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No Right to Walk between High Water Mark and Water's Edge

Great Lakes

Glass v. Goeckel, 2004 Mich. App. LEXIS 1229 (Mich. App. May 13, 2004).

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

In May 2004, a Michigan Court of Appeals ruled that the general public does not have a right to traverse the shore of Lake Huron between the ordinary high water mark and the water's edge. The court confirmed that in Michigan lakefront property owners have the exclusive right of use to the land running to the water's edge, subject only to the public's right of access for navigation.

Background

Richard and Kathleen Goeckel own land abutting Lake Huron in Alcona County, Michigan. In 2001, Joan Glass, a neighbor of the Goeckels, sued the Goeckels claiming they were denying her access to Lake Huron guaranteed by an express fifteen-foot easement across the Goeckels' property "for ingress and egress to Lake Huron" contained in Glass's deed. Glass presented evidence that the Goeckels were restricting her access to the Lake by parking cars in front of the entrance to the easement and refusing to trim tree branches along the easement. Glass also claimed that the Goeckels were interfering with her right to walk along the beach.

The parties eventually resolved their dispute regarding the express easement. The Goeckels agreed to prune the pathway to insure Glass unimpeded access to Lake Huron. Glass could also use the beach portion of the fifteen-foot easement for

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Kauai Planning Commission Can Modify SMA Use Permit

Hawaii

Morgan v. Planning Department, County of Kauai, 86 P.3d 982 (Haw. 2004).

Daniel Park, 2nd Year Law Student at University of Hawaii School of Law

On March 24, 2004, the Supreme Court of Hawai'i ruled that the Planning Commission of the County of Kauai (Commission) possesses the inherent authority to modify a validly issued Special Management Area (SMA) Use permit due to changed conditions. The supreme court based its decision on the language and context of Hawai'i's Coastal Zone Management Act (CZMA)[1], as well as the Planning Commission's Rules of Practice and Procedure (PCRPP).

Background

For many oceanfront property owners, shoreline erosion threatens significant damage to their property. In response to this threat, owners usually construct some type of structure for protection. In September 1981, several property owners in Kauai (the seawall owners) located within a SMA applied for a SMA Use permit, required for any development within a SMA, to construct a seawall for

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Barges Below High Water Mark Do Not Infringe on Property Rights

Romeo v. Sherry, 308 F. Supp. 2d 128 (E.D. N.Y. 2004).

Lauren Cozzolino, 2nd Year Law Student at University of Connecticut School of Law

The United States District Court for the Eastern District of New York found that the State of New York owns the land between the high and low water marks (the "foreshore") unless specifically granted by the state. The court also found that waterfront property owners (riparian owners) only have a right to reasonable access to the adjacent navigable waterway.

Background

Plaintiff Joseph Romeo owns waterfront property in Tottenville, New York along the Arthur Kill. Arthur Kill is a navigable waterway that divides Staten Island, New York from New Jersey. When Romeo purchased the waterfront property in August of 1994, fourteen steel and wooden barges lay offshore in plain sight. All but five of these barges were removed by their owners at Romeo's request. The remaining barges lay on the foreshore, or the land between the high and low water marks. Romeo contends that these barges infringed on his riparian right of access to the waterway. He had wanted to use the properties for the development of a myriad of businesses including a wedding chapel, photography studio, restaurant and a community center. He argued to the court that he was unable to use the land as he had hoped because of the presence of the barges. Romeo also alleged that he had ownership of the foreshore and that the presence of the barges constituted trespass and nuisance.

Riparian Rights

Under New York law, a riparian owner's right of access to navigable waters is not absolute. Romeo argued that any interference, however slight, is an interference with his riparian rights. The court disagreed, pointing out that "well over a century of common law adjudication has established the riparian owner's right to reasonable access."[1] "Reasonable access" is defined on a case-by-case basis. The court stated that the presence of the abandoned barges offshore Romeo's property did not prevent the plaintiff from accessing Arthur Kill because the barges only blocked 25 percent of the plaintiff's access to the navigable water. The court also highlighted the fact that Romeo did not present any evidence that he had ever lived at the waterfront property in question or that he had ever attempted to launch or land a watercraft. After weighing these factors, the court held that the presence of abandoned and sunken barges on the foreshore did not violate the owner's riparian rights because riparian owners only have the right to reasonable access to navigable waters.

Ownership of the Foreshore

In addition to claiming that his riparian rights were interfered with, Romeo filed an action for trespass and nuisance. In order to successfully bring these claims, Romeo had to prove that he had ownership rights to the land where the barges rested. Citing the United States Supreme Court, the New York district court pointed out that "unless specifically granted, States are the owners of all lands subject to the ebb and flow of the tide."[2] Romeo admitted he had no grant from the State but contended that he had a right to the foreshore that derived from a colonial grant that was transferred to a previous owner of the waterfront property. This colonial grant was given to Captain Christopher Billopp in 1687 by English Royal Governor James Dongan. The grant conveyed much of the southern portion of Staten Island and stated that it included land "unto [the] low water marke."[3]

The court was not persuaded by Romeo's argument that he had a right to the foreshore based on this grant. This was due in part to the fact that Captain Billopp was convicted of treason in 1779 for fighting with the British against American colonists. He was banished from the State of New York and his property was forfeited to the people of New York. In 1784, New York State Commissioners sold the Billopp property to Thomas McFarren. McFarren's deed did not grant him land below the high-water mark. More importantly, New York courts have held that large grants of seacoast land granted for private purposes violate the public trust doctrine.[4] Therefore, Romeo could not rely on the Billopp grant for ownership of the foreshore.

Romeo made an additional claim that he obtained title to the foreshore through adverse possession. Romeo was unsuccessful in this attempt because "navigable waterways are inalienable except by grant."[5] The court found for the defendants because Romeo was unable to prove that he owned the foreshore. In short, the court reasoned that without a valid grant the State owns the foreshore.

Conclusion

The United States District Court for the Eastern District of New York concluded that under New York law, a riparian owner only has the right to reasonable access of adjacent navigable waters. The presence of the abandoned and sunken barges on the foreshore did not violate Joseph Romeo's reasonable access. In addition, the court found that the abandoned and sunken barges on the foreshore did not constitute trespass or nuisance because Romeo did not own the foreshore.

Endnotes

1. *Romeo v. Sherry*, 308 F. Supp. 2d 128, 144 (E.D.N.Y. 2004).
2. *Id.* at 141.
3. *Id.* at 135.
4. *Id.* at 142, *citing Marba Sea Bay Corp. v. Clinton St. Realty Corp.*, 272 N.Y. 292, 296 (1936).
5. *Id.* at 147.

Photo courtesy of Sean Linehan, NOAA, NGS, Remote Sensing

Santa Cruz County and California Coastal Commission Exceed Authority

Big Creek Lumber Co. v. County of Santa Cruz, 10 Cal. Rptr. 3d 356 (Cal. App. 2004).

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

In February, the California Court of Appeal for the Sixth Appellate District ruled that the California Coastal Commission did not have the authority to require Santa Cruz County to impose additional zoning criteria for timber production within the coastal zone. Additionally the court held that the County's zoning regulations were expressly preempted by the Forest Practice Act of 1973 (FPA).

Background

In 1998, the Santa Cruz County Timber Technical Advisory Committee recommended that the County adopt additional timber regulations. The County initially sought to proceed through the State Forestry Board (Board). The County submitted proposed forest practice rules to the Board as authorized by the FPA. Under the FPA, counties may recommend forest practice rules and regulations to the Board which the Board shall adopt if the proposed rules are consisted with the purposes of the FPA and necessary to protect local needs.[1] The Board accepted some of the County's proposed rules, but rejected others including a riparian "no-cut" corridor and limits on helicopter operations.

Foiled by the Board, the County adopted Ordinance 4529 banning timber harvesting in designated riparian areas in November 1998. In November 1999, the County adopted two more ordinances affecting timber harvesting. Ordinance 4571 replaced Ordinance 4529 and continued the ban on timber harvesting in riparian corridors. Ordinance 4572 limited the area in which helicopter operations could take place.

Then in December 1999, the County amended the County's General Plan/Local Coastal Program (LCP) and zoning code. The amendments limited timber harvesting to properties, both inside and outside the coastal zone, zoned Timber Production (TP) or Mineral Extraction Industrial, and properties outside the coastal zone zoned Parks, Recreation, and Open Space.[2] The County forwarded the amendments to the California Coastal Commission (Commission) for approval. The Commission approved the amendments in 2000, but only after the County had incorporated two modifications proposed by the Commission which imposed limitations on applications for timber production zoning within the coastal zone.

