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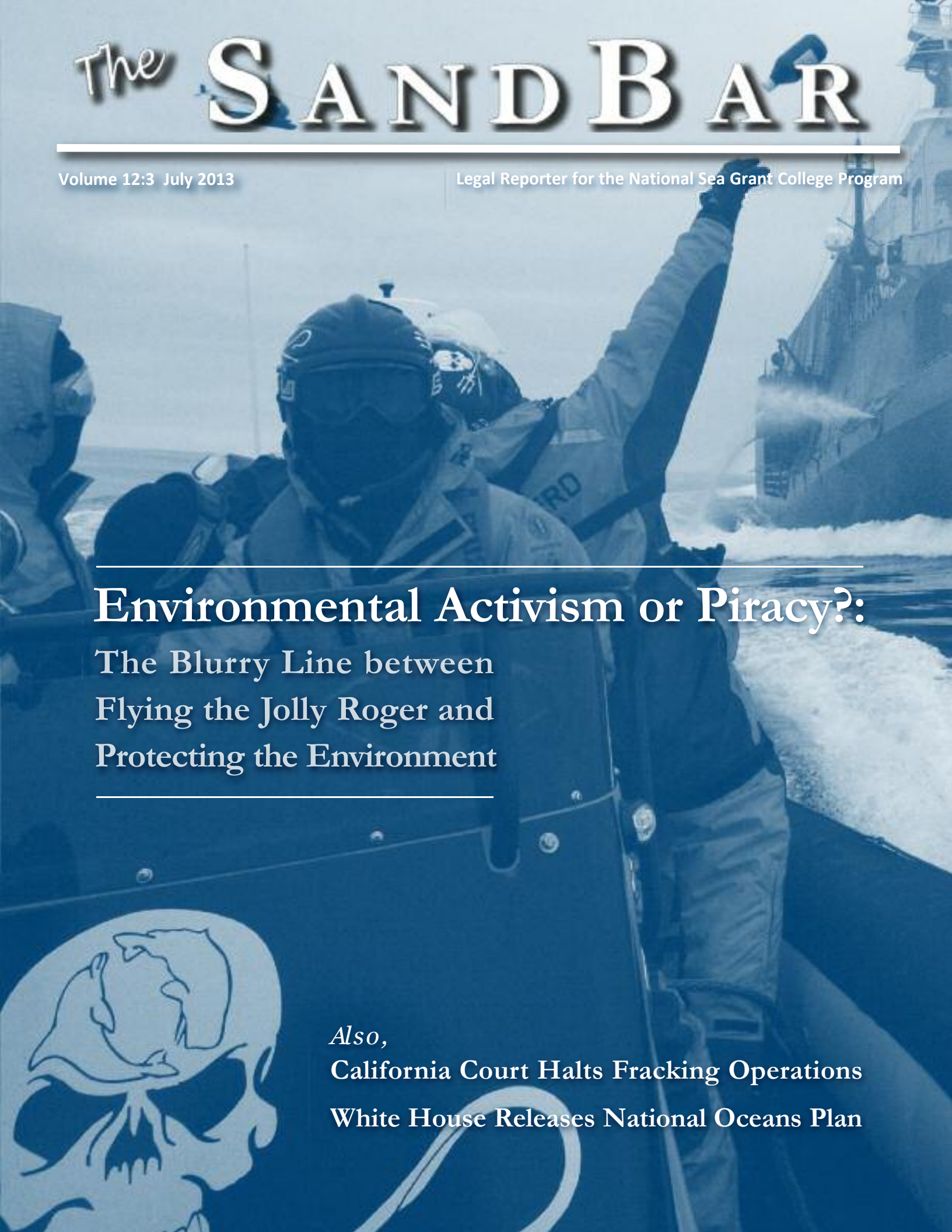

Environmental Activism or Piracy?:

The Blurry Line between Flying the Jolly Roger and Protecting the Environment

Also,

California Court Halts Fracking Operations

White House Releases National Oceans Plan

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Sea Grant Law Center, Kinard Hall, Wing E, Room 258, P.O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: sealaw@olemiss.edu. We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

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Cover page photograph of Sea Shepherd Crew hurling rotten butter at Japanese harpoon whaling ship, courtesy of John Quano.

Contents page photograph of a sunset over the Atlantic Ocean, courtesy of Hans Petter Fosseng.

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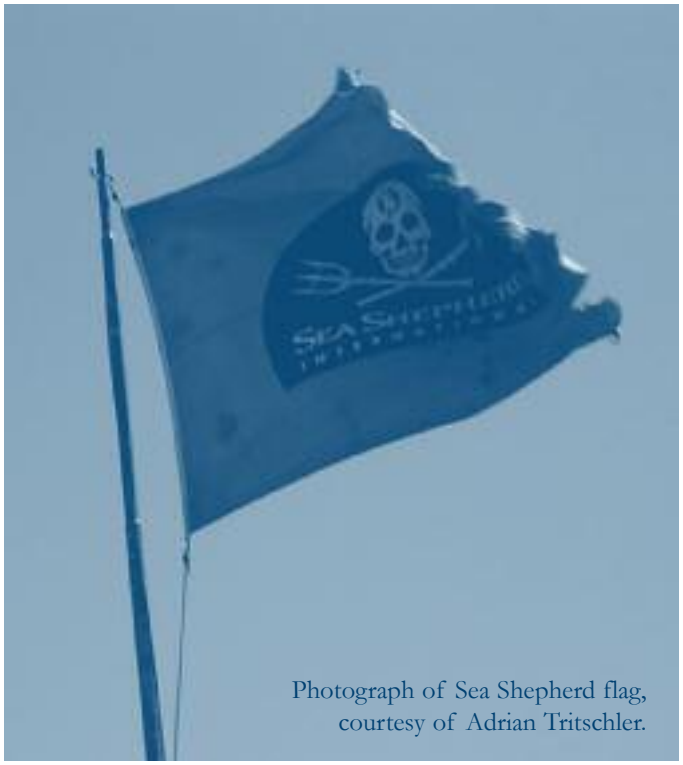
Environmental Activism or Piracy?:

