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New Jersey Again at Forefront of Expanding Public Trust Doctrine

Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112 (N.J. 2005).

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On July 26, 2005, the Supreme Court of New Jersey, affirming last year's decision of the Appellate Division[1], ruled that a private beach club could not limit vertical or horizontal access to its dry sand beach area for intermittent recreational purposes, although it could charge a reasonable fee for services provided.

Background

Atlantis Beach Club (Atlantis) owns a 480-foot parcel of upland sand beach in Lower Township, Cape May County. The lot extends to the mean high water line. Atlantis is located in a residential area of approximately three blocks by nine blocks, and is the only beach in Lower Township that faces the Atlantic Ocean. The Atlantis property was open to the public without charge until 1996 when Atlantis established Club Atlantis Enterprises and began charging membership fees for use of the beach and beach services. The closest free public entry is nine blocks away and access is limited due to a low number of available parking spaces.

Procedural History

In 2002 Atlantis filed a complaint seeking to enjoin the general public from "trespassing, entering and accessing" the Atlantis property, arguing that it was not required to provide public access to and use of its property or the adjacent ocean.[2] The Raleigh Avenue Beach Association (Association) fought back, arguing that Atlantis was in violation of the public trust doctrine. The Association claimed the doctrine required the public be granted access to the beach through Atlantis's property and to a portion of the dry sand for enjoyment of beach activities.

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California Coastal Commission's Authority Upheld

Marine Forests Society v. California Coastal Commission, 2005 Cal. LEXIS 6846 (Cal. June 23, 2005).

Emily Plett-Miyake, 3L, Vermont Law School

On June 23, 2005, the Supreme Court of California upheld the constitutionality of the California Coastal Commission under the separation of powers clause of the California Constitution. In doing so, the Court "removed the most serious legal challenge faced by the California Coastal Commission in its three decades as one of the state's most powerful environmental bodies."[1]

Background

In 1972, a state initiative created the California Coastal Zone Conservation Commission (Commission). Four years later, the California Coastal Act of 1976 was enacted, with the Commission having primary implementing authority. The Commission thus has authority for land use planning along the State's coastline, including public access and recreation, coastal resources, and residential and industrial development. The structure of the Commission was set up so that members are appointed as follows: four by the State Governor,

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Court Preserves Public Access to Newport's Historic Waterfront

Newport Realty, Inc. v. Lynch, 878 A.2d 1021 (R.I. 2005).

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

The Rhode Island Supreme Court recently ruled that the public can access the Newport Harbor waterfront via a commercial wharf despite a private landowner's challenge. The court found that a 1921 land transfer reserved several streets for public use, preserving the public's right to access.

Background

In 1990, Newport Realty sought to establish ownership of certain streets traditionally open to the public in Newport, Rhode Island. The streets, North Commercial Wharf and Scott's Wharf, are both located on "the Wharf," an artificial land structure extending into the water which has historically provided the public with access to Newport Harbor. The streets are valuable to private landowners because they service commercial interests located on the Wharf and the Town of Newport, which has an interest in maintaining public access to the waterfront. Newport Realty's ownership of North Commercial Wharf and Scott's Wharf is dependent upon a somewhat awkward history of land conveyances.

In 1919 Narragansett Bay Realty Company ("Narragansett") gained ownership of the Wharf, including rights to all access roads located on the Wharf. However, in 1921 the financially troubled Narragansett conveyed the Wharf to a board of trustees who subdivided the land.

Recorded as the First Ebbs Plat, the parcels in the subdivided Wharf were conveyed to various parties with proceeds going to Narragansett's creditors. Subsequent conveyances by the trustees in 1923 and 1924 were recorded as the Second and Third Ebbs Plat, respectively; a final sale in 1925 completed the work of the Trustees. Since 1925, parcels on the Wharf have been conveyed to different owners, until

1986, when Newport Realty established common ownership of all but one of the Wharf's lots.

Central to Newport Realty's ownership claim of North Commercial Wharf and Scott's Wharf was whether the public gained an interest in the two streets after the Wharf was originally subdivided in the First Ebbs Plat from a single parcel of land. Interpreting the law of incipient dedication, the Rhode Island Supreme Court found for the State of Rhode Island when it held that the streets were reserved for public use.

Incipient Dedication

The Rhode Island Supreme Court determined, under the doctrine of incipient dedication, that the rights of way on North Commercial Wharf and Scott's Wharf belonged to the City of Newport. For the public to receive ownership of land by incipient dedication, the law requires that the landowner intend to convey ownership to the public and the public accepts that conveyance. In the case of subdivided land, the question of "whether the streets on the plat are open to the public depends on the owner's intent at the time the plat is recorded and the lots are sold."[1] In determining the Trustees' intent in 1921, the court relied on precedent establishing that when an owner sells lots referenced in a recorded plan that has clearly delineated public streets, it is a clear indication of an owner's intent to reserve the delineated streets for public use.

Because the First Ebbs Plat was clear in its delineation of North Commercial Wharf and Scott's Wharf streets, the court rejected Newport Realty's reliance on the Second and Third Ebbs Plat to negate

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Reflections of a Knauss Fellow: Part 3

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

The past few months have been busy here at the Marine Mammal Commission. We recently held our sixth and final plenary meeting of the advisory committee on acoustic impacts on marine mammals. After a series of highly publicized strandings of cetaceans coincident with exposure to mid-frequency sonar, public concern has increased about the effects of anthropogenic sound. A Federal Advisory Committee Act committee was established by the Commission in response to a 2003 Congressional directive to "survey acoustic 'threats' to marine mammals, and develop means of reducing those threats while maintaining the oceans as a global highway of international commerce." The 28-member advisory committee includes individuals from a diverse range of backgrounds, including the U.S. Navy, the oil and gas industry, and environmental groups. As one can imagine, these members have varying goals and objectives, and professional facilitators were contracted to assist in finding agreement on key recommendations to Congress. However, finding consensus has been a difficult process and this continues to be a highly controversial issue.

The Commission also recently hosted a workshop aimed at assessing the population viability of endangered marine mammals in response to a 2004 Congressional directive. This was the first of a three-phase approach to ultimately improve the biological effectiveness of current protection programs for the most endangered marine mammals. The Endangered Species Act of 1973 (ESA) employs a two-category system: listing species either as endangered (in danger of extinction throughout all or a significant portion of its range) or threatened (likely to become endangered in the foreseeable future). Absence of Congressional guidance on how to interpret the terms has left the task of defining them to the U.S. Fish and Wildlife Service (USFWS) and NOAA Fisheries. The workshop involved managers from USFWS and NOAA Fisheries as well as population modelers who are specialists in population viability analysis in an attempt to develop the use of quantitative methods to assist management actions such as listing decisions and recovery programs under the ESA.

In October the Commission will hold its 2005 annual meeting in Anchorage, Alaska. The meeting will focus on key issues impacting marine mammals in the North Pacific ecosystem, including climate change, coastal development, contaminants, and fishing.

Rhode Island Court Resolves *Palazzolo*

Palazzolo v. State, 2005 WL 1645974 (R.I. Super. July 5, 2005).

Jonathan Lew, 2L, Roger Williams University School of Law

The landmark U.S. Supreme Court decision of *Palazzolo v. Rhode Island*, decided in 2001, recently made its way back through the Rhode Island court system to determine whether the denial of a development permit to coastal landowner Palazzolo amounted to a taking. While the U.S. Supreme Court found that Palazzolo's claim was ripe for appeal, it left open the question of whether he could recover for a state denial of his proposed large-scale condominium complex on coastal wetlands. The Rhode Island Superior Court determined Palazzolo did not show a taking of private property without just compensation.

The Palazzolo Property & Claim

Palazzolo, president of Shore Gardens Inc. (SGI), acquired Rhode Island coastal property in 1959. Six prime lots on which houses could be easily built were immediately conveyed to other owners; the remainder of the property, a salt marsh located on the south side of Winnapaug Pond, was located on such permeable ground that any attempt to build would first require considerable fill.

In 1971, Rhode Island created the Rhode Island Coastal Resources Management Council (CRMC) to protect the State's coastal properties and the Council subsequently enacted the Rhode Island Coastal Resources Management Program (CRMP), which designated salt marshes as protected coastal wetlands on which development is greatly limited. In 1978, SGI's corporate charter was revoked and Palazzolo became the sole landowner. He filed proposals to fill the marsh in order to build condominium complexes, all of which were denied because they conflicted with the CRMP and did not satisfy the standards for obtaining a special exception.

Palazzolo filed an inverse condemnation action asserting that the denial of his permit applications amounted to a taking of his property without compensation in violation of the Fifth and Fourteenth Amendments. The initial trial was held in 1997 and the Rhode Island Superior Court entered a judgment for the State. The Superior Court found that no taking had occurred because the state regulations precluding the development predated Palazzolo's ownership of the parcel. The Superior Court also found that the development contemplated by Palazzolo would constitute a public nuisance and bar him from compensation. On appeal, the Rhode Island Supreme Court affirmed the Superior Court's decision by finding that the appeal was not ripe for decision because while the CRMC denied Palazzolo's application, it never made a final decision as to what land, if any, could be developed.

