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Corps of Engineers - New Guardians of Ecology

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In conclusion, the result reached by the court in the instant case is correct, but the court's reasoning should have been grounded in Civil Code article 2236.[37] The decision of the court is especially desirable because it forces parties deriving advantages from an authentic act either to comply fully with the formalities required by law or to face the possibility of losing these advantages. In the near future Louisiana appellate courts may have an opportunity to clarify other problems relating to attacks on authentic acts, such as what fulfills the requirements of authenticity[38] and when should parties to an act be estopped from disputing a notary's declarations.[39]

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CORPS OF ENGINEERS—NEW GUARDIANS OF ECOLOGY

Plaintiffs, riparian landowners, desired to fill a portion of adjacent submerged lands owned by them in order to create an island to be connected to the mainland by a bridge. The landowners applied to the United States Army Corps of Engineers (hereinafter referred to as Corps) for a permit to dredge and fill the affected navigable waters. Although the proposed project was found to involve no adverse effects on navigation, the Secretary of the Army (hereinafter referred to as Secretary) denied the application on grounds of potential damage to fish

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probative force, *see* Succession of Theriot, 114 La. 611, 38 So. 471 (1905); W. Cox & Co. v. King's Estate, 20 La. Ann. 209 (1868); Lewis' Heirs v. His Executors, 5 La. 387 (1833). For an argument that the agreement contained in the authentic act should not have undue probative force, *see* Comment, 3 LA. L. REV. 427 (1941).

37. LA. CIV. CODE art. 2236; *see also* note 17 *supra*.

38. The instant case was remanded to the district court. Once the defendant introduces parol evidence to substantiate his allegations that the two witnesses were not present at the execution of the act, the district court will have to decide whether there was substantial compliance with LA. CIV. CODE art. 2234 in regard to what constitutes execution "in the presence of two witnesses." *See, e.g.*, Finance Sec. Co. v. Williams, 42 So.2d 902 (La. App. 1st Cir. 1949); *cf.* Abshire v. Comeaux, 159 La. 1087, 106 So. 574 (1925); General Fin. v. Warner, 169 So. 112 (La. App. 1st Cir. 1936); Wessell v. Kite, 142 So. 363 (La. App. 2d Cir. 1932); Dainello v. McCoy, 131 So. 608 (La. App. Orl. Cir. 1930).

39. The district court, on remand, will also have to consider whether the defendant should be estopped from contesting the validity of the authentic act of mortgage because he later "cured" any defects of formality by his action subsequent to the act's execution. Childs v. Pruitt, 196 La. 866, 875, 200 So. 282, 285 (1941); Reliance Homestead Ass'n v. Brink, 173 La. 331, 137 So. 52 (1931); *cf.* Monk v. Monk, 243 La. 429, 144 So.2d 384 (1962); Hodges v. Long-Bell Petroleum, 240 La. 198, 121 So.2d 831 (1959); Snell v. Union Sawmill Co., 159 La. 604, 105 So. 728 (1925); Blanchard v. Allain, 5 La. Ann. 367 (1850).

and wildlife resources. Suit was subsequently filed in federal district court to compel the Secretary to issue the permit. Plaintiffs contended that (1) the project would not obstruct navigation, and (2) the Secretary was not authorized to deny a permit on grounds other than potential obstruction to navigation. The district court sustained plaintiffs' contention, but the United States Court of Appeals for the Fifth Circuit reversed, holding that the Secretary can refuse on conservation grounds to grant a permit under the Rivers and Harbors Act. *Zabel & Russell v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 39 U.S. L.W. 3360 (1971).

Assuming that landfill projects which damage or destroy fish and wildlife resources have substantial effects on interstate commerce, the authority of Congress to prohibit or regulate such activities for ecological reasons would seem constitutionally justified. In view of the disclaimer found in the Submerged Lands Act[1] concerning the transfer of jurisdiction over certain submerged lands to the several states it cannot be seriously argued that Congress' power under the commerce clause does not apply to the navigable waters of the separate states. Accordingly, this Note is limited to the question of whether Congress has delegated to the Secretary authority to consider factors other than effects on navigation in the evaluation of applications for permits to dredge and fill navigable waters within state boundaries. It is suggested that in *Zabel* the court confused the plenary power of Congress over interstate commerce with the delegated authority of the Corps and the Secretary, and, while studiously avoiding a search for delegation of authority, looked instead to national policy expressed in reports and acts of Congress as the basis for the Corps' new authority.

