RECENT DEVELOPMENTS

ENVIRONMENTAL LAW: ECOLOGY HELD VALID CRITERION FOR DENYING DREDGE AND FILL PERMIT UNDER SECTION 10, RIVERS AND HARBORS ACT OF 1899

In *Zabel v. Tabb*[1] the Court of Appeals for the Fifth Circuit held that the Secretary of the Army may refuse to grant a dredge and fill permit under section 10 of the Rivers and Harbors Act of 1899[2] solely on "conservation grounds," even after a specific determination that the project would not interfere with navigation.[3] Landowners Zabel and Russell proposed dredge and fill operations on eleven and one-half acres of their land underlying Florida's Boca Ciega Bay for the purpose of constructing a trailer park. After experiencing vigorous opposition, they obtained the necessary consent from the applicable state and local authorities[4] and applied for a permit from the Army Corps of Engineers.[5] At a public hearing, several Florida agencies, including the Florida Board of Conservation, renewed their opposition to the landowners' plan, and both the District Engineer and the Division Engineer recommended against issuing the permit. Accepting these recommendations, the Secretary of the Army denied the application due to the potentially harmful effect on fish and wildlife in Boca Ciega Bay,[6] the opposition of the Florida agencies, and the probable conflict with the

1. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 39 U.S.L.W. 3356 (U.S. Feb. 2, 1971).

2. 33 U.S.C. § 403 (1964). See note 12 *infra* and accompanying text.

3. 430 F.2d at 213. Some preliminary issues were considered by the court including congressional power under the Commerce Clause, U.S. CONST. art. 1, § 8, to protect fish and wildlife in navigable waters and whether such power was relinquished to the states in the Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1964), but they were all disposed of in consonance with the Secretary of the Army's position.

4. *See* Zabel v. Pinellas County Water & Nav. Control Auth., 154 So. 2d 181, 183-84 (Dist. Ct. App. Fla. 1963), *quashed and remanded*, 171 So. 2d 376 (Fla. 1965).

5. While final authority to issue permits rests with the Secretary of the Army, the initial "field" determination is made by the Army Corps of Engineers pursuant to 33 U.S.C. § 403 (1964).

6. The United States Fish and Wildlife Service, Department of the Interior, was opposed to the dredge and fill project. 430 F.2d at 202.

Fish and Wildlife Coordination Act of 1958.[7] Landowners filed in the district court seeking reversal of the Secretary's decision, stipulating "—that there was evidence before the Corps of Army Engineers sufficient to justify an administrative agency finding that [the] fill would do damage to the ecology or the marine life on the bottom."[8] Also, the Corps of Engineers admitted that "the proposed work would have no material adverse effect on navigation."[9] The district court, in granting landowners' motion for summary judgment, held that section 10 of the Rivers and Harbors Act did not "vest the Secretary of the Army with discretionary authority" to deny dredge and fill permits for non-navigational reasons,[10] ordered the Secretary to issue a permit, and enjoined the Government from interfering with the dredging and filling operations. The Court of Appeals for the Fifth Circuit reversed and rendered summary judgment in favor of the Government.[11]

Section 10 of the Rivers and Harbors Act of 1899 prohibits, *inter alia*, excavating, dredging, or filling in "any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."[12] Nothing in the Act suggests criteria to be used by the Secretary in granting or withholding his authorization, although Congress, when it considered the Act, was primarily concerned with protecting navigation.[13] The courts, when faced with possible arbitrariness on the part of the Secretary, have generally interpreted section 10 to require the issuance of a permit for projects which do not impede navigation.[14] There are other acts of Congress, however, which further delineate the Secretary's authority in conjunction with the Rivers and Harbors Act. The Fish and Wildlife Coordination Act of 1958[15] provides that any federal agency

7. 16 U.S.C. §§ 661, 662 (1964), *as amended* 16 U.S.C. § 662(d) (Supp. V, 1970).

8. Zabel v. Tabb, 296 F. Supp. 764, 767 (M.D. Fla. 1969).

9. *Id.*

10. *Id.* at 771.

11. 430 F.2d at 215.

12. 33 U.S.C. § 403 (1964).

13. 32 CONG. REC. 2297 (1899). This view is reflected in discussions by commentators on the function of the Corps of Army Engineers. *E.g.*, Army Corps of Engineers, 1 BNA, ENVIRONMENT REP.—FEDERAL LAWS 15:1501 (1970).

14. *Compare* Wisconsin v. Illinois, 278 U.S. 367, 413 (1929), *with* Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251, 268 (1915), *and* Miami Beach Jockey Club, Inc. v. Dern, 83 F.2d 715, 719 (D.C. Cir.), *aff'd on rehearing*, 86 F.2d 135 (D.C. Cir.), *cert. denied*, 299 U.S. 556 (1936).

