

University of Colorado Law School

Colorado Law Scholarly Commons

New Sources of Water for Energy Development
and Growth: Interbasin Transfers: A Short
Course (Summer Conference, June 7-10)

1982

5-8-1982

The Clean Water Act as a Restraint on Interbasin Transfers of Water

Sue Ellen Harrison

Follow this and additional works at: <https://scholar.law.colorado.edu/new-sources-of-water-for-energy-development-and-growth-interbasin-transfers>



Part of the [Agriculture Law Commons](#), [Animal Law Commons](#), [Aquaculture and Fisheries Commons](#), [Biodiversity Commons](#), [Contracts Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Hydrology Commons](#), [Law and Economics Commons](#), [Legal History Commons](#), [Legislation Commons](#), [Natural Resource Economics Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), [Transportation Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Harrison, Sue Ellen, "The Clean Water Act as a Restraint on Interbasin Transfers of Water" (1982). *New Sources of Water for Energy Development and Growth: Interbasin Transfers: A Short Course (Summer Conference, June 7-10)*.

<https://scholar.law.colorado.edu/new-sources-of-water-for-energy-development-and-growth-interbasin-transfers/16>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



William A. Wise Law Library
COLORADO **LAW**
UNIVERSITY OF COLORADO **BOULDER**



Getches-Wilkinson Center Collection

Sue Ellen Harrison, *The Clean Water Act as a Restraint on Interbasin Transfers of Water*, in *NEW SOURCES OF WATER FOR ENERGY DEVELOPMENT AND GROWTH: INTERBASIN TRANSFERS* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1982).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

THE CLEAN WATER ACT AS A RESTRAINT
ON INTERBASIN TRANSFERS OF WATER

Sue Ellen Harrison
Assistant Regional Counsel
Environmental Protection Agency, Denver

New Sources of Water for Energy
Development and Growth: Interbasin Transfers

a short course sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 7-10, 1982

,

,

,

The Clean Water Act as a Restraint on
Interbasin Transfers of Water

by

Sue Ellen Harrison*
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VIII, Denver, CO

*The views expressed are entirely those of the author and should not be construed as representing the position of the U.S. Environmental Protection Agency or any other agency of the federal government.

I. Introduction

For purposes of the Clean Water Act, 33 U.S.C. Section 1251, et. seq. (the "CWA") the restraints on interbasin transfers are basically similar to the restraints on water diversions in general. Therefore, an attempt was made to discuss those sections of the CWA which are relevant in this sense, on the assumption that this analysis will be of value to those involved in such transfers. However, emphasis has been placed on those areas which have the greatest potential for affecting interbasin transfers of water.

II. History and Goals of the Clean Water Act

A. History

Passage of Federal Water Pollution Control Act of 1972, 33 U.S.C. Section 1251 et. seq. represented a different approach to controlling water pollution. Past legislation had focused on utilizing water quality standards and stream classifications, but that was unworkable and unenforceable. The 1972 system was based on the fact that no one had the right

to use the nation's waters as a waste disposal mechanism. No discharges were allowed from point sources without a CWA Section 402 (NPDES) or Section 404 permit, 33 U.S.C. Section 1342, and Section 1344. 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, pgs. 1254, 1303.

B. Goals and Objectives

1. "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters..." CWA Section 101(a), 33 U.S.C. Section 1251(a).

2. Eliminate the discharge of pollutants into navigable waters by 1985; fishable, swimmable water by 1983; discharge of toxic pollutants prohibited. CWA Section 101(a), 33 U.S.C. Section 1251(a).

3. Courts read goals charitably in light of the purposes to be served echoing Justice Holmes statement: "A river is more than an amenity, it is a treasure." State of New Jersey v. State of New York, 283 U.S. 336, 342, 51 S. Ct. 478 (1931). Minnehaha Creek Watershed Dist. v. Hoffman 597 F. 2d 617, 625 (8th Cir. 1979); EPA v. State Resources Control Board, 426 U.S. 200, 203, 96 S. Ct 2022, 48 L. Ed. 2d 578 (1976).

