The SandBar

Volume 10:1, January 2011

Legal Reporter for the National Sea Grant College Program

Court Upholds L.A. Port Program

The Plight of the Blue Mud Shrimp

ESA inadequate for invasive species threats

From the Editor

Greetings from the National Sea Grant Law Center! This winter, the Law Center is hard at work on our publications, presentations, and answering your legal questions. In fact, this issue of *The SandBar* features an article based on a research request received by the Law Center. A researcher contacted the Law Center with questions regarding the protection of a species, *Upogebia puget-tensis* or blue mud shrimp, which has been decimated by an aquatic invasive species. Through the Advisory Service, the Law Center was able to provide legal research regarding the availability of protection for the species under the Endangered Species Act.

The Advisory Service is a legal research service provided free of charge to the Sea Grant College Program and its constituents. While the Law Center is prohibited from providing legal advice or becoming involved in litigation, Law Center attorneys provide the Sea Grant community and its constituents with the background information needed to understand the law. Contact the Law Center with any questions about the service.

As always, thanks for reading *The SandBar*!

Terra

Now, follow us on Facebook at:
http://www.Facebook.com/pages/Oxford-MS/National-Sea-Grant-Law-Center/129712160375306?v

Our Staff

Editor:
Terra Bowling, J.D.

Research Associates:
Lindsey Etheridge
April Killcreas
Mary McKenna

Production & Design:
Waurene Roberson

Ocean & Coastal Law Fellow:
Nicholas Lund, J.D.

ISSN 1947-3966 NSGLC-11-02-01 *January 2011*
ISSN 1947-3974

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:

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

The SandBar is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under award NA090AR4170200, 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 statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Sea Grant Law Center or the U.S. Department of Commerce.

Recommended citation: Author's Name, *Title of Article*, 10:1 SandBar [Page Number] (2011).

Cover and contents page photographs of portions of the Port of Los Angeles courtesy of Curt Sletten /Airtight Images.com.

The SandBar

Contents

The Plight of the Blue Mud Shrimp

Nicholas Lund, J.D.

In addition to heaps of deserved praise, the Endangered Species Act (ESA) has endured its fair share of criticism. Among the most potent claims are that the Act is unable to respond quickly enough to species facing a rapid decline and that one of the Act's major tools for protection, critical habitat designation, is inadequate for certain species, especially those at risk from aquatic invasive species. Dr. John Chapman, a scientist at Oregon State University, found both of these criticisms to be true when he asked the National Sea Grant Law Center to examine the feasibility of listing a creature he studies, the blue mud shrimp, under the ESA. With little hope of obtaining federal protection for the shrimp, Dr. Chapman has found himself in the position that the ESA was designed to prevent: having to stand by and watch a species go extinct.

The Case of the Blue Mud Shrimp

In the late 1980s, scientists noted the appearance of a small isopod in the waters off Washington state. Though originally thought to be a native species, the small crustacean was actually new to American waters, having been brought from the Asian coast in ships' ballast water. The isopod lay dormant until 1997 when scientists, including Dr. Chapman, began to notice the animal attached to the sides of most of the reproductive-sized blue mud shrimp, *Upogebia pugettensis*. It was quickly realized that the isopod, *Orthione griffenis*, was bad news: attaching itself to the shrimp's gill chamber, the parasite sucks the shrimp's blood, leaving its host alive but unable to reproduce.

Because the castrated shrimp were left alive to compete with unaffected shrimp for food and space, the isopod invasion was soon recognized to be potentially devastating to blue mud shrimp populations. Not surprisingly, then, with the 1997 boom in the *O. griffenis* population came a parallel crash in *U. pugettensis* numbers. California populations of the shrimp appear to be either extinct or at <0.01% of their former abundances. The largest remaining populations, which Dr. Chapman has been studying in Oregon, have declined by around 18% per year since 2002. Faced with what appears to be the imminent extinction of *U. pugettensis*, Dr. Chapman contacted the National Sea Grant Law Center to inquire about protection from the country's most famous wildlife protection law: the Endangered Species Act.

ESA Protection

The Law Center quickly found, however, that even if a petition to list the blue mud shrimp on the ESA was successful, the Act might not be able to provide much protection for the shrimp. Passed with a primary aim to protect species from direct human harms like commercial exploitation and loss of habitat to development, the ESA appears much less effective at combating the aggressive takeovers of human-aided invasive species, especially when those species live in the water. The experience highlighted the need for better legal protection against invasive species infestations.

Passed in 1973, the Endangered Species Act (ESA) is designed to protect imperiled species from extinction as a "consequence of economic growth and development untempered by adequate concern and conservation."[1] The centerpieces of the ESA are the endangered species list and the threatened species list. Once listed, the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) and/or the NOAA Fisheries Service (depending on the species at issue) to ensure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of designated critical habitat of the species. The ESA further prohibits the "taking" of a listed species and severely restricts trade related to the species.

