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EPA Must Repeal Ballast Water Exception

Northwest Env. Advocates v. EPA, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. March 30, 2005).

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On March 30, 2005, the U.S. District Court for the Northern District of California ruled that the Environmental Protection Agency (EPA) exceeded its statutory authority under the Clean Water Act (CWA) by issuing a regulation, 40 C.F.R. §122.3(a), that exempts discharged ballast water from CWA pollution regulation programs. This decision marks the end of a long struggle by environmental organizations to force the EPA to recognize the environmental, commercial, and economic harms caused by invasive species carried into harbors and bays via ballast water.

Background

Ballast water is sea water that is taken on or discharged by ships in order to accommodate changes in weight resulting from cargo loads. Tanker ships in the Great Lakes can hold up to 14 million gallons of ballast water, and seagoing tankers can hold twice as much. Every year, more than 21 billion gallons of ballast water are discharged into U.S. waters from international ports.[1] Invasive aquatic plant and animal species, including zebra mussels and Chinese mitten crabs, are carried into harbors, bays and the Great Lakes in the greatest quantities through ballast water.[2] An estimated 10,000 marine species are transported around the world in ballast water every day. They have caused severe environmental harm by destroying habitat, damaging commercial fisheries, clogging intake pipes at water treatment and power facilities, as well as costing the United States economy estimated billions of dollars annually.[3]

The Lawsuit

Six years ago, in January 1999, various environmental groups petitioned the EPA, the agency with the pri-

See Ballast Water, page 20

U.S. Owns Submerged Lands in Glacier Bay

Alaska v. United States, 125 S. Ct. 2137 (2005).

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In 1998, Congress voted to phase out commercial fishing in Glacier Bay and Tongass National Forest for the purpose of protecting marine wildlife. Since then, the National Park Service has progressively limited fishing and cruise ship activity. Alaska protested by claiming title to submerged lands around the Alexander Archipelago and Glacier Bay. Ownership of these submerged lands would give the state control of commercial fishing and other activities on the water directly above.

The Constitution gives original jurisdiction to the United States Supreme Court over controversies between states and the federal government. Alaska invoked the Court's jurisdiction to referee the submerged lands claims between it and the United States. The Supreme Court appointed a Special Master to evaluate Alaska's claims; the Special Master recommended judgment for the United States as title-holder of the submerged lands; and the Supreme Court affirmed that decision.

Equal Footing and the Submerged Lands Act

Alaska bases its claims on the common law and statutory presumption that states hold certain submerged lands in trust for the use and benefit of the public. Upon statehood, the thirteen original states were vested with title to submerged tidelands off their shores.[1] When Alaska was granted statehood in 1959, it was guaranteed the same rights and privileges,

See Supreme Court, page 16

Table of Contents

Court Allows Taking of Double-Crested Cormorant

Southeast

Fund for Animals v. Norton, 365 F. Supp. 2d 394 (S.D.N.Y. 2005).

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Editors Note: Although this is a case out of New York, the challenged agency action primarily affects aquaculture operations in the Mississippi Delta and the Southeastern U.S.

On March 28, 2005, the U.S. District Court for the Southern District of New York upheld the Fish and Wildlife Service's "Public Resource Depredation Order" to manage the double-crested cormorant population.

Background

A water bird native to North America, the double-crested cormorant is a fish-eating bird that has been responsible for the loss of at least $25 million in annual catfish production, mainly in the Mississippi Delta. The FWS's authority to regulate the double-crested cormorant arises from the Migratory Bird Treaty Act (MBTA), which implements bilateral conventions between the United States and Great Britain, Mexico, Japan, and Russia. Under the statute's terms, protected birds may not be "taken" except as authorized by regulations implementing the MBTA.

After receiving many complaints about the double-crested cormorant's harmful effects on aquaculture, the Fish and Wildlife Service (FWS) adopted the Aquaculture Depredation Order (ADO) in 1998. The ADO allowed landowners, operators, and tenants of aquaculture facilities to utilize firearms to take double-crested cormorants when the birds were found committing acts of depredation on the aquaculture stock. In the years following the adoption of the ADO, the FWS continued to receive complaints, as well as a large number of applications for cormorant depredation permits unrelated to aquaculture.

On March 17, 2003, the FWS published a proposed rule adopting the Public Resource Depredation Order (PRDO) after determining that population control was necessary where double-crested cormorants posed a substantial threat to public

resources. Supporters of the depredation orders claimed that their resources had quite literally gone to the birds. The catfish industry, for example, claims cormorants eat over 49 million fingerlings each winter with a value of approximately $5 million.[1]

A final rule, issued on October 8, 2003, governed the taking of the double-crested cormorants on land and in the freshwater of 24 states.[2] The rule provided that non-lethal control methods should first be attempted as a means of population control and limited lethal methods to egg oiling, egg and nest destruction, cervical dislocation, firearms, and CO_2 asphyxiation. The FWS estimated that approximately eight percent of the bird's total population of 2 million would be taken each year under the PRDO. Several animal rights organizations challenged the order asserting it violated treaty obligations and federal statutes.

Court's Analysis

Plaintiffs asserted several main arguments. First, plaintiffs argued that the PRDO contradicted the terms of the Migratory Bird Treaty Act. The court found that there was no conflict between the PRDO and the language of the MBTA. The MBTA grants the Secretary of the Interior the power to "determine when, to what extent, if at all, and by what means" the taking of birds is permissible, and "to adopt suitable regulations permitting and governing the same."[3] The court found that the PRDO's limited delegation of authority to state agencies and regional branches of the FWS does not depart from the MBTA's language or intent. The court determined that the PRDO does not unduly relinquish federal power to the states, or vary from the national approach to bird management required by the MBTA. The PRDO requires agencies seeking to initiate control activities to first provide notice to the appropriate Regional Migratory Bird Permit Office and provide a detailed description of the proposed population control activity, including the location of the activity, a description of how the cormorant impacted public resources, and how many birds are likely to be taken.

Plaintiffs also argued that the PRDO was incompatible with the terms of the Treaty's conventions. The court concluded that agency action should be evaluated for compliance under only those conventions that explicitly govern the disputed bird species, rather than under all four MBTA Conventions. The court's evaluation of the PRDO, therefore, focused strictly on the U.S. - Mexico convention, the only convention that specifically protects the cormorant. Plaintiffs argued that the PRDO violated the U.S. - Mexico treaty because the treaty requires "the establishment of close seasons" for the taking of protected birds and the PRDO does not provide for close seasons. Here, the court was faced with two opposing interpretations. Defendants alleged that it was unnecessary for the PRDO to address a "close season" because the cormorant is not a game bird and the term "close season" specifically applies to game hunting. The plaintiffs maintained that the term "close season" should be read to apply to a period of time when the taking of any bird (game or non-game) is prohibited. The court held that in the absence of express guidance from the Convention or Congress, the FWS's interpretation that the "close season" provision governs the taking of migratory game birds only was reasonable and the PRDO does not violate the U.S.- Mexico Convention.

Plaintiffs also claimed that FWS's adoption of the PRDO was arbitrary and capricious. Before taking action, an agency must have examined the relevant data and articulated a satisfactory explanation for the action, including the reasons behind it in connection with the facts found. Plaintiffs alleged that the FWS did not point to facts in the administrative record proving that the double-crested cormorants adversely impacted public resources. The court found that there were differences of opinion among experts, but determined that the FWS considered all relevant evidence. "A factual finding [is] not arbitrary and capricious simply because conflicting evidence exist[s]."[4] The court held that the FWS's adoption of the PRDO was based on a significant fact record which contained substantial evidence of the double-crested cormorant's effect on public resources.

The court further rejected plaintiffs' parallel argument that the PRDO was arbitrary and capricious because it did not reflect the FWS's stated goals. The plaintiffs claimed that the MBTA "requires the FWS to be as protective as possible of the birds," and they argued that the MBTA always requires the adoption of the least intrusive alternative to regulating the cormorant.[5] However, the court pointed to specific language in the U.S. - Mexico Convention that stated an intention to foster a "rational utilization" of protected birds, rather than to require the FWS "be as protective as possible" of a protected bird species.[6]

Plaintiffs also alleged that the FWS did not comply with the National Environmental Policy Act (NEPA) which requires every proposal for every

See Southeast, page 9

Reflections of a Knauss Fellow: Part 2

Elizabeth Taylor, 2005 Knauss Sea Grant Fellow; J.D., Lewis & Clark Law School

The Marine Mammal Commission continues to be an exciting home for the year. Recently we received a visit from the Japanese Environmental Lawyers Federation. They were here to meet with us about an ongoing case (*Okinawa Dugong v. Rumsfeld*) involving the relocation of a U.S. Marine Corps base in Okinawa, Japan and the endangered dugong. As discussed in the April 2005 issue of the THE SANDBAR, the lawsuit involves a coalition of conservation groups from both sides of the Pacific who filed suit in U.S. District Court in September 2003 against the U.S. Department of Defense over the proposed construction of an offshore military air station in the same location where dugongs graze among the coral and sea grass beds. The dugong, an aquatic herbivorous mammal related to the manatee and the extinct Steller's sea cow, is listed as endangered under the Endangered Species Act and in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The Okinawa dugong is a small, isolated population, thought to comprise fewer than fifty individuals that feed on the few remaining sea grass beds in the area. The dugong also plays a central role in the creation mythology, folklore, and rituals of the traditional Okinawan culture and is protected by the government of Japan under the country's Cultural Properties Protection Law. According to a 2002 United Nations Environmental Program report, the construction of a military base in this location could "destroy some of the most important known remaining dugong habitat in Japan" and the report predicts that unless measures are undertaken to protect Okinawan dugongs, they will soon be extinct.