III. CWA Section 208, 33 U.S.C. Section 1288

A. General

Sections 208(a) and (b) provide for the development of areawide waste treatment management plans through the planning process by designated agencies. Plans are applicable to all wastes and shall include recommendations on siting for wastewater treatment plants.

B. Siting

1. The federal funding requirements of Section 208(d) basically dictate siting of wastewater treatment plants due to federal funding.
2. Reductions in federal funding may diminish future effects.
3. Importance of siting for water users:
 - a) Metro Denver Sewage Disposal Dist No. 1 v. FRICO,

179 Colo. 36, 499 P. 2d 1190 (1972); District moved sewage discharge point and ditch company was required to pay costs for pumping back into ditch.

b) Thayer v. City of Rawlins, Wyo., 594 P. 2d 951 (1979); City changed effluent discharge point of imported water, thus eliminating certain water users. Those users had no right to demand the continued flow of that water.

4. Process

Water users must involve themselves in the 208 process, both locally and at the state adoption level, to insure that their water rights are protected. See Harrison and Woodruff, "Accommodations of the Appropriation Doctrine and Federal Goals Under Sections 208 and 404 of P.L. 92-500 and Section 10 of the Rivers and Harbors Act of 1899", 22 Rocky Mountain Mineral Law Institute, 941 (1976).

C. Section (f)-(k) - "Best Management Practices"

1. 208 plans are required to identify and set forth procedures and methods (including land use requirements) to control various non-point sources—agriculture,

silviculture, mine drainage, construction activities, salt water intrusions, etc.

2. To the extent such controls are enforceable, they may require greater consumptive uses, thus jeopardizing downstream water users.

3. BMP's are utilized in 401 certification and NPDES permits.

D. Enforceability

1. Federal

a) Section 208(d)—Construction grants will not be authorized unless they are in conformity with an approved plan.

b) Section 208(e)—No NPDES permit shall be issued for any point source which is in conflict with an approved plan.

2. State and Local

a) Plans become enforceable to the extent that local or state governments adopt regulations implementing the plan.

E. Case Study—Northwest Colorado Council of Governments
Areawide Water Quality Management (208) Plan.

1. Attempt by local governments to diminish adverse effects of interbasin diversions on the basin of origin.
2. Utilization of 208 process to assist in development of ordinances for local governments, but ultimate authority must rest with those local governments. 208 agencies do not become mini-federal agencies by virtue of the CWA.
3. Grand County ordinances affecting interbasin transfers of water. Denver v. Berglund, 517 F. Supp. 155 (D. Colo. 1981). Although basis of this case concerned NEPA, FLPMA and federal rights of way, independent authority was found upholding applicability of county regulations to the Williams Fork Project. The court found that as a matter of state law, the county regulations were not preempted by constitutional claims argued by the City of Denver.

IV. CWA Section 303, 33 U.S.C., Section 1313--Water Quality Standards

A. Process

1. States (and in their absence, EPA) adopt water quality standards including designated uses of the water and numeric criteria based on those uses. Section 303(c)(2).
2. Standards based on health, welfare, fish and wildlife, public water supplies, recreation, agriculture, industry, and others. Section (c)(2).
3. EPA reviews state standards and makes the final decision. Section 303(c)(3) and (4).
4. Present regulations, 40 CFR 35.1550 et. seq. are undergoing extensive revision by current administration: EPA's involvement will diminish; emphasis on site specific studies rather than "Red Book" numbers; and easing up of variance requirements.

B. Effect on water users and enforceability

1. Water quality standards are not enforceable per se, but they must be included in setting discharge limitations in NPDES permits. CWA Section 402(a), 401, 301(b)(1)(c), 40 CFR Section 122.62(b).

2. More stringent limitations often translate into consumptive treatment techniques, thus jeopardizing downstream water users.

3. State 401 certification of 404 permits

4. See discussion under Part V concerning dams and diversion pipes as point sources and the effects of NPDES permits.

C. Salinity

1. EPA established salinity standards for the Colorado River Basin which were upheld in EDF v. Costle, 16 ERC 1185 (D.C. Cir. 1981). "Proposed Water Quality Standards for Salinity Including Numeric Criteria and Plan of Implementation for Salinity Control," as modified, Aug., 1975.

