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Water Law - When Water Quantity Regulation Is Not Water Quantity Regulation - Riverside v. Andrews

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Water Law—When Water Quantity Regulation is Not Water Quantity Regulation. *Riverside v. Andrews,* 568 F. Supp. 583 (D. Colo. 1983).

Riverside Irrigation District and the Public Service Company of Colorado (Riverside) planned to build a dam and reservoir on Wildcat Creek, a tributary of the South Platte River in Morgan County, Colorado.[1] It was authorized to store and use the water under water rights validly decreed in Colorado courts.[2] Riverside was required to obtain a dredge and fill permit from the Army Corps of Engineers under the Clean Water Act[3] for placing fill material into navigable waters of the United States. Because Wildcat Creek is an intermittent stream above the headwaters of a non-tidal stream,[4] the dam developers believed they were entitled to an automatic nation-wide permit for their dredge and fill activities,[5] and brought suit when it was denied.

In this suit, Riverside argued that the federal authorities infringed upon its state water rights.[6] It contended that the permit denial was based on the depleted flow of the South Platte River that would result from the dam's operation, a matter of water quantity regulation which, they argued, was outside of the Corps' authority.

In reply, the Corps never contended that the denial of the permit decision was based on federal authority to regulate water quantity. Rather, the Corps argued that it was exercising federal police powers by considering the project's environmental effects, and that it reached a no-permit decision on those grounds.[7] The district court sided with the Corps, holding that it had police power authority to deny an automatic permit to a project which was likely to jeopardize the habitat of an endangered species.[8] An appeal of the district court's decision is now pending before the United States Court of Appeals for the Tenth Circuit.

Congress has made protection of the environment a very high priority, as demonstrated by much legislation passed in the 1960's and 1970's.[9] Perhaps the greatest emphasis has been placed on protecting endangered species of wildlife and habitats on which they depend. Concern for habitat

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1. Riverside Irrigation Dist. v. Stipo, 658 F.2d 762, 763 (10th Cir. 1981), *remanded sub. nom.* Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583, 585 (D. Colo. 1983).

2. Complaint of Riverside Irrigation Dist. and Public Service Co. of Colorado at 4, Riverside v. Stipo, 658 F.2d 762 (10th Cir. 1981), *remanded sub. nom.* Riverside v. Andrews, 568 F. Supp. 583, 585 (D. Colo. 1983) [hereinafter cited as Complaint].

3. The Clean Water Act is the popular name for the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982).

4. Complaint, *supra* note 2, at 7.

5. 33 C.F.R. § 330.4 (1984) stipulates that nationwide permits have been issued for discharges into certain waters including "non-tidal rivers . . . that are located above the headwaters."

6. *Riverside v. Andrews,* 568 F. Supp. at 587.

7. *Id.* at 588.

8. *Id.* at 590.

9. *See, e.g.,* M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 463-67 (1977).

preservation has been codified in the Endangered Species Act, which requires that construction projects, including planned and existing water projects, may not jeopardize the continued existence of endangered species.[10] *Riverside v. Andrews* illustrates the impasse that arises when the enforcement of federal environmental laws collide with state created and traditionally state regulated water rights. Thus far the Tenth Circuit has maintained that federally mandated environmental protection takes precedence over claims of state sovereignty in the area of water quantity regulation. The Tenth Circuit Court of Appeals should continue to place the highest priority on preserving and maintaining the natural environment and all species dependent upon it.

BACKGROUND

Expansion of Corps Authority

Under section 13 of the Rivers and Harbors Act, it has been illegal since 1899 to discharge refuse, including dredge and fill material, into United States waters without a permit issued by the Army Corps of Engineers.[11] The Corps' jurisdiction was originally derived from its authority to protect the navigability of United States waters for defensive[12] and commercial purposes.[13] In the late 1960's, however, environmentalists used section 13 of the Act as a means to control pollution, directing the Corps' orientation away from strictly navigational concerns to protecting the environment.[14]

An early example of a pollution case brought under section 13 of the Rivers and Harbors Act[15] is *United States v. Standard Oil Co.*[16] The Supreme Court upheld the Corps' authority to indict Standard Oil for its discharge of oil into the St. John River. The Court held that regardless of the oil's industrial or other value, it adversely affected the river and

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10. 16 U.S.C. §§ 1531-1543 (1982). *See also* Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV. 1, 2 (1985).