The Commission is also involved in several issues occurring in the Hawaiian Islands. Of particular concern is the prospect of a high-speed inter-island ferry system of the type being planned by Hawaii Superferry, which already operates in these waters. Their plan is to have three 340-foot high-speed catamarans carrying passengers, vehicles, and freight between Oahu, Maui, Kauai, and Hawaii, beginning in 2006. The ferries will cruise at speeds of up to 45 mph. High-speed ferry operations in Hawaii and elsewhere pose a risk of collisions with marine mammals and sea turtles, potential disturbance from noise produced by boats and machinery, and other possible threats such as oil spills. With collisions presently occurring at speeds of 21 mph or less, there is clearly a significant potential for collisions to occur at more than twice this speed. Scientific studies of ship strikes have shown that vessels over 240 feet in length and traveling at speeds over 14 knots (~ 16 mph) are most likely to kill or mortally injure large whales. Crew members on vessels of this size and traveling at such speeds are unlikely to observe whales in time to avoid collisions.

Also of concern is the issue of spinner dolphin harassment in the Hawaiian Islands. We have received complaints from local residents in areas traditionally home to pods of resting spinner dolphins describing situations of blatant harassment by commercial tour operators. Currently, there are several operations that bring customers to these areas and pursue the dolphins in an effort to swim with the dolphins. The Marine Mammal Protection Act prohibits the harassment of any marine mammal. The term "harassment" is defined as any act of pursuit, torment, or annoyance which has the potential to disturb a marine mammal. The Commission is working with the state of Hawaii and the National Marine Fisheries Service to address this issue.

As I mentioned in my last article, the U.S. Congress has asked the Commission to review the ecological role of killer whales and their effects on endangered marine mammal species. In response, the Commission convened a workshop April 19-21, 2005 in Seattle to gather over twenty-five killer whale researchers to provide a comprehensive assessment of existing knowledge about the ecological role of mammal-eating (known as transient) killer whales and identify essential information gaps. With the input of these researchers, we are currently drafting a research plan to address the need for a comprehensive approach to understand fundamental questions about the marine ecosystem.

These are just a few of the fascinating projects I am involved with at the Commission. There are many more enthralling issues the Commission oversees and I will explore more of them in my next article.

Court Enforces Forum Selection Clause on Cruise Ship Ticket

Vega-Perez v. Carnival Cruise Lines, 361 F. Supp. 2d 1 (D.P.R. 2005).

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A district court in Puerto Rico recently enforced a forum selection clause contained on the back of a cruise ticket. Carnival Cruise Lines (Carnival) moved to dismiss the suit brought by the parents of an injured minor for improper venue. The court denied the motion to dismiss, but transferred the case to the U.S. District Court for the Southern District of Florida.

Background

Jan Ramos took a Carnival cruise with his grandparents in December of 2003. While waiting to disembark at the end of the cruise, Jan tripped on a rug and spilt his cheek on an air hockey machine in the arcade.

Jan's parents (plaintiffs) filed a personal injury action against Carnival in federal district court in Puerto Rico. Carnival filed a Motion to Dismiss for improper venue because the passage contract contained a forum selection clause designating Miami, Florida as the exclusive dispute resolution forum. Carnival argued that the ticket contract and the travel brochure both reasonably communicated this forum selection clause to passengers.

Forum Selection Clause

The court stated that Puerto Rico law and federal common law support enforcement of forum selection clauses. The court stated, "as a rule, forum selection clauses 'are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances.'"[1] The First Circuit has developed a two-prong test to evaluate the legitimacy of forum selection clauses under a "reasonably communicated" standard. A court first examines whether the ticket contract is clear and its language obvious and understandable and then evaluates whether the passenger was meaningfully informed of the contract terms.[2] The court noted that a forum selection clause is enforceable regardless of whether the passenger read it.

The court found that because the plaintiffs were presumed to be aware of the forum selection clause when they received the tickets, the terms were assumed to be reasonably communicated to them. Furthermore, the court found the clause reasonable because Miami was not an unduly inconvenient forum.

The court noted that a forum selection clause is enforceable regardless of whether the passenger read it.

Conclusion

The U.S. District Court for the District of Puerto Rico denied Carnival's motion to dismiss for improper venue and transferred the suit to the U.S. District Court for the Southern District of Florida.

Endnotes

1. *Vega-Perez v. Carnival Cruise Lines*, 361 F. Supp. 2d 1, 2 (D.P.R. 2005) (*quoting The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)).
2. *Id.* at 3 (*quoting Shankles v. Costa Armatori*, 722 F.2d 7, 8-9 (1st Cir. 1991)).

Photograph of cruise ship from the ©Nova Corp. collection.

EPA Must Modify CAFO Rule

Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2nd Cir. 2005).

Jason Savarese, J.D.

The Second Circuit Court of Appeals ruled in February that some aspects of the Environmental Protection Agency's (EPA) regulations governing water pollution from concentrated animal feeding operations (CAFOs) were arbitrary and capricious under the Administrative Procedure Act (APA) and in violation of the Clean Water Act (CWA).

Background

CAFOs are large farms that house and feed a large, concentrated population of animals. A mid-sized CAFO can have more than 50,000 turkeys or almost 125,000 chickens. These operations produce large amounts of wastes, which contain high levels of nitrogen, phosphorus, disease-carrying bacteria and viruses, and carbon dioxide. These pollutants can enter the environment following a spill, purposeful discharge, or an overflow from a storage pond. Most CAFOs, however, contaminate surface waters through a practice known as "land application," the spreading of manure, litter, and other process wastewaters onto fields as a fertilizer. While land application is a legitimate agricultural practice, environmental problems can result if the wastes are excessively applied or misapplied. To limit the amount of CAFO discharges, EPA promulgated a series of regulations, known as the "CAFO Rule."

The CWA bars the discharge of pollutants from any point source – a "discernible, confined, and discrete conveyance"[1] – into the navigable waters of the U.S. unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit. Every NPDES permit is required to include "effluent limitations," which restrict the amount, rate, and concentration of pollutants discharged. The CAFO Rule, finalized in 2003, establishes NPDES permit requirements and effluent limitation guidelines for CAFOs. The regulations require all CAFO owners or operators to apply for an NPDES permit or seek a determination from the EPA or the relevant state agency that they have "no potential to discharge" manure, litter, or process wastewater. In addition, each CAFO must develop and implement a nutrient management plan. This plan must ensure adequate manure and wastewater storage and proper disposal of dead animals; prevent farm animals from coming in contact with U.S. waters; restrict the disposal of chemicals; limit pollution runoff; and ensure land applications are conducted in accordance with specific nutrient management practices.[2]

Nutrient Management Plans

Waterkeeper Alliance, Sierra Club, the National Resources Defense Council and the American Littoral Society (Environmental Plaintiffs) claimed that the CAFO Rule was an "impermissible self-regulatory permitting regime." They argued it was unlawful because the regulations did not require the nutrient management plans be incorporated into the NPDES permit or provide for permitting authority review of the plans.

The court held that the CAFO Rule's permitting scheme violated the CWA and was arbitrary and capricious under the APA. The CWA requires the EPA to "prescribe conditions for [NPDES] permits to assure compliance with [all applicable requirements, including effluent limitations]."[3] The court found that the CAFO rule, by failing to require review of the plans before the issuance of a permit, "does nothing to ensure that each Large CAFO has, in fact, developed a nutrient management plan that satisfies" the CWA requirements.[4]

EPA defended the CAFO rule arguing that a nutrient management plan does not "constitute an effluent limitation guideline, but is instead 'simply a planning tool' to help CAFOs comply with the effluent limitations."[5] The court disagreed, holding that the nutrient management plans were themselves effluent limitations, since the CWA defines effluent limitation as "any restriction established by a State or the [EPA] Administrator on quantities, rates, and concentrations of chemical, physical, biological . . . constituents which are discharged from point sources."[6] Under the CWA, NPDES permits must contain all applicable effluent limitations and the EPA must assure that the permittee complies with those limitations. Therefore, the terms of the nutrient management plans must be included in the NPDES permits as effluent limitations and the EPA must provide for permitting authority review to assure compliance.

Public Participation

The Environmental Plaintiffs also argued that the CAFO Rule is arbitrary and capricious because it violates the CWA's public participation requirements. The Court agreed, ruling that the EPA's development of the CAFO Rule and the underlying NPDES permitting scheme prevent the public from carrying out its usual role in regulatory development and "effectively shields the nutrient management plans from public scrutiny and comment."[7] The CWA mandates that the public be allowed to comment on NPDES permits and assist in the development and enforcement of effluent limitations.[8] The Court found that the permitting scheme deprives the public of these opportunities, because the CAFO Rule does not require the plans be part of the NPDES permit, thereby denying the public the chance to comment on those plans. Furthermore, the public cannot enforce through a citizen suit the terms of a plan it does not have access to.

NPDES Registration

Under existing regulations, CAFOs are required to either apply for an NPDES permit or prove that the farm has no potential to discharge pollutants. The American Farm Bureau Federation, National Chicken Council, and National Pork Producers Council claimed the EPA had exceeded its statutory authority by imposing such a requirement. The court stated that the CWA gives the EPA authority to regulate the discharge of pollutants through the development of effluent limitations and the issuance of NPDES permits. The definition of "discharge of any pollutant," however, does not include potential discharges. The Court held that the EPA cannot require CAFOs to apply for an NPDES permit unless they are actually discharging pollutants.

