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Supreme Court Upholds EPA's Regulation of Intake Systems

Entergy Corp. v. Riverkeeper Inc., 129 S. Ct. 1498 (2009).

Brian R. Fredieu, J.D.[1]

The U.S. Supreme Court rejected a challenge by several environmental groups and states to the Environmental Protection Agency's (EPA) use of cost-benefit analysis in regulating water pollution by power plants. The case involved regulation under the Clean Water Act (CWA)[2] that seeks to ensure protection of shellfish, fish, and wildlife from the intake structures used by power plants to take in cooling water.

Background

Petitioners operate, or represent those who operate, large power plants. In the course of generating power, coal-fired and other types of power plants generate large amounts of heat. To prevent overheating, these plants employ "cooling water intake structures" that extract enormous amounts of water from nearby water sources. Doing so is hazardous to the fish and other aquatic life forms that live in these bodies of water, chief among these hazards is "the squashing against intake screens (elegantly called 'impingement') or suction into the cooling system ('entrainment') of aquatic organisms that live in the affected water sources."[3] To mitigate against this, § 316(b) of the CWA requires that power plants employ various measures. The CWA mandates that any standard established pursuant to § 316(b) and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. This section employs a variety of "best technology" standards to regulate the discharge of effluents into the nation's waters.

After 30 years of regulating new facilities under § 316(b) on a case by case basis, the EPA promulgated a regulation requiring existing cooling water intake structures to be retrofitted to comply with the agency's latest determination of the "best technology available for minimizing adverse environmental impact," (which the Court identifies as "BTA") measured in terms of the potential effects on early life stages of fish. The EPA issued two phases of regulations. Its "Phase I" regulations govern new cooling water intake structures, while the "Phase II" rules at issue here apply to certain large existing facilities. For Phase II, the EPA set "national performance standards," requiring most Phase II facilities to reduce "impingement mortality for [aquatic organisms] by 80 to 95 percent from the calculation baseline," and requiring a subset of facilities to reduce entrainment of such organisms by "60 to 90 percent from [that] baseline."[4] For Phase I power plants, the EPA regulations require the use of any technology at least as effective as a "closed-cycle cooling system." These systems re-use cooling water within the plant, which substantially reduces the amount of external water used, and thus reducing the impact on fish and other aquatic life. However, because it is much cheaper to build a closed-cycle cooling system from the ground up than it is to retrofit an existing plant with such a cooling system, the EPA regulations exempt old plants from this requirement. The EPA decided that the BTA standard allows consideration of the technology's costs and of the relationship between those costs and the environmental benefits produced.

Under the challenged EPA regulations at issue, an old power plant will not be subject to the closed-cycle cooling-system requirement, and may qualify for a site-specific variance, if it can show either that the cost of retrofitting would be significantly greater

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than the EPA assumed in setting the standard for new plants, or that compliance costs "would be significantly greater than the benefits of complying with the applicable performance standards."[5] Where a variance is justified, the EPA must impose remedial measures that yield results "as close as practicable to the applicable performance standards."[6]

Several environmental groups and states (respondents) challenged the EPA's Phase II regulations. The Second Circuit, deferring to EPA, held that EPA has authority to retrofit existing facilities. But, siding with environmental petitioners and against EPA, the Second Circuit also held the site-specific cost-benefit variance provision to be unlawful and should be limited to a narrow "cost-effectiveness" test.

Regulations at Issue

The issue for the Supreme Court was whether the EPA is permitted to use cost-benefit analysis in determining the content of Phase II regulations. Writing for the Court, Justice Scalia overturned the Second Circuit's decision and said that the EPA acted reasonably in weighing the costs and benefits of various technologies when it promulgated regulations under § 316(b) of the Clean Water Act.

The Court focuses on the "BTA" test. The majority opinion states, "[i]n the Phase II requirements challenged here the EPA sought only to avoid extreme disparities between costs and benefits."[7] The court noted that under another Supreme Court case, *Chevron v. Natural Resources Defense Council,* an agency's view governs if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.[8] The EPA refused to require plants to retrofit in part because of the "generally high costs" of converting existing facilities to closed-cycle operation, and because "other technologies approach the performance of this option." The closed-cycle cooling systems can reduce fish and wildlife mortality by 98%, but the cost of retrofitting all Phase II plants would be approximately $3.5 billion per year, or what would amount to nine times the cost of compliance with Phase II performance standards. Furthermore, if retrofitted, the Phase II plants would produce 2.4 to 4.0% less electricity due to reduced efficiency which could possibly require "the construction of 20 additional 400 MW plants . . . to replace the generating capacity lost."[9]

When looking at the Phase II facilities, the Court stated that it, "demonstrates quite clearly that the agency did not select the Phase II regulatory requirements because their benefits equaled their costs."[10] The Court went on to say that the EPA's practice of using cost-benefit analysis is a reasonable and legitimate exercise of its discretion.

Statutory Construction Questions

The dissenters thought that the EPA exemption for existing power plants was inconsistent with § 316(b) of the Clean Water Act because that section is silent on authorizing the EPA to conduct cost-benefit analysis. That omission, the dissenters thought, was intentional by Congress, because other provisions of environmental laws passed at the same time as § 316(b), expressly authorize cost-benefit analysis and other tests concerning "best technology" preclude cost-benefit. Thus, the dissenters argued, Congress did not intend the agency to balance costs and benefits.

The dissenters disagreed with the EPA's approach, stating that cost-benefit analysis tends to minimize the value of regulation because costs are easier to monetize than benefits, especially when it comes to assigning value to wildlife. For example, although the EPA estimated that water intake structures kill 3.4 billion fish and shellfish each year, the agency counted only those species that are commercially or recreationally harvested, which is only 1.8% of all impacted fish and shellfish. The EPA struggled to value all aquatic life, but measured the benefits at $735 million. But, when the EPA decided to give value only to the fish commercially or recreationally harvested, the benefits calculation dropped to $83 million. The agency even noted that its failure to monetize the other 98.2% of affected species could result in serious misallocation of resources, and may not accurately assess the net benefits to society. Because of the inadequacy of cost-benefit, the dissenters concluded that Congress deliberately chose not to authorize the EPA to balance away the environmental benefits of the BTA rule.

The majority disagreed, stating that the other statutory provisions of the CWA authorizing best-technology tests also authorized other consideration of factors not addressed by § 316(b). The majority reasoned that silence should be reasonably interpreted as suggesting that the EPA is accorded discretion in determining how to regulate the section. Justice Scalia reasoned that if the dissent's conclusion regarding § 316(b)'s silence of cost consideration is correct, it must be true that the BTA test permits no consideration of cost whatsoever, not even the "cost-effectiveness" and "feasibility" analysis that the Second Circuit approved, or that the dissent would approve. Justice Scalia noted that "[i]f silence here implies prohibition, then the EPA could not consider *any* factors in implementing § 316(b) – an obvious logical impossibility."[11] Thus, the majority reasoned that the other statutory provisions cited by the dissent were not part of the relevant context for understanding § 316(b) itself. The Court went on to say that "[i]t is eminently reasonable to conclude that § 316(b)'s silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."[12]

Justice Scalia also noted that even the environmental groups challenging the EPA regulations acknowledge that the EPA did not have to require

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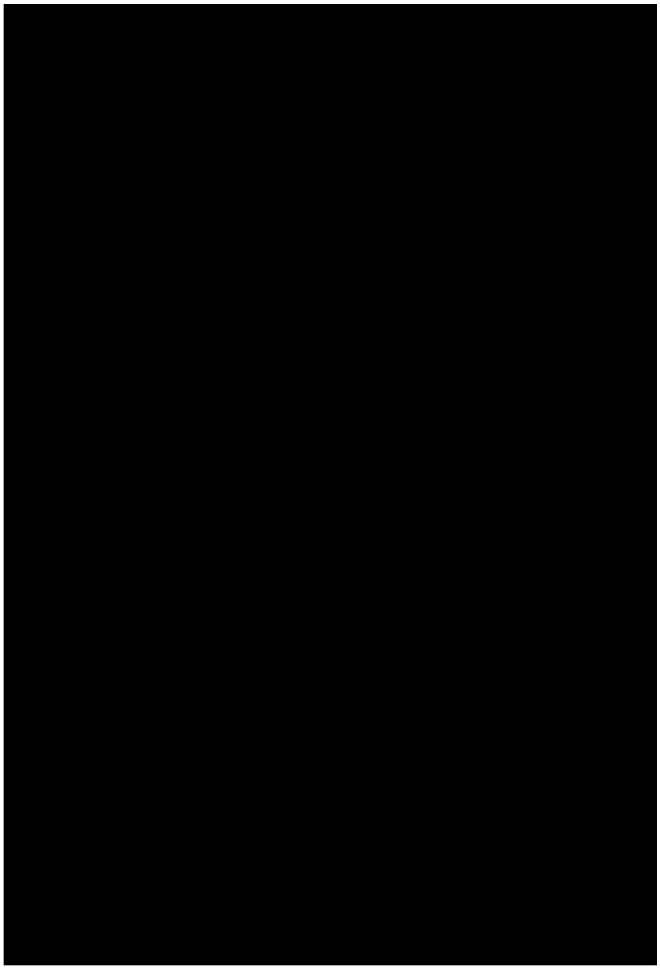


Photograph of power plant courtesy of ©Nova Development Corp.