The Lawsuits

In 1998, Big Creek Lumber Company filed suit challenging Ordinance 4529 and several other actions of Santa Cruz County based on violations of the California Environmental Quality Act (CEQA) and preemption. In 2000, the Central Coast Forest Association (CCFA) challenged Ordinances 4571 and 4572 and the Commission's certification, also on the basis of the CEQA and preemption. The court later consolidated Big Creek's and CCFA's actions.

Big Creek and CCFA forwarded several arguments. First, they argued that the County's riparian corridor and helicopter operation regulations violated the Timberland Productivity Act of 1982 (TPA). Big Creek and CCFA also argued that the County's new zoning regulations violated the FPA. Finally, the plaintiffs argued that the modifications required by the Commission as a prerequisite for certification illegally imposed additional zoning criteria for timber production lands in violation of the TPA.

The trial court found for Big Creek and the CCFA with regard to the riparian corridor and helicopter regulations and the Commission's modifications. The trial court, however, held that the County's zoning ordinances which merely limited timber operations to certain zones were not pre-

empted by state law. Big Creek and CCFA appealed the decision of the trial court, arguing that state law preempted the County's ordinances in their entirety. Santa Cruz County and the Commission also appealed the court's decision.

Coastal Commission Modifications

The Commission has chief responsibility for regulating the use and development of California's coastal zone. Local governments participate in the regulation of the coastal zone through the development of local coastal plans, which must be certified by the Commission. The local plans may be amended by the local governments, but amendments are ineffective until certified by the Commission.

As a condition of certification, the Commission required Santa Cruz County to impose limitations on applications for timber production zoning in the coastal zone, including requiring TP rezoning applications to be processed as LCP amendments. The court held, however, that the Commission does not have the authority to condition certification on the imposition of additional conditions. Under the TPA, timberland production zones are restricted to the growing and harvesting of timber and compatible uses.[3] Counties are authorized to adopt criteria for timberland production zoning, but the county "shall not impose any requirements in addition to those listed in [the TPA]."[4] Because the county did not have the power to impose additional criteria and the Commission may not require a local government to exercise power it does not have,[5] Santa Cruz County's adoption of additional criteria is invalid.

Preemption

A county "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[6] Pursuant to this authority, Santa Cruz County adopted several measures regulating timber harvesting in the County, including zone districts, riparian corridors, and helicopter operations. The court determined that these measures are in conflict with general laws, specifically the TPA and the FPA, and therefore preempted by California state law.

Local measures are preempted by state law when "local measures duplicate or contradict state law, or when they invade a field that the state has fully occupied, either expressly or implicitly."[7] The

Photo courtesy of NOAA's America's Coastlines Collection, Santa Cruz County, California, ca. 1905

zone districts adopted by the County restricted logging to designated areas. The court held that these zone districts regulated the conduct of timber operations by prohibiting logging in certain areas. Local regulation of the conduct of timber operations is prohibited by the FPA.[8] The County's zone district regulations contradicted the FPA by authorizing the local regulation of timber operations and are preempted by the FPA.

Santa Cruz County also adopted a riparian ordinance, which applied within timber production zones, prohibiting logging within 50 feet of a perennial stream or 30 feet of an intermittent stream. The court determined that the FPA preempted the riparian ordinance, because the County's buffer width was different from the width of the buffer set by the State Forestry Board. Consequently, logging near streams allowable under state law could be prohibited by the Santa Cruz ordinance, clearly contradicting state law.

Finally, Ordinance 4572 limited helicopter operations to qualifying parcels within the boundaries of an approved timber harvest plan. As men-

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sunbathing and other recreational purposes. The Goeckels, however, continued to object to Glass's use of the beach in front of their property. The trial court found for Glass, ruling that she has the "right to use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel."[1] The Goeckels appealed the decision of the trial court.

Public Access to Lake Huron

The Goeckels argued that, as riparian owners, they have the exclusive right to use the land up to the water's edge and can therefore prevent Glass and other members of the general public from walking above the water's edge. The Michigan Court of Appeals agreed, holding that riparian owners have exclusive use of the dry land to the water's edge, subject only to the public trust doctrine. Under the public trust doctrine, the state of Michigan holds title to the waters and the submerged lands of the Great Lakes within its borders in trust for the public.

According to the court, the dividing line between the public trust doctrine and riparian rights along Lake Huron is the *water's edge*.[2] Therefore, the Goeckels and other riparian owners have the exclusive right to use the dry land to the water's edge. It is important to note, however, that the court held that this right of exclusive use does not correspond with actual ownership of the land. The land upon which Glass sought to walk had not always been dry land. The disputed strip emerged as the waters of Lake Huron receded.

The general rule is that "the title of the riparian owner follows the shoreline under what has been graphically called a 'moveable freehold."[3] The reasoning of the court is not entirely clear, but it appears Michigan deviates from this general rule with regard to land formed by the recession of water. While riparian owners gain the right to use the land that emerges as the water level of Lake Huron falls, the actual title to the previously submerged land remains with the state.[4] Riparian owners have the right to use the now-dry land and exclude others, but they do not own the land and they will lose the right of exclusive use when the waters rise.

This is an interesting interpretation of the public trust doctrine. In a majority of states, the public trust doctrine requires the state to hold navigable waters, the submerged lands underneath, and adjacent lands below the ordinary high water mark in trust for the public. Private individuals cannot own land below the high water mark or

Photo of the Lake Huron shoreline courtesy of NOAA

Photographer is Carol Y. Swinehart, Michigan Sea Grant Extension

exclude the general public from that land. In Michigan, however, the state's title to land below the high water mark is "subject to the riparian owner's exclusive use, except as it pertains to navigation issues."[5] This interpretation is narrow, merely protecting the public's right of access to the Great Lakes for navigation and not for fishing, recreation or other purposes.

Mich. Comp. Laws § 324.32502

Glass countered the Goeckels' arguments by claiming that Mich. Comp. Laws § 324.32502 provides her with a statutory right to traverse the Goeckels' property anywhere between the high water mark and the water's edge. The court disagreed. The court held that § 324.32502 simply sets forth the rules of construction for Part 325 of the Michigan Natural Resources and Environmental Protection Act. Section 324.32502 identifies lands covered by the Act, provides for the state's ability to sell and lease unpatented submerged lands, provides for the private and public use of waters over patented and unpatented lands, and preserves traditional riparian rights. This section, however, creates no substantive rights and "contains no provision guaranteeing any member of the public the right to walk on a beach fronting private property along one of the Great Lakes."[6]

Conclusion

The Goeckels, as riparian owners, have the exclusive right to the use and enjoyment of the dry land to the water's edge. Glass and other members of the general public have the right to use the lake bottom until it reaches dry land for the purpose of navigating Lake Huron.

This case is still moving through the Michigan courts. On June 24, 2004, Glass's attorneys filed an application for leave to appeal with the Michigan Supreme Court. The Law Center will continue to track this litigation and share information as it becomes available via the web and other publications.

Endnotes

1. *Glass v. Goeckel*, 2004 Mich. App. LEXIS 1229 at *4 (Mich. App. May 13, 2004).
2. *Id*. at *23.
3. *Id*. at *16, *citing Peterman v. Dept. of Natural Resources*, 521 N.W.2d 499 (Mich. 1994).
4. *Id*. at *23.
5. *Id*.
6. *Id*. at * 27.

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tioned above, the FPA prohibits local regulation of the conduct of timber operations, which includes the removal of timber.[9] The court held that Ordinance 4572 attempts to regulate the conduct of timber operations by regulating the removal of timber and is therefore preempted by the FPA.

Conclusion

The California Court of Appeals held that the Commission did not have the authority to require Santa Cruz County to impose additional criteria regarding TP rezoning. Additionally, the local measures adopted by the County were an impermissible attempt to regulate the conduct of timber harvesting and preempted by the FPA.

Endnotes

1. CAL. PUB. RESOURCES CODE § 4516.5 (2004).
2. *Big Creek Lumber Co. v. County of Santa Cruz*, 10 Cal. Rptr. 3d 356, 362 (Cal. App. 2004).
3. CAL. GOV. CODE § 51115 (2004).
4. *Id.* at § 51113, subd. (c).
5. CAL PUB. RESOURCES CODE § 30005.5 (2004).
6. Cal. Const. Art. XI, § 7.
7. *Big Creek*, 10 Cal. Rptr. 3d at 381.
8. CAL. PUB. RESOURCES CODE § 4516.5 sudb. (d) (2004).
9. *Id.* at § 4527.

SCUBA Shellfishing Ban Withstands Challenge

Cherenzia v. Lynch, 847 A.2d 818 (R.I. 2004).

