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Environmental Law--Landfill Permit Requirements--The Corps of Engineers Does an About Face

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Comments

ENVIRONMENTAL LAW—LANDFILL PERMIT REQUIREMENTS—THE CORPS OF ENGINEERS DOES AN ABOUT FACE.—Plaintiffs Zabel and Russell owned eleven acres of tideland on Boca-Ciega Bay in the St. Petersburg-Tampa, Florida area which they desired to fill and use for commercial purposes. Their plans were opposed by state and local agencies[1] on ecological grounds, but state judicial approval was eventually granted.[2] Plaintiffs then applied to the Army Corps of Engineers for a federal dredging and filling permit in accordance with the Rivers and Harbors Appropriation Act of 1899.[3] The Corps of Engineers concluded that the fill would not interfere with navigation, but refused the permit on the basis of evidence that unavoidable ecological damage to the bay's marine life would ensue. Plaintiffs initiated this suit contending that their fill would not hinder navigation and that the United States, under the Submerged Lands Act,[4] had relinquished its authority to regulate tidelands for any purposes except navigation, flood control, and power production. They further alleged that the Corps of Engineers and its superior, the Secretary of the Army, was without authority to deny their permit on other grounds. A federal district court granted summary judgment for plaintiffs with an order to the Secretary of the Army to issue the permit.[5] Defendants appealed to the United States Court of Appeals, Fifth Circuit. *Held:* Reversed. The Secretary of the Army is authorized to deny, on ecological grounds, a permit to dredge and fill privately owned tidelands even though the fill will not interfere with navigation. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

Since the turn of the century the United States has achieved fantastic technological progress. We are just beginning to realize how dear the price of progress is and will continue to be. Water pollution alone is going to cost an estimated 24 to 26 billion dollars over the next five years.[6] The cost is high but at least there is hope when a resource is reclaimable. The real tragedy occurs when a

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[1] Pinellas County Water and Navigation Control Authority, Board of County Commissioners of Pinellas County, the County Health Board of Pinellas County, the Florida Board of Conservation.

[2] Zabel v. Pinellas County Water & Navigation Control Authority, 154 So. 2d 181 (Dist. Ct. App. Fla. 1963), *rev'd*, 171 So. 2d 376 (Fla. 1965).

[3] 33 U.S.C. § 403 (1964).

[4] 43 U.S.C. § 1311 (1964).

[5] 296 F. Supp. 764 (M.D. Fla. 1969).

[6] Jackson, *Foreword: Environmental Quality, the Courts, and the Congress*, 68 MICH. L. REV. 1073 (1970).

resource is irrevocably lost. As of 1965 the United States had lost over seven per cent, some 750,000 acres, of its total estuarine areas to small dredge and fill operations.[7] Florida has lost almost 10 per cent of its shoreline and California has suffered a staggering 67 per cent loss.[8] This continued loss of estuaries is ruining the habitat of many of our most valuable food and game fishes. The result is a continually decreasing commercial fishery with the accompanying financial hardship to all those who are dependent on it. The aesthetic loss, the difference between an undisturbed shoreline and a high-rise building, is more difficult to measure.

Zabel has shown us that there are far-reaching means at the government's disposal to protect our natural resources. It is squarely up to the governmental agencies, such as the Corps of Engineers, to see that these means are utilized and that the environment is given equal consideration along with other factors when water resource projects are planned.

The Corps of Engineers has primary authority for approval of any construction in the nation's navigable waters. This authority is derived from the Rivers and Harbors Appropriation Act of 1899, which makes dredging and filling in navigable waters illegal *unless* first recommended by the Corps and authorized by the Secretary of the Army.[9] The "unless" is the crux of the problem. The Corps may grant or deny a request on some conditions, but these conditions are not specified in the Act. Historically, most disputes have arisen in terms of navigation problems.[10] But, in *United States ex rel.*

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[7] Hearings on Permit for Landfill in Hunting Creek, Va. Before a Subcom. of the House Comm. on Government Operations, 91st Cong., 1st Sess., pt. 2, at 56 (1969).

[8] *Id.*

[9] 33 U.S.C. § 403 (1964) provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge or inclosure within the limits of any breakwater, or of the channel of 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.