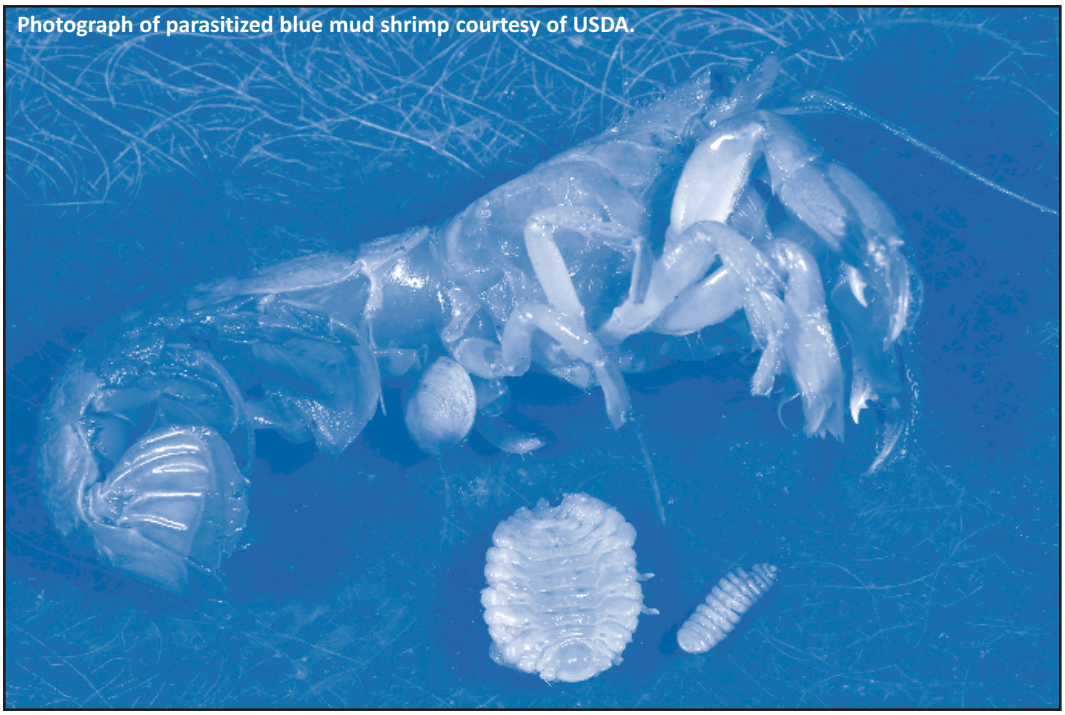
Two major protections are extended to listed species: critical habitat designation[2] and recovery plans.[3] Critical habitat is to be designated within one year of the species being listed under the Act. Once designated, federal agencies are prohibited from authorizing, funding or carrying out any action likely to result in the destruction or adverse modification of the critical habitat. The area designated as critical habitat can be publicly or privately-owned, but the restrictions on destruction or adverse modification are, similar to NEPA, restricted to those with federal involvement such as a permit or approval. Habitat designations can help once they're made, and it has been shown that species receiving critical habitat designations are twice as likely to recover.[4]

Despite critical habitat being a centerpiece of Endangered Species Act protection, its designation would do almost nothing to protect the blue mud shrimp from *O. griffenis* infestation. For most other species, critical habitat offers protection by putting the brakes on human encroachment. Aquatic isopods, though, aren't slowed by human boundaries. Because the isopod can move freely through the water (though how it travels is poorly understood, it is now found all along the Pacific coast from California to Canada), designating an area as critical habitat would not do anything to prevent the isopod from infecting shrimp there.

In addition to a critical habitat designation, NOAA Fisheries (which would be responsible for the ocean-dwelling blue mud shrimp if it were listed under the ESA) would also be required to produce a recovery plan for the blue mud shrimp if it were listed. The statute requires that, at a minimum, these recovery plans include: a description of site-specific management actions necessary to recover the species; objective measurable criteria which, when met, would result in a determination that the species be taken off the list; and, estimates of the time and costs required to achieve the plan's goal.[5]

For the blue mud shrimp, the problem with the ESA's recovery plans is that they take too long to develop. While the statute does not specify a timeframe for recovery plan development, the agencies have had a policy that plans should be developed within two-and-a-half years of a species listing.[6] In reality, though, the wait is much longer, and many species have to wait more than a decade for a recovery plan.[7] This timeframe is unacceptable for a species that has gone extinct in much of its range since just 1997.

Complaints about delays in the ESA process are not new. At least forty-two species became extinct between the time they were proposed for protection and when they were finally listed.[8] Hundreds of species suffered lengthy delays between the time they were first identified as declining and when they were finally given ESA protection, making their recovery more difficult and more expensive, if possible at all.[9] While these delays affect all species, the double-whammy of delay and the inadequacy of critical habitat designations are unique to those species, like the blue mud shrimp, under siege from aquatic invasive species. The experience left Dr. Chapman looking in other areas for protection; perhaps ballast water legislation could provide funds for impacts of invasive species transported in the past.



Photograph of parasitized blue mud shrimp courtesy of USDA.

An Answer in Ballast Water Legislation?

A more logical source of protection for species at risk from aquatic invasive species might be found in legislation seeking to regulate ballast water to prevent the introduction of new species. For years there have been calls to strengthen standards for the cleanliness of ballast water discharged into American waters from foreign ships. With Congress slow on passing legislation (likely fearing harm to the shipping industry), the U.S. Coast Guard has taken the lead by working through internal rulemaking to create a higher standard of protection. While current rules only require mid-ocean ballast water exchanges – a technique criticized because of the amount of organism-containing sediment left on the bottom of the ship's ballast tank – new rules would mandate an upper limit for the number of organisms in each ship's ballast and provide mechanisms to approve ballast-cleaning equipment.[10]

The Environmental Protection Agency has also recently addressed ballast water discharge. In early 2009, the EPA began requiring ships to obtain Vessel General Permits to comply with the Clean Water Act (CWA). Ballast water discharges had previously been excluded from compliance with the CWA, but are now required to meet a series of Best Management Practices and reporting requirements.[11]

