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The SandBar

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Supreme Court Rules for Virginia in Potomac Conflict

Virginia v. Maryland, 124 S.Ct. 598, 2003 LEXIS 9192 (2003).

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

On December 9, 2003, the U.S. Supreme Court ruled that the Fairfax County, Virginia, Water Authority legally may build a structure to divert water from the Potomac River for use in Virginia without being subject to regulation by the State of Maryland, despite the fact that the river lies entirely within Maryland's borders. The 7-2 majority based its decision on its interpretation of key provisions of two historical documents. Chief Justice Rehnquist delivered the Court's opinion; Justices Kennedy and Stevens filed dissents.

Background – Centuries of Dispute

Maryland and Virginia have bickered over control of the Potomac River since the 1700s. The roots of the dispute reach even farther back in time: Virginia's claims go back to a 1609 charter from King James I and a 1688 patent from King James II, both of which included the Potomac. Maryland's claim dates to a 1632 charter from King Charles I, which also included the Potomac. In its 1776 constitution Virginia recognized the validity of the 1632 charter, but reserved the rights of "navigation and use" of the Potomac. Maryland's constitutional convention shortly afterward passed a resolution rejecting Virginia's reservation.

For nine years the states quarreled over navigational and jurisdictional issues. In 1785, at the urging of George Washington, the states agreed to a binding compact. The 1785 compact recognized, among other things, both states' rights to navigate the river. Of particular moment in the present case is Article Seventh of the compact, which provides

> The citizens of each state respectively shall have full property in the shores of Potowmack [sic] river adjoining their lands, with all emol-

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Cape Wind Associates Wins Round Two

Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army, et. al., 2003 U.S. Dist. LEXIS 16405 (D. Mass. Sept. 18, 2003).

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

During the second round of litigation[1] in the contentious battle to build a wind farm in Nantucket Sound, the U.S. District Court for the District of Massachusetts held that the U.S. Army Corps of Engineers (Corps) has the authority to grant a permit for the construction of a data tower on the outer continental shelf.

Background

Cape Wind Associates (Cape Wind) intends to build the first offshore wind energy plant in the

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The Ninth Circuit Court of Appeals recently ruled that the National Marine Fisheries Service (NMFS) violated the Endangered Species Act when it issued longline fishing permits under the High Sea Compliance Act to California vessels.

Background

The longline fishing industry utilizes fishing lines extending behind the vessels for several miles. Thousands of baited hooks are attached to the lines which snag fish as the vessel moves through the water. Longline vessels mainly target pelagic species, such as swordfish and tuna. Longline fishing is extremely controversial because the hooks capture non-targeted fish resulting in significant incidental catch (bycatch). Of particular concern is the industry's interaction with endangered and protected species.

When litigation shut down the Hawaii longline swordfish industry in November 1999 because of conflicts with sea turtles, many Hawaiian vessels relocated to California. The amount of swordfish landed at San Pedro, California alone increased from 1.5 million pounds in 1999 to 2.6 million pound in 2000. The increased activity raised concerns regarding the impacts on threatened and endangered species in the Pacific Ocean.

In July 2000, the Center for Biological Diversity and Turtle Island Restoration Network (Center) sent the NMFS a notice of intent to sue based on alleged violations of the Endangered Species Act (ESA). The Center claimed that when the NMFS issued longline permits under the High

Seas Compliance Act (Compliance Act) the agency violated § 7 of the ESA by failing to consult and § 9 by granting permits that result in the "take" of threatened or endangered species. The NMFS claimed the agency did not have the discretion to impose permit conditions to further the conservation of protected species and, therefore, the ESA consultation provisions were not applicable. The Center filed suit and the district court granted summary judgment in favor of the NMFS, finding the agency had no discretion to condition the permits. The Center appealed.

Consultation

Section 7(a)(2) of the ESA states:

> Each federal agency shall, in consultation with and with the assistance of the Secretary [of Interior or Commerce], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat.[2]

Section 7 applies "to all action in which there is *discretionary Federal involvement or control*."[3] This discretionary control must "have the ability to inure to the benefit of a protected species."[4] The NMFS argued that the consultation provisions do not apply to the issuance of fishing permits under the Compliance Act because the agency does not retain sufficient discretionary control to impose conditions which inure to the benefit of a protected species.

Congress enacted the Compliance Act in 1995 to implement the "Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas" (Agreement). Under the Compliance Act, U.S.-flagged vessels must obtain permits from the NMFS to fish on the high seas. The Compliance Act authorizes the Secretary of Commerce "to establish such conditions and restrictions on each permit issued under this section as are necessary and appropriate to carry out the obligations of the United States under the Agreement, *including but not limited to* . . ." vessel marking standards and reporting requirements.[5]

The Ninth Circuit held that the Compliance Act provides the NMFS with the discretion to protect listed species. The phrase "including but not limited to" indicates that Congress did not intend the list of restrictions enumerated in § 5503(d) to be exhaustive. Rather, the court held this Congressional language anticipates that other obligations might arise and provides the NMFS with the discretion to determine what types of conditions and restrictions are appropriate to carry out U.S. obligations. The Agreement obligated signatory nations to take measures to ensure that their fishing vessels refrain from engaging in activities which undermine the effectiveness of international conservation and management measures. The Compliance Act defines "international conservation and management measures" as "measures to conserve or manage one or more species of living marine resources."[6] Because the U.S. is obligated to prevent its vessels from undermining international conservation measures, the court determined that the NMFS clearly has the discretion to impose conditions on permits for the benefit of threatened and endangered species. The issuance of permits under the Compliance Act, therefore, is discretionary agency action requiring consultation under § 7 of the ESA.

