Legal Reporter for the National Sea Grant College Program

The SandBar

Volume 1:1, 2002

Premiere Issue

Dear Colleague,

On the following pages, you will find the first issue of *The SandBar*, the official Legal Reporter of the National Sea Grant Law Center. You have been added as a subscriber for its first volume, four quarterly issues, compliments of the Sea Grant Law Center and National Sea Grant College Program. I hope you find its contents useful.

In this premiere issue, the staff has presented analyses of significant ocean and coastal judicial decisions from across the country addressing government's use of water resources, liability of ports and harbors, and cases examining the management of marine resources. Future topics in Volume I will include analysis of significant fisheries cases from this year and an update on the two Ocean Commissions' activities.

The National Sea Grant Law Center opened its doors on February 1 of this year to provide the Sea Grant College Program and its constituents a source of critical analysis of marine laws and policies. In addition to publishing the *The SandBar*, Center attorneys are also actively researching current issues in the coastal and ocean law field, including marine habitat conservation, invasive species, fisheries issues and individual research requests from Sea Grant constituents. Please visit our web site to view the publications or request information: www.olemiss.edu/orgs/SGLC .

If you know of someone who would find this publication useful or you received this from a colleague and would like to be added as a subscriber, visit our web site to fill out the on-line subscription form.

We welcome your thoughts, ideas for articles, and suggestions for improvements. You can reach the staff via e-mail at sealaw@olemiss.edu or by phone at 662-915-7775. We look forward to hearing from you!

Sincerely,

Kristen Fletcher

Editor

Legal Reporter for the National Sea Grant College Program

The SANDBAR

Volume 1:1, 2002

Supreme Court Rejects Lake Tahoe Landowners' Takings Claim

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002).

S. Beth Windham, 3L
Kristen M. Fletcher, J.D., LL.M.

This spring, the Supreme Court released its latest "takings" decision, holding that a planning agency's 32-month moratorium on development at Lake Tahoe was not an automatic taking of property under the Fifth Amendment.[1] In distinguishing between a government physically taking a property and the adoption of a temporary rule limiting a landowner's development, the Court found that a temporary moratorium, such as the Tahoe Basin development moratorium, did not automatically constitute a taking.

Conserving the "Noble Sheet of Blue Water"[2]

Lake Tahoe is considered a national treasure because of its blue color and transparency, which is particularly threatened by development that increases nutrient loading via runoff and erosion.[3] To combat this problem, the legislatures of California and Nevada signed the Tahoe Regional Planning Compact in 1972, creating the Tahoe Regional Planning Agency (TRPA) to conserve the Tahoe Basin and its natural resources. After the TRPA failed to limit new residential construction, the two states formed a new compact in 1980 that required the agency to develop standards for water quality, air quality, and vegetation conservation. It also required the TRPA to adopt a regional plan to achieve those standards and directed the TRPA to place a moratorium on development until implementing the plan.

The TRPA instituted two moratoria on development in the Basin that ended thirty-two months later with the adoption of a plan in 1984. The plan specified environmental threshold carrying capacities for protection of the lake, which set standards for air quality, water quality, soil conservation, noise and vegetation preservation. The plan also set out a

See Lake Tahoe, page 9

Supreme Court Upholds Immunity for Ports Authority

State Not Required to Respond to Federal Maritime Commission Complaint

Federal Maritime Commission v. South Carolina State Ports Authority, 122 S.Ct. 1864 (2002).

Magnolia Bravo, M.S., J.D.
Kristen M. Fletcher, J.D., LL.M.

The U.S. Supreme Court recently extended the doctrine of state sovereign immunity to protect a state from having to answer a complaint in front of federal administrative agencies without its consent. The Court found that though administrative adjudications were virtually nonexistent at the time the Constitution was written, the intent of the Framers of the Constitution was to apply immunity to states from a challenge in front of an agency such as the Federal Maritime Commission.

See Ports Authority, page 8

Table of Contents

Rivers Polluted by Nonpoint Source Pollution Subject to TMDLs

Pronsolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002).

Kristen M. Fletcher, J.D., LL.M.

The Ninth Circuit Court of Appeals recently determined that, like waterbodies polluted by industrial discharge, rivers polluted by only nonpoint source pollution, such as runoff resulting from agricultural or silvicultural activities, are subject to a federal statutory requirement setting limits for the amount of pollution that may enter the waterbody on a daily basis. A Federal District Court in California decided in 2000 that the Garcia River, which is polluted only by sediment run-off, and rivers like it, require the establishment of "Total Maximum Daily Loads" or TMDLs, as prescribed by the Clean Water Act.[1] In affirming the lower court's decision, the Ninth Circuit sanctioned the Environmental Protection Agency's (EPA) interpretation of the Clean Water Act to require TMDLs for all impaired waterbodies, whether impaired by direct industrial discharges or solely by agricultural or silvicultural runoff.

Under the Clean Water Act (CWA), Congress recognized two sources of pollution: point source pollution that is discharged from a "discernable, confined and discrete conveyance such as a pipe [or] ditch;"[2] and nonpoint source pollution that is runoff from a variety of sources including urban areas and agricultural and forestry sites. The CWA mandates a permitting scheme to limit the pollution that point sources may discharge; however, the CWA "provides no direct mechanism to control nonpoint source pollution" but rather grants authority to states to reduce nonpoint source pollution.[3]

States were also granted the responsibility under section 303 to set water quality standards for *all* waters within their boundaries regardless of the sources of the pollution entering the water.[4] Once standards are set, the states must then identify and compile a list of waters that fail to meet the standards and set a TMDL for those waterbodies. The EPA defines a TMDL as

See TMDL, page 7

EPA Logging Permits Violate Public Notice Requirement

Permits for Marine Discharges Void until Public Input Obtained

NRDC v. EPA, 279 F.3d 1180 (9th Cir. 2002).