The court first considered the Rivers and Harbors Appropriations Act of 1899,[2] (hereinafter referred to as Act) which prohibits any obstruction to the navigable capacity of the nation's

1. 43 U.S.C. §§ 1301-1315 (1964). The disclaimer is found in § 1314(a): "The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title."

2. 33 U.S.C. §§ 401-11 (1964). The court was concerned with § 10 of the act, now § 403.

waters without a permit issued by the Secretary upon the recommendation of the Corps. Since the Act places no restriction on the Secretary's discretion to deny a permit, the court used negative reasoning to determine that the Secretary may consider criteria other than obstruction to navigation. In so doing, as shown *infra*, the court ignored the fact that the Act was restricted to matters of navigation[3] and that Congress' only interest in the nation's waters at the time of passage of the Act was protection of the navigable capacity of the country's waterways. The court's inclination to make a policy decision was evident from its marshalling of authority in support of the proposition that the Secretary may consider ecological factors in evaluating applications for dredge and fill permits. It dismissed, as "out of step with the sweeping declaration of power over commerce in *United States v. Appalachian Electric Power Co.*,"[4] plaintiffs' contention that *Miami Beach Jockey Club, Inc. v. Dern*[5] was authority for the proposition that the Secretary may deny a permit for navigational reasons only. The court then construed *United States* ex rel. *Greathouse v. Dern*[6] and *Citizens Committee for the Hudson Valley v. Volpe*[7] as holding that the Secretary's authority was not limited to navigation. As

3. The fact that the Corps of Engineers has historically been concerned only with navigation is also pointed out by Corps regulations. Until December 1967 33 C.F.R. § 209.330(a) and (c) (1967) specified: "(a) The decision as to whether a permit will be issued *must rest primarily upon* the effect of the proposed work on navigation . . . . (c) . . . It is pointed out . . . that the Department's function in approving plans for structures in navigable waters is *only to insure that structures meet the requirements of navigation* . . . ." (Emphasis added.) However, in practice the Corps has met objections of state agencies, adjacent landowners, naturalist societies and other groups to proposed projects by acting beyond their apparent authority as a mediator with the ostensible object of reasonably satisfying all concerned parties before a permit is issued. This practice, which often results in the inclusion of conditions in the Corps permit relating to matters other than navigation, has been in effect for many years without specific statutory or regulator authority; it has never been challenged in the courts. The above regulations were amended in December 1967 to read as follows: "'(a) The decision as to whether a permit will be issued will be predicated upon the *effects of permitting activities on the public interest including effects upon water quality, recreation, fish and wildlife, pollution, our natural resources*, as well as the effects on navigation . . . . (c) . . . It is pointed out . . . that the Department's function in approving plans for structures in navigable waters is to insure that structures meet the requirements for navigation *and are in the best public interest* . . . ." These amended regulations, the scope of which now seem to extend beyond the Rivers and Harbors Act, were challenged and upheld in Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).

4. 311 U.S. 377 (1940), as cited in Zabel v. Tabb, 430 F.2d 199, 207 n.14 (5th Cir. 1970).

5. 86 F.2d 135 (D.C. Cir. 1936).

6. 289 U.S. 352 (1933).

7. 302 F. Supp. 1083 (S.D. N.Y. 1969).

will be noted later, however, neither of the latter two cases was applicable to the dispute at issue. The court, in examining the Fish and Wildlife Coordination Act,[8] found a "government-wide policy" applicable to Corps actions and cited *Udall v. Federal Power Comm'n*[9] and a memorandum of understanding between the Secretary and the Secretary of the Interior as additional authority for its position. Finally, the court cited the National Environmental Policy Act of 1969[10] as further evidence of a national policy requiring the Secretary of the Army to consider non-navigational factors when evaluating applications for dredge and fill permits. The court thus determined that authority for the Secretary to deny permits for ecological reasons is based on *current* "government-wide policy."