In 2001, the U.S. Supreme Court reversed this decision finding that Palazzolo's acquisition of title after the regulations took effect is not an automatic bar to a takings claim, explaining that "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land."[1] Moreover, the Court found the case was ripe for decision because it would be futile to force Palazzolo to continue to submit additional plans when the initial proposal was rejected and the State effectively determined which portion of the land in question could be developed. Consequently, the Supreme Court remanded the case back to Rhode Island to conduct a takings analysis, known as the *Penn Central* test, on the facts of the case.[2]

Nuisance

Before conducting the *Penn Central* analysis, the Rhode Island Superior Court revisited its original conclusion that Palazzolo's proposed development would constitute a public nuisance, precluding a verdict on his takings claim. The Supreme Court has found that there can be no taking in a case where a proposed use is prohibited by nuisance law.[3] The state used the theory of anticipatory nuisance because a "court may enjoin a threatened or anticipated nuisance, public or private, where it clearly appears that a nuisance will necessarily result from the contemplated act or things which it is sought to enjoin."[4] The state argued that Palazzolo's proposed development, a large scale condominium complex, constituted a nuisance because it would adversely affect the environment by increasing nitrogen levels and reducing marshland, which filters runoff. The court agreed, also holding that the marshland has a unique character and such a large complex would obstruct views and jeopardize the pristine nature of the location.

Penn Central Test

The *Penn Central* test guides a court in determining whether a taking has occurred by measuring the impact regulations have on property. The three factors

that set the framework for the test are (1) the character of governmental action, (2) the economic impact of the action on the claimant, and (3) the extent to which the action interfered with the claimant's reasonable investment-backed expectations.

Regarding the character of the state's action, Palazzolo has claimed a partial regulatory taking because the state regulation has banned certain uses of his property. Palazzolo argued for compensation because the cost for preserving wetlands should be borne by taxpayers and not by him as an individual property owner. The Superior Court found this argument to be unpersuasive because the same regulation affects the surrounding landowners and it is impractical for the government to compensate each and every landowner for their inability to develop large-scale complexes on unsuitable land.

Regarding the second prong of the *Penn Central* test, Palazzolo based his economic impact upon two theories. First, Palazzolo claimed the State denied him his entire planned development and he should be compensated based on a fifty-lot subdivision. The second theory is based on whether or not half of Palazzolo's property is subject to the Public Trust Doctrine. If the Superior Court found that half of his property lies below the mean high water line, that portion of Palazzolo's property would be subject to the Public Trust Doctrine and held by Rhode Island in trust. Palazzolo concedes that if the Superior Court finds half of his land to be subject to the Public Trust Doctrine than he should only be compensated for a 17-lot subdivision.

The difficulty in determining Palazzolo's economic impact rested on the reliability of trial experts and real estate appraisers. Palazzolo's engineer estimated that it would cost over $460,000 to provide the infrastructure and site work for the 17-home development and over $1 million to accommodate the 50-home development, while the State's expert estimated that the development costs of the 50-lot subdivision would be almost $3.9 million and the development costs of the 17-lot subdivision would be $1.3 million. Ultimately, the Superior Court found the State's expert more reliable because the "fatal flaw in the plaintiff's profit estimate is principally due to the site preparation costs determined by Plaintiff's engineer."[5] Among other factors, Palazzolo's engineer lacked experience with marshland development and failed to use the most accurate pricing information, which led to figures that were "unreasonably low and unreliable."[6] The court ultimately found that "regardless of any diminution of parcel size available for development due to the Public Trust Doctrine, site development costs unique to the parcel in question would result in an economic loss."[7] The court also relied upon "average reciprocity of advantage" stating that Palazzolo and the surrounding marshland owners are receiving a benefit from the undeveloped marshland if it remains pristine in nature.

Regarding the final prong, the Superior Court found that Palazzolo's "investment backed expectations were not realistically achievable."[8] It refused to recognize Palazzolo's development proposals as reasonable because any expectations would have been modest at best. Palazzolo paid a modest sum to invest in this subdivision with his partner, Urso, an attorney with prior real estate experience. After the six prime lots were sold, Urso, who understood the difficulties of developing the marshland and wanting to avoid a bad investment, sold out to Palazzolo. In addition, none of the surrounding marshland owners had developed any significant portion of the marshland, especially for a development the size of Palazzolo's proposed development, and Palazzolo was aware that such a significant development would have to be approved by

Photograph courtesy of the Community Rights Counsel (CRC), http://www.communityrights.org/legalresources/recentsupremecourtopinions/Palazzoloaerialview1.asp .

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four by the Speaker of the Assembly, and the remaining four by the Senate Committee on Rules. Each serves two-year terms "at the pleasure of their appointing authority."[2] The Commission is empowered to take a variety of actions, such as hearing applications for coastal permits, promulgating regulations, and issuing cease and desist orders halting illegal development.

Marine Forests Society is a nonprofit corporation whose purpose "is the development of an experimental research program for the creation of so-called marine forests to replace lost marine habitat."[3] Their objective is to discover economically feasible means of creating "marine forests" to replace lost habitat. As part of their project, Marine Forests began depositing materials, including "used tires, plastic jugs, and concrete blocks, on a sandy plain of the ocean off Newport Harbor."[4] The project received approval from the City of Newport Beach, the California Department of Fish and Game, and the California Integrated Waste Management Board. They did not receive approval, however, from the Commission, and in fact, they did not apply for a permit. In June 1993, the Commission informed Marine Forests that it was required to apply to the Commission for a permit in order to conduct its activities. Two years later, in 1995, Marine Forests applied for an "after-the-fact" permit, which the Commission denied in 1997. The Commission next began to commence enforcement proceedings against Marine Forests to compel it to cease and desist performing the contested operations. Two years later, the Commission issued a "Notice of Intent to Commence Cease and Desist Order Proceedings" against Marine Forests. In response, Marine Forests filed suit against the Commission for declaratory and injunctive relief, seeking to enjoin the Commission from pursuing enforcement actions against them. Marine Forests argued that the Commission lacked authority to pursue enforcement proceedings, because

> a majority of the voting members of the Commission were appointed by the Senate Rules Committee and the Speaker of the Assembly and served at the will of their appointing authority, the Coastal Commission must be considered a "legislative body" for purposes of the separation of powers clause of the California Constitution and that the Commission therefore lacked the authority either to grant, deny, or condition a permit (a power the complaint characterized as an "executive power") or to conduct a hearing and issue a cease and desist order (a power the complaint characterized as a "judicial power").[5]

The trial court agreed with the plaintiff and issued an injunction preventing the Commission from granting or denying coastal permits, or issuing cease and desist orders. The Commission appealed to the California Court of Appeals in 2002. Based on an examination of the separation of powers doctrine, the court affirmed the decision of the trial court and reinstated the injunction.

Since the decision at the Court of Appeals level, the Commission has undergone some structural changes, accomplished through amendments to the Coastal Act. The Commission is still made up of twelve members, four appointed each by the Governor, the Speaker of the Assembly, and the Senate Rules Committee. While those appointed by the Governor continue to serve two-year terms "at the pleasure of their appointing authority," the members appointed by the Senate Rules Committee and Speaker of the Assembly are now appointed for a four-year term and are no longer removable by the appointing authority.

Separation of Powers

The California Supreme Court determined it would evaluate the new, not the old, appointment structure under the separation of powers challenge. The court declined to review the validity of the past structure of the Commission, finding that "it is clear under a long and uniform line of California precedents that the validity of the judgment must be determined on the basis of the current statutory provisions, rather than on the basis of statutory provisions that were in effect at the time the injunctive order was entered . . . Because relief by injunction operates in the future, appeals of injunctions are governed by the law in effect at the time the appellate court gives its decisions."[6] The court also stressed that the correct separation of powers doctrine under which to test the structure of the Commission is that of the California Constitution, rather than the federal Constitution and federal separation of powers doctrine. While the federal separation of powers doctrine may have resulted in a different outcome, this was not the case under the state doctrine.

The California Constitution states that "the powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as

permitted by this Constitution."[7] Looking to state common law, the court noted that "Although the language of California Constitution article III, section 3, may suggest a sharp demarcation between the operations of the three branches of government, California decisions have long recognized that, in reality, the separation of powers doctrine 'does not mean that the three departments of our government are not in many respects mutually dependent', or that the actions of one branch may not significantly affect those of another branch. Indeed . . . the substantial interrelatedness of the three branches' action is apparent and commonplace."[8] In contrast with the federal Constitution, the state Constitution does not grant the Governor or executive exclusive appointment authority for all executive officials or prohibit the Legislature from doing so.

The Court then examined whether the current structure of the Commission was permissible. They found nothing to support a finding that the structure of the Commission, as brought before them, violated the separation of powers doctrine. The Court evaluated the structure using the appropriate standard: "whether these provisions, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional function." In doing so, the Court considered "whether the statutes either (1) improperly intrude upon a core zone of executive authority, impermissibly impeding the Governor . . . in the exercise of his or her executive authority or functions, or (2) retain undue legislative control . . . compromising the ability of the legislative appointees to the Coastal Commission . . . to perform their executive functions independently, without legislative coercion or interference." The Court found that the current structure of the Commission did no such thing, and is permissible and valid under the state separation of powers doctrine.