Conclusion

The Ninth Circuit held that the NMFS violated the ESA by failing to consult internally prior to the issuance of longline permits under the Compliance Act. The Center's claims brought under § 9 of the ESA, which the district court did not reach, were remanded for further proceedings in light of this decision.

ENDNOTES

1. *Turtle Island Restoration Network and Center for Biological Diversity v. NMFS*, 340 F.3d 969, 971 n. 2 (9th Cir. 2003).
2. 16 U.S.C. § 1536(a)(2) (2003).
3. 50 C.F.R. § 402.03 (2003) (emphasis added).
4. *Turtle Island*, 340 F.3d at 974.
5. 16 U.S.C. § 5503(d) (2003) (emphasis added).
6. *Id.* at § 5501(5).

> uments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river.

The compact did not, however, settle the issue of the exact location of the boundary between the states. Ninety-two years would pass before binding arbitration awarded ownership of the bed of the Potomac to Maryland by establishing the boundary at the low-water mark on the Virginia shore. Article Fourth of the 1877 award is the second key provision interpreted by the Court in the present case. Article Fourth of the award states

> Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five.

The Modern Conflict

Maryland instituted a permitting program for waterway construction and water withdrawal on the Potomac in 1933. Over the years, starting in 1957, Maryland issued many of these permits to various Virginia entities without objection. In 1996, the Fairfax County Water Authority (FCWA) applied for permits to build a 725-foot water intake structure to supply water to northern Virginia, site of some of Washington D.C.'s most booming suburbs. Maryland denied the permit – a first. Maryland officials believed granting the permit would be detrimental to their state by encouraging sprawl in Virginia, and claimed that FCWA had not adequately demonstrated need for the project. After fruitlessly seeking administrative remedies, Virginia filed a complaint with the U.S. Supreme Court in March 2000 seeking a declaration that Maryland lacked regulatory authority to veto the project. (In 2001, Maryland approved the permit, but with the condition that FCWA install a restrictor to limit withdrawal.)

The Court accepted the case under its original jurisdiction over controversies between states.[1] As it typically does in original jurisdiction cases, the Court referred the complaint to a Special Master for factfinding and recommendation. The Special Master, Ralph I. Lancaster, Jr., of Maine, reviewed evidence submitted by both states and recommended that the Court rule for Virginia because, in his opinion, Maryland did not have authority to regulate Virginia's rights under the 1785 compact and 1877 award. Maryland opposed this recommendation on two grounds: first, that as sovereign over the river to the Virginia border it had regulatory authority; and second, that even if Virginia's rights under the compact and award were unrestricted, Maryland had acquired the right to regulate by way of Virginia's acquiescence to its regulation since 1957.

The Court's Analysis

The Court agreed with both states that the 1785 compact and 1877 award were determinative. Starting with the 1785 compact, the Court observed that Article Seventh, quoted above, is silent concerning regulatory authority, while other articles about other rights (for example, fishing) speak explicitly of regulatory schemes. Virginia argued that the compact's structure indicated the states' intention to define clearly the circumstances under which one state's citizens would be under the jurisdiction of the other, and therefore Article Seventh's silence meant each state would regulate its own citizens under that article. Maryland argued that its sovereignty over the Potomac was well settled by 1785, so Article Seventh should be interpreted in Maryland's favor. The Court sided with Virginia after noting the fact that the states' boundary was not finally determined until 1877, so sovereignty over the river could not have been well settled by 1785. In 1785, the Court said, the states merely agreed to protect the rights of both states' citizens to build structures; questions of regulatory authority were postponed until sovereignty over the river was decided.

The 1877 arbitration decided the sovereignty question in Maryland's favor, by drawing the boundary line at the Virginia shore's low-water mark. Nonetheless, even though the Potomac is an entirely intrastate, Maryland river, the Court read the "plain language" of Article Fourth as recognizing in Virginia a sovereign right – that is, a right Maryland cannot regulate - to use the Potomac's waters.[2]

Maryland argued that even if Virginia did have such a right, it lost it by acquiescing for years in Maryland's regulation of water withdrawal and waterway construction. Among other things, Maryland had taxed structures, issued licenses, and exercised exclusive criminal jurisdiction on its side of the state boundary – policing activities normally carried out by a sovereign. The Court deflated this argument by focusing solely on the states' relationship vis-à-vis water withdrawal and waterway construction activities. In 1976, Virginia protested Maryland's assertion of an exclusive right to withdraw water; thus, Virginia had not in fact acquiesced to Maryland's assertion of regulatory authority over withdrawals and construction, and Maryland's acquiescence argument fails.

The Dissents

Justices Stevens and Kennedy filed separate dissenting opinions, and each joined the other's opinion. Justice Stevens saw a much simpler issue: Maryland is sovereign, Virginia is riparian, so the question is whether riparian landowners' rights to withdraw water can be restricted by the sovereign. Under common law, the answer is "yes."

Justice Kennedy undertakes a more extensive analysis. Unlike the majority, he finds that Maryland had clear title to the river in 1785, because the 1877 award (approved by both states and Congress) declared that Maryland's "clear title to the whole River" dated back to 1632.[3] The fact that Virginia disputed title between 1785 and 1877 has no force. The decisive question, then, is whether Maryland waived sovereignty at some time since 1785.

Justice Kennedy interprets the 1785 compact as a mutual recognition of rights of access to the river, to protect each state's citizens in case the other state ultimately was found to have full title to the river. When Maryland was determined to have title, the compact worked as a waiver of sovereignty only to the extent that Maryland could not exclude Virginia from the river. Maryland's police powers remained intact. Maryland can, therefore, restrict Virginia's water withdrawals so long as such restriction does not amount to exclusion.