The Blurry Line between Flying the Jolly Roger and Protecting the Environment

Cullen Manning[1]

Over the last century, environmental awareness has inspired men and women all over the world to spend their lives protecting the environment. Environmental crises, such as global warming, resource depletion, and endangered wildlife, affect everyone on the planet and, as a result, produce highly outspoken opponents to individuals, corporations, and governments that actively contribute to these problems. But when does environmental activism turn into criminal activity? In contrast, when does preventing environmental activism deprive groups of their rights to protest?

This article explores the tension environmental activism produces by comparing two recent court decisions. The first case focuses on the widely publicized actions of the Sea Shepherd Conservation Society and the infamous *Sea Shepherd* captain Paul Watson. The second case focuses on Greenpeace USA's peaceful but disruptive protests against Shell Offshore, Inc.'s controversial oil drilling on the outer continental shelf.



Photograph of Sea Shepherd flag, courtesy of Adrian Tritschler.

Sea Shepherd[2]

Since 1979, Captain Paul Watson and his crew have voyaged across the high seas ramming ships, sabotaging rudders, and throwing jars of acid onto decks in an effort to protect ocean life from humans.[3] His environmental activism is highly renowned. In addition to being a founding member of Greenpeace, Watson has received countless environmental awards and honors including "The Daily Point of Light Award" given by President George H.W. Bush.[4] After leaving Greenpeace and founding the Sea Shepherd Conservation Society, Watson began to protect sea creatures that are popular commercial targets, such as whales, seals, sea turtles, and dolphins, often targeting Japanese whaling vessels. Watson's voyages became so popular and praised that the Discovery Channel offered to document his ventures in a series called "Whale Wars."[5] The series frequently depicts the *Sea Shepherd* with a pirate flag or "Jolly Roger" consisting of a skull with a dolphin and a whale on the forehead above a crossed trident and shepherd's staff.[6]

Normally, killing whales is a violation of several international treaties; however, there is an exception available if the whales are killed for research purposes.[7] The Institute of Cetacean Research (ICR) is one organization that commissions Japanese whaling vessels to kill whales for research purposes. ICR's very broad research objectives are to estimate whale stocks and to better understand the role of whales in the ecosystem.[8] After their research is complete, ICR processes the whales and sells them to local Japanese fishing businesses for use. Essentially, the Japanese whaling vessels that the *Sea Shepherd* so adamantly fought their "whale war" against now kill whales as part of government-sponsored research programs.

NORMALLY, KILLING WHALES IS A VIOLATION OF SEVERAL INTERNATIONAL TREATIES; HOWEVER, THERE IS AN EXCEPTION AVAILABLE IF THE WHALES ARE KILLED FOR RESEARCH PURPOSES.

After coming under attack from the *Sea Shepherd*, the ICR filed for a preliminary injunction in United States District Court for the Western District of Washington D.C. The group alleged that *Sea Shepherd's* acts amounted to piracy and violated international agreements regulating conduct on the high seas.

Greenpeace[9]

Drilling for oil off the coast of Alaska continues to produce a great deal of controversy. Many, including Greenpeace activists, state that oil drilling is causing environmental problems in the Arctic, such as the melting of the ice caps. With concerns of global warming rising, a slew of campaigns have been launched to prevent oil drilling and to declare the Arctic a global sanctuary safe from the influence of humans.[10]

Greenpeace started one such campaign against Shell Inc.'s (Shell) drilling in the Arctic. The "Stop Shell" campaign included peaceful protests at Shell gas stations, unfurling banners with the campaign slogan onboard Shell oil drilling vessels, forming human chains in the water to prevent ships from reaching their drilling destination, and the commandeering of escape pods to cease drilling.[11] Shell filed for a preliminary injunction in the United States District Court of Alaska in response to these interferences with its drilling operations.

"You Don't Need A Peg Leg And An Eye Patch" To Be A Pirate[12]

Courts determine whether a party receives a preliminary injunction by looking at: the likelihood of success of the requesting party's claim, the presence of irreparable harm, the balance of inequities, and the public interest involved.[13] On appeal, the court will give great deference to the district court's decision as to whether to issue a preliminary injunction or not. In the *Sea Shepherd* and Greenpeace cases, the courts ultimately granted preliminary injunctions.

Paul Watson and the *Sea Shepherd* crew successfully overcame the request for a preliminary injunction in the district court, but were not as successful when ICR appealed the decision. The two issues the United States Court of Appeals for the Ninth Circuit strongly disagreed with were the district court's assessment of the claim's likelihood of success and the public interest that the injunction would serve.

