Legal Reporter for the National Sea Grant College Program

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California Secures Victory for State Consistency Review

California v. Norton, 311 F.3d 1162 (9th Cir. 2002).

Jennifer Lindsey, 2L
Stephanie Showalter, J.D., M.S.E.L.

The Ninth Circuit Court of Appeals recently ruled that the state of California has the right to review the federal government's approval of offshore oil and gas lease suspensions for consistency with the State's coastal management plan.

Background

In 1999, the Mineral Management Service (MMS) granted suspension requests for oil and gas leases on the outer continental shelf off the coast of California. The leases were originally issued between 1968 and 1984. Under the Outer Continental Shelf Lands Act, after the initial term of an oil lease expires, the lease can continue indefinitely as long as oil and gas are being produced in paying quantities or drilling operations continue.[1] However, if drilling operations are discontinued or the tenant fails to produce paying amounts by the end of the lease term, the lease expires. To gain additional time to continue operations, lessees can apply to the federal government for a lease suspension, which suspends the expiration date of the lease for a period of time.

The leases for the oil fields involved in this dispute have never produced paying amounts of oil or gas and would have expired without the aid of previous suspensions. In May 1999, the lessees requested another suspension for forty unproductive oil fields. The MMS granted suspensions for thirty-six of those leases to provide additional time for the lessees to "facilitate proper development of the leases."[2]

The State of California attempted to assert its authority under the Coastal Zone Management Act (CZMA) to review the lease suspensions for consistency with the state's Coastal Management Program. The federal government, however, refused to submit the lease suspensions for approval, claiming California had no authority to review the applications. The State of California filed suit, demanding the federal government provide the state the

See CZMA, page 6

Owner of Bridge Not Presumed Negligent for Barge Allision

Union Pacific Railroad Co. v. Kirby Inland Marine, Inc., 296 F.3d 671 (8th Cir. 2002).

Jason Dare, J.D.

Even when a bridge is deemed an "unreasonable obstruction to navigation" pursuant to the Truman-Hobbs Act, the owner of that bridge is not presumed negligent when a vessel allides[1] with it. Accordingly, when the *M/V MISS DIXIE* allided with the Clinton Railroad Bridge in Clinton, Iowa, the barge owner and operator had the burden of proving the bridge owner was negligent.

See Bridge, page 12

Table of Contents

California Secures Victory for State Consistency Review
Jennifer Lindsey
Stephanie Showalter 1

Owner of Bridge Not Presumed Negligent for Barge Allision
Jason Dare 1

Notice to the SandBar Subscribers 2

Aerial Spraying is Point Source Pollution
Jason Savarese 3

Remote Sensing: An Emerging Tool for Environmental Protection
Tracy K. Bowles
Stephanie Showalter 4

Crisis in the Connecticut Lobster Fishery
Peg Van Patten
Nancy Balcom 8

First Circuit Rules on NMFS's Lobster Conservation Plan
Sara E. Allgood 10

International Law Update 13

Book Reviews
The Lobster Chronicles: Life on a Very Small Island
Stephanie Showalter
Watershed: The Undamming of America
Jason Savarese 14

Coast To Coast
And Everything In-Between 15

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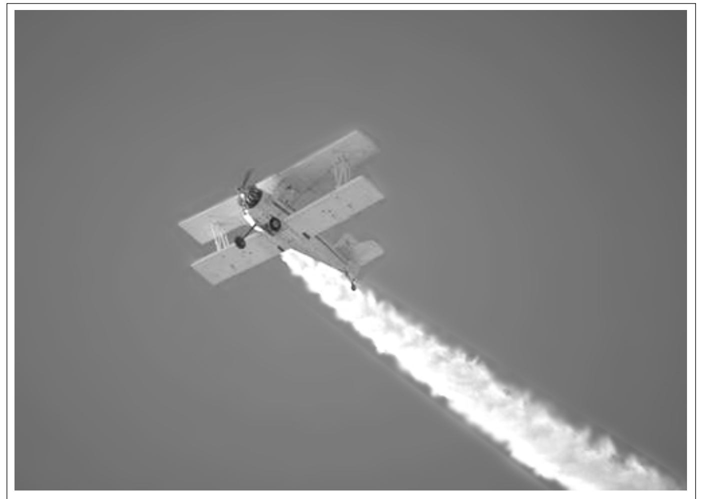
Aerial Spraying is Point Source Pollution



League of Wilderness Defenders/ Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181 (9th Cir. 2002).

Jason Savarese, 2L

The Ninth Circuit Court of Appeals recently held that aerial pesticide spraying by the United States Forest Service (Service) was point source pollution requiring a permit under the Clean Water Act (CWA).

Background

Moth epidemics are nature's way of thinning a forest and establishing stand openings. About 700,000 acres in Oregon, Washington, and Idaho were destroyed by moths in the 1970s, prompting the Service to design a system to warn of impending moth epidemics. This warning system predicted a Tussock moth attack in 2000-2002, so a spraying plan was implemented to ward off these moths that kill Douglas fir trees. The Service aerially sprayed insecticide on 628,000 acres of national forest in Washington and Oregon, believing an attack would severely damage scenic areas, critical habitat areas, and seed orchards. The aerial insecticide spraying occurred over forests and streams, posing dangers to birds, plants, and insects like stoneflies, which in turn could potentially rob salmon and other fish of their sustenance. Some of the insecticide was carried from the target area by winds, possibly exterminating desirable species.

The League of Wilderness Defenders and several other environmental groups sued the Forest Service, claiming violations of the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA). They alleged that the Forest Service did not take into account the impacts of pesticide drift on unintended target areas in the prepared Environmental Impact Statement (EIS). The groups sought an injunction to prevent further aerial spraying.

The Forest Service claimed the aerial spraying was not point source pollution, pointing to an Environmental Protection Agency (EPA) regulation, two EPA letters written to the Forest Service, and an EPA "guidance document." The Forest Service argued that the aerial spraying was a method of silvicultural pest control activity and claimed the above documents exempted such activities from the CWA permit requirement.