Unless, of course, Virginia's rights were expanded by the 1877 arbitration award. Here, Justice Kennedy rejects the majority's reading of the "plain language" of Article Fourth and concludes that the award simply recognizes Virginia's riparian (but not sovereign) rights.

Justice Kennedy ultimately declares that the proper question would have been whether Maryland's regulation in this case amounted to an exclusion of Virginia, and not whether Maryland has the right to regulate Virginia at all. He also expresses concern that the majority decision contains no principle limiting Virginia's withdrawals, and that more complex questions about the power of one state to regulate another have been circumvented.

Conclusion

A 7-2 majority of the Supreme Court overruled Maryland's objections to the Special Master's report, and entered the decree proposed by the Special Master affirming Virginia's sovereign rights under the 1877 arbitration award to build structures appurtenant to its shore and withdraw water from the Potomac River without regulation by Maryland. The effect of this case on other interstate water disputes may be limited, for two reasons. First, the decision turned on interpretation of historical documents unique to this case – the 1785 compact and 1877 arbitration award. Second, the Potomac River, although practically serving as the border between Virginia and Maryland, in fact belongs entirely to Maryland. Conflicts generally involve interstate waters, not intrastate ones. As Justice Kennedy points out in his dissent, interstate disputes are governed by the federal common law of equitable apportionment.[4] The Court's decision leaves open the question of what law will be applied when, in the future, Maryland objects to the amount Virginia withdraws – an objection that, when one considers the growth of Virginia's D.C. suburbs, seems inevitable.

ENDNOTES

1. U.S. CONST. art. III, § 2, cl. 1.
2. *Virginia v. Maryland*, 124 S.Ct. 598, 2003 LEXIS 9192 at * 36 (2003).
3. *Id.* at *48 (Kennedy, J., dissenting).
4. *See* Josh Clemons, *Water-Sharing Compact Dissolves*, WATERLOG 23:3, 1 (2003), available at http://www.olemiss.edu/orgs/SGLC/23.3watershare.htm .

Wind Farm, from page 1

United States on Horseshoe Shoal, five miles off Cape Cod, Massachusetts. Cape Wind's plant would consist of 130 wind turbines producing a maximum output of 420 megawatts. As a first step toward the wind farm's construction, Cape Wind Associates applied for a permit from the Corps under § 10 of the Rivers and Harbors Act to build a "Scientific Monitoring Station" on Horseshoe Shoal to compile data on wind, wave, tide height, current, and water temperature. The station is a 197-foot monopole structure supported by three open-ended steel piles driven into the ocean floor. The data tower covers approximately 900 square feet. Cape Wind submitted a separate permit application for the wind energy plant.

After reviewing the data tower permit application and soliciting public comment, the Corps issued a § 10 permit to Cape Wind. Cape Wind could build its tower provided it dismantled the tower within five years, posted a $30,000 bond for emergency repairs and removal, and shared the data collected with government agencies, education institutions, and research organizations. Pursuant to its requirements under the National Environmental Policy Act (NEPA), the Corps prepared an Environmental Assessment through which the agency determined that the data tower would not have a significant impact on the environment. The Alliance to Protect Nantucket Sound (Alliance) filed suit challenging the Corps's decision to issue the § 10 permit.

Section 10 Permit

Alliance argued the Corps lacked the authority under the Rivers and Harbors Act (RHA) to issue the § 10 permit. Under § 10, a permit is required for the construction of any structure in navigable waters of the U.S. Generally, the jurisdiction of the Corps under the RHA only extends three miles seaward of the coast. However, in the Outer Continental Shelf Lands Act (OCSLA), Congress extended the authority of the Corps to prevent obstructions to navigation to artificial islands, installations, and other devices "permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources."[2] The Corps interprets this provision in the OCSLA as extending the authority of the Corps to "artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf."[3]

The district court determined that the Corps's issuance of a § 10 permit for the data tower was reasonable, rejecting Alliance's argument that the Corps only has authority over structures erected

for the purposes of extracting resources. The court found that the statutory provisions of the OCSLA supported the Corps's claim of authority over all structures on the continental shelf. The court's reasoning, however, is questionable and likely to be reviewed on appeal.

Section 1333 of the OCSLA states that the Corps has authority over "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom."[4] Relying on legislative history and Corps regulations, the court interprets this phrase to mean all artificial islands, installations, and other devices located on the seabed "including, but not limited to, those that '*may be*' used to explore for, develop, or produce resources."[5] With the addition of the phrase "including, but not limited to" the court is attempting to close a regulatory gap. Currently no federal agency has clear authority over the placement and construction of offshore wind farms. The court tries to fill this void by simply concluding that "Congress could not have intended to create such a regulatory void when it amended the OCSLA in 1978."[6] Although this is a reasonable argument for the court to make, because it is unlikely Congress was thinking about wind farms in 1978, the failure of the district court to give effect to the plain language of the statute could cause higher courts to overturn this decision on appeal.

NEPA

Alliance also argued that the Corps violated the National Environmental Policy Act (NEPA) by failing to circulate the Environmental Assessment and Finding of No Significant Impact (FONSI) for public review, failing to adequately consider alternatives, and reviewing the data tower permit separately from the wind energy plant permit. The court quickly dismissed all of Alliance's arguments.

In limited circumstances, such as when a proposed action is without precedent, an agency is required to make the FONSI available for public review.[7] The court determined that Cape Wind's data tower was not without precedent as the Corps previously authorized a similar tower off Martha's Vineyard. The court also found that the Corps adequately considered alternatives, including land-based towers.