2. Colorado River Basin standards set numbers on three dams, but no state-line numbers. The implementation of certain projects to improve salinity was considered part of the "standards."

3. Although EPA's approach was considered reasonable by the Court, future administrations could set state-line numbers which must be "backtracked" into permits and utilized for 401 certification. Such requirements could cause additional consumptive uses affecting water diversions. If dams are point sources, then water projects could be directly affected. See discussion of National Wildlife Federation v. Gorsuch, 16 ERC 2025 (D.D.C. 1982) at V.E., 1, (b).

4. State 401 certification requires compliance with water quality standards, including salinity.

D. Section 303(d), Total Maximum Daily Loads (TMDL's)

1. Section 303(d) requires states to identify water quality limited streams and to set waste load allocations for those streams. Thus pollutant loadings would be set on such streams and the "pie" would be divided up by local authorities.

2. This section is being emphasized by the present administration despite its resource intensive requirements.

3. What happens if a water diverter brings interbasin water into a stream with TMDL's already established?

a) Possible point source subject to NPDES requirements: "discharge of pollutants" CWA Section 402, 502(12), (14), and (19). NWF v. Gorsuch, supra.

4. No apparent control under CWA if a diverter removes water from a basin and upsets the balance on a TMDL stream. Although, local 208 regulations may be able to force mitigation requirements.

V. Section 402 National Pollutant Discharge Elimination System (NPDES). CWA Section 402, 33 U.S.C. Section 1342.

A. NPDES discharge permits required for the discharge of a pollutant from a point source into navigable waters.

1. Activities sanctioned under CWA Section 318 (aquaculture projects) and Section 404 (dredge and fill) are exempt. CWA Section 402(a)(1).

2. Discharges must conform with:

a) Section 301—water quality standards and effluent limitations

b) Section 302—water quality related effluent limitations

c) Section 306—new source performance standards

d) Section 307—toxic and pretreatment standards

e) Section 308—inspection and monitoring requirements

f) Section 403—ocean discharge requirements

g) "such conditions as the Administrator determines are necessary to carry out the provisions of this Act." Section 402(a)(1). This phrase is the origin of the phrase "BEJ" (best engineering judgment), now

"BPJ" (best professional judgment) which is utilized to support permit requirements in the absence of state or federal effluent limitations. "BMP's" (Best management practices) are derived from Section 304(e) and this section.

3. No NPDES permits for discharges composed entirely of return flows from irrigated agriculture. CWA Section 402(e).

B. Most states have assumed NPDES programs through CWA Section 402(b), but EPA retains a veto power over all permits. CWA Section 402(d). See 40 CFR Part 122, Subparts A and D, and 40 CFR Part 124, Subparts A, D, E and F for EPA administered programs. See 40 CFR Part 123, Subparts A and D for state administered programs.

C. Pertinent definitions:

1. Pollutant (CWA Section 502 (6))
2. Discharge of a pollutant (CWA Section 502 (12))
3. Point source (CWA Section 502 (14))

D. NPDES and Consumptive Uses

1. Increasing levels of CWA requirements often result in treatment technologies with additional levels of consumptive use—often the least expensive alternative.

2. EPA should include water rights considerations in developing technology based effluent limitations:

a) Appalachian Power Co. v. Train, 545 F.2d 1351, 1369 (4th Cir. 1976).

b) Section 304(b)(1)(B) requires consideration of non-water quality environmental impacts which should include water rights.

c) Weyerhaeuser Co. v. Costle, 590 F 2d 1011 (D.C. Cir. 1978) BASF Wyandotte Corp. v. Costle, 17 ERC 1054 (1st Cir. 1980). (Court upheld highly evaporative technique to achieve zero discharge of pollutants.)

d) In practice, EPA continues to conclude that in BPT and BAT guideline development, the effects on water rights are minimal.

3. Ability of water users to protect water rights
"consumed" for water quality purposes:

a) Supremacy clause, U.S. Const. Art. VI, Section 2 and its inter-relationship with interstate compacts.

b) The Colorado experience:

(1) C.R.S. 1973, 25-8-101, et. seq. (Supp. 1981); in particular: 25-8-102(1) and (2), 25-8-104, 25-8-203(c) (e), and (f), and 25-8-503(5).

