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Supreme Court Fails to Clarify Limits of Corps' Wetland Jurisdiction

Rapanos v. U.S., 2006 U.S. LEXIS 4887 (June 19, 2006).

Stephanie Showalter

On June 19, 2006, the U.S. Supreme Court issued its long-awaited opinion in *Rapanos v. United States*. After months of speculation, the result was rather anti-climatic. Hopes that the Court would resolve once and for all the question of what wetlands may be regulated under the Clean Water Act (CWA) were quickly dashed. No opinion was able to garner the support of a majority of the court. A 4-4-1 split leaves lower courts, lawyers, and landowners with a mess that is certain to fuel additional litigation and may even force Congress's hand.

"Waters of the United States"

Section 404 of the CWA prohibits the "discharge of dredge and fill material into the navigable waters" without a permit from the Army Corps of Engineers.[1] The term "navigable waters" was defined in a less-than-helpful manner by Congress to mean "the waters of the United States, including the territorial seas."[2] The unenviable task of further defining this term falls to the Corps.

Corps regulations define "waters of the United States" to include traditionally navigable waters (waters that are navigable-in-fact or subject to the ebb and flow of the tide) and their tributaries; interstate waters and their tributaries; "all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce;" and wetlands adjacent to any of the above waters.[3] Wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[4]

"Adjacent Wetlands"

Although the original purpose of § 404 was most likely to assure the continued navigability of U.S. waters, it has become the primary regulatory tool to protect the nation's rapidly diminishing wetlands. The Corps' assertion of jurisdiction over wetlands under § 404, however, has been controversial and the subject of considerable litigation.

In 1985, the Supreme Court upheld the Corps' assertion of jurisdiction over "adjacent wetlands."[5] The property in question in *Riverside Bayview Homes* was eighty acres of low-lying, marshy land abutting Lake St. Clair in Michigan. The landowner had begun filling the property without obtaining a § 404 permit which the Corps asserted was required as the property was a wetland adjacent to a navigable water. The Court recognized that the transition between open water and solid ground is not always abrupt and that, "in determining the limits of its power to regulate discharges under

See Rapanos, page 16

Table of Contents

Reflections of a Knauss Fellow: Thomas Street

After being at the National Oceanic and Atmospheric Administration (NOAA) for nearly six months, I am learning a great deal about how marine policy is made, coordinated, and implemented at the federal level. What has interested me the most are the sheer number of agencies that have some level of jurisdiction over or stake in oceans, coastal, and Great Lakes law and policy. NOAA is by the far the largest, but there is also the Navy, the Army Corps of Engineers, the Department of Homeland Security, the Department of Justice, the Department of State, the Department of Transportation, the Environmental Protection Agency, the National Aeronautics and Space Administration, the National Science Foundation, and the Council on Environmental Quality. As part of the President's Ocean Action Plan, these agencies coordinate their activities and policies through the Interagency Committee on Ocean Science and Research Management Integration, which in turn reports to the Committee on Oceans Policy (COP), composed of Cabinet-level representatives from across the federal government. The COP's primary responsibility is to advise the President.

I work in the headquarters of the National Ocean Service (NOS), a component agency of NOAA. I principally serve as a legal and policy assistant to the Deputy Assistant Administrator (DAA) of the NOS. In this capacity, I assist the

See Knauss, page 20

Failure to Designate Critical Habitat Not a Continuing Violation

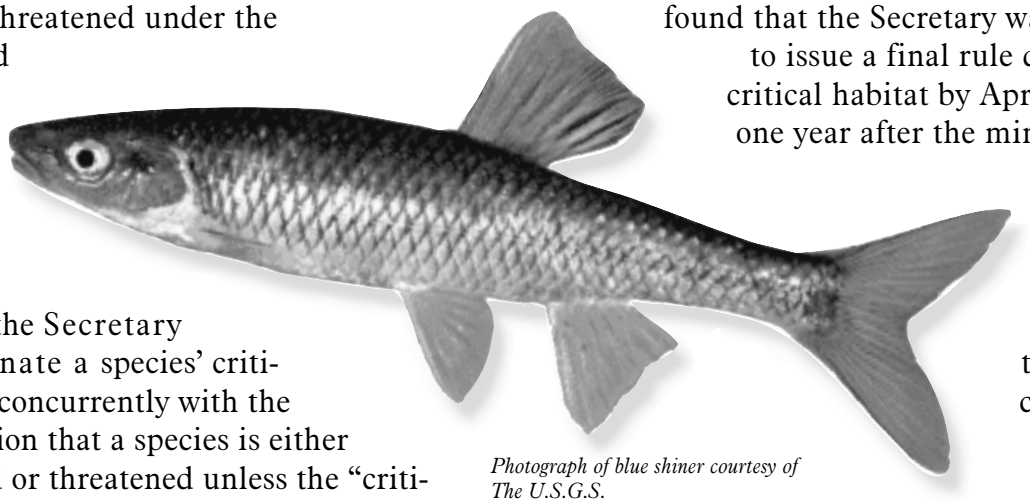
Center for Biological Diversity v. Hamilton, 2006 U.S. App. LEXIS 16198 (11th Cir. June 28, 2006).

Stephanie Showalter

In a case of first impression in the Courts of Appeal, the Eleventh Circuit recently held that the failure of the Secretary of the Interior to designate critical habitat for a threatened species is not a continuing violation that permits a plaintiff to file suit outside the six-year statute of limitation.

Background

The Fish and Wildlife Service listed two species of minnows, the Blue Shiner and the Goldline Darter, as threatened under the Endangered Species Act (ESA) on April 19, 1992. Generally, the Secretary is to designate a species' critical habitat concurrently with the determination that a species is either endangered or threatened unless the "critical habitat of such species is not then determinable."[1] In the final rule listing the minnows as endangered, the Secretary found that their critical habitat was not determinable. If at the time of listing the critical habitat is not determinable, the Secretary is required to continue to collect information and, by the end of a one-year period, to publish a final regulation designating critical habitat. The Secretary has yet to issue a rule designating critical habitat for the threatened Blue Shiner and Goldline Darter.



Photograph of blue shiner courtesy of The U.S.G.S.

Statute of Limitations

On September 2, 2004, the Center for Biological Diversity (Center) filed suit against the FWS on the basis that the Secretary violated his nondiscretionary duty to designate critical habitat for the minnows. The Secretary conceded his failure to designate the critical habitat, but moved for dismissal on the grounds that the Center's suit was untimely under the six-year statute of limitations that governs suits against the government. The Center argued that its suit was timely because the Secretary's failure to designate critical habitat is a continuing violation.

> "The continuing violation doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period."[2]

The court found that the Secretary was required to issue a final rule designating critical habitat by April 19, 1993, one year after the minnows were listed as threatened. Although the Center could have filed suit beginning April 20, 1993, it argues that April 20, 1993, is only the first violation of § 1533 and that each passing day creates an additional cause of action against the Secretary, i.e. a continuing violation.

The court disagreed, finding that § 1533 should be read to favor a single violation accruing on the day following the deadline. Furthermore, the continuing violation doctrine

See Critical Habitat, page 9

District Court Vacates Steller Sea Lion Research Permits

Humane Society v. Department of Commerce, 2006 U.S. Dist. LEXIS 34006 (D. D.C. May 26, 2006).

Stephanie Showalter

In May, the D.C. District Court vacated a number of permits issued by the National Marine Fisheries Service (NMFS) authorizing research on Steller sea lions. The court found that NMFS failed to comply with the National Environmental Policy Act (NEPA) when it issued the permits without preparing an Environmental Impact Statement (EIS).

Background

Steller sea lions are distributed across the North Pacific Ocean Rim from northern Japan to central California. There are two distinct stocks divided at 144° West longitude (Cape Suckling, Alaska). NMFS listed the Steller sea lions as threatened in 1990. Due to continuing declines, the western stock (from Cape Suckling to Hokkaido, Japan) was reclassified as endangered in 1997.[1]

Over $80 million was appropriated by Congress in 2001 and 2002 to fund research into the decline of the western stock of Steller sea lions. This was the largest appropriation ever dedicated to a single species and NMFS was subsequently flooded with permit requests and applications for surveys, biopsies, capture, branding, tagging, and other research activities. In 2002, NMFS prepared an Environmental Assessment (EA), concluded that the research proposed through 2004 would not have a significant impact on the sea lions, and issued the requested permits.