Lance M. Young, 2nd Year Law Student at Roger Williams School of Law

Last year, commercial fishermen in Rhode Island challenged a legislative act that prohibited them from using a self-contained underwater breathing apparatus (SCUBA) to harvest shellfish in coastal saltwater ponds. A superior court judge declared the legislation unconstitutional because it unreasonably deprived the divers of their occupations. This spring, the Rhode Island Supreme Court reversed that decision, holding that the legislature has broad power to regulate fishing and the judiciary is limited in its ability to scrutinize those acts.

Background

Potter Pond, known for its abundant fish stock, is the deepest of several salt ponds in Rhode Island. It attracts both commercial and recreational fishermen, supports recreational boaters and is surrounded by residential and vacation homes. Some commercial fishermen used SCUBA diving equipment as a means to harvest shellfish from the pond. In 2000, residents started to complain that SCUBA diving fishermen failed to comply with quantity limits, neglected to use proper safety measures, and trespassed on private property. They claimed that the divers' failure to comply with quantity limits damaged recreational fishing and that unsafe diving practices posed a safety hazard to boaters. Concerns increased when residents learned that the Division of Fish and Wildlife was considering the rescission of a ban on SCUBA harvesting in three other Rhode Island ponds.

In 2001, the Rhode Island General Assembly enacted a statute that prohibited the use of SCUBA diving equipment for harvesting shellfish in Green Hill Pond, Quonochontaug Pond, Charlestown Pond, and Potter Pond.[1] The state defended the legislation on the grounds that it had a duty to compromise between resident concerns and SCUBA diving fishermen. The effect of the legislation, however, seemed to benefit only the residents. Furthermore, the General Assembly defended the legislation on the basis that it retains the power to regulate fishing for environmental resource protection.

Before the trial court, the fishermen argued that the legislation was not related to a legitimate state interest. They provided expert witnesses and a Department of Environmental Management report to establish a healthy shellfish population in the ponds and the adequacy of catch limits as a regulatory tool. The fishermen argued that the state could not legitimately claim it was protecting shellfish populations with the new legislation, as existing laws already restricted catch and no other method of harvesting shellfish was restricted. The superior court judge granted summary judgment in favor of the SCUBA diving fishermen, ruling that the legislation unconstitutionally deprived the SCUBA diving fishermen of their occupations. The Rhode Island Attorney General appealed to the state Supreme Court.

Right to Fish, Equal Protection, and Due Process

On appeal the fishermen claimed the ban violated their constitutional right to fish. The Rhode Island Constitution protects citizens' "rights of fishery, and privileges of the shore."[2] The fishermen argued that the legislative ban on SCUBA fishing served no legitimate state interest because the use of SCUBA equipment does not jeopardize shellfish populations or raise public health concerns. Therefore, they argued, the public gained nothing from the legislation and a single class of fishermen was illegally discriminated against. Because the enactment had the effect of discriminating against them, the fishermen also contended that it violated their constitutional guarantee of equal protection under the law and due process rights.

The Court's Analysis

The Rhode Island Supreme Court unanimously upheld the legislation's validity and reversed the superior court. First, it agreed with the Attorney

General that the General Assembly has broad and full authority to regulate the state's resources. The standard for reviewing legislation in Rhode Island requires that the plaintiff prove beyond a reasonable doubt that the legislative act violates either the State or United States Constitution before judicial intervention is appropriate.[3]

In its review, the court distinguished between strict scrutiny and minimal scrutiny of legislation. Strict scrutiny is appropriate when a statute infringes upon an "enumerated constitutional right" like the freedom of speech or a right "fundamental to our concept of ordered liberty," like the right to privacy.[4] Strict scrutiny would also be applied if there was suspicion of discrimination against a protected class, such as race, religious affiliation, or gender. Otherwise, the court claims, the legislature can enact laws that affect certain classes of individuals differently than others with only minimal judicial scrutiny.

The court held that the statute in question did not infringe on any enumerated or fundamental right and the fishermen did not fall into any suspect classification. The Rhode Island Constitution protects the fundamental right of all inhabitants of equal access to the State's fisheries. The court reasoned that the statute does not deny the fishermen equal access because they are still entitled to harvest shellfish. Nor does the legislative act discriminate against one class of fishermen, such as commercial fishermen. It merely regulates a method of fishing that is applicable to all citizens.

The court also noted that the State Constitution imposed on the legislature the duty to protect fish resources by providing "adequate resource planning and control and regulation."[5] The constitutional responsibility is not limited to regulating catch and size limitations. The state can also regulate methods of fishing to plan for sustained future resources.

Finally, for a plaintiff to claim violation of due process, he or she must show that a statute violates a protected interest like liberty or property. In the alternative, the statute must be proven "arbitrary and unreasonable" because it had no relation to public health, safety, morals, or general welfare.[6] Because the statute was related to the conservation of shellfish and boating safety, the court found no viable due process claim.

Conclusion

Tension is bound to arise when different user groups utilize the same resource. The Rhode Island General Assembly responded to the tension that arose between property owners and commercial fishermen that utilized Potter Pond. The enacted legislation, which banned the practice of harvesting shellfish using SCUBA gear, was validated on the grounds that the act intended to protect future shellfish populations. This seems duplicative, as the shell fishermen suggest, because the SCUBA diving fishermen are already restricted by the same catch and size limits as other fishermen. State law also exists that regulates SCUBA diving safety[7] and trespass. However, because the "right of fishery" is not an enumerated or fundamental right and fishermen are not a protected class of citizens, this group of plaintiffs was unable to challenge legislative motive in the Rhode Island Supreme Court.

Endnotes

1. R.I. Gen. Laws § 20-6-30 (2004).
2. R.I. Const. Art. I, § 17.
3. *Gorham v. Robinson*, 186 A. 832, 837 (R.I. 1936).
4. *Cherenzia v. Lynch*, 847 A.2d 818, 823 (R.I. 2004).
5. R.I. Const. Art. I, § 17.
6. *Cherenzia,* 847 A.2d at 826.
7. R.I. Gen. Laws § 46-22-24 (2004).

Diver riding a shrimp net watches a turtle escape through the excluder device. Photo courtesy of NOAA's OAR/National Undersea Research Program (NURP)

The Legal Status of Autonomous Underwater Vehicles[1]

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

AUVs, Autonomous Underwater Vehicles, are the cutting edge of technology used to explore the world's oceans. Today, AUVs can explore areas of the oceans scientists only dreamed about mere decades ago. These robots provide unprecedented access to hydrothermal vents and other mysteries of the deep. AUVs can swim under the polar ice caps and venture into underwater canyons. But scientists are not the only group benefiting from these machines. Once the exclusive purview of the United States Navy and academic institutions, recent advances are bringing AUVs into the commercial sector. AUVs can search for offshore oil and mineral deposits, lay submarine cables, and search for mines. Private individuals and corporations can now purchase AUVs for use in salvage operations, underwater archaeology, or simple exploration. The possibilities appear limitless and the benefits incalculable.

Unlike tethered and remotely operated vehicles which are a simple extension of the research vessel, AUVs are, and legally should be, considered separate entities. AUVs, as the name suggests, are designed to operate freely in the vast oceans. Ideally, AUVs would be released and tracked from shore, eliminating the need for a costly support vessel. The AUV's autonomous nature, however, creates a regulatory gap. AUVs, as discussed in more detail below, may or may not be vessels as defined by U.S. maritime laws. The use of AUVs is virtually unregulated by the federal government, mostly due to a combination of the newness of the technology, difficulties with classification, and the unwillingness of overburdened federal agencies to incur additional responsibilities.

No legal framework currently exists to regulate the use of AUVs. Permits and licenses are only required in a few narrow circumstances. While there is no indication that the oceans are in danger of being overrun by AUVs, their growing availability and popularity warrant investigation into the potential regulatory implications of the widespread use of AUVs.

Technology often outpaces regulatory regimes, whose adaptability is hindered by the legislative process and administrative agency resources. In general, the international treaties and domestic law governing marine activities apply only to vessels. While AUVs are autonomous vehicles that operate on and below the service of the ocean, the application of U.S. maritime laws, including the International Regulations for Preventing Collisions at Sea (COLREG), is unclear because these machines may not be considered "vessels" under U.S. law.

A vessel "includes every description of watercraft or other artificial contrivance used, or capable of being used, *as a means of transportation on water*."[2] The "vessel" test is simple - is the structure "fairly engaged in or suitable for, commerce or navigation and as a means of transportation on water?"[3] For a boat, barge, or other floating structure to be considered a vessel, "it must have some relation to commerce or navigation, or at least some connection with a vessel employed in trade."[4]

The current AUV models have no such connection to commerce or navigation. AUVs are used to study and explore the ocean environment. The majority, due to their size and design, are unable to be used as a means of transportation for goods or people on water. Small AUVs used for scientific purposes are probably not vessels subject to U.S. maritime regulations and need not comply with the COLREGs.