Jason Dare, 3L

The Ninth Circuit recently ruled that the Environmental Protection Agency failed to meet public notice requirements when it granted permits for the disposal of woody debris into the marine waters of Alaska. The decision significantly affects harvesters in the Tongass National Forest in southeastern Alaska, nullifying logging permits because the public was not given an adequate opportunity to protest new rules allowing logging companies to dispose of wood waste in estuaries and coastal areas.

Background

Because of Alaska's unique and rugged terrain, the typical mode of transportation for logs harvested from the Alaskan wilderness is via marine waters. Individual logs are tied together to form rafts, which are then pushed in the water at log transfer facilities (LTFs) and moved to various destinations. When log rafts are placed in the water, friction between the logs dislodges bark and other woody debris and deposits it in a "zone of deposit," usually an estuarine or coastal water body. The woody debris, classified as "residue," takes many years to decay and accumulates on the bottom of the water body, affecting water quality and the marine ecosystem.[1]

Because woody debris is considered a pollutant under the Clean Water Act (CWA), dischargers of the waste must obtain a NPDES permit (National Pollutant Discharge Elimination System) from the US Environmental Protection Agency (EPA).[2] The two types of NPDES permits are (1) individual permits which authorize individual entities to discharge certain pollutants into particular areas and (2) general permits which authorize classes of dischargers to discharge certain pollutants into areas with common characteristics, provided an individual in the class files a "notice of intent" to discharge.[3]

When the EPA recognized woody debris as a pollutant in the early 1980s, the CWA required LTFs created after 1985 to obtain an individual NPDES permit before discharging the pollutant. LTFs established before 1985, however, were allowed to continue discharging woody debris based on their existing permits. This pre-1985 LTF permit policy continued until the mid-1990s, at which time the EPA began to amend these permits to bring them into CWA compliance. At that time, the EPA prepared general permit requirements for woody debris discharge that would apply to both pre- and post-1985 LTFs.

Under the woody debris general permit, Alaska proposed that a one-acre "zone of deposit" be allowed. The permit allowed the zone of deposit to accumulate woody debris up to "100% cover that exceed[ed] four inches' [in] depth at any point."[4] Furthermore, Alaska proposed to permit "patchy distribution" of woody debris outside the zone of deposit.[5] As was its duty pursuant to the Administrative Procedures Act, the EPA gave public notice of Alaska's proposals and provided the public with an opportunity to comment on them.[6] Moreover, the EPA requested that the Alaska Department of Environmental Conservation (ADEC) certify that the general permit proposal was in compliance with state water quality standards before the proposals were finalized.

The ADEC submitted three certification drafts to the EPA, with the final one amending the zone of deposit to the size of the LTF's "project area," instead of the one-acre zone of deposit originally proposed.[7] Because it was not as severe as the original woody debris permit requirements, the EPA determined that the amended zone of deposit definition would violate antidegradation laws by making a change that "degrade[d], rather than improve[d], water quality."[8] In response to these concerns, the ADEC argued that the project area zone more accurately reflected what, in fact, had occurred in the past. Furthermore, the ADEC claimed that its new definition of zone of deposit would be more successful at preserving water quality because of other changes made to the definition, including thinner levels of acceptable accumulation and remediation requirements. The EPA accepted the state's reasoning and issued two general permits for woody debris discharge containing the project area zone of deposit requirement, one for pre-

See Logging, page 6

Logging, from page 5

1985 LTFs and one for post-1985 LTFs. The EPA, however, gave no public notice of this final permit requirement and sought no comments from the public. For this reason, the Natural Resources Defense Council (NRDC) and other environmental organizations brought the current claim to the Ninth Circuit, seeking review of the EPA's permit order.

Test for Public Notice Requirement

Pursuant to the Administrative Procedures Act, the EPA must provide a means for public notice and comment before it can finalize an NPDES permit.[9] This does not mean, however, that the EPA is required to provide means for multiple public notice and comment sessions after each draft proposal is complete. The court noted that "it is 'the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency.'"[10] The EPA must provide for one public notice and comment session after the initial permit proposal, provided that the final rule does not deviate too far from the original rule. The test to determine if the deviation is excessive depends on "whether interested parties reasonably could have anticipated the final rulemaking from the draft permit."[11]

Because the initial draft permit contained references to patchy distributions of woody debris outside the zone of deposit, the EPA argued that the public should have had notice that the woody debris discharge areas could extend further than the proposed one-acre zone of deposit. Despite this, the Ninth Circuit viewed the EPA's change from a one-acre zone of deposit to a project area zone of deposit as a "fundamental policy shift, rather than a natural drafting evolution."[12] It relied upon the fact that "the public was never notified that Alaska was proposing to redefine the allowable zone of deposit, nor was the public afforded the opportunity to comment on the proposed change, either at the state or federal level."[13] This was particularly evident in the "contents of the instant petition for review, which raises for the first time numerous issues about the proposed change in the conception of zones of deposit. These are precisely the type of comments that should have been directed in the first instance to the EPA, but which understandably were not because of the inadequate notice."[14]

In accordance, the court ruled that no reasonable person could have expected the EPA's shift to a larger zone of deposit because "interested parties did not know that a fundamental change in the zone of deposit definition was 'on the table.'"[15] Recognizing that "[I]f the EPA had reached the opposite conclusion, and had added additional requirements to the final permits, Alaskan logging interests would surely have taken the position that notice and comment had been inadequate," the court's decision requires the EPA to withdraw the permits until another round of public notice and comment sessions can be offered.[16]

As a result of the EPA's failure to provide for a second public notice and comment session, the Ninth Circuit granted the NRDC's petition and remanded the general permits so the agency could meet the public notice requirements. ~