In April 2005, NMFS announced that eight institutions had submitted applications for multiple-year permit extensions authorizing further research of similar character. In May, NMFS issued the requested permits after concluding in its final EA that the research program would not have a significant impact on the environment and was not likely to jeopardize the continued existence of the western population of Steller sea lions. In total, NMFS authorized the repeated taking of more than 200,000 sea lions through annual vessel and aerial surveys and more than 140,000 through ground-based research; an annual incidental mortality of up to sixty animals, including up to twenty from the western stock; the annual capture or restraint of more than 3,000; the branding of more than 2,900; and the attachment of scientific instruments to 700.

The Humane Society of the United States (Society) objected to both the scale and invasiveness of the approved research. The organization was particularly concerned about the issuance of permits for hot branding, tissue sampling, and tooth extraction, procedures which are sometimes conducted without anesthesia. The Society filed suit on July 12, 2005, seeking a moratorium on further testing until the agency completes an in-depth review of the potential adverse effects. On December 28, 2005, in what appears to have been an attempt to sidetrack the Society's lawsuit, NMFS announced that it would prepare an EIS "to evaluate the cumulative impacts of continuing to fund and permit research activities" as "some of the proposed research may result in adverse effects on threatened and endangered Steller sea lions."[2] Despite this apparent concession as to the need for an EIS, NMFS argued in court that its EA constituted a thorough analysis of the environmental factors.

NEPA

NEPA requires that federal agencies prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." To determine whether an EIS is required, agencies may first prepare an EA. If during the preparation of its EA, the agency

concludes that the action will not have a significant impact on the environment, it may issue a "finding of no significant impact" (FONSI) and proceed without preparing an EIS. When it issued its EA in May 2005, NMFS also issued a FONSI and then proceeded to issue the permits. The Society claimed that the issuance of the research permits was an "action significantly affecting the quality of the human environment" and NMFS therefore should have prepared an EIS. The district court agreed.

Photograph of Steller sea lion pups courtesy of The National Marine Mammal Laboratory, Photographer Rolf Ream.

"Significant Impact"

The court found that "NMFS neglected to take a 'hard look' at the relevant environmental issues and thereby failed to make a 'convincing case' that the authorized research will not have a significant impact on the environment."[3] First, NMFS failed to address the important issue raised by the Society during the public comment period - whether the authorized research will result in incidental mortalities exceeding the western stock's PBR level. The PBR (potential biological removal) level is "the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population."[4] NMFS's most recent assessment established a PBR for the western stock of 208. An estimated 171 Steller sea lions are killed each year through native subsistence hunts and approximately another thirty perish in commercial fishing operations. Because the potential annual incidental mortality due to the research is twenty, the Society argues that there is clearly a potential for the research program to violate the PBR. The court concluded that, by failing to address this issue in its EA, NMFS failed to make a convincing case that the expanded research program will not have a significant effect.

Second, during the NEPA analysis federal agencies must consider the degree to which the environmental effects are likely to be highly controversial, highly uncertain, and cumulatively significant. The court found that "the highly controversial nature of the permits' effects is, in short, readily apparent from the record."[5] For example, in preliminary comments to the agency, the Marine Mammal Commission indicated that it "remained concerned" that the cumulative impacts could have a significant adverse impact. NMFS's decision in December to prepare an EIS is further evidence of the degree of controversy surrounding the impact of the research. In addition, the court stated that "there can be no doubt that NMFS authorized research where the effects were both uncertain and unknown."[6]

Conclusion

The court vacated the permits and remanded the case to the agency for preparation of an EIS. The court indicated, in a footnote, that the agency's discussion of alternatives in the EA was also not satisfactory. The court found that the agency had not seriously considered alternatives, but merely deferred to the views of permit holders regarding less invasive research techniques. The EIS must therefore contain more detailed analysis regarding alternatives.

In June, the Society and NMFS reached a settlement which allows non-invasive research, such

See Steller, page 18

District Court May Exercise Jurisdiction Over Norwegian Shipping Companies

Fortis Corporate Ins. v. Viken Ship Management, 2006 U.S. App. LEXIS 14057 (6th Cir. June 8, 2006).

Stephanie Showalter

The global nature of the shipping industry often gives rise to unbelievably complex litigation. Sometimes one of the most challenging issues is jurisdiction. Who can and should hear the case? Consider the following situation.

In 1998, Viken Ship Management, a Norwegian company, chartered a fleet of vessels for the transportation of cargo from FedNav International, a Canadian company. FedNav later subchartered one of the Viken ships, the M/V *Inviken*, to Metallia, a U.S. company, for the shipment of steel coils from Poland to Toledo, Ohio. While en route, seawater entered the hold and caused severe rust damage to the coils. Fortis Corporate Insurance, a Belgian company, paid $375,000 to resolve Metallia's insurance claims. Fortis turned around and sued Viken in the U.S. District Court for the Northern District of Ohio in February 2004 seeking damages for negligence and breach of bailment obligations. Got it? Simply stated, a Belgian insurance company sued a Norwegian shipping company in U.S. court.

Viken, not surprisingly, objected to being brought into U.S. court and moved for summary judgment arguing that the district court lacked jurisdiction. The court agreed and dismissed Fortis' complaint. Fortis appealed.

Minimum Contacts

Jurisdiction refers to the power of a court to hear a case and render a valid judgment. A court's judgment will only be valid if it has jurisdiction over both the persons involved and the subject matter. To exercise personal jurisdiction over foreign corporations, due process requires only that the corporation have "certain minimum contacts" with the territory of the forum, such that the maintenance of the action does not offend "traditional notions of fair play and substantial justice."[1] In other words, exercise of jurisdiction is reasonable if the corporation has "purposefully availed" itself of the benefits of the forum state.

Photograph of steel coils being loaded onto ship courtesy of MARAD.

In the Sixth Circuit, the "purposeful availment" inquiry focuses on "whether the defendant has engaged in some overt actions connecting the defendant to the forum state."[2] Viken outfitted and rigged its ships to sail into the Great Lakes and even stated in the Charter Agreement with FedNav that "the vessel is suitable for Toledo." Furthermore, Viken entered into a long-term agreement with a charterer which shipped into the Great Lakes. The court found that Viken had purposefully availed itself of the forum state and "had more than sufficient notice that they might be subject to jurisdiction in [Ohio]."[3]

The court also found that the cause of action arose out of Viken's activities in Ohio, the second factor in the minimum contacts test. Although the leak and the damage to the steel coils occurred at sea before the *Inviken* reached Toledo, the harm ultimately suffered by Fortis occurred in Ohio when the ship delivered rusted steel coils. The court held that, in this case, the delivery of damaged goods was sufficient to meet the "arising under" test.

See Great Lakes, page 18

No "Right to a View" of the Coastline from the Ocean

Schneider v. California Coastal Commission, 2006 Cal. App. LEXIS 986 (Cal. Ct. App. June 28, 2006).

Terra Bowling, J.D.
Stephanie Showalter

The California Court of Appeals recently overturned a decision of the California Coastal Commission (CCC) which restricted development based on a boater's "right to a view" of the coastline. This was the first legal test of the CCC's offshore view policy and an apparent win for property rights advocates.

Background

Dennis Schneider owns a forty-acre ocean-front parcel in San Luis Obispo County abutting an ocean bluff. The property is located in an Ocean Shoreline Sensitive Resource Area and zoned agricultural. In 2000, Schneider received a permit from the San Luis Obispo County Planning Commission (County) to construct a 10,000 square foot residence, a barn, and a 1.25 mile access road.