Point Source Pollution

Point source pollution is defined as "*any discernible, confined and discrete conveyance, including but not limited to any* pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or *vessel* or other floating craft, *from which pollutants are or may be discharged.*"[1] The court found that the insecticide being sprayed was clearly a "pollutant" as defined by the CWA. Therefore, the CWA applies to the Forest Service's aerial spraying because the insecticides were sprayed over rivers (in addition to the intended tree targets) regulated under the CWA.

The court rejected the Service's arguments regarding silvicultural pest control activities. The court determined that only those pest control activities with natural runoff were excluded from the definition of point source pollution. Because the planes were spraying the insecticides onto trees, and incidentally into rivers, natural runoff was not the cause of the pollution in the rivers and, therefore, not an excluded silvicultural pest control activity.

See Aerial Spraying, page 7

Remote Sensing: An Emerging Tool for Environmental Protection

Tracy K. Bowles, 2L
Stephanie Showalter, J.D., M.S.E.L.

Introduction

Remote sensing technology is gaining popularity in the courtroom as a tool for establishing causation and even guilt. Remote sensing is the process of using instruments to observe and record information from a distance, allowing detailed observation and monitoring from the Earth's core out through the atmosphere. This technology enhances vision so that objects, areas, or activities can be "seen" from afar using instruments such as cameras, telescopes, satellites, ocean buoys, RADAR, and Global Positioning Systems (GPS).

Aerial photographs and satellites, used for image and data collection, are the oldest and most well-known remote sensing devices. Ever since the first cameras were invented 150 years ago, people have been creating images of the earth from afar. The use of satellites to view the Earth stems from the earliest days of the space program. Some satellites carry sensors that collect data passively, by recording radiation that is being radiated or reflected off the Earth's surface or atmosphere. Other satellites collect data actively, by emitting radiation and then recording what is reflected back from the Earth's surface or atmosphere. Earth-observing satellites can carry sensors, which are capable of recording wavelengths across the entire electromagnetic spectrum, from infrared to visible radiation. Airplanes also carry sensors, such as Side-Looking Airborne Radar, which is used by the U.S. Geological Survey to map geologic features, explore for mineral and energy reserves, and identify potential environmental hazards. Once the data has undergone initial processing techniques, it can be used for various purposes, from the simple production of an enhanced image to the more complex creation of spatial databases. The data may also be used to develop statistical observations and graphs. Geographic Information Systems (GIS), computer systems capable of assembling, storing, manipulating, and displaying geographically referenced information, are an effective method for analyzing the remote sensing data with reference to other spatial data.

Remote sensing is not new in the environmental field. Aerial photographs are used routinely for baseline environmental studies to determine historical land use and to guide sampling and site characterization. Additionally, aerial infrared images have been used by the Army Corps of Engineers in wetlands permitting enforcement actions. The U.S. Environmental Protection Agency (EPA) conducts satellite and aerial remote sensing to support the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act, and other EPA regulatory programs and investigations. Images from these projects can stand alone or be used in conjunction with topographic maps, digital data, and other features stored in GIS databases. Remote sensing technology can also be used to monitor oceans, manage coral reefs, monitor pollution and oil spills, track effluent discharges, and analyze short-term and long-term fish habitat. Remote sensing technologies are capable of measuring sea level, wave height, surface wind speed and temperature, as well as locating ocean floor features.

Evidentiary Challenges

It is important to note that litigators seeking to use remote sensing data in the courtroom will encounter evidentiary challenges. The technology is still quite new and many courts are still unsure of how to categorize remote sensing evidence. Despite the confusion, most of the data obtained with remote sensing technologies can be admitted into evidence under Federal Rule of Evidence 702, which allows the admission of scientific testimony, if such knowledge will assist the trier of fact. Scientific data and knowledge, however, cannot be admitted into evidence unless the court determines that it is relevant and reliable.[1] Generally these requirements will be satisfied if the data can be authenticated. The ability to "groundtruth," the act of verifying the remotely sensed data by collecting on the

ground data at the particular site, improves the evidence's chance of being accepted by a court of law. Although they do exist, the evidentiary challenges are minor and do not differ greatly from those encountered with other types of scientific and technical evidence. Remotely sensed data and imagery can also potentially be admitted as demonstrative evidence under Rule 1006 of the Federal Rules of Evidence or possibly as Business Records under Rule 803(6).

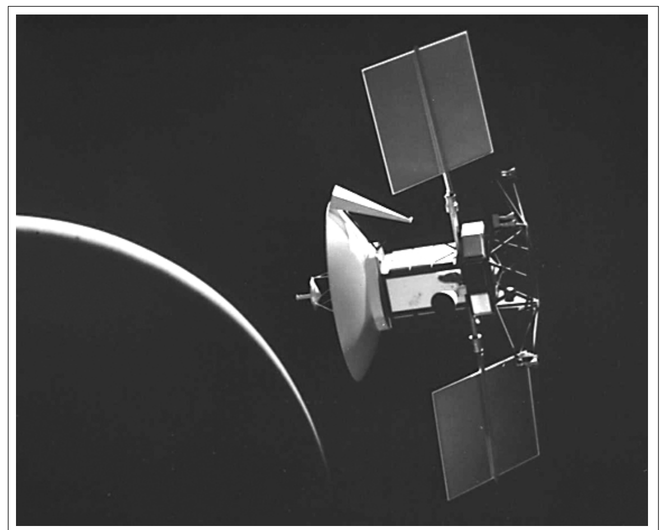
Remote Sensing in Action

In *St. Martin v. Mobil*,[2] the owners of a freshwater marsh sued Mobil for damage caused to their land. Mobil operated canals through the St. Martin's property, which caused damage to marshland because Mobil failed to properly maintain spoil banks on their canals. The Fifth Circuit affirmed the district court's award of damages to the St. Martins. The landowner introduced aerial photographs of the open ponds produced by the oil company's failure to maintain spoil banks. The open ponds eroded the St. Martin' marsh property, proven by a series of aerial photographs that showed the progression of the deterioration of the marsh and interpreted testimony of experts from both sides. These aerial photos, combined with expert testimony, led the court to conclude that Mobil was responsible for the degradation to the marshland.

