The SandBar

Volume 9:2, July 2010

Legal Reporter for the National Sea Grant College Program

Cleaning up the Gulf Oil Spill

Legal issues and the current regulatory framework

From the Editor

The damage from the Gulf Oil Spill continues to grow, resulting in an unknown level of harm to natural resources. With over 200 lawsuits having been filed so far, it is clear that fishermen, landowners, and other businesses have already felt the impact of the spill. In "Cleaning up the Gulf Oil Spill," we examine legal issues that have arisen in the aftermath and the current regulatory framework for addressing U.S. oil spills.

In this edition of *The SandBar*, we also look at the U.S. Supreme Court's decision examining whether a beach renourishment project initiated under Florida's Beach and Shore Preservation Act (BSPA) resulted in a taking. From a legal standpoint, the most interesting aspect of the Court's decision is its consideration of the argument that the Florida's Supreme Court's decision upholding the BSPA resulted in a judicial taking.

In the never-ending struggle to determine jurisdiction under the Clean Water Act, a federal district court considered whether ditches were excluded from the definition of navigable waters under § 404 of the Act. Cases involving these issues will likely continue until Congress clarifies the CWA or the U.S. Supreme Court grants review of *Rapanos*.

In response to rumors surrounding the effects of the Ocean Policy Task Force on recreational fishing, law student Nathan Wilson looks at the Task Force's Interim Framework for Coastal and Marine Spatial Planning. He concludes that the report clearly does not recommend a ban on recreational fishing, but provides recommendations for a new approach in managing ocean and coastal resources.

And, finally, law student Barton Norfleet assesses a district court ruling that the Coast Guard's final rule governing tank vessels and tug requirements in Buzzards Bay preempts portions of the Massachusetts Oil Prevention Act. Please let us know if you have any suggestions for future issues you would like covered or comments on this edition of *The SandBar*.

Terra

Our Staff

Editor:
Terra Bowling, J.D.

Production & Design:
Waurene Roberson

Research Associates:
Michael McCauley, 3L
Nathan P. Wilson, 3L

Contributors:
Niki L. Pace, J.D., L.L.M.
Melanie King, J.D.

ISSN 1947-3966 NSGLC-10-02-02 *July 2010*
ISSN 1947-3974

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:

Sea Grant Law Center, Kinard Hall, Wing E, Room 258, 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*.

The SandBar is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under award NA090AR4170200, the Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi Law Center. The U.S. Government and the Sea Grant College Program are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon.

This newsletter was prepared by the Sea Grant Law Center under award NA090AR4170200 from NOAA, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Sea Grant Law Center or the U.S. Department of Commerce.

Recommended citation: Author's Name, *Title of Article*, 9.2 SandBar [Page Number] (2010).

Cover photograph of oil dipped from the Gulf of Mexico courtesy of The Mississippi-Alabama Sea Grant Consortium.

Contents page photo of hydrophilic oil-absorbing fabric installed at East Beach in Ocean Springs, MS courtesy of Melissa Schneider.

The SandBar

Contents

Photograph of Gulf oil cleanup with skimmer boom courtesy of U.S. Coast Guard.

Cleaning Up the Gulf Oil Spill

NIKI L. PACE, J.D., L.L.M.

On April 20, 2010, the nation awoke to news of an explosion on the *Deepwater Horizon* oil rig. The rig was on fire. Two days later, the rig sank to the floor of the seabed. Eleven crew members are missing and presumed dead.[1] Along with the tragic loss of life, the spill has resulted in the largest environmental disaster the U.S. has ever faced. The Obama administration has made it clear that the rig owner, BP, and other responsible parties will be held accountable for repairing damage to the Gulf of Mexico coastlines and fisheries. This article examines legal issues that have arisen in the aftermath and the current regulatory framework for addressing U.S. oil spills.

Background

Before sinking on April 22, the *Deepwater Horizon* oil rig was located approximately 40 miles off the coast of Louisiana in federal waters and was drilling at a depth of roughly 5,000 feet. Following the explosion, efforts to engage the emergency shutoff system (designed to minimize the amount of oil spilled) failed, allowing oil to continuously spill into Gulf waters. Initial reports estimated the leak at 1,000 barrels a day (42,000 gallons) but those estimates quickly rose to 5,000 barrels a day (210,000 gallons) and have now ballooned to between 35,000 and 60,000 barrels a day (between 1,470,000 and 2,520,000 gallons).[2]

On April 29, NOAA designated the oil spill a Spill of National Significance (SONS). A SONS is defined as, "a spill that, due to its severity, size, location, actual or potential impact on the public health and welfare or the environment, or the necessary response effort, is so complex that it requires extraordinary coordination of federal, state, local, and responsible party resources to contain and clean up the discharge."[3] The designation allows assets from other areas of the country, including other coastal areas, to be used to fight the spill.[4]

The *Deepwater Horizon* is owned by British Petroleum (BP) but operated by Transocean Ltd. At the time of the explosion, Halliburton was providing cementing services on the rig as well. The specific cause of the explosion is currently unknown but both the U.S. Coast Guard and the Minerals Management Service are conducting separate federal investigations into the matter.[5] BP, along with federal agencies, made several unsuccessful attempts to plug the leak. Now, officials are banking on a relief well expected to be completed in August to stop the leak.