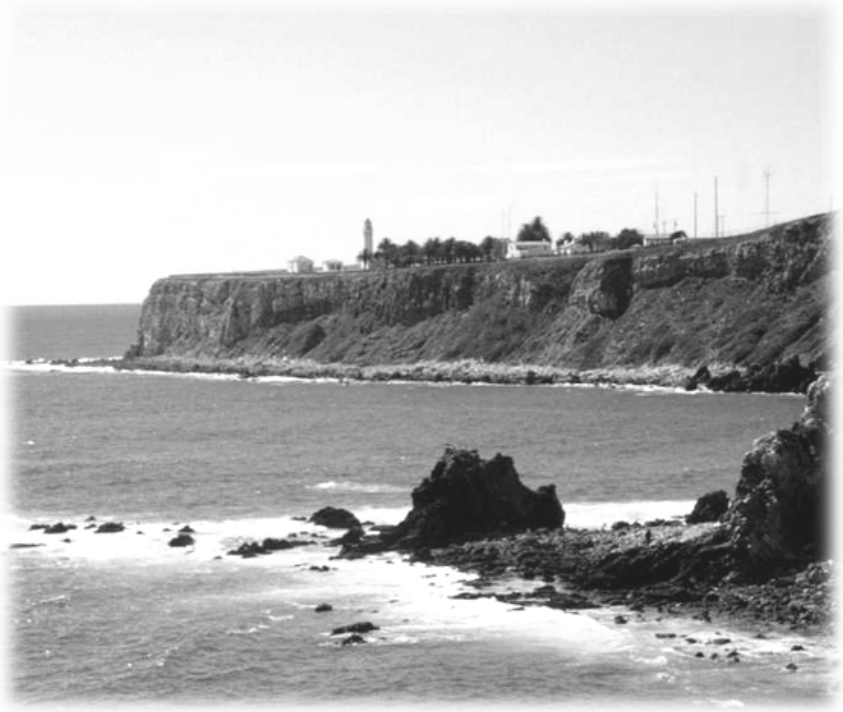
Two members of the CCC appealed the County's issuance of the permit, arguing that the proposed development was inconsistent with the County's Local Coastal Plan. After a hearing, the CCC found that Schneider's house and barn would be visible from the ocean. The CCC conditionally approved the project but imposed fifteen special conditions which required, among others, that the project be re-sited at a higher elevation and confined to 5,000 square feet or less. Additionally, all structures would have to be single story, the access road relocated, and the barn could not be constructed.

Schneider, represented by the Pacific Legal Foundation, appealed alleging that the CCC had no authority to impose development conditions protecting views of the coastline from offshore, ocean-based vantage points. The trial court sided with the Coastal Commission stating that "the beauty of a sunrise from a vantage point offshore is afforded the same protection as a sunset seen from land."[1] Schneider appealed to the California Court of Appeals.

"Right to a View"

This case revolved around the CCC's interpretation of § 30251 of the California Coastal Act of 1976 which provides that: "The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas . . ."

See California, page 18



Photograph of coastal bluff courtesy of ©Nova Development Corp.

Court Vacates Anacostia River TMDLs

Friends of the Earth, Inc. v. EPA, 446 F.3d 140 (D.C. Cir. 2006).

Terra Bowling, J.D.

In *Friends of the Earth v. EPA*, the United States Court of Appeals for the D.C. Circuit was faced with the question of whether the word "daily," as used in the Clean Water Act (CWA), was flexible enough to represent other increments of time. The D.C. Circuit held that the term daily could only mean daily, a ruling which will force the Environmental Protection Agency (EPA) to amend its seasonal and annual pollution limits for the Anacostia River.

Background

The Anacostia river system, flowing from Maryland to Washington D.C., is polluted by fertilizers, chemicals, and trash that run into the river after every rainfall.[1] Another source of trouble is the city's sewage system, which uses the same pipes for both sewage and stormwater runoff.[2] As a result, the river contains many biochemical pollutants that have caused its dissolved oxygen level to sink below the applicable water quality standard. Additionally, the river is murkier than the applicable turbidity standard allows, stunting the growth of plants in the river.

For such highly polluted waters, the CWA requires that states and the District of Columbia establish a "total maximum daily load" (TMDL) of pollutants that can be discharged into the waters. In an effort to decrease the pollution of the Anacostia system, the EPA approved two pollution limits. One TMDL limited the annual discharge of oxygen-depleting pollutants, while another limited the seasonal discharge of pollutants contributing to turbidity.

Friends of the Earth brought suit challenging the TMDLs, claiming that the CWA requires the establishment of daily, not seasonal or annual, loads. The D.C. District Court granted the EPA's motion for summary judgment, finding that the word "daily" could be interpreted to encompass seasonal or annual limits.[3]

Daily Means Daily

The D.C. Circuit found that nothing in the language of 33 U.S.C. § 1313 suggested that the EPA was authorized to approve total maximum seasonal or annual loads. "Daily connotes every day," said Judge Tatel. "Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually."[4]

"Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually."

The EPA argued that deviating from daily limits was necessary in some cases, since some pollutants cause more damage when released in low levels every day, whereas some large, one-day discharges may have no effect if the seasonal or annual discharges remain low. The D.C. Circuit pointed out that the EPA was basically in a predicament of its own devising. The CWA provides that TMDLs must be established only for those pollutants "which the Administrator identifies . . . as suitable."[5] In 1978, the EPA issued a regulation deeming "all pollutants . . .

suitable for calculation of total maximum daily loads."[6] If the EPA no longer believes that all pollutants are suitable for TMDLs, it can amend its regulations to reflect its change in position.

Conclusion

The D.C. Circuit remanded the case to the district court with instructions to vacate the EPA's seasonal and annual pollution caps. The court indicated that the parties could move for a stay, giving the District of Columbia a chance to establish daily load limits or the EPA a chance to amend its regulations. The court further noted that if the unambiguous term "daily" caused unintended results, the parties should direct their concerns to EPA or Congress.

Photograph of Anacostia River in Washington, D.C. courtesy of the D.C. Office of Planning.

Endnotes

1. Ray Rivera and Elizabeth Williamson, *Anacostia Pollution Limits Tightened*, THE WASHINGTON POST, April 26, 2006.
2. *Id*.
3. *Friends of the Earth v. EPA*, 346 F. Supp. 2d 182, 189 (D. D.C. 2004).
4. *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140 (D.C. Cir. 2006).
5. 33 U.S.C. § 1313(d)(1)(C).
6. 43 Fed. Reg. 60,622, 60,665 (Dec. 28, 1978).

Critical Habitat, from page 3

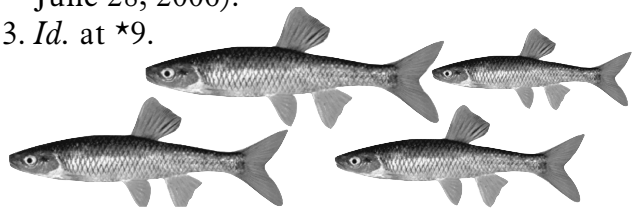
is generally limited to situations "in which a reasonably prudent plaintiff would have been unable to determine that a violation had occurred."[3] That is not the case here. The Center could have easily determined whether the Secretary violated his duty to list critical habitat by checking the Federal Register for notice of the final rule. The court held that the continuing violation doctrine was therefore not applicable.

Conclusion

The Eleventh Circuit dismissed the Center's complaint against the FWS. The Center's only other option is to file a petition with the Secretary for the designation of critical habitat for the minnows.

Endnotes

1. 16 U.S.C. § 1533(b)(6)(C).
2. *Center for Biological Diversity v. Hamilton*, 2006 U.S. App. LEXIS 16198 at *4 (11th Cir. June 28, 2006).
3. *Id.* at *9.



Honolulu's Aerial Advertising Ban is Constitutional

Center for Bio-Ethical Reform v. City and County of Honolulu, 2006 U.S. App. LEXIS 16837 (9th Cir. July 6, 2006).