In analyzing the claim's likelihood of success, the court addressed the issue of whether the Sea Shepherd crew could be considered pirates under international law. The United Nations Convention on the Law of the Sea (UNCLOS) defines piracy as "illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship . . . and directed . . . on the high seas, against another ship . . . or against persons or property on board such ship."[14]

The Ninth Circuit believed that the district court incorrectly interpreted "private ends" as meaning acting solely for financial gain. They reasoned that the district court's interpretation was too narrow and that the phrase actually encompasses a wide range of personal ends, such as morals and beliefs.[15] The Ninth Circuit also decided that the district court's interpretation of

the word "violence" as only pertaining to the harm of people rather than equipment was off-base. The court pointed directly to the definition of violence under UNCLOS, which states that violence can be "against another ship."[16] Since the court felt strongly that the *Sea Shepherd* crew was a band of pirates and piracy violated a slew of international laws and treaties, the court deemed it likely that ICR would be successful in their request for a preliminary injunction.[17]

Additionally, the Ninth Circuit ruled that the public interest in the safety of passengers was greater than any interest the *Sea Shepherd's* actions promoted. The court justified its stance by referring to the laws that best protect whales. Both the Whaling Convention Act and the Marine Mammal Protection Act provide extensive protection to whales but also allow vessels to kill whales for research if the owners of the vessels first applied for governmental permits.[18] Since the laws exempt killing whales for research, the court reasoned that the interest in safety to passengers on ships outweighed that of preventing whales from being harvested for research purposes. The court noted:

> *You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.*[19]

Similarly, the Ninth Circuit granted Shell's request for a preliminary injunction. The court determined that Shell's likelihood of success was great because Greenpeace's executive director stated that vandalizing and boarding ships would continue.[20] Also, the public policy of safety far outweighed the right of activists to board vessels in protest.[21]

Conclusion: Why Treat Protestors Like Pirates?

A preliminary injunction is a strong remedy for the court to issue against a party. The courts in *Sea Shepherd* and Greenpeace both came to the conclusion that protests involving boarding or harming boats will not be tolerated. Although the courts acknowledge that people have the right to protest on the sea, the decision to allow preliminary injunctions against environmental activists reflects a concern for passenger safety onboard ships. When compared to one another, the *Sea Shepherd* and Greenpeace cases indicate that courts are not yet willing to distinguish between violent actions and peaceful actions when it comes to environmental activism. In the aftermath of the issuance of the preliminary injunction in the *Sea Shepherd* case, Paul Watson stepped down as head of the Sea Shepherd Conservation Society.[22]

Endnotes

1. 2014 JD Candidate, University of Mississippi School of Law.
2. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 2013 U.S. App. LEXIS 3887 (9th Cir. Wash. 2013).
3. *Id.* at *1.
4. *Captain Paul Watson Awards*, SEASHEPHERD.ORG, http://www.seashepherd.org/who-we-are/paul-watson-awards.html.
5. *Whale Wars*, ANIMAL PLANET, http://animal.discovery.com/tv-shows/whale-wars/about-whaling/sea-shepherd.htm
6. *Id.*
7. *Sea Shepherd Conservation Soc'y,* 2013 U.S. App. Lexis at *2.
8. The Government of Japan, The 1994/95 Research Plan of Japanese Whale Research Programme Under Special Permit in the Antarctic (May 1994).
9. Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1284 (9th Cir. Alaska 2013).
10. SAVE THE ARCTIC, http://www.savethearctic.org/
11. *Greenpeace,* 709 F.3d at 3-7.
12. *Sea Shepherd Conservation Soc'y,* 2013 U.S. App. LEXIS at *1.
13. *Id.*
14. United Nations Convention on the Law of the Sea art. 101, Dec 10, 1982.
15. *Sea Shepherd Conservation Soc'y,* 2013 U.S. App LEXIS at *5.
16. UNCLOS, *supra* note 14.
17. *Sea Shepherd Conservation Soc'y,* 2013 U.S. App. LEXIS at *7-11.
18. *Id.* at *12-13.
19. *Id.* at *1.
20. *Greenpeace,* 709 F.3d at 19.
21. *Id.* at *24-26.
22. *Paul Watson Quits Sea Shepherd over U.S. Court Order*, CBC NEWS (Jan. 8, 2013), http://www.cbc.ca/news/world/story/2013/01/08/canada-paul-watson-sea-shepherd-conservation-society-president.html.

California Court Halts Fracking Operations

Terra Bowling

In April, the U.S. District Court for the Northern District of California ruled that a federal agency should have considered the environmental effects of hydraulic fracturing operations prior to issuing oil and gas leases for federal lands.[1] The court held that the absence of an evaluation of the impact of hydraulic fracturing and reliance on outdated environmental reviews constituted a violation of the National Environmental Policy Act (NEPA). While the ruling does not have broad implications, it signifies a closer examination of the impacts of hydraulic fracturing.

Background

The Monterey Shale Formation in Central California contains about 15 million barrels of oil, totaling nearly 64% of the total shale oil reserve in the United States. Most of the "easy" oil has been extracted from the formation via conventional drilling techniques; however, shale oil remains locked inside an impermeable rock. The remaining oil is accessible only through newer hydraulic fracturing techniques.

Hydraulic fracturing or "fracking" is an extraction technique that involves injecting large quantities of water and other fluids at a high pressure that fractures rock formations, releasing gas and liquids. In recent years, new horizontal hydraulic fracturing techniques have enabled deep shale gas production. These new techniques have renewed interest in drilling in areas that were previously inaccessible. For example, 117 drilling permits were issued in the Marcellus Shale in the Northeast in 2007, while approximately 3,300 permits were issued in 2010.

