⁶⁴28 U.S.C. § 1346(b).

¹⁶⁵Id.

¹⁶⁶Id. § 2680(a).

¹⁶⁷*U.S. v. Gaubert*, 499 U.S. 315, 323 (1991).

¹⁶⁸*Berkovitz v. Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988).

claims of a property owner whose basement flooding was allegedly caused by a CDF's improper drainage system.¹⁶⁹ The court stated that Congress intended to confer discretion on the Corps with respect to the placement and design of CDFs and, "in the absence of specific directives from Congress, the court can find no grounds for holding anything other than the design of the [National Park CDF] was completed pursuant to the discretionary grant from Congress, which is immune to suit."¹⁷⁰ The Corps has exercised similar discretion in its design, construction, and operation of Erie Pier and is unlikely to be held liable for its actions at the facility.

3. Release of Hazardous Substance at a Beneficial Use Project Site

Because dredged materials will be processed at Erie Pier for use in beneficial use projects, there is a possibility that contaminated materials may come to rest somewhere else. While the operators of Erie Pier are sure to make every effort to remove contaminants and heavy metals, they cannot completely eliminate the risk that some hazardous compounds may remain. Even though the Port Authority and the Corps would neither be the owner of that beneficial use site or the operator, there is a possibility they could be seen as having arranged for the disposal of that dredged material.

As illustrated by these various scenarios, the Port Authority is exposed to a significant amount of risk. As the owner of the facility, it could potentially be on the hook for millions of dollars in clean-up costs. Luckily, CERCLA bars recovery for "response costs or damages resulting from a federally permitted release."¹⁷¹ A "federally permitted release" includes "discharges in compliance with a legally enforceable permit under § 404 of the Federal Water Pollution Control Act."¹⁷² As long as the dredged material was placed at Erie Pier or at a beneficial use project site pursuant to federal permits, all parties should be shielded from CERCLA liability.

However, § 107(j) does not shield the Port Authority and the Corps from liability "under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance."¹⁷³ If a release were to occur at Erie Pier or a beneficial use site, lawsuits could be filed by environmental groups for the resulting violations of the Clean Water Act or state environmental statutes or by private citizens for personal injury or property dam-

¹⁶⁹See, *Williams v. U.S. Army Corps of Engineers*, 2007 WL 2261559 (D. N.J. Aug. 2, 2007).

¹⁷⁰*Id.* at *6.

¹⁷¹*Id.* § 9607(j).

¹⁷²*Id.* § 9601(10)(D).

¹⁷³*Id.* § 9607(j).

age. In such cases, liability would turn on the party's compliance with environmental regulations or whether they acted in a negligent manner.

B. Invasive Species

Dredged materials processed at Erie Pier may also be contaminated with purple loosestrife or other invasive species. Purple loosestrife, a European plant species, was introduced to the U.S. in the 1800's.¹⁷⁴ It is an aggressive invader that disrupts wetlands ecosystems by displacing native plants, which results in the loss of traditional sources of food and habitat for native birds and animals.¹⁷⁵ Purple loosestrife is one of the most prevalent invasive species in the U.S., covering an estimated 400,000 acres of federal land and costing \$45 million annually to control.¹⁷⁶ Purple loosestrife is established in the Lake Superior region raising some concern that the invasive could be spread through beneficial reuse of dredged materials processed at Erie Pier.

Restrictions are in place in both Minnesota and Wisconsin to prevent the further spread of purple loosestrife. For instance, in Minnesota, purple loosestrife is classified as a "prohibited noxious weed."¹⁷⁷ A permit is required to "transport along a public highway materials or equipment containing the propagating parts of [noxious weeds]."¹⁷⁸ It is also unlawful for any person to "sell material containing noxious weed propagating parts to a person who does not have a permit to transport that material."¹⁷⁹

If dredged materials at the Erie Pier processing-reuse facility contained purple loosestrife seeds or other plant material capable of spreading the plant, the operators could run afoul of Minnesota law by selling the material to a person without a permit to transport it. The person transporting materials obtained from Erie Pier could also be in violation of the law, unless a permit had been obtained. Such violations would be classified as misdemeanors,¹⁸⁰ punishable by up to 90 days in prison, a \$3,000 fine, or both.¹⁸¹

In Wisconsin, purple loosestrife is classified as an "invasive aquatic plant"¹⁸² and a "restricted invasive species."¹⁸³ It is unlawful for anyone to

¹⁷⁴Minnesota Sea Grant, *Purple Loosestrife*, <http://www.seagrant.umn.edu/ais/purpleloosestrife> (last visited Oct. 22, 2009).