Ninth Circuit Affirms NMFS Policy on Hatchery v. Natural Salmon

***Trout Unlimited v. Lohn*, 559 F.3d 946 (9th Cir. 2009).**

Jonathan Proctor, 3L, University of Mississippi School of Law

The Ninth Circuit Court of Appeals recently ruled that the National Marine Fisheries Service (NMFS) may consider natural and hatchery-spawned salmon and steelhead together in one evolutionary significant unit when listing species under the Endangered Species Act (ESA). In doing so, the court affirmed the agency's decision to downlist the Upper Columbia River steelhead from endangered to threatened under the ESA. Furthermore, the court affirmed NMFS' practice of distinguishing between natural and hatchery-spawned salmon and steelhead when determining the level of protection that should be provided under the ESA.

Background

Salmon species, including steelhead, in the Pacific Northwest have suffered greatly due to human development which has degraded or destroyed their natural habitats. In fact, several salmon species receive protection under the ESA.

The ESA aims to conserve the "ecosystems upon which endangered species and threatened species depend."[1] Pursuant to the ESA, NMFS must first determine whether a population of fish, under the ESA, is a species.[2] Under the ESA, "species" is defined as "any subspecies of fish or wildlife or plants, and any *distinct population segment* of any species of vertebrate fish or wildlife which interbreeds when mature." NMFS considers a salmon stock a distinct population if it is an "evolutionarily significant unit" (ESU) of the species.[3] To be considered an ESU, the stock "must satisfy two criteria . . . (1) It must be substantially reproductively isolated from other nonspecific population units; and (2) It must represent an important component in the evolutionary legacy of the species."[4] NMFS must then determine whether to list the species or ESU as endangered or threatened.[5] If a species or ESU is listed as endangered or threatened, NMFS must afford that population certain legal protections, such as banning the "taking" of that fish.[6]

In an effort to combat dwindling population numbers, NMFS instituted hatchery programs designed to "increase the number of salmon available for fishing, and to prevent natural salmon from becoming extinct."[7] Though generally successful in bolstering population numbers, hatcheries can negatively affect the natural population via competition for prey, increased occurrences of disease, and interbreeding which can produce genetically inferior offspring.[8]

The hatchery programs raised the question of whether the hatchery fish should be considered alongside natural fish under the ESA. Through a series of policy decisions, NMFS had found that although hatchery fish could be part of the same ESU as natural fish, absent exceptional circumstances, only natural fish could be listed as endangered or threatened. However, in *Alsea Valley Alliance v. Evans* in 2001, an Oregon district court found that, if NMFS classifies natural and hatchery fish in the same evolutionary significant unit (ESU), they may not be listed separately under the ESA.[9]

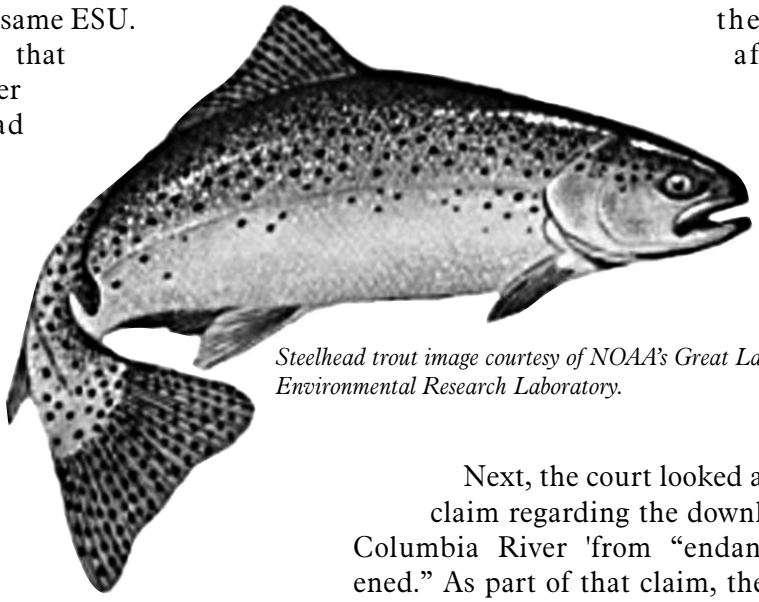
. . . the court affirmed NMFS' practice of distinguishing between natural and hatchery-spawned salmon and steelhead . . .

To comply with the *Alsea* decision, NMFS issued a Hatchery Listing Policy in 2005, eliminating the previous distinction between natural and hatchery fish in defining and listing ESUs.[10] The updated policy required NMFS to consider the ESU as a whole when determining whether to list the ESU as endangered or threatened. However, under the policy NMFS could still exempt listed hatchery fish from the ESA's take prohibition.[11] On the basis of the new policy, the Upper Columbia River steelhead ESU was downlisted from endangered to

threatened, justified primarily by the inclusion of hatchery fish in the ESU.

Trout Unlimited, along with other environmental groups, filed suit challenging NMFS' decision not to separate natural and hatchery fish into distinct ESUs and the steelhead's downlisting from endangered to threatened.[12] Additionally, the Building Association of Washington (Building Industry) challenged NMFS's policy to exempt listed hatchery fish from the ESA's take prohibition.[13]

A California district court ruled that NMFS could continue to include natural and hatchery fish in the same ESU. However, the court held that the Upper Columbia River steelhead population had been improperly downlisted from endangered to threatened under the ESA. The trial court dismissed the Building Industry's claims, finding that NMFS may consider the contributions of hatchery fish on natural populations and may distinguish between members of an ESU when making listing determinations.



Steelhead trout image courtesy of NOAA's Great Lakes Environmental Research Laboratory.

Ninth Circuit Decision

When Congress gives an agency the authority to carry out its laws, the regulations and policies of that agency are given a high level of deference by the courts.[14] Unless the courts find an agency's interpretation or implementation of the law to be "arbitrary and capricious,"[15] the agency's decision shall be upheld. Therefore, if the Ninth Circuit found that NMFS made informed and plausible decisions with regards to the above issues, then the court should defer to the agency's expertise on the matter.

The court first addressed the question of whether NMFS should have created separate ESUs for the natural and hatchery steelhead. Trout Unlimited primarily relied upon the alleged dangers posed by hatchery fish to the native population in its argument that the natural and hatchery fish should not be considered in the same ESU. The group claimed that "'[n]o hatchery has ever been shown to promote the long-term recovery of wild salmon, and countless studies document the harm that hatcheries have caused to wild populations.'"[16] However, the court found this to be a simplification of two separate issues: 1) determining "the *composition* of the ESU"; and 2) later determining "whether to *list* the ESU."[17]

The listing determination is the appropriate phase in which to consider the potential harms to natural steelheads, not when determining the composition of the ESU. As such, the Ninth Circuit affirmed the trial court's decision that NMFS's refusal of Trout Unlimited's petition to split the two groups into separate ESUs was not arbitrary and capricious.

Next, the court looked at Trout Unlimited's claim regarding the downlisting of the Upper Columbia River 'from "endangered" to "threatened." As part of that claim, the group argued that NMFS should only consider natural components of the ESU when making listing determinations. Building Industry argued that the agency should consider both natural and hatchery components. The court agreed with Trout Unlimited and the trial court's assessment that the ESA's main focus is on natural populations and, therefore, NMFS should primarily consider the natural fish when determining the ESU's endangered or threatened status. However, the ESA requires NMFS to examine the "species" for listing purposes; it does not require NMFS to examine only the naturally occurring members of that species. Furthermore, the Hatchery Listing Policy in question provides that "[h]atchery fish will be included in assessing an ESU's status in the context of their contributions to conserving natural self-sustaining populations,"[18] promoting the ESA's goal of natural population protection. Whether NMFS made the scientifically correct decision is not for the court to decide; as long as the decision was not "arbitrary and capricious" it should be given deference. As such, the Ninth

Circuit reversed the trial court's ruling that NMFS improperly downlisted the steelhead from endangered to threatened.

Conclusion

Though Trout Unlimited and Building Industry may have had valid concerns about NMFS's policies and practices, courts are restrained from overruling an agency's plausible and informed decisions unless they are clearly arbitrary and capricious. Using this standard, the Ninth Circuit ruled in NMFS's favor on all claims.

