

## Boston College Law Review

---

Volume 12

Issue 4 *Special Section Recent Developments In  
Environmental Law*

Article 6

---

3-1-1971

### Environmental Law -- Consideration Must Be Given to Ecological Matters in Federal Agency Decisions -- *Zabel v. Tabb*

William A. Goldstein

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Environmental Law Commons](#)

---

#### Recommended Citation

William A. Goldstein, *Environmental Law -- Consideration Must Be Given to Ecological Matters in Federal Agency Decisions -- Zabel v. Tabb*, 12 B.C.L. Rev. 674 (1971),  
<http://lawdigitalcommons.bc.edu/bclr/vol12/iss4/6>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

**Environmental Law—Consideration Must Be Given to Ecological Matters in Federal Agency Decisions—*Zabel v. Tabb*.<sup>1</sup>**—Plaintiffs-appellees (hereinafter the Landholders), Zabel and Russell, owned riparian land on the Boca Ciega Bay in Florida, and adjacent land underlying the navigable waters of the Bay. The Landholders sought to dredge and fill their property for the construction of a trailer camp. After having obtained approval from local and state agencies having jurisdiction to prohibit their work,<sup>2</sup> the Landholders applied to the Army Corps of Engineers for a federal permit.<sup>3</sup> After a public hearing,<sup>4</sup> the Secretary of the Army denied the application.<sup>5</sup> The Landholders

<sup>1</sup> *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 39 U.S.L.W. 3356 (U.S. Feb. 23, 1971).

<sup>2</sup> The Landholders received significant public opposition to their work. After considering the negative recommendations of a number of groups, including the Board of County Commissioners of Pinellas County, the Health Board of Pinellas County, the United States Fish & Wildlife Service, the Florida Board of Conservation, the Trustees of the Internal Improvement Fund of the State of Florida, the Central and South Florida Flood Control District, the Board of Pilot Commissioners for the Port of St. Petersburg, and about 700 private residents, the Pinellas County Water & Navigation Control Authority rejected the Landholders' permit application, and this determination was upheld in an unpublished opinion of the state circuit court. In *Zabel v. Pinellas County Water & Navigation Control Authority*, 154 So.2d 181 (Fla. 1963), a Florida District Court of Appeals affirmed that determination. On appeal, the Supreme Court of Florida reversed, 171 So.2d 376 (Fla. 1965), holding that the burden of proving the potentially adverse effects of the project fell to the defendant, and that, since that burden had not been met, to allow the lower court decision to stand would be a taking without compensation. The District Court of Appeals adopted the opinion of the Supreme Court and remanded the matter to the circuit court for further proceedings consistent with the Supreme Court's ruling. The circuit court directed the Authority to issue the permit, and the Authority appealed to the District Court of Appeals, 179 So.2d 370 (Fla. 1965). That court affirmed and directed issuance of the permit notwithstanding the appellant's contention that the Supreme Court of Florida's ruling had intended further proceedings on the application.

<sup>3</sup> *Cummings v. Chicago*, 188 U.S. 410, 431 (1903), requires that prior to submitting an application for a federal permit, the consent and approval of all local and state agencies having authority to prohibit the proposed work must be obtained.

<sup>4</sup> A public hearing was held in St. Petersburg in November, 1966, where public concern over the Landholders' project was clearly expressed. One month later, the District Engineer at Jacksonville, Florida, Colonel Tabb, basing his conclusions upon the public hearing, recommended denial of the application. The Division Engineer, and later the Chief of Engineers, concurred in that recommendation to the Secretary of the Army. 430 F.2d at 202.

<sup>5</sup> On February 28, 1967, the Secretary of the Army, Stanley R. Resor, denied the Landholders' application because issuance of the requested permit:

1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay,
2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, as amended (16 U.S.C. 662),
3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County, and
4. Would be contrary to the public interest.