(2) Colo. Const. Art. XVI, Sections 5 and 6

(3) Colorado appears to allow for incidental effects to occur to water rights; but if a material injury occurs, then the state water court system will determine who will pay. Permits "necessary to protect the public health" are not affected.

(c) NWE v. Gorsuch, supra at p.2040, 2041. NPDES permits can incidentally affect water rights, despite Wallop Amendment language.

(d) Wallop Amendment, CWA Section 101(g), 33 U.S.C. Section 1251(g). See discussion in Section "F" below. The basic issue focuses on to what extent the Wallop Amendment allows water quality requirements to infringe on water rights.

E. Dams and Diversion Structures as Point Sources

1. Dams

(a) South Carolina Wildlife Federation v. Alexander, 457 F. Supp. 118 (D.S.C. 1978). Dams could be discharging pollutants.

(b) National Wildlife Federation v. Gorsuch, 16 ERC
2025 (D.D.C. 1982).

(1) Dams are point sources subject to NPDES
permits.

(2) Dams and attendant resevoirs add pollutants
to navigable waters even though it is the "same"
river:

(i) create pollutants that would not exist
"but for" the dam and reservoir

(ii) processes occurring as a result of
the dam reservoir operation result in the
addition of pollutants (rejection of
argument that river cannot "add" to itself)

(3) Sediment, dissolved metals, low dissolved
oxygen, cold water and supersaturation are
pollutants created and added by dam operation
and pollutants are controllable by application
of technology.

(4) Pollutants arguably regulated by CWA Section 208 and upstream point source controls. Those controls exist, but they do not affect point source determination vis-a-vis dams.

(5) CWA Section 304(f) (a) (F) allows for EPA to issue guidelines for nonpoint source pollution caused by "changes in the movement, flow or circulation of any navigable waters...including changes caused by the construction of dams..." This also does not negate point source considerations.

(6) Court rejected Wallop amendment arguments in reasoning that any effects on water rights would be incidental.

(7) Liberal interpretation of CWA: Court reasoned that constricted interpretation of the definitions was in error--the Court looked to the scientific information to determine the real effect of the activity on the water body.

(8) New breed of scientific opinions? Is the Judge an aquatic biologist?

(c) Missouri v. Dept. of the Army, 17 ERC 1001, 1006 (8th Cir. 1982). Operation of the dam did not result in the "discharge of a pollutant" because such discharge requires an "addition" of a pollutant from a "point source" and neither term applies to soil erosion or the oxygen content of the water. Unfortunately neither the Court of Appeals or the District Court gave any explanation as to how they arrived at this conclusion.

2. Diversions

a. Arguably addition of pollutants from point source

(1) pipes are point sources

(2) diverted water could contain "pollutants"

(3) diverted water could cause violations of water quality standards and TMDL's

(4) NWF v. Gorsuch, supra. suggests that the judge should look at the effects of the activity. Also, "but for" the pipe, no addition of pollutants.

(5) U.S. v. Earth Sciences, 599 F. 2d 368, 373 (10th Cir. 1979.) Broad reading of "point source" found with the overflow of a sump pond.

b. Purposes of the discharge is irrelevant in evaluating whether a pollutant is discharged.

(1) Minnehaha Creek Watershed Dist. v. Hoffman, supra. at 627. Definition of pollutant has only two specific exclusions in the CWA.

(2) NWF v. Gorsuch, supra. at 2033: NPDES program was intended to be comprehensive and to cover any situation encompassed by the statutory language. See also U.S. v. Earth Sciences, Inc., Supra., Sierra Club v. Abston Construction Co., Inc., 620 F. 2d 41 (5th Cir. 1980); and NRDC v. Costle, 568 F. 2d 1369 (D.C. Cir. 1977).

(3) A-B Cattle Co. v. United States, 196 Colo. 539, 589 P. 2d 57 (1978). In this case, the Colorado Supreme Court certified to the Court of Claims that under Colorado law, a diverter was not entitled to the silt content in the water. By analogy, a diverter is then only entitled to divert "water" and has no rights in the diversion of other elements of that water, namely pollutants. Thus, by bringing water into another basin, the diverter could arguably be required to treat the pollutants.

c. Interbasin diversions as "foreign" water are arguably more susceptible to NPDES permits than other diversions.

