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Vessel Owner Awarded Over $37 Million for Temporary Taking

American Pelagic Fishing Company v. U.S., 55 Fed. Cl. 575 (2003).

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

The United States Court of Federal Claims recently determined the amount of governmental compensation due to the owner of a fishing vessel as a result of a temporary regulatory taking. American Pelagic Fishing Company claimed a regulatory taking occurred when the federal government prevented its vessel, the *Atlantic Star*, from entering the Atlantic mackerel fishery.

Background

In early 1996, Lisa Torgersen began exploring fishing opportunities off the East Coast of the United States. During her research, Torgersen discovered documents published by the Mid-Atlantic Fishery Management Council urging large vessels to enter the East Coast herring and mackerel fishery and an International Trade Commission report that indicated mackerel fisheries in the United States were underutilized. Relying on this governmental information, Torgersen acquired a fishing vessel for $1.7 million. $34 million later, the newly renamed *Atlantic Star* was a state of the art freezer trawler, with the capacity to hold over 400 metric tons of fish. The vessel's two engines generated over 13,000 horsepower. On board the *Atlantic Star* was the best freezing equipment available at the time and extensive processing equipment, including six refrigerated seawater tanks which could each hold 150 metric tons of fish. During the outfitting of the vessel, Torgersen applied for and received all the necessary fishing permits.[1] In April 1997, ownership of the vessel passed to the American Pelagic Fishing Company (APFC) and the permits were re-issued by the National Marine Fisheries Service.

There was a great deal of commercial opposition mounted against the *Atlantic Star* project. In March 1997, the New England Fishery Management Council discussed the possibility of enacting restrictions based on vessel size and gear specifications. Also in 1997, bills were introduced in both the House of Representatives and the Senate proposing a moratorium on large fishing vessels in the Atlantic

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NOAA Fisheries Strengthens Patagonian Toothfish Regulations

Luke Miller, 2L

The Chilean Sea Bass, scientifically known as *Dissostichus eleginoides* (Patagonian toothfish) and *Dissostichus mawsoni* (Antarctic toothfish), is a slow-growing fish living in the cold, deep waters of the southern hemisphere. Known to live up to fifty years, most toothfish are caught at 10-12 years of age at a weight of approximately twenty pounds, far short of their 250 pound potential. Recently, these fish received extra protection from the Department of Commerce. As a member of the Commission for

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Washington State Declared Owner of Submerged Logs

In the Matter of the Personal Restraint of John Tortorelli, 66 P.3d 606 (Wash. 2003).

Christopher Tang, 3L

The Supreme Court of Washington recently held that ancient forests submerged in a lake are natural resources and, thus, are state property that cannot be salvaged without permission.

Background

Until 1994, Washington law authorized the issuance of licenses to salvagers to retrieve stray logs, provided that a percentage of the profit was shared with the state. Approximately 1,100 years ago, a landslide caused the inundation and submergence of a pine forest in Lake Washington, a saltwater lake running into Puget Sound. Due to the water's depth, its cold temperature, and its low oxygen content, the trees were remarkably well preserved. Because of their historic, cultural, and scientific value, these trees were deemed unsalvageable by the state salvage law. Many of the ancient tree trunks were excavated a few years ago by the U.S. Army Corps of Engineers to help build the Ballard Locks connecting Lake Washington to Puget Sound. The root balls and treetops were returned to the lake.

In August 1991, Tortorelli applied for a logging permit under the name of the former owners of his ship. Believing that the ship was still owned by those previously licensed operators, the Washington Department of Natural Resources (DNR) issued Tortorelli a salvage license. Tortorelli began to salvage the remains of the ancient forest in Lake Washington in cooperation with local scientists. In March 1992, a ruptured sewer line resulted in closer inspection of the area by DNR. DNR discovered Tortorelli's operation and informed him that if he wished to continue his activities in the area he would need to acquire

a hydraulics permit. Tortorelli applied for the permit, but continued his salvaging operation. On May 7, 1992, the Department of Fisheries issued a hydraulics permit on the condition that Tortorelli pay for a study to show that his operation was not harming the local crayfish population. Also during May, Tortorelli received two citations for permit violations, but both citations were dismissed. In November 1992, pursuant to a search warrant, Tortorelli's home and log patrol area were searched and from the seized records it was determined that Tortorelli had illegally salvaged $165,000 worth of trees.

John Tortorelli was found guilty in state court of theft, trafficking in stolen property, and criminal profiteering arising from his business of salvaging submerged trees from Lake Washington. His direct appeal was denied by the Court of Appeals. He then sought relief from his conviction by appealing to the Washington Supreme Court on the grounds that there was insufficient evidence that he had obtained the "property of another." His contention was that the state did not provide sufficient proof that the timber was a marine resource and, therefore, the property of the state. He also claimed that he had operated in good faith during his salvaging operation.

The state contended that the law clearly stated that the ancient forest was the property of the state, that the law of salvaging timber did not apply to the submerged forest, and that Tortorelli was on notice of this fact. Therefore, by procuring the timber and selling it, Tortorelli engaged in theft, trafficking, and profiteering from the sale of state property. Primarily, the state relied on strong constitutional and federal precedent for the principle that marine resources belong to the state.

Logs are Natural Resources

To convict Tortorelli, the state had to prove that Tortorelli was stealing its property. The court found that the submerged logs belonged to the state as a matter of law. The Washington State Constitution vests ownership of the "beds and shores of all navigable waters in the state" to the state.[1] The court also found that the Submerged Lands Act of 1953 (SLA) confirmed that the states took title to natural resources found within their navigable waters stating:

> It is determined and declared to be in the public interest that . . . title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, . . .[are] vested in and assigned to the respective States . . . in which the land is located.[2]

Tortorelli's main argument was that the trees could not have been state property because they are not natural resources covered by the SLA. "Natural resources" are defined in the SLA as "*without limiting the generality thereof*, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life."[3] Because this definition does not include timber resources, the court referenced the dictionary definitions of natural resources to clarify the full meaning, which is permissible when a statute does not provide a full definition. The dictionary definition of "natural resources" includes all materials found in nature and unprocessed timber is undeniably a resource obtained from nature. In sum, as the submerged trees are located in the navigable waters of Washington, the state owns the submerged trees.