ENDNOTES

1. *NRDC v. EPA*, 279 F.3d 1180, 1183 (9th Cir. 2002).
2. 33 U.S.C. §§ 1342(a)-(c) (2001).
3. 279 F.3d at 1182.
4. *Id.* at 1184.
5. *Id.*
6. 5 U.S.C. §§ 553(b)-(c) (2001).
7. 279 F.3d at 1185.
8. *Id.*; Alaska Admin. Code tit. 18, § 70.015 (2001); 40 C.F.R. § 131.12(a) (2002) ("State[s] shall develop and adopt a statewide antidegradation policy . . . .").
9. 5 U.S.C. §§ 553(b)-(c) (2001).
10. 279 F.3d at 1186.
11. *NRDC v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988).
12. 279 F.3d at 1188.
13. *Id.* at 1187.
14. *Id.* at 1188.
15. *Id.*
16. *Id.* at 1189.

TMDL, from page 4

"the sum of the individual wasteload allocations for point sources and load allocations for nonpoint sources and natural background."[5] Each source of pollution into the river is granted a "share" of the TMDL, which together make up the maximum amount of pollution the waterway can handle. To meet this lower permissible level of pollution, landowners with operations contributing to the river's pollution must alter their activities.

The Appeal

The appellants, Betty and Guido Pronsolino purchased 800 acres of logged timber land in the Garcia River watershed in 1960. As a result of the increase in sediment in the river from nearby logging operations and other nonpoint sources, the EPA directed California to list the Garcia River as impaired in 1992. The resulting TMDL called for a sixty percent reduction of sediment, allocating portions of the TMDL to nonpoint pollution sources including pollution associated with roads, timber-harvesting activities, and erosion.

In 1998, after regrowth of the forest on their land, the Pronsolinos and other similarly situated landowners applied for a harvesting permit from the California Department of Forestry. In order for the landowners' activities to comply with the Garcia River TMDL, the Forestry Board required that the Pronsolinos provide mitigation of sediment runoff, a prohibition on removal of certain trees, and restrictions on harvesting. It is estimated that, individually, the restrictions would cost the Pronsolinos $750,000, and collectively, would cost over $10 million for all the landowners in the suit.[6]

Specifically, the CWA requires a list of waters "for which certain effluent limitations are not stringent enough to implement the applicable water quality standards for such waters."[7] The appellants challenged that the inclusion of the "effluent limitations" language limits the EPA to regulating only those rivers that are affected by point source discharges. They reasoned that because the Garcia River is only affected by nonpoint source discharges, then section 303 does not apply. The EPA countered that the language does not "implicitly [contain] a limitation to waters initially covered by effluent limitations."[8]

The Court Finds EPA Authority

The Ninth Circuit found that "[w]hether or not the appellants' suggested interpretation is entirely implausible, it is at least considerably weaker than the EPA's competing construction."[9] The court determined that section 303 should be read "with reference to the stated goal of implementing any water quality standard applicable to such waters."[10] Reading section 303 in this way would expand its reach beyond the Pronsolinos' contention that any waters not meeting water quality standards must be identified only if specified effluent limitations would not achieve those standards.

Finally, the court turned to the overall purpose of the CWA and § 303 and failed to find a reason to distinguish "between waters with one insignificant point source and substantial nonpoint source pollution and waters with only nonpoint source pollution."[11] Stating that such a distinction would lead to an "irrational regime," the court alleged that "such a distinction would, for no apparent reason, require the states or the EPA to monitor waters to determine whether a point source had been added or removed, and to adjust the § 303 list and establish TMDLs accordingly."[12]

The court's interpretation actually increases the importance of TMDLs for waterbodies only affected by nonpoint source pollution. Because the Garcia River is only polluted by nonpoint source pollution, effluent limitations cannot be assigned to it and the only method of improving the condition of the impaired waterway is by controlling runoff through § 303 and setting TMDLs for the river.

After dispensing with appellant's arguments claiming federal intrusion into the state's traditional control over land use and the proper level of review, the court held that TMDL authority does exist for the Garcia River and waterbodies like it that are affected only by nonpoint source pollution. ~

ENDNOTES

1. *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337 (N.D. Cal. 2000). For an analysis of the District Court decision, see *Peeples, Tim and Kristen Fletcher, TMDL Authority Upheld for Nonpoint Source Pollution*, 20:2 WATER LOG 4 (2000) (available online at http:// www.olemiss.edu/orgs/masglp).
2. 33 U.S.C. § 1362 (14) (2002).
3. *Pronsolino v. Nastri*, 291 F.3d 1123, at *5, *citing Oregon Natural Desert Assoc. v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998).
4. 291 F.3d 1123, at *6.
5. *Id., citing* 40 C.F.R. § 130.2(i) (2002).
6. The estimated costs to other members of the Appellant Group included $10,602,000 for Landowner Mailliard and $962,000 for Landowner Barr. 2002 U.S. App. LEXIS 10308, at *16.
7. 33 U.S.C. § 1313(d)(1)(A) (2002).
8. 291 F.3d 1123, at *32.
9. *Id.*
10. *Id.* at *33.
11. *Id.* at *45.
12. *Id.*

Ports Authority, from page 3

Background

Various passenger cruise lines run regularly-scheduled cruise departures from the Port of Charleston in South Carolina. South Carolina Maritime Services (Maritime Services) intended to berth a cruise ship, the M/V *Tropic Sea* at the port, offering both cruises to the Bahamas and cruises that merely traveled in international waters without any ports of call. Both cruise itineraries offered gambling activities while on board.[1]