[10] United States v. Republic Steel Corp., 362 U.S. 482 (1960); Wisconsin v. Illinois, 278 U.S. 367 (1929); Sanitary Dist. v. United States, 266 U.S. 405 (1925).

Greathouse v. Dern,[11] the Supreme Court, for economic reasons, took a different view. There petitioners sought a permit to build a wharf extending into the Potomac River. The Secretary of War specifically found that the wharf presented no navigational hazard, but denied the permit because the United States planned to build a parkway in the immediate area and petitioner's land would be condemned to provide access to it. Thus, to allow construction of the wharf would have increased the cost of the land to the government in the future. The decision indicates that there are circumstances in which factors other than navigation may determine whether a permit is issued.

In *Citizens Committee v. Volpe*,[12] the Corps' approval was requested and granted for a huge landfill which would be connected to, though not be a part of, a causeway. The project would include 9,500,000 cubic yards of fill at a cost of millions of dollars. The state still required the approval of the Secretary of Transportation to construct the causeway as provided in the Department of Transportation Act.[13] The Secretary, in turn, was required by the Act to consider any resultant environmental damage of projects approved by him.[14] Therefore if the fill were completed, any potential environmental damage would be done and the Corps would have effectively rendered the Secretary's decision moot. The court said:

> In view of this congressional [environmental] intent encompassed in the Department of Transportation Act we hold that the Corps of Engineers exceeded its statutory authority in ignoring the presence of the causeway when it issued the permit without prior approval of the Secretary of Transportation.[15]

The theme of these cases indicates that the Corps is not and should not be restricted to questions of navigation. This view was taken by Congress in 1958 when it amended the Fish and Wildlife Coordination Act [hereinafter Wildlife Act].[16] It begins by stating that national policy includes:

> . . . recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and . . . that wildlife conservation shall receive *equal consideration*

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[11] 289 U.S. 352 (1933).
[12] 302 F. Supp. 1083 (S.D.N.Y. 1969).
[13] 49 U.S.C. § 1655(g) (Supp. V, 1970).
[14] 49 U.S.C. § 1651 (Supp. V, 1970).
[15] Citizens Comm. v. Volpe, 302 F. Supp. 1083, 1090 (S.D.N.Y. 1969).
[16] 16 U.S.C. §§ 661-666c. (1964).

and be coordinated with other features of water-resource development programs. . . .[17] (Emphasis added.)

In order to implement this policy, section 662(a)[18] directs that before any proposed water-resource project is undertaken "any department or agency" planning the work must consult with the United States Fish and Wildlife Service and related state agencies with a view not only to conserve wildlife resources, but to develop and improve them. While the Wildlife Act specifies "any department or agency," a portion of the legislative history is so specific as to the agency and type of project involved as to be on all fours with *Zabel:*

Finally, the nursery and feeding grounds of valuable crustaceans, such as shrimp, as well as the young of valuable marine fishes, may be affected by dredging, filling, and diking operations often carried out to improve navigation and provide new industrial or residential land.

. . . .

Existing law has questionable application to projects of the Corps of Engineers for the dredging of bays and estuaries for navigation and filling purposes. More seriously, existing law has no application whatsoever to the dredging and filling of bays and estuaries by private interests or other non-Federal entities in navigable waters under permit from the Corps of Engineers. This is a particularly serious deficiency from the standpoint of commercial fishing interests. The dredging of these bays and estuaries along the coastlines to aid navigation and also to provide land fills for real estate and similar developments, both by Federal agencies or other agencies under permit from the Corps of Engineers, has increased tremendously in the last 5 years. Obviously, dredging activity of this sort has a profound disturbing effect on aquatic life, including shrimp and other species of tremendous significance to the commercial fishing industry. The bays, estuaries, and related marsh areas are highly important as

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[17] 16 U.S.C. § 661 (1964).

[18] 16 U.S.C. § 662(a) (1964) states:

Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

> spawning and nursery grounds for many commercial species of fish and shellfish.[19]

There is no doubt that Congress is vitally concerned about the cumulative effect of many small dredging projects such as the one proposed by the plaintiffs. By providing for consultation between the Corps and the United States Fish and Wildlife Service, it intended to prevent this type of dredge and fill project in this location.