The court also found that the Corps acted reasonably in conducting separate reviews for the data tower and the wind energy plant. Actions which are connected should be addressed in the same environmental assessment and impact statement. Connected actions are those which automatically trigger other actions requiring a NEPA review, cannot proceed unless other actions are taken, or are interdependent parts of a larger action.[8] The court held that the data tower was not a connected action which should have been reviewed in conjunction with the wind farm project, because the authorization of the data tower does not automatically trigger the authorization of the wind farm, the data tower project can proceed without the wind farm, and the utility of the data tower is not dependent on the final approval of the wind farm.

Conclusion

The district court found the Corps has the authority to grant a permit for the construction of a data tower on the outer continental shelf. The court also determined that the Corps fulfilled its obligations under NEPA with respect to the data tower permit. An appeal of this decision is expected.

ENDNOTES

1. The first round involved whether a license from the Commonwealth of Massachusetts, in addition to a federal permit, was required for the construction of the data tower. The court determined that because the tower would be built more than three miles offshore, the federal government has exclusive jurisdiction.
2. 43 U.S.C. § 1333 (2003).
3. 33 C.F.R. § 320.2(b) (2003).
4. 43 U.S.C. § 1333(a)(1) (2003).
5. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army, et. al.*, 2003 U.S. Dist. LEXIS 16405 at *29 (D. Mass. Sept. 18, 2003) (emphasis in original).
6. *Id.* at *32 n. 87.
7. 40 C.F.R. § 1501.4 (2003).
8. 40 C.F.R. § 1508.25(a)(1) (2003).

Public Access to Lake Erie Threatened

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

Introduction

A controversial bill pending before the Ohio State Legislature, if passed as introduced, would shift the upper boundary of Ohio's Lake Erie public trust lands from the ordinary high water mark to the low water mark. Frank Lichtkoppler, a Sea Grant Extension agent in Ohio, brought this matter to our attention and asked us to share our thoughts.

The Public Trust Doctrine

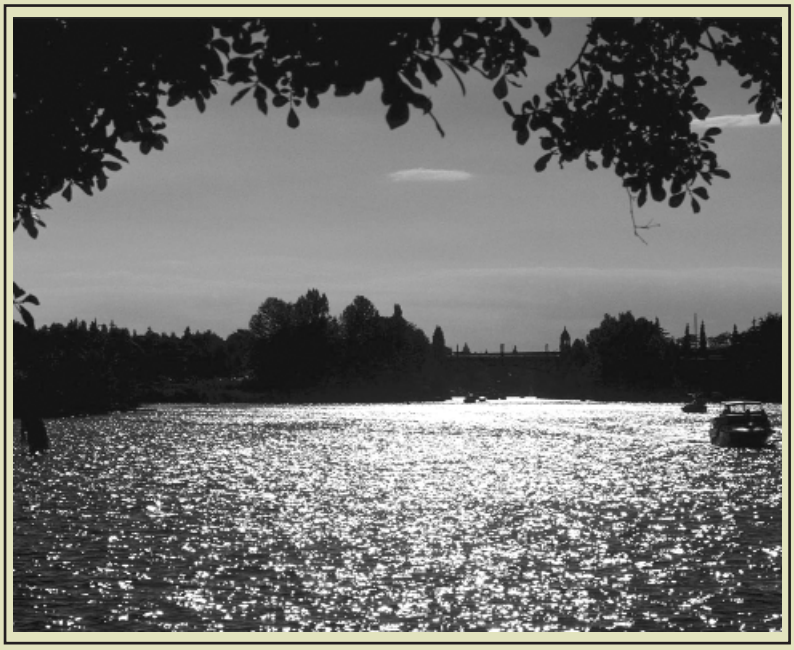
Under the common law, the public trust doctrine provides that "public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of public uses."[1] Public trust waters are the state's navigable waters and public trusts lands are the lands beneath those navigable waters, up to the ordinary high water mark. Public trust lands include tidelands, shorelands, and the land beneath oceans, lakes, and rivers.

Public trust lands are unique in that two separate titles exist to the same piece of land. The state holds the public title, often referred to as *jus publicum*, ensuring the right of the public to use and enjoy the public trust waters and lands for commerce, navigation, fishing, bathing, and other related uses. The *jus publicum* interest is reserved by the state regardless of the deed. "A state cannot convey the *jus publicum* interest into private ownership, nor can it abdicate its trust responsibilities."[2] The private title, the *jus privitum*, can be held by a private individual or the state. The holder of the private title has the right of use and possession. The private right to use the public trust lands, however, is subservient to the dominant public right of access.

Ohio's Public Trust Doctrine

Each State manages its public trust lands and waters in different and unique ways. Ohio is a high water state, which means that the state owns both titles, the private right to possess and the public "trust" title, from the shore up to the high water mark.[3] Section 1506.10 of the Ohio Code establishes Ohio's rights to the waters of Lake Erie. It states that

> the waters of Lake Erie . . . extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state.[4]



The Ohio Supreme Court has stated that "the state as trustee for the public cannot by acquiescence abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created."[5]

House Bill 218

When introduced, House Bill 218 contained language that would clearly violate the public trust doctrine. The drafters of the bill sought to alter § 1506.10 by placing the words "natural low water mark of the" before "southerly shore" and adding a paragraph restricting the state's property interest to below the natural low water mark.[6] As mentioned above, a state may not transfer all ownership rights to public trust property to private owners. A shift in the boundary line from the high water mark to the low water mark would improperly divert public trust property from public to private use.