Another issue addressed by the court was whether the common law of finds applies to these logs since they were never "found" prior to Tortorelli's salvage and as such were the property of the first person to obtain them. The common law of finds applies to all personal property that was previously undiscovered. In response to Tortorelli's argument that the common law of finds applies to the timber, the Supreme Court held that federal and state law declaring all marine resources to be the property of the state superseded the common law.

Conclusion

The Washington Supreme Court concluded that the trees were property of the state as a matter of law. The court found that there was sufficient evidence to support the state's claim that Tortorelli had deprived the state of resources and upheld his conviction for theft. As of this writing, notice of intent to appeal the decision has not been filed.

ENDNOTES

1. WASH. CONST. art. XVII, § 1.
2. 43 U.S.C. § 1311(a) (2003).
3. 43 U.S.C. § 1301(e)(2003) (emphasis added).

National Park Service May Relocate Docks

Isle Royale Boaters Association v. Norton, 303 F.3d 777 (6th Cir. 2003).

Joseph M. Long, 3L

The Sixth Circuit recently determined that the section of the National Park Service's (NPS) General Management Plan for Isle Royale National Park for the relocation of docks throughout the park was not arbitrary or capricious and did not violate the Wilderness Act or the Organic Act of 1916.

The Challenge

In August 1998, Isle Royale Boaters Association (IRBA) challenged the General Management Plan (GMP) for Isle Royale National Park and Wilderness Area. The GMP was designed to minimize intrusive noise from motorized water craft use within the park and wilderness area by removing docks from non-motorized use areas and relocating and adding docks in areas not frequented by non-motorized park users. The IRBA argued that the elimination of these docks from their original locations limited or denied boater access to the trail system and various shelter areas located upon the main island of Isle Royal National Park.

The GMP

Isle Royale was designated as a national park in 1931 and a national wilderness area in 1976. Because of the park's dual designation, the actions of the NPS must comply with both the NPS's Organic Act and the Wilderness Act. Under the Administrative Procedure Act, agency action may be set aside by a court if it is found to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."[1]

The Sixth Circuit first addressed the authority of the NPS to relocate docks solely within the area of Isle Royale designated as national parkland. Such actions are subject to regulation under the Organic Act of 1916. The court determined that the Organic Act requires the Secretary of the Interior to provide for the enjoyment of the national parks, but does not demand the provision of docks or boat access. The court noted that removing docks actually "helps to conserve scenery and moving docks to reduce noise on the trails facilitates the enjoyment of the scenery, natural objects, and wildlife that the island offers" consistent with Congress's mandate under the Organic Act.[2] The NPS's decision to relocate the docks was, therefore, not arbitrary or capricious.

The court next addressed the NPS's actions in the wilderness areas. Wilderness areas are to be managed "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness."[3] The NPS in managing Isle Royale has increased obligations regarding boater access in such areas because "greater protections apply to wilderness areas than to ordinary parklands."[4] Under the Wilderness Act, the Secretary of the Interior has the discretion either to ban motorboats, structures, and installations or allow pre-existing motorboat use to continue.[5] The court found that the GMP furthers the Wilderness Act's goal of ensuring that "the Earth and its community of life are untrammeled by man" and that the land "retains its primeval character."[6]

Conclusion

The Sixth Circuit affirmed the district court's judgment for the NPS, finding that separating motorized and non-motorized activity within Isle Royale National Park is supported by statute and is not arbitrary or capricious.

ENDNOTES

1. 5 U.S.C. § 706(2)(A) (2003).
2. *Isle Royale Boaters Ass'n v. Norton*, 303 F. 3d 777, 782 (6th Cir. 2003).
3. 16 U.S.C. § 1131(a) (2003).
4. *Alaska Wildlife Alliance v. Jensen*, 103 F.3d 1065, 1069 (9th Cir. 1997).
5. 16 U.S.C. §§ 1311(c), 1311(d)(1) (2003).
6. 16 U.S.C. § 1311(c) (2003).

Highlights of the IWC Meeting

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

In June, the 55th Annual Meeting of the International Whaling Commission (IWC or Commission) was held in Berlin, Germany. The Commission addressed a number of issues, including whale sanctuaries and scientific permits. The meeting, generally hailed as a success by anti-whaling States and non-governmental organizations, resulted in the adoption of three resolutions and a new stance on conservation.

Although two proposals for the creation of whale sanctuaries in the South Pacific and the South Atlantic were defeated, the Commission did pass a resolution establishing a Conservation Committee. In Resolution 2003-1 the IWC indicated that it was time for a Conservation Committee because over the years the IWC has "evolved into an organization internationally recognized . . . for its meaningful contributions to the conservation of great whales" and "has gradually developed an extensive conservation-oriented agenda." By far the most vexing development for whaling nations, the Conservation Committee is charged with preparing, implementing, and maintaining a Conservation Agenda. The Committee is directed to explore coordination with other conventions and organizations, such as the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the International Maritime Organization, and to work with the Scientific Committee to ensure that whalewatching, environmental issues, and behavioral research are incorporated into the Agenda. Opposing States, such as Japan and Norway, claimed that the IWC was created to set whaling quotas, not conservation measures, and argued against the creation of the Conservation Committee. However, the IWC's new conservation focus appears to be firmly entrenched, as the 55th Annual Meeting marked the first meeting in which the whalewatching industry was awarded observer status.