Validity of Past and Pending Commission Decisions

The Court acknowledged that more serious questions about the validity of the structure did exist before the 2003 amendments, but declined to issue a finding of whether it violated the separation of powers doctrine. In addition, they found that past Commission decisions and actions should be held valid regardless of the ultimate validity of the structure under which they were made. The Court recognized that statutes of limitations bar complaints against many of the estimated 100,000 vulnerable decisions. In addition, and more conclusively for recent and pending decisions of the Commission, the Court found that "under the 'de facto officer' doctrine prior actions of the Commission cannot be set aside on the ground that the appointment of the commissioners who participated in the decision may be vulnerable to constitutional challenge . . . the lawful acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer elected and qualified for the office and in full possession of it."[9] This legal principle, designed to give agencies and officers as well as the public for whom they operate a sense of certainty and finality, precluded any finding that the past and pending decisions of the Commission were invalid.

Conclusion

The conclusion of the case has been met with mixed response. Marine Forests and various property rights groups, including the Pacific Legal Foundation, expressed disappointment. "I thought we would have some members of the court going our way," remarked James Burling, head of the Property Rights Division of the Pacific Legal Foundation.[10] Ronald Zumbrun, who represented Marine Forests, expressed unhappiness that the case was not considered under the old law, rather than the new. Arguing against what his client, French researcher and head of Marine Forests Rodolphe Streichenberger, has called a "totalitarian tribunal," he also expressed shock at some of the analysis in the opinion.[11] On the other hand, Commission members and supporters were happy with the out-

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Photograph courtesy of the California Environmental Protection Agency.

Fishermen in Federal Waters Need State Permit to Land Catch in Alaska

Alaska v. Dupier, 2005 Alas. LEXIS 123 (Alaska Aug. 12, 2005).

Stephanie Showalter

The Alaska Supreme Court recently held that the Commercial Fisheries Entry Commission (CFEC) did not exceed its authority when it required federally permitted fishermen to possess state interim-use permits to land their catches. The decision was contrary to the earlier holdings of the District Court and Court of Appeals.

Background

John Dupier, Rodman Miller, and Philip Twohy hold Individual Fishing Quotas (IFQs) to fish for halibut and sablefish in federal waters off Alaska. In 2001, the three fishermen separately attempted to land fish caught in the Exclusive Economic Zone (EEZ) in Alaska. The men did not possess any state permits. The CFEC charged them with "possessing commercially taken fish in state waters without having a valid interim-use permit."[1]

In Alaska it is unlawful to "operate gear in the commercial taking of fishery resources without a valid entry permit or a valid interim-use permit issued by" the CFEC.[2] For non-limited entry fisheries, the CFEC is required to issue interim-use permits to "all applicants who can establish their present ability to participate actively in the fishery."[3] If a fishermen does not hold a limited entry permit or interim-use permit, he may not deliver or land fish in Alaska unless he holds a valid federal permit and has been issued a landing permit by the CFEC.[4] The CFEC may only issue landing permits after the Commissioner of the Fish and Game "has made a written finding that the issuance of landing permits for that fishery is consistent with state resource conservation and management goals."[5] The CFEC has never issued landing permits.

Interim-Use vs. Landing Permits

The statutory permitting regime seems straightforward on paper. In practice, it has been anything but. For fishermen fishing in state waters, the process is pretty clear. But what about fishermen operating outside of state waters? There are a number of federal fisheries in Alaska, including salmon, halibut, and sablefish. According to Alaska Stat. § 16.05.675, if fishermen want to land fish caught in federal waters, the fishermen must possess a federal permit (which authorizes the harvest) and a landing permit to land their catch.

Unfortunately, landing permits have never been issued by the CFEC. The Department of Fish and Game has yet to issue regulations authorizing the CFEC to issue landing permits. To fill this gap, the CFEC requires federally permitted fishermen to obtain interim-use permits even though the fishermen have no intention of fishing in state waters. The CFEC regulations state that "it is unlawful for any person to possess within water subject to the jurisdiction of the state, any fish or shellfish, taken for a commercial purpose, . . . unless the person has in his possession a valid interim-use or entry permit card. . ."[6] "A person reporting a landing of fish under a federal individual fishing quota (IFQ) possesses fish for a commercial purpose."[7]

The district court invalidated this regulatory provision and the Court of Appeals affirmed. The Court of Appeals held that "the CFEC is only authorized to issue interim-use permits to fishers participating in fisheries that are potentially subject to limited entry by the CFEC."[8] The halibut and sablefish fisheries are not potentially subject to limited entry by the CFEC because they are managed by the federal government.

The State defended its regulation by urging a broad reading of §16.43.210 which at the time authorized the state to issue interim-use permits "pending the establishment of a maximum number of entry permits." The State claimed this phrase gave CFEC "the authority to issue interim-use permits for any fishery in which it has not limited entry, regardless of who manages that fishery."[9] The Court of Appeals found this interpretation to be unreasonable as it would oblige the CFEC "to issue an interim-use permit to any qualified applicant to fish in any fishery in the world."[10] The court held that a more reasonable interpretation of §16.43.210 is that it requires CFEC to issue interim-use permits to applicants seeking to fish in fisheries to which entry has not been limited, "that is fisheries over which the CFEC has authority to limit entry or impose a moratorium, but has not yet done so."[11] The Supreme Court disagreed. It found that §16.43.210 was meant to apply to every

fishery not limited by the CFEC. Since the CFEC has not limited entry to the halibut and sablefish fisheries, the CFEC could issue interim-use permits. Apparently it does not matter that the CFEC does not have the authority to limit entry to the halibut and sablefish fishery.

The Supreme Court's reasoning begs the question: if CFEC has authority to issue interim-use permits for federal fisheries, why did the legislature authorize landing permits? The Supreme Court found that the legislature created landing permits in 1984 only for a "narrow class of fishers." In 1984, a salmon fisherman with a federal permit for the salmon troll fishery sought to land his catch in Alaska. Because he did not have a state interim-use permit or entry permit, he was prohibited from landing his catch. Before litigation ensued, the legislature passed a bill giving the Commissioner of Fish and Game discretion to authorize CFEC to issue landing permits.

Because the legislature could have directed the CFEC to issue interim-use permits in this situation, the Court of Appeals concluded that the legislature intended landing permits to be issued when "a fisher with a valid federal permit to harvest fish in the EEZ wants to land that fish in Alaska but holds no entry or interim-use permit."[12] The Supreme Court, however, distinguished the defendants' situation from that of the salmon fisherman. Unlike the halibut and sablefish fisheries, Alaska's salmon fisheries were subject to limited entry by the state in 1984. A federally permitted salmon fisherman would have been unable to obtain an entry or interim-use permit. The court found the defendants, unlike the salmon fisherman, could have procured interim-use permits since CFEC has not limited entry to the halibut and sablefish fishery.

Fishing vessel underway in Kodiak Harbor. Photograph from the NOAA Photo Library, photographer Charlie Ess, NMFS.

The defendants challenged the CFEC's position that they could have received interim-use permits. The federal IFQ program allows corporations, firms, and associations to participate. The CFEC, however, only issues interim-use permits to individuals. The State claimed that corporations participating in the IFQ program must assign their quota shares to a natural person who harvests the fish. That person would be eligible to apply for a CFEC permit. The court did not rule on this issue, but acknowledged that respondents could seek to disprove the State's assertion at trial. If the defendants can prove that they could not obtain CFEC permits, they may be able to succeed on a federal preemption claim as Alaska would be prohibiting them from landing fish legally harvested under federal law.

Conclusion

The court's conclusions appear to be based more on sympathy for the CFEC's position than on the statutes passed by the legislature. The CFEC was in an awkward spot. It should have required landing permits, but the Commissioner of Fish and Game had not created a regulatory scheme authorizing it to do so. Because all fishermen need a CFEC permit to land fish, it required the only one that was available - an interim-use permit.

This is a classic example of lawyers making things more complicated than they need to be. Since no one was challenging the authority of the state to require fishermen to possess landing permits, it would have seemed more logical for the court to order the Commissioner of Fish and Game to develop regulations authorizing the CFEC to issue landing permits than to force the defendants to pay a fine for not applying for permits inapplicable to their situation.

Endnotes

1. *Alaska v. Dupier*, 2005 Alas. LEXIS 123 at *2 (Alaska Aug. 12, 2005).
2. ALASKA STAT. § 16.43.14.
3. *Id.* §16.43.210.
4. *Id.* §16.05.675.
5. *Id.* § 16.05.675(c).
6. 20 Alaska Admin. Code 05.110(a).
7. *Id.* 05.110(c).
8. *Alaska v. Dupier*, 74 P.3d 922, 924 (Alaska 2003).
9. *Id.* at 928.
10. *Id.*
11. *Id.* at 929.
12. *Id.* at 930.

District Court Upholds Most of Atlantic Scallop Fishery Management Plan

Oceana v. Evans, 2005 WL 1847303 (D.D.C. August 2, 2005).

Britta Hinrichsen, 3L, Vermont Law School

In August, the District Court for the District of Columbia issued a lengthy opinion regarding the legality of the Atlantic Scallop Fishery Management Plan. The court held that the National Marine Fisheries Service's (NMFS) no jeopardy decision was not irrational and that the agency considered a reasonable range of alternatives to protect essential fish habitat from the adverse impacts of scallop dredging. The court, however, remanded a few sections of the amendment to the agency for violations of the Magnuson-Stevens Act.