Some AUVs, however, could be considered vessels and would be required to comply with the COLREGs and other maritime laws. For example, research is underway to develop cargo carrying AUVs to "deliver payloads or cargoes [sonar arrays, underwater cables, scientific instruments, etc.] to places that manned ships or submarines cannot operator cost-effectively or safely."[5] Already the Canadian Defense Research Establishment and the U.S. Office of Naval Research have proved that

AUVs can be used to lay cables. In the spring of 1996, during a cable laying mission in the Artic, the *Theseus* AUV laid two fibre optic cables under the polar ice cap over a distance of 175 km. The ability of certain classes of AUVs to operate in commercial activities, such as laying cables and carrying cargo, significantly alters the legal analysis of whether AUVs are vessels. If AUVs are used to carry cargo, a strong argument can be made that they are also vessels capable of being used for transportation on the water.

So let's assume for a moment that AUVs are vessels. One class clearly would have to adhere to the COLREG provisions – the semi-submersibles. A semi-submersible AUV is "designed to operate like a snorkeling submarine and consequently, is limited to operations near the sea surface."[6] Rule 22 of the COLREGs requires inconspicuous, partly submerged vessels to display a white all-round light visible up to a minimum of three miles. Vessels are also required to carry equipment for sound signals which varies depending on the size of the vessel. Rule 33 states that vessels less than twelve meters long are not obliged to carry the bells and whistles required on larger vessels. However, if the vessel is not so equipped, it must be provided with some other means of making an efficient sound signal. Semi-submersible AUVs should, therefore, also be outfitted with some type of sound signaling device.

Unlike the semi-submersible AUVs, the majority of AUVs are designed to operate completely under the water. It is important to note that the COLREGs are only applicable to vessels operating on the water. There are no lighting and signal requirements for underwater operations, unless a vessel on the surface is engaged in underwater operations, such as fishing or laying cables. Submarines only have to display lights when operating on the surface. There may be situations, however, when the AUV might operate on the surface. It may need to surface to send or retrieve data or as part of its emergency abort system. Once on the surface, the AUV would be subject to the COLREGs.

For vessels less than twelve meters in length, Rule 22 requires a masthead light, sternlight, and towing light visible up to two miles; a sidelight visible up to one mile; and a white, red, green, or yellow all-round light visible up to two miles. For vessel more than twelve meters long but less than fifty meters long, a masthead light, visible up to five miles, is required unless the vessel is less than twenty meters long. For vessels between twelve and twenty meters long, the masthead light need only be visible for three miles. A sidelight, sternlight, towing light, and a white, red, green or yellow all-round light must also be visible for a range of two miles.

Although it is unclear whether AUVs are subject to the maritime regulations for vessels, to reduce damage and liability concerns, it is advisable for AUV operators to adhere to the COLREG provisions dealing with lighting and signals when the AUV is on the surface. While an AUV may not be able to fully comply with these requirements due to design limitations, comparable lighting should be incorporated into the design whenever possible. Failure to adhere to the international lighting and signal requirements may result in a maximum civil penalty of $5,000 which can be assessed against both the vessel operator and the ves-

See AUV, page 15

Photo of AUV courtesy of NOAA

Dock Extension Delayed because of Inadequate EIS

Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108 (9th Cir. 2004).

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

In March, the Ninth Circuit Court of Appeals delayed the planned expansion of an oil refinery dock in Washington State until the U.S. Army Corps of Engineers (Corps) prepares a full Environmental Impact Statement (EIS) and reassesses the permit under the Magnuson Amendment. This is a case of first impression with respect to the Magnuson Amendment.

Background

In 1969, BP West Coast Products (BP) received a permit from the Corps to build a dock for the delivery of crude oil. BP's refinery was built in 1971 in Cherry Point, Washington. The original dock design called for two platforms, one for the unloading of crude oil and one for loading the refined product. During construction, however, BP chose to build only the southern platform which was altered to handled both the unloading of crude and loading of refined product.

In 1992, BP applied for a permit from the Corps to build the northern platform and return to the refinery's original plans for separate docks for loading and unloading. During the public comment period, the U.S. Fish and Wildlife Service (FWS) expressed concern that the increase in tanker traffic as a result of the expansion would increase the possibility of a major oil spill. The Lummi Indian Nation and the Nooksack Indian Tribe expressed similar misgivings.

On March 1, 1996, the Corps approved BP's permit application, finding that the construction of the northern platform would not result in adverse cumulative impacts to fish and wildlife in the Cherry Point area. The Corps claimed that the dock expansion would reduce the risk of oil spill because of a decrease in tanker wait time and the installation of oil spill containment booms around the new platform.[1] The Corps determined that the expansion would not "significantly affect the quality of the human environment" and issued a Finding of No Significant Impact (FONSI) under the National Environmental Policy Act (NEPA) thereby excusing the agency from preparing an EIS.[2]

In 1997, Ocean Advocates contacted the Corps requesting a more thorough analysis of the cumulative impacts of the dock expansion on vessel traffic and whether the permit violated the Magnuson Amendment[3] which regulates permits for oil transport terminals in Puget Sound. The Corps denied both requests. Ocean Advocates submitted a second request for reconsideration in 1999.

In 2000, the Corps granted BP a one-year extension to its 1996 permit to complete construction, finding that the dock extension did not violate the Magnuson Amendment because the extension would not increase the facility's capacity to offload crude oil. The Corps again determined that an EIS was unnecessary. The northern platform is currently operational.

The Lawsuit

Ocean Advocates filed suit against the Corps in November 2000 arguing that BP's permit violated the Magnuson Amendment and that the Corps violated NEPA by failing to prepare an EIS. The U.S. District Court for the Western District of Washington granted summary judgment in favor of the Corps and BP holding that an EIS was not required because the northern platform would alleviate existing vessel traffic problems and traffic would increase regardless of BP's planned expansion. The court also agreed with the Corps that the permit did not violate the Magnuson Amendment. Ocean Advocates appealed the district court's decision to the Ninth Circuit.

Preliminary Matters

On appeal, BP argued that Ocean Advocates lacked standing. To bring a cause of action in federal court, a plaintiff must show s/he has suffered an "injury in fact" that is traceable to the chal-

lenged action of the defendant and redressable by a favorable decision.[4] The Ninth Circuit held that Ocean Advocates had standing. In environmental cases, injury in fact is satisfied if an individual or organization provides evidence "that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct."[5] Ocean Advocates' members have an interest in the Cherry Point area for recreation and wildlife viewing which would be impaired by a major oil spill, which is made more likely by the construction of the northern platform. The court found that Ocean Advocates showed injury in fact clearly traceable to BP's proposed dock expansion. Finally, Ocean Advocates' injury is redressable through court action because OA sought an injunction to restrict tanker traffic which, if granted, would reduce OA's concerns regarding spills and increased traffic.

Photo of docks courtesy of NOAA
Photographer is Commander John Bortniak, NOAA Corps (ret.)

BP also argued that OA's action was barred on the basis of laches. Laches is disfavored in environmental cases, but it is an affirmative defense if a defendant can show that the plaintiff lacked diligence in pursuing her claim and that lack of diligence resulted in prejudice to the defendant. The Ninth Circuit held that laches does not bar OA's action, due to OA's diligent pursuit of its claim from the Corps' issuance of the first permit in 1996.

NEPA

Federal agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment."[6] In situations where it is unclear whether the federal action will significantly affect the quality of the human environment, federal agencies may initially prepare an Environmental Assessment (EA). If, through the EA, the agency determines the action will significantly affect the human environment, it must prepare an EIS. If not, it may issue a FONSI. However, an agency must prepare an EIS if significant questions are raised regarding whether a project "may cause significant degradation of some human environmental factor."[7]

The Ninth Circuit was not persuaded that the Corps took a "hard look" at the environmental impacts of the proposed dock expansion. The court held that the Corps failed, in both 1996 and 2000, to "provide *any* reason why an EIS was unnecessary."[8] The Corps simply stated that the project would not have a significant impact on the quality of the human environment. Such a statement alone, without supporting reasons, is insufficient to satisfy the NEPA requirements.