Conclusion

The court vacated several portions of the CAFO Rule it found to be arbitrary and capricious under the APA and in violation of the CWA. NPDES permits must include the terms of the nutrient management plans developed by the individual CAFOs and the EPA must provide for review of those plans by the responsible permitting authority. Furthermore, CAFOs cannot be required to prove that they do not have the potential to discharge pollutants.

Although the CAFO Rule applies only to certain livestock operations, this ruling could have an impact on the way EPA administers its regulations for concentrated aquatic animal production (CAAP) facilities issued in 2004. The time has passed to challenge the legality of the CAAP guidelines, but EPA may err on the side of caution and begin requiring CAAP facilities to include the terms of their best management practice (BMP) plans in future NPDES permits. This would harmonize the agency's pollution programs and enable public participation.

Endnotes

1. 33 U.S.C. § 1362(14).
2. 40 C.F.R. § 122.42(e)(1)(i)-(ix).
3. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498 (*citing* 33 U.S.C. § 1342(a)(2) (2005)) (emphasis added).
4. *Id.* at 499.
5. *Id.* at 501.
6. 33 U.S.C. § 1362(11).
7. *Waterkeeper*, 399 F.3d at 503.
8. 33 U.S.C. § 1251(e); § 1342(a); §1342 (b)(3) (2005).

Photograph of hog farm courtesy of Natural Resources Conservation Service.

FERC Has Authority to Require Invasive Species Monitoring Plans

Rhinelander Paper Co. v. FERC, 405 F.3d 1 (D.C. Cir. 2005).

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The D.C. Circuit Court of Appeals recently affirmed the Federal Energy Regulatory Commission's (FERC) decision to delay modification of a hydroelectric project's license boundaries and to require, as a provision of the renewal license, the development of an invasive species monitoring plan. The court found both actions a reasonable exercise of FERC's authority under the Federal Power Act.

Background

The Rhinelander Paper Company (Rhinelander) operates a hydroelectric plant on the Wisconsin River in Oneida County, Wisconsin. On June 26, 1998, the company filed an application to renew its license with FERC for the 2.12 megawatt project. Under the previous license, the project encompassed approximately 2,478.5 acres of land. The modification would have removed privately owned land from the project boundaries and reduced the size of the project to approximately 292.5 acres.

On August 20, 2003, FERC renewed Rhinelander's license under the Federal Power Act, but did not accept the company's modification. In addition, FERC inserted two important provisions in the renewal license. First, FERC required that the project maintain its historical boundaries pending the preparation of a land management plan. Second, FERC required that Rhinelander develop and implement a plan to monitor invasive plant species at the project.

The U.S. Fish & Wildlife Service (FWS) was the primary impetus behind the addition of these two provisions. The FWS recommended maintaining the historical boundaries of the project until Rhinelander provided a clearer identification of the land to be removed from the project. The FWS also requested that the license renewal require Rhinelander to cooperate with state and federal agencies to monitor and control the spread of highly invasive and exotic plant species, despite the fact that there was no evidence of the presence of such species at the project.

Rhinelander requested a rehearing on the Director's decision, which was denied on February 18, 2004. In its denial, FERC admitted that the land slated for removal may not be necessary, but also stated that more information was needed before a decision could be made. Also, FERC stated that the plant monitoring provision was appropriate since section 10(j)(1) of the Federal Power Act requires FERC "to include in each hydroelectric license conditions 'to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat),' based on recommendations from federal and state resource agencies."[1] Rhinelander then brought the decision before the D.C. Circuit Court of Appeals for review.

Boundary Modification

In reviewing a FERC licensing decision, the courts are held to the commonly employed "arbitrary and capricious" standard.[2] In other words, a court must determine if the Commission's decision was reasonable and within the bounds of the powers granted to the agency by Congress. In this case, the D.C. Court of Appeals determined that the Commission had made a proper decision with regard to both issues. In regards to the first issue, FERC based its decision on section 10(j)(1) of the Federal Power Act, which states in part that:

> the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes.[3]

The Commission has construed this portion of the Act as imposing a statutory obligation upon both the Commission and the licensee to protect the shoreline and aquatic resources within the project area through

the use of a buffer zone. While a modification of the project area in this case may have been acceptable, FERC contended that Rhinelander had not provided sufficient maps and other specific information about the lands for the Commission to make an informed decision concerning boundary modification. The D.C. Court of Appeals found FERC's basis for this decision entirely reasonable.

Invasive Species Monitoring Plan

In regards to the second issue, the D.C. Court of Appeals also held that the Commission's decision was not arbitrary and capricious. As stated earlier, FERC based this decision on section 10(j)(1) of the Federal Power Act, which requires licenses to protect, mitigate and enhance wildlife in the project area. The court used the classic *Chevron* analysis: determining whether Congress has spoken directly on the point at issue, and if not, whether the agency in question has made a permissible reading of the statute.[4] The D.C. Court of Appeals held that FERC's reading of section 10(j)(1) was permissible. Specifically, the court referred back to Rhinelander's own admissions at oral arguments that a hydroelectric project like the one at issue in this case obviously has an affect upon fish and wildlife within a river system, and that the project has the potential to spread the invasive species at issue through the contribution of the seeds of these plants to the flow of the river. While the court acknowledged that prior cases had held that provisions which required project operators to work with agencies to control the spread of these plant species were premature, the court pointed out that this license merely required the operator to implement a plan for cooperative monitoring efforts. Thus, FERC's decision was an acceptable interpretation of the statute at issue, and was not in conflict with previous license decisions.

Conclusion

The spread of invasive species like purple loosestrife and Eurasian water-milfoil have become an issue of national import. The court's decision in this case is an important step in fighting the problems caused by these invasive species, as it has read into the Federal Power Act a federal statutory basis for FERC to impose monitoring obligations upon hydroelectric projects. These projects are acknowledged as a significant cause of the spread of these species, and this decision represents one method by which to combat the problem. If similar obligations can be read into the habitat conservation provisions of other agency's statutes, perhaps the spread of invasive species through methods such as ship ballast water can be more adequately addressed in the future.

Endnotes

1. *Rhinelander Paper Co. v. FERC*, 405 F.3d 1,4 (D.C. Cir. 2005).
2. *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296 (D.C. Cir. 2003), *citing North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997).
3. 16 U.S.C. § 803(a)(1).
4. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Southeast, from page 3

major federal action "significantly affecting the quality of the human environment" to issue a detailed statement describing the project's environmental impact. Contrary to the plaintiffs' argument, the court found the Final Environmental Impact Statement included an in-depth analysis of all alternatives considered by the Service and illustrated that its actions were based on sufficient facts. For these reasons, the court held that the FWS's stated objectives and listed alternatives adequately satisfied the standards of NEPA.

Conclusion

The court dismissed the plaintiffs' remaining arguments related to the Endangered Species Act and the FWS MBTA implementing regulations, found for the defendants, and authorized the Fish and Wildlife Service's PRDO as an appropriate vehicle for controlling the double-crested cormorant population in 24 states.

Endnotes

1. *Fund for Animals v. Norton*, 365 F. Supp. 2d 394, 417 (S.D.N.Y. 2005).
2. The PRDO is applicable in Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Vermont, West Virginia, and Wisconsin.
3. *Fund for Animals*, 365 F. Supp. 2d at 410 (*citing* 16 U.S.C. § 704(a)).
4. *Id.* at 418.
5. *Id.* at 419.
6. *Id.* at 420.

Coast Guard Immune from Suit in Shark Attack Death

Taghadomi v. U.S., 401 F.3d 1080 (9th Cir. 2005).

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The Ninth Circuit recently dismissed a lawsuit against the Coast Guard following a shark attack because the plaintiffs could not file suit under the Public Vessels Act (PVA), the Suits in Admiralty Act (SAA), or the Federal Tort Claims Act (FTCA).

Background

While kayaking in Maui, Monazzami Taghadomi, a U.S. resident, and his wife, Nahid, an Iranian citizen, lost control of their kayak due to high winds and waves. Nahid fell overboard, was attacked by a shark and died. Monazzami was rescued three days later and spent several days in the hospital. While the couple was struggling with the kayak, a witness on land contacted the Coast Guard in Maui to inform it of the couple's distress. Twenty minutes later the Maui office called the Coast Guard's Operations Center, which directed a Coast Guard cutter to conduct a search and rescue mission. Nightfall prevented the Coast Guard from conducting more than a brief search.

Monazzami, along with Nahid's family, filed suit against the kayak rental company and later added the Coast Guard. The Coast Guard was left as the only defendant when the plaintiffs settled with the rental company. The plaintiffs brought the claims against the Coast Guard under the FTCA, alleging that the Coast Guard was negligent in its rescue mission and its failure to contact local authorities with access to better rescue equipment. The district court granted summary judgment in favor of the Coast Guard because the claims were not allowed under the FTCA.

Federal Immunity

A claim may be brought against the U.S. only if the U.S. has waived its sovereign immunity. The Ninth Circuit determined that none of the three immunity-waiving statutes relevant to this case, the PVA, SAA, or the FTCA, were applicable. The PVA and SAA waive immunity in some maritime suits. Some non-maritime claims can be asserted under the FTCA. A tort falls within the admiralty jurisdiction of the federal courts if the tort occurred on or over navigable waters (the "locality test") and it bears a significant relationship to traditional maritime activity (the "relationship test").[1]

The plaintiffs asserted that their claims do not fall under admiralty jurisdiction because they fail both tests; therefore they appropriately brought suit under the FTCA. First, the plaintiffs argued that the tort did not pass the "locality test" because the tort occurred on land. The plaintiffs argued that the alleged negligence by the Coast Guard was a failure by the land-based Operations Center to contact local authorities with access to better rescue equipment. Secondly, the plaintiffs argued that the tort did not pass the "relationship test" because the activity was purely recreational in nature, not commercial.