In appears other members of the Ohio House realized the problems with the bill's language. The bill now reads "the waters of Lake Erie. . . extending from *where the waters of Lake Erie make contact with the land* to the international boundary . . . belong to the State."[7] With the alteration in language, even if the bill passes, the authority of the Ohio Department of Natural Resources and the rights of the public should be preserved. While the version of the bill passed by the House could still be interpreted as granting private property rights above the low water mark, Ohio courts are more likely to adhere to precedent and set the high water mark as the line where Lake Erie makes contact with the land.

Conclusion

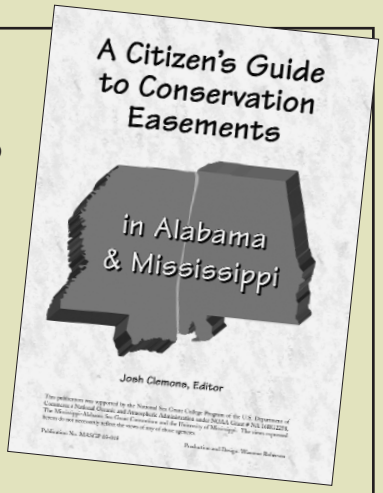
It is still too early to tell whether the panic caused by the introduction of this bill was premature. While passage of the bill could greatly affect the state's coastal management program, H.B. 218 has significant hurdles to overcome before adoption. The bill is currently pending in the Ohio Senate, which may not be as susceptible to the political pressure applied by Lake Erie property owners as representatives in the House. Due to the significant public access implications of H.B. 218, the Law Center will continue to track this legislation as it moves through the Ohio Legislature and/or the courts.

ENDNOTES

1. Coastal States Organization, Putting the Public Trust Doctrine to Work, 1 (1997).
2. *Id.* at 8.
3. There is one minor exception to this rule. If an area of public trust land was conveyed to private owners by the U.S. federal government prior to statehood, the private owners hold sole title.
4. OH. REV. CODE § 1506.10 (2003).
5. *State v. Cleveland & Pittsburgh RR Co.*, 113 N.E. 677, 682 (Ohio 1916).
6. H.B. 218, as introduced, 125th Gen. Assem., Reg. Sess. (Oh. 2003).
7. H.B. 218, as passed by the House, 125th Gen. Assem., Reg. Sess. (Oh. 2003).

Publication Announcement

The Mississippi-Alabama Sea Grant Legal Program is pleased to announce the recent publication of *A Citizen's Guide to Conservation Easements in Alabama & Mississippi*. Edited by Josh Clemons, Research Counsel for the Legal Program, the guide is intended to acquaint Alabama and Mississippi landowners with the law applicable to conservation easements in their states. Summaries of the relevant state and federal statutes and regulations are provided, along with the text of the statutes and regulations themselves. The guide is available on-line at http://www.olemiss.edu/orgs/SGLC/citizen.pdf and hard copies are available upon request.



Formal Cumulative Impacts Analysis Not Required Under Alaska Law

Greenpeace, Inc. v. State of Alaska, 79 P. 3d 591 (Alaska 2003).

Shannon McGhee, 2L

The Supreme Court of Alaska recently addressed whether Alaska requires a NEPA-like or "whole-project" approach to cumulative impacts analysis when projects are reviewed for consistency with the State's coastal management plan.

Background

In 1995, British Petroleum Exploration (BP) purchased four oil and gas leases to develop Alaska's first offshore oil facility and subsea oil pipeline in the Beaufort Sea near Prudhoe Bay. BP's plans, known as the Northstar Project, required several federal and state permits. Any project impacting Alaska's coastal areas and requiring multiple permits must undergo a comprehensive review to determine its consistency with Alaska's Coastal Management Program (ACMP). The Alaska Division of Government Coordination (DGC) administers the review and is responsible for issuing the consistency determination. Due to the nature of the Northstar Project, the United States Army Corps of Engineers was also required to review the project under the National Environmental Policy Act (NEPA) and prepare an Environmental Impact Statement. In an effort to expedite the review process, the DGC and Army Corps of Engineers (Corps) coordinated their reviews.

During the review process, public comment was sought by DGC and the Corps. Greenpeace responded with extensive comments. DGC found the Northstar Project consistent with ACMP's standards in a Proposed Consistency Determination in early 1999. Greenpeace, unhappy with the consistency determination, asked the Alaska Coastal Policy Council to review whether Greenpeace's comments were fairly considered in the proposed consistency determination. The Council sustained the proposed consistency determination and the DGC issued a Final Consistency Determination on February 4, 1999.

Greenpeace appealed the Final Consistency Determination to the Alaska Superior Court. The superior court affirmed DGC's decision and Greenpeace appealed to the Supreme Court of Alaska. Greenpeace alleged as a matter of law that DGC failed to apply the proper cumulative impacts analysis and phasing procedural requirements mandated under ACMP. On appeal, the Supreme Court ruled Alaska law did not require DGC to perform a NEPA-like cumulative impact analysis and that Northstar was not a phased project.