In *Nutra-Sweet v. X-L Engineering,*[3] Nutra-Sweet sued to recover the costs of cleaning up hazardous waste improperly disposed of by X-L Engineering. Nutra-Sweet introduced into evidence aerial photographs which showed a history of X-L's hazardous dumping. The aerial photos, interpreted by an expert witness, confirmed that volatile organic compounds were dumped onto X-L's land and then migrated through the groundwater onto Nutra-Sweet's land. Nutra-Sweet's expert witness, an environmental scientist, testified that the hazardous waste found on Nutra-Sweet's land was the same as that dumped by X-L. In support of this testimony, Nutra-Sweet's expert witness used the aerial photographs. The Seventh Circuit held X-L Engineering liable for violations under CERCLA.

ENDNOTES

1. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).
2. *St. Martin v. Mobil Exploration & Producing U.S. Inc.*, 224 F.3d 402 (5th Cir. 2000).
3. *Nutra-sweet Co. v. X-L Engineering Co.*, 227 F.3d 776 (7th Cir. 2000).



Army Corps of Engineers, Environmental Protection Agency

On January 15, 2003, the U.S. EPA and the Army Corps of Engineers issued an advance notice of proposed rulemaking in order to obtain "public input on what, if any, revisions in light of [*Solid Waste Agency of Northern Cook County*] might be appropriate to the regulations that define 'waters of the United States.'" The rulemaking solicits comments on two specific questions: (1) under what circumstances the factors listed in 33 C.F.R. 328.3(a)(3)(i)-(iii) (*i.e.*, use of water by interstate travelers for recreation purposes, presence of shellfish which could be sold in interstate commerce, etc.) or any other factors provide a basis for jurisdiction over isolated, intrastate, non-navigable waters and (2) whether agency regulations should define "isolated waters", and if so, what factors should be considered. ***Comments or information must be postmarked or emailed before April 16, 2003.*** (68 Fed. Reg. 1991-1998 (Jan. 15, 2003)).

CZMA, from page 1

opportunity to evaluate the applications and conduct an environmental review.

Coastal Zone Management Act

Section 1456 of the CZMA empowers coastal states to review "federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone."[3] In other words, the CZMA requires federal agency activities with the potential to affect the resources of a state's coastal zone to comply with the state's resource management policies. The disputed lease suspensions have never been reviewed by the state of California for consistency with the state's coastal program.

The federal government argued that the lease suspensions were not subject to state review because the suspensions would not have an environmental impact upon the California coastal zone. The Ninth Circuit disagreed and found that the suspensions did immediately affect the coastal zone. The suspensions require the lessees to perform certain "milestone" activities, such as seismic surveying, which do immediately affect the coastal zone during the suspension term. The commencement of drilling operations is not the only activity that can trigger consistency review. Therefore, the federal government is required to submit the lease suspension applications for review.

National Environmental Policy Act

The National Environmental Policy Act requires federal agencies to take a "hard look" at the environmental consequences of their actions.[4] Proper documentation of the resulting environmental impact of proposed governmental activity must be submitted and approved before any type of activity begins. The investigation into the resulting impact of such action is called an environmental assessment and the results of the investigation or study are codified in an environmental impact statement, or EIS. Not all government activities, however, are subject to these requirements. Categorical exclusions for certain activities exist which waive the requirement that an environmental assessment be performed. The federal government has adopted a categorical exclusion for lease suspensions and, therefore, did not prepare any environmental documents for the lease suspensions in question.

The Ninth Circuit held that categorical exclusion determinations must be made while a request for a lease suspension is pending. The court found that the MMS provided no documentation to show that a categorical exclusion determination had been made at the time the leases were approved. Rather, the federal government appeared to be using the categorical exclusion as a *post hoc* rationalization for its failure to consider the environmental impacts of the suspensions.

Furthermore, ten exceptions to the categorical exclusion exist and the federal government failed to explain why the exceptions were not applicable to these particular lease suspensions. Pertinent exceptions disallow the use of the categorical exclusion when the action may have adverse effects on endangered or threatened species or "ecologically significant or critical areas" and when the actions may have "highly controversial environmental effects."[5] The court held that there was substantial evidence in the record that these exceptions may apply, because the California Coastal Commission expressed concern over the impacts of these suspensions on the threatened southern sea otter and the Monterey Bay and Channel Island National Marine Sanctuaries and the public controversy surrounding offshore oil and gas leasing in California. The requirement of an explanation ensures that the government does not abuse its power. The Ninth Circuit concluded that the MMS improperly failed to make a categorical exclusion determination at the time the government approved the suspension and failed to provide proper documentation.[6]

Conclusion

The Court of Appeals for the Ninth Circuit affirmed the authority of the State of California to conduct a consistency review of lease suspension applications.

ENDNOTES

1. 43 U.S.C. § 1334(a)(1) (2002).
2. *California v. Norton*, 311 F.3d 1162, 1165 (9th Cir. 2002).
3. 42 U.S.C. § 1456(c)(1) (2002).
4. 42 U.S.C. §§ 4321-4370(f) (2002).
5. 49 Fed. Reg. 21437, 21439 (May 21, 1984).
6. *Norton*, 311 F.3d at 1175.

Aerial Spraying, from page 3

The court also found the EIS to be incomplete, due to the Service's disregard of the foreseeable pesticide drift and its impacts on areas outside the target area. Although the EIS included plans to lessen injuries to other moths species and butterflies in neighboring forest areas, such as a one-mile buffer zone around the target areas and the use of less deadly pesticides, the EIS did not discuss any measures to mitigate drift. The Forest Service failed to note the possible distance of the pesticide drift and the EIS did not discuss which direction the pesticide might be carried by winds.

Conclusion

The Ninth Circuit Court of Appeals held that the Forest Service's aerial pesticide spraying was point source pollution, requiring an NPDES permit under the Clean Water Act. The court also held that the EIS was deficient regarding the impact of pesticide drift. The case was remanded to the district court and the Service is barred from future spraying until an adequate EIS is completed and the proper permits obtained.

ENDNOTES

1. 33 U.S.C. § 1362(14) (2002) (emphasis added).