Stephanie Showalter

To protect its visual landscape, Honolulu passed an ordinance in 1978 prohibiting aerial advertising. The ordinance prohibits the "use of any type of aircraft or other self-propelled or buoyant airborne object to display in any manner or for any purpose whatsoever any sign or advertising device."[1] The Center for Bio-Ethical Reform (Center), a pro-life advocacy group which hires airplanes to tow aerial banners displaying graphic photographs of aborted fetuses, challenged the constitutionality of the ordinance after it was prevented from towing banners over the beaches of Honolulu. The Ninth Circuit Court of Appeals recently upheld the ordinance.

Preemption

As an initial matter, the Center argued that the Honolulu Ordinance was preempted by federal law. Because FAA regulations prohibit operation of civilian aircraft over densely populated areas, the Center, in order to conduct its aerial advocacy campaign, had to obtain a waiver in the form of a Certificate of Authorization. The FAA issued the Center a certificate granting authorization to tow banners in "the contiguous United States of America, Alaska, Hawaii, and Puerto Rico." The Center contended that this certificate should trump Honolulu's ordinance.

State law may be preempted by federal law either when Congress enacts a comprehensive regulatory scheme that occupies the entire field being regulated (field preemption) or when compliance with federal and state regulations is not possible (conflict preemption). The Center claimed that Congress, via the Federal Aviation Administration (FAA), occupies the entire field of tow banner regulation. The Ninth Circuit explained that advertising is traditionally subject to regulation under the states' police power and neither Congress nor the FAA has exerted its authority over the airspace to such a degree to warrant a finding of preemption.

Furthermore, the Center's Certificate of Authorization "contemplates coexistence between federal and local regulatory schemes," thereby eliminating the potential for conflict preemption.[2] The Center's certificate contains explicated language stating that it "does not constitute a waiver of any State law or local ordinance." The Ninth Circuit concluded that the Honolulu Ordinance is not preempted by federal law and moved on to the Center's constitutional arguments.

Freedom of Speech

Banner towing is a form of speech protected by the First Amendment, but "the right to use public or government property for one's private speech or expression depends on whether the property has by law or tradition been given the status of a public forum."[3] Regulation of speech in public forums is subjected to strict scrutiny analysis, i.e. the restrictions must be narrowly tailored to a compelling state interest. Restrictions on speech in nonpublic forums need only be reasonable and viewpoint neutral.

The Ninth Circuit concluded that the airspace above Honolulu's beaches is a nonpublic forum. Public forums are places traditionally devoted to expressive activity, such a public parks, streets, and sidewalks. The airspace, in contrast, is not a place which has "immemorially been held in trust for the use of the public and, time out of mind, [ ] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[4] In fact, as the court states, "one would be hard pressed to find another forum that has had its access as historically restricted as U.S.

airspace."[5] The airspace is, therefore, a nonpublic forum.

As mentioned above, a reasonable and viewpoint neutral restriction of speech in a nonpublic forum does not run afoul of the First Amendment. The Court found that the Honolulu ordinance was reasonable as it "fulfills several legitimate needs, including preserving the economically vital scenic beauty of Honolulu and minimizing traffic safety hazards for motorists and pedestrians."[6] The court also concluded that the ordinance was viewpoint neutral. The ordinance bans all aerial advertising and displays regardless of content or purpose. The one exception, which permits "an identifying mark, trade name, trade insignia, or trademark on the exterior of the aircraft," acknowledges that Honolulu cannot prohibit airlines from displaying their names and logos. The court found that there was nothing in the ordinance which would prohibit the Center from purchasing an aircraft or blimp, emblazing it with an identifying mark such as "Abortion Kills," and flying it over the Honolulu beaches.

The Center also argued that the ordinance violates the First Amendment because it forecloses an entire medium of communication, banner towing. The court disagreed. Banner towing is not a common means of speaking or a traditionally important form of expression deserving of special protection. Furthermore, although banner towing may be the Center's preferred method of speech, the Center may still communicate its message through television, direct mail, email, leaflets, etc.

Photograph of Honolulu Beach courtesy of NOAA's Photo Library.

Conclusion

The Ninth Circuit determined that the Honolulu Ordinance restricting aerial advertising was not preempted by federal law. The court also held that the ordinance does not violate the First Amendment as it is reasonable, viewpoint neutral, and rationally related to legitimate government interest.

Endnotes

1. HONOLULU, HAW., REV. ORDINANCES § 40-6.1 (1996).
2. *Center for Bio-Ethical Reform v. City and County of Honolulu*, 2006 U.S. App. LEXIS 16837 at *10 (9th Cir. July 6, 2006).
3. 16A AM. JUR. 2D *Constitutional Law* § 519.
4. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992).
5. *Center for Bio-Ethical Reform*, 2006 U.S. App. LEXIS 16837 at *16.
6. *Id.* at * 23-24.

Supreme Court Affirms States' Role in Dam Licensing

S.D. Warren Co. v. Maine Board of Environmental Protection, 126 S. Ct. 1843 (2006).

Stephanie Showalter

On May 15, 2006, the U.S. Supreme Court ruled that hydroelectric dam operators must obtain state water quality certification when seeking federal licenses from the Federal Energy Regulatory Commission (FERC).

Background

S.D. Warren Company (Warren) owns five hydropower dams on the Presumpscot River in Maine. Each dam operates by impounding water, passing it through turbines, and reintroducing it to the same waterway downstream.[1] In 1999, Warren sought to renew its federal licenses from FERC. Section 401 of the Clean Water Act (CWA) requires applicants "for a Federal license or permit to conduct any activity . . . *which may result in any discharge into the navigable waters*, to provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with applicable" state water quality standards.[2]

Although Warren was of the opinion that its dams do not result in discharges, it applied for water quality certifications from the Maine Department of Environmental Protection (DEP) under protest. The DEP issued Warren a certification, but imposed several conditions, including requirements to maintain minimum stream flows in the bypassed portions of the river and to allow passage of migratory fish and eels. FERC renewed Warren's licenses subject to the DEP's conditions. Warren appealed.

Maine Supreme Court

The Maine Supreme Court found that the reintroduction of the water downstream of the dams is a "discharge" subject to § 401. The court's reasoning was as follows. The CWA does not define the term discharge, stating only that "discharge when used without qualification includes a discharge of pollutant, and a discharge of pollutants."[3] The phrase "discharge of pollutants," however, is defined and means "any addition of any pollutant to navigable waters from any point source."[4] Based on the definition of "discharge of a pollutant," the Maine Supreme Court found that an "addition" is a key feature of any covered discharge.

The court further found "the operation of Warren's dams does result in an addition to the waters of the Presumpscot River and therefore a discharge occurs."[5] The Maine Supreme Court stated that when the water is removed from nature to pass through the dams, thereby subjected to private control, it loses its status as a water of the U.S. "Because these waters have lost their status as waters of the United States, when they are redeposited into the natural course of the river it results in an addition to the waters of the United States."[6]

Warren appealed the findings of the Maine Supreme Court arguing that defining discharge to include the reintroduction of dam water to the same waterway cannot be reconciled with the U.S. Supreme Court's recent decision in *South Florida Water Management District v. Miccosukee Tribe*.[7] At issue in *Miccosukee* was whether a pump between a canal and a water impoundment resulted in a "discharge of a pollutant" under § 402 of the CWA even though the pumping station did not add any pollutant to the transferred water. Section 402 requires a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of a pollutant. The Supreme Court held that a permit was required, because there was an "addition" of a pollutant to the receiving water. The court indicated, however, that there can be no

addition unless the two bodies of water are "meaningfully distinct." Warren latched onto this "meaningfully distinct" phrase and argued that its dams could not result in discharges because the waters above the dams are not meaningfully distinct from the waters below.

U.S. Supreme Court

The U.S. Supreme Court affirmed the judgment of the Maine Supreme Court, but on different grounds. The court disagreed that an "addition" was a necessary element of the application of § 401. Section 401, unlike § 402, refers only to a "discharge." Looking to the plain meaning of the term discharge, a "flowing or issuing out," the Court found that Warren's operations resulted in discharges because water flowed from its turbines to navigable waters. The Court ruled that *Miccosukee* is not applicable because that case arose under a different section of the CWA which contains different language, "discharge of a pollutant."