The court disagreed with the plaintiffs' argument that the tort claims failed both tests. The court stated that the "locality" of the tort is where the injury occurred, in this case on navigable waters. The court also concluded that the tort met the "relationship test." A court must ask two questions to determine if there is a "significant relationship to traditional maritime activity." The first inquiry is whether the incident would have a potentially disruptive impact on maritime commerce. Even though the activity was recreational in nature, the kayak accident gave rise to an activity by the Coast Guard. The court stated that negligent search and rescue could disrupt maritime commerce.

The second question is whether the "general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity."[2] The court again looked not only at the activity of the plaintiffs, but also the activity of the Coast Guard. The court stated that a search-and-rescue mission carried out by the Coast Guard most assuredly does have a substantial relationship to maritime activity.

Interaction of PVA, SAA, and FTCA

After determining that both claims, failure to communicate and negligent search and rescue, were maritime in nature, the court stated that the claim could not be brought under the FTCA because the act is not applicable to maritime claims that can be brought under either the PVA or the SAA.[3]

Under the PVA, the U.S. is liable for torts where the "damage is caused by a public vessel of the United States."[4] Public vessels are vessels owned and operated by the U.S. in a public manner. The court determined that the plaintiffs' claim of negligent search and rescue fell under the PVA because the alleged negligent act occurred on a Coast Guard cutter. Nahid's parents,

however, are barred from bringing a claim under the PVA because of a reciprocity clause that "permits foreign nationals to sue the U.S. government only if their country of nationality would permit a similar suit by a U.S. citizen."[5] Because U.S. citizens could not bring a suit similar to the plaintiff's in Iran, the parents' claim is barred.

The plaintiffs argued, however, that even if the non-citizen claims are barred under the PVA, the claims could still be brought under the FTCA or the SAA because those statutes do not have a reciprocity clause. The court disagreed, stating that a non-citizen could not escape the reciprocity clause of the PVA by bringing the claim under another act. As for the U.S. plaintiffs, their claims were time-barred because the statute of limitations had lapsed.

The plaintiffs' failure to communicate claim did not involve a public vessel and therefore fell within the SAA. Unfortunately for the plaintiffs their claim was still barred, despite the SAA's lack of a reciprocity clause, because the statute's two-year statute of limitations had expired.

Conclusion

The court upheld the summary judgment ruling by the district court. The court stated that the claims could not have been brought under the FTCA because the FTCA does not apply to maritime claims. Nor could the claims be brought under the PVA or SAA because the statute of limitations had run for both.

Endnotes

1. *Taghadomi v. U.S.*, 401 F.3d 1080, 1084 (9th Cir. 2005).
2. *Id.* at 1086.
3. The FTCA does not apply to "any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States." (28 U.S.C. § 2680(d), referring to the PVA and SAA).
4. 46 U.S.C. App. § 781.
5. *Taghadomi*, 401 F.3d at 1083.

Groundfish Management Plan Stays Afloat

Oceana, Inc, v. Evans, 2005 U.S. Dist. LEXIS 3959 (D.D.C. March 9, 2005).

Benjamin N. Spruill, 3L, Roger Williams University School of Law

In March 2005, the United States District Court for the District of Columbia upheld the majority of the provisions to Amendment 13 of the Northeast Multispecies Fisheries Management Plan. Judge Ellen Segal Huvelle's ruling appears to close one chapter in the long battle interest groups have waged against the Secretary of Commerce.

Background

Authorized by the Magnuson-Stevens Fisheries Conservation and Management Act (MSA), the New England Fisheries Management Council (Council) developed the Northeast Multispecies Fisheries Management Plan (FMP) to prevent depletion of regional fish stocks. Amendment 13, developed over five years by the Council, is a response to the court-rejected Amendment 9 which failed to meet the overfishing and stock rebuilding requirements of the MSA.[1] Amendment 13 represents the latest attempt at groundfish management to replenish New England groundfish stocks, while limiting adverse economic consequences on fishing communities. Several conservation groups including Oceana and the Conservation Law Foundation (CLF), alleged that the Council violated its obligation under the MSA because the FMP fails to stop overfishing and effectively monitor bycatch rates. Additionally, the Trawlers Survival Fund (TSF), created to represent the economic interests of local fishermen, alleged that the Secretary of Commerce (Secretary) violated MSA procedure. The MSA requires that the Council's recommendations be approved by the Secretary; however, the TSF alleged that the Secretary breached his authority in a number of alterations he made to Amendment 13 contrary to the Council's recommendations.

Overfishing During Rebuilding Period

Amendment 13's rebuilding plan incorporates a "phase-in" approach to fisheries management, allowing overfishing of jeopardized stocks for several years into the rebuilding period. The phase-in approach allows fishing in excess of the rate at which a species

See Groundfish, page 21

Agencies Suffer Setback in Columbia and Lower Snake River Management

National Wildlife Federation v. National Marine Fisheries Service, No. CV 01-640-RE (D. Or. May 26, 2005) (opinion and order granting summary judgment).

Stephanie Showalter

Judge James A. Redden, a U.S. District Court judge in Oregon, dealt a significant blow to the National Marine Fisheries Service (NOAA), the Army Corps of Engineers (Corps), and the Bureau of Reclamation (Bureau) in late May. Judge Redden invalidated the 2004 Biological Opinion (BiOp) covering the operations of the Federal Columbia River Power System (FCRPS) in the Columbia and Lower Snake Rivers. This was the fourth BiOp prepared by the agency since 1993. A few weeks later, on June 10, 2005, Judge Redden issued an injunction requiring the agencies to provide for summer spill over some of the dams in the system.

Background

The Corps and the Bureau operate thirty-one hydropower projects, including fourteen sets of dams (Dams), on the Columbia and Snake Rivers. The Columbia and Snake Rivers are a management nightmare. There is simply not enough water available to meet the needs of everyone and everything in the region. Fish obviously need the rivers to contain water to survive, but salmon and other fish are also killed and injured by dams when swimming to and from the sea. Twelve species of salmon listed under the Endangered Species Act (ESA) are found in the Columbia and Snake River systems.

NOAA issued its first BiOp on the impact of the hydropower operations on listed species in 1992, which concluded that the Dams would not jeopardize the salmon. A second, similar BiOp was issued in 1993 covering the Dams' operations through January 1994. The agency's no jeopardy finding was challenged by the State of Idaho, and the Oregon District Court invalidated the 1993 BiOp as arbitrary and capricious. NOAA's 1995 BiOp applied to the Dams' operations through 1998. Although environmental groups challenged the 1995 BiOp, the Oregon District Court ultimately upheld the agency's findings. The BiOp issued in 2000 for the Columbia River Basin found that federal actions in the region would jeopardize eight listed species and destroy critical habitat. Judge Redden invalidated this BiOp on May 7, 2003 for, among other things, violations of the ESA consultation requirements. Although the agency was ordered to produce a new BiOp in 18 months, the new BiOp was not issued until November 2004.

2004 BiOp

Section 7 of the ESA requires federal agencies in consultation with the Secretary of the Interior to "insure that any action authorized, funded, or carried out by such agency [ ] is not likely to jeopardize the continued existence of the endangered or threatened species or result in the destruction or adverse modification of habitat of such species."[1] Section 7 applies "to all actions where there is discretionary Federal involvement or control."[2]

During consultation, agencies must "evaluate the effects of the action and cumulative effects on the listed species or critical habitat.[3] The "effects of the action" are the effects that will be added to the environmental baseline. The environmental baseline "includes all past and present impacts [on listed species and their critical habitat] of all Federal, State, private and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation process."[4]

Interestingly, in its 2004 BiOp NOAA concluded that "the operation of the DAMS will not jeopardize the continued existence of any listed species nor destroy or adversely modify critical habitat for three of those species."[5] This was the complete opposite of the conclusion drawn by the agency in 2000. NOAA reached this conclusion by categorizing the existing Dams on the Columbia and Snake Rivers and their operations as part of the environmental baseline. According to NOAA, "each of the dams already exists, and their existence is beyond the scope of the present discretion of the Corps and the [Bureau] to review."[6] The action agencies basically decided they were under no obligation to consult on any elements of pre-existing projects.

Judge Redden found the 2004 BiOp "legally flawed" for four reasons: (1) NOAA improperly segregated elements it claims are non-discretionary; (2) NOAA's comparison, rather than aggregation, of the effects of the proposed action; (3) improper critical habitat determinations; and (4) failure to adequately consult.

Segregation of Nondiscretionary Impacts

Judge Redden held that "NOAA must consult on the entire proposed action if the action agencies have meaningful discretion to operate the DAMS in a manner that complies with the ESA" and found that the action agencies do have sufficient discretion to act for the benefit of listed species under the ESA.[7] The Corps and the Bureau, pursuant to Congressional authority, operate the FCRPS for multiple purposes, including power production, flood control, wildlife preservation, and recreation. Judge Redden stated that "decisions in operating the DAMS to accommodate the divergent interests involve choices and the exercise of discretion."[8] Although the federal agencies must continue to operate the dams, they do have discretion over how to operate the dams. NOAA cannot segregate the discretionary and nondiscretionary aspects of the FCRPS operations.

