Legal Reporter for the National Sea Grant College Program

The SANDBAR

Volume 7:2, July 2008

Supreme Court Finds New Jersey and Delaware Share Jurisdiction

***New Jersey v. Delaware*, 128 S. Ct. 1410 (U.S. 2008).**

Joseph Rosenblum, J.D.

For the third time in 130 years, the Supreme Court has ruled on a boundary dispute between the State of New Jersey and the State of Delaware concerning jurisdiction over activities in the Delaware River. In 1877, fishing rights were the issue. In 1934, it was a disagreement over oysters. In the most recent incarnation of *New Jersey v. Delaware*, the Supreme Court addressed the authority of Delaware to deny permits for and prevent construction of a liquefied natural gas ("LNG") plant proposed by British Petroleum and approved by New Jersey.[1]

Map of Delaware River Basin courtesy of the State of New Jersey.

Background

The LNG plant, along with storage tanks and other structures, was to be located in New Jersey. However, its erection and operation would have required dredging in parts of the Delaware River and construction of a 2,000-foot pier extending roughly 1,500-feet towards Delaware. The LNG plant was approved by both the Federal Energy Regulatory Commission and New Jersey. British Petroleum also sought permits from Delaware because the pier extended into the state's submerged lands. Delaware denied the request, determining that the LNG plant was a heavy industry facility within Delaware's coastal zone, and thus was prohibited under Delaware's Coastal Zone Act.

In 2005, invoking the Supreme Court's "original jurisdiction" for disputes between states, New Jersey brought suit against Delaware challenging Delaware's authority to deny the LNG plant. The Supreme Court appointed a special master to review the issues, and in April 2007 the special master filed a report agreeing with Delaware's interpretations of a 1905 Compact between the two states, and concluding that Delaware had the authority to deny construction of the LNG plant. The special master's recommendation in such a case is nonbinding, and the Supreme Court subsequently heard the case, with Justice Stephen Breyer recusing himself because he owns British Petroleum stock.

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Riparian Rights

Under a 1934 Supreme Court case, Delaware owns the entire river and riverbed along the impacted portion of the Delaware River, from the Delaware shore to the low-water mark on the New Jersey bank. However, jurisdictional authority is significantly complicated by a 1905 compact between the two states that provides that "each state may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature."[2] Citing this agreement as to "riparian jurisdiction" under the compact, New Jersey thus argued that it had the sole right to approve development projects extending into the river, even though Delaware retained control and ownership of the river itself. Delaware on the other hand asserted regulatory authority over structures located within its boundaries, including those portions of the River adjudged to be part of Delaware under the 1934 decision.

The Court also found noteworthy that New Jersey had in the past admitted Delaware's permitting authority over projects in the Delaware River.

The Court ultimately ruled 6-2 in favor of Delaware with Justice Ginsburg penning the decision for the Court. According to the Court, New Jersey retained ordinary riparian rights; however, its jurisdiction under the compact is not exclusive over unusual or extraordinary projects. Distinguishing the term "riparian jurisdiction" from the broader term "exclusive jurisdiction," used in similar compacts, the

Court held that New Jersey and Delaware have overlapping authority to regulate riparian projects of extraordinary character extending offshore of New Jersey's domain into the river over which Delaware is sovereign.

The Court found that the proposed LNG plant "goes well beyond the ordinary or usual."[3] The court noted that two or three supertankers would arrive for unloading each week surrounded by a moving safety zone that would restrict other vessels 3,000 feet ahead and behind, and 1,500 feet to the sides. While in transit, these tankers would pass densely populated areas.

The Court also found noteworthy that New Jersey had in the past admitted Delaware's permitting authority over projects in the Delaware River. For example, in 1980 New Jersey submitted a coastal management plan to the Secretary of Commerce stating "that any New Jersey project extending beyond mean low water must obtain coastal permits from both states."[4] Similarly, New Jersey itself had sought Delaware's approval to refurbish a stone pier located in the Delaware River and extending past the low-water mark on the New Jersey shore.

Conclusion

In a scathing dissent, Justice Scalia, joined by fellow New Jersey native Justice Alito, questioned the Court's definition of extraordinary, asking whether "a pink wharf, or a zig-zagged wharf qualify?"[5] Justice Scalia suggested that rather than using established legal principles, the Court reached its conclusion based on environmental concerns, noting that "if New Jersey had approved a wharf of equivalent dimensions, to accommodate tankers of equivalent size, carrying tofu and bean sprouts, Delaware could not have interfered."[6]

Delaware's victory will keep British Petroleum's LNG plant from locating in the contested site. Whether the plant will be relocated to another site, as is suggested by the majority, or whether New Jersey will be left without the economic benefits promised by such a large development, as expressed by the dissent, is still unclear. As a practical matter, by finding against New Jersey, the Court seems to have recognized Delaware's jurisdiction to apply its environmental laws and regulations to similar projects extending from the New Jersey side of the river.

Endnotes

1. Delaware's denial of a permit to construct the LNG plant was met with threats from New Jersey of withdrawing state pension funds from Delaware banks, which in turn prompted Delaware to considered authorizing the National Guard to more aggressively protect its border. *New Jersey v. Delaware*, 128 S. Ct. 1410, 1418 (U.S. 2008).
2. *New Jersey v. Delaware*, 128 S. Ct. 1410 (U.S. 2008).
3. *Id*. at 1427.
4. *Id*. at 1426.
5. *Id*. at 1437 (Scalia, J. dissenting).
6. *Id*. at 1439.

Photograph of LNG terminal courtesy of the Federal Energy Regulatory Commission (FERC).

California's Emissions Regulations Preempted

Pacific Merchant Shipping Association v. Goldstene, 517 F.3d 1108 (9th Cir. 2008).

Terra Bowling, J.D.

The Ninth Circuit has ruled that California's regulations limiting emissions from ships are preempted by the Clean Air Act (CAA). The court found that the California Air Resources Board (Board) must obtain permission from the Environmental Protection Agency (EPA) before adopting standards related to the control of emissions from vehicles and engines.

Background

The CAA amendments of 1990 regulate emissions of nonroad sources, including marine vessels. The amendments preempt state regulation of certain sources; however, Section 209(e)(2) of the CAA allows California to regulate other nonroad engines and vehicles if it obtains authorization from the EPA prior to enforcement. In this instance, the Board did not obtain EPA authorization prior to enforcing its Marine Vessel Rules.

The rules limit emissions from the auxiliary diesel engines of oceangoing vessels within 24 miles of the state's coast. The rules regulate the emission of particulate matter, nitrogen oxide, and sulfur oxide, specifying that the emissions may not exceed the emission rates that would result from the vessel using certain (listed) fuels with a sulfur content of no more than 0.5% by weight. The rules exempt certain vessels, including vessels passing through the regulated waters but not entering or stopping at a port in California and vessels owned or operated by any federal, state, local, or foreign government.