Background

Under the Magnuson-Stevens Fisheries Conservation and Management Act (MSA), the New England Fisheries Management Council (Council) has authority to amend the Atlantic Sea Scallop Fishery Management Plan (FMP or Scallop FMP). Since 1994, the scallop fishery has been a limited access fishery with designated annual days at sea and the Council has the authority to open or close areas to scallop harvest. In 2000, the Council developed Amendment 10, which proposed a formal rotational closure system to "focus fishing effort on larger, more valuable scallops in area[s] where the effort is more efficient."[1] In addition to creating a structured rotation program based on the productivity of the scallops, Amendment 10 proposed measures to minimize adverse effects to essential fish habitat (EFH). While finalizing Amendment 10, NMFS used interim framework adjustments to manage the scallop fishery. Framework 16 established the first rotational access areas for Amendment 10, allowed for scallop dredging in areas of the Georges Bank closed to groundfish harvesting, provided more days at sea in those areas, and revised the EFH closed areas to be consistent with other amendments to the Scallop FMP. Oceana brought a number of claims against the Secretary of Commerce under the MSA, Endangered Species Act (ESA), and Administrative Procedure Act (APA) challenging the agency's actions regarding Amendment 10 and Framework 16 of the Scallop FMP.

Biological Opinion

To comply with the ESA, NMFS conducted formal consultation to determine if the authorization of Amendment 10 would jeopardize endangered loggerhead sea turtles. NMFS issued a Biological Opinion (BO), which found that continued authorization of the scallop fishery would not jeopardize the existence of the loggerhead sea turtles, although NMFS estimated that 479 turtles would be killed annually as a result of scallop fishing. In developing the 2004 BO, NMFS used a model originally designed to determine the impacts of shrimp trawling on sea turtles in the Gulf of Mexico, because that was the only data and model available. Oceana does not dispute that the model is the best available science. Rather, Oceana argues that the model is so ill-suited to the scallop fishery that the agency could not have rationally concluded that the fishery was not likely to jeopardize the turtles' survival.

The court disagreed. The necessary data simply does not exist and NMFS determined in the absence of that data the old model was the best alternative. The court indicates that the "agency needs only a reasoned basis for concluding that its action is 'not likely' to jeopardize the species" and the court will defer to such agency decision unless the model "bears no rational relationship to the reality it purports to represent."[2] The model was designed to help NMFS understand population trends in response to new conservation measures and it is the best available. Oceana offered several alternatives to the model, but the court found that they did not provide the agency with a better analysis because "no reliable estimates of absolute population size" were known and nesting data does not provide "statistically reliable trends" for loggerhead populations.[3]

Oceana also challenged NMFS's definition of "action area." The ESA defines "action area" as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action."[4] For the purposes of the 2004 BO, NMFS defines the action area as "the area in which the scallop fishery operates."[5] Oceana argued this definition operated to exclude significant sources of other mortality such as habitat loss and nesting predation. The court found the definition proper for limiting the BO to those areas where

loggerhead sea turtles are actually impacted by scallop fishing. The court found there was no support for "the proposition that the action area must be extended to include the migratory range of loggerhead turtles."[6]

Bycatch Reporting

Oceana claimed that Amendment 10 fails to establish an adequate bycatch reporting program. The court agreed. A FMP must include a standard reporting methodology of bycatch to assess quantity and type of bycatch for the fishery, and conservation and management measures to minimize bycatch and the mortality of unavoidable bycatch.[7] In Amendment 10 the Council proposed expanding its observer program in the sea scallop fishery, but "the FMP does not indicate what an appropriate increase would be, or how bycatch hotspots are to be determined."[8] Rather than creating a method of reporting, Amendment 10 merely grants "complete discretion to the Regional Administrator" and establishes a one-percent funding set-aside for at-sea observation of bycatch.[9] Because Amendment 10 fails to establish a methodology for bycatch reporting, the court remanded that portion of the Amendment for revision in accordance with the MSA.

Photograph courtesy of the National Marine Fisheries Service.

Framework Actions

Oceana also argued that Amendment 10 unlawfully delegates FMP adjustments to the framework action process. The MSA authorizes the agency to issue FMPs as well as amendments and regulations to those FMPs, each of which requires public notice and opportunity for comment. To respond to quickly changing conditions in fish populations, however, the Council uses "framework adjustments," which do not require public notice and comment. Because Amendment 10 creates a "rotational area management" scheme that depends on changes in scallop productivity, the Council argues that it needs to be able to quickly adjust management of the harvest areas when new data on scallop populations is available. Oceana challenged the future use of framework adjustments for the Scallop FMP.

The court found Oceana's challenge to the framework adjustment process not ripe for judicial review. Amendment 10 identifies different options for the agency to respond to changes in the scallop populations, and the future use of the framework adjustment process may be within the authority of the MSA if such changes are made to better meet the objectives of the Scallop FMP. If NMFS utilizes the framework process and exceeds the authority under the MSA, the plaintiff may then raise this challenge.

Oceana's other successful claim was that Framework 16, which implemented Amendment 10, violated the MSA. Without any opportunity for public comment, Framework 16 revised the scallop closure areas to be consistent with the Groundfish FMP. The court found the agency could make this change, but it must do so as a "modification" to the FMP rather than a framework adjustment, because modifications are subject to public notice and comment.

Conclusion

Amendment 10 to the Scallop FMP may be implemented as proposed by the agency, except for the two provisions remanded to the lower court; 1) establishment of a bycatch reporting methodology, and 2) a modification of the habitat closures.

Endnotes

1. *Oceana v. Evans*, 2005 WL 1847303, at *1 (D.D.C. August 2, 2005).
2. *Id.* at *10-11.
3. *Id.* at *7.
4. 50 C.F.R. § 402.02.
5. *Oceana*, 2005 WL 1847303, at *17.
6. *Id.* at *19.
7. *Id.* at *20.
8. *Id.* at *80.
9. *Id.* at *20.

Indiana and Ohio Failed to Comply with EPA Water Quality Guidance

Northeast Ohio Reg'l Sewer Dist., et al. v. EPA, 411 F.3d 726 (6th Cir. 2005).

Jeffery Schiffman, 3L, Cleveland-Marshall College of Law (Cleveland State University)

In June, the Sixth Circuit Court of Appeals affirmed the finding of the EPA that Indiana's and Ohio's regulatory schemes to address toxic discharges into the Great Lakes were inconsistent with EPA guidance.

Background

The Clean Water Act (CWA) requires polluters to obtain National Pollutant Discharge Elimination System (NPDES) permits for their discharges. These permits must include restrictions on pollution discharge, and when necessary, Whole Effluent Toxicity (WET) limitations. Permitting authorities are authorized to impose WET limitations when there is "a reasonable potential" of a water quality violation.

In 1995, to protect water quality in the Great Lakes, the EPA issued "Final Water Quality Guidance for the Great Lakes System" (the Guidance).[1] The eight Great Lakes states were free to establish their own procedures and regulations in implementing the Guidance, as long as their regulations provide the same or a greater level of protection as the Guidance.[2] If a state fails to meet this goal, the EPA is authorized to impose its own standards.[3]

The Guidance provides some procedures for establishing WET limits. Samples are taken from a facility's discharge and marine organisms are exposed to those samples and a control group. Tests are performed to determine the percentage of organisms which die upon exposure to the facility's discharge. The percentage of deaths that occur is called a toxic unit; the highest toxic unit measured in a set time period is then multiplied by a predetermined statistical variable. If the resulting value exceeds the EPA's predetermined criterion, a WET limitation should be imposed.

Indiana and Ohio submitted their schemes in 1997. EPA concluded that neither state's regulations were consistent with the Guidance. Indiana's procedure used a geometric mean of all the values sampled, rather than the Guidance's recommended maximum value from all WET tests during a set period. Indiana also did not plan to use a statistically based multiplier in the analysis. Ohio, on the other hand, adopted a weight of the evidence approach requiring authorities to examine a variety of factors to determine whether to impose WET limits. Ohio also chose not to use a statistically based multiplier in its analysis.

In December of 2000 a group of Ohio parties appealed EPA's decision to the Sixth Circuit Court of Appeals. A similar group from Indiana appealed to the Seventh Circuit Court of Appeals. The plaintiffs contended that the EPA erred in concluding that their regulations were inconsistent with the Guidance. Plaintiffs argued that their proposed regulations were at least as protective of water quality as the Guidance. The EPA moved to transfer the Indiana case from the Seventh Circuit to the Sixth Circuit to combine it with the suit already filed by the Ohio group. The motion was granted in the spring of 2001.

Indiana

The Indiana regulations differed from the Guidance in two ways. First, the Indiana proposal required water toxicity to be measured using a geometric mean of tested values. The Guidance calls for using a maximum tested value to determine toxicity. Such a maximum value is mathematically greater than a geometric mean. Under the Indiana proposal, a facility's effluent toxicity would have to be consistently higher than the mean in order to trigger a WET limit. Second, the Indiana proposal did not use a statistical multiplier as required by the Guidance, but rather an independently derived factor.

Indiana asserted that its proposal was more protective of the environment than the Guidance. The EPA disagreed because "a maximum value taken from a sample will necessarily be greater than the geometric mean of a sample." The Court held EPA acted rationally when it rejected the Indiana proposal. EPA concluded that the state's use of a geometric mean would result in fewer WET limits than a scheme using maximum values, which would be less protective of the environment. EPA's decision, therefore, was neither arbitrary nor capricious.