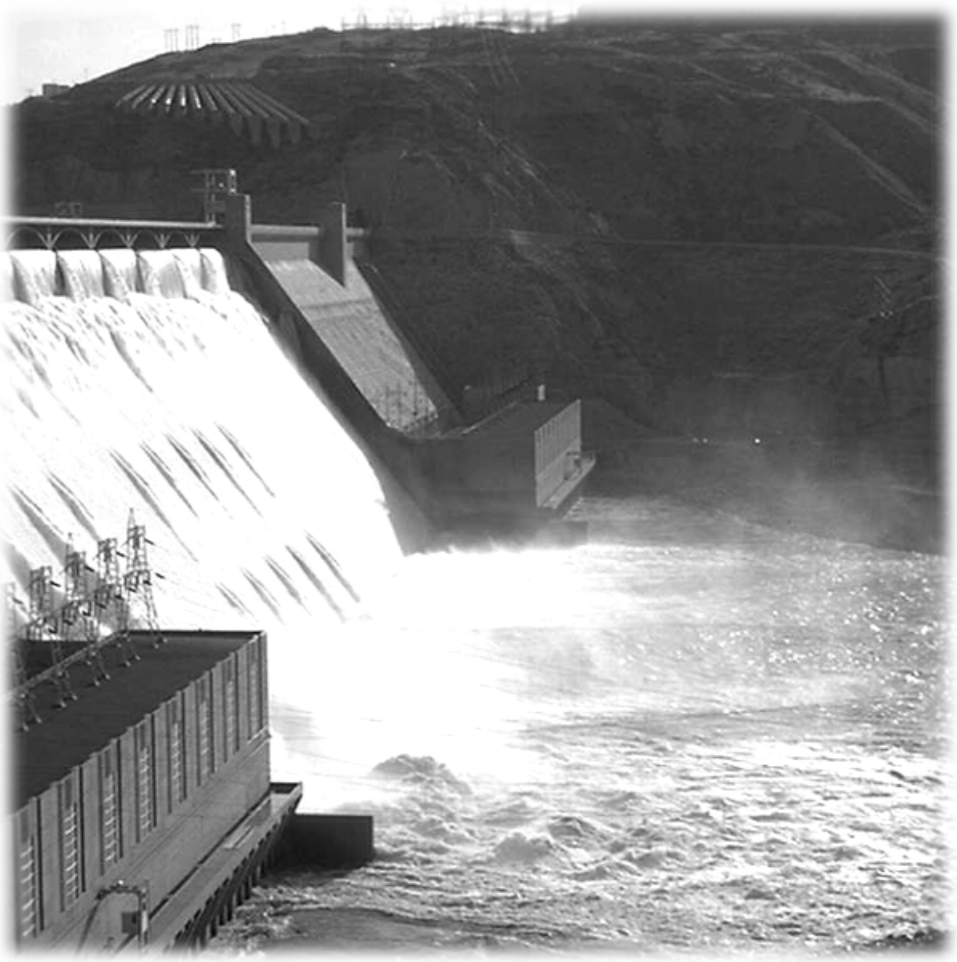
Conclusion

Dams can cause numerous changes in the physical, biological, and chemical character of rivers, contributing to water pollution as it is broadly defined in the CWA. The court found that the state certifications issued under § 401 are "essential in the scheme to preserve state authority to address the broad range of pollution" and "reading § 401 to give 'discharge' its common and ordinary meaning preserves the state authority apparently intended."[8]

Endnotes

1. Robert Meltz and Claudia Copeland, Congressional Research Service, *The State Role in the Federal Licensing of Hydropower Dams:* S.D. Warren Co. v. Maine Board of Environmental Protection, at 2 (April 24, 2006).
2. 33 U.S.C. § 1341(a) (emphasis added).
3. *Id.* § 1362(16).
4. *Id.* § 1362(12).
5. *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 868 A.2d 210, 215 (Me. 2005).
6. *Id.* at 216.
7. 541 U.S. 95 (2004).
8. *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1853 (2006).

Photograph of dam courtesy of ©Nova Development Corp.



District Court Allows Evidence Obtained by Coast Guard

United States of America v. Vilches-Navarrette, 413 F. Supp. 2d 60 (D. P.R. 2006).

Terra Bowling, J.D.

In March 2005, the search of a freighter by the U.S. Coast Guard netted more than 2,000 pounds of cocaine and lead to the indictment of its crew members. Relying on the Fourth Amendment, the crew members moved to dismiss the indictments and to suppress evidence seized by the Coast Guard, as well as to suppress statements made by some of the defendants. The U.S. District Court for the District of Puerto Rico denied the motion to dismiss, as well as the motions to suppress the evidence and statements.

Background

On January 31, 2005, the Coast Guard, acting on intelligence, instructed one of its cutters to intercept and board the 165-foot *M/V Babouth* off the coast of Trinidad and Tobago. Upon approaching the vessel, U.S. Coast guardsmen asked for and received permission to board. The officers began a search of the vessel at sea, which lasted for five days during which the Coast Guard found more than 17 grams of amphetamines and 58 grams of heroin. The Coast Guard was then directed to take the freighter to San Juan, Puerto Rico where agents from various federal agencies began searching the vessel. A canine unit from Customs and Border Protection alerted the searchers to the presence of narcotics; however, the search team was unsuccessful in locating them.

As the search continued the next day, one of the freighter's crew members, Luis Fernando Piedrahita-Calle, threw a note to a Coast Guardsman and indicated that he wanted to talk. On direction from Piedrahita-Calle, the team located several vinyl tiles that had been adhered to the deck with fresh contact cement. Under the tiles, the team found a tank that held thirty-five bales of cocaine, totaling approximately 2,030 pounds. The crew members were then arrested and read their *Miranda* rights. During questioning, two crew members made incriminating statements to law enforcement officials. All of the crew members were later indicted for conspiracy and possession with intent to distribute five kilograms or more of cocaine.

Motion to Dismiss

The defendants argued for dismissal on several grounds. First, the defendants claimed that the case should be dismissed because the search was not based on probable cause, violating the Fourth Amendment. However, the court noted that the remedy for a search and seizure without probable cause is exclusion of the evidence wrongfully seized or obtained, not dismissal.

Next, the defendants claimed that the case should be dismissed due to the unreasonable delay in seeing a judge and the unreasonable period of time that they were detained. If true, the government's actions would have violated Federal Rule of Criminal Procedure 5(a), as well as the Fourth Amendment. Rule 5(a) states that "any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate."[1] The Fourth Amendment has been interpreted to compel a 48-hour time limit on detentions when there has not been a ruling on probable cause.[2] However, before either rule is triggered, individuals must be arrested and not merely detained. The crew members argued that they were arrested when the Coast Guard boarded the freighter, so the five-day trip at sea and a two-day dockside search in San Juan violated the rules. The court rejected the defendants' argument, as case law has determined that a routine boarding of a vessel on the high seas is not an arrest.[3]

The court noted that even if the arrest had occurred when the Coast Guard boarded the

freighter, neither the 48-hour rule nor Rule 5(a) would apply. The court said that the trip from the high seas to Puerto Rico took a reasonable amount of time, so the delay that the crew members faced was not an "unnecessary delay," which is what Rule 5(a) requires. In examining a violation of the 48-hour rule, the court found that even if the defendants were considered to be under arrest when the ship was moored on February 5 and they were not taken to the judge until more than two days later, the rule did not apply because the government may show a bona fide emergency or special circumstance justifying the delay.[4] In this case, the court felt that the enormous size of the freighter and the complexity of the search were circumstances that justified the slight delay in the defendants seeing a judge.