11. *See* Rivers and Harbors Act of 1899, § 13, 33 U.S.C. § 407 (1982), which provides in part that:

> It shall not be lawful to throw, discharge, or deposit, or cause to be deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any tributary of any navigable water from which the same shall float or be washed into such navigable water.

12. Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503, 506 (1977).

13. Note, *The Clean Water Act of 1977: Midcourse Corrections in the Section 404 Program*, 57 NEB. L. REV. 1092, 1096 (1978).

14. Parish & Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 LAND & WATER L. REV. 43, 45 (1982).

15. 33 U.S.C. § 407 (1982).

16. 384 U.S. 224 (1966).

was "refuse" as defined by section 13.[17] Because the effect on navigability was negligible, the Supreme Court clearly signalled that the Corps' authority also extended to punishing acts which were environmentally harmful.

Four years later, in *Zabel v. Tabb*,[18] the United States Court of Appeals for the Fifth Circuit found that environmental considerations must pervade the Corps' decision-making process with respect to permit issuance.[19] At the outset, the opinion noted the "depth [of] the contemporary interest in the preservation of the environment."[20]

The *Zabel* suit was initiated by landowners who wished to compel the Corps of Engineers to issue a dredge and fill permit.[21] The Corps' district engineer had recommended that the permit application be denied even though there would be "no material adverse effect on navigation."[22] The Corps' denial was based on the harmful effects that the project would have on fish and wildlife, and a conclusion that the project "would be contrary to the public interest."[23] The landowners argued that the Corps was limited in its consideration to the effects of the project on navigation, and that it could not refuse a permit on any other grounds.[24]

In the *Zabel* opinion, the court of appeals held that the Corps' authority could not be narrowly constrained by the dictates of the dredge and fill permit regulations considered in isolation. Rather, the court found that while acting in accordance with one statutory responsibility, the Corps was "required to take heed of, sometimes effectuate and other times not thwart other valid statutory governmental policies."[25] The court found that on the facts of *Zabel*, additional considerations were imposed on the Corps by the Fish and Wildlife Coordination Act,[26] and the National En-

17. 33 U.S.C. § 407 (1982).
18. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).
19. *Id.* at 209.
20. *Id.* at 200-01.
21. *Id.*
22. *Id.* at 202.
23. The Corps' regulations list general policies for evaluating permit applications at 33 C.F.R. § 320.4 (1984). The first policy listed is that all applications shall be subject to Public Interest Review, which requires a broad consideration of a project's impact.

> The decision whether to issue a permit will be based on an evaluation of the probable impact *including cumulative impacts of the proposed activity and its intended use* on the public interest. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its *reasonably foreseeable detriments*. . . . All factors which may be relevant to the proposal must be considered including *the cumulative effects thereof*: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

Id. (emphasis added).
24. Zabel v. Tabb, 430 F.2d 199, 203 (5th Cir. 1970).
25. *Id.* at 209.
26. 16 U.S.C. §§ 661-667(d) (1982).

vironmental Policy Act.[27] In complying with the requirements of those Acts, there was no doubt that the Corps could "refuse on conservation grounds to grant a permit under the Rivers and Harbors Act."[28]

The *Standard Oil* and *Zabel* decisions were consistent with the results of a study conducted by the Conservation and Natural Resources Subcommittee.[29] The subcommittee found that the Army Corps of Engineers should play an increased role in protecting the natural environment in conjunction with its regulation of the nation's waters.[30] The report stated that until 1968 the Corps narrowly circumscribed its duties with regard to dredge and fill permits, confining itself to issues of navigation.[31] The report noted that the Corps had an "obligation to consider all facets of the public interest," as well as the national policy and directives embodied in other statutes, "to minimize pollution, maximize recreation, protect aesthetics, preserve natural resources, and promote the comprehensive planning and use of water bodies to enhance the public interest rather than private gain."[32] Thus, the Corps' historic role of navigation-enhancing regulation expanded to include regulation which was environmentally protective.