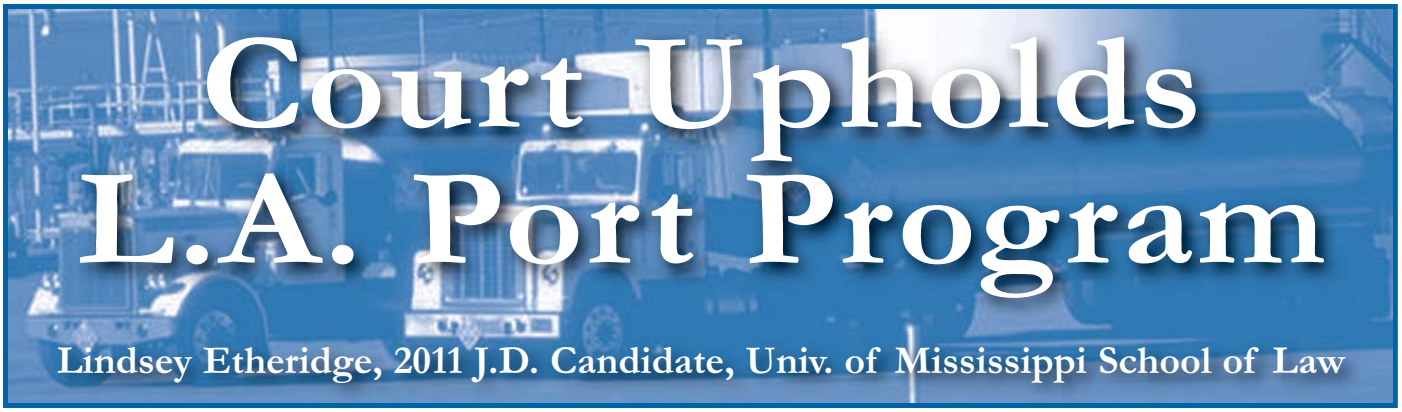
While the momentum towards tighter regulation of ballast water is encouraging, cleaner discharges alone would do nothing to protect the blue mud shrimp from an animal that arrived in ballast water two decades ago. One potential solution could be the creation of recovery funds within any newly created ballast water or invasive species legislation. Such funds are common in environmental management, akin to conservation trusts existing in many states that are funded by the money generated from hunting and fishing licenses. In the case of ballast water legislation, proceeds from newly required permits or fees could be dedicated to the eradication of invasive species or the protection of those species threatened. Such a program would likely be a quicker and more effective source of protection than the ESA.

No Time to Wait

The blue mud shrimp cannot afford to wait for the passage of new legislation, however. The inapplicability of the ESA and the lack of other options have left Dr. Chapman unsure of where to turn. Oregon's state Endangered Species Act is equally unhelpful, as it specifically excludes invertebrates from protection. Even though Dr. Chapman has outlined a plan that could potentially save the shrimp – which involves culturing some of the remaining unaffected shrimp in isolation until the isopod dies off for lack of hosts and then reintroducing the shrimp. However, he lacks the support to implement this plan quickly with only ad-hoc and volunteer efforts. Some funded organized research is critical to develop and test such long-term culture and reintroduction methods. While time may be running out for the blue mud shrimp, the inadequacy of the ESA means that the need for better protection from aquatic invasive species remains.

Endnotes

1. 16 U.S.C. § 1531(a)(1) (2010).
2. *Id.* at § 1536(a)(2).
3. *Id.* at § 1533(f).
4. Martin F. J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, BioScience 55(4):360-367 (2005).
5. 16 U.S.C. § 1533(f) (2010).
6 Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act, 59 Fed. Reg. 34272 (July 1, 1994).
7. *See* Species and Populations With Recovery Plans, U.S. Fish & Wildlife Service, http://ecos.fws.gov/tess_public/TESSWebpageRecovery?sort=1 (last visited Dec. 1, 2010).
8. D. Noah Greenwald et al., *The Listing Record*, *in* The Endangered Species Act at Thirty: Volume 1 51, 51 (Dale D. Gobel et al eds., 2006).
9. *Id.*
10. *See* U.S. Coast Guard Ballast Water Management Regulations, http://www.uscg.mil/hq/cg5/ cg522/cg5224/bwm.asp (last visited Dec. 1, 2010).
11. *See* National Pollutant Discharge Elimination System (NPDES) – Vessel Discharges, http://cfpub.epa.gov/npdes/home.cfm?program_id=350 (last visited Dec. 2, 2010).



Photograph courtesy of ©Nova Development Corp.

Court Upholds L.A. Port Program

Lindsey Etheridge, 2011 J.D. Candidate, Univ. of Mississippi School of Law

On August 26, 2010, a California district court decided a case in which the American Trucking Association (ATA) brought suit against the Port of Los Angeles (POLA or Port), challenging part of its new Clean Truck Program.[1] The program and POLA's Clean Air Action Plan were implemented in an effort to reduce all Port-related emissions, including those from drayage trucks, and improve air quality around the Port. The Clean Truck Program was successful in its first year, reducing the rate of truck emissions by an estimated 70 percent.

Background

The Port of Los Angeles is the leading container port in the United States in terms of shipping container volume and cargo volume. The cargo handled at the Port is usually transported in shipping containers, which can be offloaded directly from ships onto railcars or trucks for transfer inland. The movement of cargo between a marine terminal and a local destination by truck is commonly referred to as "drayage."

On July 28, 2008, ATA challenged part of the Clean Truck Program, specifically, the Los Angeles Concession Agreement. The Concession Agreement requires drayage trucks to register and comply with a number of requirements in order to become "concessionaires" and be allowed to continue providing services at POLA. ATA claimed that the Agreement is preempted by the motor carrier provision of the Federal Aviation Administration Authorization Act (FAAA Act) and that the Agreement is preempted because it places an undue burden on and discriminates against the right of motor carriers to engage in interstate commerce.

Two days after it filed suit, ATA asked the district court to issue a preliminary injunction to stop the Port from implementing the mandatory Concession Agreement. The court denied the injunction, finding that ATA would likely lose its suit and also that ATA had not shown a likelihood of irreparable harm if the Agreement were allowed to go forward. ATA appealed the decision to the Ninth Circuit Court of Appeals which reversed and remanded the case for further proceedings. The district court then issued an order granting in part and denying in part the preliminary injunction so that only certain provisions of the Agreement were enjoined and others were allowed to proceed. The Ninth Circuit affirmed this decision with one limited exception. The district court was then ready to rule on ATA's challenges to the Concession Agreement.

ATA's Challenges to the Concession Agreement

ATA challenged five provisions of the Concession Agreement:

1. The Employee Driver Provision requiring that all drivers of drayage trucks be employees of motor carriers and not independent drivers;
2. The Off-Street Parking Provision requiring that motor carriers develop an off-street parking plan for their trucks to park off public streets and away from residential areas;
3. The Maintenance Provision requiring that motor carriers prepare a maintenance plan and be responsible for vehicle condition and safety;
4. The Placard Provision requiring that all trucks display a placard referring the public to a phone number to report concerns regarding emissions, safety, or security compliance; and
5. The Financial Capability Provision requiring that motor carriers prove that they possess the financial capability to perform their obligations under the Concession Agreement.