(1) CWA only requires treatment of pollutants which a facility adds to the water it diverts. Appalachian Power Co. v. Train, 545 F. 2d 1351 (4th Cir. 1976) The theory is that a permittee only treats the pollutants which are added in the process--the rest of the water and its original pollutants "pass through."

(2) Water diverters from different basins cannot claim that they are passing through the same water from the river--they are bringing in "foreign" water, thus adding pollutants. But, arguably they are not affecting the diverted water if it is in a pipe. Open ditches and dams could be changing the quality.

3. Arguments against NPDES are similar to those raised in V., D., 3. above.

F. Wallop Amendment, CWA Section 101(g), 33 U.S.C. Section 1251(g)

1. 1977 Amendment to the CWA:

It is the policy of the 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 co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources. CWA Section 101(g).

2. Legislative History

- a) See Attachment I for legislative history quoted at length.

b) Pertinent sections:

...Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. Water quality standards (and)....requirements of section 402 and 404 permits may incidentally affect individual water rights....It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.

c) Effects

Thus, the CWA may not abrogate, supersede or impair state authority, but the Act may cause some injury to individual water rights. The unanswered question is how much?

(1) "Incidentally" not defined

(2) Relationship to "material injury", i.e. Colorado legislation, see Part IV, D.

(3) No indication of who bears the financial burden

(4) no indication of how direct or indirect the necessary water quality considerations must be.

(5) Note that the Wallop amendment is a policy statement and arguably cannot nullify specific grants of jurisdiction in other sections of the Act. Connecticut Light and Power Co. v. Federal Power Commission, 324 U.S. 515, 527, 65 S. Ct. 749 (1945).

d) Compare discussions of Wallop Amendment in Riverside Irrigation District et. al. v. Stipo, Civil Action No. 80-K-624, (D.Colo.), Brief of National Wildlife Federation (In Support of Summary Judgment), pgs. 27-31 and Brief of Plaintiff-Intervenors Northern Colorado Water Conservancy District, et. al., No.'s 80-2142, 2241, 2242, (10th Cir.), pgs. 14-18.

VI. CWA Section 404, 33 U.S.C. Section 1344

A. Basic Provisions

1. Section 404(a) requires a permit from the U.S. Army, Corps of Engineers ("COE") for the discharge of dredged or fill material into navigable waters at specified disposal sites. Generally, see Schlauch and Strickland, Changing Land to Water: The Alchemy of the Wetlands Regulatory Scheme, 27 Rocky Mountain Mineral Law Institute 635 (1982); Blumm, The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective, 8 Ecology L.Q. 410 (1980); 33 C.F.R. Part 320; 40 C.F.R. Part 230; Fed. Reg., Vol. 45, No. 184, Sept. 19, 1980 (Proposed, but undergoing agency revision).

(a) Although origins of Section 404 derive from the Rivers and Harbors Appropriation Act of 1899, Section 13 (Refuse Act), 33 U.S.C. Sections 401-418 (1976), for jurisdictional purposes the definition of navigable waters utilized for Section 404 purposes is derived from the CWA, thus encompassing the broadest constitutional interpretation of waters of the United States. 33 C.F.R., Section 323.2(a), ftnt. #2; NRDC v. Callaway, 392 F. Supp 685 (D.D.C. 1975); Leslie Salt Co. v. Froehlke, 578 F. 2d 742 (9th Cir. 1978):

- (1) territorial seas

- (2) coastal and inland waters, lakes, rivers, and streams that are navigable waters, including adjacent wetlands

- (3) tributaries to navigable waters, including adjacent wetlands (manmade irrigation ditches on dry land are excluded)

- (4) interstate waters and tributaries, including adjacent wetlands

- (5) all other waters of the United States, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters not tributary to navigable waters, the degradation or destruction of which could affect interstate commerce.

(b) "Wetlands" are defined to include "those areas that are inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a

prevalence of vegetation typically adapted for life in saturated soil conditions..." 33 C.F.R. Section 323.2(c). Thus, Section 404 will extend to many areas considered to be land by the uninformed and unsuspecting person.