Meanwhile, tar balls have collected on the shores of Louisiana, Mississippi, Alabama, and Florida. Impacts to wildlife and shorelines from both the oil and the estimated 100,000 gallons of dispersant chemicals remain unclear. Federal fisheries adjacent to the oil slick areas have been closed, causing a rush for local seafood across the northern Gulf of Mexico.[6]

The federal government placed a six-month moratorium of deepwater drilling on the U.S. outer continental shelf. However, the U.S. District Court for the Eastern District of Louisiana has enjoined enforcement of the moratorium, finding that the administrative record on which the moratorium was based incomplete and that the specifics of the moratorium were arbitrary and capricious.[7] Since the ruling, Interior Secretary Ken Salazar said that the U.S. will issue a new more flexible oil drilling moratorium, which would allow drilling in certain oil fields.[8]

On June 1, the Justice Department announced that it would launch an investigation of federal laws that may have been violated by the oil spill including the Clean Water Act (CWA), the Oil Pollution Act of 190 (OPA), and the Migratory Bird Treaty Act.[9] Attorney General Eric H. Holder Jr. stated, "[W]e must also

ensure that anyone found responsible for this spill is held accountable. That means enforcing the appropriate civil – and if warranted, criminal – authorities to the full extent of the law."[10]

Clean Up Liability

Following the disastrous 1989 *Exxon Valdez* oil spill, Congress passed the Oil Pollution Act of 1990 (OPA) to protect public health and welfare and the environment. Along with Section 311 of the Clean Water Act (CWA), the OPA provides the primary basis for domestic oil spill regulation. The OPA provides the framework for recovering clean-up costs and also imposes liability for damage to natural resources.[11] The CWA provides the framework for civil and criminal enforcement actions by the federal government.[12] For hazardous substances other than petroleum products, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) applies.[13]

U.S. law prohibits the discharge of oil or hazardous substances into navigable waters and adjoining shorelines.[14] Under both the CWA and the OPA, navigable waters is broadly defined and includes waters subject to the ebb and flow of the tide, as well as wetlands adjacent to navigable waters.[15] To fall within the scope of regulation, the discharge must be "harmful to the public health or welfare or the environment."[16] Environmental harms include damage to fish, shellfish, wildlife, public and private property, shorelines, and beaches.[17] The OPA defines oil as any kind of oil "including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil."[18]

Under the OPA, responsible parties are strictly liable for cleanup costs and damages resulting from oil discharges. Responsible parties include the lessee or permittee of the area in which an offshore facility is located as well as owners and operators of vessels and pipelines.[19] The OPA limits liability to the total of all removal costs plus $75,000,000 per incident, an increase over the CWA § 311 levels.[20]

In certain circumstances, the liability limits will be lifted. For instance, limits do not apply where the incident was caused by gross negligence, willful misconduct, or violation of a federal safety, construction, or operating regulation.[21] Limits will also be removed where responsible parties fail to report the incident or refuse to cooperate in removal activities.[22] In such situations, the government bears the burden of proof that the liability limits do not apply. BP, however, has agreed to waive liability limits under the Act.[23]

The OPA also provides affirmative defenses to liability. These defenses include an act of God, an act of war, an act or omission of a third party (other than an employee or agent of the responsible party), or any combination of the three. To assert the third party defense, the responsible party must establish that he exercised due care with respect to the oil spill and took precautions against foreseeable acts or omissions of the third party.[24]

Photograph of pelicans being released after washing courtesy of U.S. Coast Guard.

Private Party Damages

The OPA allows private party recovery of three types of damages. First, individuals may recover damages for "injury to, or economic losses resulting from destruction of, real or personal property."[25] The second category of damages addresses losses resulting from use of natural resources.[26] The third area of private party recovery deals with damages resulting from "the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources."[27] In addition, private parties may pursue other claims for damages under maritime law and state law.

Photograph of controlled burnoff in the Gulf courtesy of U.S. Navy, Justin Stumberg/Marine Photobank.

Oil Spill Liability Trust Fund

Another aspect of the OPA was the creation of the Oil Spill Liability Trust Fund (Fund) and the National Pollution Funds Center (NPFC). The NPFC, an administrative agency of the U.S. Coast Guard, administers the Fund. The primary purpose of the NPFC is to "1) ensure a rapid and effective federal response to a discharge; 2) implement and oversee a compensation mechanism, or claims process, to reimburse those damaged by discharges when the liable or responsible party cannot or does not pay; 3) establish a liability and compensation regime that serves as a deterrent to potential responsible parties; and 4) establish a mechanism through Certificates of Financial Responsibility (COFRs) to ensure that owners and operators of certain vessels have insurance in place or the funds to pay for oil spill response costs and damages up to certain limits."[28]

Along with funding spill response, the NPFC may adjudicate third-party claims for unreimbursed response costs and damages.[29] Before submitting claims to the NPFC, claims must first be submitted to, and denied by, the responsible party. Consideration by the NPFC requires the claimant produce a statement of the claim, evidence supporting how the loss occurred, and invoices documenting costs incurred by the claimant.[30] If NPFC denies both the claim and reconsideration of the claim, the individual may seek judicial review in an applicable federal district court under the Administrative Procedures Act.[31]

BP Fund

In addition to the Fund, President Obama called for BP to set up an account to compensate victims. On June 16, BP agreed to create a $20 billion fund to compensate those affected by the spill.[32] So far, nearly 65,000 claims have been made, and, as of press time, no claims have been denied.[33]

While claimants can still go to court against BP, the fund is intended as a buffer between claimants and the court system.[34] Claimants may also seek compensation from the Oil Spill Liability Trust Fund, and interim payments from the BP fund would be subtracted from the final settlement award.[35]

Civil and Criminal Penalties

The federal government may assess civil penalties for unlawful discharges, failure to remove discharges, or

failure to comply with an order or regulation relating to the discharge.[36] Penalties may go up to $25,000 per day of violation or up to $1,000 per barrel discharged.[37] For those spills caused by gross negligence or willful misconduct, the penalty shall not be less than $100,000.[38] In assessing penalties, the following factors are considered: 1) seriousness of the violation; 2) economic benefit to the violator, if any; 3) the degree of culpability; 4) other penalties from the incident; 5) any history of prior violations; 6) the nature, extent, and degree of success of efforts by the violator to mitigate or minimize the spill; 7) the economic impacts of the penalty on the violator; and 8) other matters required by justice.[39] Civil penalties are in addition to removal costs and may be imposed regardless of fault.