After the Board began enforcing the rules in January, the Pacific Merchant Shipping Association (PMSA) brought suit alleging that the regulations were preempted by the Clean Air Act (CAA) and the Submerged Lands Act. The United States District Court for the Eastern District of California found that the regulations were emissions standards and were preempted by § 209(e)(2) of the CAA. The court granted summary judgment to PMSA on the CAA claim, but did not rule on the Submerged Lands Act claim.

Photograph courtesy of the ©Nova Development Corp.

Preemption

The Board and other groups appealed the decision, arguing that the Marine Vessel Rules were not within the scope of § 209(e)(2), which requires California to obtain

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Court Vacates Monitoring and Enforcement Requirements

***Fishing Company of Alaska, Inc. v. Gutierrez*, 510 F.3d 328 (D.C. Cir. 2007).**

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When the Secretary of Commerce (Secretary), acting through the National Marine Fisheries Service (NMFS), enacted regulations creating a minimum "groundfish retention standard" for the Bering Sea and Aleutian Islands fisheries, an Alaskan fishing company challenged the regulations. The U.S. Court of Appeals for the District of Columbia ruled in favor of the company and ordered that the monitoring and enforcement (M&E) requirements be vacated.

Background

The seas off the Alaskan coast play host to a wide variety of groundfish.[1] Commercial fishing vessels on the Bearing Sea and around the Aleutian Islands catch the groundfish using large nets or "trawls" to drag the ocean floor. Unwanted groundfish, known as "bycatch," are often mixed in the trawls with more commercially desirable species and are thrown back into the ocean dead or dying.

In 1996, in an attempt to minimize the environmental effect of large bycatch, Congress added a goal of minimizing bycatch in the formal statement of policy in the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The North Pacific Fishery Management Council (Council), a regional body created by the MSA, must implement such congressional policies within its region by developing fishery management plans (FMPs) and amendments.[2]

In its June 2003 meeting, the Council adopted an Amendment[3] to the regional FMP supporting the idea of a minimum groundfish retention standard through the imposition of economic disincentives on vessels with high bycatch rates. The Council also approved an outline for the implementation of the Amendment through regulatory measures. Measures requiring vessels to keep observers on board to monitor bycatch and the use of certified scales to weigh fish were included in the outline.

On May 24, 2005, after drafting language for the proposed regulation based on the Council's outline, NMFS forwarded the text of the proposed regulation to the Council's Executive Director with instructions to submit all pertinent documents to the Secretary for review. The draft text created by NMFS included three M&E requirements that were not originally considered by the Council in its June 2003 meeting. In April 2006, the Secretary issued a final rule with regard to the Council's FMP Amendment that adopted the draft text created by NMFS, including the three M&E requirements not contemplated by the Council.

The Fishing Company of Alaska (FCA) brought suit in district court charging that the 2006 rule establishing minimum "groundfish retention standards" was unlawful because of its addition of the three M&E requirements. In addition, FCA alleged that the M&E requirements were substantively inconsistent with the MSA's "National Standards" for conservation. The district court granted summary judgment to the Secretary and FCA appealed.

NMFS's Addition of M&E Provisions

In the appeal, FCA did not challenge NMFS's role in drafting the language of the regulation, but the substantive change in the language previously considered and approved by the Council.[4] The Secretary contended that the MSA does not address the development process of proposed regulations; therefore, the regulation was properly submitted when the Executive

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Director forwarded the pertinent documents back to NMFS in May 2005.

According to the MSA, the Council is required to submit proposed regulations which it "deems necessary or appropriate for the purposes of…implementing a fishery management plan or plan amendment…simultaneously with the plan or amendment"[5] to the Secretary. The court noted that even if the Executive Director's actions could be attributed to the Council, he did not deem the three new M&E requirements "necessary or appropriate" as required by MSA. Because the Secretary did not have an indication that the plan had been deemed necessary or appropriate, the court found that the Secretary's publication of the rule was inconsistent with the law.

The court based their opinion on several facts: (1) there was no indication that the Council or anyone acting for the Council knew that the M&E requirements existed or deemed them necessary or appropriate; (2) NMFS's letter that accompanying the draft text called no attention to the added provisions; (3) the Executive Director made no note of the substantive changes in his cover letter when he distributed the draft text to the Secretary per NMFS's instructions; (4) The Council's Environmental Assessment (EA) assumed the absence of the added M&E provisions; and, (5) NMFS's admission that the Council did not have the opportunity to consider the new M&E provisions until after final submission to the Secretary.

NMFS defended the three additional M&E provisions as clarifications of details of the FMP originally contemplated and passed by the Council. In addition, the Secretary claimed that the additions were not inconsistent with the Council's original regulatory outline for implementation of the FMP. The court dismissed these arguments and held that the additional M&E requirements were inconsistent with the Council's original outline to the point that they constituted material additions to the Council's amendment.

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Photograph of Alaskan fishing boats courtesy of Valerie Craig/Marine Photobank.

Water Wars Continue in Southeastern States

***Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008).**

Terra Bowling, J.D.

As a southeastern drought enters its third year, there is no end in sight to an interstate feud between Georgia, Florida, and Alabama over federal water reservoirs located in Georgia.

Water Crisis

At the source of the water wars is a limited water supply and an increase demand for available water. Metro-Atlanta depends on one reservoir, manmade Lake Lanier, as its primary water source. Lanier, which is operated by the U.S. Army Corps of Engineers, was formed by the construction of the Buford Dam on the Chattahoochee River northeast of Atlanta. The Chattahoochee meets two other rivers, the Flint River and the Apalachicola River, and flows through Florida and into the Gulf of Mexico, making up the Apalachicola-Chattahoochee-Flint river basin (ACF basin), which includes several counties in Alabama. In addition to acting as a water source for Georgia residents, water flowing from the reservoir into Florida helps protect the state's oyster industry, as well as several endangered species within the ACF basin. In Alabama, water from the reservoir is used to cool its power plants.

In the past few years, water levels in the reservoir have dropped significantly, hitting record lows. In addition to drought conditions, the lake has lost water for other reasons. In 2006, at the same time the area began experiencing a serious drought, the Corps released water from Lake Lanier and several other reservoirs to protect the federally protected Gulf sturgeon.[1] Simultaneously, a faulty gauge measuring the lake's elevation caused the Corps to accidentally release more than 22 billion gallons of water.[2] Lake Lanier subsequently dropped two feet and remains well below its normal level.[3]

Georgia has attempted to offset the effects of the decreased water supply. The state has enacted a water ban on outdoor water use and ordered local providers to reduce consumption by 10%.[4] Despite these efforts, the state's—especially Metro-Atlanta's—water deficiency remains critical. State officials argue that it cannot spare to release more water than it is currently and would like the Corps to allot more of the reservoir's water for its needs. Florida and Alabama, however, argue that more water should be released from Lake Lanier and four other federal reservoirs to protect endangered species located in the ACF basin, as well as to meet their industry, recreation, and commercial fishing needs.