International Coastal Management:

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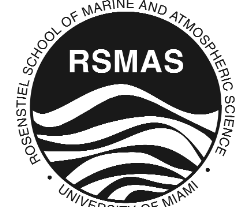
June 13-14, 2003 • University of Georgia in Athens, Georgia



JUNE 13TH

Overview of International Coastal Management .... *Steve Olsen, Coastal Resources Center*

Using Scientific Information Effectively .... *Josh Eagle, Stanford Fisheries Policy Project*

Sustainable Fisheries .... *Michael Sutton, The Packard Foundation*

Keynote Address .... *Noel Jacobs, MesoAmerican Reef System Project*

Canadian Climate Change Issues .... *Meinhard Doelle, Climate Action Network Canada*

Climate Change and Pacific Island Nations .... *Wil Burns, Colby College*

Marine Protected Areas in Australia .... *Simon Woodley, S & J Woodley Pty. Ltd.*

JUNE 14TH - FOCUS ON LOCAL INITIATIVES

Belize .... *Richard McLaughlin, Professor of Law, University of Mississippi*

Panama .... *Daniel Suman, Associate Professor, Marine Affairs & Policy, University of Miami*

Atlantic Coast .... *Fred Hay, Georgia Coastal Management Program*

Crisis in the Connecticut Lobster Fishery

Peg Van Patten and Nancy Balcom
Connecticut Sea Grant

The lobstermen who harvest the waters of the Long Island Sound (LIS) estuary got a very harsh wake-up call in 1999, when they began to pull up pots full of dead and dying lobsters. The live ones seemed limp and lethargic, and died shortly thereafter. In some locations in the Western Sound, as much as 99% of the harvest was lost, affecting more than a thousand lobstermen. In all, the toll was in the hundreds of thousands of lobsters, decimating a fishery that was worth between $10 and $40 million (annual landings vary) – and that doesn't include related industry such as restaurants and tourism. This dire situation hasn't improved much to date.

The cause of these massive mortalities was unclear, but many lobstermen, putting together observations and timing of events, were certain that the shoreline application of pesticides to control mosquitoes that might carry the deadly West Nile virus was responsible. Following several human deaths as well as birds and horses, state environmental agencies in New York had performed aerosol application of Malathion in late summer. While only one human was affected in Connecticut, the virus was detected in mosquitoes and crows. Amidst fears that the disease would spread further eastward, Connecticut's towns applied Resmethrin, a pyrethroid pesticide, around the same time. Both pesticides break down very rapidly once applied.

Responding to requests for disaster aid from Governors John G. Rowland and George E. Pataki, the Secretary of Commerce William J. Daley declared the fishery a disaster, and Congress set up a $6.6 million fund for research and resource assessment in addition to $7.3 million for relief to impacted fishermen, many of whom completely lost their livelihood.

Three lobstermen from Connecticut and New York filed a lawsuit against several pesticide manufacturers, *John Fox et. al vs. Cheminova et.al.*, alleging that pesticides were responsible for the industry crash, with the intent to get the lawsuit accepted as a class action representing all lobstermen from the two states. The Connecticut Sea Grant College Program responded quickly to the emergency when contacted, by allocating emergency funds to veterinarian pathologists at the University of Connecticut, to perform critical autopsies on the lobsters. Autopsies revealed pinkish internal tissues, and they found that paramoeba, a tiny one-celled organism with two nuclei, had invaded lobster tissues as a parasite and inflamed the nervous system, leading to death. All sick lobsters died within 24 hours, their brain tissues consumed by the parasites. This was a tremendous breakthrough in the mystery, but what was not clear, and may never be entirely clear, was whether this parasite was the primary cause of the mortalities or whether the parasite was so successful because the lobster immune systems were perhaps already stressed from other factors.

Meanwhile, lobsters harvested from the eastern Sound, as well as from Rhode Island and Massachusetts waters, were showing increasing signs of shell disease. This disease leaves black, pitted lesions on the shell and renders the lobsters unsuitable for the live market. Caused by bacteria, shell disease eats through shell and can kill the lobster in its most severe stage. Shell-diseased lobsters are believed to be safe for consumption, but affected lobsters are sold for the less-profitable canned meat market rather than the more lucrative live market.

With the federal assistance, the Long Island Sound Lobster Mortality Research Initiative was set up as a partnership between several federal agencies (NOAA National Marine Fisheries Service, NOAA Sea Grant College Program, the Environmental Protection Agency, and the Atlantic States Marine Fisheries Commission), state environmental agencies (DEP, DEC), and the lobster industry. The Connecticut and New York Sea Grant programs coordinated a call for research proposals and several key symposia, inviting scientists, lobster industry members, and regulatory officials to put their heads together and try to answer a suite of questions. For example,

(1) Were the dead and sick lobsters already stressed by environmental factors that weakened their immune systems?
(2) Could the disease be part of a natural cycle that fluctuates from year to year?
(3) Can the existing population recover if the problem is solved?
(4) How many such diseases are currently occurring in Long Island Sound and what is their distribution and prevalence?
(5) What role might toxins, hypoxia, and physical factors such as temperature change play?

(6) Are the LIS lobsters a different genetic strain than other lobsters in the region?

Federal funds also provided for outreach, allowing Sea Grant extension educators to work closely with the industry and act as liaisons with the research community. The lobstermen's lawsuit was filed without waiting for the prolonged period of time necessary in order for the scientists to get their funding and proceed with their work. In all, 17 major research projects were funded, following a national call for proposals. The Connecticut and New York Sea Grant programs funded researchers from those two states as well as from California, Georgia, Louisiana, Maryland, Massachusetts, and Virginia.

At the first symposium, when scientists, fishermen, and agency officials shared their observations, it was found that a third pesticide could be suspect and should be examined. Methoprene is a pesticide that kills mosquito larvae. It is used in a timed-release, solid briquette form, placed in fresh water lakes and in storm drains. Methoprene, considered by many town officials to be harmless, was shown to be chemically analgous to a key hormone affecting many physiological processes, that earlier Connecticut Sea Grant-funded research had found in both insects and crustaceans. While methoprene was never directly put into Long Island Sound per se, it could possibly have entered via overflow during storm events. Thus a third pesticide was added to the research investigation list.

