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District Court Overturns Agency Decisions on King William Reservoir

Alliance to Save the Mattaponi v. United States Army Corps of Eng'rs, 2009 U.S. Dist. LEXIS 57217 (D.D.C. Mar. 31, 2009).

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Limiting the Environmental Protection Agency's (EPA) discretion under the Clean Water Act (CWA), the U.S. District Court for the District of Columbia recently held that the EPA is obligated to veto a CWA permit if "adverse effects" are likely to result.[1] The ruling relates to the King William Reservoir project in Virginia, a 1,526-acre project that would provide additional water to the region and, according to the EPA, "… would represent the largest single permitted wetland loss in the Mid-Atlantic region in the history of the Clean Water Act Section 404 program."[2]

Background

In 1984, the Norfolk District of the U.S. Army Corps of Engineers (Corps) conducted a nine-year study which forecasted that the Lower Peninsula of Virginia would require 40 million gallons per day of additional water by 2030. In response, the City of Newport News submitted an application to the Corps for permits to construct the King William Reservoir, which would be created by building a dam across Cohoke Creek. The project would require the excavation, fill, destruction, and flooding of approximately 403 acres of freshwater wetlands. The Virginia State Water Control Board (Board) issued the City a permit for the proposed project in December 1997.

A group of organizations led by the Alliance to Save the Mattaponi (Alliance) and the Mattaponi Indian Tribe (Tribe) brought an action against the Board for issuing a building permit for the project, claiming the project would cause extensive environmental damage. The Virginia Supreme Court in *Alliance to Save the Mattaponi v. Virginia* upheld the issuance of permits for the reservoir in 2005.[3]

Also in 2005, the Corps issued its final record of decision (ROD) and issued a CWA permit for the company to place dredged or fill material into wetlands. The Corps found the project was in the public interest and would not cause or contribute to significant degradation of the waters of the United States, given Newport News' wetland mitigation plan that included the restoration and creation of 806 acres of wetlands. Although the EPA has the authority to veto the Corps' issuance of a permit, it abstained.

The Alliance and the Tribe filed suit in the U.S. District Court for the District of Columbia, claiming that the Corps' approval of the permit and the EPA's failure to veto it were arbitrary and capricious. The plaintiffs challenged the Corps' issuance of the permit "on the grounds that the determinations of the Corps that the Project was the least damaging practicable alternative, that it would not cause or contribute to significant degradation of the waters of the United States, and that it was in the public interest were arbitrary and capricious"[4]

Corps' Permit

The CWA prohibits the Corps from issuing a permit if there is a less damaging practicable alternative. The plaintiffs argued that the Corps' issuance of the permit was arbitrary and capricious because it rejected less damaging and otherwise

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practicable alternatives by relying on an outdated analysis in the final EIS.

The court found that before determining that a project which would flood 403 acres of functioning wetlands is the least damaging practicable alternative, the Corps must do more than give vague explanations about the potential adverse effects of other alternatives. Given that the CWA "compels that the [least damaging] alternative be considered and selected unless proven impracticable,"[5] the court found that the Corps acted arbitrarily and capriciously when it determined that the project was the least damaging practicable alternative based on mere assertions that other alternatives may not meet needs and could be more damaging. The court ordered the Corps to adequately explain why there is no less damaging practicable alternative, or reconsider its determination based on an adequate analysis of the alternatives.

In addition, the court found the Corps' determination that the project would not cause or contribute to significant degradation of the waters of the United States to be arbitrary and capricious. The CWA prohibits the Corps from issuing § 404 permits if the proposed discharge of dredged or fill material "will cause or contribute to significant degradation of the waters of the U.S."[6] The Corps found that Newport News' proposed mitigation plan would adequately compensate for lost wetlands. However, the court asserted that the Corps cannot simply state that it is not required to replicate the destroyed wetlands; instead, it must explain how the mitigation plan will adequately compensate for lost wetland functions and values, which would result in "no net loss" of wetland functions and values.

Congruent with the plaintiffs' argument that the issuance of the permit violates the Corps' public interest requirement, the court found that the district engineer did not weigh the benefits that reasonably may be expected to accrue from the project against its reasonably foreseeable detriments, considering all relevant factors. Therefore, the court held that the Corps' decision that issuance of the permit was in the public interest was arbitrary and capricious.

However, the court found the Corps' decision not to supplement the final environmental impact

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Supreme Court Upholds Corps' Slurry Discharge Permit

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 129 S. Ct. 2458 (2009).

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The U.S. Supreme Court recently held that the U.S. Army Corps of Engineers, not the Environmental Protection Agency (EPA), has authority under the Clean Water Act (CWA) to issue permits for the discharge of fill material into navigable waters. The Court upheld the Corps' issuance of a permit to a mining company to dispose mining waste into a lake. In doing so, the Court may have offered similar mining operations a "loophole" in circumventing the CWA.

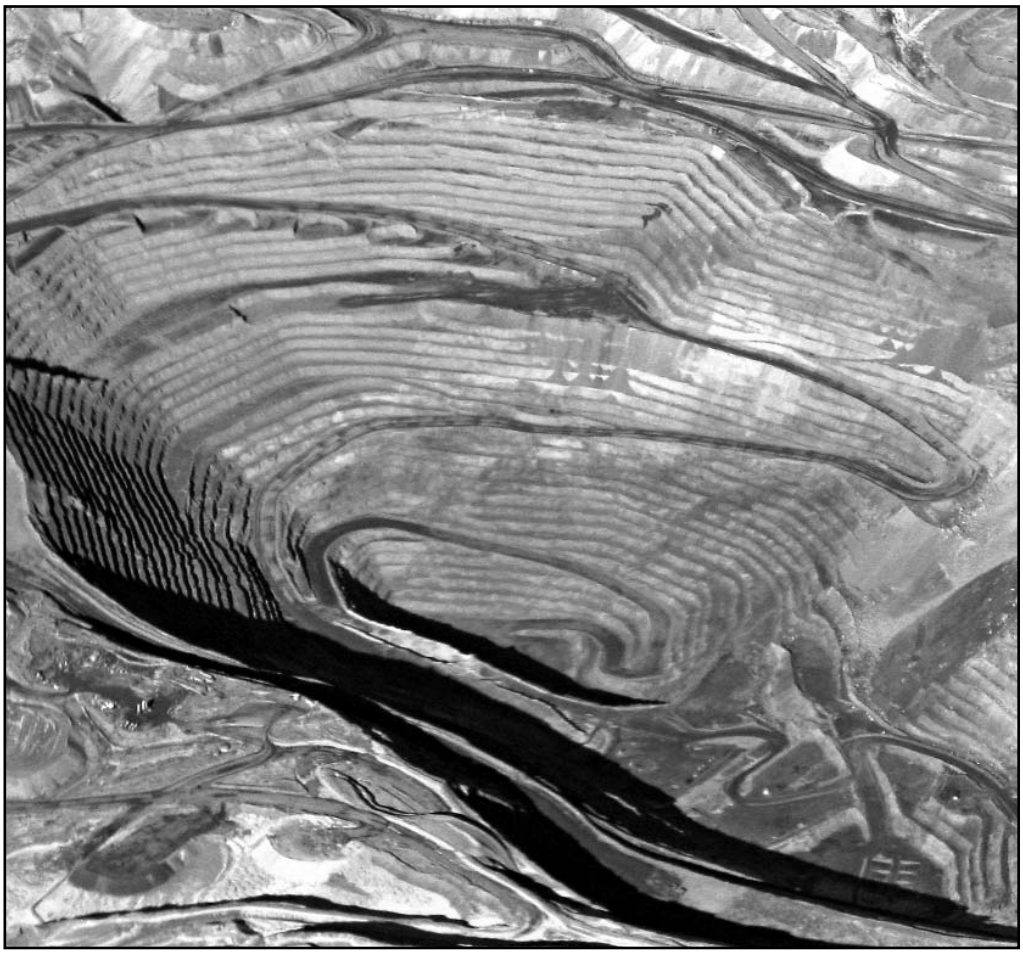
Background

As part of its plans to reopen a long-abandoned gold mine, Couer Alaska planned to churn the mine's crushed rock in water and chemicals. The mixture, called "slurry," causes the gold-bearing materials to float to the surface where it can be easily extracted. Typically, the remaining slurry is pumped into a pond excavated specifically for this purpose. However, Coeur Alaska sought a permit from the U.S. Army Corps of Engineers (Corps) to dispose of the slurry in nearby Lower Slate Lake, a navigable body of water subject to the CWA.