On five separate occasions, Maritime Services asked the South Carolina State Ports Authority (SCSPA) for permission to berth its cruise ship, but was denied. SCSPA contended that its policy was to deny berth to any ships whose main purpose was to promote gambling. Maritime Services then filed a complaint with the Federal Maritime Commission (Commission) against SCSPA for a violation of the Shipping Act[2] alleging that SCSPA enforced its anti-gambling policy in a discriminatory manner by denying Maritime Services' requests, but allowing Carnival Cruise Lines to berth cruise ships offering gambling activities. Maritime Services asked for reparations, attorneys fees, and an order forcing SCSPA to cease its discriminatory behavior. The Administrative Law Judge (an impartial officer designated to hear the case) dismissed the suit finding that the state was immune from the complaint under the Eleventh Amendment which protects states from private lawsuits without their consent.[3]

Unhappy with the findings, the Commission then provided its own review of the Administrative Law Judge's dismissal and found that the doctrine of state sovereign immunity applies to judicial tribunals but not to administrative agencies like the Commission. The Commission reversed the findings and claimed adequate authority over the complaint. Reviewing SCSPA's appeal, the Fourth Circuit Court of Appeals found immunity for the state and the Ports Authority, concluding that "the [Commission's] proceeding walks, talks, and squawks very much like a lawsuit and . . . its placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication."[4]

The Eleventh Amendment and Original Intent

On appeal, the Supreme Court began its analysis of state sovereign immunity by stating that "[d]ual sovereign immunity is a defining feature of our Nation's constitutional blueprint."[5] At the time the Constitution was written, the original Framers purposely designed our government with the central principle that states were sovereign entities and were not simply facets of the federal government. While states did consent to suits brought by sister states or the federal government, they explicitly retained their right to be immune from private suit.

The issue at bar in this case was whether the framers intended states to be immune from suit brought by private individuals in a federal administrative adjudication with an agency like the Federal Maritime Commission. To resolve this issue, the Court used a presumption first explicitly expressed in *Hans v. Louisiana* which stated that States are immune from suits arising in any proceedings that were "anomalous or unheard of when the Constitution was adopted."[6] To decide whether the *Hans* presumption applied in this case, the Court examined the nature of Federal Maritime Commission adjudications to determine whether they were the type of proceedings from which the Framers would have assumed the states to have immunity.

The Court found numerous similarities between Commission administrative proceedings and civil litigation including the fact that the Commission's Rules governing practice and procedure are very similar to the Federal Rules of Civil Procedure, discovery procedures are "virtually indistinguishable" and that the role of the Administrative Law Judge is similar to that of a judge. Because Commission proceedings are akin in structure to federal proceedings and therefore fulfill the *Hans* presumption, and because the "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities," the Court ruled that "state sovereign immunity bars the Commission from adjudicating complaints filed by a private party against a non-consenting State."[7]

The Commission attempted to distinguish its adjudications from those of a court by showing that it cannot enforce its own orders. While the Court recognized that the Commission's orders can only be enforced by a federal district court, it found this distinction to be of little merit. Once a Commission order reaches a district court, the sanctioned party can no longer litigate the merits of its position in that court. In addition, once the Commission "issues an order assessing a civil penalty, a sanctioned party may not later contest the merits of that order in an enforcement action brought by the Attorney General in federal district court."[8]

The United States also argued that sovereign immunity should not be extended to Commission adjudications because they do not "present the same threat to the financial integrity of States as do private judicial suits."[9] The Court dismissed this argument stating that it "reflects a fundamental misunderstanding of the purposes of sovereign immunity" which are

See Ports Authority, page 14

Lake Tahoe, from page 3

method of maintaining the carrying capacities after they were achieved. The Compact initially set a deadline for the plan in 1981, but, despite a good faith effort, did not reach it and the TRPA enacted an ordinance imposing the first moratorium on development. It remained in effect until the next deadline in 1982.

Again, the TRPA was unable to complete the plan due to the complexity of defining the carrying capacities. Consequently, TRPA adopted a second moratorium which continued for another eight months until instituting a final plan. After the plan, California obtained an injunction from a federal court preventing the implementation of the plan until approval of yet another plan in 1987. The injunction and the 1987 plan both prevented construction on certain lands in the Tahoe Basin.

The Tahoe Sierra Preservation Council, representing the interests of local landowners, filed suit against the TRPA. The Sierra Preservation Council postured that the moratoria and the 1984 plan constituted a government taking of their property without just compensation, in violation of the Fifth Amendment. The lower court held that it was the federal injunction, not the 1984 plan, that resulted in the plaintiffs' restraints.[4] The Supreme Court granted review on whether the two moratoria of 32 months constituted a taking of private property.

Physical vs. Regulatory Takings

The Fifth Amendment prohibits the taking of property by the government for public use without compensation. Takings fall into two general categories: physical and regulatory. Physical takings are those in which the government actually acquires property for its own use or physically intrudes on property, such as taking private property for the construction of an interstate. Regulatory takings, in contrast, are actions by the government that prevent landowners from using their property in a certain way, such as the adoption of a regulation that prevents development.

The Supreme Court has developed two "per se" rules for takings. First, when the government physically takes an interest in property, compensation is mandated whether taking all or just a part of an owner's interest.[5] Second, when a government action deprives the landowner of all economically viable use of the land, a taking has occurred.[6] However, when a regulation prevents an owner from conducting certain activities without removing all viable use, a court must assess the purpose and the effect of the regulation. Using the "*Penn Central* Analysis," named for the case that established it, the court weighs the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.[7]

Court Rejects a Categorical Rule

The plaintiffs claimed that the two moratoria, while temporary in nature, denied landowners all viable economic use of their property and that such a loss should automatically be considered a taking. Thus, rather than weighing factors of how the regulation affects the landowner to determine whether a taking has occurred, the Court should automatically declare a taking if the regulation imposes a temporary loss of all value. By mandating compensation whenever the government institutes such a moratorium, takings jurisprudence would prevent the "[g]overnment from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[8]

Ultimately, the Court resisted applying a categorical rule for temporary takings, even if all economic value is lost on a temporary basis. It first noted that the language of the Fifth Amendment supported treating physical takings and regulatory takings differently. It reasoned that the Amendment's "plain language requires the payment of compensation whenever the government acquires private property for a public purpose. . . . But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property."[9] Additionally, physical takings were historically analyzed using per se rules while regulatory takings have more recently been analyzed by evaluating the circumstances and facts. The Court concluded that there was no reason to treat regulatory takings and physical takings the same by imposing a rule traditionally used for physical takings on regulatory ones.