Ohio

Ohio's proposed scheme allowed permitting authorities to consider a variety of data on discharge toxicity when issuing a permit or WET limit. This "weight of evidence" standard included such things as the magnitude of discharge, the degree and type of effect, and the quality/quantity of each type of data. Only discharges that met a variety of factors would receive WET limits. Ohio argued this provided a comprehensive approach to water quality that is more protective of the environment than the Guidance. However, the court felt this could be read as giving permitting authorities too much freedom, while not providing enough guidance on weighing the various factors. Ohio's scheme was held to be less protective than the Guidance which used a statistically determined multiplier to calculate toxicity.

Pursuant to Ohio's scheme, authorities could not issue a WET limit without biological data, unless: (1) the maximum measured toxicity was three times greater than expected; (2) the average toxicity exceeded one-third the expected limit; and (3) more than 30 percent of the test results exceeded a projected value. Ohio conceded that such a scheme could result in less protection than afforded under the Guidance. The state further conceded that toxic discharges would occur in situations where no biological data was available. Ohio defended its regulations arguing that if the data set was larger, the scheme would require WET limits where the Guidance did not. Ohio argued such a trade-off in protections was allowable, and thus the EPA's rejection of its plan was arbitrary and capricious.

The Court found that EPA did not act arbitrarily or capriciously in rejecting the Ohio scheme. While the EPA's final decision did not address Ohio's more protective provisions, the fact that Ohio would allow toxic discharges in certain situations in direct conflict with the Guidance neutralized any positive effects of its more protective measures.

Scientifically Indefensible

Ohio and Indiana also argued that the WET testing set forth in the Guidance was "'not scientifically defensible' because of the huge variation introduced by taking only maximum tested values and utilizing an independent statistical multiplier."[4] The Guidance itself provides that if a state could demonstrate that a procedure was not scientifically defensible, then a state could either provide an alternative methodology for defining water quality or apply an alternative procedure.[5] Both states argued their schemes were appropriate alternatives. EPA countered that flexibility was built into the Guidance to allow for regulators to address future pollutants which might not have an adequate methodology under the Guidance. EPA further argued that the indefensible exception was for specific situations, rather than across-the-board regulatory schemes. The Court found both of EPA's arguments convincing; WET discharges are not future pollutants and the scientifically indefensible excuse is not available for common discharges.

Conclusion

The Sixth Circuit Court of Appeals affirmed the findings of the EPA that Indiana's and Ohio's regulatory schemes were inconsistent with agency guidance. At press time, Indiana and Ohio had filed a petition for rehearing which was pending before the Sixth Circuit. Federally-promulgated regulations are currently in effect and apply until the two states bring their programs into compliance.[6]

Endnotes

1. 60 Fed. Reg. 15366 (March 23, 1995).
2. 40 C.F.R. § 132.5(g)(3).
3. 33 U.S.C. § 1268(c)(2)(C).
4. *Northeast Ohio Reg'l Sewer Dist., et al. v. EPA*, 411 F.3d 726, 735 (6th Cir. 2005).
5. 40 C.F.R. § 132.4(h).
6. 65 Fed. Reg. 47864-47874 (Aug. 4, 2000).

Sediment sampling aboard EPA research vessel, "Mudpuppy", Indiana Harbor Canal, East Chicago, IN. Photograph courtesy of the USEPA, ARCS program.

Washington Court Protects Public Access to Tidelands on Bainbridge Island

City of Bainbridge Island v. Brennan, 2005 Wash. App. LEXIS 1744 (Wash. App. July 20, 2005).

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On July 20, 2005, the Court of Appeals of Washington held that a dedicated right-of-way laid out to navigable waters is presumed to provide access to the water's edge.

Facts

Bainbridge Island, located 35 minutes by ferry from Seattle, is home to quiet harbors, farms, and a rich history. Bainbridge Island grew from a small town of two square miles with 3,147 people to a bustling community of 20,920. Over the years, it has managed to uphold its friendly aura, small town charm, and natural environments.

In 1898, Peder Erlandsen purchased 32 acres on Bainbridge Island, which adjoined, but did not include, the tidelands of Fletcher Bay. Over the years, a county road was built across Erlandsen's property to provide access to the beach and later a wharf that extended from the end of the road into the bay. In 1911, Erlandsen dedicated for public use all the streets and avenues on his property, which included the county road. Soon thereafter, Erlandsen received title to all of the tidelands adjoining his property.

A few years later, a private ferry company began providing service between Fletcher Bay and the Kitsap Peninsula. Customers accessed the ferry via the county road and the wharf. In 1923, Erlandsen dedicated an additional 40-foot right-of-way to accommodate a change in the county road's route following a county improvement project. The public frequently used the wharf and the surrounding beach to dig clams and moor their boats, even after the ferry service was discontinued in 1941 and the wharf dismantled.

Erlandsen died in 1943 and his property, including the tidelands, was eventually subdivided. Some of the new lot owners began challenging the public's use of the tidelands going so far as to build a fence and erecting a locked gate to blocked access.

In 1999, the City of Bainbridge Island (City) which had acquired an undivided 2/20 interest in the tidelands, sued to quiet title to the road and tidelands. The trial court quieted title in favor of the City holding that "the land-based portion of Fletcher Landing was dedicated to the public as a public road right-of-way to the western edge of the concrete bulkhead built in 1924 and still presently on site."[1] A few of the record owners of tideland parcels appealed.

Dedication to Public Use

Appellants made several claims on appeal. First, appellants contended that the City failed to prove that Erlandsen intended to dedicate the tidelands to public use. Under Washington state law, "a dedication is generally defined as the devotion of property to a public use by an unequivocal act of the owner, manifesting an intention that it shall be accepted and used presently or in the future."[2] The elements that indicate a dedication are (1) intention of the owner to dedicate and (2) acceptance by the public. The court determined that Erlandsen's conduct before and after he purchased the tidelands indicated his intention to dedicate them for public use and that the public accepted this dedication. The court cited well-established Washington law that "when a public highway is laid out to navigable waters, its terminus is presumed to be a public landing as incident to the highway."[3] Since the public frequently used the tidelands, the court found that the two elements were clearly satisfied.

The record owners also argued that they were bona fide purchasers for value and therefore entitled to exclusive use of the property. Under Washington law, "where there is an apparent dedication to public use, or where such a dedication may be inferred or suggested from the condition of the property, the purchaser is put on notice and cannot defeat the right of the public therein, should such a right in fact exist; and this is so regardless of the state of the record title or of the recitals in his deed."[4] This court agreed with the trial court's finding that the record owners had knowledge of the land's dedication for public use, and were therefore put on notice and could not defeat the right of the public. The court reasoned that the physical attributes and location of the property should have put appellants on notice that the land was dedicated for public use or, at the very least, put them on notice of the need to inquire further.

Public Trust Doctrine

A cross appeal was filed by the Larsons who owned waterfront property close to the tidelands. Because of their property's steep bank, they used the tidelands to launch their small boats and gain access to the tide flats. The Larsons claimed they had a right to use the tidelands for recreational purposes based on the public trust doctrine. Developing out of the public's need for access to navigable water, the public trust doctrine protects "public ownership interests in certain uses of navigable waters and underlying lands."[5] The doctrine reserves a public property interest in tidelands and the waters flowing over them despite the sale of these lands into private ownership.

The Washington Supreme Court has never considered pedestrian passage over tidelands. Although the appeals court recognized the right of the Larsons to access the tide flats under the public trust doctrine for "navigation, commerce, fisheries, recreation, and environmental quality," it affirmed the dismissal of the Larsons' claims to pedestrian travel over privately-owned tidelands when not covered by water. The court stated that under the public trust doctrine, the public is allowed to use the neighboring tidelands when covered by water, but when the tide is out, the public has no right to walk across private property.

Conclusion

In sum, under Washington law, a dedicated right-of-way laid out to navigable waters is presumed to provide access to the water's edge. The court also found that the public trust doctrine does not extend to protect pedestrian travel over privately-owned tidelands when not covered by water.

Endnotes

1. *City of Bainbridge Island v. Brennan*, 2005 Wash. App. LEXIS 1744 at *11 (Wash. App. July 20, 2005).
2. *Id.* at *13.
3. *Id.* at *28.
4. *Id.*
5. *Id.* at *59.

Photograph of Brainbridge Island from the Washington State Department of Ecology.

California, from page 7

come. Executive Director of the Commission, Peter Douglas, described his reaction as "Relieved, greatly relieved," and that with "all the threats facing the coast, one simply cannot underestimate the enormity of this decision."[12] California Attorney General Bill Lockyer, who defended the Commission law, stated that the "decision affirms that the Coastal Commission's appointment structure reflects the will of the voters who long ago declared that our coastal resources will best be preserved for future generations if planning decisions affecting the coast are made by an independent body comprised of members representing a variety of philosophical backgrounds."[13]

Endnotes

1. Dennis Pfaff and Hudson Sangree, *Court OK's Coastal Commission*, SAN FRANCISCO DAILY JOURNAL, June 24, 2005.
2. CAL. CONST. art. III, §3.
3. *Marine Forests Society v. California Coastal Commission*, 2005 Cal. LEXIS 6846 at *11 (Cal. June 23, 2005).
4. *Id.*
5. *Id.* at *13.
6. *Id.* at *29.
7. CAL. CONST. art. III, §3.
8. *Marine Forests Society,* 2005 Cal. LEXIS 6846 at *32.
9. *Id.* at *106.
10. Pfaff and Sangree, *supra* note 1.
11. *Id.*
12. *Id.*
13. *Id.*

New Jersey, from page 1

The trial court held that the public had a right to access the ocean horizontally by means of a three-foot wide strip of dry sand immediately landward of the mean high water line, but had limited vertical access. The court also held that Atlantis was prohibited from charging fees for access, but it could charge reasonable fees for services such as lifeguards. The State and the Association appealed the trial court's decision.