(1) Broad Court interpretation: Aroyelles Sportsman's League v. Alexander, 511 F. Supp. 278 (W.D.L. 1981).

(c) "Discharge of dredged material" is the addition of excavated or dredged material from waters of the United States back into such waters. 33 C.F.R. Section 323.2(1)

(d) "Fill material" is any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation. 33 C.F.R. Section 323.2 (m). Discharging fill material is simply the addition of that material to waters of the United States. 33 C.F.R. Section 323.2(n).

2. Pollutants discharged primarily for waste disposal purposes are regulated by Section 402, not Section 404.

3. Dredging material from waters of the United States and depositing it on dry land does not require a Section 404 permit.

4. General permits exist for certain categories of activities that will cause "only minimal individual and cumulative adverse environmental impact." 33 C.F.R. Section 323.2(p), CWA Section 404(e) (1). These permits must comply with the EPA 404(b) guidelines, 40 C.F.R. Part 230.

5. Nationwide permits exist for discharges into certain waters. 33 C.F.R. Section 323.2(q), Section 323.4-2. For example: lakes smaller than 10 acres or streams less than 5 cfs.

6. 33 C.F.R. Section 323.4-4 grants discretionary authority for the COE to require individual permits if the concerns of the aquatic environment (40 C.F.R. Part 230) indicate the need for such action because of individual and/or cumulative adverse impacts to the affected waters.

7. Although the 404 process is administered by the COE, EPA has a veto authority over all permits. Section 404(c).

8. States and/or EPA must provide or waive a CWA Section 401 certification on all Section 404 permits, CWA Section 401(a) (1), 33 C.F.R. Section 320.4(d). A denial of such certification will prevent that permit from being issued. 33 C.F.R. 320.4(j) (6).

B. Specific Restraints on Interbasin Transfers

1. Delay in issuance of Section 404 permit

2. Conditions placed in Individual Permits or denials of such permits as a result of COE review. The COE utilizes the following sections to determine what conditions are necessary:

(a) Public interest review, 33 C.F.R. Section 320.4(a).

(1) Permits will not be granted unless they are determined to be in the public interest. The impact is balanced against the intended use and all relevant factors must be considered: conservation, economics, aesthetics, environmental concerns, fish and wildlife, flood prevention, land use, navigation, recreation,

water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people. Evaluation criteria are listed at 33 C.F.R. Section 320.4(a)(2).

(2) Applicants can satisfy all technical requirements of 404(b) guidelines and still be denied a permit. It has been suggested that this section is routinely utilized by the COE to require mitigation requirements of applicants that might otherwise be questionable. Parish and Morgan, History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act, Land and Water Law Review, Vol. XVII, No. 1, 1982.

(3) Permits may be denied on environmental grounds, in other words, the COE is not limited to water quality or navigable concerns. Zabel v. Tabb, 430 F. 2d 199 (5th Cir. 1970); cert. denied, 401 U.S. 910 (1972).

(b) Effect on Wetlands, 33 C.F.R. Section 320.4(b)

(1) Permits will not be issued for projects which will unnecessarily alter or destroy wetlands. No permit will be issued in "important wetlands," 33 C.F.R. Section 320.4(b)(2), unless the benefits outweigh the damage.

(2) Alternative sites may be required. 33 C.F.R. Section 320.4(b)(4), 40 C.F.R. Section 230.10(a)(3).

(3) No permit will issue unless practicable steps will be taken to minimize adverse impacts on the aquatic ecosystem. 40 C.F.R. Section 230.10(d).

(c) Fish and Wildlife, 33 C.F.R. Section 320.4(c);
Fish and Wildlife Coordination Act, 16 U.S.C.
Sections 661-666.

(1) Applicants "will be urged to modify" their proposals to eliminate or mitigate damage to the conservation of wildlife resources. The COE consults with various agencies concerning the direct and indirect effects of the project.

(2) Corps will apply 404(b) guidelines, 40 C.F.R. Part 230.

(3) EPA may veto a 404 permit based on fish and wildlife considerations. CWA Section 404(c), 33 U.S.C. Section 1344(c).