*Zabel v. Tabb*, 296 F. Supp. 764, 766-67 (M.D. Fla. 1969).

instituted suit in federal district court<sup>6</sup> for review of the Secretary's determination and for a court order compelling him to issue a permit. They argued that the proposed dredging and filling would not interfere with navigation,<sup>7</sup> and that the Secretary had no authority to withhold a permit on non-navigational grounds.<sup>8</sup> Defendants-appellants (hereinafter the Government)<sup>9</sup> supported their decision to deny the permit request on authority of Section 10 of the Rivers and Harbors Appropriation Act,<sup>10</sup> and the Fish and Wildlife Coordination Act.<sup>11</sup> Following denial of the Government's motion for lack of jurisdiction, the district court granted the Landholders' pretrial conference motion for summary judgment.<sup>12</sup> The Secretary of the Army was directed to issue the permit, and the Government was enjoined from interfering with the dredging and filling operations.<sup>13</sup> The Government appealed the decision to the Court of Appeals for the Fifth Circuit.<sup>14</sup> That court vacated the injunction of the district court, reversed the summary judgment, and rendered judgment for the Government. The court of appeals HELD: that the Secretary of the Army was within his statutory mandate when he denied the Landholders' permit application for other than navigational considerations.

The *Zabel* case is noteworthy because a court has, for the first time, recognized ecological preservation as a legitimate rationale for a permit denial by a federal agency. Justification for the denial is found in both the specific language of the governing statutory provisions, and in various directives which indicate a general governmental policy of environmental conservation. The opinion is divided into two sections. In the first, the court extended the Rivers and Harbors Appropriation Act test of "interference with navigation," to include permit refusal based on ecological factors within the broad discretionary mandate of the statute. In the second section, the court highlighted other statutory

<sup>6</sup> *Zabel v. Tabb*, 296 F. Supp. 764 (M.D. Fla. 1969).

<sup>7</sup> Defendants admitted in discovery proceedings that the District Engineer found that, "[t]he proposed work would have no material adverse effect on navigation." 296 F. Supp. at 766. In fact, he found that the proposed project might indeed have positive effects: "Navigation, present or prospective: . . . the proposed fill would improve water depths in the immediate area . . . . [T]he dredging [done in the past] has also improved navigation conditions in the same area." *Id.*

<sup>8</sup> The Landholders did stipulate, however, that the landfill might harm the ecology or marine life in the Bay area, but maintained that such effects were irrelevant to the proper test for permit approval. 296 F. Supp. at 767.

<sup>9</sup> Those joined as defendants-appellants were Colonel R. P. Tabb of the Corps of Engineers; Stanley R. Resor, Secretary of the Army; and the United States of America.

<sup>10</sup> 33 U.S.C. § 403 (1964), which gives the Secretary of the Army discretion to issue permits.

<sup>11</sup> 16 U.S.C. §§ 661, 662(a) (1964). These sections require the Secretary of the Army to consult federal and state conservation agencies before issuing a permit to dredge and fill.

<sup>12</sup> 430 F.2d at 201.

<sup>13</sup> The district court then granted the Government's plea for a stay of execution until this appeal had been adjudicated. 296 F. Supp. at 771.

<sup>14</sup> *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

provisions, recent executive orders, and congressional conference reports, which, when viewed as a totality reveal an unmistakable governmental policy of environmental control authorizing the Secretary of the Army to deny the Landholders' permit application. This casenote will analyze these major sections of the court's opinion, and will consider the question of whether Congress possesses the power to regulate the use of the nation's natural resources. Further, the ecological significance of the opinion and its importance for future federal agency regulatory standards will be examined.

The Landholders sought a judgment based on the misuse of federal power. They alleged that the Submerged Lands Act<sup>16</sup> heralded the abandonment of the congressional power to regulate natural resources.<sup>16</sup> Analysis of case law, however, as well as the congressional intent expressed in the legislative history of the Submerged Lands Act, support the court's refusal to allow the Landholders' claim that the authority to control navigable waters is presently vested solely in the several states.