To suggest that any federal agency may enforce "government-wide policies" without a specific mandate from Congress would void one of the most basic of constitutional principles, *viz.*, separation of powers. To permit any administrative agency to enforce its own concept of "government-wide policy" would vest virtually the entire legislative power in the executive branch. To avoid such a concentration of power there must be a delegation by Congress which vests the Corps with authority to consider non-navigational factors in issuing or denying permits. In the absence of such a delegation, or even of broad general language directing the Corps to protect the "public interest," the court was forced to misconstrue cases not on point and to avoid the limited legal issue in order to reach a socially and ecologically desirable result. The court in effect gave the Corps its needed authority where Congress had failed to delegate it.

Had the court looked for a valid delegation, it would necessarily have had to find that there were some standards governing the exercise of such power or, at least, that Congress had marked "the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."[11] In the absence of such standards the proper holding should have been that the Corps did not have authority to deny applications for dredge and

8. 16 U.S.C. §§ 661-666(c) (1964).
9. 387 U.S. 428 (1967).
10. 42 U.S.C. §§ 4331-4347 (1969).
11. Yakus v. United States, 321 U.S. 414, 425 (1944).

fill permits on non-navigational grounds. The court in its holding created the potential danger of a system in which administrators, not elected by the people and tightly controlled neither by Congress nor the President, may make decisions on the basis of that undefinable ghost, public policy, so long as the judiciary concurs in the result of their actions. As Professor Jaffe states: "[L]est we be subjected to the personal caprices of a vast, heterogeneous body of administrators and judges, there must be limits set by general agreement within which individual determinations can be logically contained."[12]

The Court's technique and use of authority is also questionable.[13] A finding that the Secretary's discretion under the Act is not limited to navigation ignores both the history and purpose of the Act. The language of the Act shows that its purpose was to protect the navigable capacity of the nation's waterways. It provides that before a permit is issued for any construction in navigable waters an investigation must be conducted by the

12. L. JAFFE & N. NATANSON, ADMINISTRATIVE LAW 37 (1968).

13. The Fifth Circuit's opinion illustrates a problem area which has troubled many students of the law. The problem arises from the common law doctrine of *stare decisis*, requiring a court to demonstrate authority for the principle of law which it applies to the case. This need for authority has become so engrained in our legal theory that the judiciary feels compelled to appeal to precedent even when faced with a question that is *res nova*. As a result, when a question is truly one of first impression, statutes and previous cases are sometimes misconstrued and distorted to make them appear to be authority for the court's position. The same result sometimes occurs when a court is faced with authority contrary to its position. It should be remembered that judicial opinions must persuade the lawyer and layman of the correctness and fairness of the court's ruling (as well as expound the law) if the citizenry is to have faith in the law. When faith in the law is lacking, respect for the law breaks down. It is submitted that when the judiciary is faced with a case where the only authority is contrary to its beliefs (as in *Zabel*), it should either follow the previous cases or hand down a well-reasoned reversal. It is further submitted that where achieving a desired result would do offense to the Constitution (as in *Zabel*) the courts should forego achieving that result in the hope that Congress will use its constitutional powers to remedy the situation.

It is further submitted that the basic purpose of judicial opinions would be better served if the courts were more candid when faced with a controversy for which there is no precedent. When faced with a case of first impression (as the Fifth Circuit saw *Zabel*), the court should point out that although there is no precedent or statute for it to rely on, it must decide the case and mete justice to the parties. By pointing out that it is applying policy considerations and basic legal principles instead of articulating the law, the courts would avoid construing cases and statutes in a manner that could cause future problems and misunderstandings. Such an approach would:

(1) Allow the court to decide the issues involved.

(2) Allow the accumulation of a body of cases from which to draw upon before static rules of law are laid down, thus avoiding the future necessity of misconstruction or agonized reversal of leading cases.

(3) More convincingly illustrate that American justice is rational and fair.

Corps to determine its possible effects on navigation.[14] The Act's sole concern for navigation is further evidenced by the fact that it allowed the discharge of sewage into navigable waters and authorized the Secretary to permit the dumping of any substance which would not impede navigation.[15] It is thus reasonable to assume that Congress was not concerned with environmental protection in 1899. In fact, as late as 1925, the United States Attorney General expressed the view that the only constitutional interest of Congress in the nation's waters was to protect navigation.[16] The United States Supreme Court agreed.[17] The Attorney General also expressed the following opinion concerning the function of the War Department in relation to the purposes of the Act:

"Unquestionably the War Department must take into

14. Section 10 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403 (1964) provided: "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 War; 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 War prior to beginning the same."