In passing the OPA, Congress amended the Clean Water Act's list of criminal violations to include negligent discharge of oil.[40] The decision to bring criminal charges by the federal government is discretionary, not mandatory. In deciding whether to pursue criminal prosecution, the government may consider factors such as prior history of the violator, the preventative measures taken, the need for deterrence, and the extent of cooperation.

Conclusion

Litigation is already underway in the Gulf of Mexico states. To date, more than 200 lawsuits have been filed with claimants ranging from commercial fisherman in Louisiana and Mississippi to condo and hotel owners in Alabama and Florida. Most lawsuits seek monetary compensation from BP for alleged losses of property or economic harms connected to the spill. Natural resource damages are also accruing. While the full ramifications of the spill cannot possibly be known at this early stage, these initial lawsuits foretell of potentially lengthy legal battles ahead.

Endnotes

1. Leslie Kaufman, *Search Ends for Missing Oil Rig Workers, but Spill Seems Contained for Now,* N.Y. Times, April 24, 2010, at A8.
2. Campbell Robertson, *U.S. Intensifies Bid to Control Oil Spill in Gulf,* N.Y. Times, April 30, 2010, at A1.
3. 40 C.F.R. 300.5.
4. Robertson, *supra* note 2.
5. John M. Broder et al., *Amount of Spill Could Escalate, Company Admits*, N.Y. Times, May 5, 2010, at A1.
6. Kim Severson, *Fish Sells Out as Threat Creeps Closer*, N.Y. Times, May 7, 2010, at A18.
7. Hornbeck Offshore Servs., L.L.C. v. Salazar, 2010 U.S. Dist. LEXIS 61303 (E.D. La. June 22, 2010).
8. Tom Doggett and Ayesha Rascoe, *US to Issue More Flexible Oil Drilling Moratorium*, money.cnn.com, June 23, 2010.
9. Attorney General Eric Holder, Remarks on Gulf Oil Spill (June 1, 2010) (available at http://www.justice.gov/ag/speeches/2010/ag-speech-100601.html).
10. *Id.*
11. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2762.
12. Clean Water Act, 33 U.S.C. § 1321.
13. 42 U.S.C. § 9601-9675.
14. 33 U.S.C. § 1321(b)(1).
15. 33 U.S.C. § 2701(21); 40 C.F.R. § 110.1; 33 C.F.R. Part 2.
16. 33 U.S.C. § 1321(b)(3)-(4).
17. *Id.* § 1321(b)(4).
18. *Id.* § 2701(23).
19. *Id.* § 2701(32).
20. *Id.* § 2704(a)
21. *Id.* § 2704(c)(1).
22. *Id.* § 2704(c)(2)
23. John Curran, The *Gulf Oil Disaster: Who's Liable, and for How Much?* Time, May 24, 2010.
24. *Id.* § 2703(a).
25. *Id.* § 2702(b)(2)(B).
26. *Id.* § 2702(b)(2)(C).
27. *Id.* § 2702(b)(2)(E).
28. John M. Woods, *Going on Twenty Years – The Oil Pollution Act of 1990 and Claims Against the Oil Spill Liability Trust Fund*, 83 Tul. L. Rev. 1323, 1324 (2009).
29. 33 U.S.C. § 2712(a).
30. 33 C.F.R. § 136.105.
31. 5 U.S.C. §§701-706; *see also* Woods, *supra* note 28, at 1325.
32. Jonathan Weisman and Guy Chazan, *BP Agrees to $20 Billion Fund*, The Wall Street Journal, June 23, 2010.
33. The Ongoing Administration-Wide Response to the Deepwater BP Oil Spill, Deepwater Horizon Incident Joint Information Center, June 19, 2010, http://www.d8externalaffairs.com/go/doc/2931/677099/ .
34. Weisman, *supra* note 32.
35. *Id.*
36. 33 U.S.C. § 1321(b)(7).
37. *Id.* § 1321(b)(7)(A).
38. *Id.* § 1321(b)(7)(D).
39. *Id.* § 1321(b)(8).
40. *Id.* § 1319(c).

STOP the Beach Renourishment

U.S. Supreme Court Grapples with Judicial Takings Case

Melanie King, J.D.[1]

In 2005 the Florida Department of Environmental Protection (FDEP) issued a permit to restore 6.9 miles of critically eroded beaches and dunes under Florida's Beach and Shore Preservation Act (BSPA).[2] The nonprofit organization Stop the Beach Renourishment, comprised of six beachfront homeowners, objected to the renourishment project and brought a suit claiming that the process for restoring the beach deprived littoral property owners of their property rights without just compensation. The Florida Supreme Court rejected those claims.

The property owners appealed to the U.S. Supreme Court, arguing that the BSPA resulted in an unconstitutional taking and that the Florida Supreme Court's decision constituted a judicial taking. The U.S. Supreme Court affirmed the Florida Supreme Court's decision and held that it did not constitute a judicial taking.[3] However, the Court was split on the question of a judicial taking, or whether it is possible for a court to take property without just compensation. Four justices supported the conclusion that a court can take property without just compensation by overturning an established property right. Two justices concluded that this case does not require the Court to determine when a judicial decision constitutes a taking, as due process principles are sufficient to support the finding. Two other justices found that it is unnecessary to decide more than that no judicial taking occurred here, expressing concern over the difficult procedural questions that would be raised by the plurality's decision.