Endnotes

1. 16 U.S.C. § 1531(b).
2. 16 U.S.C. § 1532(16).
3. Policy on Applying the Definition of Species, 56 Fed. Reg. 58,612, 58,618 (Nov. 20, 1991).
4. *Id*.
5. 16 U.S.C. § 1533(a)(1).
6. 16 U.S.C. § 15638(a)(1)(B).
7. *Trout Unlimited v. Lohn*, 559 F.3d 946, 948 (9th Cir. 2009).
8. *Id*. at 949 (citing Final Listing Determinations for 10 Distinct Population Segments of West Coast Steelhead, 71 Fed. Reg. 834, 857 (Jan. 5, 2006)).
9. *See Alsea Valley Alliance v. Evans (Alsea I)*, 161 F. Supp. 2d 1154, 1162 (D. Or. 2001).
10. *Trout Unlimited*, 559 F.3d at 951. (*See* Policy on the Consideration of Hatchery-Origin Fish, 70 Fed. Reg. 37,204 (Jun. 28, 2005).
11. *Trout Unlimited*, 559 F.3d at 952.
12. *Id*. at 953.
13. *Id*.
14. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
15. 5 U.S.C. §706(2)(a).
16. *Trout Unlimited*,559 F.3d at 955.
17. *Id*.
18. *Id*. at 958 (*citing* Policy on the Consideration of Hatchery-Origin Fish, 70 Fed. Reg. 37,215 (Jun. 28, 2005)).

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power plants to "spend billions to save one more fish or plankton."[13] Thus, he concluded, at some point in time the costs of further mitigation of environmental harm must outweigh the benefits, and the EPA must eventually draw a line. According to the majority, the only issue for the Court was whether the line the EPA drew was reasonable.

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Conclusion

Though the majority sided with the dissenters that the EPA was not required to conduct cost-benefit analysis, the majority also concluded that the EPA also not prohibited from doing so. Under the *Chevron* test, where a statute conferring regulatory authority on an agency does not address some question, longstanding administrative law principles state that the courts should defer to a reasonable agency regulation that does address the question.

Endnotes

1. Fredieu is an Analyst and Presidential Management Fellow with the NOAA Aquaculture Program on developmental assignment with the Sea Grant Law Center.
2. Federal Water Pollution Control (Clean Water) Act § 33 U.S.C.S. § 1251 *et seq*.
3. *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1502 (U.S. 2009)
4. 40 C.F.R. § 125.94(b)(1), (2).
5. *Id*. § 125.94(a)(5)(ii).
6. *Id*. § 125.94(a)(5)(i), (ii).
7. *Entergy Corp.*, 129 S. Ct. at 1508.
8. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).
9. *Entergy Corp.*, 129 S. Ct. at 1504.
10. *Id.* at 1508.
11. *Id.*
12. *Id.* at 1507.
13. *Id.* at 1510.

DC Circuit Vacates Bush-era Oil and Gas Lease Expansion

Ctr. for Biological Diversity v. U.S. Dept. of the Interior, 2009 U.S. App. LEXIS 8097 (D.C. Cir. 2009).

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On April 17, 2009, the Court of Appeals for the District of Columbia vacated a Bush-era program expanding oil and gas leases on the Outer Continental Shelf (OCS). Despite rejecting a number of claims against the Department of the Interior (Interior), the court found Interior's reliance on a shoreline study in its initial evaluation of the lease program's expansion areas irrational and invalid.

Background

The Lease Expansion Program (Program) proposed twenty-one potential lease-sales in eight areas off the OCS, an area generally encompassing lands 3 to 200 miles offshore, for oil and gas development. The proposed lease areas were off the Alaskan and Virginian coasts, as well as in the Gulf of Mexico. Four of the lease areas were in the Bering, Beaufort, and Chukchi Seas off the Alaskan coast. The five-year Program was slated to span from 2007 to 2012.

The OCS off the coast of Alaska in the Bearing, Beaufort, and Chukchi Seas hosts an abundance of wildlife, including many whale, walrus, seal, and bird species, including two populations of polar bears and the North Pacific right whale. In addition, the Chukchi Sea plays a central role in the subsistent, cultural, and religious activities of the Native Village of New Hope, a federally recognized tribal government.

The Outer Continental Shelf Land Act (OCSLA) regulates the lease of OCS areas for gas and oil development. The Act creates a four-tiered, pyramidal framework for the leasing programs. Under the Act, preparatory stages for offshore projects are governed by broader requirements that graduate into stricter mandates in the later leasing, exploration, and production stages. The disputed Program, proposed in August of 2005 and approved by Secretary of the Interior Dirk Kempthorn in April of 2007, was in the first stage of the OCSLA process. The Center for Biological Diversity, Alaska Wilderness League, Pacific Environment, and the Native Village of Point Hope, (collectively the Center) challenged the Interior Department's 2005 approval of the plan under the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the OCSLA.

ESA and NEPA Claims

Among other charges, the Center claimed Interior violated both the requirements of the ESA and NEPA in its initial approval of the Leasing Program. The ESA requires an agency, if it concludes an action "may affect a listed species or critical habitat," to consult with either the National Marine Fisheries Service or the Fish and Wildlife Service.[1] However, rather than requiring Interior to take these steps in the initial phase of the program, the court reasoned that ESA requirements should be applied at the appropriate stage in the OCSLA process. The court held that the initial phase of the Leasing Program does not include any actions that would adversely affect any species or habitat in the OCS areas or trigger the ESA requirements. Therefore, the ESA claims were unripe.

On the other hand, NEPA imposes procedural requirements to ensure agency actions are both well informed and fully considered as to any environmental impact. To satisfy NEPA, an agency must establish an environmental impact statement addressing three primary issues: (1) the environmental impact of the proposal; (2) the unavoidable and adverse environmental impacts which cannot be avoided; and (3) alternatives to the agency's proposed action. Similar to the ESA claims, the Center's NEPA-based accusations–a failure by the Interior to account for greenhouse gases and gaps in initial baseline information–were unripe due to the multi-staged nature of OCSLA. The court ruled that any NEPA obligations under OCSLA mature only at the second, leasing stage of the program, a point in which resources are "irreversibly and irretrievably" committed.[2]

OCSLA Claims

The Center also claimed that the Department violated OCSLA by: (1) failing to account for climate change in its initial assessment, (2) providing insufficient baseline information, and (3) irrationally relying on a NOAA study of shoreline sensitivity. First, the court brushed aside the larger greenhouse

gas claims by looking to the statutory language. The Center argued that the Department should have considered "the present and future impact of climate change on the Program areas" and "the impact on climate change by the additional consumption caused by the Program."[3] OCSLA's mandates, however, require Interior to consider only the effects of gases produced by the exploration, development, and production of the oil and gas resources, *not* the global need or consumption of the resources. Second, the court dismissed the baseline information claim by again pointing to the graduated, pyramidal structure of OSCLA which the court suggested was in place to resolve any gaps in the information as it became necessary and proper.

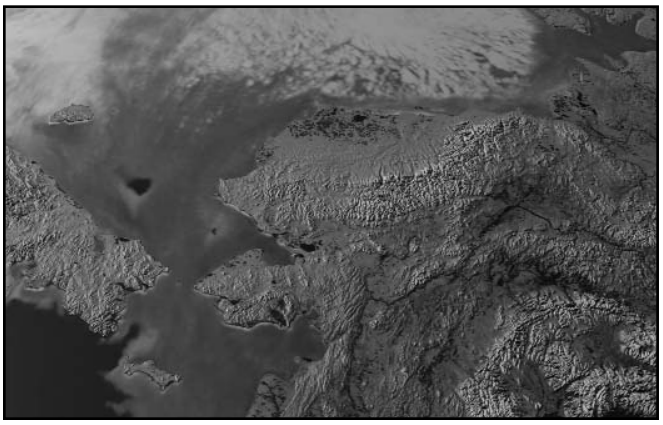
The last remaining challenge, however, found the court siding with the Center. In developing a leasing program, § 18(a)(2)(G) of OSCLA obliges Interior to consider "the relative environmental sensitivity…of different areas of the [OCS]."[4] Though the court recognized that an agency has substantial leeway over their method of consideration and is given deference in its decision, it nonetheless declared Interior's evaluation of the environmental sensitivity of these areas irrational. Interior relied solely on a NOAA study of shoreline environmental sensitivity in its assessment and, because the OCS is largely an offshore area, the court held that any evaluation of OCS sensitivity must include more than just a single shoreline study. Additionally, the court explained that the requisites of § 18(a)(2)(G) are conjoined with those of § 18(a)(3), a three-factor environmental evaluation amounting to a "condensation of the § 18(a)(2) factors."[5] As a result, because the Interior's § 18(a)(2) consideration was irrational, the court accordingly found the § 18(a)(3) analysis improper.

Conclusion

The court vacated the Interior's 2007 to 2012 Leasing Program and remanded the program back the Secretary of the Interior for reconsideration.

Endnotes

1. *Ctr. for Biological Diversity v. United States Dept. of the Interior*, 2009 U.S. App. LEXIS 8097, *34 (D.C. Cir. 2009).
2. *Id.* at *29 (citing *Mobil Oil Corp. v FTC,* 562 F.3d 170, 172 (2d Cir. 1977)).
3. *Id.*
4. *Id.* at *50.
5. *Id.*



Photograph of Bering Strait with ice cover courtesy of NASA.

Obama Announces National Ocean Policy

President Obama recently announced a national ocean policy for the nation's oceans, coasts, and Great Lakes. In the memo announcing the policy, Ogbama recognizes the need for "a unifying framework under a clear national policy, including a comprehensive, ecosystem-based framework for the long-term conservation and use of our resources."