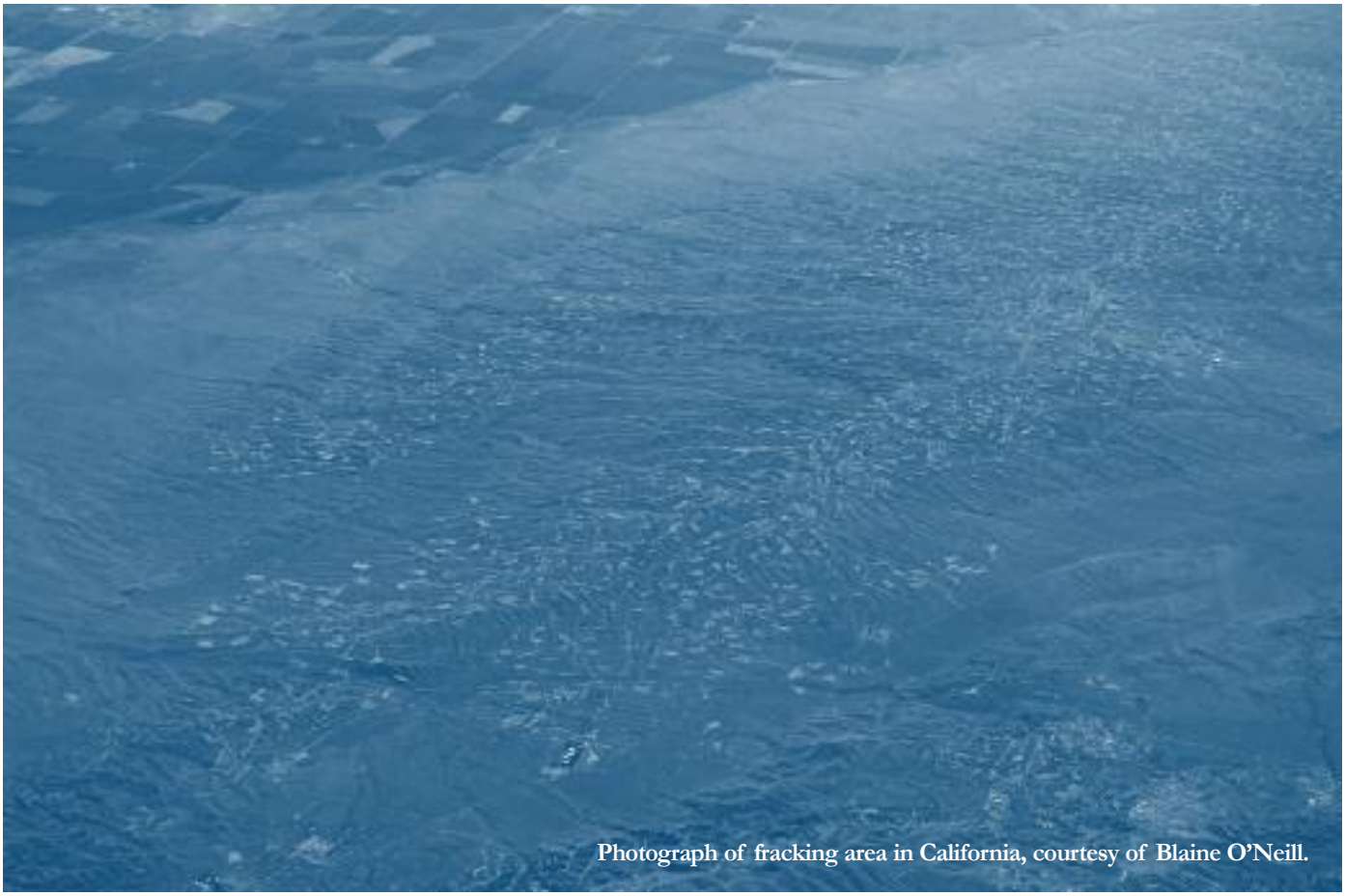
The increase in hydraulic fracturing has also given rise to concerns over the environmental impacts of the process. The process has the potential to reduce water quantity, contaminate groundwater, and negatively affect air quality, as well as other concerns. Some states and local governments have gone so far as to enact bans on fracking altogether.

In 2011, despite objections from environmental groups and local governments, the United States Bureau of Land Management (BLM) successfully completed several lease sales for oil and gas development on parcels of land in Monterey and Fresno counties. Several environmental groups filed suit over the lease sales. The groups alleged that the agency should have prepared environmental impact statements considering the impacts of fracking prior to granting the leases.

Decision to Lease

Under the Federal Land Policy and Management Act, the BLM must use a three-phase process when leasing public lands for oil and gas development. First, the BLM must prepare a Resource Management Plan (RMP). Next, the BLM may lease specific parcels. Finally, lessees may submit applications for drilling permits to BLM.

Accordingly, in 2006 BLM prepared a proposed RMP/Final Environmental Impact statement for approximately 274,000 acres of lands, which included the parcels of land for the leases at issue. In 2007, the BLM proposed a lease sale for approximately 2,700 acres and issued an Environmental Assessment (EA). The final EA projected drilling activity to include no more than one exploratory well, an assumption based on the 2006 RMP. The EA stated that fracking was "not relevant to the analysis of impacts … because the reasonable foreseeable development scenario



Photograph of fracking area in California, courtesy of Blaine O'Neill.

anticipates very little (if any) disturbance to the human environment."[2] The BLM chose not to analyze the impacts of fracking until it received applications for a permit to drill "because as it saw it, analyzing site-specific impacts would be more feasible."[3] In addition to the EA, BLM issued a Finding of No Significant Impact (FONSI), finding that the proposed lease did not require further analysis under NEPA. BLM ultimately issued a Decision Record, with its plans to offer a competitive oil and gas lease auction. The Decision Record emphasized a further NEPA review when applications for a permit to drill were submitted.

In September 2011, the BLM successfully completed lease sales for four parcels of land in Monterey and Fresno counties. The Center for Biological Diversity and Sierra Club brought suit for declaratory and injunctive relief for the lease sale of the federal land. The plaintiffs sought summary judgment that the leases were sold in violation of NEPA and the Mineral Leasing Act of 1920 (MLA).