NOAA may have gotten away with its segregation of nondiscretionary elements if it had aggregated the effects of the proposed action. Instead, NOAA compared the proposed action, the ongoing operation of the Dams, to that portion of the proposed project it classified as nondiscretionary and part of the environmental baseline, the existence of the Dams. This comparison approach is not appropriate, according to Judge Redden, because the environmental baseline is part of the "effects of the action" as defined by the ESA. A BiOp must evaluate the impacts of the action when added to the environmental baseline, not when compared to the environmental baseline. Judge Redden concluded that NOAA's jeopardy analysis is arbitrary and capricious because it is "insufficiently comprehensive to 'insure' that any action carried out by a federal agency" is unlikely to jeopardize a listed species.[9]

Conclusion

Although Judge Redden ruled that the 2004 BiOP does not comply with the ESA, he refrained from ordering the agency to withdraw it. Instead, he scheduled a conference for September 7, 2005 to discuss the remand of the BiOp and what should remain in place during the remand.[10]

On June 10, 2005, however, he granted the National Wildlife Federation's motion for a preliminary injunction and ordered that the action agencies provide for summer spill over some of the dams. Finding that "as currently operated, . . . the DAMS strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made," Judge Redden ruled that agencies shall provide spill from June 20, 2005 through August 31, 2005 at the Lower Granite, Little Goose, Lower Monumental, and Ice Harbor Dams on the lower Snake River; and from July 1, 2005 through August 31, 2005 at the McNary Dam on the Columbia River.[11] The Department of Justice appealed this injunction on June 15, 2005.

Endnotes

1. 16 U.S.C. § 1536(a)(2).
2. 50 C.F.R. § 402.03.
3. *Id.* § 402.14(g)(3).
4. *Id.* § 402.02.
5. *National Wildlife Federation v. National Marine Fisheries Service*, No. CV 01-640-RE, slip op. at 7 (D. Or. May 26, 2005) (opinion and order granting summary judgment) (emphasis in original).
6. *Id.* at 16.
7. *Id.* at 18.
8. *Id.* at 21.
9. *Id.* at 29.
10. *National Wildlife Federation v. National Marine Fisheries Service*, No. CV 01-640-RE, slip op. at 5-6 (D. Or. June 10, 2005) (opinion and order granting preliminary injunction).
11. *Id.* at 8-11.

Photograph of dam from ©Nova Development Corp. collection.

Exclusion of 1999 as Qualifying Year Upheld

Yakutat, Inc. v. Gutierrez, 407 F.3d 1054 (9th Cir. 2005).

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On May 18, the Court of Appeals for the Ninth Circuit upheld the lower court's ruling that the Secretary of Commerce did not violate the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) or the Administrative Procedure Act (APA) by deciding not to include 1999 as a qualifying year when issuing licenses for pot catcher/processor vessels in the Bering Sea and Aleutian Islands Pacific cod fishery.

Legal Framework

The Magnuson Act gives authority to the Secretary of Commerce (Secretary) to manage fisheries within the exclusive economic zone of the U.S. through the National Marine Fisheries Service (NMFS) and Regional Fishery Management Councils, which were established by the Magnuson Act. These Regional Councils create, monitor, and review Fishery Management Plans (FMP) to "achieve and maintain, on a continuing basis, the optimum yield from each fishery."[1] The Regional Council must submit its FMP to the Secretary, who makes the final decision to implement the plan or amendment.

A Regional Council may create a limited access system for the fishery in order to achieve optimum yield. Upon review of a limited access system, the Secretary must determine that the FMP or amendment to an FMP considers

A) present participation in the fishery,
B) historical fishing practice in, and dependence on, the fishery,
C) the economics of the fishery,
D) the capability of fishing vessels used in the fishery to engage in other fisheries,
E) the cultural and social framework relevant to the fishery and any affected fishing communities, and
F) any other relevant considerations.[2]

In 1995, the Northern Pacific Fishery Management Council (Council) created a License Limitation Program (LLP) to limit vessels operating in the Bering Sea and Aleutian Islands (BSAI) groundfish fishery. The original LLP did not classify groundfish licensees by the type of gear used or the fish species harvested. To address concerns "about new participants entering the Pacific cod fisheries" and transfer of crab fishermen into the Pacific cod fisheries due to decreases in crab, the Council decided to limit new entrants.[3] The Council analyzed vessels with different gear types, changes in minimum landing requirements, and the impacts of various qualifying years in an Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prior to issuing the Pacific cod license endorsements. Following the public comment period, recommendations from the advisory panel, and a public hearing regarding the final EA/RIR/IRFA for Amendment 67, the Council decided not to include 1999 as a qualifying year for the pot gear sector. Therefore, Amendment 67 required "pot catcher/processor vessels to have landed over 300,000 pounds of Pacific cod in any two years during the 1995-1998 period in order to qualify for a license."[4] After another public comment period, the Secretary reviewed Amendment 67 and issued the Final Rule in the Federal Register in April of 2002.

Factual Background

Yakutat, Inc. has operated the *F/V Blue North* in the BSAI groundfish fishery since 1994. The *F/V Blue North* originally used longliner gear and then incorporated pot catcher/processor gear in 1996. In 1997, the *F/V Blue North* used its longliner gear until May and then switched to pot gear for the remainder of the year, catching more than 300,000 pounds of Pacific cod. The *F/V Blue North* did not use pot gear in 1998, but did again in 1999, once again exceeding the minimum landing requirement for Pacific cod (>300,000 pounds). Under Amendment 67, the *F/V Blue North* is ineligible for a pot catcher/processor Pacific cod endorsement, because it only caught the minimum landing requirement for one of the qualifying years between 1995-1998.

Yakutat, Inc. filed suit against the Secretary of Commerce, alleging that the Final Rule for Amendment 67 violated the Magnuson Act and the APA. Specifically, Yakutat claimed that

1) the Secretary acted in an arbitrary and capricious manner by not providing justification for excluding 1999 as a qualifying year, and

2) exclusion of 1999 as a qualifying year is unfair and inequitable, and lacks a rational basis.

Court's Decision

When reviewing regulations under the Magnuson Act, the role of the appellate court is to "determine whether the Secretary [of Commerce] has considered the relevant factors and articulated a rational connection between the facts found and the choice made."[5] For reviewing actions under the APA, the court "may reverse the agency action only if the action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law."[6] Given these standards of review, the Ninth Circuit decided that the Secretary's issuance of the Final Rule for Amendment 67 was neither arbitrary and capricious nor unfair or inequitable.

First, the court found that the Secretary's failure to include 1999 as a qualifying year was not arbitrary and capricious. Through an extensive analysis of 106 alternatives (42 of which included 1999), the Secretary and Council chose not to include 1999 as a qualifying year. The court determined that this was a rational conclusion by the Secretary based on the facts. Data demonstrated that not including 1999 as a qualifying year primarily excluded boats that "were not historically dependent on the Pacific cod fishery and the [ ] majority of their income likely [came] from other fisheries."[7] Also, public testimony expressed concern about crab fishermen transferring to the Pacific cod fishery.

Furthermore, the Secretary and Council did not rely upon factors beyond those intended by Congress. As required when implementing any FMP or amendment, the Secretary relied upon the six factors listed above under "Legal Framework" and the ten national standards. The court found that the Secretary's response to public concerns regarding the national standards indicated he considered these standards. Also, the Secretary considered an important aspect of the problem, since he considered the Council's recommendation for including 1999 as a qualifying year as well as independently analyzing the inclusion of 1999 as a qualifying year. Finally, the Secretary acted with agency expertise when he excluded 1999 as a qualifying year based on the Council's recommendations, the advisory panel's opinions, and public comments.

In addition, the court found that the Secretary's decision to publish the Final Rule for Amendment 67 was not unfair and inequitable under National Standard 4 of the Magnuson Act, which states that "If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen."[8] Yakutat claimed that the exclusion of 1999 as a qualifying year demonstrated that the Secretary failed to consider "present participation," one factor of consideration for implementing a limited access system under the Magnuson Act. However, the Council noted that participation had increased in the Pacific cod fishery, because the industry knew of the proposed rule. Therefore, the Council did not include 1999 as a qualifying year "to ensure that vessels in the [pot catcher/processor] sector that had historical and consistent participation based on the Council's analysis of available data would be allowed to continue to participate at a level that reflected what the Council determined to be economic dependence."[9] By considering the individual catch histories for different gear types and landing quantities, the Council determined that 1999 was not necessary as a qualifying year to protect the interests of vessels that were historically dependent upon the Pacific cod fishery.

Conclusion

To successfully challenge the Secretary's Final Rule, Yakutat had to show that the Secretary made procedural errors that impacted his decision, which Yakutat could not prove. The Council provided an EA/RIR/IRFA, the proposed rule satisfied the requisite public comment period, and the Secretary evaluated the 106 alternatives available before issuing a final rule. The court concluded that, given the Council's analysis, the Secretary used proper discretion in weighing the national standards and that it owed deference to the agency's decision. The Secretary justified his decision to exclude 1999 as a qualifying year by limiting the number of vessels in the Pacific cod fishery to those with historic participation and true economic dependence on the fishery, thereby conserving this valuable groundfish fishery.

Endnotes

1. *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1058 (9th Cir. 2005).
2. 16 U.S.C. § 1853(b)(6)(2005).
3. *Yakutat*, F.3d at 1062.
4. *Id.* at 1063.
5. *Id* at 1066 (internal quotations omitted).
6. *Id.*
7. *Id.* at 1067.
8. 16 U.S.C. § 1851(a)(4) (2005).
9. *Yakutat,* 407 F.3d at 1071.

under the equal footing doctrine, as the original 13 states and all other states that joined the union before it. As the Supreme Court explained in *Pollard v. Hagan*, submerged land within territories acquired by the United States are transferred to the state upon statehood under the equal footing doctrine.