The memo creates an Ocean Policy Task Force charged with shaping this framework. The task force will be led by the Chair of the Council on Environmental Quality and composed of other federal agency officials. The task force has 90 days to develop recommendations for a national ocean policy, a framework for policy coordination, and an implementation strategy. The Task Force has 180 days to develop a recommended framework for coastal and marine spatial planning.

President Obama simultaneously released a proclamation designating June 2009 as National Oceans Month. President Obama stated, "During National Oceans Month, we celebrate these vast spaces and the myriad ways they sustain life. We also pledge to preserve them and commend all those who are engaged in efforts to meet this end."

The memorandum creating the task force and the proclamation are available at http://www.whitehouse.gov/the_press_office/Presidential-Proclamation-National-Oceans-Month-and-Memorandum-regarding-national-policy-for-the-oceans/ .

Michigan Court Rejects Judicial Review of Agency Decisions

Anglers of the Ausable, Inc. v. Dep't of Envtl. Quality, 2009 Mich. App. LEXIS 723 (Mich. Ct. App. Mar. 31, 2009).

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A Michigan appellate court recently held it does not have jurisdiction over a Michigan Department of Environmental Quality (DEQ) decision granting a permit for the discharge of treated wastewater into the Kolke River. The court found that judicial review is limited under the Michigan Environmental Protection Act (MEPA) to conduct that is likely to result in destruction of Michigan's natural resources, not administrative decisions. However, the court affirmed the trial courts finding that the discharge of the wastewater resulted in a MEPA violation

Background

In 2004, Merit Energy purchased a production facility. Pursuant to the transfer agreement, Merit Energy entered into a settlement agreement with the DEQ that required treating a sixty-acre plume of contaminated water, which had begun to pollute nearby residential wells. The DEQ issued a permit for treating the water, transporting it via pipeline across state-owned property, and discharging it into the Kolke River. An easement was granted to Merit Energy to transfer and discharge the water at a rate of 700 gallons per minute into the river over a ten-year period.

. . . the court declined to broaden the scope of MEPA to include administrative decisions

Residents living along the affected waterway filed a cause of action under MEPA, alleging the increased water volume would result in sedimentation and flooding that would interfere with recreational activities. Additionally, they argued the easement DEQ granted did not convey the right to discharge treated water. A circuit court enjoined Merit Energy from discharging any treated water into the Kolke Creek water system. Merit Energy and the DEQ appealed, arguing the circuit court lacked jurisdiction and challenging the court's finding of a *prima facie*[1] violation of the MEPA.

Limits of Judicial Review

The defendants first argued that the state court lacked jurisdiction, citing part Part 201 of MEPA, which states that "a state court does not have jurisdiction to review challenges to a response activity *approved by the department under this part*."[2] The court rejected this argument, holding that the "Corrective Action Plan" was approved under Part 615 of MEPA which did not bar the state's jurisdiction.

While the appellate court held it had jurisdiction, it dismissed DEQ from the cause of action since the MEPA "requires *conduct* that has violated, or is likely to violate, MEPA."[3] Because plaintiffs challenged the DEQ's approval of the corrective action plan, rather than the discharge of pollutants, the court held that DEQ's review of the plan and issuance of the permit was administrative. Therefore, the court erred in failing to dismiss the DEQ from the action since an administrative decision does not meet the MEPA's language of a violation. In doing so, the court declined to broaden the scope of MEPA to include administrative decisions stating "an improper administrative decision alone does not harm the environment."[4]

Easement, Common Law, and MEPA Claims

The defendants next argued that the trial court erred in ruling that Merit Energy's easement, given to the company by DEQ, did not grant the right to discharged treated water. The appellate court agreed, finding that the purpose of the easement was to construct and operate a pipeline on state property. "Operate" was held to mean the operation of a

pipeline that would discharge treated water into Kolke Creek. In Michigan, property owners are allowed to drain their land into an adjacent watercourse, and they may grant those rights to a nonriparian property owner. The easement to Merit Energy was therefore valid.

The appellate court affirmed the trial court's ruling that Merit Energy's proposed plan to discharge treated water would result in increased sedimentation and flooding, thus impairing the riparian rights of the plaintiff. The plaintiffs have riparian rights because their land abuts Kolke Creek, thereby granting them property rights. The court rejected the defendant's argument that because the land in question was traditionally flooded, the additional drainage flooding could not be a MEPA violation. The court relied on expert testimony that established the long-term effect of Merit Energy's discharge of treated water would be "qualitatively different" from the short-term, traditional flooding. Additionally, using a reasonable use test it found no clear error in the trial courts ruling that the drop in water quality and harm to aquatic life would interfere with plaintiffs' use thereby affecting their common law riparian rights.

Finally, the appellate court affirmed the trial courts finding of a *prima facie* MEPA violation. To make a prima facie case under MEPA, the plaintiff must show that "the defendant has or is likely to pollute, impair, or destroy the air, water, or other natural resources."[5] The court noted the standard in "determining whether a plaintiff has made out a *prima facie* MEPA violation, the trial court may either (1) make detailed and specific findings that the defendant's conduct is likely to pollute, impair, or destroy, the air, water, or other natural resources, or (2) find that the defendant has violated an applicable pollution control standard."[6] The court rejected the defendant's argument that a specific finding is an option only when there is no applicable pollution control standard. The court relied primarily on caselaw and the statute's focus on polluting conduct in reaching its conclusion that discharge of treated water would pollute the river.

Conclusion

Although the appellate court found that the circuit court should have dismissed the action against the DEQ due to lack of jurisdiction, the court held that Merit Energy was properly barred from discharging treated water, because the rate of discharge would pollute or impair natural resources in violation of MEPA. By excluding administrative decisions from MEPA, the court substantially limits plaintiffs' options to hold agencies accountable for damage caused by administrative decisions.

Endnotes

1. *Prima facie* means "on first appearance but subject to further evidence or information." BLACKS LAW DICTIONARY, 551 (2nd pocket ed. 2001).
2. *Anglers of the Ausable, Inc. v. Dep't of Envtl. Quality*, 2009 Mich. App. LEXIS 723 (Mich. Ct. App. Mar. 31, 2009).
3. *Id*. at *16.
4. *Id*.
5. *Id*. at *31.
6. *Id*

Photograph of water treatment plant on Lake Michigan courtesy of the US EPA.

Hawaii Supreme Court Requires EA for Superferry

Sierra Club v. DOT, 202 P.3d 1226 (Haw. 2009).

Maxwell Livingston, 2L, Marquette University Law School

The Hawaii Supreme Court has ruled that the "Superferry," a passenger-vehicle ferry operating between Oahu and Maui, must cease operations until it undergoes an environmental assessment (EA). The court found that the agreement between Hawaii and the ferry company (Superferry), allowing the project to progress without an EA, was unconstitutional.

Background

In Hawaii, when the state approves a program which involves the use of state lands or state funds, an agent of the state must prepare an EA. In 2005, the state Department of Transportation exempted the Superferry from environmental review. Several environmental groups, including Sierra Club, brought suit against DOT and Superferry, arguing that an EA was required because the state approved the project and it involved both state land and partial state funding. The Hawaii Supreme Court ruled in favor of the Sierra Club, reversing a 2005 lower court decision and ordering the DOT to prepare an EA.[1] In October 2007, the circuit court issued a temporary restraining order, which provided that the DOT could not move forward with the Superferry project until it prepared an EA.

In 2007, the state legislature passed Act 2,[2] which provided, among other things, that an EA is not required for the use, construction, or improvement of any large ferry vessel or barge used for any large ferry vessel. The circuit court reversed itself based on the enactment of Act 2, dissolving the injunction and reviving the operating agreement between DOT and Superferry. However, the court did grant attorney's fees and costs to Sierra Club.

Sierra Club appealed, claiming that the dissolution of the injunction on the basis of Act 2 was unconstitutional and that the fees and costs granted by the court were not enough. DOT and Superferry cross-appealed because they felt that the court should not have awarded fees and costs to Sierra Club, because the organization was not the prevailing party.

Constitutionality Standard

Statutes are presumed to be constitutional. For statutes to be deemed unconstitutional in Hawaii, the party challenging them must show that they are unconstitutional beyond a reasonable doubt, and the constitutional defect[s] must be clear, manifest, and unmistakable.[3]

The court noted that to conform with the Hawaii Constitution, Act 2 must be a general law. The Hawaii Constitution favors general laws over special laws, which are generally meant to discriminate in favor of certain individuals or companies. The Hawaii Constitution only gives legislators power to create "general laws" regarding state-owned lands, with a few exceptions.[4] Act 2 involves state land because § 15 of Act 2 supports the use of state land to assist owners of large capacity ferry vessels. Since Act 2 involves state land, and since the exceptions do not apply, the court reasoned that Act 2 must be a "general law" to be constitutional.

Special or General Law?