Cumulative Impacts

Greenpeace argued that the proper standard for a cumulative impacts analysis under the ACMP should be defined as "the impact on the environment which results from the incremental impacts of the action when added to other past, present, and reasonably foreseeable future actions."[1] Greenpeace supported its argument by claiming the federal government's Final Environmental Impact Statement implicitly endorsed a NEPA-like definition by describing the ACMP's standards as encompassing a "general balancing process taking account of public need, alternatives, and cumulative effects . . ."[2] Greenpeace also claimed Alaska law defines a "use of direct and significant impact" in a way that considers the cumulative effects of a coastal project.[3]

The DGC, on the other hand, asserted Alaska law and cases support a "whole-project analysis" approach to the meaning of cumulative impacts. This whole-project analysis would require the DGC to evaluate the combined impacts of all aspects of the project under review, but not require the DGC to examine the project in light of hypothetical or proposed future development in the region.[4]

The Court agreed with the DGC that a NEPA-like cumulative impacts analysis is not warranted by the ACMP because the NEPA review process is already part of the consistency review for projects like Northstar. "The placement of struc-

tures and the discharge of dredged or fill material into coastal water must, at a minimum, comply with the standards contained in Parts 320-323, 33 C.F.R. 47," a federal regulation under NEPA requiring a formal cumulative impacts analysis.[5] This provision ensures that proposed projects requiring federal permits will achieve the minimal level of compliance with Alaskan law upon approval of a federal permit. It does not, as Greenpeace suggests, add an additional layer of cumulative impacts analysis. This statute does not require DGC to conduct an independent review. While the DGC must review and consider any cumulative impact analysis prepared by a federal agency, the DGC remains free to accept or reject the federal analysis.[6] The Supreme Court reasoned that a separate level of review is unnecessary because of the availability of a federally prepared cumulative impacts analysis.

The Court also noted that ACMP standards require the DGC to consider a project's known and predictable effects during the consistency review, such as adjacent uses and even subsequent adjacent uses. The Court rationalized a "whole-project analysis," as suggested by the DGC, as more compatible with these standards because "it takes into account 'all aspects of a project, considered as a whole' and its 'existing development context' but does not require the DGC to speculate about unknown and unpredictable future events as does a NEPA-defined cumulative impact analysis."[7]

Greenpeace also argued that the federal Coastal Zone Management Act (CZMA), as well as the DGC handbooks, promoted a NEPA-like cumulative impacts analysis for ACMP consistency reviews. No provision in the CZMA or its regulations mandates Alaska adopt a NEPA-like cumulative impact analysis. The Court also rejected similar arguments that the DGC handbooks and policies required a NEPA-defined cumulative impacts analysis, stating that at the most these materials "simply encourage coastal districts to develop cumulative impact analysis guidelines . . ."[8]

Finally, Greenpeace contended that even under DGC's "whole project" cumulative impacts analysis, DGC still failed to consider "the incremental contribution of Northstar, in the context of past, present and reasonably foreseeable actions," rendering the DGC decision arbitrary and capricious.[9] Therefore, the DGC's consistency determination could only fail because the agency failed to make a reasonable decision. Agency decisions are generally reviewed under the "hard look" standard - examining whether the agency took a "hard look" at the issues. The failure to comply with the "hard look" standard is a separate issue which was not raised by Greenpeace on appeal. Greenpeace argued that the DGC failed to comply with mandatory procedures. Because a NEPA-like cumulative impacts analysis is not required, the DGC's final consistency determination complied with mandatory ACMP procedures. Greenpeace waited to raise the issue of failure to comply with the "hard look" standard until it filed its reply briefs with the court. The Supreme Court held that Greenpeace waived its right to argue this issue by failing to raise the issue on appeal.

Phasing

The second procedural issue was whether DGC improperly phased the Northstar Project by prematurely issuing permits and approving "major aspects" of the project's future developments without sufficient information to make a reasoned ACMP consistency determination. The Court succinctly concluded that the Northstar project was not phased and that the consistency review encompassed the project in its entirety.

Conclusion

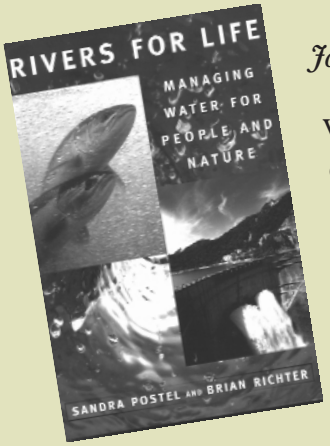
The Supreme Court of Alaska determined Alaska law did not require DCG to produce NEPA-like cumulative impact analysis during their ACMP consistency review of the Northstar Project and affirmed DCG's final consistency determination.

ENDNOTES

1. *Greenpeace, Inc. v. State*, 79 P. 3d 591, 593 (Alaska 2003) (*citing* 40 C.F.R. § 1508.7 (2002)).
2. *Id.* at 594.
3. *Id.* (*citing* ALASKA STAT § 46.40.210 (1995)).
4. *Id*.
5. ALASKA ADMIN. CODE tit. 6, § 80.040 (2000).
6. *Greenpeace*, 79 P. 3d at 595, n 20.
7. *Id.* at 596.
8. *Id.* at 597.
9. *Id*. at 598.

Rivers of Life: Managing Water for People and Nature

Sandra Postel and Brian Richter (Island Press 2003)



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

We humans love building dams. When a child encounters a trickle of water in a ditch or yard, nine times out of ten he or she will plop a big lump of mud down in the middle of it to alter the flow. The urge does not abate with age. For millennia, people have altered natural river flow patterns to provide benefits like flood protection, irrigation, navigation, and energy. Flow alteration on a massive scale has been most pronounced in the northern third of the world (including the U.S., Canada, Europe, and the former Soviet Union) where over three-fourths of large river systems are hydrologically modified – and enough water is impounded to affect the tilt of the earth's axis and the speed of its rotation. While all this flow modification and river management has undeniably been highly useful to humanity, it is equally undeniable that the benefits have not come without ecological and environmental costs.