Pursuant to § 402 of the CWA, the EPA (or the state if it has been delegated permitting authority) determines whether to approve permits for the discharge of pollutants from a point source into U.S. waters. However, § 404(a) of the CWA authorizes the Corps to grant permits for the discharge of "dredged or fill material."[1] The Corps and the Environmental Protection Agency (EPA) both define fill material to include slurry.[2] Both agencies agreed that Coeur Alaska's proposed slurry qualifies as fill material due to its "effect of... '[c]hanging the bottom elevation' of water."[3]

Coeur Alaska's plan included diverting the surrounding waters (in order to prevent spreading the pollution downstream) and covering the lake bed slurry with native materials upon the completion of mining operations. The alternative would

Aerial photograph of an abandoned gold mine in Nevada courtesy of Wikimedia.



have been to dump slurry on nearby wetlands, causing a permanent loss. Given the choice between a permanent loss of an estimated 60 acres of wetlands or the temporary harm to a relatively small lake, the Corps approved Coeur Alaska's proposal to dispose of the mining slurry in Lower Slate Lake as the "'least environmentally damaging practicable'" option.[4] Under § 404(c) of the CWA, the EPA has authority to veto the Corps' permit decision, but did not do so in this instance.

Aerial photograph of Lower Slate Lake courtesy of Lighthawk, by Pat Costello.

The Southeast Alaska Conservation Council and other environmental groups (SEACC) filed suit, arguing that the EPA, not the Corps, should have considered the permit application. SEACC also contended that the Corps improperly approved the permit, citing the EPA's performance standards promulgated under CWA § 301 and § 306. The standards prohibit discharges like these and do not have exceptions for dredge or fill material.

A federal district court found that the Corps did have jurisdiction to issue the permit. The Ninth Circuit disagreed, finding that the dischargers were required to comply with the EPA's performance standards and that the company was required to obtain a § 402 permit for its activities.

Slurry Discharge Permits: EPA or Corps?

On appeal, the U.S. Supreme Court first addressed whether the EPA or the Corps was the appropriate agency to consider slurry dumping permit applications. The slurry, when deposited into Lower Slate Lake, would raise the bottom level of the lake, meeting the EPA's and the Corps' definition of fill material. When a discharge falls under Corps' § 404 permitting authority, EPA loses its § 402 permitting authority. The court noted that "[t]he Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under §404, then the EPA lacks authority to do so under §402."[5] Regulations for both the Corps and EPA clearly prevent EPA from issuing permits for § 404 discharges. Specifically, EPA's own regulations dictate that discharges subject to Corps' § 404 permits are exempt from §402 permits. Because both agencies agreed that Coeur Alaska's proposed slurry qualifies as fill material, the Court found that the Corps had authority to permit the discharge.

The Court also noted that the EPA had the authority to override the Corps' permit approval but declined to exercise this power. Though it found Coeur Alaska's lake dumping plan less than preferable, "the EPA in effect deferred to the judgment of the Corps on this point."[6] Not only did the EPA decline to veto the Corps permit, but it also issued a permit governing the discharge of water from Lower Slate Lake into a downstream creek, contingent upon the satisfaction of certain water quality standards.

The Court held that the Corps, not the EPA, has the authority under the CWA and its associated agency regulations to issue permits regarding the disposal of fill material into navigable waters. Furthermore, the Court found that the Corps issued the Lower Slate Lake permit to Coeur Alaska in a manner consistent with the CWA and those regulations.

EPA Performance Standards

The Court next considered whether "EPA performance standards. . . apply to discharges of fill material?"[7] Under the CWA, the EPA has the authority to regulate mining operations. SEACC argued that the CWA and the agencies' regulations conflict with each other: the Corps may issue

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Supreme Court to Hear Judicial Takings Case

Terra Bowling, J.D.

Last year, in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, the Florida Supreme Court concluded that the state's Beach and Shore Preservation Act (BSPA)[1] did not result in a compensable taking of shoreline owners' property. Recently, the U.S. Supreme Court granted cert in the case and will rule on whether the decision results in an unconstitutional taking of private property.

Background

After several Florida beaches were severely damaged by Hurricane Opal in 1995, the City of Destin and Walton County initiated a renourishment project. Under the BSPA, once a renourishment project begins, an erosion control line (ECL) replaces the Mean High Water Line as a fixed property line between private and public lands.[2] Once the ECL is established, the common law no longer operates "to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion."[3] Stop the Beach Renourishment filed suit, claiming that the BSPA deprives property owners of their littoral common law rights, including the property owners' right to accretion, which is the common law right to land that accumulates over time. The Florida Supreme Court found that because the BSPA did not fundamentally interfere with the property owners' rights to access, use, and view the ocean, there was no taking.

Photograph of Destin beach courtesy of Terra Bowling.

Cert

In its petition for cert, the petitioners argued that the Florida Supreme Court's ruling "reversed 100 years of uniform holdings that littoral rights are constitutionally protected common law property rights," resulting in a "judicial taking" of the beachfront owners' property rights.[4] Although the U.S. Supreme Court should also examine whether the Florida Supreme Court's approval of the BSPA violated Due Process under the U.S. Constitution, the "judicial takings" issue will likely be the primary focus for the Court.

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." Courts will generally find a right to compensation when the government 1) directly appropriates private property; 2) physically occupies private property; and 3) imposes a regulatory constraint on the use of property so severe as to deprive an owner of all economically beneficial use. However, most "takings" cases have focused on instances in which the legislature, not a court, has appropriated private property. This case will be the first time the Supreme Court addresses whether a court's ruling has resulted in a "judicial taking." If the Supreme Court does find that a taking occurred, Florida would be required to compensate private property owners.

More than a dozen amicus briefs supporting the property owners' claims have been filed in the case, primarily asking the court to find that littoral rights cannot be modified without notice, a judicial hearing, and just compensation. Attorneys general from 26 states and several organizations have filed amicus briefs supporting Florida. The argument is scheduled for December 2nd and will be one of the first cases heard by Justice Sonia Sotomayor.

Endnotes

1. FLA. STAT. §§ 161.011-161.45 (2008).
2. FLA. STAT. § 161.191 (2008).
3. *Id*.
4. Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, Petition for Writ of Certiorari, No. 08-1151 (U.S. Mar. 13, 2009).

statement (EIS) was not arbitrary and capricious. In order to challenge the Corps' decision not to issue a supplemental EIS, the plaintiffs had to present information that is both new and would provide a "seriously different picture of the environmental landscape." But here, the plaintiffs did not point to any new practicable alternative not considered in the final EIS. Although the plaintiffs highlighted new information, such as the unavailability of a mitigation site included in the mitigation plan, which opened the possibility that the mitigation plan would not produce the promised benefits, the court could not conclude that the Corps' decision not to supplement the final EIS was arbitrary and capricious. The court noted that the mitigation plan contained other contingency sites; therefore, the court found that the Corps did not violate NEPA by failing to supplement the EIS.

Photograph of Mattaponi River courtesy of USGS.

EPA Veto

The court held that by considering factors outside of the scope of its statutory authority when it decided not to veto the permit, the EPA acted arbitrary and capriciously. The court found that the EPA Administrator's decision not to veto the permit was not based on his determination that the permit was unlikely to have unacceptable adverse effects, but on reasons completely divorced from the Guidelines promulgated by EPA pursuant to § 404(b) of the CWA. Specifically, the Administrator determined that engaging in the required notice and comment proceedings would divert resources; that additional process would be unlikely to add any new information; and that there was a water supply shortfall that needed to be addressed. The court found that the Administrator must base his decision solely on whether the issuance of a permit has unacceptable adverse effects.

Conclusion

The Corps erred in approving, and EPA erred in failing to veto, a CWA permit authorizing the construction of the project that would flood over 1,500 acres of land and require the excavation, fill, destruction, and flooding of approximately 403 acres of freshwater wetlands and over 100 archaeological sites, the elimination of 21 miles of free-flowing streams, and drawing up to 75 million gallons of water a day from the Mattaponi River.