Court Action

The feud between the three states began more than two decades ago when Alabama sued the Corps to stop the reallocation of water in Lake Lanier from stored water to water supply. The states subsequently reached a Memorandum of Agreement and later signed the ACF Basin Compact regarding water storage allocation, planning, and dispute resolution. Both of the agreements expired without a permanent solution in place.

Since then, multiple lawsuits have been filed regarding water rights in the region.[5] In 2003, Georgia sued the Corps for not reallocating reservoir storage space for local consumption. As a result, Georgia entered into an agreement with the Corps, which increased Georgia's share of the reservoir allocated for water storage from 13.9% to 22.9%. Florida and Alabama brought suit to invalidate the agreement. In February, the D.C. appellate court

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invalidated the agreement, finding that the Corps did not have the authority to grant Georgia additional water rights without getting approval from Congress.[6] There are currently at least eight pending lawsuits regarding water rights in the region.[7]

Corps' Plan

Meanwhile, in November 2007, the Corps began holding more water in Lake Lanier in response to the severe drought faced by the region.[8] Florida and Alabama objected.[9] The Governors of the three states entered negotiations to find a compromise, but in February, the talks broke down, and the matter was left to be decided by the Corps.[10]

In April, the Corps proposed a revised interim operating plan that would be in effect until a permanent plan could be developed. The interim plan proposed decreasing the amount of water released from Lanier. The Corps requested a biological opinion (BiOp) from the Fish and Wildlife Service (FWS) regarding the effects of the plan on endangered species located in Florida, including Gulf sturgeon and three mussels. In June, the FWS issued a BiOp finding that the plan would not affect the survival or future recovery of the species.[11] The plan received final approval in June, and Florida counties are calling for the Governor to take legal action objecting to the plan.[12]

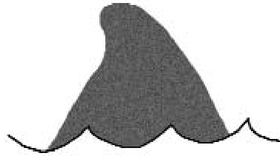
Conclusion

With a long, dry summer predicted and an endless round of lawsuits on the horizon, the water wars seem likely to continue. The Corps is developing a new water control plan for Lake Lanier and the other federal reservoirs, but the plan is not expected to be complete for three years.[13] In the meantime, court action may shape the Corps' plan and water allocation in the region.

Endnotes

1. Stacy Shelton, *Corps Overtaps Lanier; New Proposal Calls for Holding More Water in Drought*, THE ATLANTA JOURNAL-CONSTITUTION, Apr. 16, 2008, at 1A.
2. *Id*.
3. *Id*.
4. Stacy Shelton, *Perdue Wants to Relax Water Rules*, THE ATLANTA JOURNAL-CONSTITUTION, Feb. 6, 2008.
5. Ben Evans, *Attention Shifts to Courts after Talks Collapse*, THE MOBILE PRESS REGISTER, Mar. 9, 2008, at B5.
6. *Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F3d 1316 (D.C. Cir. 2008).
7. Evans.
8. Shelton, *supra* note 1.
9. Shelton, *supra* note 1.
10. Evans, *supra* note 5.
11. David Royse, *Water Plan Won't Doom 4 Species*, THE MOBILE PRESS REGISTER, June 3, 2008, at B5.
12. Bruce Ritchie, *Counties Ask Crist to Step up*, FLORIDA TODAY, June 13, 2008, at 8B.
13. Shelton, *supra* note 1.

Photograph of drying banks of Lake Lanier courtesy of NOAA's National Weather Service Forecast Office.



No Sanctions for Vessel Carrying Shark Fins

***United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976 (9th Cir. 2008).**

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The Ninth Circuit Court of Appeals found that a company that chartered a vessel to purchase and transport shark fins could not be sanctioned under the Shark Finning Prohibition Act (SFPA). The court held that enforcement of the Act would result in a violation of due process, since there was not enough notice that the chartered vessel would be included under the Act as a "fishing vessel."

Background

In 2000, Congress enacted the SFPA as an amendment to the Magnuson-Stevens Fishery Conservation and Management Act to eliminate the practice of shark finning. The Act makes it illegal to remove fins from a shark and discard its carcass at sea, to have these fins aboard a *fishing vessel* without the carcass, and to land any fin without the carcass.[1]

In 2002, Tai Loong Hong Marine Products, Ltd. (TLH) chartered a United States vessel, the *King Diamond II* (*KD II*), to meet a foreign fishing vessel on the high seas, purchase shark fins from the vessel, and deliver the fins to TLH at a Guatemalan port. The KD II subsequently met with over twenty vessels on the high seas and purchased approximately 64,695 pounds of shark fins. When the *KD II* was approximately 250 miles off the coast of Guatemala, the U.S. Coast Guard detained the ship when it found shark fins aboard the vessel without shark carcasses.

The United States government seized the shark fins and brought a complaint for the forfeiture of the shark fins. TLH did not contest that the ship was carrying the shark fins, but its classification as a fishing vessel. The company claimed that the forfeiture of the shark fins equaled a violation of due process. The district court ordered that the fins be forfeited, and TLH appealed.

On appeal, the first issue was whether the definition of "fishing vessel" under the Magnuson-Stevens Act gave sufficient notice to TLH that the vessel's activities would subject the company to sanctions. The second issue was whether the regulations applied to the *KD II* since it acquired the fins while at sea and was bound for Guatemala and not a United States port.

Due Process

To avoid a violation of due process, fair notice of what conduct is prohibited must be given before a sanction is imposed. Furthermore, the notice must be explicit enough that a person of "ordinary intelligence" would be able to know what activity is forbidden and to act accordingly.[2]

The court agreed with TLH that there was a violation of due process in this instance. There was nothing in the statutes or regulations that would have put TLH on notice that the vessel they chartered would be considered a *fishing vessel* as defined in the Magnuson-Stevens Act or 16 U.S.C. § 1802(18)(B).

Under the Act, the term *fishing vessel* includes any vessel that "aid[s] or assist[s]" another vessel in any activity relating to fishing.[3] The court found that the *KD II* did not fall under this part of the definition because their activities of purchasing, storing, and transporting the fins did not aid or assist the foreign vessels in any fishing activities. The *KD II* was acting for its own commercial purposes. The court rejected the notion that the foreign vessels were aided by being allowed to stay out at sea longer to fish than they otherwise would have had the

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KD II not purchased the fins from them. According to the court, any benefit that the foreign vessels derived was purely incidental.