Preemption by the FAAA Act

The goal of the FAAA Act is to deregulate the motor carrier industry and to help ensure that transportation rates,

routes, and services rely on competitive market forces.[2] The Act contains a broad preemption statute which declares that a state may not enact or enforce a law or regulation that is related to a price, route, or service of any motor carrier.[3] Relation to price, route, or service is found where "the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services."[4] Even if the law does not directly regulate motor carriers, preemption will apply if the effect of the regulation would be to make carriers offer different services than what the market would dictate.

The court found that the FAAA Act preempts both the employee driver provision and the off-street parking provision. The employee driver provision affects motor carriers' routes and services by prohibiting trucks driven by independent operators from providing drayage services at POLA. The provision also significantly affects the costs of operating drayage services, causing the need to increase prices. The off-street parking provision affects prices because providing off-street parking causes motor carriers to incur increased costs, which are passed on to customers in the form of higher prices. The provision also affects routes by changing where trucks are located when they are not draying cargo. The court found that the FAAA Act does not preempt the maintenance provision, the placard provision, or the financial capability provision because the evidence showed that these provisions have no effect on prices, routes, or services.

The court then turned to the exceptions to preemption by the FAAA Act. The Port of Los Angeles argued that the provisions fall under three exceptions: the safety exception, the tidelands exception, and the market participant exception. The court considered each of the five provisions in light of each exception. Although the court had found that some of the provisions are not preempted by the FAAA Act and therefore need no exception, it made findings as to how the exceptions would apply to these provisions if they had been found to be preempted by the Act.

The Safety Exception

The FAAA Act specifically states that its preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles."[5] In order to fall within the safety exception, a statute, regulation, or provision must be "genuinely responsive to safety concerns," and not, for example, an economic regulation disguised as a safety regulation. The regulation must be directed at motor carrier safety and not just one that might incidentally increase safety.[6]

The court found that neither the employee driver provision nor the off-street parking provision falls under the safety exception because both are addressed at concerns unrelated to motor carrier safety. The primary reason for the employee driver provision is to increase efficiency and regulate the drayage market. The effect of the provision is the unemployment of thousands of independent contractors, including small businesses, who drive drayage trucks, allowing only employees who work for big companies to drive the trucks. While the evidence showed that the off-street parking provision would increase safety in residential areas by removing trucks from residential streets, the main reason for the provision is to appease residents in the area who are unhappy with the presence of trucks in their neighborhoods

The court found that the maintenance provision and the placard provision would fall under the safety exception. Requiring routine truck maintenance is genuinely responsive to safety concerns and will help to ensure that drayage trucks operate properly and safely. The placard provision is primarily related to safety because the placards provide the public with a means to report unsafe driving or other truck safety concerns. Finally, the court found that the financial capability provision would not fall under the safety exception. The provision may have a safety effect "in that a financially viable motor carrier may be less likely to cut corners regarding safety out of economic necessity."[7] However, the provision was mainly enacted to ensure that the motor carriers are financially stable and have the means to maintain their trucks.

The Tidelands Exception

The Port of Los Angeles argued that the provisions of the Concession Agreement fall under the tidelands exception because the Port sits on the sovereign tidelands of San Pedro Bay. The court quickly struck this argument down, saying that the Supreme Court had held that a state's control over navigable waters such as tidelands is not absolute. The federal government's power to regulate interstate commerce over these types of waters supersedes the state's control.

The Market Participant Exception

The market participant exception applies when a state's actions, rather than being regulatory, are instead

proprietary in nature. If the state's role in a decision is as a market participant rather than as a regulator, its decision is not generally preempted by statute. A state's action is proprietary if it "essentially reflect[s] the [governmental] entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances."[8]

ATA argued that the Concession Agreement does not fall under the market participant exception because POLA does not itself purchase drayage services or directly participate in the drayage market. The court found that a state entity neither has to buy anything in the market nor directly participate in the market in order to act as a proprietor. The Port's participation in the port services market is enough to make its management of the drayage services proprietary, as long as it advances POLA's economic interests as a provider of port services.[9]

The court found that the Port adopted the Concession Agreement in order to sustain and promote Port operations and to allow the Port to manage its property and facilities, as any private operator would. POLA enacted the Clean Truck Program in response to its expansion projects being stopped because they created significant air pollution. This Port-generated air pollution interfered with Port growth and endangered the Port's economic viability. POLA's adoption of the Concession Agreement was a "business necessity" in order to allow it to expand, and therefore its actions were economically driven. The court then looked at each of the five contested provisions to determine whether each one qualified as a proprietary action. After considering each one, the court found that all five serve as a requirement for Port expansion and are therefore proprietary and fall under the market participant exception.

Preemption Because of Undue Burden on Interstate Commerce

ATA argued that the Concession Agreement places an undue burden on interstate commerce and is therefore preempted by the Dormant Commerce Clause, which "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[10] ATA also argued that the Agreement discriminates against the right of motor carriers to engage in interstate commerce because the FAAA Act prohibits additional regulations to be placed on motor carriers to be able to operate within a state beyond those already imposed by the Secretary of Transportation.

The court found that ATA was wrong on both claims. While some provisions of the Concession Agreement, such as the employee driver and off-street parking provisions, increase costs to motor carriers, they do not burden out-of-state competitors. The increased costs would likely result in increased prices for drayage services, but drayage trucks from POLA rarely travel to destinations outside of California. The higher prices, therefore, would hardly affect interstate commerce. In addition, the Concession Agreement does not impose additional regulations on when motor carriers may operate within a state; it only requires motor carriers to comply to be able to operate at POLA. They may still operate at any other port in California.