¹⁷⁵Washington Department of Ecology, *Non-native Invasive Freshwater Plants: Purple Loosestrife*, <http://www.ecy.wa.gov/programs/wq/plants/weeds/aqua009.html> (last visited Oct. 22, 2009).

¹⁷⁶National Wildlife Refuge Association, *Invasive Species*, <http://nationalwildliferefugeassociation.org/New-issues/invasives.html#TOC02> (last visited Oct. 22, 2009).

¹⁷⁷MINN. R. 1505.0730.

¹⁷⁸MINN. STAT. ANN. § 18.82, sub. 1.

¹⁷⁹Id. § 18.86(3).

¹⁸⁰Id. § 18.87.

¹⁸¹Id. § 609.03.

¹⁸²WISC. ADMIN. CODE § NR 109.07(2).

¹⁸³Id. § NR 40.04(2).

transport, transfer, or introduce a restricted invasive species in the state.¹⁸⁴ Violations of Wisconsin law, therefore, could occur if individuals purchased dredged material from Erie Pier for beneficial uses in Wisconsin and the materials were contaminated with purple loosestrife. However, this regulation "does not apply to a person who transports, possesses, transfers, or introduces a restricted invasive species . . . if the [Department of Natural Resources] determines that the transportation, possession, transfer, or introduction was incidental or unknowing and was not due to the person's failure to take reasonable precaution."¹⁸⁵ As long as the operators of the Erie Pier processing-reuse facility take reasonable steps to prevent the contamination of dredged materials with purple loosestrife, they and their customers would be protected from liability in Wisconsin. Even without this immunity provision, the liability risk for spreading an invasive species in Wisconsin would be quite small. While a permit must be obtained from the Department of Natural Resources before introducing a nonnative aquatic plant into the waters of the state,¹⁸⁶ violations of this permit requirement are subject only to a \$200 fine.¹⁸⁷

The Erie Pier Management Plan recognizes the need for noxious weed management. Because dredged materials at Erie Pier may contain noxious weed propagating parts, the Management Plan states that permits will be obtained before materials are moved from the facility.¹⁸⁸ An operational plan and best management practices system will also be developed with input from the state management agencies to prevent the spread of purple loosestrife and other noxious weeds.¹⁸⁹ These actions should ensure that operations at Erie Pier are conducted in accordance with both states' invasive species laws. As a result, the liability risk is quite low.

VI TURNING THE ERIE PIER CDF OVER TO THE LOCAL SPONSOR

A. Procedure

Although the Corps of Engineers is responsible for designing, constructing, and operating CDFs, when the facilities reach capacity, management is turned over to the local sponsor. When a traditional CDF is filled to capacity, the local sponsor receives title to the facility and must maintain the facil-

¹⁸⁴Id. § NR 40.05(3)(a).

¹⁸⁵Id. § NR 40.05(3)(b).

¹⁸⁶WISC. STAT. ANN. § 23.24(3)(a).

¹⁸⁷Id. § 23.24(6)(a).

¹⁸⁸Erie Pier Mgmt. Plan, *supra* note 6, at 22.

¹⁸⁹Id. at 22-23.

ity in the future. In addition, the local sponsor must continue to abide by the terms of the written agreement entered into by it and the Corps prior to construction.¹⁹⁰ Once the facility ceases operations, the local sponsor may transfer title to the CDF to another entity, but only if the Secretary of the Army has approved the transferee's intended future use of the CDF.¹⁹¹

Unfortunately, the Rivers and Harbors Act does not offer any guidance as to what types of post-disposal uses may be approved by the Secretary. It is therefore helpful to look at non-statutory materials that provide local sponsors guidance on this issue. The Corps and the EPA have issued various reports that suggest potential post-closure uses for a CDF. In 2003, these agencies issued a report that specifically addressed Great Lakes CDFs, stating that any post-closure uses must be compatible with the environmental integrity and function of the facility.¹⁹² While the report did not define "environmental integrity," it did provide examples of post-closure uses that have been approved by the Secretary of the Army. Those uses include: port and waterfront expansion, development of recreational areas, new or expanded marinas, and wildlife refuges.¹⁹³ These are only suggestions, as the local sponsor must determine the ultimate use of the filled CDF.