The court of appeals considered *United States v. Rands*,<sup>17</sup> in which the plaintiff owned land along the Columbia River in Oregon, which land the government had condemned for use in a lock and dam project. Rands sought compensation for the land's special value as a port site. The court held that the United States was operating within its power to control navigable waters, and that the government, through the Submerged Lands Act, did not release any of its rights arising under the constitutional authority of Congress to regulate flood control, navigation, or the production of power.<sup>18</sup> The *Zabel* court's reliance upon *Rands* was proper. In both cases the land owners claimed that the Submerged Lands Act altered congressional power to regulate the use of private property.<sup>19</sup> The *Rands* court rejected this argument with little hesitation. "The [Submerged Lands Act] left congressional power over commerce and the dominant navigational servitude of the United States precisely where it found them."<sup>20</sup>

Should any doubt remain concerning the propriety of Congress' right to act, an examination of the legislative history of the Submerged Lands Act extinguishes that reservation. Speaking on the issue of federal governmental authority, the House Report states: "[The Submerged Lands Act] does *not* affect any of the Federal constitutional powers of regulation and control over these areas within State boundaries."<sup>21</sup> (Emphasis added.)

The court, therefore, went on to analyze the statutory mandate of

<sup>16</sup> 43 U.S.C. § 1301 (1964).

<sup>16</sup> 430 F.2d at 204.

<sup>17</sup> 389 U.S. 121 (1967).

<sup>18</sup> *Id.* at 127.

<sup>19</sup> The Commerce Clause reads in part: "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. Const. art. I, § 8.

<sup>20</sup> 389 U.S. at 127.

<sup>21</sup> 1953 U.S. Code Cong. & Ad. News 1385, 1389.

Section 10 of the Rivers and Harbors Appropriation Act.<sup>22</sup> At issue was whether the Rivers and Harbors Appropriation Act allows the Secretary of the Army to refuse permission for proposed projects on other than navigational grounds. The Act, in pertinent part, reads:

The creation of any obstruction . . . to the navigable capacity of any waters of the United States is prohibited . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course . . . 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.<sup>23</sup>

The court interpreted this passage as authorizing full discretionary power to the Secretary, up to and including the decision as to whether designated conservation standards must be met to make a proposed project acceptable.<sup>24</sup> However, had the court looked at the entire Rivers and Harbors Appropriation Act, rather than merely Section 10, the congressional intent that permission be extended or withheld solely on navigational grounds would have been clear to the court. The complete Act<sup>25</sup> is noticeably centered around eliminating obstructions and preventing capacity changes of the nation's waterways. The frame of reference of the Rivers and Harbors Appropriation Act is made clear by its heading in the Statutes at Large as "An Act Making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors . . ." <sup>26</sup> Section 9 of the Act, the one directly preceding the section in which the court found broad discretionary authority, further reinforces the over-all navigational foundation of the Act:

That it shall not be lawful to construct . . . any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the . . . plans have been approved by the Chief of Engineers and by the Secretary of War. . . .<sup>27</sup>

The court, however, ignored the intent expressed by the entire public act, and instead looked to case law for authority to deny a permit on ecological grounds. Its decision was based in large measure upon *United States ex rel. Greathouse v. Dern*,<sup>28</sup> where the Secretary denied a permit for essentially fiscal and navigational reasons. In *Greathouse*, petitioners sought to build a wharf on land which the government was

---

<sup>22</sup> 33 U.S.C. § 403 (1964).

<sup>23</sup> *Id.*

<sup>24</sup> The court believed that the statute had never before been interpreted on this matter of justifiable criteria for permit denial. "Until now there has been no absolute answer to this question." 430 F.2d at 207.

<sup>25</sup> Rivers and Harbors Appropriation Act, ch. 425, 30 Stat. 1121-161.

<sup>26</sup> *Id.* at 1121.

<sup>27</sup> *Id.* at 1151.

<sup>28</sup> 289 U.S. 352 (1933).

planning to take through eminent domain for use as an access to a future parkway. The proposed wharf would not have interfered with navigation. The court refused to allow a writ of mandamus compelling issuance of the permit, holding that equity would not tolerate the building of a wharf which would, of necessity, immediately be destroyed and paid for by the government. The decision makes no mention of the Rivers and Harbors Appropriation Act as authority for the denial, but rather rests entirely upon equitable principles which militate against the use of mandamus to carry out an idle and wasted venture.<sup>29</sup> In fact, the court states quite plainly that Section 10 of the Rivers and Harbors Appropriation Act need not be considered at all because financial equities govern the decision:

It is apparent that petitioners are entitled to the relief prayed only if several doubtful questions are resolved in their favor. They are (1) whether a mandatory duty is imposed upon the Secretary of War by section 10 of the Rivers and Harbors Appropriation Act to authorize the construction of the proposed wharf if he is satisfied that it will not interfere with navigation. . . .