The majority also relied on precedent to show the importance of weighing factors on a case-by-case basis for temporary regulatory takings. The Court distinguished previous cases from the Lake Tahoe challenge explaining that "a statute that 'wholly eliminated the value' of [a landowner's] fee simple title clearly qualified as a taking. But our holding was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted."[10] Because the government deprived the Lake Tahoe landowners of economic use for 32 months, rather than permanently, the Court did not consider this a permanent deprivation.

The Preservation Council argued that the 32-month time period could be evaluated as a taking on

See Lake Tahoe, page 10

Lake Tahoe, from page 9

its own. The Court rejected this stance stating, "defining the property interest in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings."[11] The Court concluded that a delay did not render a fee simple estate useless; only a permanent restraint would result in a loss of all economic value. Thus, the starting point in the analysis should be whether there was a taking of the entire parcel of land using the factors under the *Penn Central* analysis.

Photo courtesy of NOAA & National Weather Service Forecast Office, Reno, NV.

Fairness and Justice

The Court also expressed concern over the public policy ramifications of treating regulatory takings the same as physical takings, asking "the ultimate constitutional question [of] whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases."[12]

The Justices feared that the plaintiffs' position would apply to numerous "normal delays in obtaining building permits, changes in zoning ordinances, [and] variances . . . as well as to orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee."[13] Thus, such a rule would "render routine government practices prohibitively expensive or encourage hasty decision making."[14]

The Court even broadened its analysis to view the TRPA efforts as an important regional planning process, explaining that "the interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel."[15] It found that the government often uses moratoria to keep the status quo in place and it is considered an important tool in the development process while developing a permanent plan. A categorical rule finding an automatic taking would classify all interim measures as takings regardless of the planning agency's good faith in the matter. Thus, without moratoria, landowners would be tempted to immediately develop property before a final plan was instituted, leading to unwise and haphazard projects. The Court decided to leave the construction of a general rule to the legislature.

Conclusion

In the latest Supreme Court regulatory takings review, the Court determined the two moratoria on the Tahoe Basin did not constitute an automatic taking, rejecting a categorical rule on development moratoria for the more traditional takings analysis based on evaluating multiple factors. It reasoned that treating regulatory takings as per se takings "would transform government regulation into a luxury few governments could afford."[16] ~

ENDNOTES

1. The Fifth Amendment states ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. AMEND. 5.
2. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1471 (2002).
3. 122 S.Ct. at 1470-1472.
4. 34 F. Supp. 2d 1226 (D.Nev. 1999).
5. *Id.* at 1478-1479.
6. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).
7. 122 S.Ct. at 1475, *citing Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).
8. *Id.* at 1478, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
9. *Id.* at 1478.
10. *Id.* at 1483.
11. *Id.*
12. *Id.* at 1484.
13. 122 S.Ct. at 1485.
14. *Id.*
15. *Id.* at 1488.
16. *Id.* at 1479.

First Circuit Allows Navy Exercises at Vieques to Continue

Water Keeper Alliance v. United States Department of Defense, 271 F. 3d 21 (1st Cir. 2001).

David N. Harris, Jr. , J.D.

Last fall, the First Circuit Court of Appeals affirmed a ruling that permits the U.S. Navy to continue using the island of Vieques, near Puerto Rico, for military munitions exercises. Water Keeper Alliance sought a preliminary injunction under the Endangered Species Act ("ESA")[1] claiming the Navy's activities constituted unlawful takings of thirteen endangered species and damaged their critical habitat. Holding in favor of the Navy, the First Circuit found that Water Keeper failed to show a likelihood of success on the merits of its claim or an adequate showing of irreparable harm, and that the balance of harms weighed in favor of permitting the Navy to continue its exercises.

The Navy's ESA Consultation

Since 1941, the U.S. Navy has been conducting various live ammunition exercises on and around the island of Vieques. In 1980 and 1981, the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS), pursuant to the ESA, underwent formal consultation with the Navy and issued biological opinions stating that the activities of the Navy on the island did not jeopardize the thirteen listed endangered species in the area.[2]

The ESA requires federal agencies such as the Navy to "review its actions at the earliest possible time" in order to determine if the activities will adversely affect any endangered species or habitats critical to the survival of the species.[3] If the action meets the definition of a "major construction activity" then the agency must conduct a biological assessment. If adverse impact to a species or critical habitat may occur, the NMFS and the FWS enter into a formal consultation with the agency. Formal consultation may also be required in the absence of a biological assessment if the agencies determine that an action may result in an adverse effect on a listed species. The purpose of the formal consultation is to minimize the adverse impacts on the endangered species or critical habitat.[4]

Beginning in 1995, the Navy was asked to begin formal consultation with the agencies to reexamine the effects of the military exercises. The Navy completed a biological assessment in January 2000, and entered into formal consultation for long term use of the range.[5] In February, an executive order restricted the use of the Vieques range to not more than 90 days a year and to the use of non-explosive ammunition.[6] The Navy informed the NMFS and FWS that during the period of formal consultation, the Navy would conduct periodic exercises on Vieques in compliance with the executive order. The Navy filed a consultation package with the agencies to outline potential adverse impacts of these interim activities.