Conclusion

Based on all of these findings, the court held that the Concession Agreement, and specifically the five contested provisions, could go forward. The Clean Truck Program is expected to reduce Port truck emissions by over 80 percent by 2012. POLA officials estimated that by spring 2010, between 6,500 and 7,000 trucks serving the ports would meet or exceed the EPA's 2007 heavy duty truck emissions standards.

Endnotes

1. Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 2010 U.S. Dist. LEXIS 88134 (Aug. 26, 2010).
2. *Id.* at *51-52.
3. 49 U.S.C. § 14501(c)(1) (2010).
4. Tocher v. City of Santa Ana, 219 F.3d 1040, 1047 (2000).
5. 49 U.S.C. § 14501(c)(2)(A).
6. *Am. Trucking*, 2010 U.S. Dist. LEXIS 88134 at *61 (citing City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424, 442 (2002)).
7. *Id.* at *69.
8. *Id.* at *73 (quoting Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist., 498 F.3d 1031, 1041 (9th Cir. 2007)).
9. *Id.* at *74-75, 79.
10. *Id.* at *95 (citing New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988)).

NPDES Permit Required for Logging Road

April Killcreas, 2012 J.D. Candidate, University of Mississippi School of Law

After a long battle between an environmental organization, the Oregon Department of Forestry, and several timber companies over the discharge of sediment from logging roads into nearby rivers and lakes, the Ninth Circuit Court of Appeals ruled on whether the sediment in stormwater runoff was a pollutant under the federal Clean Water Act (CWA).[1] The environmental organization, Northwest Environmental Defense Center (NEDC) argued, in particular, that the increased sediment discharged into the South Fork Trask River and the Kilches River from logging roads destroyed salmon spawning areas and impaired the quality of the water. In response, the Forestry department and timber companies maintained that the logging activities were exempt from the National Pollution Discharge Elimination System (NPDES) permitting requirements. Taking these arguments into consideration, the Ninth Circuit ultimately rejected the defendants' position and held that logging companies must have an NPDES permit before discharging polluted stormwater into protected waters.[2]

Background

The Oregon Department of Forestry owns two roads – the Trask River Road and the Sam Downs Road – in the Tillamook State Forest in Oregon. Located parallel to the South Fork Trask River and the Kilches River, these roads are primarily used by timber companies to access their logging sites and remove harvested timber from the forest. Prior to using the roads to haul the trees from the forest, the timber companies entered into contracts with the State of Oregon, which required the companies not only to maintain the roads but also to ensure that the roads' stormwater collection systems were in working order.

Each of these roads has its own system of ditches, culverts, and channels that collect stormwater runoff and drain it away from the road and into the nearby rivers. The stormwater runoff collected by this complex drainage system contains a large amount of sediment. The predominant source of this sediment in the stormwater drainage system is from the persistent timber hauling that occurs on these two roads. These roads are predominantly constructed of dirt and gravel, which is then crushed into smaller pieces when the timber trucks drive along the roads. This sediment is washed into the drainage system and, from there, into the rivers, where plaintiffs claim it is having an adverse impact on the lakes' salmon and trout populations. According to the plaintiffs, once this sediment flows into the adjacent rivers, the water becomes less suitable as a breeding ground for salmon and trout by reducing the oxygen levels in the water and burying insects that provide a food source for the fish

NEDC filed its complaint against the timber companies and the Oregon Department of Forestry under the citizen suit provision of the CWA, alleging that the defendants violated the Act by failing to obtain NPDES permits for the sediment-laden discharge into the rivers. In March 2007, the district court dismissed the complaint on the grounds that NEDC had failed to state a claim against the defendants. NEDC appealed to the Ninth Circuit.

Clean Water Act

The CWA requires NPDES permits for any discharge of a pollutant into navigable waters from a point source.[3] A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit."[4] The Act does not regulate pollution discharged from non-point sources, which are not expressly defined in the statute. Though non-point

sources are not statutorily defined, case law has, over the years, provided examples of the types of sources that constitute non-point sources. For instance, stormwater runoff that dissipates from the land in a natural, unimpeded manner without being collected and channeled does not constitute a point source discharge.[5] However, if stormwater runoff drains into a system of ditches, channels, or culverts prior to being discharged into navigable waters, then this runoff will be classified as a point source.[6]

The Silvicultural Rule

The defendants maintained that the stormwater runoff from these two logging roads is a non-point source discharge, despite the fact that the runoff is first collected in a drainage system of ditches and culverts prior to being released into the adjacent rivers. The defendants' argument relied on the Silvicultural Rule, a rule promulgated by the EPA under the CWA to regulate discharges relating to silvicultural, or forestry-related, activities. The Rule lists certain activities that are considered to be non-point sources. These activities include timber harvesting and its associated road maintenance as non-point source activities which are thus exempt from the NPDES permitting requirements. Consequently, the defendants maintain that the runoff in question in this case should be considered a non-point source because, under the Silvicultural Rule, the runoff results from their timber harvesting activities and the road maintenance resulting from these activities

The Ninth Circuit rejected this argument, noting that the CWA prohibits the discharge of any pollutant from *any* point source, which, as the CWA specifically states, includes any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, or conduit.[7] Accordingly, the Ninth Circuit held that, as long as there is natural runoff, the Silvicultural Rule will control; however, if a drainage system is in place that funnels runoff through the type of conduits and channels contemplated by Section 502(14) of the CWA, then this section will trump the Silvicultural Rule.[8] Ultimately, this holding means that the defendants must require a NPDES permit for discharging stormwater runoff into these rivers from logging roads, because the runoff has been collected and channeled in a drainage system of ditches and culverts.

. . . defendants must require a NPDES permit for discharging stormwater runoff into these rivers from logging roads . . .