But we find it unnecessary, in the circumstances of this case, to say what effect should be given to these objections alone, whether considered each separately or together. Although the remedy by mandamus is at law, its allowance is controlled by equitable principles . . . . The apparent consequences of authorizing the construction of the wharf would be only to increase the expense to the government. . . .<sup>30</sup>

The *Zabel* court, however, disregarded this language and used *Greathouse* to extend the test of the Rivers and Harbors Appropriation Act beyond its intended navigational strictures. Had *Greathouse* been included purely as an example of the circumstances in which non-navigational permit standards operated, rather than as an extension of the Rivers and Harbors Appropriation Act, its use, while still inapplicable to *Zabel*, would have at least been accurate. However, the court does in fact cite *Greathouse* with specific reference to the Rivers and Harbors Appropriation Act.<sup>31</sup>

The *Zabel* court discussed *Citizens Committee for the Hudson Valley v. Volpe*<sup>32</sup> as reinforcement for its interpretation of *Greathouse*. In *Hudson Valley*, the state sought a landfill permit as the initial step in the eventual completion of a massive causeway project. The District

<sup>29</sup> Id. at 360.

<sup>30</sup> Id. at 357, 359, 360.

<sup>31</sup> "In fact, in most cases under the Rivers and Harbors Act the Courts have been faced only with navigation problems . . . .

One very big exception is *United States ex rel. Greathouse v. Dern.*" 430 F.2d at 207-08.

<sup>32</sup> 302 F. Supp. 1083 (S.D.N.Y. 1969).

Court for the Southern District of New York invalidated the permit issued by the Corps of Engineers, holding that the Corps had an obligation to consider and recognize the reality of the entire expressway. If undertaken by the state, the landfill project would have made the completion of the larger project economically imperative to avoid the expense of the fill being totally wasted. The court, straying from a navigational vacuum, ruled that the Corps of Engineers could no longer remain oblivious to the very real economics involved.

The *Zabel* court moved from the essentially financial, commercial tests of the *Greathouse* and *Hudson Valley* decisions, to a much broader, purely discretionary standard which includes environmental priorities. It is submitted that the court's expansion of the test is improper. Both decisions were closely related to commerce and operated within solely fiscal confines. *Zabel* does not. In both instances, the court's enforcement of the denial of a permit, while strictly on non-navigational grounds, still involved a deviation from pure navigation which was imperceptible when set beside the overhauling of the Rivers and Harbors Appropriation Act effectuated by the *Zabel* court. The Statutes at Large demonstrate<sup>33</sup> a clear navigational framework which is nothing more than explicit protections for governmental commerce on the nation's waterways. To go from that posture to a wider commercial, financial protection which includes non-navigational operations,<sup>34</sup> is quite different, and significantly milder and more workable than what the *Zabel* court has done. Unless the court can uncover the current standard from within the statute, then there exist no guidelines at all by which administrators remain bound. The *Zabel* court has indulged itself in judicial overkill which, as has been shown, the complete Rivers and Harbors Appropriation Act and the relevant case law militate against. It is submitted that the second half of the opinion quite adequately justifies the reversal of the district court and renders the first part of the opinion superfluous.

In the second half of its opinion, the court approved the Secretary's action on grounds outside the Rivers and Harbors Appropriation Act. Citing other statutory provisions that require inter-agency consultation and ecological prudence, the court went on to state that when the Rivers and Harbors Appropriation Act is read *in pari materia* with other statutorially founded governmental policy, the Secretary's power to deny the dredge and fill application is clearly established.

The Fish and Wildlife Coordination Act<sup>35</sup> (hereinafter the Wildlife Act) is relied upon by the court to demonstrate the position which other statutes adopt relative to the nation's conservation resources. The Wildlife Act requires the Corps of Engineers to consult with the Fish and Wildlife Service with a view towards preventing loss and damage to wildlife resources. The Wildlife Act states:

---

<sup>33</sup> See notes 24 and 25 *supra*.