Corps Authority Under the Clean Water Act

The 1972 Amendments to the Clean Water Act[33] codified the Corps' environmental role. The amendments set out one permitting scheme requiring that all dischargers of polluting materials obtain a National Pollution Discharge Elimination System permit from the Administrator of the Environmental Protection Agency.[34] Dredge and fill material was defined as a pollutant under the 1972 amendments.[35] Rather than duplicating the Corps' permitting authority over dredge and fill activity under the Rivers and Harbors Act with another permit system administered by the Environmental Protection Agency, section 404 of the 1972 amendments gave the Corps dredge and fill permitting authority under the Clean Water Act.[36]

Section 511 of the Act noted that it did not diminish the Corps' authority under the Rivers and Harbors Act of 1899.[37] The legislative

27. 42 U.S.C. §§ 4321-4370 (1982).
28. *Zabel*, 430 F.2d at 214.
29. COMMITTEE ON GOV'T OPERATIONS, OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H.R. REP. No. 917, 91st Cong., 2d Sess. (1970) [hereinafter cited as COMMITTEE ON GOV'T OPERATIONS].
30. *Id.* at 1.
31. *Id.* at 2.
32. *Id.* at 3. *See supra* note 23.
33. Amendments to the Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1376 (1982)).
34. 33 U.S.C. § 1342(a)(5) (1982) notes that section 13 of the Rivers and Harbors Act of 1899 is superseded by this section and that applications pending at the time of its enactment will be deemed applications under this section.
35. 33 U.S.C. § 1362(6) (1982). The term pollutant is defined to include "rock, sand, [and] cellar dirt. . . ."
36. 33 U.S.C. § 1344 (1982).
37. Pub. L. No. 92-500, § 511, 86 Stat. 816, 893 (1972).

history of the 1972 Amendments indicated that the express underlying purpose of the Clean Water Act was the enhancement of the environment[38]—consideration of which had already been charged to the Corps under the Rivers and Harbors Act in *United States v. Standard Oil*,[39] *Zabel v. Tabb*,[40] and by the House Committee on Government Operations.[41]

In addition to extending the Corps' substantive jurisdiction to include water quality and environmental protection, the 1972 amendments gave the Corps more water to oversee under an expansive definition of navigable waters. The Clean Water Act applied to more waters than the Corps had policed pursuant to the Rivers and Harbors Act of 1899.[42] The Corps was reluctant to see its jurisdiction expanded, and it refused to regulate under the Clean Water Act's more liberal definition of navigable waters until forced to do so by the decision in *Natural Resources Defense Council, Inc. v. Calloway*.[43] The *Calloway* decision noted that Congress had defined waters "to the maximum extent permissible under the Commerce Clause of the Constitution. . . . As used in the Water Act, the term is not limited to the traditional tests of navigability."[44] The court also found that the

38. COMMITTEE OF CONFERENCE, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, CONF. REP. NO. 1236, 92d Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 3776, 3826.

39. 384 U.S. 224 (1966).

40. 430 F.2d 199 (1970).

41. COMMITTEE ON GOV'T OPERATIONS, *supra* note 29.

42. The waters regulated by the Corps under its retained Rivers and Harbors Act authority are "navigable waters" as defined at 33 C.F.R. § 329.4 (1984): "Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce."

This is a much more limited set of waters than those included under the Clean Water Act's section 502(7) "navigable waters" terminology. 33 U.S.C. § 1362(7) (1982). "Waters of the United States" as used in section 520.7 are defined at 33 C.F.R. § 323.2 (1984) and include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce including any such waters:
>
> (i) which are or could be used by interstate or foreign travels for recreational or other purposes; or
>
> (ii) from which fish or shell fish could be taken and sold in interstate or foreign commerce; or
>
> (iii) which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (a)(4) of this section;
>
> (6) The territorial sea;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (a)(6) of this section.

43. 392 F. Supp. 685 (D.D.C. 1975).

44. *Id.* at 686.

Corps lacked the authority to amend that definition by refusing to comply with it.[45] In refusing to accept the broader definition, the Corps had acted "unlawfully and in derogation of their responsibilities under Section 404."[46] Thus the Corps found itself responsible for issuing permits on a broadened range of consideration, in an expanded range of waters.