In addition to the provisions discussed above, the act also (1) makes it unlawful to build bridges, dams, dikes, or causeways over navigable waters between states without prior approval by Congress (upon the recommendation of the Secretary), (2) gives authority to the Secretary to establish harbor lines for the protection of the navigable capacity of harbors, (3) makes it unlawful to damage works constructed by the Corps for the improvement of navigable waters, and (4) makes it unlawful to anchor vessels or negligently sink them "in such a manner as to prevent or obstruct the passage of other vessels or craft."

The only subsequent change has been to transfer the authority of the Secretary of War to the Secretary of the Army.

15. 33 U.S.C. § 407 (1964) makes it unlawful "to throw, discharge, or deposit . . . any refuse matter of any kind . . . other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States . . . whereby navigation shall or may be impeded or obstructed . . . and provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters."

16. 34 OP. U.S. ATT'Y GEN. 410, 412 (1925): "The interest of the United States in the waters of the country under the Commerce Clause of the Constitution is confined to their navigability, and any construction which may be erected, or any use of the waters, may be said, in a remote but not very practical sense, to affect these waters."

17. United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).

account, in exercising its administrative discretion, the policy of Congress as disclosed by the statute. *The function of your Department is to determine the facts and not policies. In doing so you must be guided by the clear intention of Congress that navigable waters shall not be so diverted for local purposes as to injure the just rights of the whole people in the navigability of such waters.*" (Emphasis added.)[18]

Although the judiciary soon decided that the federal government's power over navigable waters under the commerce clause extended to more than navigation,[19] they nonetheless viewed the authority of the Secretary under the Act as limited to the protection of navigation. *Miami Beach Jockey Club, Inc. v. Dern*[20] illustrates this point. In that case plaintiff applied to the Corps for a permit to fill a 200-acre area in Biscayne Bay for the construction of a horse racing facility. A month after the permit was issued owners of residential property along the bay filed a protest. The report of the Chief of Engineers gave six reasons for the subsequent revocation of the permit, none of which were related to navigation. Nevertheless, the report concluded that the fill would constitute an unreasonable obstruction to navigation. Plaintiff attacked the revocation as arbitrary, contending that the Secretary's action had no relation to the protection of navigation. The court upheld the Secretary, stating that "the findings of the lower court . . . did show some facts consistent with the finding that the fill would obstruct navigation."[21] However, on rehearing the court noted that:

"We feel impelled to adhere to that conclusion, but we think it is fair to add that in our opinion appellant is entitled to have the question of the nature of the proposed improvement passed upon by the Chief of Engineers of the Army, and by the Secretary on his report, *exclusively* on

18. 34 OP. U.S. ATT'Y GEN. 410, 417-18 (1925). At page 416 he stated: "In my opinion Congress thus intended to delegate to the Chief of Engineers and the Secretary of War an administrative authority to determine a fact; *and if they were of the opinion that the use of navigable waters in a certain case was not such an impairment of their navigability as to require the prohibition of Congress, then the construction was 'affirmatively authorized by Congress,'* because the administrative agency to which *Congress had delegated the ascertainment of the facts* had found the fact to be that such use was not for the time being an impairment of navigable capacity such as Congress intended to prohibit." (Emphasis added.)

19. United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), *rehearing denied*, 312 U.S. 712 (1941), *petition denied*, 317 U.S. 594 (1942).

20. 86 F.2d 135 (D.C. Cir. 1936).

21. *Id.* at 136.

> evidence directed to the question whether, in the light of present-day conditions with relation to commerce and navigation, it will obstruct the navigable capacity of the waterway—and not, as it was at least in part considered, in relation to its effect upon adjacent suburban or winter homes."[22] (Emphasis added.)

The *Zabel* court dismissed *Miami Beach Jockey Club* in a footnote, on the assumption that it had been overruled by the subsequent decision in *United States v. Appalachian Electric Power Co.*[23] This case, however, did not involve the authority of the Corps but, instead, the power of Congress under the commerce clause and the Federal Power Commission under the Federal Power Act.