Another significant event occurred in 1967 when the Department of the Army and the Department of Interior issued a "Memorandum of Understanding"[20] in recognition of their joint responsibilities regarding water-resource projects. They pledged to resolve any differences "at the earliest practicable time" and at the organizational level most directly concerned. Most important is that the Secretary of the Army, after being advised that the project will have adverse ecological effects "will carefully evaluate the advantages and benefits of the operations in relation to the resultant loss or damage . . . and will either *deny the permit* or include such conditions . . . as he determines to be in the *public interest*. . . ."[21] Pursuant to the Memorandum of Understanding, the Corps in 1968 revised its permit requirements[22] to include an evaluation of "all relevant factors"[23] when considering an application. Among those factors enumerated were fish and wildlife, pollution and ecology. The Corps also incorporated in its regulations,[24] almost verbatim, section 662(a)[25] of the Wildlife Act.

Congress' most recent mandate, the National Environmental Policy Act of 1969,[26] [hereinafter Policy Act] is direct and incisive. The purpose of the Policy Act is to "encourage productive and enjoyable harmony between man and his environment."[27] This harmony is to be achieved by a coordination, among all agencies, of their respective projects and by interpreting all existing federal law in such a manner as to enhance the environment.

The Fifth Circuit in *Zabel* noted that the question presented, whether the Corps of Engineers could deny a permit on ecological

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[19] S. REP. No. 1981, 85th Cong., 2d Sess. (1958), *cited in* Zabel v. Tabb, 430 F.2d at 210.

[20] 33 C.F.R. § 209.120(d)(11) (1968).

[21] *Id.* (emphasis added)

[22] 33 C.F.R. § 209.120(d)(1) (1968).

[23] For an interesting discussion of what constitutes a "relevant factor" see Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 631 (1970).

[24] 33 C.F.R. 290.120(d)(5) (1968).

[25] *See* note 18 *supra.*

[26] 42 U.S.C.A. §§ 4321-4347 (1969).

[27] 42 U.S.C.A. § 4321 (1969).

grounds, was one of first impression. It reviewed the basis of the Corps' authority, the Rivers and Harbors Act, and like the Supreme Court, construed it "charitably in light of the purpose to be served" and not with "a narrow, cramped reading."[28] Though cognizant of the Act's concern with navigation and its historical interpretation in that light, the court did not believe so restricted a view necessary. It cited *Greathouse* as authority for the proposition "that the Corps of Engineers does not have to wear navigational blinders when it considers a permit request. That there must be a reason [to deny a permit] does not mean that the reason has to be navigability."[29]

Any doubt the court may have had about the correctness of the Corps' posture in this instance was negated by the reading it gave the Wildlife Act. The court reasoned that in light of Congress' environmental concern it would be ludicrous not to expect cooperation from the only agency authorized to license dredging operations. The pointedness of the Act's legislative history foreclosed any further debate in the court's mind. Consideration of the Memorandum of Understanding and the Policy Act solidified the court's decision.[30]

The court knew that this suit had been initiated prior to either of the latter two documents and herein would seem to lie its emphasis on the Wildlife Act. The inference seems to be that it wanted the parties to be aware that the same decision could have been reached then as now. To further that awareness it cited a 1967 decision[31] which quoted with approval the consultation provision, section 662(a), of the Wildlife Act. The court concluded that when the Rivers and Harbors Act, the Wildlife Act, the Memorandum of Understanding and the Policy Act were read in *pari materia* the inescapable conclusion was that of a national policy of environmental conservation and preservation. The Secretary of the Army, on recommendation from the Chief of Engineers, still has the final word, but only after consultation with other agencies. If he rejects an application on ecological grounds he is acting under congressional authority to do so.

The decision in *Zabel* is genuinely important, both for its contemporary relevance and its adherence to congressional command. Congress declared and the court confirmed that our environment is far too valuable to be carelessly despoiled. The court's discussion of the importance of our environment underscores the need for constant vigilance in guarding against further desecration. That the court did not exhort the public to watchfulness, however, is disappointing, for

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[28] United States v. Republic Steel Corp., 362 U.S. 482, 491 (1960).
[29] 430 F.2d at 208.
[30] 430 F.2d at 210, 213.
[31] Udall v. Federal Power Comm'n, 387 U.S. 428, 443-44 (1967).

a careful consideration of the facts reveals that local opposition to the project was more instrumental in the Corps' decision than the environmental question standing alone.