15. 16 U.S.C. §§ 661 *et seq.* (1964).

licensing water projects which affect the physical characteristics of "any stream or other body of water" must first consult with the Department of the Interior, as well as with the agency having jurisdiction over the wildlife resources within the particular state where the project is to be constructed.[16] That Act, and particularly the word "consult," could be interpreted as requiring the Secretary of the Army to examine all possible plans and choose the alternative least damaging to the environment prior to granting permits for projects which do not obstruct navigation. On the other hand, the Act could be interpreted as having expanded the grounds for *denial* of permits for dredge and fill operations, allowing the Secretary to reject all plans if all would cause unacceptable damage to the environment—regardless of whether the project affected navigation. The latter interpretation is supported by the legislative history of the Fish and Wilflife Coordination Act. Congress expressed concern over environmental damage caused by dredging and filling in "bays and estuaries along the coastlines."[17] The former interpretation, however, is more closely aligned with the case law construing section 10 of the Rivers and Harbors Act to require issuance of a permit where a project would not obstruct navigation.[18] Although the Fish and Wildlife Coordination Act does not expressly establish that Congress intended for conservation to become a permissible criterion for prohibiting navigationally-acceptable projects, the Corps of Engineers has claimed discretionary authority to deny section 10 permits for environmental reasons.[19] The National Environmental

16. *Id.* § 662(a).

17. S. REP. No. 1981, 85th Cong., 2d Sess. 5 (1958) *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3446, 3450. "More seriously, existing law has no application whatsoever to the dredging and filling of bays and estuaries by private interests . . . under permit from the Corps of Engineers . . . .

. . . .

The amendments proposed by this bill would remedy these deficiencies . . . ." *Id.*

18. See note 14 *supra* and accompanying text. This interpretation of the Fish and Wildlife Coordination Act also finds support in certain language in the Senate Report on the Act—language tending to disclaim any intention to radically alter the existing policies concerning authorizations for water projects.

> The legislation would be a permissive law so far as it concerns relationship between water project construction agencies and fish and wildlife conservation agencies. The latter would not be given any veto power over any part of the water resource development program. S. REP. No. 1981, *supra* note 17, at 6.

The *Zabel v. Tabb* district court noted that this left the veto power in an agency not having expertise in ecology matters, an absurdity it refused to recognize. 296 F. Supp. at 769.

19. *See* Army Corps of Engineers, Administrative Regulations, 33 C.F.R. § 209.120(d)(1)

Policy Act of 1969,[20] enacted after the district court decision in *Zabel v. Tabb*, also may affect the power of the Secretary of the Army to issue dredge and fill permits. While this Act stressed Congress's concern for the environment and directed broad cooperation among the federal agencies, it did not explicitly resolve the uncertainty concerning the Secretary's discretion under section 10 of the Rivers and Harbors Act of 1899. The Policy Act directed that "the policies, regulations, and public laws of the United States shall be *interpreted and administered in accordance with* the [environmental] policies set forth in [this Act]."[21] It is silent, however, on the question of whether Congress intended that the Secretary's discretion include the authority to "interpret and administer" by *denying* a dredge and fill permit for ecological reasons alone.[22] The conference report on the Act seems to support a generous interpretation of the Army Secretary's power, including the power to refuse dredge and fill permits, for it expresses the conferees' intent that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."[23]

While the trend in the federal courts has been toward liberal statutory construction to include or stress environmental considerations,[24] cases arising under section 10 of the Rivers and Harbors Act of 1899 have not firmly established the scope of the

(1970); Memorandum of Understanding between the Secretary of the Interior and the Secretary of the Army, July 13, 1967, 33 C.F.R. § 209.120(d)(11) (1970). *Cf.* Dept of Army, Chief of Engineers News Release, Army Engineers Issue Environmental Guidelines for Civil Works Programs (Dec. 10, 1970); 1 BNA ENVIRONMENT REP.—CURRENT DEVELOPMENTS 827 (1970) (where Army Secretary Resor upheld denial of dredging permit because of "'little justification' for development that would result in 'irretrievable damage to the environment and to fish and wildlife.'")

20. 42 U.S.C.A. §§ 4331-47 (Supp. March 1970).

21. *Id.* § 4332(1) (emphasis added).

22. See text after note 16 *supra*. Sections 4333 and 4334 of the Policy Act could be interpreted as precluding any expansion in the scope of existing agency authorizations without further legislation since section 4333 requires all federal agencies to review their statutory authorizations for provisions which might contradict or prevent full compliance with the Policy Act, and section 4334 disclaims any intent for the Act to affect existing agency obligations to coordinate or consult with one another.

23. H.R. REP. No. 91-765, 91st Cong., 1st Sess. 10 (1969) *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 2767, 2770.