Nation-wide Permits

To help the Corps deal with the vast increase in the number of activities requiring permits, Congress further amended section 404 of the Clean Water Act in 1977, and exempted some activities from the need for a permit.[47] The amendments also introduced a kind of automatic general permit for certain activities of widespread practice which "will cause only minimal adverse environmental effect when performed separately, and will have only minimal cumulative adverse effects on the environment."[48]

Although general permits, issued on a regional or nation-wide basis, became available in a narrow range of situations, the Corps reserved the authority to: 1) impose conditions on the issuance of those permits,[49] 2) modify issued permits,[50] 3) revoke the grant of a nation-wide permit at its discretion,[51] and 4) require an applicant to go through an individual permitting process[52] as the public interest required.[53] The appeal of these permits, from a grantee's standpoint, was that if he qualified for one he could proceed with his dredge and fill activity, obviating the need for the time-consuming application process.

THE PRINCIPAL CASE

Riverside Irrigation District v. Andrews[54] involved a dispute between the Army Corps of Engineers and the Riverside Irrigation District which wanted to use a nation-wide permit for its dredge and fill activites in conjunction with building a dam and reservoir. Because Riverside believed that it qualified for the nation-wide permit which had been issued previously for dredge and fill activities in waters above the headwaters of a nontidal stream, it intended to proceed without applying for an individual permit.[55] The project came to the attention of the officers of the federal Fish and Wildlife Service (FWS) in Denver, who questioned its possibly

45. *Id.*
46. *Id.*
47. 33 U.S.C. §§ 1344(f)(1) (1982) lists activities exempted from the requirement of dredge and fill permits among which are normal farming, silviculture, ranching activities, and activities to maintain dikes, dams, levees, and breakwaters.
48. *Id.* § 1344(e) (1982).
49. 33 C.F.R. § 325.4 (1981).
50. 33 U.S.C. § 1344(e)(2) (1982).
51. *Id.*
52. 33 C.F.R. § 325.7(e) (1981).
53. *See supra* note 23.
54. Riverside Irrigation Dist. v. Stipo, 658 F.2d 762, 763 (10th Cir. 1981).
55. *Id.* at 764.

detrimental impact on whooping crane habitat.[56] Formal consultation ensued between the FWS and the district engineer of the Corps as required by the Endangered Species Act.[57] The FWS found that the dam was likely to threaten a fifty-three-mile stretch of whooping crane habitat 250 miles downstream and set out two mitigation measures, either of which, if implemented, would have qualified Riverside for the nation-wide permit.[58]

In a letter to the Corps' district engineer, the regional director of FWS spelled out the two possibilities. The Corps could condition its permit grant on a requirement that Riverside replace water to approximate the flow that would occur if the reservoir were not constructed. Alternately, the Corps could require Riverside to improve or maintain whooping crane habitat along the Platte River, including water releases combined with land acquisition and habitat management.[59]

Riverside, convinced that it already qualified for a nation-wide permit, felt that the Corps had no authority to base a permitting decision on operation, as opposed to merely construction, effects. Both parties agreed that there would be no detrimental effects from the construction activities.[60] Because the effect in question was a depletion in stream flow, Riverside additionally argued that the Corps was overstepping its water quality regulation authority under the Clean Water Act, by invading traditional state water quantity regulation and allocation authority.[61] Rather than comply with either mitigation measure, or apply for an individual permit, Riverside brought suit against the Corps in federal district court.[62]

The district court held that the Corps had properly exercised federal police powers as mandated under the Clean Water Act and under other federal statutes in a manner consistent with an expressed congressional emphasis on preserving and enhancing the natural environment and on safeguarding endangered species.[63]

ANALYSIS

The district court was correct in deciding that the Corps of Engineers had the authority to deny a nation-wide permit to Riverside. The statute describing nation-wide permits makes it clear that they are meant strictly for innocuous classes of activities, those which "will have only minimal

56. The Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667(d) (1982) mandates that there be consultation between any agency authorizing a stream impoundment or diversion and the United States Fish and Wildlife Service.

57. 16 U.S.C. §§ 1531-1543 (1982). Section 1536 mandates interagency cooperation to further programs for the conservation of endangered species.

58. Subsequently a new and more detailed biological opinion was received by Colonel Andrews pursuant to which he has attempted to require that Riverside apply for an individual permit as allowed at 33 C.F.R. § 325.7(a) (1984). At this point Riverside may no longer qualify for a nation-wide permit by complying with one or the other of the mitigation measures.