<sup>34</sup> See p. 677 *supra*.

<sup>35</sup> 16 U.S.C. §§ 661-66c (1964).

[W]henever the waters of any stream or other body of water are proposed or authorized to be . . . modified for any purpose whatever . . . 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 . . . with a view to the conservation of wildlife resources. . . .<sup>36</sup>

This language evidences the congressional intent that the natural resources of the nation be administered on a comprehensive and coordinated basis.<sup>37</sup> The *Zabel* court recognized this, and correctly reversed the district court on this issue. The district court was left unconvinced by the language of the Wildlife Act, and suggested that it applied only to permit applications for large federal projects.<sup>38</sup> The lower court expressed fears of procedural confusion and a resultant lack of due process if private projects were included within the scope of the Wildlife Act.<sup>39</sup> That is, the district court felt the Wildlife Act was unclear relative to private non-federal projects, and was unwilling under those circumstances to allow, under the aegis of the Wildlife Act, what it termed a taking of private property through the exercise of police power.<sup>40</sup>

The court of appeals rejected this argument on the basis of Section 662(h) of the Wildlife Act which specifically outlines the areas excluded from the Act and makes no mention whatever of private land projects.<sup>41</sup> The language of the Wildlife Act is explicit: inter-agency consultation is required in private as well as public land permit applications.<sup>42</sup> This is not to say that the Fish and Wildlife Service possesses veto powers,<sup>43</sup> but only that through conference with the Corps of Engineers, it may exert influence, as it did in *Zabel*, and that the Corps, when making its ultimate decision on the permit request, can adhere to the Service's recommendations. The court did not suggest that conservationists must prevail, but rather they must be consulted regularly, and that it is

---

<sup>36</sup> Id. § 662(a) (1964).

<sup>37</sup> See Brief for Appellants at 25, *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

<sup>38</sup> 296 F. Supp. at 769.

<sup>39</sup> Id. at 771.

<sup>40</sup> 296 F. Supp. at 769. Interestingly enough, the brief filed for the Landholders on this appeal barely mentions this problem and relies almost entirely upon the supremacy of the Submerged Lands Act, a theory quickly rejected by the *Zabel* Court.

<sup>41</sup> The provisions of section 661-666c of this title shall not be applicable to those projects for the impoundment of water where the maximum surface area for such impoundments is less than ten acres, nor to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction.

16 U.S.C. § 662(h) (1964).

<sup>42</sup> 16 U.S.C. § 662(a) (1964).

<sup>43</sup> "The latter [i.e., the fish and wildlife conservation agencies] would not be given any veto power over any part of the water resources development program." 1958 U.S. Code Cong. & Ad. News 3451.



within the agency's discretion to implement their advice through permit refusals based solely upon environmental safeguards.

The court examined the legislative history to document its conclusions regarding the Wildlife Act. The portions of the Senate Report which the court extracted, give the mistaken impression that the Wildlife Act requires inter-agency collaboration only in the interests of commerce:

[E]xisting law [the laws which the Wildlife Act superceded] has no application whatsoever to the dredging and filling of bays and estuaries by private interests. . . . This is a particularly serious deficiency from the standpoint of commercial fishing interests . . . . The bays . . . are highly important as spawning and nursery grounds for many commercial species of fish and shellfish.<sup>44</sup>

If the legislative history quoted by the court were representative of the congressional intent when enacting the Wildlife Act, then *Zabel* would not fall within its purview because the Landholders were not accused of causing a loss or reduction of commerce. The court would have been wiser either to ignore the Senate Report, and let the Wildlife Act speak for itself, or to choose one of the many passages representing the ecological spirit of the law.<sup>45</sup>

In addition to the Wildlife Act, the court introduced the demands of the National Environmental Policy Act<sup>46</sup> (hereinafter the Environmental Act) upon the decision. It is submitted that this Act alone is sufficient to justify a permit denial on ecological grounds. The Environmental Act leaves little doubt that Congress has gone beyond equivocation on environmental matters. The Act is to be enforced "to the fullest extent possible . . . [to all] . . . policies, regulations, and public laws of the United States [and is to be applied to] . . . all agencies of the Federal Government."<sup>47</sup> The entire Act is important, but Section 101

---

<sup>44</sup> Id. at 3450.