In 1920, Congress created the Federal Power Commission (hereinafter referred to as FPC), gave it authority to license the construction of dams, and modified section 9 of the Rivers and Harbors Act[24] by eliminating the requirement of congressional approval for dams constructed under license of the FPC. Among the powers expressly delegated to the FPC was authority to establish conditions or deny licenses[25] for reasons which the Corps is powerless to consider under the Rivers and Harbors Act. In *Appalachian* the FPC sought an injunction to prohibit defendant power company from building a dam and hydroelectric plant on the New River in Virginia without first obtaining a license. The issue there was not whether Congress had delegated power to the FPC to condition or deny a license on matters not relating to navigable capacity, but whether Congress itself had such power under the commerce clause.[26] Thus, *Appalachian* is not determinative of the issue in either *Miami Beach Jockey Club* or the instant case.

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22. *Id.*
23. 311 U.S. 377 (1940).
24. 33 U.S.C. § 401 (1964).
25. *See* the Federal Power Act, 16 U.S.C. §§ 791-828 (1964).
26. Defendant urged: "(1) that the conditions of any federal license must be strictly limited to the protection of the navigable capacity of the waters of the United States; and (2) that the Commission's refusal to grant the minor part license containing only such conditions was unlawful, and that any relief should be conditioned upon the commission's granting respondents such a license. By these defenses respondent put in question . . . [t]he validity of the conditions of the Act carried over into the standard form license which relate to accounts, control of operations and eventual acquisition of the project at the expiration of the license." United States v. Appalachian Electric Power Co., 311 U.S. 377, 401 (1940).

The *Zabel* court reviewed two other cases which it considered determinative of the issues involved: *United States* ex rel *Greathouse v. Dern*[27] and *Citizens Committee for the Hudson Valley v. Volpe*.[28] Of *Greathouse* it said: "The importance of *Greathouse* is that it recognized that the Corps of Engineers does not have to wear navigational blinders when it considers a permit request."[29] In this case, petitioners sought a writ of mandamus to compel the Secretary to authorize construction of a wharf adjacent to their property on the Virginia shore of the Potomac River. The government conceded that the only basis for the refusal to issue a permit was that it would be inimical to the proposed George Washington Parkway project. Whether a mandatory duty was imposed upon the Secretary to issue the permit since the wharf would not interfere with navigation was only one of six questions standing between the petitioners and legal relief.[30] The court, however, found it unnecessary to decide the legal issues involved because of its view that the issuance of mandamus, an equitable remedy, "would be burdensome to the government without any substantially equivalent benefit to the petitioners."[31] To force the Secretary to issue the permit would have increased the expense of the parkway by the cost of compensating the landholders for the value of the wharf and its demolition. Petitioners could have benefited only by being allowed to execute a conditional contract of sale. The court's refusal to grant mandamus, then, is not authority for the proposition that the Secretary's discretion extends beyond considerations of navigation.

The court in *Zabel* interpreted *Hudson Valley* to support its decision and stated: "There the District Court held that the Corps must consider a fill project in the context of the entire expressway project of which it was a part rather than just

27. 289 U.S. 352 (1933).
28. 302 F. Supp. 1083 (S.D. N.Y. 1969).
29. Zabel v. Tabb, 430 F.2d 199, 208 (5th Cir. 1970).
30. Other issues involved were whether petitioners had title to the upland by virtue of accretion; whether they had a common law right to build a wharf on the lands of the United States lying in the bed and if not, whether their predecessors in title had acquired such a right under the Maryland-Virginia Compact; whether this right was not lost by the acquisition of the bed and land on both sides of the river in the cession of the District of Columbia by Maryland and Virginia; and whether the right claimed was not subordinate to the power of the United States as proprietor of the bed.
31. "The Court, in its discretion, may refuse mandamus to compel the doing of an idle act . . . or to give a remedy which would work a public injury or embarrassment." United States *ex rel.* Greathouse v. Dern, 289 U.S. 463, 460 (1933).