The Great Lakes Critical Programs Act of 1990 also authorizes the EPA, with the Secretary of the Army, to develop and implement management plans for every Great Lakes CDF.¹⁹⁴ These plans identify anticipated use and management of the CDF site over a twenty-year period, including termination of dumping at the site, need for site management, and pollution control.¹⁹⁵ These twenty-year plans must identify a schedule for review and revision that must happen at least five years after its initial adoption, and every five years thereafter.¹⁹⁶ Therefore, it appears that in addition to considering the suggested post-closure uses of the CDF and maintaining the environmental integrity of the facility, the local sponsor must also adhere to this twenty-year plan when terminating dumping at the site.

B. Case Studies

The Times Beach CDF, located on Lake Ontario near Buffalo, New York, was originally constructed to hold dredged materials from a nearby chan-

¹⁹⁰33 U.S.C. §1293a(c)(4).

¹⁹¹Id. at § 1293a(f).

¹⁹²U.S. ARMY CORPS OF ENG'RS & U.S. ENVTL. PROT. AGENCY, *GREAT LAKES CONFINED DISPOSAL FACILITIES* 11 (2003).

¹⁹³Id.

¹⁹⁴Great Lakes Critical Programs Act of 1990, 101 P.L. 596, §104, 104 Stat. 3000, 3003 (1990).

¹⁹⁵33 U.S.C. § 1268(c)(11)(C).

¹⁹⁶Id. at § 1268(c)(11)(D).

nel.¹⁹⁷ This facility was only used for four years before it was turned into the Times Beach Nature Preserve.¹⁹⁸ This short operation period was due to studies that showed significant contamination of plants and animals in and near the CDF.¹⁹⁹ The leftover dredged material was subsequently used for wetland creation, and vegetation occurred via natural colonization.²⁰⁰ Although this CDF was successfully converted into a nature preserve, on-going monitoring is still conducted by the local Audubon Society chapter and by a Waterways Experiment Station near the preserve.²⁰¹

Dike 14 is located a few miles east of downtown Cleveland, Ohio²⁰² and its local sponsor is the Cleveland-Cuyahoga County Port Authority.²⁰³ The Dike 14 CDF reached capacity in 1999 at which time numerous species of birds, butterflies, plants, and mammals were identified at the site.²⁰⁴ With this in mind, the EPA provided funding for environmental testing and brown-fields assessment to facilitate the conversion of Dike 14 into a public access site.²⁰⁵ Once the testing was completed and the land found to be suitable for public use, the Ohio Department of Natural Resources conducted an extensive evaluation to survey the preferences of local stakeholders for the post-disposal uses of the Dike 14 CDF land.²⁰⁶ This evaluation was completed over eight months during which close to 2,000 interviews with local residents were conducted, small and large group meetings were held, and special events planned to determine what the public wanted to see happen with the site.²⁰⁷ Based on this research and cooperation from the public, an advisory group was formed to develop a plan for the future use of the CDF.²⁰⁸ Eventually, the CDF was turned into a nature preserve which provides habitat and public access to Lake Erie.²⁰⁹

¹⁹⁷U.S. Army Corps of Engr's, *Times Beach CDF, NY*, USACE.ARMY.MIL, <http://el.erdc.usace.army.mil/dots/budm/factsheets.cfm?Topic=&Id=NYTimes> (last visited Aug. 27, 2009) [hereinafter *Times Beach CDF*].

¹⁹⁸Great Lakes Comm'n, *Confined Disposal Facilities Fact Sheet*, GLC.ORG, <http://www.glc.org/dredging/outreach/cdffb.html> (last visited Aug. 27, 2009).

¹⁹⁹*Id.*; *Times Beach CDF*, supra note 198.

²⁰⁰*Id.*

²⁰¹*Id.*

²⁰²Dike 14 Nature Preserve, Homepage, <http://www.dike14.org/> (last visited Aug. 25, 2009).

²⁰³EARTH DAY COAL, CONFINED DISPOSAL FACILITY (CDF) DIKE 14 CLEVELAND, OHIO 2, available at <http://www.dike14.org/> (last visited Aug. 25, 2009).

²⁰⁴*Dike 14 Nature Preserve*, supra note 204.