Background

Under the Florida Constitution, the wet sand beach between the mean high water line (MHWL) and low water lines are held in trust for the public, which the state has a duty to protect under the public trust doctrine. The boundary between public and private lands changes with gradual and imperceptible changes to the shoreline, known as accretion, reliction, or erosion.[4]

When a beach restoration project is begun under the BSPA, 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" and an erosion control line (ECL) becomes the fixed property line between private and public lands, which is generally set at the MHWL.[5] Any land created seaward of the ECL during the project becomes the property of the state, regardless of the effect on the MHWL.

In 2005 the FDEP issued a permit to restore eroded shoreline in Walton County, Florida, and several homeowners challenged the project as a taking of their littoral property rights. Under Florida common law, littoral property owners have certain property rights associated with their littoral property. "These include the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property."[6] The property owners argued that because the BPSA allows the state to fill beaches beyond the MHWL and grants the state ownership of the newly created land, the BSPA unconstitutionally takes littoral property owners' property rights. The lower courts agreed with the property owners.

In 2008 the Florida Supreme Court heard the case and held that the BPSA did not unconstitutionally take the homeowners' property rights without just compensation.[7] The court held that because common law allows the state to fill lands up to the MHWL after events such as hurricanes that cause sudden and perceptible changes to the shoreline, the BSPA is consistent with Florida common law property principles and therefore does not unconstitutionally deprive landowners of their property rights.

In its decision, the Florida Supreme Court ruled that the right of contact is ancillary to the right of access, and that right remained intact. The court also relied on the difference between avulsions and accretions, as discussed above, in coming to its decision. On appeal to the U.S. Supreme Court, petitioners argued that by departing from settled common law property principles, the Florida Supreme Court decision itself effected a taking of property.

Holding

All eight participating justices affirmed the Florida Supreme Court's decision and agreed that the court's decision did not constitute a judicial taking.[8] In coming to this conclusion, the Court, in a decision written by Justice Scalia, reviewed Florida law and found that the BSPA did not depart from Florida common law such as to take property without just compensation.

The Court noted that under Florida law, sudden and perceptible shoreline changes, known as avulsions, are treated differently from accretions. Under Florida common law "regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change; it remains (ordinarily) what was the mean high-water line before the event."[9] Thus, "when a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions. Those accretions no longer add to *his* property, since the property abutting the water belongs not to him but to the State."[10]

The Court, examining past precedents, held that the "the right [of littoral property owners] to accretions [is] subordinate to the State's right to fill."[11] However, the Court did not come to a definite conclusion on the most important question presented in the case: whether the decision of a court which departs from established rules of property law constitutes a judicial taking.

Judicial Takings

There was no majority opinion regarding whether a court decision can constitute a judicial taking. Justice Scalia, joined by Chief Justice Roberts, Justice Alito, and Justice Thomas, argued that the act of a court can constitute a judicial taking. "If a legislature *or a court* declare that what was once an established right of private property no longer exists, it has taken that property, no less than if the state had physically appropriated it or destroyed its value by regulation."[12] Justice Scalia wrote that the Takings Clause is "concerned simply with the act, and not with the governmental actor."[13] Justice Scalia relied on several previous cases that suggest a judicial decision can constitute a taking but do not address the question directly.[14] The plurality conceded that the Framers of the Constitution probably did not foresee the Takings Clause applying to judicial decisions, but "what counts is not what they [the Framers] envisioned, but what they wrote.[15]

Justice Kennedy, joined by Justice Sotomayor, concurred with Justice Scalia's analysis of Florida common law and with the holding of the case. However, they argued that the case "does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause."[16] Justice Kennedy argued that due process principles are sufficient for deciding this case, noting that "[t]he Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause."[17] This concurrence also emphasized that the right to take property for public use is a political matter for the Executive and Legislative branches. However, Kennedy's opinion does not preclude the Court from answering the judicial takings question in the future: "If and when future cases show that the usual principles . . . that constrain the judiciary like due process are somehow inadequate to protect property owners, then the question of when a judicial decision can effect a taking would be properly presented."[18]

Justice Breyer, joined by Justice Ginsberg, also concurred with the plurality's analysis of Florida common law and with the holding of the case, but found that "the plurality unnecessarily addresses questions of constitutional law that are better left for another day."[19] Justice Breyer expressed concern that the plurality's opinion will "invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law."[20]

Conclusion

While the implications of this case are unclear, it is likely that this case will be read narrowly to simply affirm the Florida Supreme Court's decision that the BSPA does not unconstitutionally take property without just compensation. The answer to the question of whether a judicial decision can constitute a taking of property without just compensation remains unclear. As with *Rapanos v. United States*, where there is no majority opinion, the controlling opinion will be the decision that changes the settled law the least.[21] In the instant case, Justice Breyer's decision, which leaves the question of judicial takings open for another day, will likely control. However, the plurality's opinion provides strong dicta

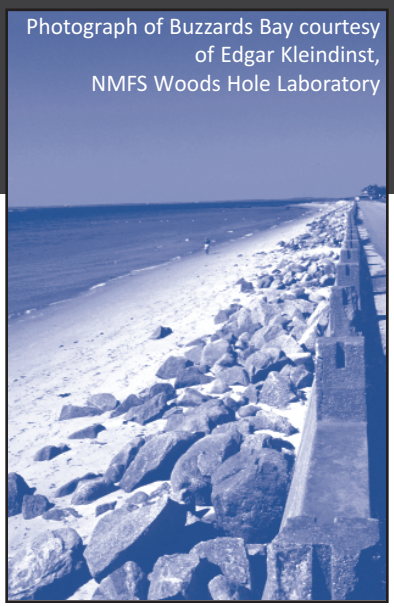
See Renourishment, p. 11

Background photograph of Blue Mountain Beach in Walton County, FL courtesy of Wikipedia.