Although the U.S. Department of Justice (DOJ) filed an appeal on behalf of the Corps and EPA in early June 2009, on June 25 the DOJ announced its plans to drop the appeal.[7] In effect, according to officials, the project "has no future."[8]

Endnotes

1. *Court Limits EPA Discretion under CWA when Vetoing Corps Permits*, INSIDE EPA, May 1, 2009, http://www.aswm.org/news/court_limits_050109_inside_epa.pdf .
2. Alliance to Save the Mattaponi v. United States Army Corps of Engineers, 2009 U.S. Dist. LEXIS 57217 at *11. Mar. 31, 2009).
3. Alliance to Save the Mattaponi v. Virginia, 621 S.E.2d 78, 87 (Va. 2005); Stephanie Showalter, *Virginia Supreme Court Upholds Issuance of Permits for King William Reservoir*, 4:4 THE SANDBAR 1 (2006).
4. *Alliance to Save the Mattaponi*, 2009 U.S. Dist. Lexis 57217 at *11.
5. *Id.* at *24.
6. 40 C.F.R. § 230.10(c).
7. Press Release, Southern Environmental Law Center, *Federal government drops its appeal of the court ruling overturning the permit*, June 26, 2009, *available at* http://www.southernenvironment.org/virginia/king_william_reservoir_va/updates/ .
8. *Id.*

Hawaii Considers Increased Fines to Deter Coral Damage

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In February 2009, a 567-foot U.S. Navy vessel, the *U.S.S. Port Royal*, grounded on top of a coral reef. After three days, the vessel was successfully removed from the coral reef, but not before causing substantial damage. The U.S. Fish and Wildlife Service (FWS), the National Oceanic and Atmospheric Administration (NOAA), and the Navy's consultants, CSA International, mapped the grounding site and documented the damage. While the main "injury scar" covers approximately 8,000 square meters, it is estimated that approximately 6-10 acres were damaged.[1]

Accidents like this pose a serious threat to coral reefs. Hawaii has a particular interest in guarding against such accidents, since the state has 84% of the coral in the U.S.[2] The coral reefs provide habitat for a variety of fish and marine life in Hawaii, which in turn provide economic well-being in the form of "fishing, research, education, ocean recreation, and tourism."[3]

DLNR Action

In 2007, the Hawaii Department of Land and Natural Resources (DLNR) responded to the problem of coral reef groundings by beginning to issue fines to boaters who caused damage. Previously, although the DLNR had the authority to impose fines for coral damage, penalties imposed were generally limited to mandatory education about coral reefs and payment of the restoration costs for the damaged area.[4]

Since 2007, the DLNR has imposed heavy fines on two tour companies for causing damage to coral reefs. For example, Maui Dive Shop was fined $400,000 when one of its tour boats sank in late September 2006 damaging a 14,600 square foot area of coral reef.[5] Last year, the Board of Land and Natural Resources, a division of DLNR, fined Makena Boat Partners $543,000 for damage it caused to a coral reef when its boat anchor chain dragged across a reef, scouring and knocking it over.[6] Makena contested the case, eventually filing suit in federal court. The Board is currently considering whether to approve a settlement amount of $130,000.[7]

In response to the Navy grounding, the DLNR notified the Navy in early April that it needed to take immediate action to mitigate the damage caused when the *U.S.S. Port Royal* grounded. The Navy responded by hiring divers to collect the loose coral from the damaged reef. After the loose coral is collected, surviving colonies will be stored onshore by the DLNR. The coral will then be reattached to live coral in the damaged area.[8]

Hawaii Legislation

Current Hawaii legislation provides for fines to be imposed for violation of regulations that involve "threatened or endangered species," but does not address damage to coral specifically.[9] The statute provides for fines based on the number of violations. The fine may not exceed $5,000 for a first offense, $10,000 for a second offense, and $15,000 for third and subsequent violations that occur within 5 years of the prior violation.

There is a proposal to change this legislation so that it will directly address damage done to "stony coral and live rock."[10] The proposed legislation would impose additional fines for damaging or breaking stony coral or live rock based upon the square meters of coral impacted. If the offender damaged an area of three meters or more, the proposed changes would impose a fine of $2,500 per square meter of stony coral or live rock broken or damaged.[11] If the offender damaged an area of less than three square meters, the fine would be $1,000 per square meter.[12]

A similar change was considered in 2008. The 2008 amendment would have imposed a fine based on the number of square meters damaged, but the fine would have been a flat rate of $5,000 per square foot of damaged stony coral or live rock, regardless of the overall size of the damaged area.[13]

Florida Legislation

Florida, which is also home to endangered coral reefs, has enacted legislation similar to that proposed

in Hawaii. Florida recently enacted the Coral Reef Protection Act (CRPA) in order to raise public awareness about coral reef protection and ensure that parties who cause damage to coral are held accountable for their actions.[14] The CRPA also sets fines based upon the size of the area of coral that was damaged and upon the offender's number of prior offenses.

Photograph of coral courtesy of Waurene Roberson.

The fines imposed under Florida's CRPA are more modest than those proposed by the Hawaii legislature. They include a $150 fine for damage to an area equal to or less than one square meter.[15] As the size of the damaged area increases, however, so does the fine. If the offender damages an area of coral greater than one square meter, but less than ten square meters, the fine is $300 per square meter of damage; if the area damaged exceeds 10 square meters, the fine is $1,000 per square meter of coral damaged.[16]

Conclusion

This new legislation provides coastal managers with an additional tool to protect coral reefs. Additionally, the larger fines offer states the opportunity to collect money for their damaged resources and restoration efforts.

Endnotes

1. Press Release, Department of Land and Natural Resources, *State to File Damage Claim for Full Restoration Cost of Port Royal Grounding, Calls for U.S. Navy to Prevent Further Harm to Reef* (April 1, 2009) (on file with author).
2. *Hawaii Protecting Coral Reefs with Big Fines*, MSNBC, Aug. 2, 2009, http://www.msnbc.msn.com/id/ 32261272/ns/us_news-environment/ (2009).
3. Press Release, Department of Environmental Protection, *Coral Reef Protection Act to Go into Effect July 1, 2009*, (June 30, 2009) (on file with author).
4. *Hawaii Protecting Coral Reefs with Big Fines*, *supra* note 2.
5. *Proposal Would Lower Fine for Coral Reef Damage*, THE MAUI NEWS, July 21, 2009, *available at* http://www.mauinews.com/page/content.detail/id/521268.html .
6. *Id.*
7. Audrey McAvoy, *Decision on Deal to Settle with Maui Coral Claim Deferred*, THE MAUI NEWS, July 23, 2009, *available at* http://www.mauinews.com/page/content.detail/id/521355.html .
8. Gregg K. Kakesako, *Navy Begins Repair of Reef and Warship*, HONOLULU STAR BULLETIN, Apr. 30, 2009, *available at* http://www.starbulletin.com/news/hawaiinews/20090430_navy_begins_repair_of_reef_and_warship.html .
9. HAWAII REV. STAT. § 187A-12.5 (2009).
10. H.B. No. 1135, 2009 Leg. (Haw. 2009).
11. *Id.*
12. *Id.*
13. H.B. No. 3176, 2008 Leg. (Haw. 2008).
14. DEP Press Release, *supra* note 3.
15. FLA. STAT. § 403.93345 (2009).
16. *Id.*

Ballast Water Permits Survive Challenges

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Ballast water, which is collected in ballast tanks to increase stability when freight is unloaded from ships, has become a sizable environmental problem for many Great Lakes states. Ballast water discharged in ports as ships load cargo may contain aquatic invasive species (AIS), as well as pollutants such as sediment, rust, and salt. Some estimates claim that ballast water from ocean-going vessels has introduced over 180 different invasive species into the Great Lakes and cost the region billions of dollars.[1]

At the federal level, ballast water is regulated by both the Clean Water Act (CWA) and the National Invasive Species Act (NISA). Prior to 2006, the Environmental Protection Agency (EPA) had exempted ballast water discharges from regulation under the CWA. In 2002, however, several organizations filed suit to require the agency to regulate such discharges. In 2006, a federal district court ordered EPA to regulate ballast water discharges under the CWA by September 30, 2008. The ruling was affirmed by the Ninth Circuit, and EPA eventually issued a general permit for the discharge of ballast water by commercial vessels.

NISA authorizes the Coast Guard to regulate ballast water. Under a previous version of NISA, the Coast Guard promulgated "ballast water management practices" in 1993 that focused on ballast water exchange. The Coast Guard promulgated mandatory national regulations for ballast water management in 2004; however, the regulations exempted classes of ships ("no ballast on board" ships, or NOBOBs) that could potentially introduce invasive species when taking on ballast water once in the Great Lakes.

In August, the Coast Guard issued a notice of proposed rulemaking to establish ballast water discharge standards. The regulations follow the International Maritime Organization's (IMO) standards for a set period of time and then become 1,000 times stricter.