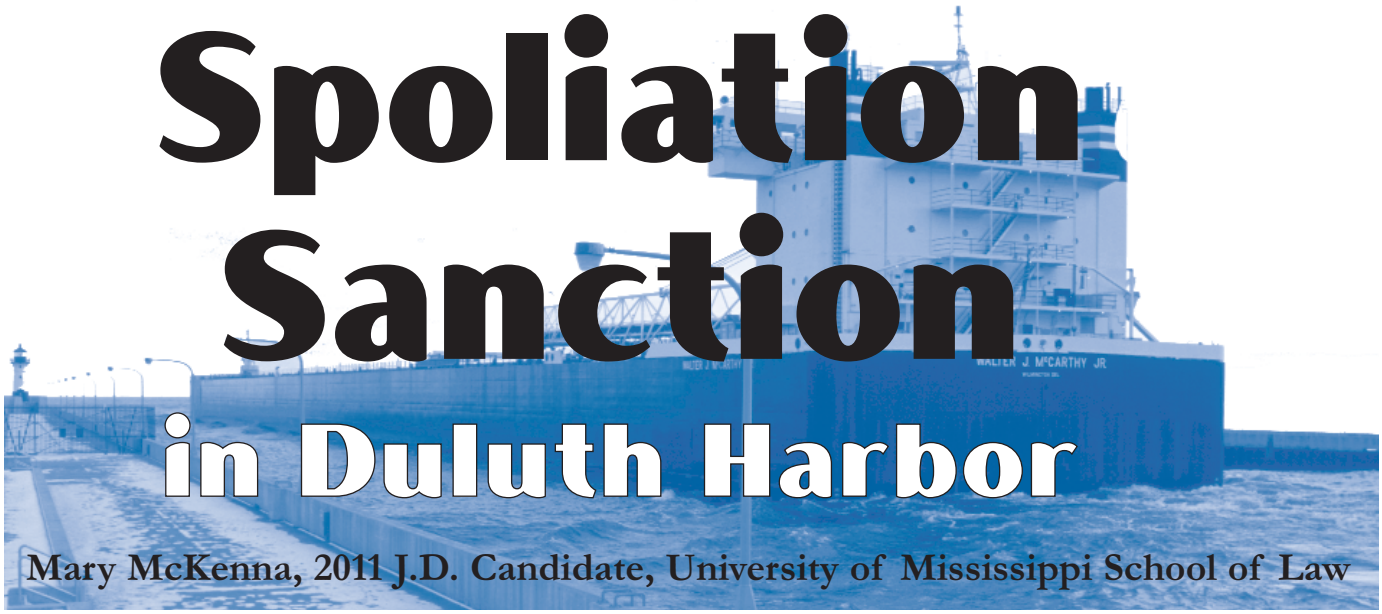
Section 402(p) of the CWA

The defendants made the alternative argument that no NPDES permit is required for stormwater runoff under section 402(p) of the CWA. Pursuant to Section 402, EPA created rules for permitting stormwater runoff discharges from industrial activities, requiring an NPDES permit for such activities but exempting activities mentioned in the Silvicultural Rule. The Ninth Circuit rejected EPA's exemption and found that logging is an industrial activity as described in section 402(p). Because logging is an industrial activity, section 402(p) requires that an NPDES permit be granted before any discharges occur.

EPA's rules define "stormwater discharge associated with industrial activity" to include "immediate access roads" used to convey raw or manufactured materials.[9] The defendants argued that these logging roads are not, in fact, immediate access roads because they are not confined to the actual logging site, they are not "primarily dedicated" for the logging companies' use, and because they are not typical industrial facilities. The Ninth Circuit rejected each of these arguments. The regulations indicate that immediate access roads are those that are primarily dedicated for use by the industrial facility, meaning, in this case, the logging companies. The Ninth Circuit maintained that the roads are primarily dedicated for the logging companies' use because without the logging company, the roads would not exist. Thus, the roads meet the definition of an immediate access road. The court also noted that, though the logging sites may not be traditional industrial sites, the regulations defining these industrial facilities are broad enough to include the sites. Thus, because the logging sites are industrial facilities and the roads are immediate access roads, the logging companies must have the required NPDES permit before they discharge polluted stormwater into Oregon's rivers and lakes.

See NPDES, page 14

Spoliation Sanction in Duluth Harbor



Mary McKenna, 2011 J.D. Candidate, University of Mississippi School of Law

In a case regarding a crewman's injury in Duluth Harbor, the Minnesota Court of Appeals ruled that a spoliation sanction against a vessel owner was inappropriate.[1] The court reversed and remanded for a new trial on liability and the apportionment of causal fault. Additionally, the appellate court ruled that federal maritime law regarding premises liability should have been applied instead of state premises-liability law. Therefore, the court directed that at the new trial, the jury be instructed on the federal maritime premises-liability law regarding the liability of the vessel owner.

Background

Daniel J. Willis was employed as a crewman on the vessel *Joseph L. Block* (*Block*) when he slipped and fell on a dock in Duluth harbor, injuring his knee. On August 27, 2004, the *Block* arrived at a dock owned by Duluth, Missabe & Iron Range Railway company (DM & IR). The dock had not been cleaned prior to the *Block*'s arrival and was covered in a slime of water and a milky limestone. Willis was on the dock handling one of the *Block*'s mooring lines used to secure the vessel when he slipped and fell. His knee hit both the dock and some taconite pellets that had been obscured by the milky limestone mixture. Willis was eventually diagnosed with deep vein thrombosis stemming from the injury to his knee.

Willis sued his employers, Indiana Harbor Steamship Co. and Central Marine Logistics, Inc., under the Jones Act. He claimed entitlement to "maintenance and cure," as well as additional compensation for his injuries under a negligence theory. He later amended the complaint to add DM & IR, the dock owner, as a direct defendant and asserted claims against ArcelorMittal USA, Inc., the *Block*'s charterer, and ArcelorMittal Minorca Mine, Inc., the owner of the manufacturing facility for which the cargo of the *Block* was destined. The trial court deemed all defendants except DM & IR a "unitary enterprise" and aggregated their fault as "vessel defendants."

The jury returned a verdict in favor of Willis in the total sum of $1,818,898, finding that Willis was entitled to compensation for $281,468 in past lost wages, $50,000 for past pain and suffering, $962,430 for future lost wages, $500,000 for future medical costs, and $251,000 for future pain and suffering. The jury apportioned 85% of the causal fault for the accident to the vessel defendants, 7.5% to DM & IR, and 7.5% to Willis. The vessel defendants appealed.