State Law Preempted

Coast Guard Final Rule Preempts the Massachusetts Oil Spill Prevention Act

**Barton Norfleet, 2012 J.D. Candidate,
University of Mississippi School of Law**



Photograph of Buzzards Bay courtesy of Edgar Kleindinst, NMFS Woods Hole Laboratory

After a long battle between the Commonwealth of Massachusetts, the U.S. federal government, and several shipping interests, the U.S. District Court for the District of Massachusetts has ruled that portions of the Massachusetts Oil Prevention Act (MOSPA) containing strict tug escort and manning requirements for tankers in Buzzards Bay, are preempted by the federal Ports and Waterways Safety Act (PWSA).[1] The court's ruling means that the Coast Guard's regulations promulgated under the PWSA, not MOSPA, will govern certain tank vessels and tug requirements in Buzzards Bay.

Background

Massachusetts enacted the MOSPA in response to a catastrophic oil spill in Buzzards Bay in 2003. In 2006, a federal district court ruled that Massachusetts was precluded from enforcing certain aspects of the MOSPA, due to preemption under PWSA.[2] Preemption is defined as "the principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation."[3]

On appeal, the U.S. Court of Appeals for the First Circuit reversed and remanded the case to the district court finding that the court needed "further development" of the reasoning for preemption.[4] Between the first ruling in 2006 and the First Circuit ruling in 2007, the Coast Guard issued final regulations under the PWSA that included manning and tug requirements in Buzzard's Bay. The Final Rule[5] called for complete preemption of the MOSPA by the PWSA.

Preemption by Regulation

The Coast Guard's Final Rule called for complete preemption of the MOSPA. In a Magistrate Judge's report and recommendation on the case, the judge found that the Final Rule[6] did in fact preempt the MOSPA completely.

Despite the likelihood that the court would find preemption of the state laws, Massachusetts asserted that the Coast Guard's implementation of the Final Rule violated the National Environmental Policy Act (NEPA), which requires all federal agencies to prepare an Environmental Assessment (EA) and an Environment Impact Statement (EIS) for "major federal actions significantly affecting the quality of the human environment." The Coast Guard stated that it did not file an EA or EIS because it believed the Final Rule met one of the exceptions to performing an EIS.

Although the court noted that it did not necessarily agree with how the Coast Guard handled the NEPA requirements, they found that "the procedural error of not following NEPA formalities was essentially harmless."[6] The court referenced the *Save Our Heritage, Inc. v. F.A.A.* case which held that if there is no harm done then, "[r]emanding for a differently named assessment [would be] a waste of time."[7]

The court agreed with the magistrate judge that MOSPA was preempted by the PWSA. The court cited *U.S. v. Locke*, which also dealt with preemption of federal law over state law.[8] In *Locke*, the court reasoned that, "The issue is not adequate regulation but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate. States, as well as environmental groups and local port authorities, will participate in the process."[9]

Conclusion

The navigation of oil tankers in Buzzards Bay has been a hot topic since the oil spill first occurred, and there have been many heated debates on whether the MOSPA or PWSA's regulations would provide for safer navigation. For example, Korrin Petersen, vice president of advocacy for the Coalition for Buzzard's Bay, stated, "We're not going to let the Coast Guard take a pass on doing an appropriate environmental review for

Buzzards Bay … Our water resources are far too valuable for the federal government to be so cavalier about their protection."[10] Despite the controversy, barges and tugs in Buzzards Bay are no longer subject to MOSPA, but must comply with the Coast Guard's Final Rule.

Endnotes

1. *United States v. Massachusetts*, 2010 U.S. Dist. Lexis 32417 (D. Mass., March 31, 2010).
2. United States v. Massachusetts, 440 F. Supp. 2d 24 (D. Mass. 2006).
3. *Black's Law Dictionary* 545 (2nd pocket ed. 2001).
4. United States v. Massachusetts, 493 F.3d 1 (1st Cir. Mass. 2007).
5. Regulated Navigation Area; Buzzards Bay, MA; Navigable Waterways within the First Coast Guard District, 33 C.F.R. Parts 161 and 165 (2007).
6. United States v. Massachusetts, 2010 U.S. Dist. LEXIS 32417 at *9.
7. *Id.*
8. *U.S. v. Locke*, 529 U.S. 89 (2000).
9. *Id.* at 117.
10. Patrick Cassidy, *State, Federal Officials War Over Tugs*, Cape Cod Times, May 28, 2010.

Renourishment, from p. 9

regarding the ability of a judicial decision to rise to the level of a judicial taking by overturning an established property right.

Endnotes

1. National Marine Fishery Service Office of International Affairs, Silver Spring, MD. The author attended the oral argument for this case on December 2, 2009.
2. The Beach and Shore Preservation Act is codified at Fla. Stat. §§ 161.011-161.45.
3. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. ___ (2010).
4. Reliction is the increase in land by the gradual and imperceptible withdrawal of a body of water. Accretion is the gradual and imperceptible accumulation of land along a shoreline. Erosion is the gradual and imperceptible loss of land from a shoreline. *See Walton County v. Stop the Beach Renourishment, Inc.*, No. SC06-1449 (Fla. S.Ct., Sept. 29, 2008) (citations omitted). For simplicity's sake, the U.S. Supreme Court in this case referred to accretions and relictions collectively as accretions, and this article does the same.
5. FLA. STAT. § 161.191.
6. *Stop the Beach Renourishment*, 560 U.S. ___, Opinion of Scalia, J. at 2.
7. *See* Melanie King, *Florida's Beach Renourishment Act Upheld,* 7:4 SANDBAR 6 (2009).
8. Justice Stevens did not participate in the decision of this case.
9. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. ___, Opinion of Scalia, J. at 3 (2010).
10. *Id.* at 3-4 (emphasis in original).
11. *Id.* at 27.
12. *Id.* at 10 (emphasis in original).
13. *Id.* at 8. The text of the Takings Clause is as follows: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amendment V.
14. *i.e. PruneYard Shopping Center v. Roberts,* 447 U.S. 74 (1980) (applying a takings law analysis to hold that a California Supreme Court decision that private property owners did not have to accord the freedoms of speech, the press, and to petition the government did not violate the Constitution) and *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155 (1980) (holding that a Florida Supreme Court decision that interest from an account for the satisfaction of claims is "public money" constituted a taking).
15. *See Stop the Beach Renourishment*, 560 U.S. ___, Opinion of Scalia, J. at 17.
16. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. ___, Opinion of Kennedy, J. at 1 (2010).
17. *Id.* at 3.
18. *Id.* at 10.
19. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. ___, Opinion of Breyer, J. at 1 (2010).
20. *Id.* at 2.
21. *Rapanos v. United States,* 574 U.S. 715 (2006) (where, in the absence of a majority decision, Justice Kennedy's concurrence setting forth the "significant nexus" test for whether waters fall under the jurisdiction of the Clean Water Act controls). *See* Stephanie Showalter, *Supreme Court Fails to Clarify Limits of Corps' Wetland Jurisdiction*, 5:2 SANDBAR 1 (2006).