While regulation at the federal level is slowly progressing, states have used their authority under the CWA to develop their own permits. The CWA authorizes states to exceed minimum federal standards to protect their waters.[2] Many Great Lakes states, including Minnesota, Michigan, and New York, have used their certification authority to attach conditions to EPA's general permit. States have also used their authority to issue state permits. Both the shipping industry and environmental groups have challenged these state actions. Courts have generally upheld the permits, giving states permission to continue to provide protection to their waters. Most recently, a Minnesota appeals court upheld the state's permit despite a challenge from an environmental group alleging that the state did not perform an adequate nondegredation review before issuing the permit. Additionally, New York's certification has been upheld, as has Michigan's permitting program.

Minnesota

Pursuant to the CWA, EPA requires states to develop nondegredation policies to maintain water quality to protect existing water uses.[3] Minnesota's nondegredation rule prohibits or controls new or expanded discharges to protected water.[4] Minnesota designated Lake Superior as an "outstanding resource value water," or protected water, in 1984 under the state's nondegredation rule. Protected waters are "waters of the state with high water quality, wilderness characteristics, unique scientific or ecological significance, exceptional recreational value, or other special qualities which *warrant stringent protection* from pollution."[5]

To protect Lake Superior from ballast discharges, in September 2008, the Minnesota Pollution Control Agency (MPCA) issued State Disposal System (SDS) Permit MNG300000, a ballast water discharge permit. The permit includes ocean-going vessels and lakers (Great Lakes only vessels), requires compliance with

best-management practices, and sets biological treatment standards for ballast water.[6] The treatment standards are identical to those mandated by the IMO. MPCA determined that these standards were "the most stringent treatment standards . . . technologically available during the term of the permit."[7]

In October 2008, an environmental advocacy group, Minnesota Center for Environmental Advocacy (MCEA), petitioned the Minnesota appellate court to review the SDS permit.[8] MCEA claimed that the agency 1) erroneously concluded that ballast water discharge does not create an "expanded discharge," 2) conducted an inadequate nondegradation review, and 3) failed to set permit terms that will preserve Lake Superior's existing water quality.[9]

MCEA's first claim was that MPCA erroneously interpreted "expanded discharge" in the state's nondegredation policy. When formulating the permit, MPCA determined that most ballast discharges do not cause an increased loading, or expanded discharge, of pollutants because ships were discharging ballast water into Lake Superior in similar volumes prior to the 1984 designation as protected waters.[10] MCEA argued that MPCA erroneously focused solely on changes in volume of the ballast water discharge and did not consider changes in "quality, location, or any other manner." However, the court rejected this argument, noting that "a change in the quality of discharge does not result in an 'expanded discharge' under the rule unless 'an increased loading of one or more pollutants' results."[11] The court held that MPCA did not err in interpreting the regulatory language regarding "expanded discharge" and that the agency correctly determined that a nondegradation review was required.

Second, the environmental group claimed that MPCA conducted an inadequate nondegradation review, because the agency did not provide "a baseline analysis of Lake Superior's existing water quality, an assessment of the risk and manner of water degradation from the individual invasive species believed most likely to invade Lake Superior, and an analysis and determination that the biological-performance standards in the SDS general permit will in fact preserve the existing water quality in light of potential invasive species."[12]

The court found that it was not necessary for the agency to conform to a particular form of nondegredation review. MPCA appropriately focused on the need to maintain Lake Superior's existing water quality, and deference to the agency's review is proper because the agency has the special knowledge and technical training necessary to conduct an adequate review. Finally, the court held that the agency's decision was not arbitrary and capricious because MPCA's decision did not run counter to the evidence, was not implausible, was not based on factors that were not intended by the legislature, and did not fail to address important aspects of the problem.[13]

Third, MCEA claimed that the terms of the SDS general permit would not preserve water quality. MPCA concluded that adopting more stringent standards in the absence of existing technology would not result in preservation of high water quality. MPCA recognized that it will take time to develop and implement better technology and, therefore, required that vessels constructed after January 1,

Photograph of freighter in Muskegon Channel courtesy of NOAA's Great Lakes Environmental Research Laboratory.

2012 must be compliant when they begin operating in Minnesota waters. The court concluded that MPCA's reasoning was sound, and the agency did not err in its adoption of water treatment standards and a timeline for implementation of those standards.

The court's overall conclusion was that the process MPCA used to conduct the nondegradation review and to adopt the permit terms was neither based on an error of law nor arbitrary and capricious. The permit survived the challenge.

Other Challenges

As of January 2007, Michigan required ocean-going vessels that discharge ballast water to use specified technologies to prevent the introduction of invasive species into the Great Lakes.[14] Michigan's law only applies to ocean-going vessels and does not require specific treatment standards.

In contrast to the permit challenge in Minnesota, several shipping companies, ports, and industry groups sued the state of Michigan, alleging that the statute unconstitutionally interferes with interstate commerce and is preempted by federal law. In this case, a coalition of environmental and conservation groups intervened on behalf of the state.

In November 2008, the U.S. Court of Appeals for the Sixth Circuit upheld Michigan's ballast water statute and rejected the shippers' challenges.[15] The court held that Michigan's statute was not preempted by the federal NISA, and the permit requirement did not conflict with the NISA or the Coast Guard's regulations promulgated pursuant to it.[16] Further, the state's statute did not violate due process. Michigan had a legitimate interest in protecting its waters from further introduction of AIS from ballast water discharges by ocean-going vessels, and the permit requirement was rationally related to advancing that interest.[17]

New York has attached conditions to EPA's general permit. Ships operating in New York waters are required to begin using technology to treat any ballast water discharged to reduce the potential for invasive species and maintain water quality. In *Port of Oswego Authority v. Grannis*, the shipping industry argued that New York's restrictions were both illegal under state law and unconstitutional. Vessel owners and others challenged three of the five conditions included in the CWA § 401 Water Quality Certificate for Commercial Vessel and Large Recreational Vessel General Permit issued by the New York State Department of Environmental Conservation (DEC) in November 2008.[18]

The first challenged condition requires that all ships with ballast water on board entering New York waters to travel 50 nautical miles offshore into waters at least 200 meters in depth and exchange the water in their ballast tanks with ocean salt water. Among the exceptions, there is one for freshwater laker vessels.[19]

The other challenged conditions set a timeline for existing and new ships, respectively, to install appropriate ballast water treatment systems that meet specifically established standards for organism and microbe content. There are exceptions, and ships may apply for extensions if the required technology is not available.[20]

The plaintiffs argued that DEC failed to follow specific procedural requirements, exceeded its legislative authority, impermissibly burdened interstate and foreign commerce, and unlawfully promulgated rules that were arbitrary, capricious, and a clear abuse of agency discretion. Further, permit opponents argued that harm to the economy and to the environment would occur.[21]

DEC argued that it had the proper authority under existing state law and that it followed the proper procedure in setting the permit conditions. Additionally, DEC argued that the vessel owners failed to scientifically support the assertion that the permit conditions would do more harm than good to the environment.[22]

Further, the Natural Resources Defense Counsel and the National Wildlife Fund intervened in the litigation to oppose the industry's challenge to the permit and to support the state's regulations. The court found that "[i]t is undisputed that ballast water on ocean-going vessels . . . is a source of significant potential and actual biological pollution for the State's water systems . . ."[23] The court upheld the state regulations, reasoning that the DEC's permit application process satisfied the procedural requirements of the state.[24] Again, state ballast water regulations survived litigation.

Conclusion

Litigation will likely continue from both commercial interests and environmental advocates, while states and the federal government work to regulate ballast water discharges. While the outcome of litigation with respect to federal permits could be different, so far courts have upheld states' permits.

Endnotes

1. Great Lakes Law Blog, http://www.greatlakeslaw.org/blog/aquatic_invasive_species/ (July 28, 2009).
2. 33 U.S.C. § 1370 (2009).
3. 40 C.F.R. § 131.12(a).
4. MINN. R. 7050.0180.
5. MINN. R. 7050.0180, subp. 2(A) (emphasis added).
6. A copy of Minnesota's permit is available at http://www.pca.state.mn.us/publications/ballast-finalpermit-092408.pdf .
7. In re Request for Issuance of the SDS General Permit MNG300000 for Ballast Water Discharges from Vessels Transiting Minnesota State Waters of Lake Superior, 769 N.W.2d 312, 316 (Minn. App. 2009).
8. Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency, Petition for Writ of Certiorari/Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency/ Petition for Writ of Certiorari, No. A08-1828 (Minn. App. Oct. 22, 2008). (Minn. App. Oct. 22, 2008).
9. *In re Request for Issuance of the SDS General Permit MNG300000*, *supra* note 7, at 315, 318, 320.
10. *Id.* at 319.
11. *Id.*
12. *Id.* at 312, 320-321.
13. *Id.* at 320-24.
14. Great Lakes Environmental Law Center, http://www.glelc.org/glelc/aquatic-invasive-species.html (last visited Sept. 18, 2009).
15. Fednav, Ltd. v. Chester, 547 F.3d 607 (6th Cir. 2008).
16. *Id.* at 619.
17. *Id.* at 625.
18. 881 N.Y.S.2d at 284.
19. *Id.* at 285.
20. *Id.*
21. *Id*. at 285-86.
22. *Id.* at 286.
23. *Id*. at 288.
24. *Id*. at 288-89.