The Submerged Lands Act of 1953 (SLA) affirmed state ownership and formally extended ownership of submerged lands to three geographical miles beyond a state's coastline[2] and granted the states ownership and management authority over natural resources within the submerged lands and the waters over them.[3] Submerged lands that the United States expressly ceded or retained when a state entered the union are exempted from the SLA.[4] Therefore, Alaska would have a valid claim for the submerged lands around the Alexander Archipelago Islands and Glacier Bay if it could demonstrate that the tidelands were inland or within three geographical miles of Alaska's coast, and that the federal government had no express title to the submerged lands.

Alaska's Claims over the Alexander Archipelago

Over a thousand submerged mountains covering 500 miles lie off the southeast Alaskan coast. The mountain peaks form a group of islands called the Alexander Archipelago. Deep channels of ocean water separate the island group from the main coast of Alaska. None of the waters to which Alaska claimed title were within three miles of the Alaskan mainland; so the state claimed the Archipelago islands were themselves a part of the Alaskan mainland.

Alaska first argued that the islands were part of the Alaskan mainland under the historic inland waters theory. Under this theory, the Supreme Court recognized that island waters are inland waters if a state demonstrates that the United States exercised authority over them continuously and with acquiescence of foreign nations. The Supreme Court emphasized that the state must show that the federal government has established a right to exclude innocent passage of all foreign vessels.

Alaska points to a number of historical incidents that support its claim to the submerged lands. A ten-year treaty in 1824 between Russia and the U.S. granted the U.S. the right to fish and trade in the Archipelago waters. This shows, Alaska claimed, that Russia considered the waters inland when it owned Alaska. At the end of those ten years, Russia stationed a brig at the Russian/U.S. border to indicate to U.S. vessels they no longer enjoyed the treaty rights. Alaska also cited a 1903 arbitration proceeding between the U.S. and Britain, in which the U.S. attorney referred to the waters as inland. Finally, Alaska alleged that the U.S. controlled the waters by enacting fishing regulations throughout the early twentieth century which excluded foreign vessels from commercial fishing, relying on a case in which a foreign vessel was arrested for a breach of the regulations.

Alaska posed a second theory for demonstrating that the islands were inland. The U.N. Convention on the Law of the Sea recognizes that an island group may be considered inland waters under the juridical bay theory if they are deemed connected to one another and also to the mainland. Article 7 of the Convention defines a bay as a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast."[5] Alaska argued that the Archipelago does indeed have two connected but unnoticed juridical bays.

Alaska's Claims over Glacier Bay

Glacier Bay National Park and Preserve is known for its diverse wildlife and ecosystem. It is located within Alaska's three-mile coastal area. The quickly retreating glacial structures in the Bay are a natural phenomenon of great scientific importance.

There was no question that Glacier Bay waters would be presumed state waters under the equal footing doctrine and SLA. The question remained, however, whether the U.S. had rebutted that presumption. The presumption can be rebutted when Congress has set aside the submerged lands as part of a federal reservation. The Supreme Court test for determining whether Congress has retained control of submerged lands is to look at whether the submerged lands are within a reservation and whether the U.S. expressed intent to retain title to the submerged lands on that reservation. Alaska claimed that the U.S. never made an express intention to control the submerged lands in this federal enclave.

Special Master's Conclusions and Court's Analysis

After considering both written and oral submissions by the U.S. and Alaska, the Special Master recommended granting judgment to the U.S. for all submerged lands that were in dispute. The Supreme Court accepted the Special Master's conclusions on all counts.

The special master weighed Alaska's historical data against a broader analysis of the Archipelago's history and concluded that the U.S. had never established a right to exclude foreign vessels from the

Archipelago waters and therefore Alaska could not claim title to the waters under the historic inland waters theory. The Special Master discounted the treaty between U.S. and Russia because it did not address navigation for the purpose of innocent passage. Its scope was specific to fishing and trading with natives. The brig that was stationed at the border did not prohibit foreign vessels from entering the waters. In 1886, a State Department letter described only waters within three nautical miles of the mainland, which excluded the Archipelago island waters, as waters that would prohibit foreign passage. This evidence of U.S. intention was persuasive to the Court.

The Supreme Court was particularly reluctant to accept Alaska's contention that a 1903 arbitration proceeding could be considered evidence that the U.S. intended to exclude foreign vessels from passage in these waters. Quoting Alaska's brief to the court, "If this court were to recognize historic inland waters claims based on arguments made by counsel during litigation about nonmaritime boundaries, the 'United States would itself become vulnerable to similarly weak claims by other nations that would restrict the freedom of the seas.'"[6]The Court also rejected Alaska's argument that fishing legislation in 1906, which prohibited foreign fishing, was evidence of U.S. control, even though Alaska provided one instance of enforcement. The isolated incident was too little evidence, according to the Court, to show the U.S. demonstrated continuous enforcement when all other authority indicated that there was no U.S. control beyond three miles of the Alaskan coastal mainland.

In rejecting Alaska's juridical bay theory, the Special Master and Supreme Court relied heavily on the Convention's requirement of "well-marked indentations." The Court noted that the state of Alaska did not even discover the physical features that it relied upon to make its argument that the islands were connected until this litigation had commenced. It noted that the physical features, which Alaska identifies, would not be identifiable to a mariner.

Glacier Bay, as the Court nostalgically acknowledged, had been a federal reservation for thirty-four years prior to Alaskan statehood and has existed primarily for the purpose of preserving wildlife and protecting the natural phenomenon that occur there. The Court assumed that the Antiquities Act of 1906, which empowers the President to declare and control national monuments, empowers the federal government to set aside the submerged lands that fall within the preserved area.[7] The stated purpose for establishing national parks and monuments is to conserve the scenery and the natural historic objects and wildlife and leave them unimpaired for future generations.[8] The Court reasoned that these legislative proclamations could demonstrate that the federal government expressly reserved the submerged lands within Glacier Bay.

The Supreme Court, however, formally looked to the Alaska Statehood Act (ASA) to make its determination that the United States owned title to submerged lands of Glacier Bay. Section 6(e) of the ASA specifically reserves for the United States "all real and personal property" of the U.S. that is "used for the sole purpose of conservation and protection of the fisheries and wildlife in Alaska" to "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife."[9] Alaska argued that this section was only applicable to specific refuges referenced in the initial clause of § 6(e) of the ASA. The Court relied on Supreme Court precedent that held a proviso is not applicable only to "the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used."[10]

Conclusion

In an opinion over submerged lands claims in Mississippi, the Supreme Court said, "We have recognized the importance of honoring reasonable expectations in property interests. But such expectations can only be of consequence where they are reasonable ones."[11] The legal theories that Alaska presented in hopes of controlling commercial activities on a federal enclave and on waters outside its territorial waters were viewed as unreasonable in this instance. Clearly, the Supreme Court is not willing to extend state submerged lands ownership to waters around island groups, outside three miles of the mainland coast,

See Supreme Court, page 19

Photograph of Glacier Bay courtesy of NOAA Corps Collection, photographer is Commander John Bortniak.

MARAD Cleared to Conduct Transatlantic Tows

Basel Action Network v. Maritime Administration, 2005 U.S. Dist. LEXIS 3278 (D.D.C. March 2, 2005).

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On March 2, 2005, the United States District Court for the District of Columbia decided that the Maritime Administration's plan to conduct tandem tows to move decommissioned military vessels to a shipbreaker off the coast of the United Kingdom did not pose an environmental threat, thereby paving the way for the transfer of several vessels in the "Ghost Fleet" to the U.K.

Background

Docked on the James River of Southern Virginia, the poetically named "Ghost Fleet" consists of decommissioned military vessels awaiting their ultimate disposal. After Congress gave the Maritime Administration (MARAD) a 2006 deadline to complete the disposal of the ships, MARAD decided to help speed up the process by utilizing domestic as well as foreign shipbreaking facilities. The problem with these "aging hulks" is the scrap metal contains toxic materials called PCBs which are given much attention because they are extremely long-lived in the environment.

In order to reach their goal, MARAD initiated a program to solicit foreign and domestic ship dismantling/recycling proposals from the ship breaking industry. MARAD contracted with AbleUK, a corporation in Teesside, U.K., requiring compliance with the laws of the United States and the United Kingdom to assure protection of the environment and worker and health safety. The contract also requires AbleUK to acquire all U.K. licenses and approvals required to tow the ships and engage in dismantling and recycling activities. Litigation in the U.K. over environmental concerns forced AbleUK to secure permits beyond those envisioned by the contract, which it did. The first four ships of the "Ghost Fleet" have arrived safely in England and have caused no problems.

In response to MARAD's proposition to conduct tandem tows to AbleUK, two environmental groups, Basel Action Network, a sub-project of the Tide Center, and Sierra Club sued MARAD and the U.S. Environmental Protection Agency (EPA) alleging MARAD's plan to dispose of nine obsolete vessels violated the National Environmental Policy Act of 1969 (NEPA), the Toxic Substances Control Act (TSCA), and the Resource Conservation and Recovery Act (RCRA).

NEPA

NEPA requires federal agencies to consider the potential environmental impacts of major federal actions. First, agencies must determine whether the proposed action is a federal action. If so, they must prepare an environmental assessment (EA) to determine whether the action will "significantly affect the quality of the human environment." Further preparation of an environmental impact statement (EIS) is not necessary if there is a finding of no significant impact (FONSI). In February 2004, MARAD prepared a draft EA for the transfer of the nine remaining vessels and released a FONSI on June 29, 2004.