The court then looked at the implementing regulations of the statute and concluded that they do not provide fair notice of the *KD II*'s status as a fishing vessel. The court looked at two specific provisions within the regulation: the possession prohibition and the landing prohibition. The former prohibits the possession of the fins without carcasses aboard U.S. fishing vessels seaward of the inner boundary of the U.S. EEZ. The regulations also prohibit the landing of shark fins without carcasses by any U.S. or foreign fishing vessel if they were harvested seaward of the inner boundary of the U.S. EEZ, specifically including "any cargo vessel that received shark fins from a fishing vessel at sea" in its definition of fishing vessel.[4] The government seized the fins under the possession provision, which does not include a provision regarding cargo vessels. Although the landing provision prohibits possession on cargo vessels, the U.S. government conceded that the landing provision applied only to vessels landing in U.S. ports, not foreign ports such as Guatemala where the *KD II* was to land. Looking at the regulations together, the court found that they did not provide notice that the *KD II* would be prohibited from possessing fins for the purpose of making a delivery to a foreign port.

Conclusion

Despite Congress' intent to curtail the practice of shark finning, the court found that under these circumstances there was no notice that the *KD II* could be considered a fishing vessel. Thus TLH had no way of knowing that the actions of the *KD II* (purchase, transportation, and storage of shark fins without a carcass) would be prohibited and subject to sanctions. Therefore, there was a violation of due process when the fins were subjected to forfeiture under SFPA.

Endnotes

1. *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 978 (9th Cir. 2008) *quoting* 16 U.S.C. § 1857(1)(P).
2. *Id.* at 980.
3. *Id.*
4. 50 C.F.R. 600.1204.

Photograph of bags of shark fins courtesy of Jessica King, Marine Photobank.

Spain Precluded from Bringing Oil Spill Case in U.S. Court

Reino de Espana v. American Bureau of Shipping, Inc., 528 F.Supp.2d 455 (S.D.N.Y. 2008).

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The District Court for the Southern District of New York held that Spain is precluded from bringing a negligence action in the United States against the American Bureau of Shipping, a classification society, as a result of the Convention on Civil Liability for Oil Pollution Damage that regulates which countries may hear such cases.

Background

In October 2002, the *Prestige*, an oil tanker, left Russia and Latvia fully laden for Gibraltar. During the voyage, the *Prestige* experienced structural failures which, in November 2002, resulted in the discharge of multiple tons of oil into the ocean off the northwestern Spanish coast. The disaster left a slick over 200 yards wide and 18 miles long, and as the *Prestige* sank, a second large oil slick formed.[1] In total, approximately three million gallons of fuel was discharged into the environment.

Reino de Espana ("Spain") brought suit against the American Bureau of Shipping, Inc. ("ABS") seeking damages as a result of the oil spill. Spain claimed that ABS negligently certified the *Prestige* as capable to carry fuel cargoes and, as a result, is subject to civil damages.

ABS is engaged in the business of determining the fitness of vessels through a procedure called classification. ABS surveyors inspect the vessel, and if the vessel is in compliance with ABS standards, the vessel is issued classification documents. Classification by ABS is essential to the marketability of a vessel for commercial shipping. The *Prestige* was initially certified when it was built in 1973 and continued to be certified until it sank.

Analysis

When an oil shipping incident results in pollution damage in the territory of a signatory state, the Convention on Civil Liability for Oil Pollution Damage (CLC) imposes liability on the owner of a vessel which was carrying oil as cargo and exempts third parties unless they acted recklessly. ABS moved for summary judgment claiming that Spain could not prove the "reckless" conduct required to hold ABS liable. Secondly, ABS claimed that under the CLC, Spain can only seek damages in a country that is a signatory to the CLC; consequently, since the United States is not a signatory to the CLC, the U.S. does not have proper jurisdiction to hear this case.

The court first looked at whether the CLC was applicable to the case. ABS is classified, under the CLC, as any "other person who…performed services" for the *Prestige*. Because ABS provided certification services to the *Prestige*, ABS argues that Spain is subject to the limitations imposed by the CLC. Spain argued in response that the CLC is only intended to cover individuals physically working on a vessel at the time of a pollution incident and thus is inapplicable to ABS. The court however rejected this argument by referring to the clear language of the CLC and held that the CLC does govern this situation.

Next, the court turned to the issue of whether the CLC required Spain to bring its claim in a contracting state. The court explained that the CLC creates legal obligations analogous to contractual obligations on the states that are parties to it. Since Spain is a contracting state, it is subject to its limitations. The CLC expressly provides that "actions for

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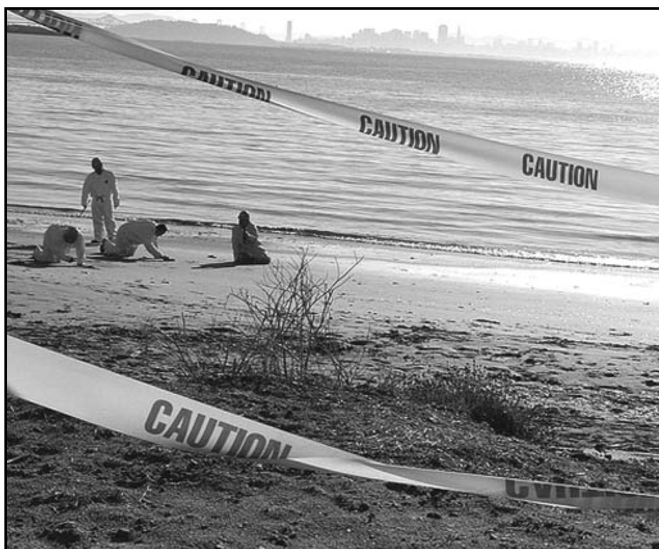
compensation may only be brought in the Courts of any such Contracting State or States." Since the U.S. is not a contracting state to the CLC, pursuing an action in the U.S. is a violation of the CLC. As a result, the court granted ABS's motion for summary judgment because the court lacked jurisdiction to hear this case.

Photograph of oil cleanup courtesy of Jon Fisher, www.drr.net/Marine Photobank.



Conclusion

The *Prestige* sank and caused an international environmental disaster by discharging nearly three million gallons of oil into the ocean off the coast of Spain. ABS certified that the *Prestige* was capable of carrying oil cargoes, when the ship was not structurally sound. However, the court held that the U.S. may not hear the case, since Spain is subject to the terms and conditions of the CLC and the CLC mandates that civil suits may only be brought in signatory countries.

Endnotes

1. *The Prestige Oil Spill*, TIME, *available at* http://www.time.com/time/photoessays/oil-spill/index.html .

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Conclusion

The U.S. Court of Appeals for the D.C. Circuit found that the procedural inadequacy of the Council's action fatally tainted the three M&E requirements added by NMFS to the Final Rule. Under the law, the Secretary was required to decide whether the entirety of the proposed regulation had been lawfully submitted and deemed "necessary or appropriate." The court found that the Secretary should have required some indication that the Council deemed the M&E requirements necessary or appropriate prior to their submission as is required by the MSA. In publishing the proposed rule with the three additional M&E requirements, the Secretary's conduct was inconsistent with law. As such, the court deemed that FCA was entitled to relief, reversed the district court's summary judgment to the Secretary and remanded the case with instructions to strike the three disputed M&E requirements from the final rule.