The Commission also addressed the issue of scientific whaling. The International Convention for the Regulation of Whaling allows special permits to be issued for the taking of whales for the purposes of scientific research. This year, Japan submitted two permit applications to the Commission for consideration at the Annual Meeting. In one application, Japan sought to extend its research program in the Southern Hemisphere, which currently results in the harvest of approximately 400 minke whales per year. The second application contemplated a research program on the feeding ecology of whales in the North Pacific, proposing the taking of 150 minke whales, 50 Bryde's whales, 50 sei whales, and 10 sperm whales. Iceland also submitted a permit application for 100 common minke whales, 100 fin whales, and 50 sei whales. The Commission denied all three permits and passed two resolutions voicing opposition to the continuation of these lethal research practices. Resolution 2003-2 states that the proposed research programs are "contrary to the spirit of the moratorium on commercial whaling and to the will of the Commission" and urges countries to limit scientific research to non-lethal methods. Resolution 2003-3 was directed solely at Japan's lethal research program on minke whales in the Southern Ocean Sanctuary in Antarctica (JARPA). The Commission has asked the Scientific Committee to provide information explaining the decline in abundance estimates for the minke whale, including the impact of environmental factors and the take of minke whales under Japan's research program. The Commission also calls on Japan to cease JARPA and recommends that no additional JARPA programs be considered until the Scientific Committee has had the opportunity to conduct a review of the 16-year old JARPA program and the abundance estimates.

The Commission also held an expert workshop on "Whale Killing Methods and Associated Welfare Issues," the result of a resolution passed in 1998 encouraging countries to share information on killing times and to provide technical assistance to aboriginal subsistence fisheries to reduce killing times. The participants from the Workshop concluded that the current "best practice" for killing

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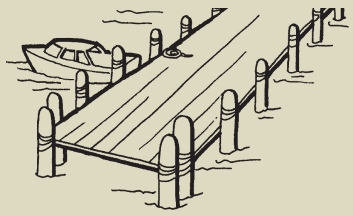
Maine Supreme Court Validates Dock Permits



Conservation Law Foundation v. Department of Environmental Protection, 823 A.2d 551 (Me. 2003).

Shannon McGhee, 2L

On April 29, 2003, the Supreme Judicial Court of Maine upheld the validity of a permit issued by the Maine Department of Environmental Protection (DEP), which allowed Edward C. Johnson IV to build a dock on waterfront property. The court also ruled that the Maine Board of Environmental Protection (BEP) had statutory authority to promulgate the regulation under which Johnson's permit was issued.

Background

The DEP is the executive agency charged with the protection of Maine's natural resources.[1] Within the Department, the BEP has responsibility for rulemaking proceedings, rulings on certain permit applications, appeals from the grant or denial of permits and licenses by the DEP Commissioner, and the revocation of licenses.[2]

In 2001, the Natural Resources Protection Act (NRPA) was enacted to protect Maine's rivers, ponds, wetlands, mountains, wildlife habitats, and coastal sand dunes.[3] The NRPA sets forth standards, requirements, and prohibitions of certain activities in protected areas. Among other things, the NRPA requires a permit from the DEP for the construction of permanent structures on coastal wetlands and requires that any proposed construction or activity submitted to the DEP for a permit "[must] not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses."[4] Generally, to receive a permit, an application must be filed with the DEP. The permit process includes notice to the public and the solicitation of comments from the public. The DEP may approve a permit, as is or with additional conditions, deny the permit request, or refer it to the BEP for a decision.[5]

However, to conserve DEP resources and applicants' time, the BEP was given statutory authority to issue permits without going through the individual application process, known as "permit by rule," which may only be utilized if the board finds the proposed activity "would have no significant impact upon the environment."[6] Pursuant to this authority, BEP adopted Rule 13 in 1992, which allows builders constructing piers or wharves in coastal wetlands meeting the standards and requirements contained in Rule 13 to bypass the individual application process. Under Rule 13, the applicant files a structure form along with photographs of the area with the DEP. If, within fourteen days of the filing, the DEP does not notify the applicant of any objections, the applicant may commence the activity.[7] At the end of construction, the applicant must then send photographs of the completed project to the DEP.

The Lawsuit

In May 1998, Edward C. Johnson IV was issued a permit by the DEP under Rule 13 to construct a pile dock on Bartlett Narrows in Mount Desert, Maine. Subsequently, the Conservation Law Foundation (CLF) and the Gagnebins, abutting neighbors, filed petitions with the Superior Court to review the validity of Johnson's permit and to obtain a court order for the removal of the dock. The Superior Court ruled Johnson's permit invalid because Rule 13 was arbitrary, capricious, an abuse of discretion and contrary to law and outside the scope of the BEP's authority.[8] The court, however, denied the request to have Johnson remove the dock, reasoning there was no private right of action to enforce the NRPA. Both parties appealed.

Validity of Rule 13

The court employed two basic principles of statutory interpretation to determine the validity of Rule 13: "(1) when a statute or statutory scheme is unambiguous, we ascertain the intent of the Legislature from the plain language, . . . [and] (2) when there is ambiguity, however, we defer to the interpretation of a statutory scheme by the agency

charged with its implementation as long as the agency's construction is reasonable."[9] The court determined that as the plain language of the statute gives the BEP express authority to "permit by rule," the promulgation of Rule 13 falls within the BEP's authority. CLF's and the Gagnebins' key argument, however, was that Rule 13 violates the NRPA standards, which require that any permitted activity not "unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses."[10]

The statute is silent on whether Rule 13 must comply with the NRPA standards. Because of this ambiguity, the court looked at how the DEP and BEP interpret their regulations. The 1992 version of Rule 13 stated that the standards of the Rule were "designed to insure that piers, wharves and piling projects will not unreasonably interfere with existing scenic, aesthetic or navigational uses," which is identical to the NRPA standard.[11]Although this language was omitted from the 1995 version of Rule 13, similar language was incorporated in Rule 1, which applies to Rule 13 activities.[12] Therefore, the court concluded that the DEP and BEP intended that Rule 13 standards comply with the NRPA standards. Because the DEP and BEP administer Rule 13 and reasonably interpret the regulation as requiring the standards to comply with NRPA, they are given deference.