Fishing for Rumors:

The Ocean Policy Task Force's Interim Framework for Coastal and Marine Spatial Planning Makes a Splash

Nathan P. Wilson, 2011 J.D. Candidate, University of Mississippi School of Law

Earlier this year unsubstantiated rumors that President Obama planned to end recreational fishing spread across the news media and blogosphere.[1] According to the *New York Times*, the bulk of the rumors originated after an online columnist for ESPN Outdoors posted an opinion piece stating that policies suggested by the Interagency Ocean Policy Task Force "could prohibit U.S. citizens from fishing some of the nation's oceans, coastal areas, Great Lakes, and even inland waters."[2] The site's executive editor later posted a response noting that while the article was an opinion piece, "this particular column was not properly balanced and failed to represent contrary points of view."[3]

Whether the fears were well-founded or not, policies suggested by the Task Force, especially with regard to coastal and marine spatial planning, appeared to stoke strong feelings among commercial and recreational fishermen. To address these concerns, this article examines the role of the Task Force, focusing on its Interim Framework for Effective Coastal and Marine Spatial Planning.

Background

On June 12, 2009, President Obama established the Interagency Ocean Policy Task Force led by the chairman of the White House Council on Environmental Quality.[4] The Task Force is comprised of senior officials from agencies represented on the existing Committee on Ocean Policy established under President Bush in 2004.[5] President Obama charged the Task Force with developing recommendations addressing: 1) a national policy that ensures protection and restoration, enhances sustainability of coastal economies, provides for adaptive management to deal with climate change, and is coordinated with national security and foreign policy interests; 2) a framework for policy coordination among federal, state, tribal, regional governance structures and local authorities; and 3) an implementation strategy that prioritizes objectives to meet the recommended policy.[6]

In addition, the Task Force was specifically instructed to develop a framework for coastal and marine spatial planning. The framework must be comprehensive and address "conservation, economic activity, user conflict, and sustainable use of ocean, coastal, and Great Lakes resources consistent with international law."[7] In preparation of the framework development, the Task Force solicited public engagement through six regional public meetings, thirty-eight expert roundtable meetings, and public comments.[8] In September 2009, the Task Force issued its Interim Report of the Interagency Ocean Policy Task Force, with recommendations of approaches to protect the nation's oceans, coasts, and Great Lakes, including coastal and marine spatial planning (CMSP).[9] Last December, the Task Force issued the Interim Framework for Effective Coastal and Marine Spatial Planning.[10]

Defining Coastal and Marine Spatial Planning (CMSP)

Essential to the development of a CMSP framework is the need to clearly identify what CMSP encompasses. To that end, the Interim Framework defines CMSP as a "comprehensive, adaptive, integrated, ecosystem-based, and transparent spatial planning process, based on sound science, for analyzing current and anticipated uses of ocean, coastal, and Great Lakes areas."[11] As the Interim Framework goes on to explain, "CMSP identifies areas most suitable for various types or classes of activities in order to reduce conflict among users, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives."[12] In other words, CMSP deals with managing human activities by allocating those activities to specific areas based on the activity type.

For example, in the Florida Keys National Marine Sanctuary certain areas are identified for research while others are designated for preservation. It can also be used to identify areas for specific uses like wind farms, aquaculture or mining. In Oregon, the Department of Land Conservation and Development adopted a management plan that designates areas for wave energy.

Rationale, Authority, and National Goals

The current regulatory framework for managing coastal and ocean resources is of limited scope and embodies a sector-by-sector and statute-by-statute approach to decision making.[13] Recent scientific and ocean policy assessments maintain that a fundamental change in the current management system is necessary to ensure the long-term health of oceans, coasts, and Great Lakes.[14] To that end, the Interim Framework proposes a new approach which is both national in scope to address national interests, but also scalable to meet the needs of regional and local interests.[15]

The report explains that a federal agency's ability to "internalize" the specific elements of a particular plan would depend on the applicable statutes.[16] CMSP is not intended to supersede existing laws. Instead, it seeks to create a process to work within a statute's authorizing language, which often give an agency the responsibility to plan and implement the objectives. When an agency has a pre-existing legal restraint to comply with a CMS Plan, the report calls for the National Ocean Council (NOC) to work with the agency to decide whether to pursue a legislative solution or changes in regulations.[17]

The report identifies seven broad national goals for CMSP. The goals include: support sustainable and productive uses, protect and ensure resilient ecosystems, provide public access, reduce user conflicts, improve the decision-making process, increase predictability in planning for and implementing new investments, and enhance communication and collaboration.[18]