The Sierra Club challenged MARAD's EA on three grounds: (1) failure to consider the impacts of high seas towing; (2) failure to analyze each ship separately; and (3) inadequate consideration of use of domestic shipbreakers. The Court concluded that the 2004 EA and FONSI prepared by MARAD fully met its obligations under NEPA.

First, the court found that NEPA does not require MARAD to consider the environmental impacts of high seas towing. The court based its finding on the presumption that laws passed by the U.S. Congress have no extraterritorial effect and that Congress generally legislates with domestic concerns in mind. Additionally, the U.K. has its own Environmental Agency and regulations which it applies to AbleUK and any ships transported there - the U.S. has no control. Because of this rationale, the court found that there was no legal or policy reason to extend NEPA beyond U.S. territorial waters.

The court also determined that MARAD did not have to consider each ship individually. Rather than a ship-by-ship analysis of the vessels, MARAD's EA identified and considered the types of materials likely to be found aboard the ships, the places they would be found, and the likely quantities. The court determined that the 2004 EA adequately evaluated chemicals and substances of concern.

Finally, the court found that MARAD adequately considered the alternatives. While the Sierra Club argued that MARAD limited its consideration to only two alternatives: (1) tandem tows to the U.K. and (2) take no action, the court reasoned that the Sierra Club's argument was merely a policy disagreement as to whether MARAD should be exporting ships for disposal at all. The court recognized that all parties want the vessels to be expeditiously broken and recycled, so if tandem towing could be done safely, then exporting some of the ships would accelerate the process. Accordingly, the Sierra Club's allegations relating to NEPA were dismissed.

TSCA

The Sierra Club also claimed that MARAD violated provisions of TSCA. The purpose of TSCA is to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use and disposal of certain chemical substances and mixtures. Specifically, the toxic substances contained on these rotting ships, PCBs, drew concern among environmental groups. Congress directed the EPA to promulgate rules for the disposal of PCBs, to eliminate PCBs from the environment as well as the economy. In 1994, the EPA published a proposed rule that would allow the export of PCBs for disposal, including vessels that contain PCBs.

In response to the TSCA allegations, the court found that the Sierra Club failed to forego suit until after the TSCA's 60-day notice period. This 60-day notice period is mandatory and cannot be waived. The Sierra Club argued that a suit under the TSCA's citizen suit provision was not available during the 60-day notice period so it was necessary to proceed under the APA. However, APA jurisdiction depends on lack of adequate remedy and allowing the Sierra Club to proceed under the APA would allow them to avoid the statutory notice requirement under the citizen suit provision in TSCA simply by disguising their claims as one arising under the APA. Sierra Club did not wait and its complaint was therefore dismissed.

RCRA

The Sierra Club also claimed MARAD disregarded RCRA requirements. Compliance with RCRA requires exporters of hazardous waste for disposal to give notice to the Administrator of the EPA and obtain the receiving country's written permission to receive the waste. This act authorizes a suit against any past or present generator or transporter of waste, or site owner, whose past or present activities may present an "imminent and substantial" endangerment to health or the environment. MARAD, however, argued that the environmental group could not proceed under the provision of RCRA for a "potential" violation that has not yet occurred. There was no current or ongoing violation of MARAD's statutory obligation to notify EPA that it intended to export hazardous wastes and to receive the agreement of the receiving nation, the U.K., to accept those wastes and the court dismissed the allegations arising under RCRA.

Conclusion

At the end of the day, the court held in MARAD's favor and dismissed each of Sierra Club's claims, thereby allowing MARAD to continue with its plans to dispose of the decommissioned military vessels in order to meet its 2006 deadline.

Supreme Court, from page 17

without strong evidence that the U.S. has controlled and excluded foreign vessels from those waters. Furthermore, physical features that make up a juridical bay must be clearly identifiable. Finally, the designation of federal preservation areas or monuments can be enough to rebut the presumption of state submerged land ownership. In this case, however, the state's own enabling Act was sufficient evidence for the Court to make that determination.

Endnotes

1. *See U.S. v. Alaska*, 521 U.S. 1, 5 (1988); *Shively v. Bowlby*, 152 U.S. 1, 15 (1892).
2. 43 U.S.C. § 1312 (2005).
3. *Id.* § 1311(a).
4. *Id.* § 1313(a).
5. Law of the Sea: Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 7, 15 U.S.T. 1606, 1609.
6. *U.S. v. Alaska*, 125 S. Ct. 2137, 2149-50 (2005).
7. *See* 16 U.S.C. § 431.
8. *Id.* § 1.
9. Alaska Statehood Act, 72 Stat. 339 § 6(e).
10. *See McDonald v. United States*, 279 U.S. 12, 21 (1929).
11. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988).

mary authority to implement and enforce the CWA, to regulate the discharge of ships' ballast water into the waters of the United States. Their petition was based on a growing concern over the increase and impact of exotic species. Specifically, the groups asked the EPA to withdraw its regulation, 40 C.F.R. §122.3(a). The regulation in question states that: "The following discharges do not require NPDES permits: (a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel."[4] The EPA has relied on this section of the regulation to exempt ballast water, as well as a variety of other pollutant discharges, from the CWA's National Pollutant Discharge Elimination System (NPDES) permit program. The EPA denied the plaintiffs' petition, and the following case ensued.

Stock photograph from the ©Nova Development Corp. collection.

In their complaint, the plaintiffs requested "a declaration that the EPA's failure to rescind 40 C.F.R. §122.3(a) in response to plaintiff's petition was in clear violation of the CWA, and an injunction directing the EPA to repeal and rescind 40 C.F.R. §122.3(a)."[5] The plaintiffs filed two specific claims against the EPA: "1) that the EPA's promulgation of 40 C.F.R. §122.3(a) is inconsistent with the EPA's statutory authority in the CWA and thus unlawful and subject to review under the Administrative Procedure Act (APA), 5 U.S.C. §706(2); and 2) that the EPA's denial of plaintiff's petition was arbitrary, capricious, and an abuse of discretion given the CWA and subject to judicial review under §706(2) of the APA."[6] The EPA argued that the District Court should not have jurisdiction over the case and that the first claim was barred by the statute of limitations, but the court disagreed.

The Clean Water Act

The CWA prohibits "the discharge of any pollutant from a 'point source' into navigable waters of the United States" without a NPDES permit.[7] Vessels and other floating craft are included in the definition of point sources, and the term "pollutant" includes biological materials. The court found that the CWA clearly and unambiguously supports a number of findings leading to the conclusion that ballast water discharges must be subject to regulation and permitting. First, the court found that "ballast water discharges constitute a 'discharge' or 'addition' under the CWA."[8] Based on numerous reports of invasive species introduction, it has been clearly established that ballast water discharges introduce biological materials from outside sources. Second, the court found that "the discharged ballast water and other discharges incidental to the operation of a vessel constitute 'pollutants' under the CWA."[9] Again, ballast water contains fish, plants, and other forms of aquatic life that constitute "biological material" under the CWA. Third, the court recognized that the EPA did not challenge the assertion that the areas where ballast discharges occur are "navigable waters" under the CWA, meaning that the CWA applies to these areas and to the activities that affect them. Finally, the court recognized that ballast water discharges are clearly from a point source, as the CWA makes specific reference to vessels as point sources.

Conclusion

The court concluded that the EPA's regulation exempting ballast water from the NPDES permit program should be struck down. Judge Illston stated that, "given the clear language of the CWA, the statute requires that discharges of pollutants from . . . vessels into the nation's lakes, rivers, and harbors occur only under the regulation of an NPDES permit. The Court found that the language of the CWA demonstrates the "clear intent" of Congress to require NPDES permits before discharging pollutants into the nation's navigable waters.[10] The court then stated that Congress had clearly and directly spoken on the issues before the court, and that the EPA exceeded its statutory authority under the APA by issuing the regulation, 40 C.F.R. §122.3(a), exempting all ballast water discharges from the NPDES permit program and denying the plaintiffs' petition. Finally, the court issued an order instructing the EPA to repeal the regulation.

Regulatory and Political Implications

If the EPA decides not to file an appeal, or loses at the Ninth Circuit Court of Appeals, they will likely obtain the sole policy setting control over the ballast

water issue. Congress currently has several ballast water treatment bills pending before it, but unless one of these is passed, the EPA will become responsible for proposing, implementing, and enforcing ballast water regulations and permit programs.

Endnotes

1. Environmental News Service, Court Acts to Halt Dumping Invasive Species in U.S. Waters, April 4, 2005. http://www.ens-newswire.com/ens/apr2005/2005-04-04-01.asp .
2. *Id.*
3. *Id.*
4. 40 C.F.R. §122.3(a) (2004).
5. *Northwest Environmental Advocates v. EPA,* 2005 U.S. Dist. LEXIS 5373, at *6-7 (N.D. Cal. March 30, 2005).
6. *Id.* at *7.
7. *Id.* at *2.
8. *Id.* at *27.
9. *Id.*
10. *Id.* at *29.

Groundfish, from page 11

can survive. This rate, however, is reduced later in the rebuilding period to allow for the stocks to recover.

The plaintiffs alleged that this policy directly contravened the MSA which they claim requires an immediate halt to overfishing. Disagreeing, the court considered the economic consequences to fishing communities if their ability to harvest fish is severely curtailed in a short time. Recognizing that the MSA requires this economic factor be considered in development of the FMP, the court held that the Council appropriately allowed for overfishing for a period of time to lessen the economic impact on fishing communities.

