

Financing Harbor Deepening and Widening Projects

Legal Developments on Existing Fee Authority

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Introduction

- Harbor and channel deepening & widening projects provide significant benefits
 - § Safety and efficiency of passage
 - § Vessel economy of scale
 - § Port profitability and commercial appeal
- However, projects are expensive
 - § Even with available federal funding, Ports must contribute local share – 25% for 20-50 foot depth; 50% if deeper than 50 feet



Funding Harbor and Channel Deepening and Widening Projects



- Army Corps of Engineers Planning, Authorization & Funding Process
 - § Authorize and fund Army Corps feasibility study. (3x3x3)
 - § Chief of Engineers submits to Congress for Authorization
 - § Authorize construction in bi-annual Water Resources Development Act bills
 - § Secure New Start authorization and appropriations

Existing Fee Authority to Fund Local Share

- Section 208 of the Water Resources Development Act of 1986 (33 USC section 2236) authorizes port or harbor dues (in the form of tonnage duties or fees):
 - § On a vessel engaged in trade entering or departing from a harbor
 - § And on cargo loaded/unloaded from vessel
 - § In conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project)



Existing Fee Authority to Fund Local Share



- Port or harbor dues may be imposed for the following purposes:
 - § To finance:
 - ∅ the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of 33 USC 2211; or
 - ∅ the cost of construction and operation and maintenance of a navigation project for a harbor under 33 USC sections 2232 or 2233; and
 - § To provide emergency response services in the harbor while fees are levied for construction as set forth above

33 USC section 2236 Requirements

- Authority is limited by type of project:
- For project features which solely:
 - § widen channels or harbors
 - § create or enlarge bend easings, turning basins or anchorage areas, or provided protected areas, or
 - § remove obstructions to navigation
- only vessels at least comparable in size to those used to justify features may be charged
- For deepening features, dues may not be charged on vessels that, based on their design draft, could have utilized the project at mean low water before construction
- Towing vessels, vessels with design drafts of 20 feet or less when utilizing general cargo and deep-draft navigation projects, and government owned vessels not engaged in commercial service, are categorically exempt



33 USC section 2236 Requirements



- In developing port or harbor dues, non-Federal interest may consider (without limitation):
 - § Elapsed time and safety of passage
 - § Vessel economy of scale
 - § Under keel clearance
 - § Vessel draft, vessel squat, and vessel speed
 - § Sinkage and trim

33 USC section 2236 Requirements

- Dues must be fair and equitable, and non-Federal interest **shall** consider:
 - § direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services
 - § the value of those facilities and services to the vessel and cargo
 - § public policy and interests served
 - § other pertinent factors



33 USC section 2236 Requirements



- Prior to levying or changing dues, non-Federal interest must provide notice and hold a public hearing
- Notice must be sent to the Secretary of the Army and include:
 - § Text of proposed regulation establishing dues
 - § Name and contact information for official who can respond to comments and questions
 - § Date by which comments on proposal are due (no earlier than 60 days after publication), and date for a public hearing (no earlier than 45 days after publication)
 - § Consent to be governed by section 2236
- Secretary must send this information to Federal Register for publication

33 USC section 2236 Requirements

- What is “fair and equitable”?
 - § “Must fairly match the [vessels’] use of port services and facilities”
 - § “The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels. The provision of a new, deeper channel is as much a service rendered to the shipper as pilotage, dockage, or wharfage.”



33 USC section 2236 Requirements



- Section 2236 leaves many questions unanswered:
 - § When can non-Federal interest levy dues?
 - § How much can be levied after completion of a usable increment?
 - § Can ships that could use portions of the waterway, but not all, be charged?
 - § Meaning of “comparable in size”?
 - § What does it mean for dues to be “fair and equitable”?

33 USC section 2236 Application



Woodley Island Marina, Humboldt Bay

- § Limitations & uncertainties = few ports have used Section 2236 fees over the past 37 years.
- § Humboldt Bay Harbor, California since 1997
- § Lake Charles/Calcasieu River, Louisiana 2002: proposed but not finalized
- § 2021: Sabine Neches Navigation District, Texas

Sabine-Neches Navigation District Litigation

- Sabine-Neches Navigation District was sued over harbor fee adopted pursuant to section 2236
- Fee was levied to fund portions of \$1.2B infrastructure project to modernize Sabine-Neches Waterway
- District partnered with USACE under WRDA, and complied with local cost share requirements for funding



Sabine-Neches Navigation District Litigation



- Army Corps Feasibility study found that improvements would ease congestion and allow Waterway to accommodate larger ships
- Project included both deepening and widening components throughout the Waterway, divided into various portions
- At the time of litigation, construction on first portion was complete, which deepened first basin from 20 to 40 feet

Sabine-Neches Navigation District Litigation

- After completion of first portion, District adopted fee ordinance, effective May 2021, which charges user fee on ships with drafts exceeding 20 feet
- Ordinance had different rates for non-hydrocarbon and hydrocarbon cargo
- Fee was proposed to be charged until earlier of all construction costs are repaid, or January 1, 2049



Sabine-Neches Navigation District Litigation



- In September 2021, 2 oil & gas companies challenged the District fees on many grounds, including:
 - § Ordinance collects fees for portions of project that are not yet complete
 - § Ordinance provides a comprehensive fee, as opposed to separate fees by navigational feature
 - § Fee was not fair and equitable because it charged hydrocarbon cargo at a greater rate

Sabine-Neches Navigation District Litigation

- February 2022 -- District Court found that:
 - § Section 2236 authorizes District to recover costs of entire project as long as a usable increment is complete
 - § Requirement that vessel be “at least comparable in size” to those used to justify project is a general inquiry
 - § Court should take a holistic view of the project, and not look at features in a vacuum
 - § Fee may recover non-Federal interest’s share of construction, operation, and maintenance costs
 - § District acted reasonably in differentiating between types of cargo, because they considered relative benefits, value, and public policy



Sabine-Neches Navigation District Litigation



- September 2022: Fifth Circuit Court of Appeal affirmed District Court on all issues, and specifically found:
 - § Section 2236 authorizes financing costs of entire share of project upon completion of a usable increment
 - § District could recover entire local share of cost including amounts agreed to in excess of those explicitly set forth in statute

Sabine-Neches Navigation District Litigation

- Case provides important clarity on interpreting section 2236
- Decision is binding on federal district courts within Fifth Circuit
- Provides helpful guidance for courts outside of Fifth Circuit
- Plaintiffs are expected to seek Supreme Court review this month





Questions?

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