59. Letter from Donald Minnich, Regional Director of the Fish and Wildlife Service, to Colonel Stipo (Dec. 20, 1979) (attached to Complaint, *supra* note 2).

60. *Riverside Irrigation Dist. v. Andrews*, 568 F. Supp. 583, 585 (D. Colo. 1983).

61. *Id.* at 586.

62. *Riverside v. Stipo*, 658 F.2d at 764.

63. *Riverside v. Andrews*, 568 F. Supp. at 589.

adverse environmental effects."[64] The Riverside project caused more than minimal effects, disqualifying Riverside from using a nation-wide permit.

Riverside argued, however, that the effects resulting in the permit denial were not of a type which the Corps had authority to consider. Riverside contended that the Corps could consider only the effects of dredge and fill activities during the construction phase of its project.[65] It argued that water depletion in the South Platte was not a proper consideration, because it was not an effect of dredge and fill activity during construction. The Corps correctly countered that it is required to act in accordance not only with the Clean Water Act, but also the mandates of other federal statutes.

An example of other federal legislation which the Corps must consider is the National Environmental Policy Act of 1969.[66] It mandates that all federal agencies must comply with the purposes and provisions of the Act to ensure that the environmental impacts of any given course of action are fully considered, and in all cases minimized.[67] Central to NEPA is the requirement of an environmental impact statement once an agency determines that a course of action will have an impact upon the environment above a certain threshold.[68] The role of NEPA is well stated in *Rucker v. Willis*:

> NEPA attempts to create a new frame of reference for the consideration of environmental problems by all governmental agencies. Each agency whose actions have environmental side effects must consider these effects in addition to carrying out their primary mission. The aim of NEPA is to internalize within each agency a procedure for assuming environmental protection.[69]

Given this broad mandate, the Corps must affirmatively consider a wide range of environmental effects whenever acting on its primary permitting mission.

Similarly, the Fish and Wildlife Coordination Act[70] requires any federal agency authorizing any modification in a body of water to consult with the Fish and Wildlife Service with a view to conserving wildlife resources.[71] In *Riverside,* this consultation resulted in a finding that an endangered species habitat was at risk. This triggered section 7 of the Endangered Species Act[72] which makes it mandatory for federal agencies to ensure that actions authorized, funded, or carried out by them will not jeopar-

64. 33 U.S.C. § 1344(e) (1982).
65. *Riverside v. Andrews,* 568 F. Supp. at 586.
66. 42 U.S.C. §§ 4321-4370 (1982).
67. Annot., 17 A.L.R. FED. 33, 57 (1973).
68. *Id.* at 58.
69. 358 F. Supp. 425, 428 (E.D.N.C. 1973), *aff'd,* 484 F.2d 158 (4th Cir. 1973); *but see* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980), in which the court found that NEPA requirements are primarily procedural.
70. 16 U.S.C. §§ 661-667(d) (1982).
71. *Id.* § 662 (1982).
72. *Id.* § 1536 (1982).

dize the continued existence of a threatened or endangered species. The strong language of section 7 prohibited granting an automatic nation-wide permit to Riverside. The Corps could not authorize a project which would likely jeopardize the continued existence of the endangered whooping crane.

The need for the Corps to consider a project's broad effects was illustrated in *Citizen's Committee for the Hudson Valley v. Volpe.*[73] There the Corps was found to have misused its authority by granting a permit after considering only the applicant's dredge and fill activity. The court found that the Corps should have considered the entire project, and the need for additional approvals from other agencies prior to a dredge and fill permit's issuance.

The Corps should therefore approve projects whose effects will conform with all consistent federal mandates. It should examine the foreseeable effects of projects, without the artificial dichotomy between construction and operation, and issue permits only to those projects which comply with federal environmental objectives in operative statutes.