Slurry Discharge, from page 4

permits for fill material discharge, yet the EPA may restrict discharge from mining operations under § 306. SEACC argued that the slurry discharge would violate EPA's performance standards under § 306. The Court resolved this conflict by interpreting the omission of § 306 (new source performance standards) from §404 (granting the Corps authority to issue dredged and fill material permits) as Congressional intent.

The exclusion of § 306 from § 404, the Court reasoned, "is evidence that Congress did not intend § 306(e) to apply to Corps § 404 permits or to discharges of fill material."[8] Whether this omission amounts to intent or merely oversight is debatable, but proved satisfactory for the Court. Additionally, the Court relied upon an internal EPA memo that addressed the scope of § 306, the ability of the Corps to make decisions in the public's interest, and the difference between the slurry in this case and more dangerous, toxic pollutants. Though not bound by the memo, the Court found it instructive and well reasoned, ultimately deferring to its conclusion that the slurry discharge did not violate EPA's performance standards.

Conclusion

The Court deferred to the agencies' interpretation of the CWA, upholding the Corps' authority to issue permits for the discharge of fill material and declining to extend EPA new source performance standards to those permits.

Endnotes

1. 33 U.S.C. §1344(a).
2. 40 C.F.R. §232.2.
3. Couer Alaska, Inc. v. Southeast Alaska Conservation Council, 129 S.Ct. 2458, 2459 (2009).
4. *Coeur Alaska, Inc*. at 2465.
5. 40 C.F.R. § 122.3.
6. *Coeur Alaska, Inc.* at 2465.
7. *Id.* at 2469.
8. *Id.* at 2471.

Mission Bay Jet Skiing Accident Subject to Admiralty Jurisdiction

Mission Bay Jet Sports, LLC v. Columbo, 2009 U.S. App. LEXIS 13529 (9th Cir. June 24, 2009).

Jason M. Payne, J.D.

On June 24, 2009, the U.S. Court of Appeals for the Ninth Circuit ruled that a jet ski accident on an isolated cul-de-sac of the Pacific Ocean falls within federal admiralty jurisdiction. The accident took place in an area near San Diego known as Mission Bay. The area is buoyed off and designated for personal watercraft only, with no commercial ships allowed. While some legal scholars will accept this ruling as a continuation of the modern trend to expand admiralty jurisdiction, others will argue that it takes federal maritime courts into a completely unanticipated and improper direction away from their original intent of protecting maritime commerce.

Background

On the evening of July 29, 2007, Brett Kohl, an employee of Mission Bay Jet Sports, was asked by a friend to provide a jet ski for a group of friends. Kohl met them with a jet ski at the buoyed off area of Mission Bay. Once there, Kohl offered rides to the plaintiffs, Haley Columbo and Jessica Slagel. While riding on the jet ski, Kohl began traveling in tight circles at around 25 mph. The plaintiffs were thrown from the jet ski once but climbed back onto the watercraft. Again, Kohl began traveling in tight circles. The plaintiffs were thrown from the watercraft a second time, but this time, they were seriously injured.

The plaintiffs brought a negligence suit in California state court against Mission Bay Jet Sports and its owner, Robert Adamson (collectively, Adamson). Adamson filed a motion to remove the case to federal district court by invoking the court's admiralty jurisdiction in order to either seek exoneration or to limit his liability to the $6,005 value of the jet ski under the Shipowner's Limitation of Liability Act.

Admiralty Jurisdiction

For a tort to fall under admiralty jurisdiction, the activity must meet both a location requirement and have a connection to traditional maritime activity. The federal district court in San Diego ruled that the accident did not fall under admiralty jurisdiction, because there was no potential impact on maritime commerce. The court came to this conclusion

Photograph of Mission Bay courtesy of California State University, Long Beach, School of Natural Sciences and Mathematics.

because the area was isolated, with no docks, wharfs or commercial shipping in it, and the damages occurred from a single jet ski accident.

On appeal to the Ninth Circuit, the judges evaluated whether the incident fell under admiralty jurisdiction using the location and the connection tests. By following several important Supreme Court cases from the past three decades as well as the court's own precedent, the court found that placing such accidents under federal admiralty jurisdiction was a logical step in the progression of admiralty law.

Location

The location test requires the incident to "occur on navigable waters and bear a significant relationship to traditional maritime activity."[1] Here, the plaintiffs argued that the buoys and two bridges that separate this area from the rest of Mission Bay form a barrier to commerce. They supported this argument with cases involving permanent dams that effectively prevented commerce. The Ninth Circuit felt the cases were distinct, however, since the buoys, bridges, and distance were not permanent barriers like dams. The court stated that even though this part of Mission Bay is separated from the Bay's active commercial area, it is nevertheless "open to the Pacific Ocean and subject to the ebb and flow of tides."[2] Using language from a previous ruling, they added that "in tidal waters, the ebb and flow of the tides remains the standard"[3] for determining whether a body of water is navigable.

Connection

Once the tort passes the location test, it must then pass the two-part connection test. The first part requires the court to "assess the general features of the type of incident involved" to see if it has "a potentially disruptive impact on maritime commerce."[4] If so, the court then looks to "whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"[5]

In analyzing the connection test, the court relied heavily on a case in which the Supreme Court ruled that an accident involving a collision of two pleasure boats on the Amite River, a navigable body of water in Louisiana, could be tried in federal admiralty court.[6] The Supreme Court held that "the federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity."[7] It went on to comment that courts should look at how an activity would affect maritime commerce and use that to determine if the incident should come under federal maritime jurisdiction. The court gave the example of how the case they had before them would significantly affect maritime commerce if it had occurred at the mouth of the St. Lawrence Seaway. Using this analysis along with other similar cases involving individuals not participating in maritime commerce, the Ninth Circuit decided this incident could have disrupted maritime commerce. They stated that "[a]mong other things, a vessel from which a passenger goes overboard in navigable waters would likely stop to search and rescue, call for assistance…and ensnarl maritime traffic in the lanes affected."[8]

In determining whether the second part of the connection test had been met, the court summed up the general character of the activity occurring at the time of the accident "as operating a vessel in navigable waters."[9] The court also noted that transporting a passenger on a vessel, such as a jet ski, obviously comes within the "substantial relationship" that is required. The court thus concluded this case involved an accident, which occurred during a substantially maritime related activity, on navigable waters with the potential to cause a hazard to maritime commerce.

Conclusion

The Ninth Circuit strictly adhered to the "ebb and flow of the tide" test. The court reversed the decision of a district court judge who was familiar with Mission Bay and felt the waters in the jet ski area were non-navigable under the admiralty jurisdiction definition. This should sound out a warning that no part of the California coast is protected from federal admiralty jurisdiction as long as the circuit follows the "ebb and flow of the tide" test. Though this decision now only affects Ninth Circuit cases, that could change if other federal circuits adopt the ruling or the Supreme Court affirms it.

See Mission Bay, page 16

Supreme Court Declares City Tax on Large Vessels Unconstitutional

Polar Tankers, Inc. v. City of Valdez, 129 S. Ct. 2277 (2009).

Brent Hartman, 3L, University of Toledo College of Law

A recent U.S. Supreme Court decision may force coastal cities and states to reconsider fees, taxes, and duties imposed on vessels. In *Polar Tankers, Inc. v. City of Valdez*, the Supreme Court, relying on the U.S. Constitution's Tonnage Clause, found that port cities cannot circumvent the constitutional prohibition of state import and export tax by taxing the vessel itself.

Background

The Tonnage Clause states that "[n]o state shall, without the consent of Congress, lay any duty of tonnage."[1] Together with the Import-Export Clause, the Tonnage Clause limits the ability of coastal states to impose taxes, duties, or fees for the privilege of entering, trading, or lying in a port. Supreme Court precedent dating back to the nineteenth century states that the term "tonnage" extends beyond the capacity or weight of a ship and its cargo. The Court has ruled that the Tonnage Clause also forbids other measures bearing a relationship to capacity or size, such as engine size or the number of passengers.

