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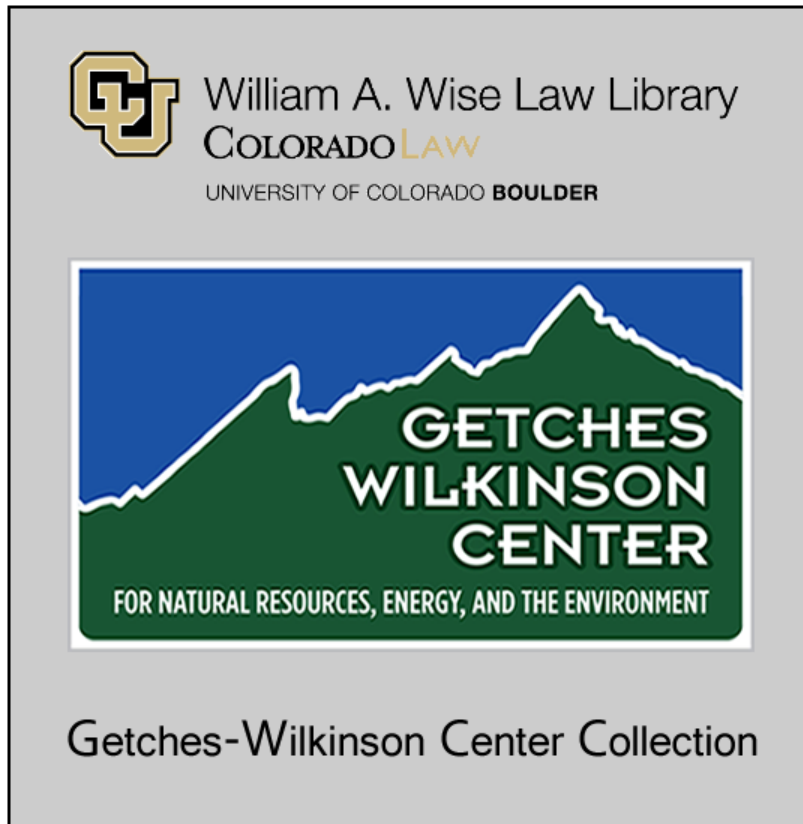
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FEDERAL REGULATION OF APPROPRIATIONS OF
WATER IN THE NAME OF PROTECTING WATER QUALITY

To What Extent May the United States
Limit the Use of State-Established Water Rights
in Order to Accomplish Purposes Under Statutes Designed to
Protect the Environmental Integrity of the Water?

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I. INTRODUCTION

There has been great concern on the part of western water rights users since the 1972 Clean Water Amendments over possible interference with state water quantity control. Originally, there was much worry about the possibility of regulation of irrigation return flow quality; this could have taken the EPA water quality regulators right into the fields regulating farming practices. There was much worry concerning the consumptive use impacts of wastewater treatment techniques on the water supply available for other water rights. There continues to be concern over the extent to which water right discharges are regulated by the Clean Water Act. And there continues to be a great worry about the dredge and fill permit program affecting basic entitlements to use water. And now there is a veritable uproar by some states alleging that development of their sacred interstate compact apportionments will be frustrated by federal regulations.

II. FEDERAL WATER QUALITY REGULATIONS THAT MAY IMPINGE UPON WATER RIGHTS ACTIVITIES

A. Clean Water Act (1972, amended 1977), 33 USC §1251 et. seq.

All the water quality regulatory programs of concern come out of this act. Passed by Congress under the sponsorship of Senator Muskie, it essentially took on the 1985 goal of "no discharge of pollutants" and the interim goal of "swimmable, fishable waters".

B. NPDES Program, 33 USC §1342

Regulates the discharge of pollutants through "a point source", defined in 33 USC §1362(14). Generally, discharge permits are written to include numeric limits on pollutant discharge based on some industry standard such as Best Practical Control Technology (BPT) or Best Available Technology (BAT), (collectively known as technology-based effluent limitations); or, more restrictively, upon stream classifications and water quality standards in order to protect uses of the stream (water quality-based limitations). This permit program is delegated, where acceptable to the EPA, to state water quality regulatory programs. Implemented by the EPA regulations, 40 CFR 123 (May 19, 1980).