In *Rivers of Life*, Sandra Postel and Brian Richter argue that human civilization has reached a point at which it is necessary to develop new ways of thinking about water management. Rather than viewing water solely as a resource to be exploited by diversion and impoundment, we should consider the benefits that natural systems provide: fish and wildlife habitat, water purification, soil regeneration, and so on. These benefits should be quantified to the extent possible so that they can then be considered in cost/benefit analyses of both individual projects and general policy. The logical outcome of this process will be what the authors call an "ecosystem support allocation" – the amount of water necessary to sustain the ecosystem benefits. Human diversionary uses will not be permitted to encroach upon this allocation. The authors strongly emphasize that their approach does not entail sacrificing economic health, or even economic growth. To the contrary, economic forces would realign with the production and enjoyment of sustainable benefits, and jobs would follow.

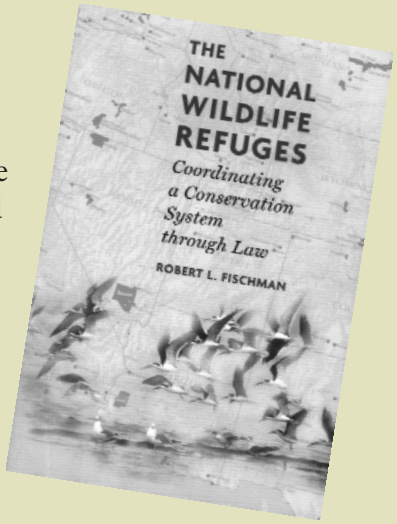
Postel and Richter highlight some encouraging developments. South Africa has established a two-part "reserve" that protects allocations of water for basic human needs and ecosystem preservation. Australia has put a cap on diversions from the large, multi-state Murray-Darling river basin. The authors examine the existing policy mechanisms available to develop similar protection schemes to benefit river systems in the U.S., particularly in the Southeast, where some of the most stressed systems are located. Reading carefully, however, one discovers that the South African and Australian endeavors are still in the early stages and have not yet proven that politicians will actually take real water from powerful, entrenched economic interests in overallocated river basins. Nonetheless, the possibilities are intriguing.

Rivers for Life is a work of advocacy as much as economics or science, and the authors make a good case for the common-sense idea of considering ecosystem benefits in cost/benefit analyses. In doing so they make some assumptions that are based on policy and not economics or science. For instance, they seem to assume that allocating water to protect endangered species is the most rational viewpoint. That is not necessarily so. It is no less rational to place a higher value on flood control or hydropower than on a certain species of fish or plant. Remember that when the U.S. Supreme Court enjoined completion of the Tellico Dam because of the endangered snail darter, Congress quickly amended the Endangered Species Act to allow the dam to be completed anyway. Whether that outcome is good or not is debatable, but it is debatable.

In short, values are subjective. For those whose values correspond to the authors', *Rivers of Life* provides powerful ammunition for arguing for the preservation of ecosystem values. For others, the book may encourage fresh ways of thinking about water management issues and prove that the ecological perspective has significant merit. By advocating a more thorough consideration of all costs and benefits, and calling for careful consideration of future needs, the authors have made a valuable contribution to the ongoing national and international discussion of water resource management policy.

The National Wildlife Refuges: Coordinating a Conservation System through Law

Robert L. Fischman (Island Press 2003)



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

Written for a broad audience of policy-makers, students, lawyers, and users, *The National Wildlife Refuges: Coordinating a Conservation System through Law* contains a comprehensive overview of the law that governs the management of wildlife refuges. While the majority of readers are unlikely to benefit from a cover to cover read, the wealth of information available in this compact source is essential for anyone connected to wildlife refuges.

For lawyers and law students interested in the inner workings of the national wildlife refuge system, *The National Wildlife Refuges* analyzes, in detail, how the 1997 Improvement Act manifests what Fischman calls "the five hallmarks of organic legislation": purpose statements, designated uses, comprehensive planning, substantive management criteria, and public participation. *The National Wildlife Refuges* provides private citizens interested in their refuges with a guide to how and when opportunities are present for public participation in refuge management decisions – from pre-decisional opportunities to administrative and judicial review. More importantly for future research and policy efforts, throughout the book Fischman identifies and analyzes the weaknesses in current FWS policy.

Fischman also covers some of the more obscure aspects of wildlife refuge management, including acquisition of water rights and oil and gas development. Many wildlife refuges in the west encounter management problems during dry years. For example, the Klamath Basin refuges are ranked fourth in the order of priority for water from the Klamath River, behind endangered species, tribal trust responsibilities, and farmers. A 1994 survey revealed only 98 out of 226 western refuges responding had adequate existing water rights even in average years. Fischman examines the duty of the Fish and Wildlife Service, established in the 1997 Improvement Act, to acquire water rights needed for refuge purposes.

Finally, an entire chapter is devoted to the Alaska Refuges. The debate over oil drilling in the Alaska National Wildlife Refuge (ANWR) is not the only issue unique to wildlife refuges in Alaska. While refuge system laws and regulations apply equally to the Alaska refuges, special rules apply in certain areas. Fischman discusses the Alaskan Native Claims Settlement Act, ANWR, and subsistence hunting and fishing allowances for rural Alaskan residents, which are provided nowhere else in the System.

Fischman's choice to reduce internal citations and footnotes increases the readability and accessibility of *The National Wildlife Refuges.* Numerous references to the legislative history of the various acts and internal agency documents provide glimpses of the driving forces behind the System's evolution. The appendices alone are worth the purchase. Fischman provides a chronology of refuge system development, the text of the National Wildlife Refuge System Administration Act of 1966 and the National Wildlife Improvement Act of 1997, and the official establishment dates for the 540 named national wildlife refuges in existence as of September 30, 2002. As Fischman's book arrived on my desk during a particularly trying period of research on coastal wildlife refuges, I can personally vouch for the utility of these appendices. This comprehensive and extensively researched book should be the entry point for anyone with a question regarding the governance of wildlife refuges.