24. *See* Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458, 467-73 (1970). *But see* New Hampshire v. AEC, 406 F.2d 170 (1st Cir.), *cert. denied*, 395 U.S. 962 (1969).

Secretary's authority.[25] In *Wisconsin v. Illinois*[26] the Supreme Court interpreted section 10 to prohibit "unreasonable obstructions to navigation and navigable capacity,"[27] but noted that the Secretary's limited authority did not include the power to issue a permit merely to aid a sewage disposal project.[28] This emphasis on navigation as the primary concern of the Corps of Engineers in administering the Rivers and Harbors Act[29] was modified by the Supreme Court in *United States v. Standard Oil Co.*,[30] which called for broader interpretations of statutory language to take into account the problems of pollution.[31] However, this case arose under section 13 of the Act,[32] a section more easily related to ecology since it regulates the depositing of "refuse matter" in navigable waters. The two principal cases arising under section 10 where navigation was not at issue are uninstructive. In *United States ex rel. Greathouse v. Dern*[33] the Supreme Court refused to issue a mandamus ordering the Secretary to authorize construction of a wharf in the Potomac River despite the fact that the Secretary's refusal was premised upon the fact that the wharf would have increased the Government's expense in building a proposed parkway.[34] The Court found it unnecessary to consider the extent of the Secretary's section 10 discretion, basing its decision on the equitable principles governing the issuance of writs of mandamus. Recently, in *Citizens Committee for Hudson Valley v. Volpe*,[35] the Court of Appeals for the Second Circuit affirmed an injunction by a district court which ordered the Corps of Engineers not to issue a dredge and fill permit to the State of New York for the construction of the Hudson River Expressway. The decision was premised upon the state's failure to obtain requisite

25. Typically, courts accepted the proposition that section 10 was "concerned with obstructions to navigation." *E.g.*, Chambers-Liberty Counties Nav. Dist. v. Parker Bros. & Co., 263 F. Supp. 602, 607 (S.D. Texas 1967). *See* United States v. Republic Steel Corp., 362 U.S. 482 (1960); United States v. Ray, 423 F.2d 16 (5th Cir. 1970); Blake v. United States, 295 F.2d 91 (4th Cir. 1961).

26. 278 U.S. 367 (1929).

27. *Id.* at 413.

28. *Id.* at 418.

29. See note 25 *supra.*

30. 384 U.S. 224 (1966).

31. *Id.* at 226.

32. 33 U.S.C. § 407 (1964).

33. 289 U.S. 352 (1933).

34. *Id.* at 360.

35. 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 39 U.S.L.W. 3246 (U.S. Dec. 7, 1970).

congressional and Department of Transportation approval for the construction of certain structures[36] and was decided primarily under section 9 of the Rivers and Harbors Act,[37] rather than section 10. The Second Circuit gave no indication of the authority of the Secretary of the Army to deny the permit *after* congressional and Department of Transportation approval of the expressway was obtained.

The court of appeals in *Zabel v. Tabb* acknowledged the uncertainty generated by section 10 and the failure of the case law adequately to define its limits.[38] The court interpreted the section as a "flat prohibition" against the "building of structures and the excavating and filling in navigable waters"[39] and pointed out that the ban is lifted only upon the Secretary of the Army's authorization. Section 10 was not seen to place any restrictions on either the denial of a permit or the Secretary's reasons for refusing to issue one. Citing the legislative history of the Fish and Wildlife Coordination Act of 1958,[40] the "Memorandum of Understanding" between the Secretaries of the Army and of the Interior,[41] and the *Greathouse* and *Citizens Committee* decisions,[42] the Fifth Circuit concluded that the Secretary of the Army "is acting under a Congressional mandate to collaborate and consider . . . [environmental] factors."[43] The court felt that the combined effect of the National Environmental Policy Act of 1969 and the Fish and Wildlife Coordination Act of 1958[44] left no doubt that the Secretary could refuse solely on conservation grounds to issue a permit for a project posing no obstruction to navigation. Although the Policy Act postdated both the denial of the permit by the Secretary and the district court

36. *Id.* at 106.

37. 33 U.S.C. § 401 (1964). While section 10 is concerned with obstructions to navigation and the construction of wharves, piers, and other projects in navigable waters, section 9 regulates the building of "bridges, causeways, dams or dikes" over or adjacent to the navigable waters of the United States.

38. The district court opinion in *Zabel v. Tabb* noted that "[t]he parties suggest and research of the court indicates that this is a case of first impression." 296 F. Supp. at 765.

39. 430 F.2d at 207.

40. See note 17 *supra*.

41. 33 C.F.R. § 209.120(d)(11) (1970).

42. See text accompanying notes 33-36 *supra*.

43. 430 F.2d at 213.