C. Section 208 Planning, 33 USC §1288 and §1314

1. Designed primarily to reach non-point source pollution. States have the lead for devising methods to address non-point pollution, such as urban runoff and irrigation return flow, through area-wide waste treatment management plans.

2. It is generally asserted that §208 planning does not create, nor delegate to states, any substantive regulatory powers. Authority for any actual regulatory components of the plan would have to come from state legislation.

3. Concern remains over future specification of Best Management Practices (BMPs) which might directly involve the §208 planning agency in such things as irrigation practices on the farm.

D. Section 404 Dredge and Fill Permits, 33 USC §1344

Administered by the Army Corps of Engineers and requiring a permit for any "discharge" of fill material or removal by dredging any material from streams. Corps discretion follows guidelines and comments by the EPA. Program may be delegated to the states under supervision of the EPA.

1. Applies to all navigable streams or tributaries of navigable streams below their "headwaters" (defined by regulation as the point below which average flow is greater than 5 cfs.) and to adjacent "wetlands".

2. Implemented by Corps Regulations, 33 CFR 320 (July 19, 1977); EPA Guidelines, 40 CFR 230 (December 24, 1980).

3. Concern exists over permit requirement for construction of ditch headgates, diversion structures, and on-stream reservoirs.

E. Colorado River Basin Salinity Control Act, 43 USC §1591

Sets out salinity control "planning" requirements in addition to authorizing certain salinity management projects.

III. FEDERAL ENVIRONMENTAL PROGRAMS WHICH MAY BE INCORPORATED BY REFERENCE INTO WATER QUALITY REGULATORY PROGRAMS

A. NEPA National Environmental Protection Act

Environmental Impact Statements may be required to be prepared by permitting agency in case of §404 permits. Not required for discharge permits, nor for §208 plans.

B. Endangered Species Act, 16 USC §1531, et. seq.

1. Section 7(a) on Interagency Cooperation provides in effect that all federal agencies shall utilize their authorities to further the purpose of this act, and that in consulting with the Secretary of the Interior, they must:

[I]nsure that any action...carried out by such agency...does not jeopardize the continued existence of any endangered species ...or result in the destruction or adverse modification of habitat of such species... unless [exempted]. 16 USC §1536(a)(2).

2. This section has been applied in particular by the Corps of Engineers in issuing or withholding §404 permits. The Corps customarily requests and relies upon a biological opinion from the U.S. Fish and Wildlife Service.

3. As a result of legislative amendments in the wake of the Tellico Dam, snail darter case, TVA v. Hill, 437 U.S. 153 (1978), an exemption process now exists to allow regulated activity to take place notwithstanding endangered species impacts if:

- (1) there are no reasonable and prudent alternatives to the agency action;
- (2) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; and
- (3) the action is of regional or national significance. 16 USC §1536(h).

In such event, the exemption will require reasonable mitigation and enhancement measures necessary to minimize the adverse effects of the agency action.

4. Citizen suits are provided for in §11(g) permitting, among other things, the enjoining of agency action which would violate the act.

C. Fish and Wildlife Coordination Act, 16 USC §661-666

Requires consultation in the case of almost any water projects, either sponsored by any federal agency or built under permit of any federal agency, between that agency and the U.S. Fish and Wildlife Service "with a view to the conservation of wildlife resources". Mitigation of adverse wildlife impacts by a water project is generally required.

IV. AREAS OF POTENTIAL INTERFERENCE

A. Section 208 Planning Process

1. Arguably, §208 plans could restrict diversions of fresh water out of a basin in order to maintain water quality, particularly with respect to salinity. This issue is raised and is pending in the Colorado State courts, Denver v. Lamm, 79CV5133, District Court in and for Denver County. Denver here challenges the Northwest Council of Governments' §208 plan purportedly restricting out-of-basin diversions.