Spoliation

Willis's accident occurred on a Friday. Although Central Marine Logistics, Inc. was informed of the accident that Friday afternoon, it failed to report it to DM & IR until Monday. Due to this late notice, the trial court imposed a spoliation sanction against the vessel defendants because the condition of the dock on which Willis's injury had occurred was not preserved.

The term "spoliation" generally refers to the destruction of relevant evidence by a party.[2] Regardless of intent, disposal of evidence may be subject to a spoliation sanction when a party knows or should know that the evidence should be preserved for pending or future litigation.[3] As a spoliation sanction, Minnesota permits the jury to draw an unfavorable inference from

the failure to produce evidence in the possession and under the control of a party to litigation.[4]

The trial court justified the spoliation-based negative-inference jury instruction by explaining that the fact of the fall and the condition of the dock at the place and time of the accident were within the exclusive knowledge—and therefore the exclusive control and possession—of the vessel defendants. Because evidence showed that the vessel defendants failed to notify DM & IR of the injury when it occurred, DM & IR was prejudiced; it could not inspect or document the location of Willis's fall the following Monday because the conditions of the dock regularly change.

The appellate court disagreed. Physical control is necessary for a spoliation sanction. As nothing in the record indicated that the vessel defendants had any control over the dock or its condition, or when the dock was cleaned, they could not be subject to a spoliation sanction for changes to the condition of the dock after the accident. Because the only party who had control over the dock, or would have cleaned the dock and thus destroyed the spill evidence, was DM & IR, the court of appeals concluded that the sanction for spoliation against the vessel defendants was not authorized.[5] In short, the trial court had erred in granting a spoliation sanction for the destruction of evidence that was never in the vessel defendants' control.

Furthermore, the appellate court held that the very granting of the sanction placed the court's authority behind the negative inference and allowed the jury to draw an unfavorable inference against the vessel defendants during deliberation.[6] The court, therefore, concluded that the negative-inference instruction had prejudiced the vessel defendants' substantial right to a fair trial.

Because the trial court was unauthorized in its granting of the spoliation sanction and because the negative-inference jury instruction could not be deemed harmless error, the appellate court reversed the jury's apportionment of liability. Accordingly, the court remanded for a new trial on liability and the apportionment of the causal fault.

Minnesota premises-liability v. federal maritime law

The trial court determined the liability and apportionment based on Minnesota premises-liability law rather than federal maritime law. Generally, state courts are bound to apply federal maritime law in cases brought under the Jones Act. Nevertheless, this general rule is inapplicable to claims asserted against a dock owner for injuries sustained on a dock; in other words, federal maritime law does not govern pier-side accidents caused by a stevedore's pier-based equipment.[7] The appellate court, however, found this exception inapplicable in the instant case because the issue was not *just* whether DM & IR, the dock owner, was liable, *but also* whether the vessel defendants were liable.

When injury is caused by a vessel, admiralty law applies regardless of whether the injury occurred on navigable waters or land.[8] Moreover, the case was brought under the Jones Act, which specifically states that the laws of the U.S. apply to Jones Act claims. The appellate court therefore held that the federal maritime standard of premises liability applied and that the trial court had incorrectly instructed the jury on Minnesota premises-liability law regarding the liability of the vessel defendants.

Past wage loss, future earnings, and future medical expenses

The appellate court, however, affirmed the jury's award of damages for past wage loss and future earnings because the amounts were not significantly outside the range testified to by financial experts. The court similarly upheld the award of future medical expenses because the amount was well below the range testified to by financial experts and a registered nurse who was also a life-care planner.

Determination of collateral sources

Under admiralty law, the owner of a vessel has a duty to compensate a seaman with "maintenance and cure" payments if injured in the service of the vessel; these payments are additional to any damages for negligence the seaman might win under the Jones Act.[9]

At trial, vessel defendants sought a collateral-source offset under a Minnesota statute that essentially prohibits a plaintiff from recovering money damages from the defendant if the plaintiff has already received compensation from certain third parties.[10] The trial court concluded that there was nothing to offset because all of the vessel defendants' prior payments to Willis (totaling $200,339.37) were properly characterized as maintenance and because Willis received no award for past medical expense.

On appeal, vessel defendants argued that the award of past wages should be reduced by $187,123.37

because that amount constituted supplemental-wage compensation, not maintenance, as the union contract established the maintenance and cure rate at only $8 per day. In essence, the vessel defendants argued that $187,123.37 constituted double payment. The appellate court, however, affirmed the trial court's finding that vessel defendants' pretrial payments were maintenance, given that the payments were treated as maintenance prior to trial. Additionally, a corporate representative had stated that the payments were wages in the form of maintenance and had failed to designate any of the payments as supplemental wages.

Conclusion

The appellate court reversed and remanded for a new trial on liability and the apportionment of the causal fault based on the prejudicial, erroneous spoliation sanction for the destruction of evidence on the dock, which the vessel defendants never had possession of or control over. Furthermore, in the new trial, the court of appeals directed the trial court to properly instruct the jury on the federal maritime premises-liability law regarding the liability of the vessel defendants. While these new applications of law are unlikely to affect the amount of damages awarded to Willis, they will certainly redistribute the fault and therefore redistribute the amounts of money each company is responsible for paying to Willis.

Endnotes

1. Willis v. Indiana Harbor Steamship Co., —- N.W.2d —- 2010 WL 4068733 (Minn. App. 2010).
2. *Id.* at *3.
3. *Id.*
4. *Id.*
5. *Id.* at *3.
6. *Id.* at *5.
7. *Id.* at *6.
8. *Id.*
9. *Id.* at *12.
10. *Id.* at *11.