In 1999, the City of Valdez passed an ordinance levying a tax on "[b]oats and vessels of at least 95 feet in length."[2] A large ship was subject to the tax if it: 1) regularly traveled to the city; 2) was kept or used in the city; or 3) had $1 million in cargo or business transactions in the city. Exceptions to the ordinance, however, essentially limited the applicability of the tax to large oil tankers. An interstate crude oil transporter, Polar Tankers, Inc. (Polar Tankers) challenged the constitutionality of the tax under the Tonnage, Commerce, and Due Process Clauses. The Alaska Superior Court declared the tax unconstitutional under the Commerce Clause and Due Process Clause, but the Alaska Supreme Court upheld the tax on appeal. On appeal to the U.S. Supreme Court, the justices ruled that the city's tax was unconstitutional under the Tonnage Clause, making it unnecessary to examine the Commerce Clause and Due Process Clause claims.

Tonnage Clause

The Tonnage Clause does not operate to ban all state or municipal taxation of vessels. For example, states are permitted to tax for services rendered to vessels. In this instance, the Court noted that applicability of the city's tax was levied based on the size of the ship, not whether services were rendered. The tax revenue supported the general municipal fund. According to the Court, collecting taxes for general revenue typically points

Photograph of tanker near Valdez, AK courtesy of NOAA.

toward a Tonnage Clause violation, because it suggests the tax is imposed in addition to any fee for service rendered. For these reasons, the Court ruled that the ordinance imposed an unconstitutional tax.

The Court had differing opinions on why the tax was unconstitutional. A plurality found that the law would be constitutional if the tax applied equally to all personal property and did not discriminate against ships. The plurality found that in this instance, however, the ordinance did discriminate against ships because the ships were not taxed in the same manner as other personal property in the state. In a concurring opinion joined by Justice Thomas, Chief Justice Roberts argued that the Tonnage Clause bars all duties including personal property tax on visiting ships. Justice Alito concurred on similar grounds, but he reserved analysis of the relationship between an evenhanded personal property tax and the Tonnage Clause for a case where the tax applied equally. In Justice Stevens' dissenting opinion which was joined by Justice Souter, the ordinance was characterized as "a legitimate property tax" based on the value of property engaged in oil production.[3] Even without such a classification, the dissent would have upheld the tax based on a more narrow view of the Tonnage Clause.

Conclusion

The Court found the city's tax to be unconstitutional under the Tonnage Clause. Although a coastal state is not completely barred from charging fees and taxes for the use of its port, the state must ensure the taxes and fees fall within constitutional bounds.

As Justice Breyer stated in the majority opinion, "[t]his case lies at the heart of what the Tonnage Clause forbids."[4] Although *Polar Tankers* does not alter Tonnage Clause interpretation, the case extends the longstanding interpretation into the twenty-first century. The Court ruling proves that the clause continues to have practical effects, and that the Tonnage Clause is as applicable today as it was over a century ago.

The Tonnage Clause reinforces the Import-Export Clause and limits the power to tax. Fees, taxes, and duties collected by a city or state cannot be collected based on any "tonnage" characteristic. Furthermore, the use of revenue from any legitimate fees, taxes, or duties should be collected for services rendered. To avoid costly legal battles, coastal cities and states must carefully craft any fees, taxes, or duties for port usage and specifically state what services are being rendered.

Endnotes

1. US CONST. Art. I, § 10, cl. 3
2. Polar Tankers, Inc. v. City of Valdez, 129 S. Ct. 2277, 2281 (2009) (citing the city's ordinance).
3. *Id.* at 2291.
4. *Id.* at 2284.

Mission Bay, from page 14

The still unanswered and potentially most hazardous result of this ruling is the problem that will arise if the Court allows the owner of the jet ski to use the Shipowner's Limitation of Liability Act to limit his liability. If this occurs it would be an enormous benefit to similar rental businesses located in coastal areas or along navigable interior waterways. The negative impact to the public, however, is the limit on compensation for a rental agency's negligence. As of now though, this matter lies with the district court.

Endnotes

1. Mission Bay Jet Sports, LLC v. Columbo, 2009 U.S. App. LEXIS 13529, 5 (9th Cir. June 24, 2009) (*quoting* Foremost Ins. Co. v. Richardson, 457 U.S. 668, 674 (1982).
2. *Id.* at 7.
3. Stone v. Paradise Holdings, Inc. 795 F.2d 756, 759 (9th Cir. 1986).
4. Sisson v. Ruby, 497 U.S. 358, 363, 364 n.2 (1990).
5. *Mission Bay*, 2009 U.S. App. LEXIS 13529 at *5, 6 (*quoting* Sisson v. Ruby, 497 U.S. at 364 n.2, 365).
6. *Foremost*, 457 U.S. at 668.
7. *Id*. at 674, 675.
8. *Mission Bay*, 2009 U.S. App. LEXIS 13529 at *13.
9. *Id*. at 14.

Court Halts Dock Construction under NEPA and ESA

Pres. Our Island v. United States Army Corps of Eng'rs, 2009 U.S. Dist. LEXIS 71198 (W.D. Wash. Aug. 13, 2009).

Michael McCauley, 2L, University of Mississippi School of Law

The U.S. District Court for the Western District of Washington held that the U.S. Army Corps of Engineers' issuance of a § 10 Rivers and Harbors Act (RHA) permit for the construction of a barge-loading facility in Puget Sound was arbitrary and capricious under the Administrative Procedure Act (APA). The court found that the agency ignored relevant studies and failed to require a formal consultation under the Endangered Species Act (ESA). Additionally, the court found the agency's failure to adequately examine the project's cumulative impact on the environment violated standards set by the National Environmental Policy Act (NEPA).

Background

In 2000, Glacier Northwest requested a permit from the Corps to repair a dock on Maury Island, a small island in Puget Sound. The company operated a gravel mine at the site and wanted to increase its yield by replacing its old barge dock with a larger one. Over the next six years the permit application went through a series of reviews under the ESA, NEPA, and RHA.

During the permitting process, public opinion began to build against the proposed construction, spilling into elections for Washington State Lands Commissioner. Glacier Northwest went so far as to contribute $50,000 to the re-election campaign of an incumbent who supported construction.[1] The election subsequently went to his democratic opponent who based his campaign on opposition to the construction.[2] Protect our Islands, an environmental organization working to protect Maury Island's air and water, spearheaded the opposition to construction, ultimately seeking a temporary restraining order arguing the permits issued were arbitrary and capricious and in violation of the ESA, NEPA, and RHA.

Photograph of Puget Sound courtesy of NOAA.

ESA

The Corps is required to consult with either the National Marine Fisheries Service (NMFS) or the Fish and Wildlife Service (FWS), depending on the species affected, regarding the effects of a project on species protected by the ESA. The Glacier Northwest repairs potentially affected bull trout, Puget Sound Chinook salmon, and Southern Resident Killer Whales. The Corps consulted with NMFS regarding the Puget Sound Chinook and its critical habitat, which resulted in recommendations to mitigate the environmental impact of construction by extending the dock farther from shore, using a bubble curtain to reduce construction noise, and conducting construction only at certain times of year when the fish would not likely be

present. The agencies concluded that by implementing these measures, construction "may affect" but would not "adversely affect" any habitat. NMFS likewise found that the project would not adversely affect killer whales, while FWS found that the project would not adversely affect bull trout. These distinctions avoided a long and costly process of entering into formal consultation, and undertaking extensive studies to determine the actual impact of the project on the environment.

The ESA requires a federal agency to prohibit any activity that would "jeopardize the continued existence of any endangered species or result in the destruction of adverse modification of habitat of such species."[3] The court noted that the consultation failed to analyze the effect the operational noise of the barges would have on juvenile salmon. Little or no data was presented for statements concluding that noise would have minimal effect or that fish would habituate to the noise levels.

The court held the EA failed to evaluate other reasonable or "no action" alternatives as defined by statute, which did not meet the "hard look" standard.

In determining whether juvenile Chinook would be present around the worksite, the Corps relied on a single study performed by the company, which found that juvenile Chinook would be "minimally present" during certain times of the year. However, the plaintiffs presented a study at trial that concluded, through sampling, that juvenile Chinook would be present during the scheduled construction period.

The standard of review of agency decisions is that the court should "engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it."[4] The court held that by ignoring relevant scientific evidence the agency acted "arbitrarily and capriciously by finding construction would not likely adversely affect juvenile Chinook salmon."[5]

The court pointed to a number of other deficiencies, such as a failure to analyze operational noise from barges loading gravel from the dock and the failure to re-initiate consultation after the habitat was designated as critical for Chinook salmon in 2005.