Hawaii courts determine whether laws are special or general by looking at the "substance and practical operation, rather than [the] title, form or phraseology."[5] A law may be classified as a special law by operation if it applies to a "class of one" and creates only an illusory (unreal) larger class. No case law within the state of Hawaii provided usable precedent for the purpose of defining special versus general law in this case. As such, the court looked to a Colorado case, *People v. Canister,* for guidance.[6] In *Canister*, the Colorado court said that there must be a specific entity considered by the legislators beyond a class of one for the class to be real; foreseeability of another party is not enough. The court then looked to a Nebraska case, *Harman v. Marsh*,[7] which said that a general law may be created when there is a reasonable probability that another party will enter the class in the future. However, the class will be unreal if it is merely theoretical that another party will be covered under the legislation in the future.

Here, by substance and operation, Act 2 creates an unreal class, and therefore is a special, unconstitutional, law. First, the court concluded that there is no apparent entity aside from Superferry capable of

using the Superferry services, and no other large capacity ferry vessel has even shown interest. Second, it is unlikely that there will be another party "entering the class in the future." At most, there is only a twenty-one month window at most during which Act 2 is in force; because the Act, according to its own terms, will be repealed after the 45th day (not including weekends) of 2009.[8] Any attempt by a third party to fulfill its permit requirements in twenty-one months, before Act 2 would be repealed, would not likely be successful, the court reasoned, given that it took Superferry thirty-five months to fulfill its requirements. Also, any other ferry would have to be almost identical to the Superferry to be able to take advantage of the provided services. Further, it is provided in the agreement between DOT and Superferry that there might not be available equipment for a potential competitor. Also, if it became necessary for there to be an environmental impact standard, Act 2 would not govern because the Act stipulates that the Office of Environmental Quality Control's acceptance of the first environmental impact statement would trigger the automatic repeal of Act 2, and, therefore, only Superferry would benefit. And finally, the ferry services can only be used in Honolulu pursuant to the express terms of the 2005 operating agreement. As such, the addition of future parties is not reasonably probable and certainly was not conceived of by the legislature.[9] Therefore, the legislation benefits only Superferry through its operating agreement with the state. The court held that the legislation is a special law, which is unconstitutional in this instance.

Attorney's Fees and Costs

The court held that since the lower court did not abuse its discretion and Sierra Club was the prevailing party, Sierra Club should be granted reimbursement of fees and costs as previously granted. The court noted that the party who wins on the main issue will be the prevailing party.[10] In this instance, Sierra Club was given an injunction on the basis of the main issue. Further, the court noted that an injunction will constitute a final judgment on the main issue, except when the initial trial is based on hastily put together information and therefore incomplete.[11] Here, the injunction was granted after four weeks of evidentiary hearings. Therefore, Sierra Club was the prevailing party. Under the Private Attorney General Doctrine, the court can grant fees and costs to a prevailing party in a public interest case, when it is reasonable to do so. The court found the grant of fees and costs reasonable, but lowered the award by $900 as Sierra Club did not challenge the requested relief by DOT.

Conclusion

Because Act 2 unconstitutionally discriminated in favor of Superferry, the court reversed the lower court's decision. The Hawaii Supreme Court's decision will require the DOT and Superferry to prepare an EA before the operating agreement will become effective, and before the ferry may become operational. The court upheld the fees awarded by the lower court and lowered costs by $900.

Endnotes:

1. *Sierra Club v. DOT*, 167 P.3d 292 (2007).
2. 2007 Haw. Sess. Laws PAGE # Act 2, [§§ 1-18 at 5-21.]
3. *Sierra Club v. DOT*, 202 P.3d 1226, 1241 (Haw. 2009).
4. Article XI, § 5.
5. *Sierra Club v. DOT*, 202 P.3d 1226, at 1244.
6. 110 P.3d 380 (Colo. 2005).
7. 467 N.W.2d 836, 848-849 (Neb. 1991).
8. 2007 Haw. Sess. Laws Act 2, §§ 1-18 at 18.
9. *See People v. Canister*, 110 P.3d 380 (Colo. 2005).
10. *Food Pantry, Ltd. v. Waikiki Bus.*, 575 P.2d 869, 879 (1978).
11. *See Sole v. Wyner*, 127 S. Ct. 2188, 2194 (2007).

Photograph of Hawaii Capitol building courtesy of the state of Hawaii.

New York's Objection to the Broadwater Energy LNG Project Upheld

U.S. Dept. of Commerce, Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC from an objection by the State of New York (April 13, 2009).

Misty A. Sims, JD, LL.M, University of Denver Sturm College of Law

Broadwater Energy LLC and Broadwater Pipeline LLC (collectively, Broadwater) sought authorization from the Federal Energy Regulatory Commission (FERC) to construct and operate liquefied natural gas (LNG) facility in Long Island Sound.[1] Because the project would be located in New York state waters, New York reviewed the project to determine whether it could be consistent with New York's coastal management, pursuant to authority granted by the federal Coastal Zone Management Act (CZMA). New York objected to the project after finding it was inconsistent with enforceable policies of the state's Long Island Sound Coastal Management Program.

Broadwater appealed New York's objection. Broadwater claimed New York's objection was defective because (1) certain coastal effects identified by the state related to a separate federal agency activity and thus cannot serve as a basis for the state's objection; and (2) it was based on materials that are not enforceable policies of the state's coastal management program. However, the Secretary ruled: (1) New York's objection considered all coastal effects resulting from the project; and (2) New York's objection is based on the enforceable policies of its federally approved coastal management program.

Secretary's Findings

The CZMA provides that states have the authority to review federal projects to determine whether activities are consistent with their coastal management program. If a state objects, the federal agency may not issue the permit. A project opponent may appeal a state's negative consistency finding to the Secretary of Commerce. The Secretary may only override a state's objection if the project is (1) consistent with the objectives of the CZMA or (2) necessary in the interest of national security.

An activity is consistent with the policies set forth in the CZMA if all of the following three elements are met: (1) the activities further the national interest in a significant or substantial manner; (2) that national interest outweighs the adverse coastal effects; and (3) there is no reasonable alternative available consistent with the state's coastal management program.

The U.S. Secretary of Commerce (Secretary) concluded that the LNG project would further the national interest in a significant and substantial manner because it is a major coastal-dependent energy facility; would develop the resources of the coastal zone; would protect and preserve the resources of the coastal zone. Nonetheless, the Secretary found that the national interest furthered by the LNG facility did not outweigh the adverse coastal effects it would cause. The Secretary considered the following direct and indirect adverse

See LNG Project, page 15

Photograph of LNG bulk carrier being escorted into harbor courtesy of the U.S. Coast Guard.

Eleventh Circuit Negligence Lawsuit to Proceed Against the Federal Government

Downs v. U.S. Army Corps of Eng'rs, 2009 U.S. App. LEXIS 5053 (11th Cir. 2009).

Joanna C. Abe, 2L, University of Mississippi School of Law

The U.S. Court of Appeals for the Eleventh Circuit recently permitted a negligence claim to proceed against the U.S. Army Corps of Engineers after a man broke his neck while diving into the surf at Miami Beach following a beach renourishment project.

Background

In the 1970s and 1980s, the Corps had entered into a contract, called a Local Cooperation Agreement (LCA), with Dade County to complete a beach renourishment project for Miami Beach. The project was designed to help control erosion of the beach. The LCA set out the duties of each party under the agreement. The renourishment project involved moving fill material to the beach area, including the surf area. The beach was filled with about nine vertical feet of material. Both parties agreed that the material suitable for the project as beach fill was "nonrocky, sandy material similar to that of the existing beach."[1]

In 2003, while swimming at Miami Beach, Dwight Downs dove into the surf and struck his head on a "basketball-sized" rock. As a result, he broke his neck and was rendered a quadriplegic. Downs brought a negligence suit against the Corps under the Federal Tort Claims Act (FTCA).[2] He claimed that the Corps negligently undertook its duty to use appropriate fill material in the renourishment project and that the agency was negligent in failing to warn of the potential danger from the fill materials used. The U.S. District Court for the Southern District of Florida held that the government was immune from suit under the discretionary function exception of the FTCA, because the contract between the Corps and Dade County left decisions about what rock could remain in the fill material to the discretion of Corps employees.

Discretionary Function Exception

Generally, under the doctrine of sovereign immunity, the U.S. and its agencies are immune from lawsuits brought by private citizens. However, the FTCA waives this sovereign immunity when injury is caused by the negligence of its employees. Private citizens, therefore, may bring suit against the government for harm resulting from the negligence of federal employees.

Government liability is precluded, however, by the discretionary function exception if claims are based on a government employee's performance of a discretionary duty. Courts use a two-part test to determine whether a government employee's action falls within the discretionary function exception. First, the act must involve an element of judgment or choice. Second, that judgment must be grounded in considerations of public policy.

When looking at whether the Corps' actions in the beach renourishment project fell within the discretionary function exception, the Eleventh Circuit noted that when the government voluntarily enters into a contract, the contract may create a nondiscretionary duty the nonperformance of which may subject the government to a claim under the FTCA. However, a contract that creates a nondiscretionary duty may also leave room for policy-based judgment, thereby preserving the availability of the discretionary function exception.