²⁰⁵*Id.*

²⁰⁶OHIO DEPT. OF NATURAL RESOURCES, GOALS FOR DIKE 14 1 (2002).

²⁰⁷*Id.*

²⁰⁸*Id.*

²⁰⁹*Dike 14 Nature Preserve*, supra note 203.

VII INTERSTATE COMPACTS

An interstate compact between the states utilizing the Erie Pier CDF could address many of the legal issues involved in both the reuse and long-term storage of dredged materials. Interstate compacts are agreements between two or more states to act or refrain from acting in a certain way. According to the legal encyclopedia *Corpus Juris Secundum*, interstate compacts are similar to contracts in that there must be an "ascertainable agreement or arrangement to which the parties have manifested mutual assent."²¹⁰ This mutual assent is often, although it does not have to be, shown by statutes with similar or identical language that are entered into by both or all of the states involved. Historically, compacts were used to make agreements concerning boundaries. As time has gone on, the utility of interstate compacts in solving regional issues has been recognized and they are now commonly used for taxation agreements, port creation and maintenance, water allocation, and child custody.²¹¹

A threshold question in considering an interstate compact would be whether it would require Congressional consent in order to be constitutional. Congressional consent for interstate agreements is required under the Compact Clause of the U.S. Constitution: "No State shall, without consent of Congress enter into any Agreement or Compact with another State." This seems like a pretty cut-and-dry statement that any interstate compact would require Congressional consent, but the Supreme Court, over time, has found that some compacts do not require Congressional consent. The Supreme Court has declared that Congressional consent is only required when the compact alters the balance of powers between the states and the federal government.²¹² Basically, if a compact involves functions that a state already performs unilaterally, then it does not require congressional consent.

The most important Supreme Court opinion concerning congressional consent is *U.S. Steel v. Multistate Tax Commission*.²¹³ The case involved an agreement between states to determine the tax liability of multi-state taxpayers, and to encourage uniformity in state tax laws. The Supreme Court

²¹⁰Compacts and Agreements Between States, 81A C.J.S. States § 68.

²¹¹See e.g. Boundary Compact Between Michigan, Wisconsin and Minnesota, MICH. STAT. ANN. §2.201 et seq. (Establishing the boundaries between the states); New York-New Jersey Port Compact of 1921, 42 Stat. 174 (1921) (establishing a port district in the New York City and New Jersey metropolitan area and a joint agency to provide transportation, terminal, and other port functions); Columbia River Gorge Compact P.L. 99-663 (establishing an agency to govern the planning and development of the area around the Columbia River); La Plata River Compact, 42 Stat. 796 (apportioning the water of the river between Colorado and New Mexico).

²¹²*Virginia v. Tennessee*, 148 U.S. 503 (1893).

²¹³*U.S. Steel v. Multistate Comm'n.*, 434 U.S. 452 (1978).

laid out a function test, which examines interstate compacts in three ways. First, does the compact authorize the states to exercise any new powers other than those they could already exercise? If yes, then the compact is invalid. Second, does the compact delegate the states' sovereign power to the commission? Again, if yes, the compact is invalid. And third, does the compacting state retain its ability to adopt or reject the rules and regulations developed by the commission and to withdraw from the compact at any time. If the answer is no, then the compact is invalid. In essence, if compacts encroach on or interfere with the authority of the federal government, they must be consented to by Congress or are void.

A different, categorical test was laid out in another Supreme Court case, *Northeast Bancorp v. Board of Governors of Federal Reserve System*, wherein the first question asked is whether the agreement is even a compact that would fall under the Compact Clause of the Constitution.²¹⁴ In that case, the Supreme Court established five indicia of a compact: reciprocity, actual cooperation, a joint or regional organization, conditional statutes, and restriction on unilateral repeal or modification.²¹⁵

To determine whether Congressional consent would be required in the case of a compact with respect to the Erie Pier CDF, it is useful to look at compacts that did and did not require consent to determine which subjects are considered part of the states' realms. Congressional consent has been required with respect to intrastate medical marijuana agreements,²¹⁶ the Great Lakes Basin Compact,²¹⁷ and the Washington Metropolitan Area Transit Authority.²¹⁸ The compact in dispute in *U.S. Steel* case, however, did not require congressional consent because each state retained authority, under the interstate agreement, over their own states' taxation actions.²¹⁹ Nor was congressional consent required for a boundary line agreement between the Virginia and Tennessee²²⁰ or a multi-state agreement dealing with state enforcement of traffic citations.²²¹ The Great Lakes Charter, a multi-state agreement, also lacks congressional consent, but is nonbinding.