The court next relied on the agency's expertise in determining whether Rule 13 actually met the NRPA standards. "When an agency utilizes its expertise in setting policy, as long as it does not contravene its statutory authority, we defer to its policy determinations."[13] Because the DEP and BEP promulgated Rule 13 based on "their knowledge of the uses of coastal wetlands, to set the standards for piers and wharves that would not unreasonably interfere with existing uses and have no significant impact on the environment," the agencies did not contravene their statutory authority.[14] Furthermore, the requirements of having photographs of proposed projects, restricting the structure to twenty-five percent of the channel, limiting the structure to no more than six feet in width, and not allowing the pier or wharf to extend beyond the low water mark are standards that prevent permits by rule from "unreasonably interfering with existing scenic, aesthetic, recreational or navigational uses." The court was of the opinion that Rule 13 may even achieve greater compliance with the standards of NRPA than an individual permit, because the Rule provides more narrow criteria for the construction of docks and wharfs than the statute itself.

CLF and the Gagnebins also argue that Rule 13 is contrary to law because it violates Maine's public trust doctrine, which protects the public's right of access to the coast. A coastal property owner's rights in the intertidal zone are subservient to the public's right of access for fishing, fowling and navigation. The public's right of access, however, must yield to the property owner's right to wharf out, by means of docks, etc. Finally, an owner's right to wharf out is subject to reasonable regulation. As Rule 13 is a reasonable regulation of the construction of docks and wharfs, it does not violate the public trust doctrine.

As to the arbitrary and capricious nature of Rule 13 asserted by CLF and the Gagnebins, the court declared they did not show that Rule 13 was unreasonable, lacked a factual basis, or lacked support in the evidentiary record.[15]

Conclusion

The Supreme Judicial Court of Maine vacated the judgment invalidating the promulgation of Rule 13 by BEP, and remanded the case to the Superior Court for entry of judgment affirming the validity of Johnson's permit.

ENDNOTES

1. ME. REV. STAT. ANN. tit. 38, § 341-A(1) (2003).
2. *Id.* at §§ 341-B, 341-D, 344(2-A).
3. *Id.* at § 480-A.
4. *Id.* at § 480-D(1).
5. *Id.* at §§ 344(1), 344(2-A).
6. *Id.* at § 344(7).
7. 06-096 CODE ME R. ch. 305, § 1(C)(1) (1995).
8. *Conservation Law Found. v. Dep't of Envtl. Prot.*, 823 A.2d 551, 557 (Me. 2003).
9. *Guilford Transp. Ind. v. Pub. Utils. Comm'n*, 746 A.2d 910, 913 (Me. 2000).
10. *CLF*, 823 A.2d at 460.
11. *Id* at 560-561.
12. *Id*. at 561.
13. *Id.*
14. *Id.*
15. *Id.* at 563-564.

Publication Announcement

Aquatic Nuisance Species in the Gulf of Mexico:

A Guide for Future Action by the Gulf Of Mexico Regional Panel and the Gulf States

The introduction of aquatic nuisance species (ANS), such as zebra mussels, nutria, and hydrilla, threaten the diversity of native ecosystems and costs the United States millions of dollars a year in management costs and lost revenues. Although the Gulf of Mexico has yet to experience an invasion on a scale similar to the zebra mussel invasion in the Great Lakes, the Gulf region is no stranger to the ANS problem.

To facilitate regional management of ANS in the Gulf of Mexico, the EPA's Gulf of Mexico Program funded research by the Mississippi-Alabama Sea Grant Legal Program into the current management regime for ANS in the Gulf. Stephanie Showalter, Research Counsel for the National Sea Grant Law Center, examined the activities and structures of the Great Lakes, Western, Gulf of Mexico, and the Northeast Regional Panels to develop recommendations for future actions by the Gulf of Mexico Regional Panel that will effectively support interstate cooperation and assist the Gulf states with the development and implementation of regional plans. The existing state laws in each of the five Gulf states were then analyzed to identify areas in which the Gulf states individually excel and where improvements are needed.

The Law Center is pleased to announce that the final report of this research, entitled *Aquatic Nuisance Species in the Gulf of Mexico: A Guide for Future Action by the Gulf of Mexico Regional Panel and the Gulf States*, is now available. Copies of the report can be obtained by contacting the Center via our website at http://www.olemiss.edu/orgs/SGLC or by email at sealaw@olemiss.edu. The report is also available in PDF format on our website: http://www.olemiss.edu/orgs/SGLC/ANS.pdf .

Position Announcement

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University of Mississippi

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Supreme Court Accepts CWA Case

S. Fla. Water Mgt. Dist. v. Miccosukee Tribe, No. 02-262 (U.S. cert. granted June 27, 2003).

Josh Clemons, M.S., J.D.

The Clean Water Act (Act) prohibits "the addition of any pollutant to navigable waters from any point source" without a permit.[1] Non-point source pollution is essentially unregulated, but point source pollution is very strictly regulated under the national pollutant discharge elimination system (NPDES). The NPDES permitting program allows discharge of pollutants if certain conditions are met, including meeting stringent standards for the treatment of polluted water prior to discharge and maintaining the quality of the receiving water body at or above a certain level.[2] These standards can be expensive and time-consuming, or even impossible, for a discharger to meet; yet if it fails to meet them it cannot legally discharge.

The economic benefit of avoiding the NPDES program, combined with the vast number of potentially regulated parties, has given rise to volumes of litigation on the intricacies of the deceptively simple statutory language. The U.S. Supreme Court for the first time has agreed to provide guidance on the meaning of "addition" and "from" - two of the most disputed terms in all of environmental law - in *S. Fla. Water Mgt. Dist. v. Miccosukee Tribe*. The Court's decision may have significant effects not just in south Florida but across the U.S.