Subpoenas are not exactly familiar events for most Sea Grant staff, so some Sea Grant communicators, extension staff, and researchers were somewhat surprised to be subpoenaed and deposed by lawyers representing one or more parties to the lawsuit, in the course of collecting information on the die-off. The first year of the two-year research program has now ended, and the preliminary results are finally beginning to put together the pieces of this puzzle. The Sea Grant programs have published a Lobster Health Newsletter, available on the LIS lobster information website maintained by New York Sea Grant, at www.seagrant.sunysb.edu/LILobsters/ . Preliminary results were presented at the Third LIS Lobster Health Symposium, held in Bridgeport, Connecticut on March 7, 2003. Final results are not due in for another six to twelve months, however.

Nature is never black and white, and it looks as though many intertwining factors including warmer temperatures, possibly tied to global warming, and sporadic storm events may have contributed to the mortalities. On the other hand, lobsters stressed by anthropogenic inputs into the estuary can't fight off disease as well. Scientists are finding lethal effects from the pesticides being tested at very tiny concentrations, varying with the ambient conditions, life stage of the lobsters, and so on. What is not clear and may never be clear is exactly how much if any undegraded pesticide actually reached the lobsters on the Sound's bottom. Anthropogenic factors in play include the various brands, formulas, and amounts of pesticides applied in the two states, existing chronic hypoxia problems and localized toxins. It is still unclear how the parasitic paramoeba fits into the picture. These are all complicated by physical factors such as the timing, winds, currents, sinking rates, influence of natural events such as storms and flooding, and so on, all combining into a very convoluted tapestry. Many of the experiments showed that sustained above-average water temperatures induced stress in the lobsters and may have increased their susceptibility to other factors. The lobsters are at the southern limit of their temperature tolerance in Long Island Sound, and a summer warming to 22 degrees C can kill them by itself. In addition, some pesticides tested have higher mortalities at warmer temperatures, and application is going to take place in late summer when mosquitoes are very active. Confounding the legal liability issue is the fact that the pesticides used, while all intended for mosquitoes that inhabit wetland environments, generally instruct the user not to apply the product in or near water bodies. Litigation is still in progress on the issue, and at press time the federal judge determined the lawsuit could proceed as a class action.

State agencies are between a rock and a hard place when they must make decisions that balance human health threats (West Nile and Equine Encephalitis viruses carried by mosquitoes) with the health of valuable living resources and their estuarine habitat. As for temperatures and storm events, we cannot change Mother Nature much, other than issues already being addressed in the context of global warming. Hopefully these detailed scientific specifics provided by this suite of studies will help resource managers and scientists to better understand the effects of natural and anthropogenic stressors on lobsters and can help facilitate the sustained recovery of the resource over time, in concert with the lobstermen in Connecticut and New York. We hope that the Long Island Sound lobster industry can recover, but resource assessments and landings data show that the recovery has not yet begun. It will clearly take time that lobstermen hoping to hang on to their traditional livelihoods may not be able to afford.

First Circuit Rules on NMFS's Lobster Conservation Plan

Campanale & Sons v. Evans, 311 F.3d 109 (1st Cir. 2002).

Sara E. Allgood, 3L

In November 2002, the First Circuit was asked to consider if the National Marine Fisheries Service (NMFS) met the procedural requirement of "consultation" as defined by the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act). Several lobster fishermen based in Rhode Island challenged the NMFS's proposed conservation program that imposed stricter limits on lobster fishermen than the plan designed by the Atlantic States Commission.

Background

One of the biggest economic and environmental problems facing conservation efforts in the United States is overfishing. Congress responded to this crisis in 1976 by enacting the Magnuson-Stevens Fishery Conservation Act. The legislation provides for both federal and state control over ocean fisheries, with the states having jurisdiction over waters within three miles of their coastlines. The Federal government regulates the exclusive economic zone (EEZ), consisting of the waters between three and two hundred miles offshore. "To conserve and manage the fishery resources found off the coasts of the United States," the Act calls for the establishment of eight regional management councils to prepare, monitor, and revise fishery management plans in order to "achieve and maintain, on a continuing basis, the optimum yield from each fishery."[1] These fishery management plans (FMP) are prepared when the Secretary of Commerce finds that a fishery is being overfished.

The present case involved the New England Fishery Management Council and the Mid-Atlantic Fishery Management Council, two of the eight regional councils. These two councils have jurisdiction over the waters of the Atlantic Ocean. However, due to the inconsistent responses of the Atlantic states and the federal government to the management of the fishery resources of the Atlantic Coast, the Atlantic States Commission (the Commission) was formed in 1993 by the Atlantic Coastal Act. The Commission contains representatives from all the states bordering the Atlantic Ocean and has duties similar to the regional councils'. The Commission's primary focus is coordinating interstate fishery management plans. If there is no regional FMP, the Atlantic Coastal Act authorizes the Secretary of Commerce to implement regulations governing fishing in the EEZ "after consultation with the appropriate regional councils."[2]

Lobster Management

In 1978, the NMFS and several Atlantic States[3] adopted the Interstate Fishery Management Plan (ISFMP) for the lobster fishery. When the enacted ISFMP conservation measures proved to be ineffective because of increased usage of lobster traps, both the NMFS and the Atlantic States Commission began working on separate proposals to address the overfishing problem. The NMFS proposed withdrawing the current management plan and began to explore alternative conservation measures. The Atlantic States Commission adopted an amendment to the ISFMP that limited the number of traps per vessel in a certain area, "Area 3." This amendment, however, would only take effect if the Area 3 Lobster Conservation Management Team (LCMT) failed to present an alternative program to the Commission.

While the LCMT was developing an alternative to the proposed limits, the NMFS issued a Draft Environmental Impact Statement pursuant to the National Environmental Policy Act (NEPA) that considered alternatives to end the overfishing.[4] These alternatives included the limits proposed by the Atlantic States Commission as well as a stricter plan limiting the number of lobster traps in Area 3 to 2,000 until April 30, 2000. On May 1, 2000, this number would be reduced to 1,800. The LCMT, on the other hand, proposed to limit the number of traps based in part on historical participation. Before LCMT's rule could be adopted by the Atlantic States Commission, the NMFS announced a final rule based on the stricter limits that were to take effect on May 1, 2000.