A "Hard Look" at Cumulative Effect

NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for "major federal actions significantly impacting the quality of the human environment."[6] To determine whether an EIS is required, federal agencies may first prepare an EA. If the EA suggest the project's impact will not be significant, the agency will issue a "Finding of No Significant Impact" (FONSI) and the permits. In this instance, the Corps issued an EA and promulgated a FONSI.

A court reviews an agency's compliance with NEPA under the APA. Instead of supplanting agency decisions, the court determines whether the agency has taken a "hard look" at the consequences and explained why a project's impact is insignificant.[7] Factors used to determine significance includes whether the activity is highly controversial and whether it is "related to other actions with individually insignificant but cumulatively significantly impacts."[8] The court held the EA failed to evaluate other reasonable or "no action" alternatives as defined by statute, and accordingly, did not meet the "hard look" standard.

The court also highlighted the importance of analyzing cumulative impacts.[9] The court found that "the Corps failed to give meaningful consideration to 'the impact on the environment which results from the incremental impact of the action …'" and "there was no meaningful cumulative impact analysis of 'reasonably foreseeable future

actions' that, in combination with the proposed project, could constitute 'collectively significant actions . . . over a period of time.'"[10] The court noted that "no single project or human activity cause the general degradation of Puget Sound. Yet every project has the potential to incrementally increase the burden upon the species and the Sound."[11]

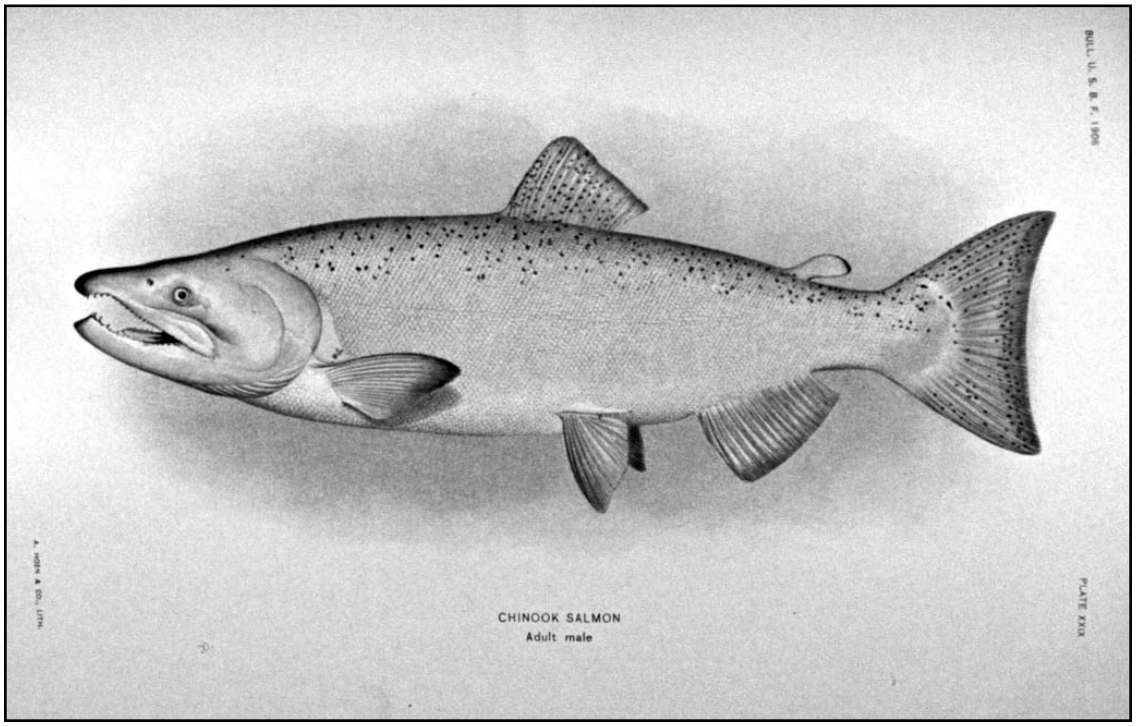
Public Response and Implications

Critics of the opposition to the Glacier Northwest project have claimed that this is nothing more than "Not in My Backyard" (NIMBY) activism and cite that the company will now likely have to use trucks to move the sand off the island, causing greater impacts on the environment via pollution.[12] Additionally, mining activity on the island will continue and the ruling may simply delay construction of the dock. However, the court ruling was heralded as a major victory for Preserve Our Island and many Washington residents.

While acknowledging the importance of economic development, the court made it clear that strict compliance to all relevant environmental regulations is required. The court noted its role was to "ensure that the agencies have taken that requisite "hard look" at the environmental consequences for the proposed project."[13] In this instance, the court found the "hard look at environmental consequences lacking."[14]

Endnotes

1. Craig Welch, *Judge Rejects Maury Island Gravel-Mine Permit*, THE SEATTLE TIMES, Aug. 14, 2009, *available* at http://seattletimes.nwsource.com/html/localnews/2009658825_mauryisland14m.html .
2. *Id.*
3. 16 U.S.C. §1536(a)(2).
4. National Wildlife Federation v. NMFS, 524 F.3d 917, 927 (2008).
5. Pres. Our Island v. United States Army Corps of Eng'rs, 2009 U.S. Dist. LEXIS 71198 (W.D. Wash. Aug. 13, 2009).
6. 42 U.S.C. §4332(2)(c).
7. National Parks & Conservation Association v. Babbitt, 241 F. 3d. 722, 730 (9th Cir. 2001).
8. 40 C.F.R 1508.27 (b)(4).
9. Welch, *supra* note 1.
10. *Pres. Our Island*, 55-56.
11. *Id.* at *58.
12. Welch, *supra* note 1.
13. *Pres. Our Island*, 2009 U.S. Dist. LEXIS 71198 at *58-59.
14. *Id.* at *59.



Chinook salmon, adult male. In: "The Fishes of Alaska." Bulletin of the Bureau of Fisheries, Vol. XXVI, 1906. P. 360, Plate XXIX, courtesy NOAA's Historic Fisheries Collection.

Federal District Court Allows CERCLA Suit to Proceed

Frontier Communications Corp. v. Barrett Paving Materials, Inc., et al., Order on Motion to Dismiss, no. 1:07-cv-113-GZS (D. Me. 2009).

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

Maine Central Railroad Company (MCRC) ran a rail yard in Bangor, Maine for over 100 years until Guilford Transportation Industries, Inc. (Guilford) purchased the company in 1981 and continued operations. Over time, several spills of polyaromatic hydrocarbon (PAH) materials and tar occurred with significant amounts reaching the adjacent banks of Penobscot River's Dunnett's Cove, contaminating the soil. Frontier Communications Corporation's (Frontier) sued the companies under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] for the costs associated with cleanup of these materials.

Citing a failure to state a claim upon which relief may be granted, Guilford and MCRC (collectively, the railroads) recently filed a motion to dismiss Frontier's suit. In order for such a motion to succeed, the court must find that the plaintiff's complaint does not include "sufficient facts to support the claim for relief."[2]

In refuting the CERCLA claims, the railroads relied upon the recent Supreme Court case *Burlington Northern & Santa Fe Railway Co. v. United States*.[3] In *Burlington Northern*, the U.S. Supreme Court limited "arranger" liability under CERCLA to entities that take intentional steps to dispose of hazardous substances. Relying on this, the railroads asserted that "'mere knowledge that spills and leaks continued to occur'" is insufficient to justify CERCLA liability.[4] The court noted that the railroads failed to address Frontier's claim that the railroads disposed of these materials into Dunnett's Cove via sewer lines on the property. The court concluded that Frontier's complaint included sufficient factual allegations to withstand the railroads' motion to dismiss. Further, the court found the railroads' contention that Frontier's CERCLA claims preempted all of its common law claims without merit.

Photograph of train yard courtesy of ©Nova Development Corp.

The district court's interpretation of the Supreme Court's decision in *Burlington Northern* points to how future courts may interpret "arranger" liability under CERCLA. In this instance, the court's focus on the railroads' disposal of substances through sewer lines, and not other spills and leaks, suggests that it would likely focus on intentional spills.

Lastly, the railroads argued that, under Maine law, the six year statute of limitations for negligence had run, barring Frontier from recovery based on any

actions occurring before 1997 (the negligence claim began in 2003). However, claims based upon continuing actions, without a clearly definable single incident, could continue until the actions have ended. As the railroads still own and operate the property in question, the court ruled against the railroads' statute of limitations argument.