The court found that an EIS is required for the dock expansion. First, in its communications with the Corps, the court found that OA raised a substantial question regarding whether the northern platform might cause significant degradation of the environment. In addition, the court determined that the Corps failed to adequately examine the cumulative effects of multiple projects in the Cherry Point area as required under 40 C.F.R. § 1508.27(b)(7). Finally, an agency must prepare an EIS when the effects of the project are highly uncertain.[9] The court determined that the Corps did not have the necessary data to determine whether tanker traffic would increase as a result of the expansion and therefore should have prepared an EIS.

See EIS, page 14

EIS, from page 13

Magnuson Amendment

Under the Magnuson Amendment,

> No officer, employee, or other official of the Federal Government shall, or shall have authority to, issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on, or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, *which will or may result in any increase in the volume of crude oil capable of being handled at any such facility* (measured as of the date of enactment of this section [Oct. 18, 1977]), other than oil to be refined for consumption in the State of Washington.[10]

BP claimed that the northern platform cannot and would not be used to unload crude oil and, therefore, the expansion did not increase the amount of crude oil which could be handled. However, the court held that the phrase "any such facility" refers to more than the northern dock expansion itself. The relevant question is whether the permit enabled BP to increase the capacity of its entire Cherry Point Marine Terminal to handle more crude oil.

The Ninth Circuit could not answer this question because it was not clear from the record whether the terms of BP's permit limited BP's ability to handle crude oil at the northern platform. While BP argued that the platform was physically incapable of handling crude oil, BP's permit does not clearly prohibit BP from modifying the new platform to handle crude oil. If the permit allows BP to modify the platform, then the Corps may have increased the capacity of the Cherry Point terminal to handle crude oil in violation of the Magnuson Amendment.

To determine whether the new platform could handle crude oil, the court remanded the case to the district court to answer the following questions:

1. Is it physically possible for the new platform to handle crude oil today?
2. Is is physically possible to modify the new platform such that it could handle crude oil, without requiring additional permitting?[11]

If the answer to either of these questions is yes, then the permit violates the Magnuson Amendment and is invalid. Stated another way, BP and the Corps must prove on remand that the new platform cannot handle crude oil without additional permits from the Corps.

The Ninth Circuit also directed the district court to investigate whether the permit allowed BP to increase the berthing capacity of the Cherry Point Terminal. If so, the increased berthing capacity could potentially increase the capacity of the terminal to handle crude oil, again in violation of the Magnuson Amendment.

Conclusion

Ocean Advocates had standing to bring suit against BP and the Corps for violations of NEPA and the Magnuson Amendment. The Ninth Circuit remanded the case to the district court directing the Corps to (1) prepare a full EIS considering the impact of reasonably foreseeable increases in tanker traffic on the environment around the terminal and (2) reevaluate the permit in light of a potential Magnuson Amendment violation.

Endnotes

1. *Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1116 (9th Cir. 2004).
2. 40 C.F.R. § 1501.4 (2004).
3. 33 U.S.C. § 476 (2004).
4. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.* (TOC), Inc., 528 U.S. 167, 180-81 (2000).
5. *Ocean Advocates*, 361 F.3d 1108, 1120 (*citing Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000)).
6. 42 U.S.C. § 4332(2)(C) (2004).
7. *Idaho Sporting Cong. v. Thomas* 137 F.3d 1146, 1149 (9th Cir. 1998).
8. *Ocean Advocates*, 361 F.3d 1108, 1125-26.
9. 40 C.F.R. § 1508.27(b)(5) (2004).
10. 33 U.S.C. § 476(b) (2004) (emphasis added).
11. *Ocean Advocates*, 361 F.3d 1108, 1132-33.

sel itself. Proactive engineering may facilitate compliance with the COLREGs and actually eliminate the need to determine whether an AUV is a vessel.

While it is important for all vessels to comply with the international collision regulations, not all vessels can. The federal government does recognize that some vessels have design limitations which prevent full compliance. "Any requirement of the [COLREGs] with respect to the number, position, range, or arc of visibility of lights, with respect to shapes, or with respect to the disposition and characteristics of sound-signaling appliances, shall not be applicable to a vessel of special construction or purpose" when the Coast Guard certifies that the "vessel cannot comply fully with that requirement without interfering with the special function of the vessel."[7] A "vessel of special construction or purpose" is defined by the Coast Guard as "a vessel designed or modified to perform a special function and whose arrangement is thereby relatively inflexible."[8] If an AUV is a vessel, it would probably qualify as a vessel of special construction or purpose.

Most AUVs are designed to carry out a specific scientific purpose. Placing lights or whistles on an AUV could easily interfere with the special function of the vessel, especially if these additions interfere with the AUV's ability to carry sensors.

"The owner, builder, operator, or agent of a vessel of special construction or purpose who believes that the vessel cannot fully comply" with the COLREGs may seek an Alternative Compliance Certificate from the Chief of the Marine Safety Division of the Coast Guard District in which the vessel is being built or operated.[9] The application must identify the vessel, describe the COLREG provision for which the alternative compliance is sought, and include "a description of the alternative installation that is in closest possible compliance with the applicable" COLREG provision, including a copy of the vessel's plan or an accurate scale drawing.[10] Notice of the issuance of alternative compliance certificates by the Coast Guard must be published in the Federal Register.[11]

Alternative compliance certificates may be issued for a class of vessels.[12] This provision could be the answer to the COLREG dilemma the AUV industry has been seeking. Designers and operators of certain types of AUV could seek alternative compliance certificates for particular groups of AUVs, like the semi-submersibles. The Coast Guard should understand the design limitations of AUVs and work with the industry to develop acceptable alternatives. These certificates would enable an AUV to comply with the COLREGS without significantly altering its design.

Although a regulatory gap currently exists with regard to AUVs, AUV operators should try to work with the federal government to make the oceans a safer place for both humans and animals. This proactive approach may enable the industry to postpone and even prevent regulation in the future, saving research institutions and operators valuable time and money. The wealth of data that AUVs could collect is unfathomable. Hopefully, the use of these little robots will continue to grow and enrich the scientific knowledge of the world.

Photo courtesy of OAR/National Undersea Research Program (NURP)

Endnotes

1. The information contained in this article is adapted from a more thorough analysis of the legal status of AUVs recently published by the Marine Technology Society in the Spring 2004 issue of the *Marine Technology Society Journal*. The article may be accessed through the SGLC's website at http://www.olemiss.edu/orgs/SGLC/Commentary.pdf.
2. 1 U.S.C. § 3 (2004) (emphasis added).
3. *Hitner Sons Co. v. U.S.*, 13 Ct. Cust. 216, 222 (1922).
4. *Id.* at 222.
5. GWYN GRIFFITHS, TECHNOLOGY AND APPLICATIONS OF AUTONOMOUS UNDERWATER VEHICLES (Taylor & Francis 2003).
6. *Id.*
7. 33 U.S.C. § 1605(a) (2003).
8. 33 C.F.R. § 81.1 (2003).
9. *Id.* at § 81.5.
10. *Id.*
11. 33 U.S.C. § 1605(c) (2003).
12. *Id.* at § 1605(d).

Construction of Navy Landing Field Delayed

Washington County, N.C. v. U.S. Dept. of the Navy, 2004 U.S. Dist. LEXIS 8733 (E.D.N.C. April 19, 2004).

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

In April, the U.S. District Court for the Eastern District of North Carolina enjoined the U.S. Navy from taking further action associated with the construction of a landing field near the Pocosin Lakes National Wildlife Refuge (Pocosin NWR) pending a decision on the merits in a lawsuit filed by the Southern Environmental Law Center.

Background

To support the operation and training of the new "Super Hornet" aircraft, the U.S. Navy intends to build an Outlying Landing Field (OLF) comprised of approximately 23,000 acres in Washington County and 7,000 acres in Beaufort County, North Carolina. The area, know as Site C, is located just a few miles from the Pocosin NWR, a waterfowl sanctuary providing winter habitat for over 100,000 waterfowl, including 20,000 tundra swans and 44,000 snow geese.[1] The Navy estimates that the OLF would be used for approximately 31,560 Field Carrier Landing Practice operations per year.[2]

On January 9, 2004, the Southern Environmental Law Center (SELC) filed suit on behalf of the National Audubon Society, North Carolina Wildlife Federation, and Defenders of Wildlife challenging the Navy's plan to construct a new OLF at Site C. SELC claims that the Navy failed to comply with the National Environmental Policy Act (NEPA), the Coastal Zone Management Act, and the North Carolina Coastal Area Management Plan. In February, SELC filed for a preliminary injunction to prevent the Navy from moving ahead with its construction plans until the court made a determination on the merits of the case.