Motion to Suppress

The crew members next argued that the cocaine on board the freighter was the fruit of an illegal search and should be suppressed pursuant to the Fourth Amendment. The court first found that under *U.S. v. Verdugo-Urquidez*, the defendants did not have the protection of the Fourth Amendment while at sea, because they are nonresidents of the United States located in international waters or a foreign territory.[5] The court also found that the defendants did not receive Fourth Amendment protection for the search at San Juan, because the foreign-flagged ship would be considered the functional equivalent of the flag nation. Since the ship was sailing under Honduras' flag, the Coast Guard search would be similar to a search conducted in a foreign territory. Additionally, the court noted that, even if the ship was not considered to be a foreign territory, the defendants would be required to have a substantial connection with the United States before they could take advantage of the Fourth Amendment.[6] The court found that the crew members' presence in the United States while on a ship would not be enough to establish a substantial connection.

The court also found that even if the Fourth Amendment was applicable to the crew members, they lacked standing to challenge the search. In order to invoke the right to be free from unreasonable searches, an individual must have "manifested a subjective expectation of privacy" in the place searched, which "society accepts as objectively reasonable."[7] The court found that neither the captain nor the crew had an expectation of privacy in the area of the ship where the cocaine was found, pointing out that the large size of the vessel presented few areas in which there could be an expectation of privacy. Even if the crew had an expectation of privacy, the court doubted that it would be one that society would accept as objectively reasonable, since the compartment was hidden and created for the express purpose of hiding illicit contraband.

Furthermore, even if the Fourth Amendment was applicable and the crew members had standing, the court found that the search was reasonable due to the Coast Guard's broad authority to stop and board a vessel. The Coast Guard may conduct a search "upon reasonable and articulable grounds for suspecting that the vessel or those on board are engaging in criminal activities."[8] In light of the intelligence that the Coast Guard had received and the surrounding circumstances, the court found that the search of the ship was reasonable.

Conclusion

The court denied all of the defendants' motions to dismiss and to suppress, allowing the govern-

See Coast Guard, page 19

Coast Guard emblem courtesy of the U.S. Coast Guard.

Rapanos, from page 1

the Act, the Corps must necessarily choose some point at which water ends and land begins."[6] The Court went on to hold that it was reasonable for the Corps to interpret the term "waters of the United States" to include adjacent wetlands given "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems."[7] Due to the key role wetlands play in protecting and enhancing water quality, the court was unable to find "that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States – based as it is on the Corps' and EPA's technical expertise – is unreasonable."[8]

"Isolated Wetlands"

No doubt emboldened by its victory in *Riverside Bayview Homes*, the Corps began asserting jurisdiction over wetlands that were not adjacent to navigable waters. Under its Migratory Bird Rule issued in 1986, the Corps required § 404 permits for the dredge and fill of intrastate waters "which are or would be used as habitat by birds protected by migratory bird treaties" or by other migratory birds which cross state lines. In 2001, the Supreme Court found that the Corps had gone too far when it interpreted § 404 to confer authority over an abandoned sand and gravel pit in northern Illinois that provided habitat for migratory birds.[9] The property in question had been the site of a sand and gravel mining operation and the excavation trenches had evolved into a scattering of permanent and seasonal ponds. The Corps asserted jurisdiction based solely on the presence of migratory birds, as the ponds had no connection to a navigable water.

The Court found that the Migratory Bird Rule was not fairly supported by the CWA. Acknowledging that it had previously upheld the Corps' jurisdiction over wetlands, the Court stated that "it was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[10] As there was no connection between the ponds and a navigable water, the Corps could not assert jurisdiction under the CWA.

Hydrological Connection

In the present case, the Court was faced with the Corps' assertion of jurisdiction over property falling somewhere between the adjacent wetlands in *Riverside Bayview* and the isolated ponds in *SWANCC*. In 1989, John Rapanos began filling wetlands on a 54-acre parcel of land in Michigan. The nearest body of navigable water is over ten miles away. The parcel does have a distant hydrological connection, however, because surface water from the wetlands flows into a man-made drain which empties into a creek that flows into a navigable river. In 2004, the Sixth Circuit ruled that the *Riverside Bayview* "significant nexus" can be satisfied by the presence of a "hydrological connection" and found that the wetland was adjacent to navigable waters.[11] Rapanos appealed to the Supreme Court.

The nine Supreme Court justices divided right down the middle, with Justice Kennedy stepping into the pivotal swing vote role previously filled by Justice Sandra Day O'Connor. The four conservative justices, Scalia, Thomas, Alito, and Roberts, held that the Corps does not have jurisdiction over wetlands that are not physically adjacent to navigable waters. The four liberal justices, Stevens, Souter, Ginsburg, and Breyer, would have deferred to the Corps' expertise and upheld jurisdiction.

Plurality

Justice Scalia wrote the opinion for the plurality and, true to form, focused exclusively on the text of the CWA and found that the Corps had stretched the term "waters of the United States" "beyond parody." Citing *Webster's New International Dictionary*, Scalia argued that "the waters" could only refer to water '[a]s found in streams and bodies forming geographic features such as oceans, rivers, [and] lakes."[12] The phrase "waters of the United States," therefore, could include "only those relatively permanent, standing or continuously flowing bodies of waters 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"[13] Such an extremely nar-

row definition of "waters of the United States" would significantly curtail the authority of the Corps and eliminate most wetlands from CWA coverage.

Scalia went on to reject the Sixth Circuit's contention that a wetland may be considered adjacent to waters of the U.S. because of the presence of a hydrological connection. "*Only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right . . . are 'adjacent to' such waters and covered by the Act."[14] According to Scalia, in order to establish that wetlands such as those in dispute in *Rapanos* are covered, the Corps must find that: (1) the adjacent channels contain a "water of the United States" and (2) the wetland has a continuous surface water connection.

Because these findings were not made in the present case, the plurality vacated the ruling of the Sixth Circuit and remanded the case to the lower courts to determine "whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*."[15]

Justice Kennedy and "Significant Nexus"

Although Justice Kennedy agreed that the case needed to be remanded to the Sixth Circuit, he disagreed with the plurality's reasoning because it failed to address the "significant nexus" requirement. Kennedy argues that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[16] Kennedy states that the requisite nexus would be present "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable."[17] Justice Kennedy expressly rejects Justice Scalia's contention that relative permanence and physical connection are required. "These limitations . . . are without support in the language and purposes of the Act or in our cases interpreting it."[18]

In *Riverside Bayview*, the Corps established that wetlands adjacent to navigable-in-fact waters are ecologically interconnected and therefore satisfy the "significant nexus" requirement. While similar interconnections may be present with wetlands adjacent to major tributaries, Kennedy found that the Corps' definition of tributary is too vague to assure that the Corps only regulates wetlands which "perform important functions for an aquatic system incorporating navigable waters."[19] "Absent more specific regulation [ ] the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries."[20] Kennedy concluded that the case should be remanded "for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters."

See Rapanos, page 19

Photograph of goose courtesy of ©Nova Development Corp.

Stellar Sea Lions, from page 5

as aerial surveys, to continue.[7] Only research involving invasive techniques, such as branding and tooth extraction, remain on hold.

Endnotes

1. The Eastern stock (ranging from central California to Cape Suckling) remains classified as threatened, although the population has been increasing by approximately three percent a year since the 1980s.
2. 70 Fed. Reg. 76780, 76781 (Dec. 28, 2005).
3. *Humane Society v. Department of Commerce*, 2006 U.S. Dist. LEXIS 34006 at *48 (D. D.C. May 26, 2006).
4. 16 U.S.C. § 1362(20).
5. *Humane Society*, 2006 U.S. Dist. LEXIS 34006 at *38-39.
6. *Id.* at *40-41.
7. For more information on the settlement, see http://www.fakr.noaa.gov/protectedresources/stellers/litigation/rsrchsettlement063006.htm .

Great Lakes, from page 6

Finally, the court found that the exercise of jurisdiction was reasonable. The parties had conducted discovery without any apparent difficulties, most of the witness speak English, and Ohio has a strong interest in ensuring that shipments to its ports are reliable. The court reversed the ruling of district court and remanded the case for further proceedings.

Endnotes

1. *See, International Shoe Co. v. State of Wash.*, 326 U.S. 310 (1945).
2. *Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 479 (6th Cir. 2003).
3. *Fortis Corporate Ins. v. Viken Ship Management*, 2006 U.S. App. LEXIS 14057 at *20-21 (6th Cir. June 8, 2006).