NEPA

The plaintiffs alleged that the BLM failed to conduct a proper NEPA analysis. NEPA requires federal agencies to take a hard look at every significant aspect of the environmental impact of a proposed action.[4] Agencies are required to prepare a detailed EIS for proposals of major federal actions "significantly affecting the quality of the human environment."[5]

BLM argued that its obligation to conduct NEPA analysis had not yet accrued, as the companies had not applied for a permit to drill. The court noted that two of the leases had "No Surface Occupancy" (NSO) provisions that prohibited surface disturbing activities. The court found that no obligation to conduct NEPA analysis had arisen for these two NSO leases. The other two leases, however, contained no such provisions and were categorized by the court as "non-NSO" leases. The court ruled that NEPA analysis was required at the point of sale of these non-NSO leases. "… [U]nless the lease reserves to the

agencies an 'absolute right to deny exploitation of those resources,' the sale of the non-NSO leases at step two constitutes the go or no-go point where NEPA analysis becomes necessary."[6] The court rejected BLM's contention that other provisions in the leases allowed BLM to deny surface disturbing activities, as they did not give the government the absolute ability to prohibit potentially significant impacts on the surface of the environment.

BLM argued that its issuance of an EA and FONSI fulfilled its NEPA obligations. The court disagreed, finding the FONSI was based on unreasonable assumptions. For example, in the EA, the BLM had concluded that the lease sale would likely result in only one exploratory drill site on the four parcels. The court found that this was unreasonable, given the dramatic increase in fracking activity in the past few years. The court noted that rather than acknowledging this "by at least considering what impact might result from fracking on the leased lands, whatever its ultimate conclusion, BLM chose simply to ignore it, asserting that 'these issues are outside the scope of this EA because they are not under the authority or within the jurisdiction of the BLM."[7] The court did not agree that these issues were outside BLM jurisdiction, asking "…[I]f not within BLM's jurisdiction, then whose?"[8] The court found that BLM also erroneously addressed three factors in its FONSI, including: controversy over the leases; potential effect of the leases on public health and safety; and that further data collection would help resolve uncertainty over fracking.

Mineral Leasing Act

The MLA authorizes BLM to grant leases for federal mineral resources on public and private lands where the government controls the subsurface mineral estates.[9] The MLA requires the BLM to "use all reasonable precautions to prevent waste of oil or gas developed in the land" when conducting explorations or mining operations.[10] The court found that the BLM met this requirement in the leases when it provided terms requiring the lessee to conduct operations and employ reasonable precautions to prevent waste.

Conclusion

The court did not consider "the policy question of whether fracking in Monterey Shale or anywhere else is a good thing or a bad thing." Ultimately, the court only determined that the BLM neglected to take a "hard look" at fracking, as required by NEPA, prior to issuing the leases. The court noted that it did not have the authority to invalidate the leases, as the lessees were absent from the suit; therefore, the court ordered the parties to submit an appropriate remedy for the NEPA violation to the court later this spring.

THE MLA REQUIRES THE BLM TO "USE ALL REASONABLE PRECAUTIONS TO PREVENT WASTE OF OIL OR GAS DEVELOPED IN THE LAND" WHEN CONDUCTING EXPLORATIONS OR MINING OPERATIONS.

While the decision was limited to the leases at hand, it indicates a trend for courts to take a closer look at the repercussions of fracking. Last December, the BLM conducted a separate lease sale for federal land in parts of Monterey, Fresno, and San Benito counties.[11] In April, the environmental groups filed suit contesting this sale.[12]

Endnotes

1. *Ctr. for Biological Diversity & Sierra Club v. BLM*, 2013 U.S. Dist. LEXIS 52432 (N.D. Cal. Mar. 31, 2013).
2. *Id.* at *12.
3. *Id.*
4. 42 U.S.C. § 4321.
5. *Id.* § 4332(c).
6. *Ctr. for Biological Diversity,* 2013 U.S. Dist. LEXIS at *24, *citing* Conner v. Burford, 848 F.2d 1441 (1988).
7. *Id.* at *32.
8. *Id.* at *33.
9. 30 U.S.C. § 181 et seq.
10. *Id.* § 225.
11. *Virginia Hennessey, Lawsuit Aims to Keep More Land from Fracking*, The Monterey County Herald, April 19, 2013.
12. *Id.*

White House Releases National Oceans Plan

Benjamin Sloan[1]

Photograph of the Atlantic coast, courtesy of Jeffrey Vanneste.

On April 16th, the Obama administration released the National Ocean Policy Implementation Plan[2] (the Plan). The Plan will help federal agencies carry out the goals of the National Policy for the Stewardship of the Ocean, Our Coasts, and the Great Lakes (the Policy), issued by President Obama nearly three years ago.[3] The Plan does not create any new regulations, seeking rather to coordinate the actions of various governmental organizations to facilitate the efficient and environmentally conscious use of resources of the nation's oceans and the Great Lakes.

The National Policy was developed in an effort to protect, maintain, and restore the nation's coast and oceans. It also endeavors to combat the deleterious effects of ocean acidification and sea level rise. To realize these goals, the Policy called for the creation of an Ocean Council, a body of officials from 27 federal agencies. One of the Council's first actions was the development of the Plan.

The Plan identifies specific actions to implement the Policy including:

- Support economic growth by improving mapping and charting capabilities to enhance the efficiency of maritime commerce.