considering the fill and its effect on navigation."[32] In this case, the State of New York planned to build an expressway along the eastern shore of the Hudson River. The project was to include landfill extending 1300 feet into the river upon which an expressway was to be built. Numerous dikes were to be constructed to protect the edge of the fill and a causeway was to be built over the river at another location. The State Department of Transportation applied to the Corps for a landfill permit. After its issuance, plaintiffs sued to enjoin the construction of the expressway. The court found that the consent of Congress was necessary for the construction of a dike, and that the construction of a causeway in addition required the approval of the Secretary of Transportation. Thus, the Corps was held to have exceeded its statutory authority by issuing the permit without prior approval of the Secretary of Transportation. By so doing, the Corps had effectively deprived the Federal Department of Transportation of its discretion to deny approval of the future causeway. The court did not hold that the Corps could consider non-navigational factors in deciding whether to issue a permit, nor did it rule that the Corps must consider the effect that the landfill might have on the approval of the causeway. The holding was only that such approval was to be given by the Secretary of Transportation and the Corps was powerless to bind his hands.[33] The *Hudson Valley* court emphasized that the Secretary of Transportation—and not the Secretary of the Army—was responsible for ecological considerations in that project—a point which the *Zabel* court ignored.

If a valid delegation of authority allowing the Corps to consider ecological factors is to be found, it would apparently have to be in the Fish and Wildlife Coordination Act[34] or the National Environmental Policy Act of 1969.[35] However, the *Zabel* court stated that:

> "Government agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometimes effectuate and other times not thwart other valid *statutory governmental policies.* And here the *government-wide policy* of environmental conservation is spectacularly

32. Zabel v. Tabb, 430 F.2d 199, 208 (5th Cir. 1970).
33. Citizens Comm. v. Volpe, 302 F. Supp. 1083, 1090 (S.D. N.Y. 1969).
34. 16 U.S.C. §§ 661-666 (1964).
35. 42 U.S.C. §§ 4331-4347 (1969).

> revealed in at least two statutes, The Fish and Wildlife Coordination Act and the National Environmental Policy Act of 1969."[36] (Emphasis added.)

The court spent little time on statutory interpretation and merely stated that the Fish and Wildlife Coordination Act "clearly requires the dredging and filling agency . . . to consult with the Fish and Wildlife Service, with a view of conservation of wildlife resources."[37] From this point they deduced that "common sense and reason dictate that it would be incongruous for Congress . . . not to direct the only federal agency concerned with licensing such projects both to the consult and take such factors into account."[38] The court did not look for a delegation nor did it attempt to interpret the statute in light of the facts of the case. In amending the Fish and Wildlife Coordination Act in 1958,[39] Congress was moved to act by its great concern over the destruction of the country's wildlife resources by vast federal water resource development projects.[40] There was no intention to abandon such projects simply because they threaten wildlife, but to incorporate certain "means and measures" for the conservation of wildlife only so long as such measures were "compatible with the purposes for which the project was authorized."[41] To these ends 16 U.S.C.A. § 662(a) provides that:

> "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

36. Zabel v. Tabb, 430 F.2d 199, 209 (5th Cir. 1970).
37. *Id.*
38. *Id.*
39. 16 U.S.C. §§ 661-666 (1964).
40. The main purpose of the amendment was to "provide for more effective integration of a fish and wildlife conservation program with *Federal water-resource developments*," and to "grant authority to the agencies of Government engaged in construction to consult with the Fish and Wildlife Service before and during the building of *Federal water development* projects." S. REP. No. 1981, 85th Cong., 2d Sess. (1958); 1958 U.S. CODE CONG. & AD. NEWS 3446. (Emphasis added.)
41. S. REP. No. 1981, 85th Cong., 2d Sess. (1958); 1958 U.S. CODE CONG. & AD. NEWS 3446, 3449.

> 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."