(4) Endangered Species Act ("ESA"), 16 U.S.C. Section 1531-1543 (1976 and Supp. III 1979).

(i) ESA, Section 7, 16 U.S.C. Section 1536, commands all federal agencies to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species or result in the destruction or modification of the critical habitat of such species. See Erdheim, The Wake of the Snail Darter: Insuring the Effectiveness of Section 7 of the Endangered Species Act, Ecology Law Quarterly, Vol. 9, No. 4, 1981.

(ii) Section 7, if brought into play in any interbasin project, can result in a denial of the project altogether, or the imposition of mitigation measures. The ESA mandates affirmative preservation of endangered species and their habitat.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 173, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); North Slope Borough v. Andrus, 642 F. 2d 589, 607 (D.C. Cir. 1980).

(iii) Agencies are required to consult formally with the U.S. Fish and Wildlife Service pursuant to ESA Section 7. The burden is on the agency, and it is a large burden, for the courts have held that a "low threshold of possible effect" on an endangered species or its critical habitat triggers the consultation requirement. Romero-Barcelo v. Brown, 643 F. 2d 835, 837 (1st Cir. 1981).

(iv) Unlike other wildlife areas where the COE is the final authority in mitigation measures, for purposes of the ESA, the conclusions of the Secretary of the Interior are final. Thus the COE is bound by the biological opinion. 40 C.F.R. Section 230.30(c). Sierra Club v. Alexander, 484 F. Supp. 455, 469 (N.D.N.Y., 1980).

(v) Direct, indirect, and cumulative effects on an endangered species are to be considered. In National Wildlife Federation v. Coleman, 529 F. 2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976) the Fifth Circuit enjoined construction of a highway based on habitat loss due to indirect effects of the highway--residential and commercial development on private land.

(vi) Indirect effects could include controlling the releases of water from

dams to protect an endangered species or critical habitat. T.V.A. v. Hill, supra. concerned the operation of the Tellico Dam.

(vii) Presently, it is the opinion of the Solicitor for the Department of the Interior that cumulative, direct and indirect effects are to be considered, but not the effects of future projects. M-36938, 88 I.D. 903 (1981).

(viii) Although Section 7 is directed to federal actions, the question arises as to the applicability of Section 7 to state programs which are the implementation of federal legislation, i.e. the NPDES Program. The Supreme Court has determined that the EPA veto of a state issued NPDES permit was federal "agency action." Crown Simpson Pulp Co. v. Costle, 455 U.S. 193, 100 S.Ct. 1093 (1980). Although this was the disapproval of a permit with active EPA involvement, the case raises the question

as to whether EPA peripheral involvement could trigger Section 7 of the ESA for state purposes. In addition, in EPA's approval of state NPDES programs, could the state be required to include Section 7 considerations?

(d) Water Quality, 33 C.F.R. Section 320.4(d)

(1) State or EPA 401 certification, or waiver, must be received for a 404 permit to issue within certain time limits. Such certification is directed towards violations of water quality standards and effluent limitations.

(2) Should the removal of water from a basin cause violations of a state water quality standard, then a state denial of 401 certification would prevent the issuance of a 404 permit.

(e) Other possible sources of controls on interbasin projects through Section 404:

(1) Wild and Scenic Rivers Act, 33 C.F.R. Section 320.4(e)

(2) National Historic Preservation Act of 1966, 33 C.F.R. Section 320.4(e)

(3) Nation Landmarks, Wilderness Areas, Seashores, Monuments, etc., 33 C.F.R. Section 320.4(e)

(4) Coastal Zone Management Act, 33 C.F.R. Section 320.4(h)

(5) Marine Protection Research and Sanctuaries Act of 1972, 33 C.F.R. Section 320.4(i)

(6) National Environmental Policy Act, 33 C.F.R. Sections 320.3(d) and 320.4(j)(4).
NEPA is always an important consideration in any interbasin project. The role of EPA and other federal agencies in advising the lead agency can be a very powerful one.

C. The "Taking" Issue

1. The Fifth Amendment of the U.S. Constitution prohibits the taking of private property by governments without just compensation. But it is possible for governments to take away some uses of property without payment in order to promote the general welfare. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646 (1978); Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138 (1980).