2. Arguably, §208 plans and §303 basin plans might require on-farm management plans to reduce salinity loads. This issue, among others, was presented in EDF v. Costle (DC Circuit, Civil Action No. 77-1436), decided April 21, 1981. The DC Circuit Court held that the EPA and the Interior Department were not required to give further consideration of on-farm practices than that included in their plan in promulgating Colorado River salinity plans. The decision did not comment on the authority of the EPA or the Interior Department to mandate on-farm management techniques on non-federal project farms. In Colorado, for example, such authority (of on-farm practices) probably does not exist at the state level.

B. Discharge Permits

1. It is being argued that an on-stream reservoir, which has the effect of altering stream temperatures, pH, suspended solids loads, and dissolved oxygen levels, should require a discharge permit. NWF v. Costle, pending in the U.S. District Court for the District of Columbia, Civil Action No. 79-0915, argued and awaiting decision.

2. It is reasonably clear that irrigation return flows are not subject to the NPDES requirement, as they are expressly defined out of "point sources". §502(14), 33 USC §1362(14).

C. Section 404 Dredge and Fill Permits

1. Some of the original fears concerning interference by the Corps with normal irrigation activities is relieved by provisions of §404(f)(1), exempting such things as plowing, maintenance of "currently serviceable structures" such as dams and dikes, and the maintenance of headgates. 33 USC §1344(f)(1).

2. Uncertainty continues over precise application of these exemptions. In U.S. v. DeFelice, C.A. 5, 15 ERC 1896, it was held that defendant's failure to replace a dam for nine

years barred him from claiming the "currently serviceable structure" exemption. The Corps has asserted with respect to a "sand dam", a temporary earthen diversion dam normally replaced by bulldozer each year (a common practice on some Rocky Mountain-region streams), that a §404 permit is regularly required and is not within the currently serviceable regulation.

3. Can long-term effects of the operation of a dam be considered, or merely the water quality or navigational impacts of the construction itself? In the case of Riverside v. Stipo (Wildcat Reservoir case), pending in the U.S. District Court for Colorado, Civil Action No. 80-624 (presently on appeal to the 10th Circuit on motion granted dismissing Fish and Wildlife Service and individual defendants, argued and awaiting decision on these procedural issues), the Corps has asserted that operational impacts must be considered. They received a negative biological opinion from the U.S. Fish and Wildlife Service, asserting that the cumulative effect of basin-wide developments was depleting South Platte stream flows and adverse effect might result on critical Whooping Crane habitat. Only if project depletions were made up on an acre-foot by acre-foot basis at the critical habitat would permit issue. (Obviously, such a makeup requirement is prohibitory; the project could have no net water supply benefit.) Riverside asserts that §404 addresses only discharges and only at time of construction. Section 404(f)(2), however, provides that:

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced, shall be required to have a permit under this section. 13 USC §1344(f)(2).

Riverside also asserts, with some apparent basis, that the biological-hydrological basis of the acre-foot for acre-foot compensation requirement is not thoroughly reasoned.

This situation is to be contrasted with the recent "non-jeopardy" opinion given by the Fish and Wildlife Service with respect to the proposed Windy Gap diversion project. The incremental effect of this diversion was held not to significantly affect the critical habitat of the Colorado River Squawfish, a federal endangered specie, even though the cumulative impact of all similar diversion developments which could be anticipated would have an adverse effect. Are projects to be weighed on incremental impacts or cumulative impacts? Also, compare the earlier settlement of the Grayrocks Dam dispute. See Nebraska v. REA, 12 ERC 1156 (D. Neb. 1978), the decision vacating and dismissing due to settlement in which Whooping Crane mitigation measures allowed issuance of §404 permit.