Endnotes

1. Groundfish are fish that spend most of their lives on or near the ocean floor.
2. For an FMP or an amendment to an FMP to take effect, it must first be submitted to the Secretary for review of compliance with applicable law and publication in the Federal Register for public comment. Throughout the review and public comment process, the Secretary is bound by the judicial review procedures of the Administrative Procedure Act, namely a requirement that the Secretary's actions not be an "arbitrary and capricious abuse of discretion…"
3. Amendment 79, See *Groundfish Retention Standard,* 70 Fed. Reg. 35,054, 35,055 (June 16, 2005*) see also Final Rule,* 71 Fed. Reg. at 17,362.
4. NMFS acknowledged that the M&E requirements were not before the Council when it took its final action in June 2003. *Final Rule,* 71 Fed. Reg. at 17373.
5. 16 U.S.C. § 1853(c).

Limited-Entry Statutory Scheme Is Constitutional

Riley v. Rhode Island Department of Environmental Management, 941 A.2d 198 (R.I. 2008).

Terra Bowling, J.D.

In a constitutional challenge to Rhode Island's limited-entry fishing licensing scheme, the Rhode Island Supreme Court has held that statutory limits on entry into the state's fishery do not the violate the right to pursue a lawful occupation or the right to a free fishery.

Background

When Steven Riley applied to the Rhode Island Department of Environmental Management (DEM) for a principal effort fishing license, the department denied his application, citing the fact that Riley did not have a prior license. Rhode Island's Commercial Fishing Licenses Act of 2000 allows only those holding a valid principal-effort or multipurpose license before December 31, 2002 to receive a "new" principal-effort license.[1]

Although the Department denied Riley's application for the principal effort license, it approved Riley for another, less lucrative, entry-level commercial fishing license. Despite this, Riley filed suit, claiming that his constitutional rights were violated because the entry-level license did not give him the same rights to fish for the same species as other commercial fishermen. The lower court granted summary judgment in favor of the DEM.

Right to Pursue a Lawful Occupation

On appeal, the court first addressed Riley's claim that the denial of the preferred license violated the Due Process clause of the Fourteenth Amendment by denying his fundamental right to pursue a common occupation of life. The court looked at whether a fundamental right was, in fact, involved.

The court recognized that the "liberty" provision in the due process clause includes "the right of the individual to engage in the common occupations of life . . ."[2] However, in this instance, the court found that the statute did not restrict Riley's right to pursue the occupation of commercial fisherman, given that he was granted a commercial fishing license. The fact that the license was less lucrative than the one he sought did not matter. The license he was approved for enabled him to harvest more than a hundred species of fish and other sea creatures.

The fact that the license was less lucrative than the one he sought did not matter.

Because no fundamental right was involved, Riley had to prove that there was a violation of substantive due process, which requires a plaintiff to prove that the law is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[3] Riley was unable to prove that the law was arbitrary and unreasonable. The court noted that limiting the fishery to those who possessed a license prior to 2002 "has a real and substantial relationship to a legitimate governmental goal of limiting the number of licenses available to take restricted species."[4]

See Limited Entry, page 14

Limited Entry, from page 13

Right of Fishery

Next, the court examined whether a fundamental constitutional right of fishery was implicated in the case. The court noted that the Rhode Island constitution guaranteed the "rights of fishery" to the people of the state.[5] Furthermore, the state courts have consistently held "that the right of fishery in Rhode Island belongs to the general public, and to no particular individual."[6] However, the court did examine whether the General Assembly acted within its power granted to it by the state constitution in regulating the fishery.

Riley argued that because the statute only allowed some commercial fishermen to take restricted species, it denied other citizens equal access to the fishery in violation of their constitutional rights. Essentially, Riley thought that the right of equal access required that "either everyone is permitted to harvest the same species, or no one is."[7] The court disagreed, noting that taking "equal access" literally was inconsistent to the court's holdings that no fundamental right is implicated when the General Assembly enacts legislation for the "good of the whole," at the expense of a few.

Pursuant to the equal protection clause, legislative actions that do not affect a fundamental right or suspect class, such as race or national origin, are subject to a "minimal scrutiny" analysis. Under minimal scrutiny, a statute merely has to bear a reasonable relationship to public health, safety, or welfare. Riley argued that because there were other interstate regulations in place limiting the poundage of species that could be harvested, the state statues limiting entry into the fishery were unnecessary. The court had to determine whether limiting entry into the fishery was a rational means to achieve a legitimate goal. The court noted that preserving the state's natural resources for the good of the whole was a not only a legitimate goal, but a constitutional duty of the General Assembly. Furthermore, regulating the access to different species of fish was a rational means of protecting not only the viability of the stocks and the fishing industry, but also was for the well-being of the people of the state.

Conclusion

The court upheld the statutory scheme as constitutional, finding that the objectives of the statutory scheme are legitimate and limiting the entry of new licenses is a rational way to achieve the goal of preserving the state's marine fisheries.

Endnotes

1. R.I. Gen Laws § 20-2.2-5(1)(i) (2008).
2. *Riley v. R.I. Dep't of Envtl. Mgmt.*, 941 A.2d 198, 206 (R.I. 2008)
3. *Id*. at 207.
4. *Id*.
5. R.I. Const. art. 1, sec. 17.
6. *Riley*, 941 A.2d 198, 208.
7. *Id*. at 210.

Photograph of commercial fishermen courtesy of NOAA's National Marine Fisheries Service.

Minnesota Court of Appeals Dismisses Nonprofit's Suit

***Save our Creeks v. City of Brooklyn Park*, 2008 Minn. App. Unpub. Lexis 175 (Minn. Ct. App. 2008).**

Sara Wilkinson, 3L, University of Mississippi

In a recent decision, the Court of Appeals of Minnesota dismissed claims brought against the city of Brooklyn Park by a nonprofit corporation concerned with the effects of a residential development on an area creek and wetlands. The nonprofit, Save Our Creeks, alleged that the city acted arbitrarily and capriciously when it denied a request for further environmental review of the development.

Background

The claims brought by Save Our Creeks arose in June 2003, when several individuals, including William Barton, petitioned the Minnesota Environmental Quality Board (MEQB) for further environmental review of several pending residential development projects planned by Brooklyn Park. Barton and the petitioners were concerned that the development would negatively affect Oxbow Creek and its surrounding wetlands. In turn, the MEQB designated the city of Brooklyn Park as the responsible governmental unit (RGU) charged with deciding the need for further environmental review. Brooklyn Park, as the RGU, determined that further environmental review in the form of an Environmental Assessment Worksheet (EAW) and/or an Environmental Impact Statement (EIS), was not required for the projects in the subject area and denied Barton's petition.