The Appellate Division held that the public could cross Atlantis's dry sand beaches to access the beach vertically from upland areas and horizontally from the public beach bordering Atlantis's property. With regard to membership fees, the court held that Atlantis could charge a reasonable fee for extended use of the property contingent upon approval by the New Jersey Department of Environmental Protection (DEP). Atlantis appealed.

Public Access

New Jersey courts look to the following four factors to determine whether the public has access to a privately-owned beach:

(1) Location of the dry sand area in relation to the foreshore;
(2) Extent and availability of publicly-owned upland sand area;
(3) Nature and extent of the public demand; and
(4) Usage of the upland sand land by the owner.[3]

The court held that these factors weighed in favor of public access to the Atlantis property. First, Atlantis's dry sand is immediately adjacent to the ocean. Second, there are no publicly-owned beaches in Lower Township, although there is significant public demand from residents and tourists. Finally, Atlantis was utilizing the upland area as a commercial enterprise that excluded the public. Due to high public demand, lack of public beaches, and the commercial nature of Atlantis's use of the property, the court stated that "the Atlantis upland sands must be available for use by the general public under the public trust doctrine."[4]

Beach Fees

As for the beach fees, the court affirmed the Appellate Division's determination that the DEP has jurisdiction to review Atlantis's beach fees. The DEP has authority to issue rules and regulations governing land use within the coastal zone under the Coastal Area Facility Review Act (CAFRA). Atlantis planned to build a boardwalk pathway over the dunes and the court found that this qualified as a development triggering CAFRA jurisdiction. The DEP also has the authority to regulate health and safety issues, which would include the lifeguard and other services provided by Atlantis. The DEP, therefore, has the authority to review fees charged for use of the ocean and beach. However, the Supreme Court found that the DEP does not have the authority to regulate fees charged by Atlantis for the construction, maintenance, and rental of its cabanas and other similar business enterprises like concessions and beach chair rentals.

Conclusion

The court's holding was not unanimous. Two justices dissented, disagreeing about the application of the four *Matthews* factors. The dissenters found that an adjacent beach is available to the public and the public trust doctrine only requires access to the ocean and to a small beach area. While the dissenting justices suggest a three-foot wide strip is not adequate (they recommended a ten-foot strip), they argue that the public should not be allowed to infringe on Atlantis's private property rights any further.

The majority opinion controls, however, and Atlantis must allow public access both vertically and horizontally across its property. Despite this ruling, the issue is not likely to be quieted any time soon. Other private beach clubs with different factual situations may attempt to restrict public access in the future. A subsequent legal challenge by the general public may fail if a court is persuaded that the demand for public access has been met, and that the property has historically been held by a private entity and used commercially. In a case involving these distinguishing characteristics, a court could potentially find that a private beach club is well within its rights to restrict public access.

Endnotes

1. For a thorough discussion of the Appellate Division's opinion, *see* Jennifer Simon, *Not Just a Walk in the Park: Beach Access and the Public Trust Doctrine in New Jersey*, THE SANDBAR 3:3 (2004).
2. *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112, 116 (N.J. 2005).
3. *See Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984).
4. *Raleigh Avenue Beach Ass'n*, 879 A.2d at 124.

Earthjustice Draws Line in the Hawaiian Sand

Danny Davis, 3L, University of Mississippi School of Law

Earthjustice, on behalf of Public Access Shoreline Hawaii (PASH) and the Hawaii Chapter of the Sierra Club, drew a line in the sand on July 25, 2005. Earthjustice has filed suit in Hawaii's First Circuit Court against the Board of Land and Natural Resources (BLNR) seeking a judicial declaration invalidating BLNR's definition of 'shoreline' in its shoreline certification rules.[1] At issue: where do private property rights on the shoreline end and public access begin?

All coastal states recognize the right of the public to access coastal waters and some have granted the public rights to areas of the beach. Under the public trust doctrine, states hold lands underneath navigable waters in trust for the benefit, use, and enjoyment of all citizens. The extent of public rights under the doctrine varies by state. Some states are "high-water states" and grant the public rights seaward of the mean high water mark. Others states use low-water mark as the landward boundary of public access rights.

Despite a long tradition of public access, population growth and tourism in Hawaii has increased private development of beachfront property and the number of public access disputes. In 1968, the Hawaii Supreme Court held that the boundary of the shoreline should be established as "the upper reaches of the wash of the waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves." The definition of "shoreline" in Hawaii's Coastal Zone Management Act is very similar to the definition developed by the Supreme Court. Haw. Rev. Stat. § 205A-1 defines shoreline as "the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves."

The BLNR has responsibility for promulgating rules and regulations governing how close a private landowner can build to the ocean. The BLNR shoreline certification rules define 'shoreline' as "the upper reaches of the wash of the waves, other than storm or tidal waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or where there is no vegetation in the immediate vicinity, the upper limit of debris left by the wash of the waves."[2]

PASH claims that the BLNR's definition conflicts with the definition of 'shoreline' set forth by Hawaii's Supreme Court and Hawaii's shoreline protection statute by giving a "blanket preference for the vegetation line" because the debris line is used only if there is no vegetation line in the immediate vicinity. PASH and Earthjustice argue that this focus on the vegetation line encourages private property owners to appropriate public beaches by artificially extending the vegetation line through plantings and irrigation systems.

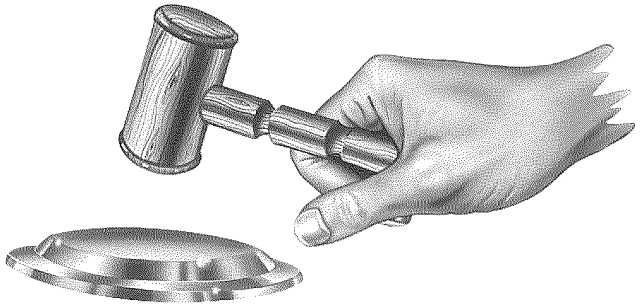
Many groups have worked with the Hawaii Legislature to come up with a solution to the shoreline problem, but those efforts have stalled in the Legislature. Earthjustice attorney Isaac Moriwake stated he hopes this issue will be settled amicably, but PASH and Sierra Club are willing to move forward with the suit if needed.[3]

Endnotes

1. Complaint at 2-3, *Public Access Shoreline Hawaii v. Board of Land and Natural Resources*, on file with author.
2. HAW. ADMIN. R. § 13-222-2.
3. E-mail from Isaac Moriwake, Staff Attorney, Earthjustice, to Danny Davis, Research Assistant, Sea Grant Law Center (August 29, 2005) (on file with author).

Photograph of Hawaii shoreline courtesy of NOAA's Photo Library.

Litigation Updates



Here are some updates on cases covered in previous issues of THE SANDBAR.

Steward v. Dutra, 2005 U.S. App. LEXIS 16612 (1st Cir. Aug. 9, 2005).

Earlier this year, the Supreme Court ruled that the *Super Scoop*, a dredge used in Boston Harbor, was a vessel and remanded the case to the First Circuit to determine whether Willard Stewart, an engineer injured while working onboard the *Super Scoop*, qualified for seaman status under the Jones Act. An employee must meet three requirements to qualify as a seaman: (1) the watercraft on which he was working when injured must be a vessel; (2) his duties must have contributed to the vessel's mission; and (3) he must have a substantial connection to the vessel. Despite Dutra Construction Company's arguments to the contrary, the First Circuit found there was sufficient evidence that Stewart had a substantial connection to the *Super Scoop* and his work contributed to the vessel's mission. The court remanded the case to the district court for trial on the remaining Jones Act issues related to liability, causation, and damages.

National Wildlife Federation v. NMFS, 418 F.3d 371 (9th Cir. Sept. 1, 2005).

In June, the U.S. District Court for the District of Oregon invalidated a biological opinion prepared by the National Marine Fisheries Service (NMFS) for salmon in the Columbia River System. The court ordered the Army Corps of Engineers and the Bureau of Reclamation to provide summer spill over several dams to avoid harm to juvenile fall chinook salmon and other species listed under the Endangered Species Act. The federal agencies appealed the district court's preliminary injunction. The Ninth Circuit found that the National Wildlife Federation raised "substantial questions as to whether the agencies have violated Section 7 of the ESA" and there was "no reversible error in the factual findings made by the district court." The granting of a preliminary injunction was therefore proper. The Ninth Circuit, however, remanded the case to the district court to determine "whether modification or 'narrow tailoring' of the order is required" to address issues that arose after the original ruling.

National Audubon Society v. Department of the Navy, 2005 U.S. App. LEXIS 19277 (4th Cir. Sept. 7, 2005).