Development of a CMS Plan

As envisioned by the Interim Framework, the geographic planning area for CMSP would extend landward from the mean high water line to include the territorial sea, exclusive economic zone, Great Lakes, and the continental shelf.[19] Development and implementation of CMSP would be conducted on a regional approach. The Task Force recommends nine regional planning areas: Alaska/Arctic, Caribbean, Great Lakes, Gulf of Mexico, Mid-Atlantic, Northeast, Pacific Islands, South Atlantic, and West Coast.[20] These regions are recommended based on large marine ecosystems (LMEs), which are defined based on consistent ecological conditions and other factors.[21]

The regional planning bodies would be comprised of Federal, State, tribal authorities, and community representatives with interests relevant to CMSP for that region much like the current council structure under the Magnuson-Stevens Fishery Conservation and Management Act. Ideally, the regional planning bodies will work together to create a CMS plan that includes a nine-step process: 1) identify objectives, 2) identify existing efforts in the region, 3) engage stakeholders and the public, 4) consult scientists and other experts, 5) analyze data, uses, services, and impacts, 6) develop and evaluate alternative future use scenarios and tradeoffs, 7) release a draft of a CMS plan and allow for public comment, 8) finalize CMS plan and submit for NOC review, and 9) implement, monitor, evaluate and modify. The goal of the process is to ensure consistency across regions.

Implementation of a CMS Plan

Prior to implementation, the NOC will review the CMS Plan to ensure consistency with national policy and any other guidance provided by NOC. It would also consider the plan's compatibility with adjacent regions, before providing certification. Once certified by NOC, the plan would be co-signed by appropriate state, federal, and tribal representatives. After signature of the parties, implementation would begin. The report calls for a three-phase implementation plan that would last up to five years.

Conclusion

Opponents of CMSP have expressed concern that the Task Force might "side with preservationist who would like to ban all consumptive use of these public waters, with inclusion of the Great Lakes a [sic] means of pushing federal control into inland lakes, reservoirs, and streams."[22] Recreational fishing groups also were troubled

See Spatial Planning, p. 15

Photograph courtesy of ©Nova Development Corp.

Ditch Jurisdiction?

D.C. Court rejects facial challenge to CWA permits for upland ditches

Michael McCauley, 2011 J.D. Candidate, University of Mississippi School of Law

A federal district court has rejected a facial challenge to a nationwide permit regulating non-tidal upland ditches under § 404 of the Clean Water Act (CWA).[1] The National Association of Home Builders (NAHB) claimed that upland ditches did not constitute navigable waters under the CWA and were therefore outside of the U.S. Army Corps of Engineers' (Corps) authority to regulate. While acknowledging that other courts have ruled that particular ditches were outside the purview of § 404 of the CWA, the court declined to rule that all ditches are not navigable waters.

Background

Nationwide Permit 46 (NWP 46), "authorizes the discharge of dredged or fill materials into upland ditches and governs non-tidal ditches that (1) are constructed in uplands; (2) receive water from another water of the United States; (3) divert water to another water of the United States; and (4) are determined to be a water of the United States."[2] The NAHB, an organization representing the interests of developers, argued that because under the CWA "the term 'ditch' is contained in the statutory definition of 'point sources,' a ditch categorically cannot also be a 'navigable water' because the two terms are mutually exclusive."[3] The Corps argued that a ditch can be both a point source and navigable water under certain circumstances. Both parties submitted motions for summary judgment.

Standing

As a threshold issue, the NAHB was required to establish that it had standing to bring suit. The traditional test for standing requires that the plaintiff (1) must have suffered an injury in fact; (2) the injury must be traceable; and (3) the injury must be redressible.[4] As an association, the NAHB may sue in its own right or on behalf of its constituents.

To demonstrate associational standing, NAHB had to show that (1) an individual member would have standing; (2) the interests at stake are related to the organization's purpose; and (3) the claim does not require members' participation in the lawsuit.[5] Additionally, since the plaintiffs were suing under the Administrative Procedure Act, the NAHB was required to show "that the alleged injury falls within the zone of interests that the statute on which the plaintiff bases the complaint seeks to protect."[6]

The court found that the NAHB met the requirements for associational standing. The NAHB has over 2,500 members who develop land that contains upland ditches or are required to construct such ditches to manage stormwater. Developers are often unsure whether a particular project falls within the jurisdiction of the CWA and must spend considerable time and expense to determine whether they are required to obtain a permit. Based on this information, the court found that the injury could be directly attributed to the permit process and would be redressible by the court's decision; therefore, NAHB had associational standing.

Motion for Summary Judgment

As mentioned previously, NAHB contended that because ditches may be regulated as a point source under § 303 of the CWA, a ditch cannot be regulated as a navigable water under § 404 of the CWA. Because NAHB submitted a facial challenge to NWP 46, it "must establish that no set of circumstances exists under which the permit would be valid."[7] Essentially, NAHB had to prove that ditches cannot be navigable waters in any situation.

Both NAHB and the Corps relied heavily on *Rapanos v. United States*, 547 U.S. 715 (2006), to support their positions. In *Rapanos*, the Supreme Court determined whether wetlands adjacent to ditches fell under the jurisdiction of the CWA. The NAHB cited the plurality's opinion that ditches were not "by and large" navigable waters.[8] The Corps, however, argued that the terms "point source" and "navigable waters" are not mutually exclusive. In other words, a ditch could be both a point source and a navigable water. While noting there was not significant overlap between the two terms, the court noted that while the Supreme Court had the opportunity, it declined to establish that the two terms were mutually exclusive.

The federal district court cited a number of cases in which a particular ditch was held not to be navigable water, but noted that this particular case hinged on the issue of whether all non-tidal upland ditches fall outside the jurisdiction of the CWA. The district court thus rejected the

NAHB's argument that under *Rapanos* that ditches cannot be both a point source and navigable waters.