The Lawsuit

The Rhode Island lobstermen filed suit claiming that the NMFS failed to follow the proper procedures

established by the Atlantic Coastal Act by failing to properly consult with the appropriate regional councils prior to implementing regulations concerning the EEZ. They filed suit in district court seeking a declaratory judgment that the rule published by the NMFS violated the "arbitrary and capricious" standard under the Administrative Procedure Act. The district court granted summary judgment in favor of the defendants, stating that "the underlying statutory ideology of the [Atlantic Coastal Act] . . . is not offended by the perhaps less than exhaustive 'consultation.'"[5] The plaintiffs appealed this judgment.

Consultation Requirement

Agency actions may only be set aside if "arbitrary or capricious" or undertaken "without observance of procedure required by law."[6] The First Circuit reviewed the actions of the NMFS to determine whether the agency followed the statutory requirement of the Atlantic Coastal Act to consult with the appropriate councils.

When faced with a question of statutory interpretation, a court is generally limited to the plain meaning of the statute. Pursuant to that doctrine, the First Circuit stated that consultation should be given its ordinary meaning, "the act of asking the advice or opinion of someone."[7]

The NMFS claimed the consultation requirement had been met through the obligation imposed by NEPA. After publishing its proposed rule, the NMFS received comments from a variety of sources, including the New England Fishery Management Council and the Mid-Atlantic Council, both part of the Atlantic States Commission. The NMFS argued that this correspondence between itself and the councils was sufficient to satisfy the "consultation" requirement, because the Atlantic States Commission had been made aware of the proposed changes and were able to submit comments.

Although the Atlantic States Commission did comment on the proposed regulation, the court found that this commentary was no different than comments made by the general public pursuant to NEPA. The Atlantic States Commission received no tailored notice from the NMFS to initiate consultation nor did the agency solicit advice from either the New England Fishery Management Council or the Mid-Atlantic Council. The court determined that Congress placed the consultation requirement in the Atlantic Coastal Act to force the agency to undertaken something more than general correspondence with the councils. Because the Atlantic States were expecting to be consulted specifically concerning the new regulation, their comments in response to the NEPA regulation may not have been as adequate or as tailored as they might have been during a formal consultation. Furthermore, the court stated that if such general awareness and correspondence under NEPA was sufficient, inserting the consultation requirement into the Atlantic Coastal Act would have been "superfluous." Because the NMFS failed to properly consult with the management councils, the court reversed the summary judgment in favor of the defendants and remanded the case for further proceedings.

Conclusion

The power of the court to determine whether an agency has abused its discretion in this situation is confined to reviewing whether the procedures outlined by Congress were properly followed by the agency. The NMFS abused its discretion by failing to consult with the proper counsels regarding the "soundness of the regulations for conserving Atlantic Coastal fishery resources."[8]

ENDNOTES

1. 16 U.S.C. § 1081(b) (2002).
2. *Campanale & Sons v. Evans*, 311 F.3d 109, 112 (1st Cir. 2002).
3. These states included: Maine, New Hampshire, Rhode Island, Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Maryland, Virginia, and North Carolina, all members of the Atlantic States Commission.
4. The National Environmental Policy Act (NEPA) requires that agencies prepare environmental reports for any major federal actions that adversely affects the environment. The statute also requires that the acting agency must publish their proposed action and receive comments from the public. 42 U.S.C. § 4332 (2003).
5. *Campanale*, 311 F.3d at 117.
6. 5 U.S.C. § 706 (2002).
7. *Campanale*, 311 F.3d at 117.
8. *Id.* at 119.

Oregon Rule vs. Pennsylvania Rule

Built in 1907, the Clinton Railroad Bridge (the "Clinton Bridge") traverses the Mississippi River, and connects Clinton, Iowa with East Clinton, Illinois. On February 28, 1996, pursuant to the Truman-Hobbs Act[2], the U.S. Coast Guard issued an Order to Alter the Bridge to the bridge owner, Union Pacific Railroad Company ("Union Pacific"). In its issuance, the Coast Guard cited that the Clinton Bridge was "unreasonably obstructing navigation" and ordered Union Pacific to alter it. Approximately two months later on May 5, 1996, the river barge towboat *M/V MISS DIXIE*, owned and operated by Kirby Inland Marine, Inc. ("Kirby"), allided with the Clinton Bridge and caused damage to both its cargo and the bridge.

Two judicially created rules could apply in this situation. Pursuant to the longstanding Oregon rule, when a vessel strikes a stationary object such as a bridge, a presumption is raised that the vessel's crew was negligent.[3] Conversely, the Pennsylvania Rule says that "where any party violates a statutory or regulatory rule designed to prevent collisions, that party has committed per se negligence and that party has the burden of proving that its statutory fault was not a contributing cause of the accident."[4] Union Pacific and Kirby reached a settlement agreement concerning the allision, but needed the court to answer whether the Oregon Rule or the Pennsylvania Rule applied. If the Oregon Rule applied, Kirby would be presumed negligent and would pay more under the settlement agreement. If the Pennsylvania Rule applied, Union Pacific would have the burden of proving it was not negligent, and Kirby would pay less under the settlement agreement. The U.S. District Court for the Southern District of Iowa held that the Pennsylvania Rule was the proper rule to apply. Union Pacific appealed to the Eighth Circuit.

For the Pennsylvania Rule to apply, there must be "(1) proof by a preponderance of the evidence of violation of a statute or regulation that imposes a mandatory duty; (2) the statute or regulation must involve marine safety or navigation; and (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent."[5] According to the Eighth Circuit, the Truman-Hobbs Act was not designed to promote safety, but was instead a funding act designed to identify bridges in need of federal assistance. Because no mandatory duty arose to repair a bridge deemed "unreasonably obstructive to navigation," the first prong was not met. Secondly, prong two was not met because the Truman-Hobbs Act did not deal with marine safety or navigation. Finally, the Truman-Hobbs Act's intent was to "decrease the cost of navigation by using federal funds to alter bridges which unreasonably obstruct navigation."[6] Even though altering a bridge may reduce allisions into that bridge, the court held this not to be the type of injury the Truman-Hobbs Act intended to prevent. Since none of the prongs required for the application of the Pennsylvania Rule were met, the Eighth Circuit reversed the district court's ruling and applied the Oregon Rule instead.[7]