The Conflict in the Everglades

The Everglades, once a wild and free-flowing "river of grass," has been tamed and harnessed by massive engineering projects to protect and serve south Florida's burgeoning population and vast agricultural industry. The water bodies at issue in this case, Water Conservation Area-3A (WCA-3A) and the C-11 Canal (both "navigable waters" under the Act), are encompassed by the U.S. Army Corps of Engineers' Central & Southern Florida Flood Control Project, which is operated for water supply and flood control purposes. Although they occupy an area that was once a single hydrologic system, the C-11 Canal and WCA-3A are separated by levees and are legally and hydrologically distinct water bodies.

The C-11 Canal serves the water management needs of highly developed Broward County by collecting runoff from the C-11 Basin, which contains high levels of phosphorus, a "pollutant" under the Act. WCA-3A serves the subsistence, commercial, recreational, and religious needs of the Miccosukee Tribe, which has a perpetual lease to most of WCA-3A's water. WCA-3A, like most of the Everglades, is very sensitive to phosphorus levels. Phosphorus is a plant nutrient; as such it can lead to overgrowth of vegetation, which, in turn, can upset the delicate ecosystem upon which the Everglades and the Tribe depend. The waters of the C-11 Canal enter WCA-3A via the South Florida Water Management District's (SFWMD's) S-9 pumping station (S-9), a "point source" under the Act. SFWMD does not have a NPDES permit to operate S-9.

The Tribe brought suit to enjoin SFWMD from operating S-9 without a NPDES permit, alleging that S-9's pumping of phosphorus-contaminated water from the C-11 Canal into WCA-3A constituted "addition of a pollutant from a point source." The U.S. District Court for the Southern District of Florida agreed with the Tribe that a permit was required and granted the injunction. The Eleventh Circuit affirmed the District Court's holding that SFWMD was adding a pollutant from a point source in violation of the Act, but vacated the injunction in light of its potentially dire consequences for Broward County. Because there is inconsistency among the appeals courts on the issue, the U.S. Supreme Court accepted SFWMD's petition to decide whether S-9's pumping "constitutes an 'addition' of a pollutant 'from' a point source" subject to the Act's NPDES requirements.

SFWMD's Position

SFWMD argues that it is not adding a pollutant from a point source because S-9, the point source, is not introducing the pollutant to navigable waters, but merely passing an already-present pol-

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lutant from one navigable water to another. SFWMD relies on a line cases originating in the D.C. Circuit with *National Wildlife Federation v. Gorsuch*. In *Gorsuch* the D.C. Circuit deferred to EPA's interpretation that "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world."[3]

The fundamental reasoning in the *Gorsuch* line of cases is that "addition from a point source" is determined at the interface between the pollutant and the *first* "navigable" water body it enters. If that interface is a point source, a permit is required. If the interface is non-point in nature, as is the case with most kinds of runoff, a permit is not required. In this case, phosphorus first enters the C-11 Canal via runoff from the C-11 Basin; this runoff is a non-point source, and by the *Gorsuch* reasoning S-9 would not require a NPDES permit.

Miccosukee Tribe's position

The Tribe's position, which was endorsed by the trial court and the Eleventh Circuit, is that the proper focus is on the water body receiving the discharge rather than on the original entry of the pollutant into navigable waters: if a point source causes the entry of a pollutant into a distinct navigable water body, then the point source must have a NPDES permit. Whether the source water was already polluted or the point source itself added the pollutant is irrelevant.

This position is supported by cases from two circuits: *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273 (1st Cir. 1996) and *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001).

The Eleventh Circuit characterized the *Dubois* and *Catskill Mts.* reasoning as follows: "When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs."[4] By this reasoning the court affirmed the trial court's decision that the S-9 pumping caused an "addition of a pollutant from a point source."

National Implications

In addition to settling matters of serious importance to the parties in the case, the Supreme Court's ruling is likely to have major implications nationally. Two classes of dischargers may be particularly affected: dam operators and municipal water providers. If the Court upholds the Eleventh Circuit decision, reservoir-type dams may no longer be able to rely on EPA's long-standing policy (deferred to by the *Gorsuch* court) that such dams do not "add . . . from" a point source. The massive federal dams on the Columbia and Snake rivers, for example, add heat - a pollutant under the Act - when they discharge sun-warmed water from their reservoirs into the cooler river water downstream. Ultimately the dams might have to be removed. Municipal water supply systems that move water among various "navigable waters" through point sources, like the New York City system at issue in *Catskill Mts.*, would face similarly dim prospects.

A victory for SFWMD would present less extreme possibilities, at least for the majority of the population: the status quo would remain in effect for dams and reservoirs, and only the odd mountain lake, trout stream, or tribal water supply would be adversely affected.

Conclusion

When it decides *S. Fla. Water Mgt. Dist. v. Miccosukee Tribe*, the Supreme Court will provide long-awaited guidance on a key jurisdictional question under the Clean Water Act: what it means to "add" a pollutant "from" a point source. The Court's decision will determine not only the hydrologic fate of the Miccosukee Tribe, but possibly the fate of water projects, large and small, nationwide.

ENDNOTES

1. 33 U.S.C. §§ 1311(a), 1362(12) (2000).
2. *Id.* §§ 1342(a)(1), 1311(b)(1)(C) and (b)(2)(A).
3. *NWF*, 693 F.2d 156, 175 (D.C. Cir. 1982).
4. *Miccosukee Tribe v. SFWMD*, 280 F.3d at 1369 (emphasis in original).

Toothfish, from page 1

the Conservation of Antarctic Marine Living Resources (CCAMLR), the United States has adopted the conservation measures of the CCAMLR and implements them through the NOAA Fisheries regulations (NOAA Fisheries is also known as the National Marine Fisheries Service).