In response to the plaintiffs' argument that Amendment 13 must be rejected because there is no proof of at least a fifty percent success rate, the court deferred to the findings of the Council. Unwilling to rule on an issue beyond the expertise of the bench, the court found that the Council developed appropriate measures, including trip limits, area closures, gear restrictions, and consideration of reasonable alternatives to ensure success of the FMP.

Bycatch Monitoring Provision

The court ruled that limited overfishing could be a part of the rebuilding process; however, it found that Amendment 13 failed to establish a sufficient bycatch monitoring plan as required by the MSA. Bycatch, caught fish that are not part of the main harvest, reveal important scientific data and bycatch rates help develop more effective fisheries management plans. The MSA clearly requires that FMPs have a "standardized reporting methodology."[2] In developing Amendment 13, the court found that the Council failed to develop any methodology and the Secretary simply intended to maintain a five percent monitoring rate of all bycatch. The court easily concluded that Amendment 13 failed to meet the statutory provisions related to bycatch.

Total Allowable Catch

In its counterclaim, TSF alleged procedural violations when the Secretary effectively curtailed the right of the Council to have its recommendations implemented. The Secretary passed a statute allowing the National Marine Fisheries Service to set a catch quota, as determined by the United States/Resource Sharing Understanding (TMGC). If different from the Council's recommendation, the TMGC quota would be implemented. Because Amendment 13 requires that the Council approve any TMGC quotas before implementation, the Secretary's regulation circumvented the Council's authority. The court, agreeing with TSF, ruled that the regulation is contrary to Amendment 13 and must be deleted, thus preserving the regulatory power of the Council.

Conclusion

Finding that Amendment 13 struck a balance between conservation efforts and the economic sustainability of the industry, the court upheld the major overfishing and rebuilding provisions of the amendment. The court deferred to debatable scientific findings of the Secretary and overturned provisions of Amendment 13 only when it expressly contravened federal statutes.

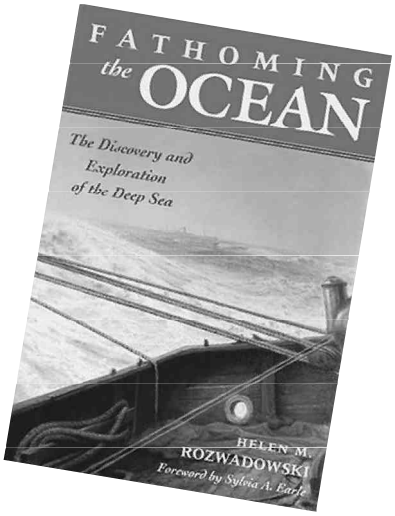
Endnotes

1. For an in-depth analysis of the court case rejecting Amendment 9, *see* Kristen Fletcher and Sadie Gardner, *Groundfish Management Proves Daunting to Court, Fishers*, THE SANDBAR Vol. 1:3 at 1 (2002).
2. *Oceana, Inc., v. Evans*, 2005 U.S. Dist. LEXIS 3959 at *137 (D.D.C. March 9, 2005).

Book Review . . .

Stephanie Showalter

Fathoming the Ocean: The Discovery and Exploration of the Deep Sea



Helen M. Rozwadowski (Belknap Press of Harvard University Press, 2005).

In *Fathoming the Ocean*, Helen Rozwadowski traces the events of the nineteenth century that lead to the emergence of oceanography as a recognized scientific discipline. Over the years, the work of a few enthusiastic naturalist-dredgers and yachtsmen, many amateurs who collected marine specimens as a hobby, evolved into organized field trips and excursions which eventually received government sponsorship. Naturalists, who explored the deep sea through dredges and soundings, originally working from rowboats, improved and adapted their gear to work from the deck of Navy vessels. Accounts of ocean voyages, as well as other types of maritime literature, rose in popularity during this time driven by rising literacy rates and the expansion of hydrographic surveying activities. The attempts of Britain and America to lay a trans-Atlantic telegraph cable focused all eyes on the deep sea. The discipline of oceanography developed over the course of a century as the public, the scientific community, and governments realized the importance of the oceans.

Fathoming the Oceans reminds the reader that humanity has a long history with the deep ocean, much longer than most people realize. The first systematic attempt to sound the deep ocean, for example, occurred during Sir John Ross's expedition to Baffin's Bay in 1817-1818. "The deep ocean is a realm with an identifiable, historical relationship to human activity, one that began in the era of the mid-nineteenth-century imperialism and industrialization and has intensified with time. The midcentury discovery of the ocean's depths set precedents for resource use that continue today; nowhere but on the sea are we still primarily hunters rather than farmers."

Rozwadowski's interdisciplinary approach paints a picture of the nineteenth century unlikely to be readily gleaned from other sources. *Fathoming the Ocean* contains details not only of the scientific voyages from which oceanography grew, but also the commercial interests (whaling and shipping) and societal changes (rise of yachting and trans-Atlantic travel) that compelled men and women to look to the sea. Societal forces are once again shaping our relationship with the ocean and before we more forward with new policies and studies, it is important to know where we came from. Rozwadowki presents a history lesson that all involved with ocean policy and science can benefit from.

Rozwadowski is Assistant Professor of History and Coordinator of Maritime Studies, University of Connecticut at Avery Point.

Book Announcement: *Marine Conservation Biology: The Science of Maintaining the Sea's Biodiversity*

The text below is taken from the Island Press website:

Marine Conservation Biology brings together for the first time in a single volume leading experts from around the world to apply the lessons and thinking of conservation biology to marine issues. Contributors including James M. Acheson, Louis W. Botsford, James T. Carlton, Kristina Gjerde, Selina S. Heppell, Ransom A. Myers, Julia K. Parrish, Stephen R. Palumbi, and Daniel Pauly offer penetrating insights on the nature of marine biodiversity, what threatens it, and what humans can and must do to recover the biological integrity of the world's estuaries, coastal seas, and oceans.

Edited by Elliot Norse and Larry Crowder, Marine Conservation Biology breaks new ground by creating the conceptual framework for the new field of marine conservation biology - the science of protecting, recovering, and sustainably using the living sea. It synthesizes the latest knowledge and ideas from leading thinkers in disciplines ranging from larval biology to sociology. Likewise, its lucid scientific examinations illuminate key issues facing environmental managers, policymakers, advocates, and funders concerned with the health of our oceans.

Coast to Coast

And Everything In-Between

The rich are never satisfied, are they? It's not enough that Goldie Hawn, Dustin Hoffman, David Geffen and other Malibu residents with beachfront property are millionaires who wake up each morning to beautiful views of the Pacific, they need to build huge sand walls to keep the public out of their "backyards." On June 10, 2005, the California Coastal Commission ordered the residents of Broad Beach, a small Malibu community, to refrain from using bulldozers to push sand from below the high tide line toward their homes. The CCC's recent ruling is simply the latest clash in a long-simmering conflict over public access to Malibu's beaches. The homeowners claim the barriers were meant to restore sand dunes destroyed by storms, but its hard to believe the construction was motivated by anything other than a desire to keep the public away. Stay tuned - the conflict surrounding the Commission's order requiring property owners to remove "no trespassing" signs and stop employing private security guards remains unresolved.

Photograph of Malibu courtesy of NOAA Photo Library.

On June 7, 2005, NOAA finally got its offshore aquaculture legislation introduced in Congress. The National Offshore Aquaculture Bill would give NOAA the authority to issue permits for marine aquaculture in federal waters and develop environmental standards for those operations. NOAA would also be tasked with developing a streamlined permitting process for the numerous other permits required to conduct marine aquaculture ranging from navigability permits from the Coast Guard to pollution discharge permits from the Environmental Protection Agency. The text of the bill and additional information is available at http://www.nmfs.noaa.gov/mediacenter/aquaculture/ .

The Pacific Fishery Management Council voted in June to permanently ban trawling in approximately 300,000 square miles of Pacific waters. The new plan bans bottom trawling in depths beyond 4,200 feet and some shallow areas the Council believes are critical habitat for important groundfish stocks, such as rockfish, ling Cod, and Dover sole. The Council's restrictions only apply in federal waters, but California and Washington have already banned bottom trawling in their state waters. Fishermen do not appear too concerned about the new restrictions since many of the protected areas are too deep for trawlers to fish in. The Council's ruling follows a similar ruling by the North Pacific Fishery Management Council which banned trawling in more than 370,000 square miles off the coast of Alaska.

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Around the Globe

Humane Society International (HSI) recently appealed an Australian court's ruling that prohibited the organization from suing a Japanese whaling company for whaling in an Australian whale sanctuary in violation of the Australian Environmental Protection and Biodiversity Conservation Act, 1999. The court dismissed HSI's petition citing concerns that a lawsuit could give rise to an international disagreement with Japan. Court documents and the latest news about the case are available from HSI at www.hsi.org.au .

Japan and other pro-whaling nations failed once again in their bid to end the international moratorium on commercial whaling. Very little, however, was actually accomplished at the International Whaling Commission's annual meeting this June in South Korea. The IWC managed to pass resolutions urging Japan to curb its scientific whaling, but Japan has no intention of actually doing so. Japan recently announced that it would increase its scientific take of minke whales to 900 and humpback and fin whales to 50 each. The members did agree to meet again and discuss the possibility of ending the nineteen-year ban in exchange for strict regulation. This decision reflects just how ineffective the Commission has become. They need a meeting to decide to have another meeting.

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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