<sup>45</sup> E.g.,

Not all of the recreational benefits from fish and wildlife accrue to those who hunt and fish. It has been estimated, for example, that 66 million people find recreation and release from tension in wildlife photography, bird watching, and other forms of nature study based on fish and wildlife resources.

. . . .  
Fish and wildlife species, like other living things, need land and water. Adequate provision must be made . . . .

. . . .  
The conservation agencies are restricted and hampered by this lack of authority [prior to this Act], particularly where the land acquisition necessary for flood control and other so-called primary purposes of projects results in little or no land being available for conservation purposes. 1958 U.S. Code Cong. & Ad. News 3448-450.

<sup>46</sup> National Environmental Policy Act of 1969, P.L. 91-190, 42 U.S.C.A. §§ 4331-347 (March, 1970 U.S.C.A. pamphlet).

<sup>47</sup> Id. at § 4332.

outlines the philosophy of this declaration of national environmental policy:

(a) The Congress, recognizing the profound impact of man's activity on the inter-relations of all components of the natural environment . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . .

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means . . . to the end that the Nation may—

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without . . . undesirable and unintended consequences;
- (4) preserve important . . . natural aspects of our national heritage, and maintain . . . an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use . . .; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.<sup>48</sup>

The Environmental Act is the most pervasive declaration of environmental concern that has ever emanated from Congress. Its applicability to the facts in *Zabel* is clearly appropriate in light of the statements in the Act requiring federal agencies and individual citizens to exercise caution and responsibility in environmental matters. The Act firmly settles, as the legislative history displays, the issue of the propriety of environmental-based agency decisions: "[The Act] would provide all agencies with a legislative mandate and a responsibility to consider the consequences of their actions on the environment."<sup>49</sup>

The Fish and Wildlife Coordination Act, the National Environmental Policy Act, and other public laws and Presidential orders since

---

<sup>48</sup> *Id.* at § 4331.

<sup>49</sup> S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969).

the Environmental Act,<sup>50</sup> show an unmistakable joint legislative-executive concern for the environment, and leave little doubt as to the propriety of the Secretary's decision in this case. The *Zabel* case is a landmark decision because it is the first judicial formulation of a principle which sanctions strict agency vigilance over natural resources. *Zabel* will be cited in the future for the proposition that agency decision making must reflect careful contemplation of the effect its action will have upon the environment. The *Zabel* court, in a somewhat unwieldy and at times imprecise manner, has fashioned a new and important standard for federal regulatory authorities. Responding to the severity of the ecological problems the society faces, the court now demands a less callous and frivolous environmental posture from government agencies. In effect, another factor has been added to the equation by which regulatory bodies will make their decisions. The court recognized that its holding had, in fact, begun a new era in this field:

The agency was entitled to deny that which might have been granted routinely five, ten, fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the unmeasurable loss from a silent-spring-like disturbance of nature's economy.<sup>51</sup>

The case also highlights the effect public sentiment can occasionally have upon government agencies and the judiciary. While the Rivers and Harbors Appropriation Act omits entirely the opinions of the citizenry in the decision-making process, the District Engineer chose to listen to the community:

Careful consideration has been given to the general public interest in this case. The virtually unanimous opposition to the proposed work . . . convinced me that approval of the application would not be in the public interest.<sup>52</sup>

---

<sup>50</sup> Two of the more significant additions are: (1) Environment Quality Improvement Act of 1970, P. L. No. 91-224, 84 Stat. 91, Title II § 202, in which it states that "the Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality . . ." March 17 to April 16, 1970 U.S. Code Cong. & Ad. News 568. The Act's purpose is "to assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law. . . ." *Id.* (The reference clearly being to the oft referred to, less oft enforced, National Environmental Policy Act.)