A key obligation as a member of the CCAMLR is to prevent and discourage unlawful harvest and trade of toothfish. To accomplish this goal, the CCAMLR created a program called the Dissostichus Catch Document (DCD) Scheme. By registering the approximate weight, location, and date of toothfish catches, CCAMLR and its member states can monitor the species population and prevent overfishing in regulated areas.[1] The DCD scheme is followed by the NOAA Fisheries and will be streamlined and strengthened by new regulations, the majority of which took effect June 2, 2003. These modifications to the pre-existing regulations have been promulgated by the NOAA Fisheries to help prevent illegal, unregulated, and unreported (IUU) catches of toothfish. The following are a few of the key changes to 50 C.F.R. Part 300:

- Lengthen permits to enter Commission Ecosystem Monitoring Program sites from one to five years – possibly as a reward for those who fish in properly designated areas;
- Define the CCAMLR fishing season as December 1 through November 30 for U.S. vessels fishing for Antarctic Marine Living Resources – currently there are only three U.S. vessels and none of them actually fishes for toothfish;
- Require U.S. vessels harvesting Antarctic Marine Living Resources in areas of CCAMLR to use an automated satellite-linked vessel monitoring system;
- Require foreign entities to designate and maintain a registered agent to act as a business liaison within the United States;
- Prohibit the import of toothfish species caught in areas outside CCAMLR monitored areas;
- Prohibit the import of toothfish that have been seized or confiscated from illegal catches, even if they have been issued a Specially Validated Dissostichus Catch Document; and,
- Institute a preapproval system for U.S. seafood receivers and importers/re-exporters of toothfish species.[2]

The involvement of the United States in protecting the toothfish species has become more intensive, which may be due either to the fact the U.S. consumes 15-20% of the world market of toothfish or to the extensive efforts by other participating countries to halt the illegal trade, or both.

Australia is the most notable counterpart in the fight to stop IUU catches of toothfish. Recently the Minister of Fisheries, Forestry, and Conservation in Australia started the process of scuttling a ship called the *South Tomi* after it was apprehended with 100 tons of illegal fish on board. Although the new modifications by the U.S. are not quite as severe as regulations in Australia, they should help control IUU catches and promote the longevity of toothfish.

ENDNOTES

1. CCAMLR, Catch Documentation Scheme for Dissostichus spp., *available at* http://www.ccamlr.org/pu/e/cds/p1.htm (last visited May 29, 2003).
2. All changes can be found at: National Oceanic and Atmospheric Administration Rules and Regulations, 68 Fed. Reg. 23,224 (May 1, 2003) (to be codified at 50 C.F.R. pt. 300).

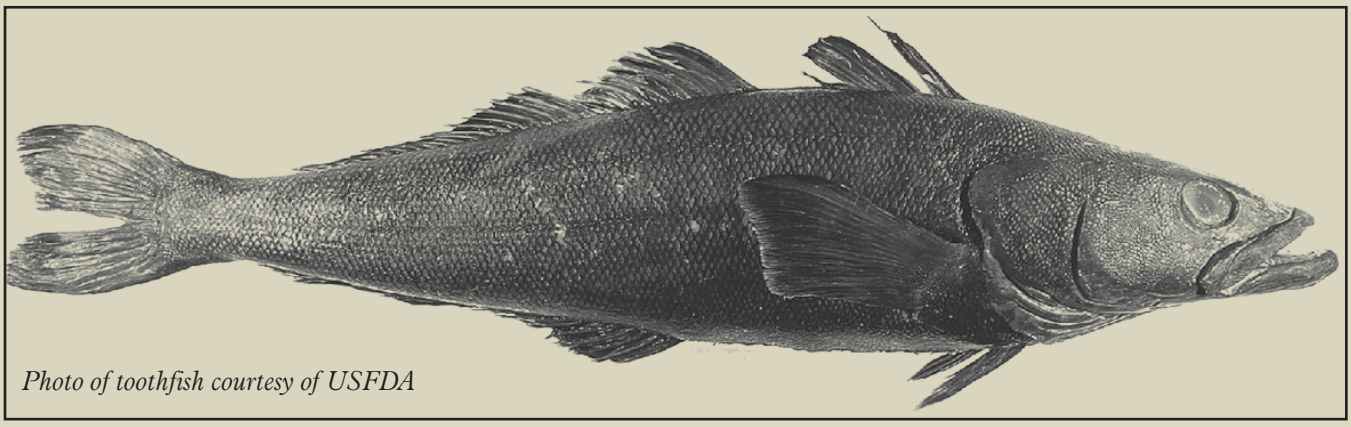


Photo of toothfish courtesy of USFDA

Taking, from page 1

mackerel and herring fisheries. Although the bills were not enacted into law, Congress obtained a moratorium by attaching a rider to the 1997 Appropriations Act. The rider stated that:

> none of the funds made available in this Act may be used to issue or renew a fishing permit or authorization for any fishing vessel of the United States greater than 165 feet in registered length or of more than 750 gross registered tons, and that has an engine or engines capable of producing a total of more than 3,000 horsepower.[2]

The rider also declared null and void for the 1998 fishing season any permit issued or renewed prior to the enactment date of the Act for any vessel to which the above prohibition applied. Identical language appeared in the 1998 Appropriations Act and, in 1999, the vessel-size limitation and permit revocations were made permanent through § 3025 of the Emergency Supplemental Appropriations Act. The *Atlantic Star* was the only vessel impacted by these revocations and prohibitions. Due to these provisions, the *Atlantic Star* could not participate in the Atlantic fisheries from December 1997 until June 1999, when APFC sold the *Atlantic Star.*

Temporary Taking

The federal government is prohibited from taking private property without providing the owner with just compensation.[3] Even though the government did not take physical possession of the *Atlantic Star*, APFC is entitled to compensation if the government regulation deprived the company of all economically viable use of the *Atlantic Star*.[4] However, because APFC was able to sell the vessel in 1999, the regulatory taking was of a temporary nature.