With the railroads' motion to dismiss denied on all counts, Frontier's CERCLA, common law, and negligence claims will proceed. The court's ruling, however, should not be interpreted as an indication of the suit's eventual outcome; motions to dismiss based upon a failure to state a claim upon which relief may be granted are viewed by the court in the light most favorable to the plaintiff. Frontier may have crossed this hurdle, but its claims will have to meet a higher standard at trial.

Endnotes

1. 42 U.S.C. §§ 9601-9675.
2. Frontier Communications Corp. v. Barrett Paving Materials, Inc., et al., Order on Motion to Dismiss, no. 1:07-cv-113-GZS (D. Me. 2009).
3. 129 S. Ct. 1870 (2009).
4. Order on Motion to Dismiss, *supra* note 2, at 5 (citing *Burlington* at 1880).

Call for Abstracts

The Sea Grant Law and Policy Journal 2010 Symposium: Addressing Uncertainty of Environmental Problems: The Challenges of Adaptive Management

The Sea Grant Law and Policy Journal, published by the National Sea Grant Law Center at the University of Mississippi, provides a forum for the timely discussion and exploration of legal topics of relevance to the Sea Grant network of extension agents, researchers, coastal managers and users, and local decision-makers. The Journal is published online biannually and is available at no cost. The Journal's spring edition features articles presented during the Journal's annual symposium.

Adaptive management, or "learning by doing," is frequently promoted as the key to solving a wide variety of environmental problems from declining fish stocks to climate change. Unfortunately, there are a number of significant legal and administrative barriers to the effective implementation of adaptive management regimes that have not been adequately explored by the legal community. The Editorial Board is seeking abstracts of paper topics related to these barriers and other legal challenges posed by the scientific uncertainty inherent in natural systems. Abstracts focusing on applied research, as opposed to theory, and case studies are strongly encouraged.

Abstract Submission

Abstracts should be 300 words maximum. All abstracts should be based on original, unpublished work. The abstracts should include the title of the paper, author's name, affiliations, and appropriate contact information. They should be submitted electronically in Word format to Stephanie Showalter at sshowalt@olemiss.edu by November 9, 2009. Six abstracts will be selected based on their relevance and potential contribution to the legal scholarship of adaptive management. Applicants will receive notification of abstract acceptance by November 13, 2009.

Publication and Symposium

Working drafts will be requested by March 22, 2010 to assist with the review process. Articles will be reviewed by the editorial board and outside peer reviewers. Applicants will be expected to produce concise, 30 – 35 page, articles based on their abstracts by May 14, 2010 for publication in the June 2010 volume of the Sea Grant Law and Policy Journal. Those selected to publish an article in the Journal must be available to present their papers at the Journal's symposium, which will be held March 30-31, 2010 in Oxford, Mississippi. Travel awards are available.

Litigation Update

Ninth Circuit Awards Valdez Plaintiffs $500 Million in Interest on Punitive Damages

Exxon Valdez v. Exxon Mobil Corp., 568 F.3d 1077 (9th Cir. Alaska 2009).

Terra Bowling, J.D.

In 1989, the *Exxon Valdez* grounded in Prince William Sound, spilling over 11 million gallons of oil along the Alaska coastline. The spill resulted in the deaths of hundreds of thousands of birds, marine mammals, and marine life. Researchers estimate that as many of 26,000 gallons of oil remain embedded in the shoreline and in nearby rivers and streams.

In 1993, commercial fishermen, small businesses, and other groups filed suit against Exxon. The U.S. District Court for the District of Alaska originally entered a punitive damage award of $5 billion. The Ninth Circuit Court of Appeals remanded the case twice on the issue of punitive damages. The District Court's award was ultimately reduced to $2.5 billion.

In 2008, the U.S. Supreme Court ruled that the company was required to pay punitive damages, but reduced the $2.5 billion punitive damage award against Exxon to about $500 million. The Supreme Court remanded the case to the U.S. Court of Appeals for the Ninth Circuit to decide issues related to interest and appellate costs.

In June, the Ninth Circuit ordered Exxon to pay about $500 million in interest to the plaintiffs. The court found that the assessment of post-judgment interest against Exxon Mobil runs from the date of the original 1996 punitive damages judgment. Exxon had argued that the interest should have run only from the 2008 ruling. In making its decision, the appellate court noted that "interest ordinarily should be computed from the date of the original judgment's initial entry when the evidentiary and legal bases for an award were sound." In this instance, the court found that the plaintiffs' entitlement to punitive damages was "meaningfully ascertained" after the 1996 ruling.

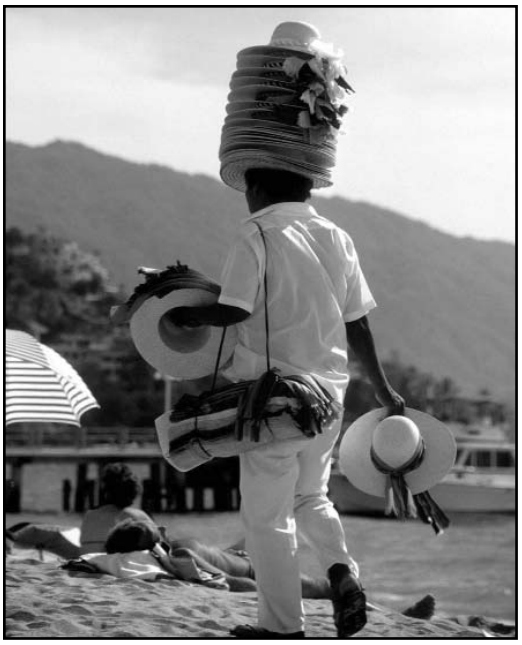
The court also found that each party in the litigation should bear its own costs. Exxon had argued that as the "winner" of the litigation, the plaintiffs should bear all or at least 90% of the company's appellate costs. The court noted that its usual practice in instances where punitive damages are reduced is to order each party to bear its own costs.

In July, the Ninth Circuit heard a subsequent appeal from one of the plaintiffs, Sea Hawk Seafoods, regarding the allocation of punitive damages among the plaintiffs. Shortly after the *Exxon Valdez* litigation began, several of the plaintiffs, including Sea Hawk, signed agreements providing for allocation of damages. In its 2008 decision, the U.S. Supreme Court did not discuss allocation of punitive damages. Sea Hawk filed a motion to void the agreement, claiming that the Supreme Court's decision controlled allocation. The Ninth Circuit affirmed the district court's denial of the motion. The appellate court ruled that the allocation agreements remain "fair, reasonable, and adequate" within the meaning of Federal Rule of Civil Procedure 23(e).

Photograph of Prince William Sound area courtesy of Exxon Valdez Oil Spill Trustee Council.

Coast to Coast
And Everything In-Between

In July, Mexican officials shut down a hotel beach, alleging that it was composed of stolen sand. Officials claimed that the hotel illegally used pumps to move sand from the sea floor onto the beach and to build a breakwater to retain sand to the detriment of hotels farther down the beach. Tourists at the hotel were angry over the closure, but Mexico's attorney general for environmental protection noted that the government must restore the city's beaches in an environmentally responsible way. (*Associated Press*, July 31, 2009)



Photograph of Mexican beach courtesy of ©Nova Development Corp.

An ecologist in New Zealand is no longer in hot water for losing his wedding ring at the bottom of a murky harbor while searching for invasive plant species. Sixteen months after the ring fell off his finger, he found it. After losing the ring, he had marked the area with an anchor, but was unable to locate the ring on subsequent dives. However, on the most recent dive he spotted the ring just inches from the anchor. His friends now call him "Lord of the Ring." (*Associated Press*, Aug. 20, 2009)

After a Louisiana woman ran into a nutria while shopping in Wal-Mart, she filed suit against the company. She alleged that the store employees allowed the rodent (nicknamed "Norman" by the employees) into the store and failed to warn shoppers, leading her to hurt her back and foot when backing away from the animal. The company is investigating the claim. Nutria can weigh up to 18 pounds and are common in Louisiana, multiplying rapidly after fur farmers released the unprofitable animals in the 1930s and '40s. (*Associated Press*, May 7, 2009).

Photograph of nutria courtesy of USFWS.

Photograph of red crab courtesy of NOAA.

Red crab fishermen in Massachusetts became the first East Coast fishery to attain green label certification from the Marine Stewardship Council. The fishery harvested more than 3 million pounds of crab last year. The fishery can now use the Council's seal to represent that the seafood was not overfished nor did the fishery harm the ocean when harvested. (*Associated Press*, Sept. 9, 2009).

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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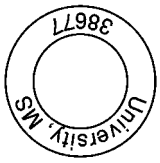

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