After Brooklyn Park denied his petition, Barton formed Save Our Creeks to dispute the city's decision. Subsequently, Save Our Creeks filed a complaint for declaratory judgment against Brooklyn Park in August 2003, claiming the actions were in violation of the Minnesota Environmental Policy Act (MEPA) when it denied Barton's petition for environmental review because several projects in Brooklyn Park met the mandatory EIS requirement. The nonprofit later added a claim alleging that Brooklyn Park violated the Minnesota Environmental Rights Act (MERA) when it refused further environmental review of the residential development near Oxbow Creek.[1]

Both parties moved for summary judgment. The district court denied Save Our Creek's motion for summary judgment. The district court denied Brooklyn Park's summary judgment motion with respect to the MEPA and MERA claims but granted summary judgment as to all other claims.

At the close of trial, the district court granted Brooklyn Park's motion to dismiss, concluding that Save Our Creeks did not meet its burden of proof by a preponderance of the evidence. The district court noted that no testimony was offered to support or explain any of the

See Save Our Creeks, page 16

Photograph of Oxbow Creek courtesy of Bill Barton of "Save Our Creeks."

Save Our Creeks, from page 15

admitted exhibits nor was any testimony offered to show that Brooklyn Park's decisions were arbitrary or capricious or that protected waters were encroached upon.[2] Save Our Creeks appealed the district court's decision.

EIS or EAW?

In its appeal, Save Our Creeks argued that dismissal of its MEPA claim was improper because Save Our Creeks presented evidence showing that Brooklyn Park acted arbitrarily and capriciously when it denied its request for further environmental review as required under MEPA. Save Our Creeks contended that further environmental review was required in the form of an EIS because the residential development projects: 1) eliminated a protected water or wetland; and 2) consisted of a project area that included over 1,500 units.

The list of protected waters did not specifically list Oxbow Creek as a protected water . . .

Minnesota law[3] sets forth the criteria for determining when an EIS and an EAW must be prepared by an RGU for a proposed project. According to Minnesota law, an EIS must be prepared when the proposed project has the potential for significant environmental effects resulting from any major governmental action. According to the law, an EAW is required when there is material evidence showing that the project may have the potential for significant environmental effects. [4]

Save Our Creeks contended that further environmental review was warranted because Oxbow Creek is a Department of Natural Resources (DNR) protected water, and therefore the preparation of an EIS was required. To meet the threshold requirement for an EIS, Save Our Creeks had to establish that Oxbow Creek is a statutorily defined protected water or wetland under Minnesota law[5] and that the disputed development projects would have eliminated Oxbow Creek.

At trial, Save Our Creeks submitted an exhibit identifying protected DNR waters in Hennepin County and a list outlining the protected waters and wetlands in that area from 1984. The list of protected waters did not specifically list Oxbow Creek as a protected water, and Save Our Creeks did not provide testimony to establish that Oxbow Creek was one of the identified unnamed protected waters on the list. The court pointed out that even if Oxbow Creek had been identified as a DNR-protected water in 1984, Save Our Creeks was still required to establish that Oxbow Creek met the statutory definition of a protected water or wetland at the time of its 2003 petition. The Minnesota Court of Appeals agreed with the district court's conclusion that the nonprofit did not provide sufficient evidence that the actions would encroach on protected waters.

Number of Units in Project

On appeal, Save Our Creeks incorrectly asserted that an EIS was required because the residential development project area concerned more than 1,500 attached and unattached units. According to Minnesota Law, an EIS must be prepared if the residential development includes 1,000 unattached units or 1,500 attached units for certain metropolitan RGUs. Further, multiple projects and multiple states of a single project that are connected actions or phased actions must be considered in total when comparing the project or projects to determine whether an EIS is necessary.[6]

One of Brooklyn Park's city planners stated in an affidavit to support Brooklyn Park's summary judgment motion that the total project area consisted of 1,590 units. Save Our Creeks argued that the affidavit constituted an admission that the developments met the threshold requirement to mandate an EIS. However, the

affidavit identified a project area consisting of 36 individual development projects, which individually consisted of too few units to meet the mandatory EIS threshold. As a result, to establish that an EIS is necessary, Save Our Creeks must show that the separate development projects located in the project area in the city planner's affidavit were connected actions.

At trial, Save Our Creeks did not provide any testimony or other evidence to establish that the project area identified in the affidavit consisted of developments that are connected actions that met the mandatory EIS threshold. As such, Save Our Creeks did not establish that an EIS was mandatory and thus did not meet its burden of proof to show that Brooklyn Park's actions in denying its petition for further environmental review were arbitrary and capricious.

Conclusion

Save Our Creeks failed to establish that Brooklyn Park acted arbitrarily and capriciously when the city did not require further environmental review of certain residential developments in the form of an EIS or EAW. Essentially, Save Our Creeks did not introduce sufficient evidence establishing Oxbow Creek as a DNR protected water, due in large part to a procedural error.[7] Accordingly, the Minnesota Court of Appeals upheld the district court's decision allowing the city of Brooklyn Park to continue residential development projects in the Oxbow Creek area.

Photograph of Oxbow Creek courtesy of Dell Erickson of "Save Our Creeks."

Endnotes

1. After extended litigation as to whether Save Our Creeks could proceed because a non-attorney signed its initial pleadings, Save Our Creeks filed an amended complaint on March 30, 2006.
2. At the 2006 trial, only Barton testified. One month prior to trial, Save Our Creeks filed a witness list that included several lay and expert witnesses not previously identified before the discovery deadline. Thus, the district court granted Brooklyn Park's motion to exclude all but Barton's testimony at trial.
3. MINN. STAT. § 116D.04 (2a); In previous holdings, the Minnesota Court of Appeals has stated that material evidence is evidence that is admissible, relevant and consequential to determine whether the project may have the potential for significant environmental effects.
4. *Watab Twp. Citizen Alliance v. Benton County Bd. of Comm'rs,* 728 N.W.2d 82, 90 (Minn. App. 2007).
5. MINN. STAT. § 103G.005, subds. 15-15a.
6. A connected action exists when the RGU determines that two projects are related because: 1) one project would directly induce the other; 2) one project is a prerequisite for the other; or 3) neither project is justified by itself.
7. See *supra* note 2.

Emissions, from page 4

EPA authorization before adopting "standards and other requirements relating to the control of emission from … vehicles or engines." PMSA again argued that the regulations were preempted by the CAA, as well as the Submerged Lands Act.

The board first argued that § 209(e)(2) applies only to new engines and the Marine Vessel Rules only apply to non-new engines, therefore, the rules were not preempted. The court disagreed, relying on a D.C. Circuit case holding that the preemption of § 209(e)(2) applies to both new and non-new engines.