In a case like this, the ultimate question is whether the government expects an employee to consider policy implications in determining how to perform the duty. If there is a fixed or readily ascertainable standard for the performance of the duty that duty is not discretionary even if the employee retains discretion over how to meet the standard. If the employee must perform the duty without relying upon such a standard, then the duty is a discretionary one.

Parol Evidence Rule

In order to determine whether the duty to use "nonrocky, sandy material" for beach fill was discretionary or not, the Eleventh Circuit examined the language of the LCA, to the contract giving rise to the duty. The court noted that if a term of a contract is subject to more than one meaning the court may examine parol, or extrinsic evidence, in order to define the ambiguous term. The Eleventh Circuit held that the district court properly concluded that

the term "nonrocky, sandy material" is ambiguous because it is subject to more than one meaning. But, the Eleventh Circuit found that the district court improperly applied the parol evidence rule, because the court first defined the ambiguous term and then used parol evidence to find that the contractual language did not create a duty. The Eleventh Circuit found that since "nonrocky, sandy material" is subject to different interpretations, external evidence was necessary to define the Corps' duty under the LCA. The court further noted that an ambiguous contract term does not necessarily mean that there is no duty.

The Eleventh Circuit reversed the district court's conclusion that since the language which gave rise to the duty was ambiguous, it did not create a "fixed and ascertainable standard" which would prevent the government employees from exercising discretion in performing the duty. The Eleventh Circuit remanded the case to the district court so that it could properly use parol evidence to define the terms of the LCA and to determine whether the Corps duty was discretionary, thus barring the suit, or nondiscretionary, thus permitting the suit under the FTCA.

Endnotes

1. *Downs v. United States Army Corps of Engineers*, 2009 U.S. App. LEXIS 5053, at *4 (11th Cir. 2009).
2. 28 U.S.C. §§ 1346, 2671-80.

Photograph of north Miami Beach courtesy of Mr. William Folsom, NOAA, NMFS.

LNG Project, from page 13

coastal effects on, among other things, the commercial fishing industry and endangered species.

Upon balancing the national interest of the Project against the adverse coastal effects, both separately and collectively, the Secretary held the national interest did not outweigh its adverse coastal effects. The Secretary found the most significant adverse coastal effect to be the loss of scenic and aesthetic enjoyment due to the Project.

The second ground for overriding New York's objection to the proposed Project is a finding that the activity is "necessary in the interest of national security."[2] Broadwater relegated its national security argument to a footnote in its notice of appeal. Furthermore, comments solicited from the Department of Defense and other federal agencies did not raise any national security concerns that would occur if the project did not go forward. Based on Broadwater's failure to assert the project was necessary in the interest of national security and the federal agency statements, the Secretary found the project was not necessary in the interest of national security.

Conclusion

Broadwater failed to establish that its project is consistent with the objectives of the CZMA. Although national interest is furthered in a significant and substantial manner, that national interest does not outweigh the Project's adverse coastal effects. In addition, the Secretary found the Project was not necessary in the interest of national security. Thus, New York's objection to the Project proposed by Broadwater was sustained.

Endnotes

1. Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Broadwater Energy LLC and Broadwater Pipeline LLC from an objection by the State of New York, April 13, 2009. *Available at*: http://www.ogc.doc.gov/czma.nsf/49320ADEF708E3EF85257597005EFA67/$File/Broadwater_Decision_04-13-2009.pdf?OpenElement .
2. *Id.* at 36.

Supreme Court Rules on CERCLA Apportionment

Burlington Northern and Sante Fe Ry. Co. v. U.S., 129 S. Ct. 1870 (May 4, 2009).

Jonathan Proctor, 3L, University of Mississippi School of Law

Designed to prevent the irresponsible disposal of hazardous substances, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] forces those who improperly dispose of hazardous waste to pay for the cleanup of those substances. Recently, the U.S. Supreme Court decided a case regarding CERCLA compensation, specifically addressing whether cleanup costs may be apportioned among multiple parties and whether a seller of hazardous materials should be liable for contamination. In this instance, the federal government sought compensation for cleaning up hazardous agricultural chemicals on contaminated land.

Background

Shell Oil sold pesticide and other hazardous materials to an agricultural chemical distributor, Brown & Bryant (B&B),[2] which operated on land leased from Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company.[3] Shell would deliver the materials to B&B and took steps to ensure their safe handling; however, spills were common, and, in 1983, the state of California and the Environmental Protection Agency (EPA) found "significant contamination of soil and ground water."[4] A few years later, B&B became insolvent and went out of business. Eventually, the government cleaned up the site at a cost of more than $8 million.[5] Under CERCLA, the government was entitled to recoup its expenses from those responsible.

Compensation

The Court found that Shell is not required to compensate the government for any cleanup costs relating to the site because, though it delivered the materials and knew that B&B improperly handled them, Shell did not "arrange for" their disposal as defined by CERCLA.[6] In its ruling, the Court stated that mere knowledge of contamination does not make a party an "arranger." This holding could potentially limit the government's ability to seek CERCLA compensation from suppliers in the future.

However, the railroads, as owners of the property, were required by CERCLA to pay the government a portion of the cleanup costs. In its opinion, the Court discussed whether CERCLA liability could be apportioned based on an entity's contribution to the harm, as opposed to making each party equally liable for the entire harm.[7] Ultimately deciding that apportionment is appropriate in this case, the Court found that the trial court's calculation of the railroads' liability (9% of cleanup costs) was appropriate, leaving the government responsible for the remainder.[8]

Endnotes

1. 42 U.S.C. §§ 9601-9675.
2. *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 129 S. Ct. 1870, 1874 (May 4, 2009).
3. *Id*.
4. *Id*. at 1875.
5. *Id*. at 1876.
6. *Id*. at 1880.
7. *Id*. at 1881.
8. *Id*. at 1884.

Photograph of soil testing courtesy of the Agency for Toxic Substances and Disease Registry.

Maine Court Affirms Criminal Conviction of Lobsterman

Maine v. Weeks, 967 A.2d 716 (Me. 2009).

Mariel Yarbrough, 2L, University of Denver Sturm College of Law

The Supreme Judicial Court of Maine affirmed a judgment convicting a fisherman on four counts of possession of a female lobster "mutilated in a manner that could hide or obliterate"[1] a v-notch. The court had to decide whether a Maine statute prohibits possession of female lobsters with naturally regenerated right center flippers that bear evidence of having been previously mutilated. The court concluded that the "v-notch" statute prohibits possession of any female lobster that has been mutilated in the past, regardless of evidence of flipper regeneration.

Background

The statute and regulation at issue in this case are "intended to protect the breeding stock of Maine's lobster fishery."[2] The v-notch lobster conservation program provides that "when an egg-bearing female lobster is caught, it must be marked with a v-shaped notch in the right rear middle flipper, and released."[3] To enforce the v-notch program, the statute makes it a crime to "take, transport, sell or possess" any female lobster showing a v-notch, or one that has been "mutilated in a manner that could hide or obliterate that mark."[4] In addition to a potential one year imprisonment and a $2,000 fine for the Class D crime, violation of the statute may result in a fine of $50 for each violation, a fine of $100 for each egg-bearing lobster, and a fine of $50 for each female lobster marked with a v-notch.

Dale Richard Weeks had participated in Maine's lobster fishery since 1974. On December 14, 2007, the Department of Marine Resources Warden, acting on complaints that Weeks was keeping lobsters in violation of the v-notch program, met Weeks's boat and inspected the catch. The officers identified six lobsters believed to have mutilated right center flippers in violation of the v-notch program and one lobster with a gouged eye socket. According to a separate regulation, it is "unlawful to possess any lobster . . . which is mutilated in a manner which makes accurate measurement impossible."[5] A gouged eye socket impairs accurate measurement; therefore, Weeks did not contest his violation of this regulation. Therefore, the case focused on whether or not he violated the v-notch program.

Weeks argued that he was not in violation of the v-notch program because the damaged flippers had regenerated after molting. He testified that marine patrol officers told him that possessing lobsters with regenerated right center flippers was legal. Weeks also pointed to the Bureau of Marine Patrol policy statement that "a naturally regenerated flipper is considered legal."[6] Despite this, the trial court found Weeks guilty for four out of the six lobsters, fining him $250 for the four v-notch program violations and $100 for the single violation of the measurement regulation. Weeks wanted the court to amend the judgment to include language clarifying that the mutilated lobsters had a "naturally regenerated flipper."[7] The trial court stated that "despite evidence of regeneration, the lobsters had been mutilated at some point in time, and . . . the statute prohibits possession of any female lobster that has a damaged right center flipper that could have once been v-notched."[8]

Mutilated to Hide V-Notch

The appellate court found that the v-notch statute applies to lobsters with regenerated right center flippers that show evidence of mutilation. Mutilate means both "to cut off or permanently destroy a limb or an essential part of," and also "to cut up or alter radically so as to make imperfect."[9] The statute and regulation unambiguously prohibit possession of a female lobster that has been mutilated in such a way as to hide or obliterate a v-notch. The mutilation can take the form of the flipper being totally cut off, partially cut off, or altered in any way. The court reasoned that, in this case, the v-notch statute defines the offense clearly enough so that "ordinary people can understand what conduct is prohibited."[10]

Naturally Regenerated Flipper

At trial, Weeks pointed to a discrepancy between the Bureau of Marine Patrol policy manual and the v-notch statute and corresponding Department of Marine Resources regulation. The policy manual

states that "a naturally regenerated flipper is considered legal." However, the trial court found that this language is ambiguous on its face and is in direct conflict with the purpose of the statute and regulation, thus making it legally ineffective. Additionally, the Department's website provides a "Guide to Lobstering in Maine," which clearly explains that possession of a female lobster with a right center flipper damaged by a natural occurrence is illegal. This publication, which is broadly available, should have resolved any reasonable confusion Weeks, or any other lobster licensee, experienced after reading the policy manual. Further, the court reasoned that since "more specific and quite clear publicly available materials place a lobster licensee on explicit notice of precisely what is required, of what is prohibited, and of the fact that this law creates a strict liability situation," there is no excuse of confusion available in this situation.[11]

Photograph of female lobster being v-notched courtesy of John Rafferty/Marine Photobank.