NPDES, from page 11

Conclusion

The Ninth Circuit's decision to require NPDES permits for the discharge of polluted stormwater runoff into lakes and rivers could have complex consequences. If other courts construe the Ninth Circuit's reasoning broadly, this opinion could be interpreted as requiring NPDES permits for any road that uses a drainage system to funnel runoff from the road to a navigable body of water. Furthermore, the court failed to address which party is actually responsible for obtaining the proper permit from the EPA. In this case, the NEDC named the Oregon Department of Forestry, as the administrator of the state's forest roads, as well as multiple timber companies who purchased the timber harvested from the site. Because this opinion fails to address whether the owner of the roads or the companies that transport logs using the roads bear the burden of obtaining the permit, the EPA should adopt further rules that clarify this issue. Ultimately, the Ninth Circuit's ruling addressed a major threat to the salmon and trout habitats in Oregon rivers and reinforced the fact that this type of sediment discharge requires a permit; however, this opinion appears to raise more questions than it answers.

Photograph of Oregon logging road courtesy of M.O. Stevens.

Endnotes

1. Northwest Envtl. Def. Ctr. v. Brown, 617 F.3d 1176 (9th Cir. 2010).
2. *Id.* at 1198.
3. 33 U.S.C. §1342.
4. *Id.* §1362(14).
5. League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1184 (9th Cir. 2002).
6. *Northwest Envtl. Def. Ctr.*, 617 F.3d at 1182.
7. 33 U.S.C. § 1362(14).
8. *Northwest Envtl. Def. Ctr.*, 617 F.3d at 1191.
9. *Id.* at 1195.

2010 Federal Legislative Update

111 Public Law 207 – Cruise Vessel Security and Safety Act of 2010 (H.R. 3360)
Imposes new security and safety requirements on cruise ships that carry at least 250 passengers and call on a port in the U.S., except as part of a coastwise voyage. Establishes requirements regarding, among other things, video surveillance to monitor crime; posing of U.S. embassy locations; and a log book entry and reporting of deaths, missing individuals, thefts, and other crimes. Institutes civil and criminal penalties for violation of the requirements. Vessels are required to have at least one crewmember on board to be trained and certified by the Coast Guard on the methods for the prevention, detection, evidence preservation, and reporting of criminal activities in the international maritime environment.

111 Public Law 281 – Coast Guard Reauthorization Act of 2010 (H.R. 3619)
Authorizes $10.2 million for fiscal year 2011. Reorganizes senior leadership, allowing organizational flexibility for the Coast Guard. Increases total number of service members and allows for improvements to military housing. Improves acquisition programs, shipping and navigation, and oil pollution prevention.

111 Public Law 209 – Modifies Date of Permit Requirements for Discharges from Certain Vessels (S. 3372)
Provides that the Administrator of the Environmental Protection Agency (EPA) or a state with an approved National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act are prevented from requiring an NPDES permit for certain vessels until December 18, 2013 for any discharge: 1) of effluent from properly functioning marine engines; 2) of laundry, shower, and galley sink wastes; or 3) that is incidental to the normal operation of a covered vessel. Covered vessels are less than 79 feet in length or fishing vessels.

111 Public Law 250 – National Flood Insurance Program Reextension Act of 2010 (S. 3814)
Authorizes the Administrator of the Federal Emergency Management Agency (FEMA) to extend the National Flood Insurance Program from September 30, 2010 through September 30, 2011. Also authorizes up to $20.725 billion in notes and obligations to finance the Program.

111 Public Law 250 – Funding from the Oil Spill Liability Trust Fund for the Deepwater Horizon Oil Spill (S. 3473)
Amends the Oil Pollution Act of 1990 to exempt advances to the Coast Guard in connection with the explosion on, and sinking of, the mobile offshore drilling unit Deepwater Horizon from the requirement that amounts in the Oil Spill Liability Trust Fund shall be available only as provided in annual appropriations. Limits such advances to a maximum of $100 million each, with the total amount for all advances subject to limits under existing law (i.e., not to exceed $1 billion for any single incident and $500 million for natural resource damage assessments and claims for any single incident, provided that, except in the case of payments of removal costs, an advance may be made only if the amount in the Fund after such advance will not be less than $30 million). Requires the Coast Guard to notify Congress of the amount advanced and the facts and circumstances necessitating the advance within seven days of the advance.

The University of Mississippi
THE SANDBAR
Sea Grant Law Center
Kinard Hall, Wing E, Room 258
P.O. Box 1848
University, MS 38677-1848

Littoral Events

National Conference on Science, Policy, and the Environment

Washington, D.C.
Jan. 19-21, 2011

The 11th Annual conference will feature the theme, "Our Changing Oceans." A number of symposia and breakout sessions will discuss aspects of marine spatial planning, including Essential Data for Marine Spatial Planning; The Role of Coastal Marine Spatial Planning in Stabilizing Food Security; Improving Ocean Governance through Multi-scale Ocean and Coastal Management; Ecosystem-Based Marine Spatial Planning in U.S. Waters – Managing the Ocean Mosaic; and From Policy to Practice – Creating the Will to Make Marine Spatial Planning Succeed. For more information, visit: http://ncseonline.org/conference/Oceans/cms.cfm?id=4028

State of the Science on the Ecological Effects of Wind

Indianapolis, IN
Mar. 9-10, 2011

The Great Lakes Wind Collaborative is hosting a regional workshop to enhance understanding of the effects of wind energy development on the biota and ecosystems of the Great Lakes region. The information presented will serve to inform the implementation of federal and state fish and wildlife guidelines in the Great Lakes region. Please visit http://www.glc.org/energy/wind/sosworkshop/index.html for more information.

Blowout: Legal Legacy of the Deepwater Horizon Catastrophe

Bristol, RI
Apr. 13, 2011

Approximately a year after the Deepwater Horizon oil rig exploded, Roger Williams University School of Law will convene a conference looking at the legacy of the catastrophe. Law and policy experts will examine the legal response to date and consider the future legal legacy. Speakers will discuss issues of tort liability, natural resource damages, and changes to law and regulation contemplated by Congress and the National Commission on the oil spill. For more information, please contact the Marine Affairs Institute at marineaffairs@rwu.edu or visit http://law.rwu.edu/academics/institutes-programs/marine-affairs-institute/symposia .