Water Keeper sought an injunction to stop the Navy from conducting exercises during this interim period from August 2000 to December 2001. Water Keeper argued that the Navy must procedurally comply with the ESA before conducting any action by filing a biological assessment and undergoing formal consultation during the interim period. The Navy countered that the consultation package submitted to the FWS and NMFS sufficed for the interim period. The Navy stated that formal consultation was not needed because the ESA requires a biological assessment *or* the finding of a potential adverse impact to endangered species or critical habitat. The Navy also argued that the training that occurred on the island was a matter of national security which must be considered before granting an injunction to stop the training activity.

Court Denies Injunction

To grant Water Keeper's motion for an injunction, the court considered the following elements: (1) the likelihood that Water Keeper would succeed on the merits of its claim; (2) the potential for irreparable harm if the injunction was denied; (3) the hardship to the Navy if enjoined from its activity compared to the hardship to Water Keeper if the injunction was denied; and (4) the effect of the court's ruling on the public interest.[7]

The trial court found that Water Keeper failed to show they would likely succeed on the merits of their claims under the ESA. The court stated that the Navy complied procedurally with the ESA because it prepared all necessary assessments and took part in all requisite consultations under the statute. In addition, the court found the consultation package to be adequate as Water Keeper failed to show that the Navy did

See Navy Exercises, page 14

Court Allows Banned Countries to Import Shrimp

Turtle Island Restoration Network v. Evans, 284 F.3d 1282 (Fed. Cir. 2002).

S. Beth Windham. 3L

The Court of Appeals for the Federal Circuit recently reviewed the ban on the importation of shrimp from countries using fishing equipment that harms sea turtles.[1] Under current U.S. law, nations "certify" that their fishing practices use technology to protect sea turtles from being ensnared in trawl nets. In March, the court found that the U.S. may allow importation of individual shipments from uncertified countries if the countries represent that the shipments were harvested in a manner that does not threaten turtles.

Shrimp, Turtles and International Imports

Because sea turtles are unintentionally caught by shrimp trawls, resulting in fatalities, the U.S. adopted regulations requiring shrimp trawls in U.S. waters to install turtle excluder devices (TEDs) when operating where sea turtles are found.[2] A TED is a metal grid incorporated in the net which releases turtles from the net.

The U.S. also requires nations who import shrimp to use TEDs under a 1990 statute.[3] The act requires the Secretary of State to negotiate agreements with foreign nations for the protection and conservation of turtles. Section 609 (b)(1) states "the importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely sea turtles shall be prohibited." The statute allows the President to exclude countries from the ban by certifying that the harvesting nation has a program to regulate the effect on sea turtles, a similar method of shrimp harvesting, a comparable rate of catching turtles as the U.S., and doesn't pose a threat to sea turtles.

In its regulations, the State Department has interpreted § 609 to allow importation of shrimp if the importing nation is certified under the statute.[4] However, the agency has also allowed importation of individual shipments of shrimp without certification if shown that the shrimp were taken in a way that does not harm sea turtles. This would allow importation of aquaculture-grown shrimp, hand caught shrimp and shrimp caught by boats that use TEDs. It also allows a nation to regulate shrimp shipments sent to the U.S. rather than its entire fleet.

Court of Appeals Analysis of § 609

The plaintiff Turtle Island Restoration Network (Turtle Island) challenged the State Department's interpretation of § 609.[5] After a lengthy history of litigation, the Court of Appeals for the Federal Circuit reviewed whether the State Department regulations were a proper construction of the statute. Turtle Island argued that § 609 could only be applied on a nation-by-nation basis, not a shipment-by-shipment basis.

Statutory Language. Turtle Island argued that the language of § 609 as a whole authorizes a nation-by-nation determination.[6] They reasoned that because § 609(a) directs the Secretary of State to negotiate with foreign nations and § 609(b)(2) is a method for nations to be exempt from the ban, then the embargo provisions refer to individual nations rather than individual shipments of shrimp.

Rather than infer a nation-by-nation method, the court found that the plain language of the embargo provision makes it clear that the "importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited."[7] Because the clause "which have been harvested" modifies the word "shrimp," the language did not justify a ban on individual shipments of shrimp caught using technology that does not harm turtles. The court reasoned that if certification were the only way to import shrimp, then language in (b)(1) stating "which have been harvested with commercial fishing technology which may affect adversely such species of turtles" would be superfluous.

Legislative History. Turtle Island also argued that the legislative history of § 609 supports a nation-by-nation determination. Claiming that the primary goal of the statute was to protect endangered sea turtles internationally, Turtle Island relied on several senators who characterized their positions with regard to § 609 by using language such as "other

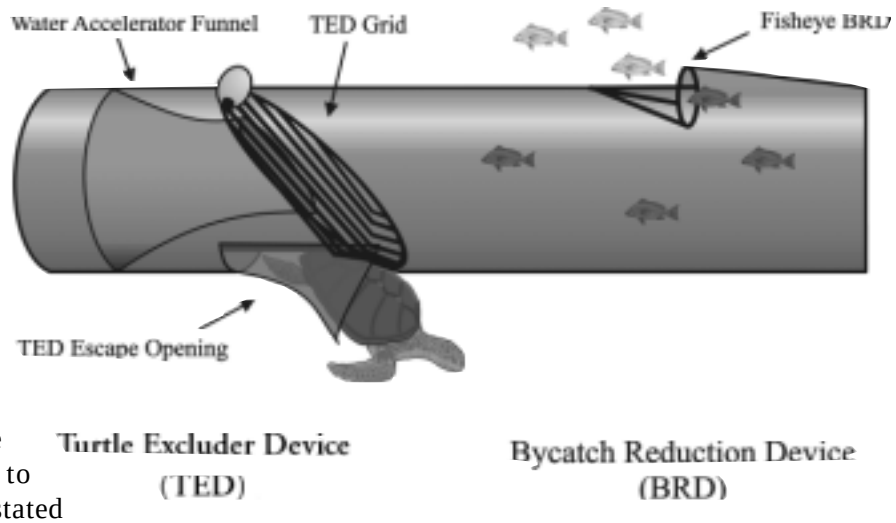
nations" and "countries."[8] The government responded by contending that Congress intended to delegate the determination of which shrimp could be embargoed.