It makes no sense to allow a project to go ahead because there will be no harm to the environment during construction, only to have it enjoined from going into operation upon completion because it threatens the continued existence of a threatened or endangered species. This was precisely what happened in *Hill v. Tennessee Valley Authority.*[74] In that case, environmental groups prevented the completion and enjoined the operation of the Tellico Dam, which had taken many years and millions of dollars to build, on the grounds that the dam's operation would eradicate a species of fish, the now famous snail darter. Similarly, in *National Wildlife Federation v. Coleman,*[75] conservation groups sought to enjoin the construction of a section of interstate highway. The Court of Appeals for the Fifth Circuit found that the Department of Transportation had taken an overly narrow view of a project's effects on the endangered Mississippi Sandhill Crane. The department considered the direct impacts associated with the taking of a right of way, but failed to consider the impacts of development and population growth that would develop privately as a result of the new highway's operation.[76] The resulting injunction caused great delay and forced expensive modification of the highway project. To avoid such wastes of time and money, a permitting agency must consider all those effects which can reasonably be foreseen to result from the entire project. The Corps should consider the effects of the construction *and* the operation of Riverside's dam in deciding not to allow it to use a nation-wide permit.

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73. 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd,* 425 F.2d 97 (2d Cir. 1970), *cert. denied,* Volpe v. Citizens Comm. for Hudson Valley, 400 U.S. 949 (1970), *cert. denied,* Parker v. Citizens Comm. for Hudson Valley, 400 U.S. 949 (1970).

74. 419 F. Supp. 753 (E.D. Tenn. 1976), *rev'd,* 549 F.2d 1064 (6th Cir. 1977), *aff'd,* 437 U.S. 153 (1978).

75. 400 F. Supp. 705 (S.D. Miss. 1975), *rev'd,* 529 F.2d 359 (5th Cir. 1976), *reh'g denied,* 532 F.2d 1375 (5th Cir. 1976), *cert. denied sub. nom.* Boteler v. National Wildlife Federation, 429 U.S. 979 (1976).

76. National Wildlife Federation v. Coleman, 529 F.2d 359, 373 (5th Cir. 1976).

Viewed from this perspective, permit denial was not based on water quantity regulation. The Wallop Amendment to the Clean Water Act[77] makes clear that:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.

The legislative history of this section shows that Senator Wallop was aware that water quality and water quantity issues cannot always be kept apart.[78] Water quality treatment requirements often affect water consumption. Thus the exercise of federal police powers to enforce water quality regulations inevitably affect state water quantity decisions in specific cases, in spite of the broad policy of the Act to leave states sovereign in making water quantity decisions.

It is misleading to say that the Corps usurped state prerogatives to allocate water in the *Riverside* case. Absent the threat to an endangered species, the Corps would not have imposed minimal flow requirements on Riverside's project. Rather, to the extent the Corps' actions can be characterized as quantity regulation, such regulation is merely incidental to the Corps' compliance with section 7 of the Endangered Species Act. That is, in a conflict between valid state water rights and the federal police powers to ensure that Congressional environmental goals are met, federal law takes precedence. As noted in *Riverside v. Andrews,* "although the defendant's actions may have a substantial effect on state water rights, such is the case with many federal laws which particularly pre-empt state water laws."[79]

CONCLUSION

Basing a nation-wide permit on a crabbed reading of the Corps of Engineers' responsibilities and a narrow interpretation of the Corps' authority would be contrary to the Corps' evolution through the last twenty years. It would also be contrary to the intent of Congress as manifested in numerous pieces of environmental legislation, and irreconcilable with the stated purpose of environmental enhancement upon which the Clean Water Act, and therefore section 404, is based.

The broad environmental goals set out by Congress can only be accomplished if agencies authorized to permit various activities consider all the foreseeable adverse environmental effects of those activities. By doing so at an early point in a project's planning, needless waste of time and money can be prevented. Riverside could be in a worse situation if

77. 33 U.S.C. § 1251(g) (1982).

78. White, *The Emerging Relationship Between Environmental Regulations and Colorado Water Law,* 53 COLO. L. REV. 597, 618, 619 (1982).

79. Riverside Irrigation Dist. v. Andrews, 568 F. Supp. 583, 587 (D. Colo. 1983).

the Corps had issued a dredge and fill permit, and construction of the Wildcat Reservoir had proceeded. In all likelihood, prior to completion, the Riverside project would have been halted by champions of the endangered whooping crane.

The propriety of the court's decision in *Riverside v. Andrews*, and of the Corps' decision in the first place, is clear. Claims of states' rights to regulate water quantity cannot override the federal environmental mandate. Some fundamental shift will have to occur in our national priorities before Riverside and its ilk can argue that their state water rights are paramount to national goals of preserving endangered species and their habitats.

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