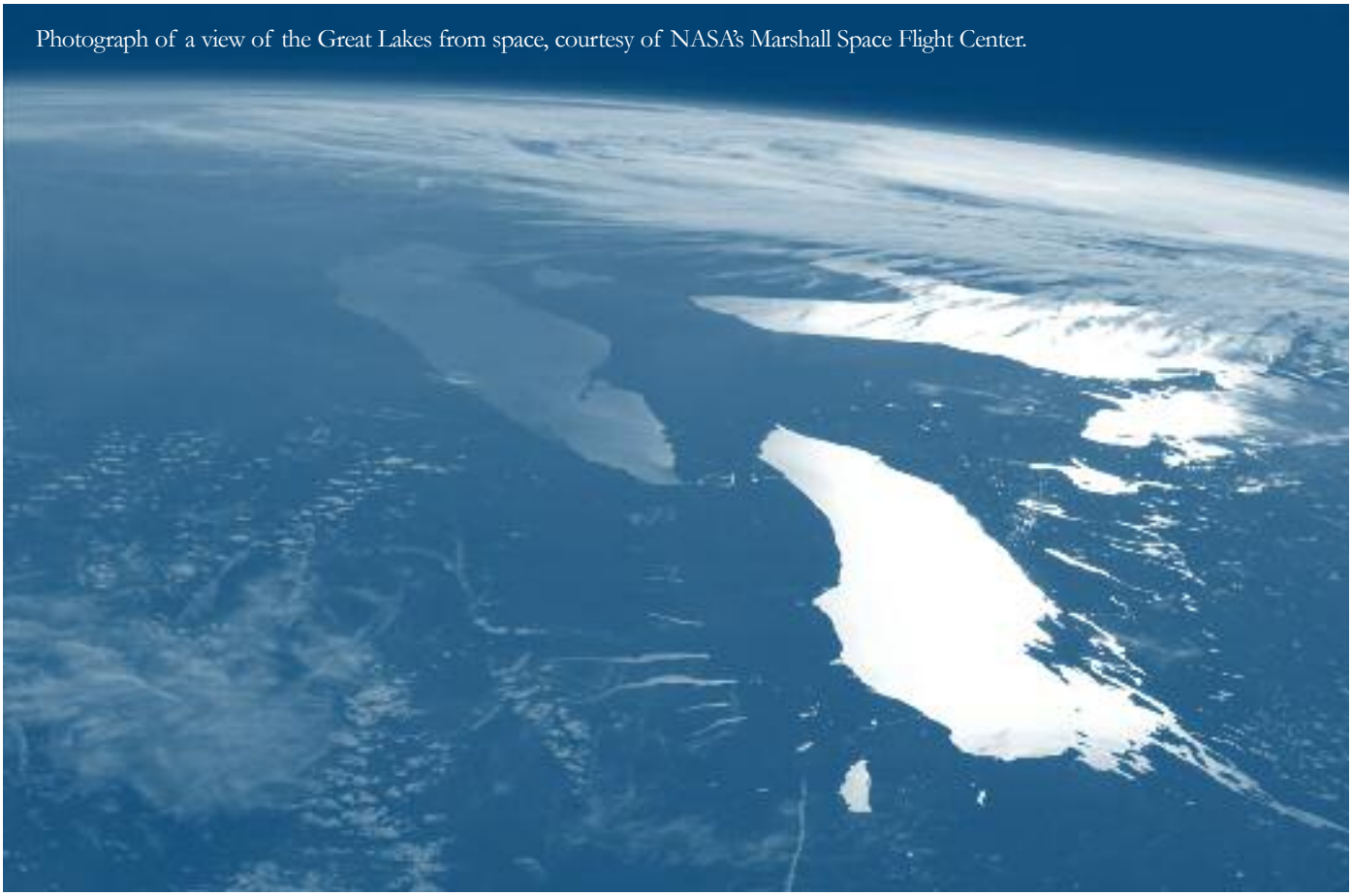
- Promote jobs by improving the efficiency of the permitting process for projects in and around the oceans and Great Lakes through better coordination of involved agencies.

- Improve maritime safety and security in a changing Arctic by enhancing communication systems and Arctic mapping and charting for safe navigation.

- Enhance the safety and security of ports and waterways by assessing the vulnerability of ports to sea-level rise and extreme weather events. In addition, the Plan calls for advanced ocean-observing systems to enhance search and rescue operations and for spill response.

- Reduce adverse conditions in coastal wetlands by identifying factors responsible for wetland loss and using successful tools to address it. Further, the Plan addresses steps to restore coral reefs. The Plan also aims to stop invasive species populations through early detection and response.

- Prepare for climate change by assessing the vulnerability of coastal communities and ocean environments and implementing adaptation strategies with coordination of tribes, coastal communities, and States.



Photograph of a view of the Great Lakes from space, courtesy of NASA's Marshall Space Flight Center.

- Recover and sustain ocean health by establishing a framework for collaboration for ecosystem-based management. In addition, the plan seeks to reactivate the National Marine Sanctuary Site Evaluation List.

- Provide tools for regional action by indentifying and conducting pilot projects that incorporate best practices for ecosystem-based management.

- Strengthen regional partnerships by supporting tribal involvement in priority-setting and planning for each region.

- Support regional priorities through the use of marine planning.

- Enhance understanding of ocean and coastal systems by exploring and expanding knowledge of coastal ecosystems through the use of advanced technologies.

- Increase ocean and coastal literacy by including ocean topics into mainstream K-12 education systems, as well as by developing content for aquariums, science centers, and National Parks.

Primarily, the Plan seeks to enhance coordination and the sharing of the scientific information so that industries can operate efficiently and sustainably in an atmosphere that recognizes the exhaustibility of ocean resources. It aims to improve the quality of the oceans and Great Lakes and increase their value by creating new avenues of cooperation, as well as strengthening existing ones to facilitate the use of these waters' resources. The Plan relies on local communities and regional bodies working to accomplish these national, as well as more specialized regional, goals.

Endnotes

1. 2013 J.D. Candidate, Univ. of Mississippi School of Law.
2. National Ocean Council, *National Ocean Policy Implementation Plan* 3 (Apr. 2013).
3. Exec. Order No. 13,547, 75 Fed. Reg. 43023 (July 19, 2010).