. . . Marine Vessel Rules were not mere "in use requirements" . . .

Next, the Board argued that the Marine Vessel Rules were not emissions standards subject to § 209(e)(2), but, instead, were "in use requirements" under § 209(d), which are not subject to preemption. The court concluded that the rules were in fact emissions standards. Because the rules subject the engines to precise quantifications, the Marine Vessel Rules "fit within the . . . definition of 'standards' as a requirement that a 'vehicle or engine must not emit more than a certain amount of a given pollutant.'"[1] The court also concluded that the Marine Vessel Rules were not mere "in use requirements" under § 209(d). Under 209(d), states may enact in use requirements to "control, regulate, or restrict the use, operation, or movement of licensed motor vehicles." The EPA has extended this allowance to the regulation of nonroad engines, including marine vessels. The Board argued that the Marine Vessel Rules met the definition of an in use requirement, because they regulated the sulfur content of the fuel in marine vessels. However, the court found that the plain language of the rules regulated emissions and not fuel content.

Conclusion

In this instance, the court found that the regulations were emissions standards and were therefore preempted by the § 209(e)(2) of the CAA. California will be required to obtain EPA authorization prior to enforcing the Marine Vessel Rules. The court did not address preemption under the Submerged Lands Act.

Endnotes

1. *Pacific Merchant Shipping Association v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008).

Photograph of ocean-going ship courtesy of ©Nova Development Corp.

Department Lacked Authority to Regulate under State's Shoreline Management Act

Twin Bridge Marine Park, LLC v. Dep't of Ecology, 162 Wn.2d 825 (Wash. 2008).

Terra Bowling, J.D.

The issue of regulatory authority over coastal development permits in Washington State came to a head over the construction of a dry-storage marina. The Supreme Court of Washington ruled that local governments have the exclusive authority to approve substantial development permits (SDP). Furthermore, the only recourse for the State Department of Ecology to challenge an SDP is through the Washington Land Use Petition Act (LUPA).

Background

The Washington State Shoreline Management Act (SMA) regulates development on state shorelines. Under the SMA, local governments must develop shoreline management plans (SMP) that are approved by the Department. The counties then have the primary responsibility for administering the permit program and ensuring compliance with their SMPs.

In 1975, Skagit County, Washington approved a final environmental impact statement (FEIS) for Twin Bridge Marine Park, LLC, to construct an office, a warehouse, and marine facilities on its property. In 1982, the county issued two shoreline SDPs to Twin Bridge for the development. The company later decided to convert its business into a dry-storage marina, and, in 2000, the county issued an FEIS addendum to the 1975 FEIS, determining that the dry-land marina development would not have a significant adverse impact on the environment. The county issued two amended building permits for the project. The city of Anacortes appealed the permits under LUPA, but the Department did not join in the appeal.

After Twin Bridge began construction, the Department issued a stop work order and ordered the company to obtain a new substantial development shoreline permit. When the company did not stop construction, the Department issued a $17,000 penalty. The company appealed the decision to the Shorelines Hearings Board (Board). Skagit County subsequently reevaluated the project and decided to require new SDPs and suspended the amended building permits. Twin Bridge stopped work on the project.

After applying to the county for new permits, the company reached a settlement agreement in which the Department withdrew its penalty. The company also reached a separate agreement with the county and Anacortes with regard to the LUPA challenge. The county then reinstated the building permits and Twin Bridge resumed construction. The county issued a final shoreline permit incorporating local, state, and federal permits for the site. The Department refused to recognize the permits, reinstated the penalty of $17,000 and tacked on an additional $17,000 penalty. Despite this, Twin Bridge completed construction and opened for business. The Department then issued a third, $25,000 penalty. Twin Bridge appealed the penalties to the Board, which upheld the penalties.

On appeal, the superior court reversed the Board's decision, finding that the county's issuance of the building permits and the FEIS addendum resulted in county authorization for the project. Furthermore, an additional permit from the Department was not necessary, since the county had concluded that the project was

See Shoreline Management Act, page 20

Shoreline Management Act, from page 19

in compliance with the Shoreline Management Act (SMA). And, finally, the Department could not penalize projects with valid county permits without first filing a LUPA challenge. In effect, the Department's issuance of penalties resulted in an invalid collateral attack on the county's decision.

The Washington Court of Appeals affirmed the ruling. The Department appealed the decision to the Washington State Supreme Court. The key issue considered on appeal was whether the Department could impose penalties under the SMA when the project had been constructed pursuant to valid county permits.

Authority under the SMA

First, the court noted that the SMA does not give the Department the authority to directly review a local government's decision to issue an SDP. However, the Department may review other permits under the SMA, such as a conditional use permit. The Department argued that the dry-land marina exceeded the impact foreseen by the original permits, and, thus, the county wrongly concluded that SDPs were the appropriate permits. The court disagreed, finding that "it is counterintuitive that a dry-storage facility would have more shoreline impact than a water marina." Additionally, because the county had two EISs it had the best available information for determining the appropriate permit. For those reasons, the court found that the county's characterization of the permits would control.

Next, the court turned to the issue of whether the Department had the authority to impose penalties on Twin Bridge. The Department cited provisions of the SMA that allow it to impose fines on those who develop in shoreline areas without the proper permits. The court noted that the company had constructed the marina only after reaching an agreement with the Department that it would apply for a new SDP and then obtaining those permits. In this instance, the court found that Twin Bridge had obtained all of the necessary permits, and the Department could not impose penalties on the company.

LUPA

The court turned to the Department's regulatory authority over local governments regarding shoreline development. Relying on an analogous case, *Samuel's Furniture v. Department of Ecology*,[1] the court noted that under the SMA, a local government and not the Department makes the threshold determination of what shoreline SDPs are required under the county's SMP. In *Samuel's Furniture*, the court had determined that LUPA provided the appropriate means for entities challenging a final land use decision by a local authority. The court found that the Department was required to comply with LUPA in this instance as well, given that this was a final land use decision issued by a local authority, Skagit County.

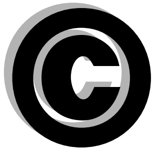
LUPA stipulates that no "person" – including entities like the Department – is exempt from its provisions when challenging a final land use decision by a local authority with jurisdiction. LUPA requires those opposing a final land use decision to appeal that decision within twenty-one days. In this instance, the Department had notice of the county's decision and did not appeal. After twenty-one days elapsed, the permits were valid and Twin Bridge correctly relied on them.

Conclusion

The court concluded that the disagreement with the local permitting authority should have been resolved through LUPA and not through penalties assessed on Twin Bridge.[2] The court affirmed the lower courts' decisions and dismissed the Department's fines and orders.

Endnotes

1. 147 Wn.2d 440 (Wash. 2002).
2. *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825, 847 (Wash. 2008).