The statute does not prohibit possession of a female lobster with a regenerated flipper showing no signs of mutilation. The statute only prohibits possession of a female lobster with a v-notch or a lobster showing evidence of mutilation that could hide or obliterate a v-notch. The court found that for the purposes of the statute, it does not matter whether the flipper is the lobster's original flipper or a naturally regenerated flipper. The Bureau of Marine Patrol policy manual statement serves to explain that evidence that a lobster has molted and regenerated a flipper is not, in itself, indicative of mutilation that would hide or obliterate a v-notch. Because the statute is unambiguous, it is the controlling law – not the policy manual.

The v-notch statute provides that "any lobster whose right flipper is v-notched or mutilated in a manner which could hide or obliterate such a mark shall be prima facie evidence of a violation."[12] This means that if a marine patrol officer finds a lobster in a catch with a mutilated right center flipper, the lobsterman in possession of that lobster is automatically held liable for violation of the v-notch statute.

Conclusion

The appellate court affirmed that the v-notch statute and regulation unambiguously prohibit possession of a female lobster with a v-notch or evidence of past mutilation to the right rear flipper, regardless of the presence or absence of evidence of regeneration. It is not a violation to possess a female lobster with a regenerated flipper showing no signs of mutilation.

This case has important implications for those in the Maine lobster industry, as well as the fishing industry as a whole, because the court, here, presumed that licensees are on "explicit notice" of what is required and prohibited in the industry and that any violator will be held strictly liable. Therefore, fishermen in possession of a commercial license should take time to familiarize themselves with state regulations.

Endnotes:

1. ME. REV. STAT. ANN. tit. 12, § 6436(1)(B) (2009).
2. *Maine v. Weeks*, 967 A.2d 716, 717 (Me. 2009).
3. *Id.*
4. *Id.* (*quoting* § 6436(1)(B)).
5. ME. REV. STAT. ANN. tit. 12, § 6431(4) (2009).
6. *Weeks*, 967 A.2d at 718, n.2.
7. *Id.* at 719.
8. *Id.*
9. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1493 (2002).
10. *Weeks*, 967 A.2d at 722, n.5.
11. *Id.* at 720-21.
12. ME. REV. STAT. ANN.

Court Rejects California's Mercury Warning on Tuna

People ex rel. Brown v. Tri-Union Seafoods, LLC, 2009 Cal. App. LEXIS 309 (Cal. App. 1st Dist. Mar. 11, 2009).

Terra Bowling, J.D.

Pick up any pregnancy-related book, and you'll likely find a recommendation for pregnant women to avoid or limit consumption of certain fish and shellfish. This is because the fish contain varying levels of methylmercury, a form of mercury, which is a reproductive toxin that can harm a developing fetus.

The state of California sued several tuna companies to require the companies to warn pregnant women and women of childbearing age that they are exposed to mercury when they consume canned tuna. The state claimed that the companies were required to provide warnings on their tuna products sold in the state under Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986. A California appellate court rejected the state's contention, finding that canned tuna is exempt from Proposition 65, since mercury in tuna is "naturally occurring."

Background

Proposition 65 requires companies to warn consumers about products that contain chemicals that cause reproductive harm or cancer. The duty to warn is exempted from the law in several circumstances: 1) when federal law preempts state authority for warning of exposure to a particular chemical; 2) when exposure to a listed chemical falls below the threshold level established under statutory and regulatory criteria; and, 3) when the chemical is naturally occurring in the food.

Proposition 65 requires the governor to publish a list of chemicals known to the state to cause cancer or reproductive toxicity. Mercury has been listed as a chemical known to cause reproductive toxicity and mercury compounds are listed as a chemical known to cause cancer.

Nearly all fish and shellfish contain traces of mercury; however, larger fish, like shark and swordfish, have the highest levels of the chemical. The Food and Drug Administration (FDA) has issued an advisory suggesting pregnant women and women of childbearing age limit consumption of fish with lower levels of mercury, which includes canned tuna, to about twelve ounces per week, with a limit of six ounces per week for canned albacore tuna.[1]

California sued several tuna companies, alleging violations of Proposition 65, for selling and distributing canned tuna products in the state without providing a clear and reasonable warning that the products contain mercury. The trial court found that the companies were exempt from Proposition 65 warnings, because federal law—through the FDA advisory—preempted a state warning. Furthermore, the court found the companies were exempt from a Prop 65 warning because the amount of mercury in tuna did not meet the established threshold warning level. And, finally, the court found that the companies were exempt because the mercury was naturally occurring in the food.

Naturally Occurring

The trial court ruled for the tuna companies on three alternative grounds; however, the appellate court confined its analysis to the trial court's conclusion that virtually all methylmercury is naturally occurring and is therefore exempt from Proposition 65 warnings. Within that ruling, the court primarily examined whether the tuna companies presented substantial evidence that the methylmercury in canned tuna is naturally occurring.

The trial court had examined several scientific studies and entertained expert witnesses from both sides to determine whether methylmercury in the oceans is the result of human activities or is naturally occurring. The trial court found the tuna companies' experts to be more credible, and, therefore, ruled in their favor. The court of appeals agreed, concluding that there was substantial evidence supporting the trial court's finding that mercury in tuna was naturally occurring, which exempted the tuna companies from Proposition 65's warning requirements. The court affirmed the trial court's ruling, noting that "when substantial evidence supports the trial court's decision, as it does here, we have no power to substitute our own deductions or preferred set of facts."[2]

See Mercury Warnings, page 20

Supreme Court of Canada Rules Against Neighborhood Nuisance

St. Lawrence Cement, Inc. v. Barrette, [2008] 299 D.L.R. 4th 385, 2008 SSC 64 (Can.).

Jonathan Proctor, 3L, University of Mississippi School of Law

The Supreme Court of Canada recently ruled that a factory was a nuisance to those living nearby, despite the plant's compliance with local laws and regulations. The case hinged on whether, under Quebec's system of civil law, neighborhood disturbance claims must be based on fault or if there exists "no-fault" liability.[1] In other words, the court had to decide whether to "recognize or reject a liability scheme based on the extent of the annoyances suffered *by the victim* rather than on the conduct of *the person who allegedly caused them*."[2]

St. Lawrence Cement (SLC) operated a cement plant whose manufacturing process produced dust, odors, and noise that drifted to neighboring properties. Several property owners brought a private nuisance action seeking damages for interference with the use and enjoyment of their properties.

Generally, Quebec law recognizes that an entity may exercise its rights so long as they do not infringe unjustly upon the rights of another. Therefore, provided SLC did not intend to cause injury to nearby residents and did not exercise its rights to operate in "an excessive and unreasonable manner,"[3] SLC would not be held liable under "fault-based" liability. Although SLC was not liable for such a fault and strove to "comply with the relevant standards in operating its plant,"[4] the trial court did find that SLC's neighbors suffered from excessive and abnormal annoyances due to the plant's "emissions of dust, odours [sic] and noise."[5]

The Supreme Court of Canada examined the right of ownership with respect to its effects upon neighbors and found that the obligation not to injure one's neighbors "exists *even in the absence of fault*."[6] This limit on the right of ownership "relates to the *result* of the owner's act rather than to the owner's *conduct*."[7] In agreement with the trial court's decision and supported by case law, comparative law, and general policy considerations, the Court held that no-fault liability applies to neighborhood annoyances and ordered SLC to pay damages to the class action members.[8]

SLC's claim that it enjoyed immunity from such liability based upon a statute authorizing its activity ultimately failed to persuade the court. Though the statute in question authorized the plant's operation, "it in no way exempted SLC from the application of the ordinary law."[9] The Court's holding will make it easier for property owners in Canada to recover damages resulting from factory pollution.

Endnotes

1. *St. Lawrence Cement, Inc. v. Barrette*, [2008] 299 D.L.R. 4th 385, 2008 SSC 64 at ¶ 19 (Can.).
2. *Id.* at ¶ 20 (emphasis added).
3. *Id.* at ¶ 25.
4. *Id.* at ¶ 11.
5. *Id.*
6. *Id.* at ¶ 48 (citing *Katz v. Reitz*, [1973] C.A. 230, 237 (Can.) (emphasis added)).
7. *Id.* at ¶ 86.
8. *Id.*
9. *Id.* at ¶ 98.