Robert L. Fischman is professor at law and Louis F. Niezer Faculty Fellow at Indiana University School of Law - Bloomington.

International Law Update

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

Below is a summary of the coastal- and marine-related international law developments in 2003.

Establishment of Endeavor Hydrothermal Vents Area March 2003

The Endeavor Hydrothermal Vents Area was the first marine protected area established under the Canada Oceans Act. The Endeavor Vents are located 250 kilometers southwest of Vancouver Island.

Establishment of a Supplementary Fund for Compensation for Oil Pollution Damage May 2003

The International Maritime Organization (IMO) adopted a Protocol establishing an International Oil Pollution Compensation Supplementary Fund. The Protocol supplements the compensation already available under the 1992 Protocols to the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damages. The amount of compensation available for one incident is limited to just over a billion. The Protocol applies to oil pollution damage in the territory and the Exclusive Economic Zone of a Contracting Party and will enter into force three months after ratification by at least eight States.

Protocol on Strategic Environmental Assessment to the Espoo Convention May 2003

On May 21, 2003, thirty-three countries signed a new protocol to the Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention").

Antigua Convention June 2003

The parties to the Inter-American Tropical Tuna Commission adopted the Antigua Convention on June 27, 2003 "to ensure the long-term conservation and sustainable use of the fish stocks covered by [the] Convention." Most significantly, the Antigua Convention instructs Commission members to apply the precautionary approach as described in the Code of Conduct and/or the 1995 U.N. Fish Stocks Agreement. Members are instructed to "be more cautious when information is uncertain, unreliable, or inadequate" and the inadequacy of scientific information shall not be put forth as a reason for failing to adopt measures. The Convention is open for signature from November 14, 2003 to December 31, 2004 and will enter into force fifteen months after ratification by seven contracting parties.

Resolution on the Conservation of Tuna in the Eastern Pacific Ocean Oct. 2003

During the 71st Meeting of the Inter-American Tropical Tuna Commission, the Commission adopted Conservation Resolution C-03-12 recommending the closure of the purse-seine tuna fishery in the Eastern Pacific Ocean in December 2003 and from August 1, 2004 to September 11, 2004.

Framework Convention for the Protection of the Marine Environmental of the Caspian Sea Nov. 2003

On November 3, 2003, a framework agreement proposed by the United Nations's Caspian Environment Program to protect the Caspian Sea and its resources was signed by Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan. The agreement seeks to reduce the amount of sewage and industrial waste flowing into the Sea.

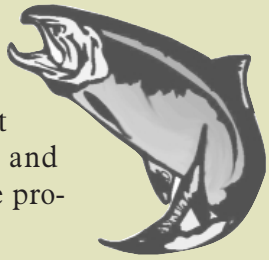
Canada Ratifies Law of the Sea Convention Nov. 2003

Canada became the 144th party to the United Nations Convention on the Law of the Sea (UNCLOS). Canada also ratified the 1994 Agreement relating to the Implementation of Part XI of UNCLOS, which addresses deep seabed mining. In the ratification agreement, Canada declared that disputes arising under the Convention will be submitted to arbitration or to the International Tribunal for the Law of the Sea.

Coast to Coast

And Everything In-Between

Water disputes are no longer restricted to the arid West. Virginia and Maryland took their fight over the Potomac River all the way to the Supreme Court. The battle between Alabama, Florida, and Georgia is known as the Tri-State Water Wars. Now water shortages in Michigan have spurned the adoption of two new groundwater laws. One instructs the Michigan Departments of Environmental Protection and Agriculture to investigate and help resolve water disputes. The other requires the identification of major water users and the mapping of the state's aquifers in an attempt to avoid future disputes.



The Ninth Circuit Court of Appeals recently held that the stocking of salmon in Tustumena Lake in the Kenai Wildlife Refuge violates the Wilderness Act. The U.S. Fish and Wildlife Service stocks the lake to improve the catch of Cook Inlet fisherman. The court determined that the project was a commercial enterprise and therefore banned by the Wilderness Act, despite the non-detrimental nature of the project.

Alaska is leasing158 sites along the state's southcentral and southeastern coast for mariculture. After paying a one-time bid fee ($200 minimum), lessees will pay $250 for the first acre and $100 for each additional acre per year to conduct mariculture activities. Among the many sites are eight intertidal sites in Prince William Sound which will no longer be accessible to the public wishing to harvest wild clams. It remains to be seen whether traditional harvesters in Prince William Sound will challenge this new restriction on their access to a public resource.

The Bush Administration recently announced that it would not issue a new rule in response to the 2001 decision of the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. With the majority of federal courts narrowly interpreting *SWANCC*, the agencies determined that a new rule was unnecessary. The EPA was also concerned about the impact of a regulatory change in the definition of protected waters on the Clean Water Act as a whole. The agencies will continue to rely on a January 2003 guidance document when faced with jurisdiction determinations.

Around the Globe . . .

Australia recently upped the stakes in its battle against illegal poaching in Antarctica. The Australian custom service has acquired a vessel armed with a deck-mounted .50 caliber machine gun. Australia anticipates the year-round use of the vessel, which will be crewed by mariners, fisheries officers, and armed customs agents. Such weaponry should make poachers ponder the question: which is more important - that hold full of Chilean Sea Bass or your life?

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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