To determine whether a property owner has been denied all economically viable use of the property, courts will consider three factors: (1) the extent of government interference with investment-backed expectations, (2) the character of the governmental activity, and (3) the extent of the economic impact on the property owner.[5] In a temporary regulatory takings case, courts will generally award compensation when the impact of the governmental regulation is so great that the property has basically been rendered idle.[6]

The court found that Torgersen and APFC had a reasonable expectation that the *Atlantic Star* could gain access to and prosper in the Atlantic mackerel fishery. The government reports and agency statements indicating that larger boats would be welcomed and productive in the East Coast mackerel fishery enticed APFC to pursue the purchase of the *Atlantic Star*. Further evidence of APFC's reasonable expectation is the fact that the *Atlantic Star* received all the necessary permits. If not for the legislation in 1997, the *Atlantic Star* would have commenced fishing. Even though all fishing vessel owners take the risk that the regulatory scheme will change due to resource availability and other factors, the court held that APFC could not have foreseen the targeted revocation of its permits by Congress.[7]

The court also found that because the *Atlantic Star* was completely excluded from U.S. fisheries, the economic impact of the legislation was severe. Torgersen did attempt to find alternative commercial uses for the *Atlantic Star*, by participating in a research project and fishing off the coast of Mauritania - the only fishing area where the vessel could purchase fishing rights without losing its status as a U.S. vessel. Unfortunately, both ventures were unprofitable. The *Atlantic Star* was also unable to fish for herring in the western Atlantic because mackerel is an inevitable bycatch requiring a permit, which the vessel was prohibited from obtaining due to the new legislation. In addition, as a permit was required even for the possession of mackerel, the *Atlantic Star* could not be utilized as a mother ship for the transfer of other vessels' catch. The denial of access to the Atlantic mackerel fishery clearly deprived APFC of any viable commercial use for the *Atlantic Star*.

When examining the character of the governmental actions, courts will take into account whether the action is retroactive and/or targeted at a particular individual.[8] Both factors are present in this situation, which strongly supported APFC's regulatory takings claim. The Appropriations Act retroactively voided the *Atlantic Star*'s permits and prohibited the issuance of permits in the future. In addition, the *Atlantic Star* was the only vessel impacted by the legislation. No other fishing vessels in the mackerel fleet were large enough to trigger the prohibitions. The Court of Federal Claims held that the federal government took APFC's property, the right to fish in the mackerel fishery, from the enactment date of the 1997 Appropriations Act until the sale of the vessel in 1999.

Damages

A separate trial on damages was held in December, 2002. The court initially determined that, at least as of 1997, there were sufficient stocks of herring and mackerel in the western Atlantic to support Torgersen's entry into the fishery, especially since the *Atlantic Star* was specifically designed to find and harvest such stocks. The court was also convinced that Torgersen and APFC could have developed a market for the harvested herring and mackerel in Japan and other overseas markets.

Photo courtesy of NOAA.

APFC sought compensation for the loss of the use of the *Atlantic Star* based upon the fair rental value of the vessel. Even though there was no existing rental market for such a vessel, a hypothetical rental value can be estimated from the reasonably established net revenue stream that would have been available to the vessel in the absence of the regulation. APFC's expert established that the rental value of the *Atlantic Star* in December 1997, the month the taking commenced, was $44,742,926. The value of the vessel at the time of trial was estimated at $55,913,929. The government disputed these figures on several different grounds. The court, however, rejected most the government's figures, highlighting the fact that the government experts were not disinterested witnesses, failed to possess a working knowledge of methods used by APFC's experts, or provided inadequate support for their estimates.

In a final attempt to persuade the court that no taking occurred, the government argued that APFC was not harmed by the legislation because the company experienced a tax gain on the sale of the vessel, received insurance proceeds, and the company's business decisions contributed to its losses. The court dismissed all these arguments, first, stating that a paper tax gain does not negate the fact that APFC suffered a temporary taking prior to the vessel's sale. Second, although APFC did have a Lloyd's of London insurance policy for the loss of fishing permits, the government cannot be the beneficiary of an insurance policy it did not pay for.[9] The proceeds received by a property owner from a policy covering loss is not just compensation for a temporary governmental taking. Finally, the government argued that because APFC waited until 1999 to sell the *Atlantic Star*, the losses during the preceding two years were the result of the company's business decisions. The court held the *Atlantic Star*'s permits were not permanently revoked until the 1999 Appropriations Act and it was not unreasonable for APFC to retain the boat until that time.

Conclusion

Based upon the fair rental value of the *Atlantic Star* during the twenty-month takings period, the Court of Federal Claims set the amount of compensation at $37,275,952.67 and ordered the government to pay APFC.

ENDNOTES

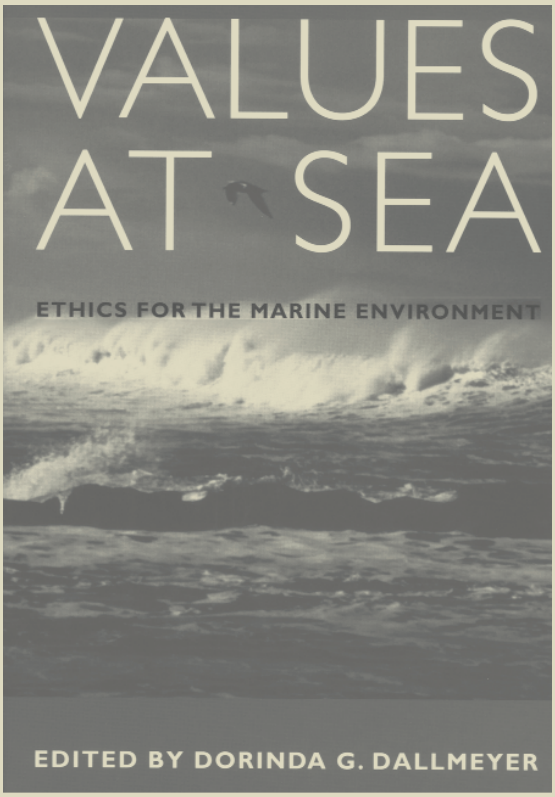
1. The *Atlantic Star* needed two permits: one to fish for or possess Atlantic mackerel (50 C.F.R. § 648.4(a)(5) (1997)); and a Northeast Multispecies (Nonregulated) permit because of the possibility of incidental bycatch (50 C.F.R. § 648.4(e)(1) (1997)). Torgersen also requested an authorization letter from the Regional Adminstrator to use a mesh size smaller than ordinarily required by 50 C.F.R. § 648.80(d).
2. Section 616 of the Departments of Commerce, Justice, and State, and the Judiciary, and Related Agencies Appropriations Act, 1998, 105 Pub. L. 119 (1997).
3. U.S. CONST. amend. V.
4. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).
5. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).
6. *American Pelagic Fishing Company, L.P. v. U.S.*, 49 Fed. Cl. 36, 47 (2001).
7. *Id.* at 49-50.
8. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532-37 (1998).
9. *American Pelagic Fishing Company, L.P. v. U.S.*, 55 Fed. Cl. 575, 592 (2003).