²¹⁴*Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985).

²¹⁵*Id.*

²¹⁶*Gonzales v. Raich*, 545 U.S. 1, 32 (2005) (production of marijuana would implicate interstate commerce).

²¹⁷Sonya Palay, *Muddy Waters: Congressional Consent and the Great Lakes-St. Lawrence River Basin Water Resources Compact*, 36 HASTINGS CONST. L.Q. 717, 728-30 (2008) (the Compact affected non-compacting states, involved U.S.-Canada relations, and dealt with the navigability of public waterways).

²¹⁸*Wash. Metropo. Area Transit Auth. v. One Parcel of Land in Montgomery County, Md.*, 706 F.2d 1312, 1317 (4th Cir. 1983) (management of transportation issues had a substantial impact on interstate commerce).

²¹⁹*U.S. Steel v. Multistate Tax Comm'n*, 434 U.S. 452, 472 (1978).

²²⁰*Comm'r of Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

²²¹*State v. Kurt*, 802 S.W.2d 954, 955 (Mo. 1991).

Obtaining Congressional consent is relatively straightforward: often Congress simply passes a resolution stating that they consent to the agreement. Congress does have the right to attach certain conditions to the agreement that must be followed. Congress may give consent in three ways: it can be implied by subsequent state and federal action even when there is no specific legislative act; it can be explicitly given after the fact by enacting legislation that specifically recognizes and consents to the compact; and it can be given preemptively when Congress passes legislation that encourages states to adopt compacts to solve particular problems.²²²

It is probable that any compact entered into between Minnesota and Wisconsin would require Congressional consent. The compact would touch on federal concerns and would not involve actions that the states could perform on their own. The compact would implicate interstate commerce because dredging the channel affects shipping in the Duluth-Superior port. The compact would also implicate water quality and the CWA because dredging channels involves the "navigable waters" that fall under CWA jurisdiction, some of the dredged material is potentially contaminated, and the treatment of the material could affect water quality or require permitting under the CWA.

Perhaps the most analogous compact to the one Minnesota and Wisconsin would enter into, albeit on a different scale, is the Port Authority of New York-New Jersey Compact of 1921 (New York-New Jersey Compact) that created the New York Port Authority to deal with transportation and harbor issues between New York and New Jersey. Prior to the establishment of the Compact, facilities of the Port of New York were "cumbersome and inadequate" and the resulting delays and high costs were causing cargo and passengers to be diverted to other ports.²²³ While many of the continental trunk lines terminated in New Jersey, most of the ocean-going traffic landed in Manhattan and Brooklyn.²²⁴ New York and New Jersey negotiated the agreement that led to the New York-New Jersey Compact in order to coordinate the terminal facilities throughout the port district and administer them as a unit.²²⁵

The Port Authority of New York-New Jersey was the first bi-state agency ever created utilizing the Compact Clause.²²⁶ Today, the Port Authority of New York-New Jersey manages and maintains the bridges, tunnels, bus ter-

²²²See, COUNCIL OF STATE GOVERNMENTS—NATIONAL CENTER FOR INTERSTATE COMPACTS, CONGRESSIONAL CONSENT AND OTHER LEGAL ISSUES, available at http://online.nwfi.org/site/DocServer/Congressional_Consent___Legal_Issues.pdf?docID=703 (last visited Sept. 1, 2009).

²²³*N.Y. v. Wilcox*, 189 N.Y.S. 724, 725 (N.Y. Sup. 1921).

²²⁴*Id.*

²²⁵*Id.*

²²⁶Port Authority of New York-New Jersey, *Overview of Facilities and Services*, <http://www.panynj.gov/about/facilities-services.html> (last visited Nov. 6, 2009).

minals, airports, ferries and the harbors in New York City and northern New Jersey. The harbor that the Port Authority manages is the largest port complex on the East Coast and includes seven cargo terminals.²²⁷

Although the New York-New Jersey Compact did receive Congressional consent,²²⁸ its constitutionality was challenged almost immediately by the City of New York.²²⁹ New York City argued, among other things, that the Compact was unconstitutional because the Legislature of New York had surrendered its sovereignty, or a part of it, and delegated "exclusive legislative functions" to the State of New Jersey.²³⁰