The court went on to cite a number of cases holding that a ditch did constitute navigable waters and stated "under the stringent standard applied to facial challenges, the plaintiff has failed to demonstrate that there is no set of circumstances which NWP 46 would be valid."[9] The court therefore held that the Corps interpretation of CWA was reasonable.

Conclusion

The court declined to rule that "point source" and "navigable waters" are mutually exclusive terms and struck down the facial challenge to the Corps jurisdiction under the CWA. The court noted that there has been considerable confusion applying *Rapanos*. The Clean Water Restoration Act was recently introduced in Congress in order to clarify the scope of the CWA. The bill would replace the phrase "navigable waters" to "waters of the United States," which would return jurisdiction to the Corps that existed before the Court's rulings.

Endnotes

1. *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 2010 WL 1222073 (D.D.C. Mar. 30, 2010).
2. Nationwide Permit 46. Mem. Op. (Mar.26, 2008) at 3.
3. *National Ass'n of Home Builders*, 2010 WL 1222073, at *4 (D.D.C. Mar. 30, 2010).
4. *Id.*
5. *Id.* at *1.
6. *Id.* at *2.
7. *Id.*
8. *Id.* at *5.
9. *Id.*

Spatial Planning, from p. 13

that the Interim Report did not distinguish between recreational anglers and commercial fishermen.

Members of the Task Force have downplayed those concerns. At an event for recreational fishers, NOAA chief Jane Lubchenco stated, "As an active participant in the task force process, I want to assure the recreational fishing community that this concern has been heard. The task force has now received significant input from anglers across the country. I am confident that when the task force releases its final report, your interests will be recognized."[23]

While it is clear that the report does not recommend a ban on recreational fishing, it does provide recommendations for a new approach in managing ocean and coastal resources. It is also important to remember that the task force is only tasked with making recommendations for a national policy. The time period for public comments on the interim report has closed and the final report with all of the recommendations is expected later this year.

Endnotes

1. Allison Winter, *Obama Admin Jumps to Squelch Rumors of U.S. Fishing Ban*, The New York Times, March 3, 2010.
2. Robert Montgomery, "Culled Out" ESPNoutdoors.com, March 10, 2010, http://sports.espn.go.com/outdoors/saltwater/news/story?id=4975762.
3. Steve Bowman, "From the Editor" ESPNoutdoors.com, March 10, 2010, http://sports.espn.go.com/outdoors/saltwater/columns/story?columnist=bowman_steve&id=4982359.
4. Pres. Memorandum, *National Policy for the Oceans, Our Coasts, and the Great Lakes*, 74 Fed. Reg. 28591 (June 12, 2009).
5. Exec. Order No. 13366, 3 C.F.R. 244 (2005).
6. Pres. Memorandum, *supra* note 2.
7. *Id.*
8. *See* The Interagency Ocean Policy Task Force, www.whitehouse.gov/administration/eop/ceq/initiatives/oceans.
9. The White House Council of Environmental Quality, *Interim Report of the Interagency Ocean Policy Task Force* (2009).
10. The White House Council of Environmental Quality, *Interim Framework for Effective Coastal and Marine Spatial Planning* (2009).
11. *Id.* at 1.
12. *Id.*
13. *Id.*
14. *Id.* at 2.
15. *Id.*
16. *Id.* at 6.
17. *Id.*
18. *Id.* at 7.
19. *Id.* at 8.
20. *Id.* at 11-12.
21. *Id.*
22. Robert Montgomery, "Now We Wait" ESPNoutdoors.com, March 10, 2010, http://sports.espn.go.com/outdoors/saltwater/news/story?id=4663915.
23. Press Release, NOAA Administrator Discusses Recreational Fishing's Concerns at 2009 Sportfishing Summit, Nov. 3, 2009, *available at* http://www.asafishing.org/newsroom/news_pr110309.html.

The University of Mississippi
THE SANDBAR
Sea Grant Law Center
Kinard Hall, Wing E, Room 258
P.O. Box 1848
University, MS 38677-1848

Littoral Events

The Working Waterways & Waterfronts National Symposium on Water Access 2010

Portland, Maine
September 27-30, 2010

The 2010 Working Waterways and Waterfronts National Symposium on Water Access will provide a forum for diverse waterfront users to address common dilemmas and share solutions. Building on the inaugural symposium in Norfolk, Virginia, in 2007, participants will increase awareness of the economic, social, cultural, and environmental values of waterfronts, and the important role of water-dependent uses in sustainable coastal communities. Visit http://www.wateraccessus.com/ for more details.

Sea Grant Week 2010

New Orleans, Louisiana
October 15-20, 2010

Sea Grant Week 2010 in New Orleans will kick off with a welcome reception at the Aquarium of the Americas. The conference will feature speakers from each of the Sea Grant Focus Areas, including Safe and Sustainable Seafood, Sustainable Coastal Development, Healthy Coastal Ecosystems, and Hazard Resilience. Potential breakout themes include "Climate Change and Coastal Communities" and "Sustainable Seafood and Changing Markets." For registration and more information, visit http://www.laseagrant.org/sgweek2010/index.html .

8th Marine Law Symposium

Bristol, Rhode Island
Nov 4-5, 2010

Since passage in 1976, the Magnuson-Stevens Act has been the basis of one of the most compelling natural resource management issues of our time: the sustainable management of our nation's fisheries. The law has been amended several times and the subject of contentious debate and litigation in response to rapidly evolving information and policy objectives. This Symposium will examine the current and future state of this body of law as a resource management scheme, including the complex integration of scientific, economic, and social information. More details are available at http://law.rwu.edu/?q=node/1228 .