Preliminary Injunction Standard

A preliminary injunction is not the final determination of a case, but rather a temporary remedy to preserve the status quo until a final ruling can be made by the court. Usually, to obtain a preliminary injunction, the moving party must establish: "(1) a substantial likelihood of success on the merits; (2) irreparable injury to the [moving party] if the injunction is denied; (3) the threatened injury to the [moving party] outweighs the injury to the other party; (4) the injunction is not adverse to the public interest."[3] No one factor is determinative.

In the Fourth Circuit, however, courts employ a "hardship balancing test" that balances the likelihood of harm to the plaintiff against the likelihood of harm to the defendant.[4] If the balance of harms weighs in the plaintiff's favor, the plaintiff need not demonstrate a likelihood of success.[5] The plaintiff simply needs to show that her claims raise serious questions.

Balance of Harms

The district court held that the balance of harm is significantly weighted in the favor of the SELC. The court stated that the SELC presented compelling evidence that the construction of the OLF at Site C would irreparably harm numerous swans and snow geese through destruction of the natural habitat on which they depend, increased noise, and increased danger of collision. In addition, the Navy's acquisition of land for the OLF will irreparably harm the citizens of Washington and Beaufort counties by permanently displacing at least one hundred families.

The likelihood of harm to the Navy, according to the district court, is slight. The Navy is still in the preliminary planning stage of this project and has yet to purchase land or secure contractor bids. Furthermore, the court was not persuaded by the Navy's primary argument that a construction delay would irreparably harm the ability of the Navy to conduct operations. Even without a delay, the OLF

would not be operational until 2007 and even the Navy admitted in its Final Environmental Impact Statement that "an OLF is not required to support the homebasing alternatives at NAS Oceana."[6]

Likelihood of Success

Because SELC demonstrated that the balance of harms weighs in its favor, the district court only needed to decide whether the questions presented by SELC are "so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation."[7] The district court found that SELC raised serious questions about whether the Navy acted arbitrarily in deciding to construct the OLF at Site C. SELC presented evidence that the Navy conducted an insufficient analysis of the impact of the OLF on the waterfowl at Pocosin NWR and that the Navy's findings in the issued environmental impact statements might actually run counter to evidence in front of the Navy at the time of its decision. SELC also presented evidence that the Navy failed to adequately consider alternative sites for the OLF.

Conclusion

The district court enjoined the Navy from taking further action to construct a new OLF in North Carolina because of the likelihood of harm to the citizens of Washington and Beaufort counties and waterfowl in nearby Pocosin NWR. Although the Navy has a duty to maintain national security and train its pilots, the court held that those duties do not automatically prevail over the procedural requirements of NEPA. Because the court was not persuaded that a delay would cause the Navy or the public tangible harm, the Navy was enjoined from further action pending resolution of the case or until further order of the court.

Endnotes

1. *Washington County, N.C. v. U.S. Dept. of the Navy*, 2004 U.S. Dist. LEXIS 8733, at *3-4 (E.D.N.C. April 19, 2004).
2. *Id.* at *3.
3. *Rothberg v. Law School Admission Council*, 2004 U.S. App. LEXIS 11824, at *6-7 (10th Cir. June 16, 2004).
4. *Blackwelder Furniture Co. v. Seilig Mfg. Co.,* 550 F.2d 189, 194-95 (4th Cir. 1977).
5. *Id.* at 196.
6. *Washington County*, 2004 U.S. Dist. LEXIS 8733, at *121.
7. *Id.* at *124.

Photo of black bear in Pocosin Lakes Wifelife Refuge courtesy of the U.S. Fish and Wildlife Service
Photographers are John and Karen Hollingsworth

Kauai, from page 1

shoreline erosion protection. One month later, the Commission granted them a permit to construct a rock revetment subject to nine conditions. Instead of building a rock revetment, the seawall owners constructed a seawall and even made unauthorized additions to the seawall at a later date. In 1986, an adjacent landowner filed a lawsuit against the seawall owners alleging that negligent construction and maintenance of the seawall damaged her property. The circuit court entered judgment in favor of the adjacent landowner and ordered compensation of $128,000.

By 1996, two property owners south of the seawall contacted state agencies to express concern about the damage to their property caused by the seawall and demand action. Consequently, the Planning Department filed a petition to revoke, amend or modify the SMA Use permit, alleging that (1) the seawall was not constructed according to approved plans; (2) the seawall owners failed to obtain permits for additional development in connection with the permitted project; and (3) the seawall owners failed to comply with the SMA Use permit condition.

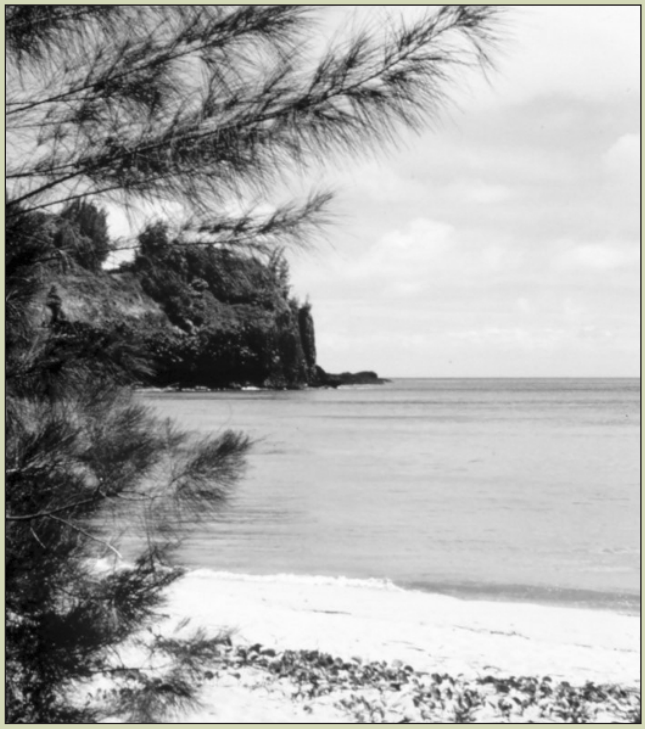


Photo of a beach on Kauai courtesy of NOAA
Photographer is Dr. James P. McVey, NOAA Sea Grant Program

After several public hearings, the Commission concluded that the seawall did not conform to the various conditions of the SMA Use permit. The Commission ordered the seawall owners to (1) conduct a sand replenishment program for the area immediately fronting the seawall, (2) alter the southern portion of the seawall to limit flanking erosion by providing a sloped, curved return rock revetment, (3) offer the two southern property owners a one-time sand replenishment program for the area immediately fronting their properties, and (4) repair the seawall and its surrounding areas. In August 1997, the seawall owners appealed the Commission's decision to the circuit court, which held that the Commission lacked authority (1) to modify a condition of the SMA Use permit, and (2) to order injunctive relief. The Planning Department and Commission appealed the circuit court's ruling.

Modification of an Existing SMA Use Permit

The CZMA is a comprehensive State regulatory scheme to protect the coastal environment of Hawai'i. The Supreme Court explained that the State legislature is dedicated to the preservation, protection and, when feasible, the restoration of the natural resources within the coastal zone of Hawai'i. The legislature authorizes counties to establish SMAs. The Court concluded that the CZMA mandates that "the designated authority seek to minimize, where reasonable . . . any development which would reduce the size of any beach or other area usable for public recreation."[2]

The primary issue in this case is whether the Commission had the authority to modify the SMA Use permit previously issued to the seawall owners. Morgan, one of the seawall owners, argued that the circuit court properly held that the Commission did not have the authority to amend a SMA Use permit issued many years ago. Since the Commission's enabling statute did not expressly allow reconsideration, Morgan argued that the Commission could not modify the permit. The Commission countered that because it must administer the objectives and policies of the CZMA, the Commission possesses continuing authority over SMA Use permits to ensure compliance with the CZMA.

The Commission also raised two other arguments regarding its authority to reconsider a SMA Use permit. First, it maintained that the circuit court's interpretation of HRS § 205A-29 would lead

to an absurd result. This statute states in pertinent part that "[a]ction on the special management permit shall be final unless otherwise mandated by court order."[3] The Commission argued that the circuit court's interpretation of this language would require the Commission to file a court action every time a SMA Use permit requires modification. Second, the Commission argued that PCRPP §§ 1-12-8(b) and 1-12-9(b) expressly allow it to modify a condition imposed by a permit.