D. Section 404 Permits Incorporating Endangered Species Act

The foregoing cases, Riverside v. Stipo and the Windy Gap Diversion, are situations where the basic issues are Endangered Species Act limitations. The difference of result, in fairness to the Fish and Wildlife Service, may have as much to do with the more thorough hydrologic investigation and proposal of mitigation measures in the Windy Gap situation as it did with the intervening change of the Secretaries of the Interior, although the latter factor does suggest itself.

V. MAJOR POLICY ISSUES PRESENTED

A. Scope of Clean Water Act with Respect to Water Quantity Results

1. Section 101(g) of the Clean Water Act, 33 USC §1251(g), provides:

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 Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

2. Consumptive use requirements of mandated treatment techniques should be covered by state water rights within state water law procedures. Additional evaporation required to achieve no discharge should not be allowed to impact other water rights. It is no excuse to say the EPA made me do it. Colorado statutory amendments presently in legislature would make this clear. S.B. 10 (1981).

3. Interstate equitable apportionments under compact or Supreme Court decree should not be prevented from being developed by clean water regulation under the terms of the Wallop Amendment. Present evidence, however, strong rhetoric notwithstanding, does not suggest this overly harsh result will obtain. The Windy Gap situation is one example. EDF v. Costle, supra, is another. There, EDF had sought, among

other remedies, the imposition of state-line numeric limits on each interstate stream, which would likely have resulted in serious restrictions to the potential for Upper Colorado River Basin states to realize their compact allotments. The court, however, rejected EDF's attack, essentially allowing the EPA's more lenient standards to stand.

B. Incremental Water Development Costs Versus Incremental Environmental Protection Costs

1. It is implicit that in analyzing cumulative environmental effects, and charging the costs of those effects against a presently proposed project, late-comer projects carry a cost which is disproportionately higher than earlier developments. Perhaps this is appropriate; certainly, other incremental costs of development are increasingly large as the end of developable supplies is approached. And in appropriation doctrine states there seems to be a solid basis for the fact that later incremental development costs should be higher. After all, first in time is first in right.

But, does it follow that there exists or should exist a priority of right with respect to environmental protection costs? In some states it is clear that the basic appropriation water right establishes a property right in the use of the water only; no priority right to the maintenance of water quality exists. A-B Cattle Company v. U.S., 196 Colo. 539, 589 P.2d 57 (1978). On certified question from the federal district court, the Colorado Supreme Court held there was no compensable interest in historic silt content. In other situations in Colorado, a common-law or junior appropriator has been able to enjoin the polluting activity of a senior, e.g., Wilmore v. Chain O'Mines, Inc., 96 Colo. 319, 44 P.2d 1024 (1934).

If, in fact, a priority right to pollute or cause other environmental damage does not exist, then there is no clear reason why later or future increments of development should be barred because of the cumulative impact of basin-wide development. Rather, affirmative environmental management practices should be shared on a basin-wide basis rather than imposed as a prohibition on later incremental projects. Indeed, this seems to be the thrust of the EPA salinity standards upheld in EDF v. Costle, supra. It would seem if such environmental protection costs are borne basin-wide, that in a general way interstate entitlements can be obtained.

Should protection of Colorado River endangered fish species be charged against the Colorado River Basin Development Fund? Why not? Notice that salinity control projects are allowed to be funded from the fund. 43 USC §1595.

2. From the ecological point of view, it may be well and practical to allow such a pro-development position. The protection of individual endangered species by attempting the prohibition of any additional development in the basin is next to suicidal. This is particularly true in view of the "snail-darter" exemption amendments to the Endangered Species Act and recent sentiments favoring extensive amendments or outright repeal of the act. Affirmative preservation techniques are to be emphasized if any serious effort at maintenance of full specie diversity is to be carried on.

3. Politically, there does seem to be a shift in wind of water development. It is regrettable that affirmative preservation and mitigation funding does not appear to be keeping pace with the apparent relaxation in water project restrictions. The pendulum politics which seem to affect the discretionary decisions involved in these areas will only experience increased amplitude. Such fluctuations in public policy do not inure greatly to the benefit of either developer or environmentalist in the long run.