Earlier this year, the District Court for the Eastern District of North Carolina held that the U.S. Navy had not adequately evaluated the environmental impacts of its decision to station Super Hornet aircraft on the East Coast near Pocosin Lakes National Wildlife Refuge and enjoined the Navy from taking further action until it fulfilled its National Environmental Policy Act (NEPA) obligations. The Navy appealed and the Fourth Circuit agreed that the Navy's Environmental Impact Statement (EIS) was deficient. The Fourth Circuit found that the Navy had not taken a "hard look" at the impacts the new flight operations would have on migratory waterfowl in and around the refuge. First, the court found the Navy's site visits were inadequate because they were too brief to truly observe the bird's behavior and it did not fully investigate the Bird Aircraft Strike Hazard (BASH) issues. Finally, the court disagreed with the Navy that its review of the scientific literature supported its conclusions that the new operations would not impact the birds. Although the court determined that the Navy needed to prepare a Supplemental Environmental Impact Statement (SEIS), it cautioned that its opinion did not mean that the Navy was prohibited from stationing the Super Hornet in North Carolina. "We reemphasize that potential negative environmental impacts do not work to prohibit the selection of [the Navy's preferred site], but those impacts must be carefully analyzed and fairly evaluated." The Ninth Circuit remanded the case to the district court for modification of the broad injunction to allow the Navy to pursue certain activities, such as submission of permit applications and engineering work, while preparing the SEIS.

Husband Denied Coverage for Wife's Scuba Diving Death

Sylva v. Culebra Dive Shop, 2005 U.S. Dist. LEXIS 19204 (D.P.R. Aug. 31, 2005).

Stephanie Showalter

On July 16, 2003, Linda Marie Wieditz, an experienced scuba diver, died while diving near Culebra Island in Puerto Rico. Culebra Dive Shop provided transportation to the site and instructors. During the dive, one of the instructors felt the currents were too strong and ordered the divers back into the boat. As Wieditz was attempting to swim back to the boat, the instructor moved the vessel towards other drifting passengers. Wieditz was never seen again. Paul Sylva, Wieditz's husband, filed suit against Culebra Dive Shop and ING Insurance for damages associated with the wrongful death of his wife.

Waiver of Responsibility

Prior to the dive, on June 23, 2003, Wieditz and Sylva signed waivers of responsibility required by Culebra. Culebra argued that Sylva's claims were barred by the waiver. Sylva does not challenge the validity of the waiver, but he does question whether the waiver was in effect on the date of his wife's dive. Culebra claimed the waiver was simply signed in advance and remained in effect until the dive happened. Sylva argued that several questions on the waiver form, such as "Last time you dove?," "Number of dives since you have been certified," and "Have you taken any medication [in] the past 24 hours?," could lead a reasonable person to conclude that the waiver was only applicable for one day.[1]

Commonwealth law states that when "the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed."[2] The magistrate judge assigned to initially review the case found that the waiver was not clear. The waiver does not state if it is only applicable for the day it is signed nor is there any reference to the number of dives it would cover. The applicability of the waiver will depend on the intention of the parties, a matter of fact for the trier of facts (the jury). Summary judgment was therefore not appropriate at that time and the case proceeded to trial.

Coverage under ING's Policy

Sylva filed a claim seeking third party liability coverage under Culebra's ING Insurance policy. ING argued it was entitled to summary judgment because the policy's "diving exclusion" barred coverage for Sylva. The magistrate judge and district court agreed. The ING policy expressly excludes third party liability coverage for "liability to divers operating from the scheduled vessel, from the time they commence to leave the scheduled vessel, until they are safely back on board." Wieditz died while she was in the water and coverage is therefore barred by the exclusion.

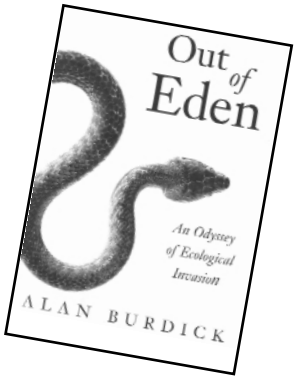
Sylva, not to be deterred by the plain language of the policy, made the intriguing argument that since he was not a diver and not in the water at the time of his wife's death he could recover damages. Culebra's policy states, however, that it "[does] not provide coverage for any person for Bodily Injury, Illness, Disease, Death or Property Damage while in the water in connection with any diving activity, or as a consequence of any diving activity."[4] The magistrate swiftly dismissed Sylva's arguments as the provision clearly "excludes claims brought by **any person** 'as a consequence of a diving activity.'"[5] The district court granted summary judgment in favor of ING because the diving exclusion barred Sylva's claims under Culebra's policy.

Endnotes

1. *Sylva v. Culebra Dive Shop*, 2005 U.S. Dist. LEXIS 21478 at *17 (D.P.R. Aug. 31, 2005).
2. 31 L.P.R.A. § 3471.
3. *Sylva,* 2005 U.S. Dist. LEXIS 21478 at *8.
4. *Id.* at *9.
5. *Id.* at *33 (emphasis in original).

Book Reviews . . .

Stephanie Showalter



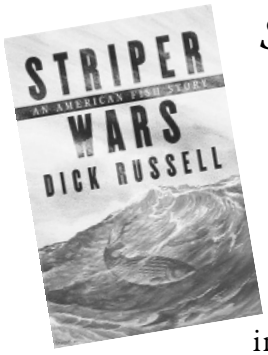
Out of Eden: An Odyssey of Ecological Invasion

Alan Burdick (Farrar, Straus and Giroux 2005).

Many of us dream of traveling to distant lands to experience new cultures and view exotic wildlife and plants. If we are lucky enough to reach our dream destinations, how many of us stop to wonder what else might have been on that boat or plane with us? Thankfully Alan Burdick, senior editor for *Discover*, did just that and the result of his musings and investigations is a fascinating journey into the world of invasion biology. From the island of Guam where scientists spend hours hunting the elusive brown tree snake to the heavily-invaded Hawaiian Islands where it is difficult to tell native from alien to San Francisco Bay where species from Asia and Europe live together seemingly in harmony, Burdick examines the side effects of humanity's wanderlust. *Out of Eden* is in essence, as Burdick states, "a travel book about the natural consequences of travel."

Out of Eden is worth reading for the last chapter alone. Burdick visits the Jet Propulsion Laboratory in Pasadena, California where NASA's attempts to prevent biocontamination of space have "created an environment that inadvertently fosters the very kind of life it is traveling so far beyond Earth to find." Twenty-two species of microbe have already been discovered in the Spacecraft Assembly Facility. Lifeforms created by NASA may be out there right now just waiting to be "discovered."

Beautifully written, *Out of Eden* is richly woven with the lives and work of leading scientists. Burdick accompanies James Carlton on a survey of exotic species in San Francisco Bay and David Foote as he collects drosophilas in Hawaii Volcanoes National Park. I felt queasy just reading Burdick's tales of the struggles of a graduate student collecting ballast water samples on a rolling deck. *Out of Eden* is a compelling tale of the impacts of human travel on the environment and the scientists who have dedicated their lives to studying them.



Striper Wars: An American Fish Story

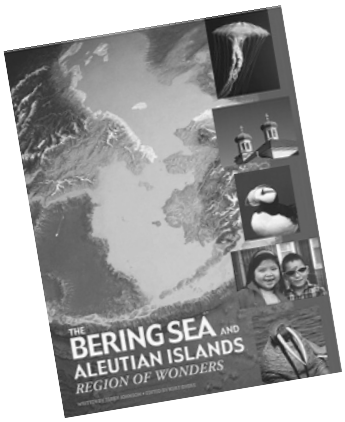
Dick Russell (Island Press 2005).

In his chronicle of the decades-long fight to save the striped bass, Dick Russell offers a first-hand account of the interplay of politics, public relations, and litigation that are present in all environment battles. The story of striped bass is also the story of Storm King mountain, the Westway Project, and Riverkeeper. It's about George Mendonsa, a powerful commercial fishermen appointed to the Rhode Island Marine Fisheries Council with strong connections to Fulton Fish Market, and Bob Pond, the guilty inventor of the Atom Plug, an artificial lure quite popular with striped bass. It's about recreational fishermen who organized and fought to save the fish they loved to catch. Russell's account is filled with minor and fortuitous events - late-night phone calls, emergency meetings with government officials, newspaper articles, dinner conversations - that often spelled the difference between victory and defeat.

Striper Wars is truly an underdog story and Russell has the reader pulling for the striped bass from the very first chapter. It's impossible not to want the little guys to win. Striped bass tipped the scales in the seminal *Storm King* case which established the right of citizen groups to sue to protect natural resources and set the stage for "environmental standing" - the bedrock of almost all current environmental litigation. Striped bass stopped a highway planned for Manhattan's west side known as the Westway Project because the project would have a destroyed a significant amount of striped bass habitat in the Hudson River. *Striper Wars* is an invaluable primer on the importance and power of common citizen action.

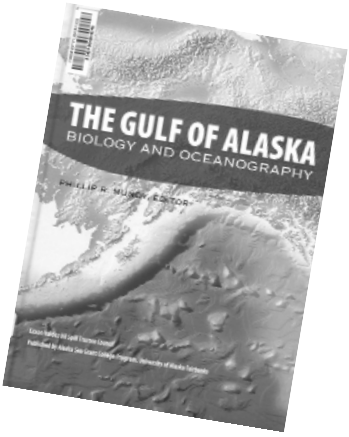
In the end, *Striper Wars* is a cautionary tale. Striped bass may again be headed for trouble. Harvest levels have increased over the years and bycatch mortality is a serious problem. The striped bass' preferred food, menhaden, is also overfished and some striped bass show signs of starvation. Pollution in the Hudson River and Chesapeake Bay and habitat loss remain perennial problems. Environmental victories take years to achieve, but are all too often fleeting. The lessons of the past must not be forgotten.