Rejecting both of these arguments, the court found that Congress may have delegated the determination of which shrimp harvesting methods harmed turtles, but did not delegate the ability to determine the scope of the embargo. Turning to Turtle Island's arguments, the court stated "we find nothing in the legislative history to mandate a nation-by-nation approach, and we find little, if any, indication that minimizing sea turtle drownings was Congress's main concern when it enacted section 609."[9] Rather, the Court determined the primary purpose of the act was to protect the domestic shrimp industry, as evidenced by the support of Gulf of Mexico state senators who opposed the national TED regulations but hoped the ban would allow the American shrimp industry to compete with foreign shrimp industries by requiring all imports to use TEDs, thereby creating a "level playing field."[10] The court went on to hold that "Congress was concerned with those foreign vessels harvesting shrimp for the United States market, not foreign vessels harvesting shrimp for foreign markets."[11]

Furthermore, the court compared several other statutes in which Congress required nation-by-nation rather than shipment-by-shipment embargoes. Noting that the nation-by-nation statutes explicitly stated the embargo was extended to all products from the countries, it reasoned that when Congress left out this language in § 609, it intended a shipment-by-shipment embargo.

Policy Arguments by Turtle Island. Turtle Island made two final efforts to argue that the statute was being improperly interpreted. First, it argued that only requiring an exporting nation to equip TEDs on vessels fails to serve the purpose of § 609, as it will result in turtle fatality. Referring to its finding that preserving turtles is not the primary goal of the statute, it concluded that even if preserving turtles was an important aspect of the statute, it was better to equip a few vessels with TEDs than no TEDs at all.[12]

Lastly, Turtle Island claimed that allowing uncertified nations to export some shrimp would decrease the incentive for nations to become certified at all. Rather than becoming certified, nations could simply equip vessels catching shrimp to be exported to the U.S. with TEDs. The court dispensed with this argument stating, "because we find that the combination of plain language, legislative history, and comparison with other statutory provisions decisively establishes the meaning of section 609(b), we need not consider more attenuated arguments on the wisdom of the governments implementation of section 609."[13]



Graphic courtesy of Harvesting Systems and Engineering Division, National Marine Fisheries Service.

Conclusion

Ultimately, the Court of Appeals for the Federal Circuit held that the primary purpose of the 1990 statute requiring certification to exporting countries was to protect the domestic fishing industry rather than sea turtles, finding the State Department's regulations a permissible interpretation of the Act. ~

ENDNOTES

1. *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282 (Fed. Cir. 2002).
2. 50 C.F.R. §§ 223.206, 223.207 (2002).
3. 16 U.S.C. § 1537 note (2002).
4. *See Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed. Reg. 36,946 (July 8, 1999).
5. 284 F.3d at 1287.
6. *Id.* at 1292.
7. 16 U.S.C. § 1537 note.
8. 284 F.3d at 1293.
9. *Id.*
10. 35 Cong. Rec. 15,511 (1989).
11. *Id.* at 1295.
12. *Id.* at 1296.
13. *Id.*

Navy Exercises, from page 11

not use the best scientific and commercial data available. Water Keeper also failed to present strong evidence to support a showing of irreparable harm, claiming only "vague concerns as to long-term damage to the endangered species expressed by FWS and NMFS."[8] The court concluded that "[i]n the absence of a more concrete showing of probable deaths during the interim period and of how these deaths may impact the species, the district court's conclusion that Water Keeper has failed to show potential for irreparable harm" was proper.[9]

Finally, the First Circuit balanced the harm to each party and to the public by denying the injunction. The court relied heavily on the argument put forth by the Navy that losing Vieques as a training ground would adversely affect military preparedness. The court put greater weight on this argument because of the implications for national security, and found that using Vieques as a training ground provided the greatest protection of the public interest. The court declined to "[substitute its] judicial judgment for agency judgment in considerations of how and where the Navy should train."[10]

Conclusion

The First Circuit held in favor of the Navy by denying the preliminary injunction, reasoning that Water Keeper did not present adequate evidence, when weighed against the public interest of national security, to support such an injunction. ~

ENDNOTES

1. 16 U.S.C. § 1536 (2001).
2. 271 F.3d 21, 26 (1st Cir. 2001).
3. 50 C.F.R. § 402.14(a) (2001).
4. *Id.*
5. 271 F.3d at 27.
6. 65 Fed. Reg. 5,729 (Feb. 24, 2000).
7. 271 F.3d at 30 (*citing Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996)).
8. 271 F. 3d at 34.
9. *Id.*
10. 271 F.3d at 35.

Ports Authority, from page 8

not only to shield state treasuries but also to provide an overall immunity to suit.[10] Lastly, the Commission's argument that "the constitutional necessity of uniformity in the regulation of maritime commerce" should limit state sovereignty was dismissed because the Federal government "retains ample means of ensuring that state-run ports comply with the Shipping Act and other valid federal rules governing ocean-borne commerce."[11]

Four Justices Dissent

As is becoming typical for Supreme Court decisions defining the scope of states' rights, the Supreme Court decision was supported by five justices while four dissented to the decision. Justice Breyer, who wrote the primary dissent, stated that he could not find the principle of law that the majority pronounces "in any text, in any tradition, or in any relevant purpose."[12] Breyer, joined by Justices Stevens, Souter and Ginsberg, explained that the Federal Maritime Commission should be considered as part of the Executive Branch of government and that the Eleventh Amendment only protects the states from *judicial* proceedings. The dissenting justices would have overruled the Fourth Circuit's decisions based on fundamental differences between Commission adjudications and judicial proceedings and the unwillingness to extend the Eleventh Amendment beyond strict judicial proceedings. Practically speaking, according to the dissent, even if a party attempted to enforce a Commission order against the state in a federal district court, the state could then claim sovereign immunity.