2. Courts have not found a "taking" to have occurred in Section 404 permit denials, despite enormous financial consequences on the developer.

(a) Deltona Corp. v. United States, 657 F. 2d 1184 (Ct. Cl. 1981). Deltona had property on the Florida coast which had been divided into sections for development. Early parcels had been developed, but the federal 404 rules changed in mid-stream, and later parcels were denied Section 404 permits. No taking occurred because there was only a diminution in value and not complete destruction,

the statutes and regulations advanced legitimate government interests, and the land had enormous residual value. See also Jentgen v. United States, 657 F. 2d 1210 (Ct. Cl. 1981).

(b) Kaiser Aetna v. United States, 444 U.S. 164, 100 S. Ct. 383 (1979). (Case under Rivers and Harbors Appropriation Act). The Supreme Court found a taking based on governmental attempts to exceed ordinary regulation or improvement for navigation by requiring public access to a private pond. This pond had been dredged and made accessible by the developers and had thus become "navigable waters."

3. If mitigation measures are upheld on an interbasin project that cause a diminution in that water right, compensation may not be available.

D. Case Study—Riverside Irrigation District v. Stipo

1. Case focuses on the legality of the COE to regulate water releases for the Wildcat Dam in Colorado to assure minimum stream flows for the protection of an endangered species—the whooping crane. The critical habitat is 350 miles downstream from the dam in Nebraska.

2. Case is now in Federal District Court, Denver, Judge Kane, Civil Action No. 80-K-624 after remand from the Tenth Circuit, 658 F. 2d 762 (10th Cir. 1981), to decide the water issue.

3. Federal authority is based on CWA Sections 101 and 404, the Endangered Species Act, and the Supremacy Clause.

4. Riverside relies on the Wallop Amendment, the South Platte River Compact and the Colorado Constitution.

VII. Conclusion

The ability of the CWA to impose restraints on interbasin transfers of water is very real. Presently, most restraints would be achieved through Section 404 and Section 401. Other less certain sources of restraints can be found in Section 303 and Section 402. But, there is no doubt that entities involved in interbasin transfers of water should focus considerable attention on this Act.

ATTACHMENT I

Legislative History of the Wallop Amendment

The conferees accepted an amendment which will reassure the State that it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems. I sponsored this amendment with Senator Hart on the floor of the Senate. This amendment came immediately after the release of the Issue and Option Papers for the Water Resource Policy Study now being conducted by the Water Resources Council. Several of the options contained in that paper called for the use of Federal water quality legislation to effect Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. This "State's jurisdiction" amendment reaffirms that it is the policy of Congress that this act is to be used for water quality purposes only. [Sec. 5; Sec. 101 FWPCA]

The amendment simply states 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 act. It also states that it is the further policy of Congress that nothing in this act will be construed for the purpose of superseding or abrogating rights to quantities of water which have been established by a State.

This amendment is not intended to create a new cause of action. It is not intended to change present law, for a similar prohibition is contained in section 510 of the act. This amendment does seek to clarify the policy of Congress concerning the proper role of Federal water quality legislation in relation to State water law. Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. Water quality standards and their upgrading are legitimate and necessary under this act. The requirements of section 402 and 404 permits may incidentally affect individual water rights. Management practices developed through State or local 208 planning units may also incidentally effect the use of water under an individual water right. It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.

This amendment is an attempt to recognize the historic allocation rights contained in State constitutions.

It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes. It does not interfere with the legitimate purposes for which the act was designed.

The amendment speaks only—but significantly—to the rights of States to allocate quantities of their water and to determine priority uses. It recognizes the differences in types of water law across the Nation. It recognizes patterns of use.

When Wyoming became a State and the Congress ratified our constitution in the Act of Admission, that constitution stated then and states today:

The water of all natural streams, springs, or lakes or other collections of still water within the boundaries of this State are hereby declared to be the property of the State.

Water quality and interstate movement is an acceptable Federal role and influence. But the States historic rights to allocate quantity, and establish priority of usage remains inviolate because of this amendment. The Water Pollution Control Act was designed to protect the quality of water and to protect critical wetlands in concert with the various States. In short a responsible Federal role.