The New York Supreme Court of New York County stated that it is "well established that subject to the approval of Congress any two states may enter into a joint adventure to promote the common welfare of their citizens."²³¹ As long as the sovereign rights of the citizens of each state are preserved, "no question can be raised as to the validity of the compact."²³² The New York-New Jersey Compact authorized the Port Authority to develop rules and regulations consistent with the U.S. and the state constitutions "for the improvement of the conduct of navigation and commerce."²³³ Such rules and regulations became binding and effective only when authorized by the Legislatures of both states.²³⁴ The Court found that the states have merely agreed to cooperate under the terms of the Compact and that "New York has parted with none of its sovereign rights, nor relinquished the control over any property belonging to the people of New York."²³⁵ The Compact, therefore, was constitutional.

VIII CONCLUSION

The legal challenges posed by the operation of a processing-reuse facility at Erie Pier suggest that federal guidance and/or an interstate agreement is necessary to address equity with regard to placement of materials, standards for beneficial use of dredged materials, and long-term management and liability. Despite the bi-state nature of the Duluth-Superior Harbor and dredging operations in Lake Superior, the burdens and benefits associated

²²⁷Id. at *Seaport*, <http://www.panynj.gov/DoingBusinessWith/seaport/html> (last visited Sept. 4, 2009).

²²⁸42 Stat. 174 (1921).

²²⁹See, *N.Y. v. Wilcox*, 189 N.Y.S. 724 (N.Y. Sup. 1921).

²³⁰Id. at 725.

²³¹Id.

²³²Id.

²³³Id.

²³⁴d.

²³⁵Id. at 727.

with operation of the Port and with the Erie Pier CDF are currently not shared equally between Minnesota and Wisconsin. Although Erie Pier is located entirely within Minnesota, any attempt by Minnesota to control the placement of materials is likely to run afoul of the dormant commerce clause. While the Corps, as a federal agency, has greater flexibility with respect to placement of materials in the CDF, a bi-state compact may provide better solutions to effective operation of the Erie Pier processing, storage, and recycling facility.

As the Corps moves forward with its conversion of the Erie Pier CDF from a disposal facility to a processing-reuse facility, the agency should work with the states and the local sponsor to develop guidelines for placement, processing, and beneficial reuse of dredged materials to ensure equitable allocation of space within Erie Pier and full utilization of the dredged materials. The Corps could facilitate this process in two ways. As mentioned earlier, the Corps could include equity provisions in future management plans for Erie Pier and other dredging permitting guidance. If Minnesota and Wisconsin desired a more formal mechanism, the Corps could enter into a Memorandum of Agreement with the states to establish similar decision-making guidelines.

As part of the above process or independently of the Corps, the states should consider developing joint guidelines for beneficial use of dredged materials from Erie Pier. The joint guidelines could then be incorporated into the decision-making and permitting processes of the individual state agencies in accordance with existing state and federal laws. This type of informal interstate cooperation is not much different from how Erie Pier is currently managed. There are some obvious benefits to this approach. Informal cooperation does not require significant investments of time or state resources towards negotiating and drafting formal agreements. Informal cooperation also avoids the specter of federal intervention, since Congressional consent is not needed. Informal interstate cooperation can often provide solutions to issues that are better tailored to the needs of the region, as the problems are examined and evaluated on a local level.²³⁶

Informal cooperation, however, has its limitations. Informal agreements and guidelines do not have the force of law that an interstate compact does. In addition, Minnesota's long-term liability concerns, because they will arise after the Corps has ceased operations at the Erie Pier CDF, cannot be adequately addressed through management plans or an agreement with the Corps. Furthermore, the maintenance of navigation channels and the disposal of the dredged materials is not simply a local issue, but a state, regional, national, and international issue.

²³⁶See Stephen David Galowitz, *Interstate Metro-Regional Responses to Exclusionary Zoning*, 27 REAL PROP. PROB. & TR. J. 49, 132-33 (1992).

Given the lengthy process and resource-intensive nature of interstate compacts, it will be more cost-effective to negotiate a compact, not just for Erie Pier, but for the entire Duluth-Superior Harbor. A compact similar to the Port Authority of New York-New Jersey Compact of 1921 would provide the states with an opportunity to think beyond the operation of the Erie Pier processing-reuse facility. A Duluth-Superior Harbor Compact could be a mechanism through which to improve the governance structure and plan for the future development of the entire Harbor.