Burden of Proof

Kirby also asserted that because the Coast Guard deemed the Clinton Bridge an "unreasonable obstruction to navigation," the Oregon Rule's presumption of negligence is rebutted and the burden of proof is shifted to Union Pacific. In support of its proposition, Kirby cited a Seventh Circuit case which held that "if the Coast Guard may find the . . . bridge an unreasonable obstruction based on the cost and accident data, then so may the trier of fact in admiralty."[8] The Eighth Circuit, however, held that a vessel's owner can attempt to rebut the Oregon Rule presumption with the fact the Coast Guard deemed the bridge an "unreasonable obstruction to navigation." However, a Truman-Hobbs determination "is not conclusive evidence of negligence, but merely another piece of evidence which the trier of fact may consider in determining fault in a negligence action."[9]

Conclusion

The Eighth Circuit reversed and remanded the district court's ruling, holding that the Truman-Hobbs Act and the Pennsylvania Rule did not render the Oregon Rule's presumption inapplicable.

ENDNOTES

1. The term "allision" refers to the collision of a ship with a fixed object.
2. 33 U.S.C. §§ 511-524 (2001).
3. *The Oregon*, 158 U.S. 186, 197 (1895).
4. *Union Pacific Railroad Co. v. Kirby Inland Marine, Inc.*, 296 F.3d 671, 674 (8th Cir. 2002) (*citing The Pennsylvania*, 86 U.S. 125, 136 (1873)).
5. *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037, 1047 (7th Cir. 1995).
6. *Union Pacific*, 296 F.3d at 675.
7. The court noted that it would not "invoke the Pennsylvania Rule to punish a bridge owner who controls a lawful bridge . . . [because] a bridge labeled an unreasonable obstruction is still a lawful bridge." *Id.* at 676 (citing 33 U.S.C. § 511).
8. *I&M Rail Link v. Northstar Navigation, Inc.*, 198 F.3d 1012, 1016 (7th Cir. 2000).
9. *Union Pacific*, 296 F.3d at 677.

International Law Update

The following are a few of the international developments in ocean and coastal law in the year 2002.

Convention on Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific

In February 2002, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama signed a historic environmental agreement. Key provisions of the treaty call for the reduction of sewage and pollutant discharges into the Pacific Ocean and the development of a strategy to deal with oil spills. An action plan for the implementation of the Convention has already been approved. Mexico and Columbia, the two remaining non-signatories in the region, are expected to ratify soon.

The World Summit on Sustainable Development

The goal of the World Summit on Sustainable Development, held in Johannesburg, South Africa, August 26 - September 4, 2002, was to conduct a ten-year review of the 1992 U.N. Conference on Environment and Development. Two main documents were adopted at the Summit: the Plan of Implementation and the Johannesburg Declaration on Sustainable Development. The Plan of Implementation contained several commitments related to the world's oceans, including:

- Maintaining or restoring depleted fish stocks by 2015;
- Elimination of subsidies which contribute to illegal fishing and over-capacity;
- Implementation of the Ramsar Convention and the Global Programme for Action for the Protection of the Marine Environment from Land-Based Sources; and
- Establishing a process under the United Nations for global reporting and assessment for the state of the marine environment by 2004.

The Johannesburg Declaration reaffirms the United Nation's commitment to sustainable development and emphasizes the three pillars of sustainable development: eradication of poverty, changing patterns of consumption and production, and protection and management of the natural resource base. The Declaration highlights the importance of women's empowerment, the indigenous peoples, and human solidarity in acheiving these goals. Both documents are available online at www.johannesburgsummit.org .

Athens Convention Relating to the Carriage of Passengers and their Luggage at Sea

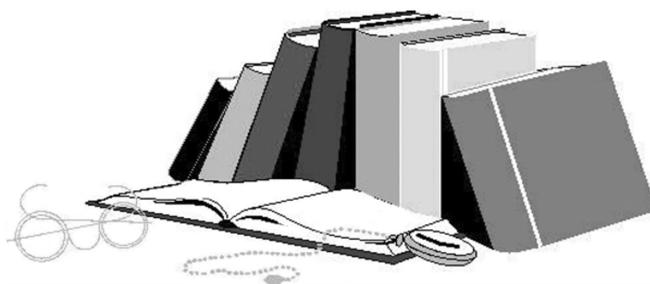
Adopted by the International Maritime Organization in late October 2002, compulsory insurance to cover passengers on ships will become international law. This new instrument will provide for compensation for death and personal injury claims and claims for loss of or damage to luggage and vehicles. The Protocol replaces the existing fault-based liability system with a strict liability system, sets maximum limits for shipping related incidents, and requires that the carrier take out compulsory insurance to cover potential claims. The Protocol allows a State Party to regulate liability limits for personal injury by national law, so long as domestic limits are not lower than those provided by the Protocol.

The "Volga Case" (*Russian Federation v. Australia*), Prompt Release

On December 23, 2002, the International Tribunal for the Law of the Sea issued its judgment in another prompt release case. On February 7, 2002, Australian military personnel arrested the fishing vessel, the *Volga*, and three Spanish crew members for illegally fishing in Australian waters. The *Volga* was boarded in the Southern Ocean around Heard and MacDonald Islands for illegally fishing for Patagonian toothfish, also known as Chilean Sea Bass, an extremely endangered fish. The *Volga* is registered at the Black Sea port of Tagenrog, Russia. In December 2002, the Russian Federation began proceedings in front of the Tribunal for the prompt release of the vessel and crew.

In a prompt release case, the Tribunal is limited to determining whether the bond set by the arresting nation is reasonable under Article 262 of the U.N. Convention on the Law of the Sea. The circumstances surrounding the seizure of the vessel are not examined by the Tribunal. In this case, the Tribunal found that the bond set by Australia at AU$3.3 million was unreasonable, as it included non-financial conditions such as the level of international concern over illegal fishing and the need to secure compliance with Australian laws. The Tribunal set the bond at AU$ 1,920,000, the full value of the vessel, fuel, and fishing equipment and ordered the prompt release of the *Volga* upon the posting of a bond or other security.