The court noted that the question presented was novel. The next question obviously is, "Why?" This question admits of two possible answers. Either this is the first time the Corps of Engineers has denied a permit on ecological grounds, or else it is the first time such a denial has been challenged. The latter is highly unlikely in view of the Corps' history of wearing "navigational blinders" and the economic concern of land developers. The former is given impetus by section 209.120(d)(1) of the Corps' own regulations, effective December 18, 1968. The date is important because this section not only specifies the requirements for a permit, but further states that in the event of local opposition to a project the permit will usually be denied.[32] This regulation effectively codifies the history of this litigation and indicates that opposition to a permit is often as important in reaching a decision as any potential ecological damage.[33] Thus we have a novel question because this is the first time a denial has been issued on an ecological basis.

This is extremely important because the court grounded its decision primarily on section 662(a) of the Wildlife Act which has required consultation between governmental agencies on this type of project since 1958. If the Corps has since then conscientiously adhered to the provisions of this Act, it seems incredible that the question before the court was not litigated years ago. Consider also that this particular project is not unique. As indicated by the statistics cited earlier,[34] these small projects have been occurring continuously for many years. This focuses attention on what seems to be the underlying issue, *i.e.* why the Corps denied the permit for this project and not for similar past projects. Admittedly the court may have had to go somewhat beyond what was necessary to its decision to reach this issue.

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[32] In a section concerned with general policies on issuing permits the regulations state:

> In cases where the structure is unobjectionable but when State or local authorities decline to give their consent to the work, it is not usual for the Corps of Engineers to issue a permit. It practically becomes of no value in the event of opposition by State or local Authority. In such cases the applicant is informed that the structure is unobjectionable and that the permit would be issued were the consent of the local authority also forthcoming. 33 C.F.R. § 209.120(d)(1) (1968).

[33] A dramatic example of public opposition to a Corps project, the Cross-Florida Barge Canal, which culminated in the President personally cancelling the project for environmental preservation is reported by Funk, *One Woman's Angry Campaign Halted the Cross-Florida Barge Canal,* The Lexington (Kentucky) Herald, January 25, 1971, § 2, at 18, col. 1.

[34] *See* note 7 *supra.*

But there are instances in which merely interpreting the law does not dispose of the entire issue. The availability of law to a party is not always enough. There must be a real desire to use it, both in letter and spirit. Therein lies the minor flaw in this opinion. The court acknowledges the authority of the Corps of Engineers to deny a permit for environmental protection, but is silent as to the Corps' obligation to use this authority even when, as here, it is apparent that public agencies and individuals have had to force it to act.

The public has a vested interest in knowing how well its environment is being protected. If public pressure is occasionally needed that fact should be stated, for the the court has information before it which the public does not. People are becoming more aware of how important their environment is to them. The right to a livable environment has become of paramount importance and has been termed perhaps the most fundamental of all rights.[35] The reason is simply that a breach of an environmental right, like transforming a shore into a landfill, is often irrevocable. This is too high a price to pay for public unawareness. The court cannot be so ingenuous as to believe that all governmental agencies now see the light of law and reason and need no further public supervision.[36]

Lee M. MacCracken

LABOR RELATIONS—§ 301(a) LABOR-MANAGEENT RELATIONS ACT AND NORRIS-LAGUARDIA ACT—COLLECTIVE BARGAINING AGREEMENTS—NO-STRIKE CLAUSE.—A supervisor employed by petitioner Boys Markets Incorporated, with the aid of other non-union personnel, rearranged various items of merchandise in the frozen foods compartments at one of petitioner's stores. A union representative thereupon demanded the food cases be stripped of all merchandise and be refilled by members of respondent union local 770. When petitioner refused to comply with this demand, a strike was called by local 770 in violation of an arbitration agreement with petitioner that required

[35] *See* Sive, *supra* note 23, at 643.
[36] *See* L. JAFFE, JUDICAL CONTROL OF ADMINISTRATION ACTION 580 (1965).