44. The court also mentioned a report issued by the House Committee on Government Operations from a study conducted by its Conservation and Natural Resources Subcommittee, which, while lacking the status of legislative history, seemed to support its rationale. *Id.* at 214 n.7, *citing* H.R. REP. No. 91-917, 91st Cong. 2d Sess. (1970).

decision,[45] the Fifth Circuit determined that the Secretary's action must be evaluated by the standards currently applicable.

On its facts, *Zabel v. Tabb* was a perfect vehicle for determining the scope of the Army Secretary's authority, since the crucial matters of ecological harm and absence of navigational obstruction were stipulated by the parties. While adopting a broad interpretation of the Secretary's power and accepting conservation as a permissible criterion for denying permits, the Fifth Circuit left its precise rationale unelear. The judicial precedents relied upon by the court were poor, and its treatment of the applicable statutes was ambiguous. The *Greathouse* case, which the Fifth Circuit asserted "recognized that the Corps of Engineers does not have to wear navigational blinders when it considers a permit request,"[46] cannot fairly be taken as authority for anything but the power of the Supreme Court to apply equitable standards to deny mandamus. The scope of authority vested in the Secretary of the Army under section 10 of the Rivers and Harbors Act of 1899 was never discussed; indeed, this issue was but one of several uncertainties regarding the right of the applicants to the judicial writ. The decision in *Citizens Committee* is no more conclusive, for there the Second Circuit was involved in construing together sections 9 and 10 of the Rivers and Harbors Act and admonishing the Corps of Engineers to refrain from issuing a dredge and fill permit without having considered what authorizations the *other* phases of an applicant's project would require. Far from declaring, as the Fifth Circuit claimed, that the Corps "cannot be oblivious to the effect of fill projects on the beauty and conservation of natural resources,"[47] the Second Circuit was only preventing the Corps of Engineers from effectively undercutting the authority of Congress and the Department of Transportation to approve, under section 9, the construction of certain structures over navigable waters. Apparently compensating for the weakness of these two judicial precedents, the Fifth Circuit in *Zabel v. Tabb* asserted that the federal government's policy of environmental conservation, as revealed in the Fish and Wildlife Coordination Act of 1958 and the National Environmental

45. The permit was denied by the Secretary of the Army on February 28, 1967, and the district court rendered its decision on February 17, 1969. The National Environmental Policy Act of 1969, however, did not become effective until January 1, 1970.

46. 430 F.2d at 208.

47. *Id.* n.15.

Policy Act of 1969, made reliance on case law unnecessary. The problem with this rationale is that the court failed to recognize the two possible interpretations of these Acts: that the Secretary, while required to authorize a navigationally-acceptable project, must consider ecology in choosing which plan will be permitted, or alternatively that the Secretary, for ecological reasons, may refuse to issue the permit altogether, regardless of navigational considerations. Ignoring these alternatives, the court consequently failed to explain exactly how the Fish and Wildlife Coordination Act and the National Environment Policy Act established the latter result in the face of judicial precedent favoring the former.[49] In addition the court failed to make clear whether the Fish and Wildlife Coordination Act of 1958, standing alone, would have sufficed as the basis for its decision. This question becomes important because two federal district courts have recently ruled the National Environmental Policy Act of 1969 not retroactive in its effect,[50] and another found the Act inapplicable in determining whether the Secretary of the Army may deny a dredge and fill permit for non-navigational reasons.[51] If either interpretation gains acceptance by the other federal courts of appeal, a conflict with the position taken by the Fifth Circuit would evolve, undermining the *Zabel* decision. This would be unfortunate, for the Fifth Circuit could have reached the same salutary result by relying entirely upon the Fish and Wildlife Coordination Act of 1958, which undoubtedly was intended to expand the role of the Corps of Engineers in protecting the environment. The alteration of United States coastlines by dredge and fill operations is a significant source of destruction of this country's natural resources,[52] and the decision in *Zabel v. Tabb*,

48. See text following note 16 *supra*.

49. See note 14 *supra* and accompanying text.

50. Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970), where the Policy Act was held not retroactive where significant work had already been completed on power transmission facilities; Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970), where the district court examined the legislative history of the Act and decided that it should not be applied retroactively to the Secretary of Transportation's approval of an unconstructed highway which had been planned prior to the passage of the Act and for which a contract had been awarded.

51. Coastal Petroleum Co. v. Secretary of the Army, 315 F. Supp. 845 (S.D. Fla. 1970). This district court is within the jurisdiction of the Fifth Circuit, which declared in *Zabel v. Tabb* that the Act was indeed applicable. Still, the fact that the district court disagreed could mean that the issue is not one-sided and that the other circuits might handle it differently.

52. Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER L. REV. 351, 352-53 (1970).

when read in conjunction with the expanded notions of the "standing" of conservation groups to seek redress of grievances before administrative agencies,[53] could provide a powerful weapon for those groups to utilize in their fight to save the environment.

53. *See, e.g.*, Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970).