Book Reviews



The Lobster Chronicles: Life on a Very Small Island, Linda Greenlaw (Hyperion 2002).

Stephanie Showalter, J.D., M.S.E.L.

Have you ever wondered what it is like to be a lobster fisherman in Maine? Even if that scenario does not rank among your top five daydreams, you should still read Linda Greenlaw's *The Lobster Chronicles.* In this thoroughly enjoyable read, the follow-up to the author's New York Times Bestseller *The Hungry Ocean,* Greenlaw takes the reader along as she struggles to make the transition from offshore swordfisherman to near-shore lobsterman. Deciding to take a break from swordfishing (Greenlaw was featured in Sebastain Junger's *The Perfect Storm* and later portrayed in the film), Greenlaw moves back home to Isle Au Haut (the Island), a tiny island off the coast of Maine in Penobscot Bay with forty-seven full-time residents, half of which are Greenlaw's relatives. *The Lobster Chronicles* is a brief glimpse into a small fishing community fighting to maintain a way of life. The community, although inhabited by strong individuals, is extremely fragile, because the Island's " little piece of America hangs on by a thread to the fate of the lobster." As the lobsters remain elusive throughout the season and more off-island lobster traps are set in traditional Island territory, a gear war becomes a distinct possibility. Seamlessly blending descriptions of fishing gear and techniques with accounts of daily island life, Greenlaw brings Isle Au Haut's colorful cast of characters to life. From the town's efforts to purchase the Island's lighthouse to meetings of the Lobster Association, Greenlaw's experiences with civic duty will strike a cord for anyone who has every lived in a small town. Hilarious and, at times, poignant, Greenlaw's narrative reveals her love for the ocean and her tiny island. A must read for ocean-lovers, lobster fans, and anyone who ever tried to change the path of their life.

Watershed: The Undamming of America, Elizabeth Grossman, (Counterpoint 2002).

Jason Savarese, 2L

In *Watershed*, Grossman reviews various stages of dam removal all over the United States. She tells readers, in epic fashion, how dams in Maine, California, Washington, Oregon, North Carolina, Wisconsin, Colorado, and Montana came to be. Her grand descriptions of the river and neighboring communities leave out no details, and with passages like, "The sunset is liquid peach as the light fades and insect hum begins to rise," the reader feels as though they were there, the mark of a true storyteller. She discusses current problems with existing dams, the positive outcomes of rivers recently freed from their blockades, as well as how some citizens and Native American tribes are approaching the delicate, politically charged issue that is river restoration. Problems such as the public's "ownership" of the navigable waters versus privately-owned dams, flooding, water temperature changes, public safety, extinction, toxic pollution from silt buildup at dams, and the excessive buildup of silt in dam reservoirs and its impact on downstream deltas and beaches are discussed in each region. The changing attitudes of local, regional, national, and even military leaders towards "dam busting" becomes quite evident, especially in light of the reduced or altogether eliminated need for the dams Grossman examines. Many of these dams no longer produce enough hydroelectric power, flood control, or drinking water to justify their continued existence. The costs to maintain and repair these dams are generally several times greater than removal costs, which are usually shared between several private, state, and federal agencies. Recommended for anyone who has ever canoed a river, fished a water body, or those who enjoy a well written, entertaining narrative on a heated, contemporary, political issue.

Coast to Coast
And Everything In-Between

Private laboratories across the United States are the focus of a disturbing new trend, the falsification of environmental testing results. **Falsification of test results** for underground storage tanks, drinking water, gasoline, and soil seriously hamper the federal government's ability to protect the public and enforce environmental regulations. Over the past several years, the U.S. Department of Justice and the EPA have prosecuted dozens of laboratories and laboratory employees, obtaining several convictions. Without accurate test results, the EPA and other government agencies are left in the dark regarding what exactly is in products such as food, water, and gasoline.

Do you ever daydream about escaping under the sea or frolicking with otters while trapped inside your office? The **Monterey Bay Aquarium's** new web cam may be able to fulfill that fantasy, albeit in a voyeuristic way. The Aquarium's five cams, Kelp Bed Cam, Penguin Cam, Otter Cam, Outer Bay Cam, and Monterey Bay Cam, are streamed live daily from 7 a.m. to 7 p.m. PST. So the next time your mind starts to wander, take a break to watch sharks swim or giant kelp sway with the current. The Aquarium's web cams can be viewed at http://www.mbayaq.org .

Despite losing in district court, conservationists are taking their case against **New England scallop dredging** to a federal appeals court. Oceana, a Washington D,C.-based environmental group, filed suit last year claiming that dredging practices in scallop fishing grounds off Cape Cod are damaging marine life. The group claims that groundfish, such as cod, are threatened by accidental harvesting and that habitat is damaged when the seafloor is dredged. Oceana has also asked the New England Fishery Management Council to close 75 percent of the area where scallop dredgers currently work. The Council is expected to recommend a rotational management scheme to reduce habitat damage instead.

Around the Globe

The Peace Corps, with assistance from the Coastal Resources Center of Rhode Island and a local New York Rotary Club, is spearheading a campaign to prevent reef destruction in the **South Pacific**. The campaign will focus on educating the local populations regarding their dependence on the reefs, reef value, and reef ecology. As part of this campaign, the Snorkel Bob Foundation donated 420 skin dive sets valued at $45,000 to a number of communities in the South Pacific, including Palua, Tonga, and Somoa. The dive sets will allow residents to explore the reef communities surrounding their islands and observe first hand the devastation wrought by humans.

According to the **International Maritime Bureau** (IMB), piracy is on the rise. While they may not wear eye patches and have peg legs, modern pirates are violent and hijacking merchant vessels, such as tugs and fishing boats, at an increasing rate. Indonesia was the victim of the highest number of attacks in 2002 at 103, while South American countries experienced 25 incidents and India 18. Vessels have also been hijacked off the coast of Somalia by armed militiamen. The Director of the IMB has called for coastal states to allocate the resources necessary to adequately patrol their waters.

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*, contact: the Sea Grant Law Center, Kinard Hall, Wing E, Room 262, 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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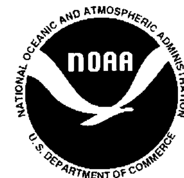

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