(2) Exec. Order No. 11,507, 35 Fed. Reg. 2573 (February 4, 1970). Prevention, Control, and Abatement of Air and Water Pollution at Federal Facilities:

§ 3(a) Heads of agencies shall . . . (2) direct particular attention to identifying potential . . . water quality problems . . . and make provisions for their prevention . . . § 4(a) Heads of agencies shall insure that . . . (4) the use, storage, and handling of all materials . . . shall be carried out so as to avoid or minimize the possibilities for water and air pollution. . . .

<sup>51</sup> 430 F.2d at 201.

<sup>52</sup> *Id.* at 202, quoting Col. Tabb's recommendation to his superiors.

The *Zabel* court, by respecting that determination, judicially manifested that the people possess a degree of self-control over their environment. The court, however, at no point specifically acknowledges the people's right to be properly informed and heard. While such interests were not vital to this case, and while the Corps did act responsibly here, the court, in dicta, could have gone a step towards transforming federal agencies from their normal position of low visibility, into responsive organs that recognize the public claim to access to the decision-making process. Specifically, the issue focuses upon the problem of public ignorance of administrative activity. While the Environmental Act does require public reports from agencies on conduct which could effect the environment,<sup>53</sup> the determination of *when* to issue these reports is internal, thus producing a system of self-analysis which inevitably leads to reduced feedback to the community.<sup>54</sup> Prior notice to the public and all persons and organizations affected by the agency conduct ought to be required,<sup>55</sup> giving those who desire to be heard an opportunity to object to, support, or propose alternative agency conduct.

Despite its flaws, the ultimate significance of the *Zabel* opinion could be immense. If followed and developed the decision will provide the judicial foundation for an ecosystems approach to the national land policy<sup>56</sup>—an approach which considers and protects the non-human elements of the environment to form an ecological community unit. That is, as a matter of survival, the present indiscriminate rape of wildlife resources would give way to scientific public management of the environment. Such a land policy would necessarily impose constraints upon single-purpose approaches such as the Landholders exhibited in *Zabel*. This is not to say that the court, by adopting an ecosystems policy, was neglecting private commercial interests, but rather that they recognized the impoverishment of an environment means the impover-

<sup>53</sup> 42 U.S.C.A. § 4332(c) (March, 1970 U.S.C.A. pamphlet).

<sup>54</sup> See Forkosch, *Administrative Conduct in Environmental Areas—A Suggested Degree of Public Control*, 12 S. Tex. L.J. 1 (1970).

<sup>55</sup> Agencies should be required by Congress to publish in trade papers and local daily papers, news of their current activity. Public announcements ought to be issued on a regular schedule, as well as in emergency situations.

<sup>56</sup> Senator Henry Jackson introduced in the Senate on January 29, 1970, the National Land Use Policy Act of 1970 (S. 3354). The bill would establish a grant-in-aid program to assist state and local governments in land-use planning; encourage states to implement recreational, industrial, and environmental land-use plans; and increase the federal government's responsibility in the area of land-use planning. The bill recognizes a . . . continuing responsibility of the Federal Government . . . to undertake the development of a national policy, to be known as the national land-use policy, which shall incorporate ecological, esthetic, environmental, economic, social and other appropriate factors. Such a policy shall serve as a guide in making specific decisions at the national level . . . and shall provide a framework for development of interstate, State, and local land use policy . . . [which shall] favor patterns of land use planning, management, and development which are in accord with sound ecological principles . . .

116 Cong. Rec. S 839 (daily ed. Jan. 29, 1970) [text of bill begins S 838].

*ZABEL V. TABB*

ishment of all those dependent upon it. To prevent submerged land from being dredged and filled for trailer camps, as the *Zabel* court has done, is not to prefer shellfish to people. It is rather to prefer the interests of the whole society, present and future, over those that would jeopardize the ecosystem for immediate gain. The *Zabel* court is not advocating environmental maintenance as an end unto itself, or requiring man to seek out nature's purpose and adapt himself accordingly, but rather it is simply explaining that wise use of our resources is an ongoing imperative.<sup>57</sup> In recognition of this, the *Zabel* court, by demanding environmental watchfulness from federal agencies, has presented us with an enlightened and timely judicial decision.

WILLIAM A. GOLDSTEIN

---

<sup>57</sup> See note 50 supra.