New York Trash Facility Set to Move Forward

Anna Outzen[1]

New York's LaGuardia Airport is located on Flushing Bay, a natural habitat for many large waterfowl, such as ducks and geese. These birds survive by eating the fish that the tide of the bay brings in and seek refuge in the bay's wetlands. Because the airport is so close to these flocking and soaring birds' habitat, the planes taking off and landing are faced with high risks of bird strikes.[2]

In 2006, when the New York City Department of Sanitation (City) proposed to reopen several trash transfer stations along the City's waterways, including a facility on Flushing Bay, it immediately raised concerns that the station would attract birds to the area, increasing the number of bird strikes. Bird strike threats are not unique to LaGuardia. Since the 1960s, over 122 aircrafts have been destroyed and over 255 people have been killed worldwide due to aircraft carriers experiencing wildlife strikes.

Bird Strike Assessments

The Port Authority of New York and New Jersey (Port Authority) and the Federal Aviation Administration (FAA) have complied with the regulations relevant to reducing the risk of bird strikes. For example, since 2000, the Port Authority has conducted "wildlife hazard assessments," which are required once bird strikes have occurred. These studies determine how to minimize the wildlife population and the level of danger they present to aircraft and the public. As a result of these assessments, the Port Authority has developed a "wildlife management plan," which has been modified and updated consistently since 2002, that provides recommendations for the airport to promote air safety and avoid bird strikes.

Despite these wildlife-focused efforts to reduce and avoid bird strikes, the number of bird strike incidents have consistently increased at LaGuardia. Opponents of the proposed trash facility worry that building a bird attractant will only exacerbate the problem and add to these numbers. However, the FAA and City of New York have found that the trash facility will not attract more birds to LaGuardia's runways as long as certain procedures are followed.

The Proposed Trash Facility

In addition to wildlife assessments by the Port Authority, the FAA is required to conduct aeronautical studies to determine the extent to which a proposed structure could adversely impact the safe and efficient use of navigable airspace and related equipment or facilities. The proposed North Shore Marine Transfer Facility will be located on Flushing Bay across an inlet from LaGuardia Airport. The facility will be three stories and be fully enclosed so as to lock in the odors and avoid attracting the area's birds. Garbage trucks will bring trash to the facility, entering through rollup doors and dispensing trash into sealed containers, which will then be transported by water to its final destination.

The FAA has twice made a "no hazard" determination for the facility, although the first determination prompted the City to redesign the trash facility by moving it out of LaGuardia's "runway protection zone" and lowering the structure's height to 100 feet. Four months after the final "no hazard" determination of the trash facility, a serious bird strike occurred.

Miracle on the Hudson

On January 15, 2009, Captain Chesley Sullenberger struck a flock of Canadian Geese upon taking off from LaGuardia. The engines stalled after ingesting several of the geese, and Sullenberger and his crew crash-landed the plane on the Hudson River. Luckily, all 155 passengers and five crew members survived, and the incident became known as the "Miracle on the Hudson."

After this incident, Queens County Congressman Gary Ackerman and others expressed concern to the FAA that the proposed trash station would attract even more birds to flock around LaGuardia's runways. The FAA, however, believed that the proposed station would be safe because similar enclosed waste-management facilities that followed certain procedures were generally considered safe for airport operations. Regardless of the FAA's assurance, the Secretary of the Department of Transportation appointed a panel to conduct a study on the impact of the proposed station on the safe airport operations of LaGuardia.

The expert panel's ultimate report concluded that if its recommendations were followed, the trash station and the airport would be compatible with each other regarding bird strikes and safe air operations, and the risk of bird strikes would decrease. The panel recommended changes in the facility's design, imposition of strict operational procedures, and an implementation of a wildlife hazard management plan and program. After the report was released, the FAA wrote a letter to the City approving and endorsing the panel's findings and encouraging the construction of the trash station. This letter triggered the current lawsuit.

Reviewable Order

A pilot and a nonprofit corporation interested in aviation safety petitioned the court to review the letter from the FAA to the City of New York, alleging that the court had jurisdiction because the letter constituted a reviewable order that was arbitrary and capricious and therefore should be modified or set aside by the court.[3] On April 6, 2011, a motions panel held that the letter was a reviewable final order. The Second Circuit, however, found that the letter was not a "final order."

Photograph of Canadian Geese, courtesy of Rainer Hungershausen

The Second Circuit noted that only "final orders" are reviewable under 49 U.S.C. § 46110(a). A "final order" is one that "imposes an obligation, denies a right, or fixes some legal relationship."[4] The Second Circuit recognized that the letter urged the City to follow the panel's recommendations because they were important, but found that a letter advising the City as to such recommendations did not establish a legal relationship. It did not, for instance, command the City to stop, change, or continue the construction of the North Shore facility. Furthermore, the court found that even if the FAA intended such, "the FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation."[5] Because the one-page letter did not "deny a right, impose an obligation, or have legal consequences, it was not a 'final order,'" and the Second Circuit dismissed the petition for lack of jurisdiction to review it.[6]

Endnotes

1. 2013 J.D. Candidate, University of Mississippi School of Law.
2. Paskar v. U.S. Dept. of Transp., No. 10-4612-ag, 2013 WL 1405863, at *1 (2d Cir. Apr. 9, 2013).
3. *Id.*
4. *Id.* at *5.
5. *Id.*
6. *Id.* at *8.

No Permit Necessary for Stormwater Runoff from Logging Operation

Evan Parrott[1]

In late March, the United States Supreme Court decided whether several logging companies in Oregon had violated the Clean Water Act (CWA) by not obtaining the appropriate permits to discharge stormwater runoff into nearby rivers and streams.[2] Specifically, the Court interpreted a series of regulations by the Environmental Protection Agency (EPA) that exempted certain pollution discharges from the CWA's permitting scheme. Due to an amendment submitted by the EPA a week before the Supreme Court heard arguments in the case, the Court's final conclusion will not be applicable to identical situations in the future. However, the Court's discussion and reasoning provide insight into how the newly amended regulations will be interpreted in respect to the permitting requirements involved with discharging stormwater runoff.