The supreme court concluded that the Commission did possess the inherent power to reconsider a validly issued SMA Use permit for several reasons. "Administrative tribunals possess the inherent power of reconsideration of their judicial acts" because "grave consequences" might occur if a decision could not be recalled.[4] The Court reasoned that the Commission could not foresee every unexpected situation that could occur at the time of permit issuance. In addition, the supreme court agreed that the Commission's enabling statute authorized the Commission to carry out the goals and policies of the CZMA and ensure its compliance. The supreme court also agreed that the circuit court's interpretation of HRS § 205A-29 was unreasonable and held that it would not allow an interpretation of the statute that creates an absurd result. Finally, the supreme court held that PCRPP §§ 1-12-8(b) and 1-12-9(b) allow revocation and modification of a permit if the permit holder does not comply with the permit's terms. Since the seawall owners did not comply with the terms of the SMA Use permit, the Commission could modify their SMA Use permit.

Injunctive Relief

The second issue in the case is whether the Commission had authority to order injunctive relief. Morgan argued that, pursuant to HRS § 205A-33, only the circuit court possesses injunctive power, and therefore, the Commission could not order the seawall owners to perform any of the four actions described above. The Commission countered that since it is vested with the authority to implement the objectives and policies of the CZMA, it could order injunctive relief. The supreme court agreed in part with Morgan.

Hawai'i Revised Statutes § 205A-33 states in pertinent part "any person or agency violating any provision of this chapter may be enjoined by the circuit court of the State . . ."[5] This statute expressly grants injunctive power to the circuit court, and there is no provision in the CZMA which expressly grants this power to a lead agency. The supreme court found that directing Morgan to conduct the sand replenishment program and offer a one-time sand replenishment program to the two landowners south of the seawall were injunctive remedies and concluded that the Commission lacked authority to order these two remedies.

The supreme court, however, concluded that the Commission did have the authority to command Morgan to alter and repair the seawall because these actions were not injunctive in nature. Instead, the Court reasoned that by ordering these two actions, the Commission intended to ensure compliance with the original conditions of the SMA Use permit. In addition, PCRPP 1-12-8(b) expressly authorizes the Commission to "allow the permit holder a reasonable opportunity to correct, remedy or rectify the problem" if any condition has been violated.[6] The supreme court reasoned that the Commission could have revoked Morgan's permit and concluded that by directing Morgan to alter and repair the seawall, the Commission provided an opportunity to correct the problem.

Conclusion

The Supreme Court of Hawai'i held that the Commission has authority (1) to modify a validly issued SMA Use permit for changed conditions, and (2) to order Morgan to alter and repair the seawall in order to rectify the damage to adjacent properties. The supreme court also concluded that the Commission improperly mandated injunctive relief when the Commission ordered Morgan to conduct a sand replenishment program and offer the two southern property owners a one-time sand replenishment.

Endnotes

1. HAW. REV. STAT. § 205A-1 et seq. (2001).
2. *Id.* at § 205A-26(3)(B) (2001).
3. *Id.* at § 205A-29 (2001).
4. *Morgan v. Planning Department, County of Kauai*, 86 P.3d 982, 992 (Haw. 2004).
5. HAW. REV. STAT. § 205A-33 (2001).
6. PCRPP 1-12-8(b) (2001).

No Exclusive Rights to Harvest Wild Alaskan Shellfish

Alaska Trademark Shellfish, LLC, et. al. v. State of Alaska, 2004 Alas. LEXIS 51, (Alaska April 16, 2004).

Jason Savarese, J.D.

The Supreme Court of Alaska recently held that the Alaska Aquatic Farming Act and its operation and stock acquisition permit provisions did not give exclusive rights to geoduck farmers seeking to harvest and sell pre-permit, wild shellfish found on their farms.

Background

Alaska's Aquatic Farming Act requires a permit in order to open an aquatic farm in the state, and gives the Alaska Department of Fish and Game (the Department) power over permit issuance decisions. The Department indicated to some potential shellfish farmers that those receiving permits would have the right to harvest all existing wild shellfish on their farm when the permits were issued. Alaska Trademark Shellfish, LLC, (ATS) and other farmers applied for aquatic farm permits from the Alaska Department of Fish and Game. ATS wanted to farm a type of slow-growing shellfish of considerable size, with high market value, known as geoducks. The Department considered the permit requests, and conditionally approved them, upon the farmers' development of a way to differentiate between "common property" geoducks already in the farmers' waters, and the new clams they intended to grow.

The concern expressed by the Department's condition was that farmers might have a higher-than-necessary density of pre-permit geoducks on their farm, and that these should remain an Alaskan common property resource for "other uses." ATS objected to the condition, and offered some alternatives. The Department rejected the alternatives, and relayed to ATS the general principles the Department would use in deciding ATS's permit applications. These included limiting the use of pre-permit geoducks to "brood stock or for active cultivation." These principles were later proposed and officially adopted as regulations in the Alaska Administrative Code.[1] ATS claimed the condition attached to the clam permits would preclude any geoduck farming, and ATS demanded their applications be approved without condition. The Department denied their permit applications.

The Lawsuit

ATS appealed the Department's decision to the superior court, putting forth two claims. First, ATS claimed that the Department was in violation of the Alaskan Aquatic Farming Act, by requiring those seeking to open a shellfish farm to maintain pre-permit shellfish as common use property. In addition, ATS asserted an estoppel charge against the Department, since it had assured potential farmers that once a permit was obtained, any existing, wild geoducks would be harvestable. The superior court upheld the Department's decision.

Reasoning its decision on a constitutional basis, the superior court found that the "real question . . . is not whether the legislature intended to allow [stock acquisition permit] holders to harvest wild stock, but whether the legislature is permitted to do so."[2] The judge held that the state constitution's "common use" clause barred ATS from having the exclusive right to harvest wild geoducks. ATS appealed the decision to the Supreme Court of Alaska.

The Supreme Court heard ATS's arguments that the superior court had misapplied the common use clause in the Alaska Constitution and the public use doctrine in not allowing farmers to harvest existing geoduck stocks on the property. ATS claimed that wild geoducks would qualify as "farmed" shellfish under the statutory definition of "stock," and that the stock acquisition permit statute allows the harvesting of wild geoducks to make such farming viable. ATS also reiterated its estoppel assertion against the Department.

Alaska Trademark Shellfish's Arguments

ATS explained that the Aquatic Farming Act's statutory definition of "stock" as those "intended for use…for…further growth or propagation"[3] included wild geoducks, since some growth would occur between the time the permit was issued and the time of harvesting. The Court found this argument to be without merit, and stated that an actual intent to "use" the wild clams "for" further growth was required.[4] Just allowing the clams to continue their natural growth is not enough to bring wild geoducks under the "stocks" statutory definition.

ATS argued that the stock acquisition permit statute commanded the Department to issue such a permit if "wild stock is necessary to meet the initial needs of farm or hatchery stock."[5] In their view, for commercial geoduck farming to succeed, wild, pre-permit geoducks would have to be harvested. This argument proved unpersuasive; as the Court pointed out the statute only addressed the farm's need for stock, not for "general startup needs."[6] Thus, the statute did not give the farmers a right to harvest wild, existing geoducks on the property.

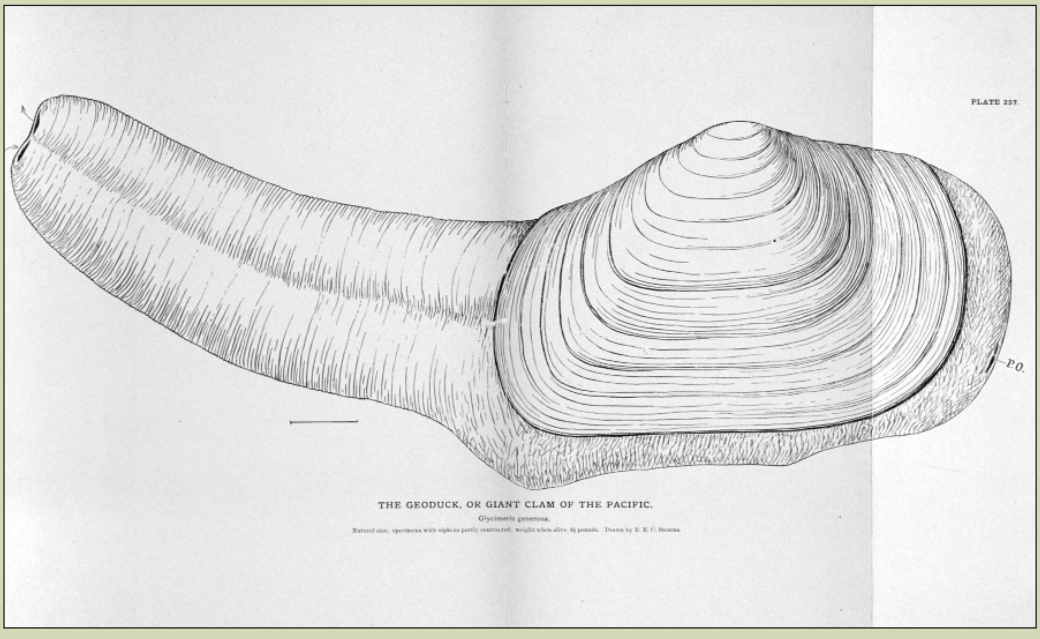
With regard to the estoppel claim, the Court declined to rule on the disputed meaning of statements made by the Department before permit applications were filed. The justices simply found, under a "totality of the circumstances test", that estoppel was not appropriate. The Alaskan Court decided the case without considering the Alaska Constitution's common use clause and the public use doctrine.