This section is the only place in the act where a "private agency under Federal permit or license" is mentioned; and such agency is charged only to consult with the United States Fish and Wildlife Service (and the head of the state conservation department where the facility is to be constructed), "with a view to the conservation of wildlife resources . . . in connection with such water resource development." It requires the agency doing the work to consult and assumes that such agency has already secured a federal permit or license. There is no requirement that the permit-granting agency consult with the Fish and Wildlife Service. The statute contemplates large federal projects which substantially alter the environment or the construction of hydroelectric plants by private companies. It is inapplicable to small landfill projects and nowhere in the Act is it indicated that the Corps should consult the Fish and Wildlife Service in regard to such projects.[42]

While the Act directs the agency under government permit to first consult with the Fish and Wildlife Service and state agencies, it also requires that the reports of these two agencies specify the possible damage to wildlife by the project and recommend changes to prevent these losses. Such recommendations should be an

"integral part of any report . . . submitted by any agency

42. That the act does not contemplate small landfill permits is borne out by subsections (G) and (H) of the same section. Subsection (G) makes the provisions of § 662 applicable to "any project for the *control or use* of water as prescribed herein or any unit of such project." (Emphasis added.) Subsection (H) excluded from application of the act all projects for the impoundment of water where the maximum surface area of such impoundment is less than ten acres "and activities for and in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction." The rest of the act prescribes the provisions for wildlife protection which are to be included in the projects.

> of the Federal Government responsible for engineering surveys and construction of such projects *when such reports are presented to the Congress or to any agency or person having the authority . . . (1) to authorize the construction of water resource development projects or (2) to approve a report on the modification or* supplementation of plans for previously authorized projects."[43] (Emphasis added.)

This is the only language in the statute which relates to the Corps, and here its role is that of planning and building federal water-resource development projects. The court thus found a national policy in an inapplicable statute to support its contention that the Secretary may deny dredge and fill permits for ecological reasons. As its "second proof that the Secretary is directed and authorized . . . to consider conservation,"[44] the court quoted a section of the Senate report accompanying the bill to amend the coordination act in which the committee expressed its concern for the damage done to marine life by private dredge and fill projects in the nation's estuaries. In every case except this one, when the Senate report pointed out a deficiency in existing legislation, it explained how the amendment would remedy this deficiency. It is submitted that Congress did not stop to consider how the amendment would remedy this situation because the amendment was not drawn with small private dredge and fill operations in mind.

Udall v. Federal Power Comm'n[45] was also cited to bolster the court's tenuous position. *Udall*, however, involved a hydroelectric project, which is the situation contemplated by the Fish and Wildlife Coordination Act. The issue in that case was whether there should be federal or non-federal development. The decision turned on whether the FPC had fully explored the benefits of federal development, and consideration of the Coordination Act was not necessary. Justice Douglas had merely cited the Act to buttress the Court's position that no dam whatsoever should be built at the proposed location—an issue not presented by the parties or the facts.

The *Zabel* court finally stated that a memorandum of understanding between the Secretary of the Army and the Secretary of the Interior showed that "the statute authorizes and directs

43. 16 U.S.C. § 662(b) (1958).
44. Zabel v. Tabb, 430 F.2d 199, 209 (5th Cir. 1970).
45. 387 U.S. 429 (1967).

the Secretary to consult with the Fish and Wildlife Service in deciding whether to grant a dredge and fill permit."[46] It is submitted that delegations of legislative authority are not made by memoranda between administrators.

The court saw the National Environmental Policy Act of 1969[47] as added evidence of the national policy of which the Secretary of the Army must take heed. This Act was intended to serve as a declaration of national policy, to encourage an information exchange between agencies of both state and federal governments, and to set up a reporting procedure by which Congress and the President would be informed of all aspects of the environmental problem. It was not intended to extend the existing statutory authority of federal agencies. It was intended, however, that the agencies, as part of the reporting procedure set up, would point out any deficiencies within their delegated authority so that *Congress* could decide whether any change was necessary.[48]

From the preceding discussion it is clear that no authority is vested in either the Secretary or the Corps upon which dredge and fill permits may be denied for ecological reasons. Administrative power under the Constitution is not derived from national policy but from Congress. Perhaps the Fifth Circuit reached a socially acceptable decision by preventing the destruction of a portion of Boca Ciega Bay. However, it is submitted that the decision is legally questionable and should not serve as precedent for future decisions. The vesting of authority in the Corps of Engineers as guardians of ecology in all private civil works has no basis in law.