Alaska Sea Grant Publications Increase Knowledge of Alaska Ecosystems



The Bering Sea and Aleutian Islands: Region of Wonders

Terry Johnson (Alaska Sea Grant 2003).



The Gulf of Alaska: Biology and Oceanography

Phillip R. Mundy, ed. (Alaska Sea Grant 2005).

One of the primary missions of the National Sea Grant Program is to disseminate scientific information. Two recent publications of Alaska Sea Grant, *The Bering Sea and Aleutian Islands* and *The Gulf of Alaska*, fulfill this mission and more. The two publications, while targeting two very difference audiences - the general public and scientists and students, contribute significantly to our understanding of Alaskan ecosystems.

Few in the Lower 48 are familiar with the Bering Sea ecosystem, aside from some images of rogue waves and ice-covered decks gleaned from The Discovery Channel's hit series *The Deadliest Catch*. The Bering Sea ecosystem covers over 885,000 square miles and is one of the most biologically rich in the world. Hundreds of species of fish, crab, coral, marine mammals, birds, and marine plants live in the Bering Sea providing food for each other, Native Russians and Alaskans, and people around the globe. The Bering Sea is also economically important. Tourism is growing and valuable oil and petroleum deposits may become more accessible in the future. The ecosystem, however, is facing major challenges as the result of declining fish and marine mammal populations, climate change, and pollution. *The Bering Sea and Aleutian Islands*, funded by the North Pacific Marine Research Program, will hopefully raise public awareness in Alaska and elsewhere about this amazing ecosystem.

The Bering Sea and Aleutian Islands is filled with over 450 beautiful color photographs and several informative maps and charts. A wide range of topics are covered including the physical environment (volcanism, glaciers, currents), sea life, culture, and commerce. Scattered throughout the book are sidebars on "Sea Science" which discuss some of the projects of Bering Sea researchers like the use of remote sensing technology to gather images of fish. *The Bering Sea and Aleutian Islands* comes with an audio cd containing nine radio interviews with scientists talking about their research in the Bering Sea, originally broadcast on Alaska Public Radio and a valuable addition to any library.

The Gulf of Alaska is not a publication for mass consumption, but rather a compilation of the scientific knowledge of the Gulf of Alaska Ecosystem Monitoring and Research (GEM) Program. Billed by Alaska Sea Grant as a "resources guide for scientists, students, and managers working in the Gulf of Alaska," the book covers a wide range of topics over the course of eleven chapters including climate and weather, nearshore benthic communities, fish and shellfish, marine mammals, economics of human uses and activities, and modeling. With an extensive References list, *The Gulf of Alaska* is great introduction to the state of scientific knowledge and a good starting point for further investigations.

Additional information about these or other books published by Alaska Sea Grant is available at http://www.uaf.edu/seagrant/ .

Newport, from page 3

the original conveyance, and found the Trustees' actions satisfied the intent requirement of incipient dedication.

Next, the court found the second element of incipient dedication, public acceptance of the disputed streets, satisfied. Public acceptance is established when the municipality formally accepts the dedication or if the public physically uses the land.[2] Aside from a stipulation by both Newport Realty and the State that the public has used North Commercial Wharf and Scott's Wharf for the past several decades, the court found that the City of Newport formally accepted the dedication.

Newport's treatment of the disputed streets has been consistent with town ownership of roadways and other public lands. The court found that Newport officially treated North Commercial Wharf and Scott's Wharf as public rights of way by not taxing the portion of the Wharf attributable to the streets and recognizing the North Commercial Wharf as a public street by posting official town signs, performing maintenance and upkeep, and extending the fire department's jurisdiction over the streets.

Conclusion

The Rhode Island Supreme Court held that the Trustees of the Wharf intended to dedicate the streets on the Wharf for public use and preserved public access to the Newport Waterfront. Further, the court ruled that where the public interest is at stake, the State has the right to pursue legal action on behalf of the public, even in seemingly local matters.

Endnotes

1. *Newport Realty, Inc. v. Lynch*, 878 A.2d 1021, 1033 (R.I. 2005).
2. *Id.* at 1034.

Palazzolo, from page 5

the State. For these reasons, the Superior Court found that Palazzolo had no reasonable expectation that he would be able to develop the property as he proposed.

Conclusion

The Superior Court's determination that Palazzolo's development plans would be a nuisance was sufficient to bar his takings claim. However, the Superior Court also analyzed Palazzolo's claim under the *Penn Central* analysis finding that the denial of Palazzolo's large scale development plans was not a taking when part of the property was still available for single family development. This Superior Court decision concludes Palazzolo's attempt to be compensated for his undeveloped marshland.

Endnotes

1. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).
2. The *Penn Central* test comes from the landmark Supreme Court decision *Penn Central Transportation Co. v. New York City*, 438 U.S. 124 (1978). In this case the Supreme Court held that plaintiffs could not establish a taking simply by showing that they had been denied the ability to exploit a property interest that they had believed was available for development. The Court established a three-part test that serves as the principal guideline for resolving regulatory takings claims.
3. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
4. *Seidner, Inc. v. Ralston Purina Co.*, 24 A.2d 902 (R.I. 1942).
5. *Palazzolo v. State*, 2005 WL 1645974, at *10 (R.I. Super. July 5, 2005).
6. *Id.*
7. *Id.* at *11.
8. *Id.* at *12.

PUBLICATION ANNOUNCEMENT

The Law Center is pleased to announce the publication of Stephanie Showalter's law review article: *The United States and Rising Shrimp Imports from Asia and Central America: An Economic or Environmental Issue?*, 29 Vermont Law Review 847 - 876 (2005). The article presents a case study of the Southern Shrimp Alliance's petition to the International Trade Commission for the imposition of antidumping duties on shrimp imports. The article also discusses the environmental impacts of shrimp farms and argues that the U.S. shrimp industry should refrain from seeking duties and instead use its political clout to secure domestic laws restricting imports for environmental reasons. Hard copies are available upon request.

Coast to Coast

And Everything In-Between

The Bush administration recently released its proposal to reauthorize the 1976 Magnuson-Stevens Fishery Conservation and Management Act. According to the chairman of the White House Council on Environmental Quality, the bill would impose tougher fines and penalties for those caught overfishing and require more peer-reviewed science studies and better market-based decisions. Advocacy groups denounced the bill, believing it will revoke the ten-year requirement to rebuild overfished stocks and allow the overfishing of some stocks for several years before prevention measures kick in.

Over the past 18 months, the Army Corps of Engineers has opened over 11,000 acres of wetlands in fifteen states to development, according to a D.C.-based environmental group. Wetlands provide a buffer against floods, cleanse groundwater, and are a critical habitat for migratory birds. Developers wanting to develop wetlands that are connected to navigable waterways must obtain a permit from the Corps. The Corps did not require permits for these 11,000 acres, because of the agency's interpretation of *Solid Waste Agency of Northern Cook County*, a 2001 Supreme Court decision. Environmental groups believe the Corps has gone beyond the Supreme Court's decision by allowing wetlands to be developed that are home to endangered species. A spokesman for the Corps says that lower courts have upheld eight of nine recently challenged permitting decisions, an indication that the Corps is interpreting the Supreme Court's decision correctly.

All eight dolphins that lived at the Marine Life Oceanarium in Gulfport, Mississippi prior to Hurricane Katrina, have been rescued. The dolphins had been moved to a pool that survived Camille in 1969 but was destroyed by Katrina allowing the dolphins to be swept out to sea. Three of the dolphins were born in captivity and had never been in the wild. The dolphins had some lacerations and were as much as 100 pounds underweight but are recovering. The Marine Life Oceanarium uses the dolphins in shows for tourists.

Photograph of dolphins courtesy of the Center for Coastal Environmental Health and Biomolecular Research.

Lawmakers seeking to eliminate the federal government's ability to protect the critical habitat of endangered species under the Endangered Species Act are gaining unexpected support from some environmental groups and Democrats. House Resources Committee Chairman Richard Pombo, R-Calif., is seeking to overhaul the 32-year-old Endangered Species Act from top to bottom including eliminating the designation of critical habitat for endangered species. Some environmental groups and Democrats are willing to give up the designation of critical habitat in exchange for other measures they believe would provide better protection of endangered species. The Pombo bill, however, eliminates critical habitat designation without adding any new measures.

Around the Globe

Cod stocks in the Grand Banks may be totally wiped out by illegal fishing, according to the World Wildlife Federation (WWF). Foreign fishing fleets, disguising their cod as bycatch, are conducting most of the illegal fishing. In 2003, 5,400 tons of cod were caught as bycatch in the southern Grand Banks, which is about 90 percent of the total cod in that area. This represents a 30-fold increase in cod bycatch since the fishery was closed. Fishermen are allowed to sell part of their bycatch, which may have led to the current abuses. The WWF is calling on the Canada-based Northwest Atlantic Fisheries Organization, which manages the fishery, to reduce the bycatch of cod by 80 percent.

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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