A Duluth-Superior Harbor Compact is not a radical, or even an original, idea. In 1976, the Minnesota and Wisconsin Legislatures authorized the creation of the Interstate Port Authority Commission to "develop a plan for the merger of the port authorities at Duluth, Minnesota and Superior, Wisconsin."²³⁷ The Commission found that the creation of an interstate port authority would have several advantages, including enabling the provision of better shipping services and improving industrial planning and promotion.²³⁸ Unfortunately, the Commission was unable to resolve the difficult question of how an interstate port authority would be financed by the two states and recommended that the legislatures take action to merge the two ports "only when so requested by the cities of Duluth and Superior."²³⁹

An effort to revive the idea of an interstate port authority in the mid-1980's also failed to gain traction.²⁴⁰ Given the current economic climate and the myriad challenges facing state governments, it is probably no more feasible to pursue an interstate compact for Erie Pier today than it was twenty years ago. The idea, however, should not be dismissed out of hand. Although interstate compacts are time-consuming to negotiate and adopt, Wisconsin and Minnesota do not have to start from scratch. The Interstate Port Authority Commission's report includes model language for a suggested compact and enabling legislation.²⁴¹ The interstate compact process would provide a mechanism for the delineation of the roles and responsibilities of the various entities involved in operations at Erie Pier and potentially the Port. Through the negotiation process, agreement could be reached on lead agencies, decision-making processes, cost-sharing, and liability. Most importantly, an interstate compact could resolve the equity issues between Minnesota and Wisconsin with respect to Erie Pier and the Port, thereby reducing the chance that one state carries a larger burden than the other.

²³⁷INTERSTATE PORT AUTHORITY COMMISSION, FINAL REPORT TO THE LEGISLATURES OF THE STATES OF MINNESOTA AND WISCONSIN, 4 (1976).

²³⁸*Id.* at 2.

²³⁹*Id.* at 3.

²⁴⁰E-mail from Davis Helberg, former director of the Duluth-Superior Port Authority, to author (Jan. 12, 2010, 1:36:07 AM CST) (on file with author).

²⁴¹See generally, Interstate Port Authority Commission, *supra* note 238.

EDITORIAL BOARD

Jane Andrewartha

Clyde & Co, LLP
London

James W. Bartlett, III

Semmes Bowen & Semmes, PC
Baltimore

Prof. David J. Bederman

Emory University

Prof. Francesco Berlingieri

President of Honour
Comité Maritime International
Genoa

Michael Marks Cohen

Nicoletti, Hornig & Sweeney
New York City

Prof. Martin Davies

Tulane University

Danièle Dion

Brisset Bishop
Montreal

Prof. Steven F. Friedell

Rutgers University

Edgar Gold, Q.C.

The Nautical Institute (Qld)
Brisbane, Australia

Hon. Charles S. Haight, Jr.

United States District Court
Southern District of New York

Hon. Alex T. Howard, Jr.

United States District Court
Southern District of Alabama

Prof. Robert M. Jarvis

Nova Southeastern University

John D. Kimball

Blank Rome, LLP
New York City

Hon. Ronald R. Lagueux

United States District Court
District of Rhode Island

Warren J. Marwedel

Marwedel Minichello & Reeb
Chicago

Bruce A. McAllister

Alley, Maass, Rogers & Lindsay, P.A.
Palm Beach

John P. McMahon

McMahon & Connell, P.C.
Rock Hill, SC

Constantine G. Papavizas

Winston & Strawn
Washington, DC

Prof. David W. Robertson

University of Texas

Prof. George A. Rutherglen

University of Virginia

Richard F. Southcott

Stewart McKelvey Stirling Scales
Halifax, NS

Graydon S. Staring

Nixon Peabody
San Francisco

Douglas B. Stevenson

Seamen's Church Institute
New York City

Prof. Joseph C. Sweeney

Fordham University

Prof. William Tetley

McGill University

Dr. Michael W. D. White

University of Queensland

Dr. Frank L. Wiswall, Jr.

Castine, ME

JOURNAL OF Maritime Law and Commerce

2100 Huntingdon Avenue, Baltimore, MD 21211

VISIT US ON THE WEB

<http://www.jmlc.org>

Return Service Requested

Periodical Postage
Paid at Baltimore, Maryland
& additional Mailing Offices