The Majority's Conclusion

Though the United States and Federal Maritime Commission raised various arguments in opposition to the Court's ruling, the majority opinion found them without merit, affirming the ruling of the U.S. Fourth Circuit Court of Appeals dismissing Maritime Services' case against the SCSPA. ~

ENDNOTES

1. *Federal Maritime Commission v. South Carolina State Ports Authority et al.*, 122 S.Ct. 1864, 1868 (2002).
2. 46 U.S.C. App. § 1709(d)(4) (2002).
3. U.S. CONST. amend. XI. The Eleventh Amendment states that "The Judicial power of the United States cannot be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."
4. 122 S.Ct. at 1870, *citing South Carolina State Ports Auth. v. FMC*, 243 F.3d 165, 174 (4th Cir. 2001).
5. *Id.* at 1870, *citing Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).
6. *Id.* at 1872, *citing Hans v. Louisiana*, 134 U.S. 1 (1890).
7. *Id.* at 1874.
8. *Id.* at 1876.
9. *Id.* at 1877.
10. *Id.*
11. *Id.* at 1879.
12. *Id.* at 1881.

Coast to Coast

And Everything In-Between

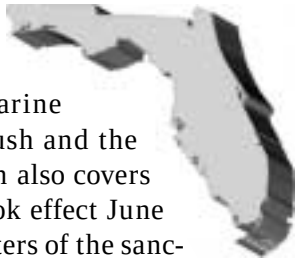
Oregon

The owner of a defunct Newport ship repair business in Oregon was recently sentenced to four months in a federal prison, four more months on house arrest and $97,000 in fines and restitution for sandblasting old boats and allowing the resulting heavy metals, marine paint and other debris to pollute the Yaquina River. The owner closed the business in May 2000, about a year after the EPA and FBI stepped in. The owner pleaded guilty in January to a felony violation of the Clean Water Act and was ordered to serve 40 hours of community service with an environmental program as part of his sentence. The site is designated for cleanup under the Superfund program.

California

In May, Charles David Keeling, a professor of oceanography at Scripps Institution of Oceanography at the University of California, San Diego, was designated by President Bush to receive the National Medal of Science. The National Medal of Science, the nation's highest award for lifetime achievement in scientific research, was awarded to Keeling for his studies on the impact of the carbon cycle to changes in climate, collecting important data in the study of global climate change. Keeling was the first to confirm the accumulation of atmospheric carbon dioxide by very precise measurements that produced a data set now known as the "Keeling curve." Keeling also has studied the role of oceans in modulating the atmospheric concentration of carbon dioxide by carrying out accurate measurements of carbon dissolved in seawater.

Florida



Under a final rule published by the EPA in May, boats are prohibited from discharging treated or untreated sewage into state waters of the Florida Keys National Marine Sanctuary. The ban was proposed in July of 2001 at the request of Governor Jeb Bush and the Monroe County Commission and is aimed primarily at recreational boaters, though also covers commercial vessels. The rule, which can be found at 67 Federal Register 35,735, took effect June 19, and is a precursor to the NOAA effort to create a no-discharge zone for federal waters of the sanctuary.

North Carolina

NOAA, the U.S. Navy and The Mariners' Museum have begun the process of recovering the *USS Monitor*'s revolving gun turret and cannons from the wreck of the famous Civil War ironclad that rests below 240 feet of water in the Atlantic off Cape Hatteras, North Carolina. The turret and cannons recovery is the final phase of a multi-year project to recover key components from the *Monitor* before sea water corrodes the vessel beyond recognition. The operation is being conducted by NOAA, the Naval Sea Systems Command (NAVSEA), Mobile Diving and Salvage Unit TWO (MDSU TWO), and The Mariners' Museum. The *Monitor*'s world famous revolving gun turret, with its two large Dahlgren cannons inside, is estimated to weigh nearly 150 tons. Once recovered, the turret will be transported by barge to The Mariners' Museum in Newport News, Virginia. The *Monitor* was designated as the first national marine sanctuary in 1975. For more information on the Expedition, visit NOAA's Monitor Expedition 2002 Web site at http://monitor.noaa.gov . ~

THE SANDBAR is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR* free of charge, contact: the Sea Grant Law Center, 518 Law Center, University, MS, 38677, 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*.

Editor: **Kristen Fletcher, J.D., LL.M**

Associate Editor: **Magnolia Bravo, M.S., J.D.**

Publication Design: **Waurene Roberson**

Research Associates:
Mandy Beard, 3L
Jason Dare, 3L
Sarah Elizabeth Gardner, 3L
David Harris, J.D.
Roy A. Nowell, Jr., J.D.
S. Beth Windham, 3L

THE SANDBAR is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under Grant Number NA16RG2258, the Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi Law Center. The U.S. Government and the Sea Grant College Program are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. The views expressed herein are those of the authors and do not necessarily reflect the views of NOAA or any of its sub-agencies. Graphics by ©Corel Gallery, © Nova Development Corp., and NOAA.

MASGP 02-005-01

This publication is printed on recycled paper.

THE SANDBAR
Sea Grant Law Center
Lamar Law Center, Room 518
University, MS 38677

Non-Profit Org.
U.S. Postage
PAID
Permit No. 6