California, from page 7

The CCC construed this section to protect views of the shoreline from both land and sea. The Court of Appeals found this interpretation was too expansive as it in essence adds the words "and from" between the words "along" and "the." The court found no evidence that the California Legislature sought to protect the occasional boater's view of the coastline at the expense of a coastal landowner when it enacted § 30251. "Historically, the protection of public views 'to and along the ocean and scenic coastal areas' has been construed to mean land-based scenic views from public parks, trails, roads, and vista points."[2]

Conclusion

The Court of Appeals reversed the judgment of the trial court and ordered it to vacate the CCC's decision. The CCC must now rehear the matter consistent with the appellate court's ruling. Schneider has won the latest battle, but it is too early to tell whether he has won the war. The Court of Appeals affirmed the authority of the CCC to impose special conditions to preserve the scenic landscape of the Harmony Coast and ensure that the development "be designed to be subordinate to and blend with the natural character of the area."[3] Schneider's 10,000 square foot residence may remain a pipe dream.

Endnotes

1. *Schneider v. California Coastal Commission*, 2006 Cal. App. LEXIS 986 at *3 (Cal. Ct. App. June 28, 2006).
2. *Id.* at *6.
3. *Id.* at *10.

Rapanos, from page 17

The Dissenters

Four justices would have upheld the Corps' exercise of jurisdiction. Justice Stevens, writing for the dissent, stated that the Corps' decision to treat these remote wetlands "as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision."[21] Focusing more on the purposes of the CWA than dictionary definitions, the dissent would have deferred to the Corps' position that remote wetlands with hydrological connections serve important water quality roles. Justice Stevens reasoned that Congress in passing the CWA found it essential to control the discharge of pollutants at the source and the Corps can define "waters" broadly to accomplish this Congressional aim. "The inclusion of all identifiable tributaries that ultimately drain into large bodies of water within the mantle of federal protection is surely wise."[22] The dissent agreed with Justice Kennedy that relative permanence and physical connection are not required, but saw no need to replace the Corps' bright line rule with Kennedy's case-by-case significant nexus test.

Bottom Line

The majority of the court rejected Justice Scalia's two conditions for wetlands to qualify as "waters of the United States." The real law in the case was therefore made by Justice Kennedy when he sided with the dissenters that relative permanence and a physical connection were not required. The relevant connection is hydrological. Because Justice Kennedy's opinion states the narrowest basis for the holding, it will control in the lower courts. In fact, the District Court for the Northern District Court of Texas has already applied it.[23]

Endnotes

1. 33 U.S.C. § 1344(a).
2. *Id.* §1362(7).
3. 33 C.F.R. § 328(a).
4. *Id.* § 328(b).
5. *U.S. v. Riverside Bayview Homes* 474 U.S. 121 (1985).
6. *Id.* at 132.
7. *Id.* at 133.
8. *Id.* at 134.
9. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
10. *Id.* at 167.
11. *U.S. v. Rapanos*, 376 F.3d 629 (6th Cir. 2004).
12. *Rapanos v. U.S.*, 2006 U.S. LEXIS 4887 at *29-30 (June 19, 2006).
13. *Id.* at *40.
14. *Id.* at *44 (emphasis in original).
15. *Id.* at *70.
16. *Id.* at *108-9.
17. *Id.* at *109.
18. *Id.* at *89.
19. *Id.* at *111.
20. *Id.* at *113.
21. *Id.* at *123.
22. *Id.* at *151.
23. *U.S. v. Chevron Pipe Line Co.*, No. 5:05-CV-293-C (N.D. Tex. filed June 28, 2006).

Coast Guard, from page 15

ment to present its case. The defendants also moved to suppress the statements made by crew members during the search. The court reserved its ruling on this motion until the statements could be evaluated in context during the trial.

Endnotes

1. FED. R. CRIM. P. 5(a).
2. *McLaughlin v. County of Riverside*, 500 U.S. 44, 111 (1991).
3. *U.S. v. Elkins*, 774 F.2d 530, 535 n. 3 (1st Cir. 1985).
4. *McLaughlin,* 500 U.S. at 57.
5. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 267 (1990).
6. *Id.* at 271.
7. *California v. Greenwood*, 486 U.S. 35, 39 (1988).
8. *U.S. v. Green*, 671 F.2d at 53 (1982).

Knauss, from page 2

DAA with the large number of the issues he addresses on a daily basis. These are largely "big-picture" issues focused upon NOS policy and operations. Of particular interest to me, I have also begun to work on NOAA's component of the White House Preserve America Initiative. Based upon Executive Order 13287, this initiative aims to foster federal and community efforts to protect, develop and better utilize the cultural resources that exist throughout the United States. In addition to continuing to manage and showcase its many cultural resources located in the waters off the United States (largely shipwrecks and submerged cultural resources), NOAA is working with other federal agencies and non-governmental organizations to examine how historic preservation policies can be improved across the federal government. As this is the subject of my Ph.D. dissertation, I have particularly enjoyed working on this project.

I also serve as a staff member on the NOAA Ocean Council (NOC), an intra-agency body that works to coordinate policy and oversee projects that concentrate on the "wet-side" of NOAA. The Assistant Administrators of both the NOS and the National Marine Fisheries Service co-chair this committee, which has representatives from all the line offices of NOAA with some interaction with oceanic or coastal issues. It has been fascinating to see policy formulation and coordination at work.

Finally, I have been involved with issues related to the Northwestern Hawaiian Islands Marine National Monument. According to the Presidential Proclamation, the Secretary of Commerce, through NOAA, and the Secretary of the Interior, through the Fish and Wildlife Service, will, in effect, have joint management responsibility for much of the Northwestern Hawaiian Islands. It has been very interesting to be involved with issues related to the world's newest and largest marine protected area.

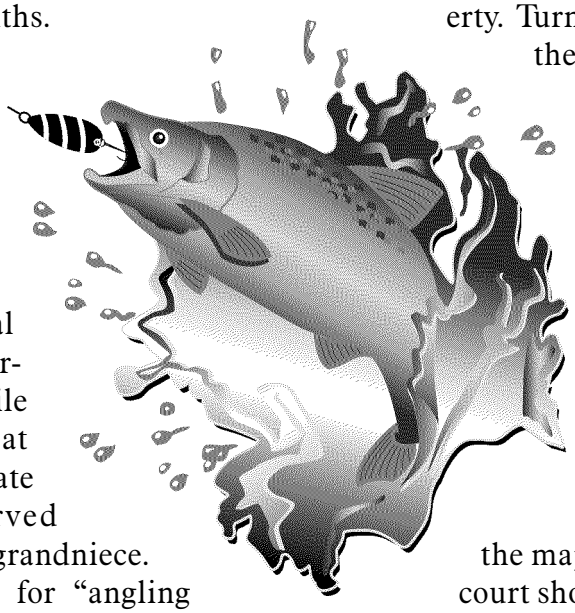
Photograph of the wreck of the 7 destroyers near Pt. Conception courtesy of NOAA"s Photo Library, Ship Collection, circa 1924.

Angler with Revoked License May Fish During Free Weekend

State v. Milburn, 205 Or. App. 205 (Or. Ct. App. 2006).

Terra Bowling, J.D.

An Oregon man convicted of angling with a revoked license during a "free fishing weekend" recently received a reprieve from the Oregon Court of Appeals. In December 2002, Thomas Milburn was cited for keeping a "foul-hooked" fish, which is a fish that has been hooked on some part of the body other than the mouth. Consequently, Milburn's fishing license was revoked, suspending his angling privileges for the next twenty-four months.



In June 2003, the Oregon Department of Fish and Wildlife sponsored its annual free fishing weekend. No angling licenses or tags are required for the taking of fish for personal use in Oregon waters during free weekends.[1] While performing surveillance at Hebo Lake, an Oregon State Police Trooper observed Milburn fishing with his grandniece. Milburn was later cited for "angling while revoked" in violation of Oregon Rev. Stat. § 497-411, which prohibits a person with a revoked license from engaging in the activity for which the license is required.