Background

Georgia-Pacific West, along with other logging and paper-product companies, is under contract with the State of Oregon to harvest timber from forests within the state. To this end, it uses two logging roads in Oregon's Tillamook State Forest, which is located about 40 miles west of Portland. When it rains, water runs off the roads and eventually discharges into rivers and streams. The discharge often contains a large amount of sediment from the dirt and gravel from the roads, which has been found to harm aquatic organisms.

In September 2006, Northwest Environmental Defense Center (NEDC) filed suit under the CWA against several parties, including companies involved in logging and paper-product operations such as Georgia-Pacific West, as well as state officials, including Doug Decker, the State Forester of Oregon. The suit alleged the logging companies violated the CWA by not obtaining a National Pollutant Discharge Elimination System (NPDES) permit.

NPDES Permits

The CWA was passed in 1978 to restore and maintain the integrity and condition of the United States' waters. One of the requirements of the CWA is that individuals or organizations must secure NPDES permits before discharging pollution from any point source into the nation's navigable waters.

Due to the excess of permit applications and the burdens that accompany such requests, the EPA issued regulations in an effort to more narrowly define which kinds of discharges qualified as point sources, and therefore required NPDES permits. One of those regulations was the Silvicultural Rule, which stated that any discharge from a logging-related point source requires a NPDES permit, absent any other federal statutory exemption.

In an effort to assist the EPA with its management of NPDES permits, Congress passed several amendments in 1987 to narrow the kinds of discharges that require permits. These amendments exempted certain discharges composed entirely of stormwater from the NPDES permit system. However, the amendments did not exempt discharges of stormwater runoff that were associated with industrial activity.

The EPA then adopted a regulation, known as the Industrial Stormwater Rule, to clarify what constituted "industrial activities" under the amendments. The rule limited the provision to discharges of stormwater from conveyances "directly related to manufacturing, processing or raw materials storage areas at an industrial plant."[3] The rule also stated that the "industrial activities" also referred to any facilities specifically classified as Standard Industrial Classification 24 (Class 24) under the system used by the federal government to categorize corporations by business activity. Class 24 includes corporations engaged in logging activities.

EPA's Final Attempt at Clarification

The United States District Court of Oregon dismissed the original suit finding that NPDES permits were not required under the CWA because the ditches, culverts, and channels were not point sources of pollution under the CWA or the Silvicultural Rule. The Ninth Circuit Court of Appeals reversed the district court's decision and held that the language of the CWA and related regulations required Georgia-Pacific West and the other logging companies to obtain NPDES permits for the discharges.

In response to the Ninth Circuit's decision, the EPA issued a final version of an amendment to the Industrial Stormwater Rule, limiting the applicability of the rule to Class 24 facilities only if a facility involves rock crushing, gravel washing, or log storage. The Silvicultural Rule defines these activities as point sources. This amendment was submitted to the United States Supreme Court less than a week before the Court heard the case.

The Supreme Court's Decision

The Court noted that the new regulation would be used from this point onward to determine whether NPDES permits would be required for the stormwater discharges at issue. However, the Court did not attempt to interpret the EPA's amended regulation. Instead, it limited its analysis and review to the earlier version of the Industrial Stormwater Rule because it has been the source of all the litigation, and it could still be the basis for penalties, regardless of whether the types of discharges at issue require permits in the future. For example, if the court found that the logging company should have obtained NPDES permits before discharging stormwater runoff, the company could be liable for past violations. Accordingly, the Court looked at whether the pre-amendment version of the Industrial Stormwater rule exempted discharges of channeled stormwater runoff from logging roads from obtaining a NPDES permit.

In interpreting whether or not the pre-amended Industrial Stormwater Rule applies to the logging companies, such as Georgia-Pacific West, the Court deferred to the EPA's interpretation of its own regulations. The Court held that the language of the Industrial Stormwater Rule leaves open the rational interpretation that it only extends to traditional industrial buildings, factories, and other relatively fixed facilities. The Court found that this interpretation was consistent with EPA's history regarding the requirement of permits for similar discharges. The Court also found that this interpretation is in line with the State of Oregon's extensive efforts in assuring the control of stormwater runoff from logging roads. The Court noted that "[i]n exercising the broad discretion the Clean Water Act gives the EPA in the realm of stormwater runoff, the agency could reasonably have concluded that further federal regulation in this area would be duplicative or counterproductive."[4] Therefore, the Court held that the pre-amendment version of the Industrial Stormwater Rule exempts discharges of channeled stormwater runoff from logging roads from obtaining a NPDES permit.

Conclusion

While it initially appeared that this case would clarify the Industrial Stormwater Rule, the EPA limited the scope of the Court's review by addressing the issue with an amendment prior to the Court's decision. Going forward, the newly amended regulation will determine whether NPDES permits will be required for discharges of stormwater runoff from logging roads. How the new amendment will be interpreted remains to be seen, but it is clear that the EPA and its interpretations of the amendment will be given much deference when the regulation is being analyzed and applied. If the EPA's past interpretations of the CWA and its associated regulations are any indication, then the Industrial Stormwater Rule will be further narrowed and corporations who are responsible for the discharge of stormwater runoff from logging roads will not have to obtain a NPDES permit.

Endnotes

1. 2013 J.D. Candidate, Univ. of Miss. School of Law.
2. *Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326 (2013)
3. 40 C.F.R. §122.26(b)(14).
4. *Decker*, 133 S.Ct. at 1338.

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