Conclusion

The Supreme Court of Alaska held that the Alaska Aquatic Farming Act does not give the Alaska Department of Fish and Game the power to authorize aquatic farmers to harvest and sell wild geoduck stocks growing on their property. The Court pointed out a section of the Aquatic Farming Act which specifically allows the Department's commissioner to "attach conditions to a permit issued under this section that are necessary to protect natural fish and wildlife resources."[7] The Court went on to hold that the statute governing operation permits does not include an implied right to take wild shellfish. The Court did not reach the issue of whether the grant of such an exclusive right would violate the Alaska Constitution. The decision of the Department of Fish and Game to deny Alaska Trademark Shellfish's geoduck farming permit application was upheld.

Endnotes

1. Alaska Admin. Code tit. 41, §240 (2003).
2. *Alaska Trademark Shellfish, LLC, et. al. v. State of Alaska, et. al.*, 2004 Alas. LEXIS 51, at *8 (Alaska April 16, 2004).
3. Alaska Stat. § 16.40.199(8) (2003).
4. *Alaska Trademark Shellfish*, 2004 Alas. LEXIS 51, at *19.
5. Alaska Stat. § 16.40.120(f) (2003).
6. *Alaska Trademark Shellfish,* 2004 Alas. LEXIS 51, at *20
7. Alaska Stat. § 16.40.100(c) (2003).



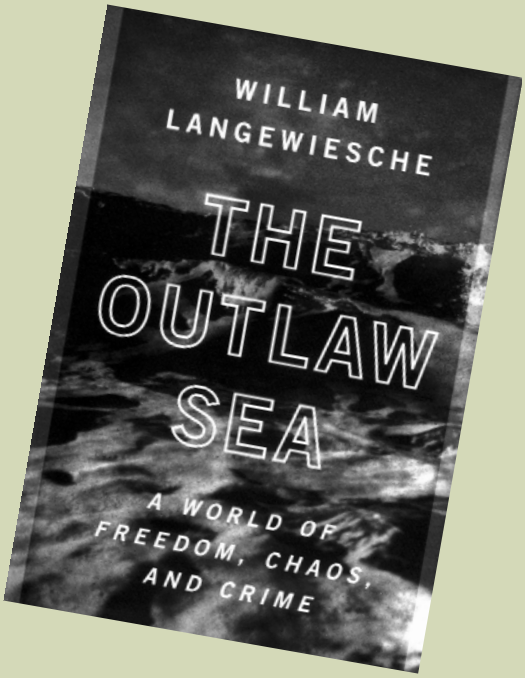
Historic drawing of geoduck courtesy of NOAA's Historic NMFS Collection

Book Review . . .

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

The Outlaw Sea: A World of Freedom, Chaos, and Crime

William Langewiesche (North Point Press 2004).



In *The Outlaw Sea*, William Langewiesche details the chaotic world of international shipping. Despite numerous treaties and oversight by powerful international bodies like the International Maritime Organization, the ocean remains a lawless realm. More than forty thousand large merchant vessels ply the open ocean with little or no regulation. According to Langewiesche, these merchant vessels "are possibly the most independent objects on earth, many of them without allegiances of any kind, frequently changing their identity and assuming whatever nationality - or 'flag' - allows them to proceed as they please."

The ocean today is not much safer then it was 400 years ago. Terrorism is a significant concern, piracy is on the rise in some areas such as Southeast Asia, and aging vessels break apart in storms threatening both the lives of the crews and the natural environment. It is almost impossible to police the world's oceans. No country has the manpower or the ships needed to adequately patrol beyond the horizon. Even if it was possible to patrol the oceans, ships can easily hide in plain sight simply by changing names, flags, and/or color.

In many cases, design modifications are necessary to ensure mariner safety and prevent environmental disasters such as oil spills. Adoption, let alone enforcement, of international standards is difficult to achieve, as Langewiesche highlights by examining the efforts of the United States, and later the European Union, to phase out single-hull tankers. Langewiesche also examines the current controversy surrounding shipbreaking in India and other developing nations.

The Outlaw Sea, however, does more than document the failures of the international community to regulate shipping. Langewiesche pays homage to the victims of some of the most shocking maritime disasters in recent years. From the sinking of the passenger ferry *Estonia* in 1994, which claimed the lives of at least 852 people, to the loss of the *Kristal*, an all-purpose tanker, in 2001 due to a broken hull, Langewiesche describes in stunning detail the price that is paid, in both human lives and environmental damage, when things go wrong.

A significant portion of *The Outlaw Sea* is devoted to the sinking of the *Estonia*. With powerful prose, Langewiesche reconstructs the events of that terrifying night, shares the stories of some of the survivors and the victims, examines the accident investigation, and even investigates the conspiracy theory of a German journalist. Through eyewitness accounts, Langewiesche recreates the chaos and terror that reigns on a sinking ship and reminds us all that sailors and passengers have names, families, lives.

The Outlaw Sea is a frightening glimpse into the anarchic world of international shipping. Terrorist organizations finance their operations by transporting goods on vessels fully compliant with international regulations. Vessels break apart and sink weeks after passing inspection by reputable inspectors. Vessels are hijacked by barefoot pirates. In an age when governments often espouse the belief that additional regulations will make the world a safer place, Langewiesche forces readers to face the fact that "our world is an ocean world, and it is wild."

Coast to Coast
And Everything In-Between

Photo courtesy of Nova Corp.

NOAA is currently accepting comments on a rulemaking petition submitted by Oceana urging the National Marine Fisheries Service (NMFS) to promulgate a rule to protect deep-sea coral and sponge habitats in the U.S. exclusive economic zone. Oceana claims the deep-sea habitats are vulnerable to destructive fishing practice like bottom trawling and are not adequately protected by the federal government through existing fishery management plans. Oceana wants NMFS to initiate a mapping effort to identify the location of deep-sea coral and sponge habitats; designate areas with high concentrations of deep sea coral and sponges as habitat areas of particular concern and essential fish habitat; close certain deep-sea areas to bottom trawling; and enhance monitoring and enforcement. NMFS is accepting comments until ***August 13, 2004***. Oceana's petition is available at http://www.nmfs.noaa.gov/habitat/habitatconservation/DSC_petition/Oceana .

A New York federal court recently sentenced three men to prison for illegally harvesting and exporting Chilean sea bass and rock lobster into the United States. Arnold Bengis, David Bengis, and Jeffrey Noll faced a variety of charges, including illegally harvesting sea bass and rock lobster in excess of quotas, illegally exporting the harvested seafood to the United States, under-reporting the catch to South African authorities, and bribing South African fisheries inspectors. Arnold Bengis and his son, David, were ordered to forfeit a total of $5.9 million to the U.S. government. Arnold was sentenced to 46 months in prison, while David received 12 months. Noll was ordered to forfeit $1.5 million and sentenced to 30 months.

NOAA's new National Estuaries Restoration Inventory (NERI) is now on-line at https://neri.noaa.gov/ . NERI, a product of the NOAA Habitat Restoration Program, was created to track estuary restoration projects across the nation and serve as a searchable source of information on restoration results. Federal, state, local, and private entities are encouraged to submit projects to the inventory as long as the project goal is to restore ecosystem benefits to estuaries and associated habitats. NOAA anticipates that the inventory will grow to include an interactive mapping feature which would allow visitors to create customized maps.

Photo of sea cucumber courtesy of NOAA

Around the Globe

In late June, an Ecuadorean judge overturned limits in the sea cucumber fishery in the Galapagos Islands, following a strike by artisanal fishermen. On June 3, fishermen from Isabela Island took over the offices of Galapagos National Park in protest of the sea cucumber quota set by the Ecuadorean government. Authorities had set the quota at 4 million for a 60-day period in 2004 and banned harvesting during 2005-2006. On June 3, 2004, the artisanal fishermen of Isabela Island took over the offices of Galapagos Island National Park, destroyed some property, and prevented tourists from disembarking in the Galapagos to protest the new regulations which they claimed denied them of their constitutional right to make a living as fishermen. The environmental community is expected to appeal.

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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