The Corps has not previously been oriented toward matters of resource conservation and it is not at present administratively equipped to adequately evaluate ecological factors in coastal development projects. It has been charged that in executing its functions, the Corps has ignored ecological factors in an

46. Zabel v. Tabb, 430 F.2d 199, 210 (5th Cir. 1970).
47. 42 U.S.C. §§ 4331-4347 (1969).
48. 42 U.S.C. § 4333 (1969): "All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of the Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purpose, and procedures set forth in this chapter."

effort to build monuments to engineering genius. Miles of natural rivers have been ruined, and millions of acres of wildlife habitat have been lost through dam construction and flood control projects.[49] The dredging of rivers has left bare ditches, able to support navigation, but incapable of supporting aquatic life.[50] Permits have been issued for the filling of over one-third of San Francisco Bay (over 250 square miles) with ruinous results.[51] The fact that the Corps must depend on other federal and state agencies for ecological analysis and input affords some evidence of the Corps' internal lack of administrative expertise in the field of ecology.

The responsibility for preserving the ecological balance of our nation's waters should be vested in a separate agency responsible only for environmental quality such as the Environmental Protection Agency. Unfortunately, the Environmental Protection Act[52] does not provide for evaluation of such projects. Moreover, the Corps of Engineers has moved to institutionalize the *Zabel* rule as quickly as possible. In April 1970 the Chief of Engineers formed the Corps of Engineers Environmental Advisory Board which provides the machinery (on paper at least) for the Corps to exercise the authority given to it by the Fifth Circuit. A proposed rule[53] gives EPA a veto over all applications for a discharge of refuse under section 13 of the Rivers and Harbors Act of 1899[54] as to water quality standards established under the Federal Water Pollution Control Act,[55] but the Corps would continue to determine the effect of section 13 discharges on fish and wildlife resources. EPA's influence over the issuance of permits is thus to be confined to a technical finding involving the effect of section 13 discharges on water quality standards while the Corps of Engineers could continue to deny permits for section 13 discharges or section 10[56] constructions (such as the *Zabel* dredge and fill project) on conservation grounds. Thus, EPA's influence under the proposed rule is negligible; and, even if it were not, rules established by memorandum can be changed by memorandum. To remedy

49. Douglas, *The Public Be Damned*, 16 PLAYBOY 143 (July 1969).
50. *Id.*
51. *Id.*
52. Pub. L. No. 91-190, 83 Stat. 852 (1970).
53. *See* 36 Fed. Reg. 983 (1971).
54. 33 U.S.C. § 407 (1964).
55. 33 U.S.C. §§ 1151-1160 (1966).
56. 33 U.S. § 403 (1964).

this situation, Congress should enact legislation giving EPA a veto power over all projects in navigable waters including water resource development projects proposed by federal agencies (especially the Corps of Engineers) and private power companies under federal permit. The President's Advisory Council on Executive Reorganization has recommended that this veto power be given to the proposed Department of Natural Resources. However, EPA with its mission-oriented structure is more suited to evaluate such problems free from the pressures of special interest groups.

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A Selected Approach to Election of Remedies in Mineral Trespass Cases

Plaintiffs brought suit for recovery of the value of minerals produced under a mineral lease granted to defendant on property claimed by plaintiffs. After a determination that plaintiffs were in fact the owners of the land in question, the court of appeal *held*, that plaintiffs' suit for the value of the oil produced from their property was an action in tort, subject to the prescription of one year, and that the only damages recoverable by plaintiffs were for the value of the oil produced during the year immediately preceding the filing of suit, less their proportionate share of drilling and operating costs for that period. *White v. Phillips Petroleum Co.*, 232 So.2d 83 (La. App. 3d Cir. 1970), *cert. denied*, April 20, 1970.

Before the advent of the 1960 Code of Civil Procedure, a party entitled to recover damages under alternative theories was held to have elected one remedy over others according to the legal theory upon which his pleadings were based and the remedy prayed for.[1] Thus, the theory of plaintiff's pleadings determined the applicable prescriptive period, cause of action, and measure of damages.[2] For example, if a suit involving a taking of movables could be brought alternatively under Civil Code article 2315 and the quasi-contractual concept of unjust enrichment, the prescriptive period would be one year for the former cause of action and ten years for the latter. Furthermore, damages would be measured by the value of the thing

1. *See* Importsales v. Lindeman, 231 La. 663, 92 So.2d 574 (1957).
2. Kramer v. Freeman, 198 La. 244, 3 So.2d 609 (1941).