Mercury Warnings, from page 19

Conclusion

Based on the court's ruling that mercury in tuna is "naturally occurring," canned tuna is exempt from California's Proposition 65. However, the court noted that its ruling was limited to the substantial evidence issue and that "there are potential scenarios that could possibly lead to a renewed Proposition 65 claim against the Tuna Companies or similar companies that would survive res judicata and collateral estoppel challenges."[3]

Endnotes

1. *Available at* http://www.fda.gov/Food/Food - Safety/ProducSpecificInformation/Seafood/ - FoodbornePathogensContaminants/Methylmer - cury/ucm115662.htm .
2. *People ex rel. Brown v. Tri-Union Seafoods, LLC*, 2009 Cal. App. LEXIS 309, *45 (Cal. App. 1st Dist. Mar. 11, 2009).
3. *Id.* at *45.

Coast Guard Immune from Suit for Negligent Search and Rescue

Azille v. U.S., 2008 U.S. Dist. LEXIS 97902 (D.V.I. 2008).

Jason M. Payne, J.D., University of Mississippi

The U.S. District Court for the Virgin Islands dismissed a suit against the federal government for the U.S. Coast Guard's allegedly negligent search and rescue efforts. The court ruled that the discretionary function exception to the Suits in Admiralty Act (Act) prohibited the suit.

Background

On April 22, 2004, Bernard Azille, Bernard James, and John B. Sonson (plaintiffs) left St. Croix in Azille's 26-foot boat headed for St. Thomas with a large load of fish they intended to sell. During the trip, the container holding the nearly two tons of fish shifted and the boat began taking on water. Azille called his daughter on his cell phone around 10:35 a.m. telling her they were about four nautical miles (nm) south of Buck Island near St. Thomas. Another daughter then notified the Coast Guard. By 11:05 a.m. the Coast Guard had launched a boat and had spoken with Azille who once again estimated their coordinates as four to five nm south of Buck Island. The Coast Guard advised Azille to begin throwing the catch overboard, which the fishermen did not do, and to fire a flare in ten minutes. The call ended when Azille's phone stopped working. Approximately twenty-five minutes later, the boat capsized leaving the plaintiffs with no means of communication.

Around 11:30 a.m., the Coast Guard boat, followed by a second boat, arrived in the vicinity of Azille's description. After searching the area, the second boat headed east where they thought they had seen a flare. A helicopter joined the second boat in searching the area where they thought the flare had come from. Throughout the afternoon, two more helicopters joined the search to no avail. One of the helicopters deployed a datum marker buoy that the Coast Guard uses to find people lost at sea by determining the speed and direction of the current in a search area. They called the search off at 5:31 p.m.

The following day, the Coast Guard resumed its search by helicopter at 6:31 a.m. and at 7:39 a.m. they launched a boat. Around 8:00 a.m., a private sailing vessel picked up the plaintiffs almost twenty-seven miles from where their boat capsized. By the time the plaintiffs were found, the Coast Guard estimated it had spent eighteen hours and forty minutes searching for them in an area of 192 nm.

The plaintiffs later brought an action claiming the Coast Guard acted negligently in conducting the search for them. The plaintiffs argued that the Coast

Photograph of Coast Guard cutter courtesy of ©Nova Development Corp.

Guard was careless in repeatedly sending a search helicopter northeast of the location Azille gave when the wind was blowing from the east, thus pushing the plaintiffs west of the given location.

Sovereign Immunity

Under the doctrine of sovereign immunity, the United States cannot be sued without consent. The Suits in Admiralty Act expressly waives sovereign immunity "where a civil action in admiralty could be brought against a private person."[1] In essence, it allows the United States or a federally-owned corporation to be treated like any other individual or corporation in a civil suit in admiralty. The Act does contain an implied discretionary exception which allows the U.S. to claim sovereign immunity in limited circumstances. The exception exists to "prevent judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[2]

The issue before the court was whether the Coast Guard's action fell within the discretionary function exception. To answer that, the court first had to determine what conduct was actually at issue. The court found that the primary issue was the Coast Guard's decision to send the helicopters to search the area northeast of Azille's last reported location. However, the court recognized that "it is the nature of the conduct … that governs whether the exception applies."[3] So, the court did not focus on the decision to send the helicopters off to search to the northeast, examining instead the more general decision to mount a search and how it was conducted.

The court had to determine if the Coast Guard's decision on how to conduct the search was a matter of discretion. The court used a two-part test from *Berkovitz v. United States* in which "a court [first] considers whether the challenged government action is a . . . matter of discretion [and] [s]econd, a court must determine whether the judgment or decision at issue 'is of the kind that the discretionary function exception was designed to shield.'"[4]

The court concluded that the Coast Guard had no mandatory duty to search for the plaintiffs and the search plan involved numerous factors, from the number of ships to the reported location and speed of drift. The court further supported its belief that the search was discretionary by referencing the U.S. National Search and Rescue Supplement (NSRS) and the Coast Guard Addendum to the NSRS.[5] The documents offer guidance on conducting rescues saying "[rescue] planning is both an art and a science" and that "[USCG] personnel are expected to exercise broad discretion and to exercise sound judgment in performing the functions discussed."[6] The USCG addendum also states "this document creates no duties, standard of care or obligations to the public and should not be relied upon as a representation by the [USCG] as to the manner or proper performance in any particular case."[7]

After determining that the Coast Guard's action was discretionary, the court looked at whether the issue at hand is "susceptible to policy analysis."[8] They concluded that "the Coast Guard's decision to attempt to rescue plaintiffs and its decisions about how to search for them are the kinds of decisions the discretionary function exception to the waiver of sovereign immunity under the Suits in Admiralty Act were designed to protect."[9] The court also referenced *Lewis, et. al. v. United States, et. al.*, another case involving alleged negligence during a USCG rescue.[10] In that case, the court likewise found that a USCG rescue is susceptible to policy analysis and therefore falls within the discretionary function exception.

Conclusion

This case was dismissed by the federal district court judge based on the court's decision that the Coast Guard's actions fell under the discretionary function exception to the Suits in Admiralty Act. Sovereign immunity will likely protect the Coast Guard from any similar negligence claims arising out of an attempted ocean rescue operation.

Endnotes:

1. *Azille v. U.S.* , 2008 U.S. Dist. LEXIS 97902 at *5 (D.V.I. 2008).
2. *United States v. Gaubert*, 499 U.S. 315, 323 (1991).
3. *Id.* at *7.
4. *Azille,* 2008 U.S. Dist. LEXIS 97902, at *6 (quoting from *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).
5. *Id.* at *9.
6. *Id.* at *9.
7. *Id.* at *10.
8. *Gaubert* 499 U.S. at 325.
9. *Azille*, 2008 U.S. Dist. LEXIS 97902 at *11.
10. *Lewis v. U.S.*, 2002 WL 34104078.

Coast to Coast
And Everything In-Between

Suffering from a bacterial infection, a loggerhead sea turtle found her way to the Turtle Hospital, the world's only veterinary facility that exclusively treats sea turtles. After arriving at the treatment center's dock, the turtle stuck around for hours until hospital staff members treated her. Now on medication, the turtle will recuperate until she can be released back into the wild. (*NBC Miami*, Apr. 1, 2009).

Photograph of loggerhead courtesy of Mito Paz, of Green Reef.

Apparently unable to curb his appetite, John Silvera pled guilty to stealing about $500 worth of frozen shrimp in four separate trips to a Market Basket in Salem, N.H. The serial shrimp shoplifter also faces charges in Methuen, MA, where he allegedly stuffed his jacket with frozen shrimp before leaving a separate Market Basket grocery store. (*Associated Press*, Apr. 2, 2009).

After falling overboard in rough seas off the coast of Queensland, Australia, a pet dog survived for four months on a largely uninhabited island before reuniting with its family. The dog swam five nautical miles to St. Bees Island and survived on the island's feral goat population until being rescued. Despite its difficult journey, the dog has successfully readjusted to domestic life. (*Agence France Presse*, Apr. 6, 2009).

Lost a watch in the ocean lately? A man in Hawaii recently caught a fish that coughed up a still-functioning gold watch. The man noticed the fish swimming awkwardly by the shore and caught it by hand. He threw the fish in a cooler and later noticed the gold watch next to the fish's mouth. (*Associated Press*, June 5, 2009).

Photograph of Greenpeace diver collecting tar from an oil spill courtesy of Greenpeace©/Carè©/Marine Photobank.

Greenpeace reacted harshly to a recent Spanish court ruling that cleared Spanish authorities of any responsibility for a 2002 oil spill, calling the outcome "unacceptable." Finding that the authorities reasonably prevented the ship from approaching the coast of the Galicia region, the court affirmed that the ship's crew was to blame for the spill of 64,000 metric tons of oil. (*Agence France Presse*, Mar. 21, 2009).

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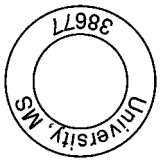

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