At trial, Milburn argued that the statute only prohibited him from fishing in instances when a license is required. He contended that since there is no license requirement for a free fishing weekend, his conduct did not violate the "angling while revoked" statute. The circuit court found that since the free-fishing weekend statute did not specifically allow individuals with revoked licenses to fish, Milburn was not allowed to participate. The judge was of the opinion that "there was no intention for the legislature to allow those people who were suspended or had their privileges revoked to fish on open fishing days."[2]

The Court of Appeals disagreed, concluding that Milburn had not violated Oregon law by fishing during a free weekend while his license was revoked. The court first found that the general angling licensing statute[3] distinguished among different angling activities, only some of which required a license. No license, for instance, is required to angle on your own property. Turning to the revocation statute, the court found nothing in the text to suggest that revocation also prohibits the person from engaging in fishing activities that do not require a license. Because a license is not required to fish during a free fishing weekend, persons whose angling licenses had been revoked are not prohibited from participating.

One judge dissented from the majority opinion arguing that the court should have considered the legislature's intent in creating the free fishing weekend. Judge Rosenblum felt that, had the legislature considered the issue, it would have expressly prohibited individuals whose angling licenses were revoked from participating in free weekends.

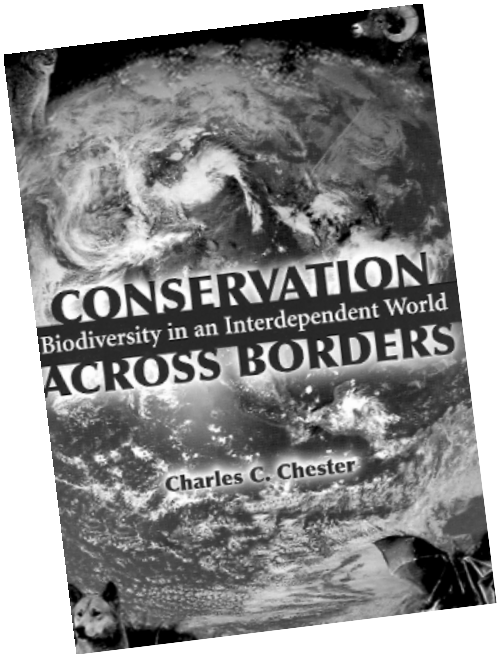
Endnotes

1. *Oregon Rev. Stat.* § 497.079.
2. *State v. Milburn*, 205 Or. App. 205, 209 (Or. Ct. App. 2006).
3. *Oregon Rev. Stat.* § 497.075.

New Releases from Island Press . . .

Conservation Across Borders: Biodiversity in an Interdependent World

Charles C. Chester

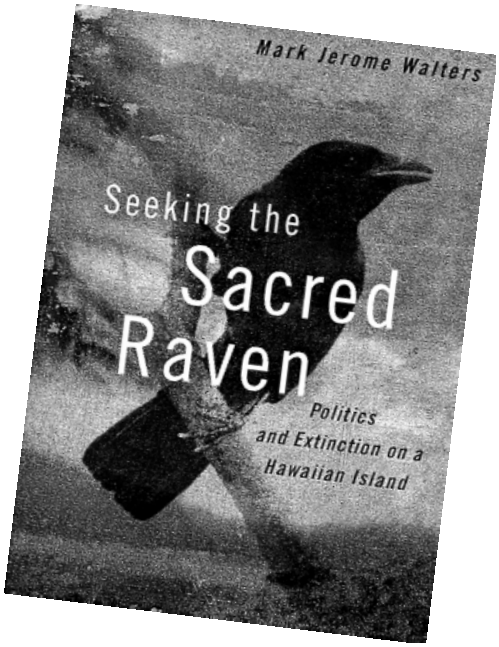


Nature's boundaries, unfortunately, rarely coincide with political boundaries. Efforts to protect large ecosystems, such as the Black Sea or Antarctica, necessarily involve multiple countries and political entities. In *Conservation Across Borders*, Charles Chester examines the history of transboundary conservation efforts from the establishment of early "peace parks" to the designation of continental migratory paths. Over the years, conservationists have employed a wide range of mechanisms in both the public and private sectors to protect biodiversity. Chester presents detailed case studies of two initiatives, the International Sonoran Desert Alliance and the Yellowstone to Yukon Initiative, to illustrate the benefits and challenges of landscape-scale protection.

Chester is adjunct assistant professor at the Fletcher School at Tufts University and a program consultant with the Henry P. Kendall Foundation in Boston, Massachusetts.

Seeking the Sacred Raven: Politics and Extinction on a Hawaiian Island

Mark Jerome Walters



In *Seeking the Sacred Raven*, Mark Jerome Walters tells the tale of the last wild 'alala to inhabit the cloud-forest high on the slopes of Mauna Loa volcano. The sacred Hawaiian bird, which once numbered in the thousands, today survives only in captivity. Walters chronicles the well-intentioned, but ultimately destructive, efforts of biologists, landowners, and government officials to save a species on the brink of extinction. The story of the race to save the 'alala is a sobering reminder of the many roadblocks that arise to detour the best laid plans: turf wars, personal agendas, policy failures, and individual foibles.

Walters is a professor of journalism at the University of South Florida, St. Petersburg. He is a contributing editor of Orion.

On May 3, 2006, NOAA designated the twenty-seventh National Estuarine Research Reserve. The Mission-Aransas National Estuarine Research Reserve represents the Western Gulf of Mexico Biogeographic Region and is located in Aransas and Refugio counties, on the southeastern coast of Texas, approximately thirty miles northeast of Corpus Christi. The Reserve encompasses 185,708 acres and contains a variety of habitats including coastal prairie, fresh and salt water marshes, tidal flats, seagrass meadows, mangroves, and oyster reefs. The University of Texas Marine Science Institute is the lead state agency for the Reserve. For more information, visit the Reserve's website at http://www.utmsi.utexas.edu/nerr/ .

The Coast Guard has issued voluntary interim measures for passenger vessels to account for the increase in the average weight of Americans. The National Transportation Safety Board has concluded that vessel overloading due to increased passenger weight was a contribute factor in several recent accidents, including the capsizing of the *Ethan Allen* on Lake George which resulted in the death of twenty people. Coast Guard regulations governing stability tests currently recommend an average weight per person of 160 pounds. For vessels which operate exclusively on protected waters, the average weight used is an almost-comical 140 pounds. The interim measures recommend that owners and operators of small passenger vessels reduce their passenger capacity by dividing the total test weight by 185 pounds. Operators may, as an alternative, weigh passengers and their effects dockside to insure that weight limits are not exceeded.

On June 15, 2006, President George W. Bush, pursuant to his authority under the Antiquities Act, created the world's largest marine conservation area, the Northwestern Hawaiian Islands (NWHI) Marine National Monument. The National Monument encompasses 137,792 square miles of the Pacific Ocean and includes the NWHI Coral Reef Ecosystem Reserve, the Midway National Wildlife Refuge (NWR), the Hawaiian Islands NWR, and the Battle of Midway National Memorial. The area's extensive coral reefs are home to more than 7,000 species. NOAA has primary responsibility for managing the Monument, although the Fish and Wildlife Service has sole responsibility for the wildlife refuges. Additional information is available at http://www.hawaiireef.noaa.gov/about/welcome.html .

Around the Globe

On June 28, Transport Canada published ballast water management regulations for ships operating in Canadian waters. The regulations are harmonized as much as possible with U.S. Coast Guard requirements and the International Convention for the Control and Management of Ship's Ballast Water and Sediments. Unlike the U.S., however, Canada has established offshore locations where ballast water may be exchanged when a high-seas ballast water exchange is impracticable. Ships have six months to develop and implement ballast water management plans. The regulations were published in the June 28, 2006 edition of the Canada Gazette available at http://canadagazette.gc.ca/partII/2006/20060628/pdf/g2-14013.pdf (pages 705 - 723).

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