"But I Own It . . . I Think." The Joys of Copyright Ownership

Will Wilkins, J.D.

What is copyright ownership?

In this series of articles, we have explored many aspects of copyright law but have yet to address, in more than a cursory fashion, some of the most fundamental issues involving copyright ownership such as: who owns the copyright in a work and what does owning a copyright mean? We will take on those issues here.

Let's first review what can be copyrighted. U.S copyright law delineates several types of "works of authorship" which can be protected by copyright. These include: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. If a work does not fit into these categories it is not protected by copyright law (though other means of protection may be available).

So, assuming that there is an original work of authorship, as defined above, then what rights does the owner have in the work? In other words, why are we so concerned about ownership? Copyright ownership, like other types of property ownership, carries with it some very strong rights reserved to the owner of the property. These rights include the right to copy the work, to prepare other works based on the original, to distribute copies, and to display or perform the work publicly. In copyright law, these rights are known as "exclusive rights" which means that the owner of the copyright rights not only has the ability to do these things, he has the ability to keep others from doing these things with his works.

Who initially owns a copyright?

Generally speaking, the author or creator of a work is the owner of the copyright. If the work is a joint work, then the creators become co-owners of the work.

Easy enough, right? Not so fast. This general rule may not apply in the workplace, where, in certain situations, the work will be termed a "work made for hire," and the copyright is owned by the employer. There are two instances where a work may become a "work made for hire." The first is when it is created by an employee within the course and scope of his employment. In other words, where an employee creates a work as a part of his job, then that work will be owned by the employer.

Another type of work may also be a "work made for hire" and thus owned by the employer. It is a work that is specifically ordered or commissioned where the parties expressly agree in a signed written document that the work is to be a work made for hire. But, not all works qualify under this category – it only applies to: contributions to collective works; parts of motion pictures or other audiovisual works; translations; supplementary works; compilations; instructional texts; tests or answers; or atlases.

. . . the owner of the copyright is usually the creator . . .

So the owner of the copyright is usually the creator, unless the work is a work made for hire (or unless the rights have been signed away – more on that later). Keep in mind here, though, that we are talking about ownership of a copyright and not ownership of the physical work itself. One aspect of copyright ownership

See Copyright, page 22

Copyright, from page 21

that is very different than the ownership of other types of property is that the copyright in a work and the work itself are two entirely different pieces of property and may be owned by different individuals. For example, when you buy a book in the bookstore, you clearly own the copy of the book you bought, but you do not own the copyright to that book. The copyright ownership remains with the copyright holder, in this case, usually the author or publisher.

Also, a special note is in order to those dealing with universities or the federal government, since both alter the relationship between creators and employers. Universities traditionally waive any claim they might have to copyright ownership of faculty and staff work, but often reserve it in certain specific circumstances involving, for instance, specifically commissioned works or substantial uses of university resources. In fact, there is no modern norm regarding how universities determine copyright ownership for works created on campuses, so you must look at the internal policies of each on a case by case basis.

Works created by federal government employees are also special cases. Pursuant to Section 105 of the copyright statutes, "[c]opyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise." A work of the United States Government is defined as a work created by a government employee as part of his job.

Photograph of recording studio courtesy of the U.S. House of Representatives.

Transfers of copyright rights

Copyright ownership, like ownership of physical property, can be transferred to another person. This transfer must be in writing and must be signed by the owner or his authorized agent.

Similarly, copyright owners can allow others to use exercise their copyright rights (to copy, distribute, perform . . .). These permissions are generally referred to as licenses. The best licenses clearly set forth – in writing - the parameters of the permission. Owners can restrict such permissions to a certain period of time, to a certain geographic boundary, or in any other imaginable way.

Ownership matrix

The determination of copyright ownership is important from a couple of perspectives. First, if you are a creator of original works, it is critical to know if you will own the works you create in different situations and whether you need to enter into a written agreement to alter these default outcomes set by U.S. copyright law. Also, if you want to use someone else's works -say to reprint an article- you will need to determine first who owns the copyright in the work.

Though simplified here, I generally follow the basic outline set forth above when working through copyright ownership issues. First, ownership generally vests in the creator unless it was a work for hire. If it might be a work for hire, I ask if there is there a chance there is a university or federal government employee involved. By answering these questions, you have at least a good start in finding the copyright owner.

Coast to Coast

And Everything In-Between

The Red Bird Reef, an artificial reef constructed from New York City's subway cars off the coast of Delaware, has been a huge success with fish and fishermen alike. The reef consists of over 700 cars on the ocean floor and is populated by mussels, sponges, black sea bass, tautog, and flounder. Since the reef was started several years ago, commercial and recreational fishermen have flocked to the area. Other states, such as New Jersey Maryland, and Virginia, have also used New York's subway cars to build reefs. The growth of Delaware and other states' reefs may slow down this summer, however, as state officials in New York are working to get permits that would allow them to use the cars for reefs off their own coast, according to *The New York Times*.

Photograph of car used in artificial reef courtesy of NOAA's coral Kingdom Collection, photographer, Dr. James P. McVey, NOAA Sea Grant Program.

A shipwrecked dog named Snickers and parrot named Gulliver have been rescued and expect to find new homes. The pets were aboard their owners' sailboat when it landed on a coral reef near a tiny atoll 1,000 miles south of Hawaii. The owners swam to shore with Snickers and Gulliver, but when the owners hitched a ride from the atoll on a cargo vessel, the pets were left in the care of native islanders. In March, word spread that the animals would be destroyed. A boating journal sent out an SOS and Norwegian Cruise Line workers were able to rescue Snickers from the island. Snickers was quarantined in Hawaii until he could be sent to his new owner in Las Vegas. Plans to move Gulliver from the atoll to nearby Christmas Island and later to Los Angeles are in place, according to the *Associated Press*.

Graphic courtesy of ©Nova Development Corp.

A missing Cape Cod lighthouse has shown up in California. The lighthouse was thought to be destroyed in 1925, but it was actually taken down by the Coast Guard and moved to the California coast. The find was discovered by lighthouse researchers, who could not uncover how or why the lighthouse was moved. The lighthouse is still used as a navigational aid and hostel in Point Montara, California, according to the *Associated Press*.

The National Oceanic and Atmospheric Administration (NOAA) is seeking comments on its proposed authorization of the Navy's mid-frequency sonar training exercises around the Hawaiian Islands. Comments will be accepted through July 23. For more information, please visit http://www.noaanews.noaa.gov/stories2008/20080623_navysonar.html .

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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THE SANDBAR is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under Grant Number NA16RG2258, the Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi Law Center. The U.S. Government and the Sea Grant College Program are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. This newsletter was prepared by the Sea Grant Law Center under award NA06OAR4170078 from NOAA, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Sea Grant Law Center or the U.S. Department of Commerce.

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MASGP 08-004-02 *July 2008*

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