Values at Sea

Ethics for the Marine Environment

Edited by Dorinda G. Dallmeyer

Adapted from a University of Georgia Press Release



The human impact on vast areas of the oceans remains relatively unregulated. Sometimes, in fact, the only controls over our exploitation of marine resources lie in our environmental consciousness. While the field of environmental ethics has explored rights and duties for land use, stewardship, and policy, relatively little attention has been given to comparable issues of marine environments.

Values at Sea takes an important step toward moving environmental ethics discussions into a broader framework. Gathered here are fifteen papers by an interdisciplinary group of scholars, including ethicists, marine scientists, anthropologists, economists, geographers, lawyers, and activists. From the Great Lakes to the Pacific Islands, from the open sea to coastal areas, the papers cover a broad array of ethical issues and policy matters related to such topics as the valuation of marine life, indigenous peoples' knowledge and environmental stewardship, endemic and exotic species, aquaculture, oil spills, and species protection.

Dorinda G. Dallmeyer is the associate director of the University of Georgia's Dean Rusk Center—International, Comparative, and Graduate Legal Studies, and a faculty member of the Environmental Ethics Certificate Program at the University of Georgia. She is the editor of *Joining Together, Standing Apart: National Identities after NAFTA* and coeditor of *Rights to Oceanic Resources: Deciding and Drawing Maritime Boundaries.*

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Environmental Studies

IWC, from page 5

whales is the use of powerful penthrite grenades. The experts attending the Workshop recommended that another workshop be held in 3-5 years.

This year, the IWC took major steps towards formally incorporating whale conservation into its mandate. These actions, however, have only served to further polarize the already deeply divided body. The establishment of the Conservation Committee caused pro-whaling nations to threaten a walkout and Japan to consider withdrawing from the Commission. Although the IWC's focus has shifted over the years, it has never been easy to balance the wants of whaling nations, such as Japan and Norway, with the conservation agendas of anti-whaling states, like the United States. The road ahead will not be easy for the Conservation Committee or the IWC. The 56th Annual Meeting in Italy in May, 2005 should prove to be as emotionally charged and contentious as ever.

To read the Resolutions passed at the 55th Annual Meeting and for more information about the IWC, please visit its website at http://www.iwcoffice.org.

Coast to Coast

And Everything In-Between

Between February 27 and April 15, a **toxic red tide** off the southwestern coast of Florida resulted in the death of approximately 60 endangered manatees, or 2% of the Florida population. In 1996, a similar red tide event was linked to the death of over 149 manatees. The term "red tide" generally refers to an algal bloom event that can become toxic to humans, fish, and animals if the algae is of a species which releases a brevetoxin into the water upon death. The toxin enters a manatee's system either through ingestion or inhalation. Once ingested, the toxin causes paralysis.

The **U.S. Mineral Management Service** recently cut back on inspections of 23 oil platforms located in the Santa Barbara Channel off the California coast. Until November 2002, the platforms were inspected once a week; now they will be inspected only once a month. Unannounced inspections will take place once every three months, a reduction from the previous timetable of once a month. Not surprisingly, these changes angered environmentalists, who claim that reduced inspections will endanger the California coast and the safety of platform workers.

Around the Globe . . .

The **Louisiana crawfish** has invaded Italy. The crawfish was introduced into Lake Massaciuccoli, Italy as a culinary experiment over a decade ago. The experiment went horribly wrong as the aggressive Louisiana crawfish quickly multiplied and destroyed the native fish, frogs, crawfish, and other plant and animal species. According to some locals, the crawfish then mounted a campaign and spread like a conquering army throughout Tuscany. Italian biologists, however are fighting back. In 2003, 10,000 to 15,000 pike are due to be released into the lake to feed on the crawfish. Let's hope these imported fish are better fighters than the natives.

May 17 has been declared **International Baltic Porpoise Day** by the United Nations Agreement on the Conservation of Small Cetaceans of the Baltic and the North Seas. The Baltic Sea population of the harbor porpoise, numbering only 600, is at risk of extinction mostly from fatal interactions with fishing gear. Although drift nets are banned in EU fisheries in the Mediterranean and the Atlantic, the Baltic Sea fisheries are exempt. The declaration of a special day should raise public awareness of the situation in the Baltic. The eight parties to the Agreement - Belgium, Denmark, Finland, Germany, the Netherlands, Poland, Sweden, and the U.K. - plan to examine in August 2003 whether a recovery plan should be adopted for the porpoise.

Australia recently announced plans to ban fishing from approximately one-third of the **Great Barrier Reef**. Although the reef is listed as a U.N. World Heritage Site and contributes $975 million to the economy every year, it is threatened by high ocean temperatures, pollution, and overfishing. The new plan would expand the "green zones," areas where commercial and recreational fishing is banned, to over 30% of the 1,200 mile reef. Penalties for fishing in these zones could be as high as AU$1.1 million for companies and AU$220,000 for individual fishermen.

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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