The Sand Bar

Volume 9:4, October 2010

Legal Reporter for the National Sea Grant College Program

Rrrrr They Pirates?

Court says no

Cape Wind Keeps Spinning

Updates on the offshore wind project

From the Editor

Fall brings exciting change at the National Sea Grant Law Center. In September, we welcomed Nicholas Lund as our first Ocean and Coastal Law Fellow. The fellowship program is the only one in the nation focused exclusively on ocean and coastal legal issues. While here for the one-year fellowship, Nick will perform legal research and write other materials for the Law Center. In this issue of *The SandBar*, he looks at the current status of the Cape Wind Project. The project has recently cleared several regulatory hurdles and another round of litigation, bringing the project closer to fruition.

This issue of *The SandBar* also examines a U.S. court's first opinion on piracy since 1820. The district court dismissed piracy charges against six Somali nationals who had fired on a U.S. Naval Ship.

In other articles, Niki Pace examines EPA regulation of cooling water intake structures. Our research associate, Mary McKenna, takes a look at a court case considering whether privately-owned wetlands subject to the Clean Water Act are "areas under Federal jurisdiction" for purposes of the Endangered Species Act. And finally, we review the New Jersey Supreme Court's examination of whether dry beach produced by a government-funded beach replenishment program is property of the upland owners.

Thanks for reading *The SandBar*!

Terra

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ISSN 1947-3966
ISSN 1947-3974
NSGLC-10-02-04
October 2010

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:

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THE SANDBAR is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under 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*, 9.4 SANDBAR [Page Number] (2010).

Cover photograph of US Navy Fifth Fleet inspecting fishing boats off the Somalian coast courtesy of US. Navy.

Contents page photo of beach renourishment courtesy of FEMA, photographer Andrea Booher.

The SandBar

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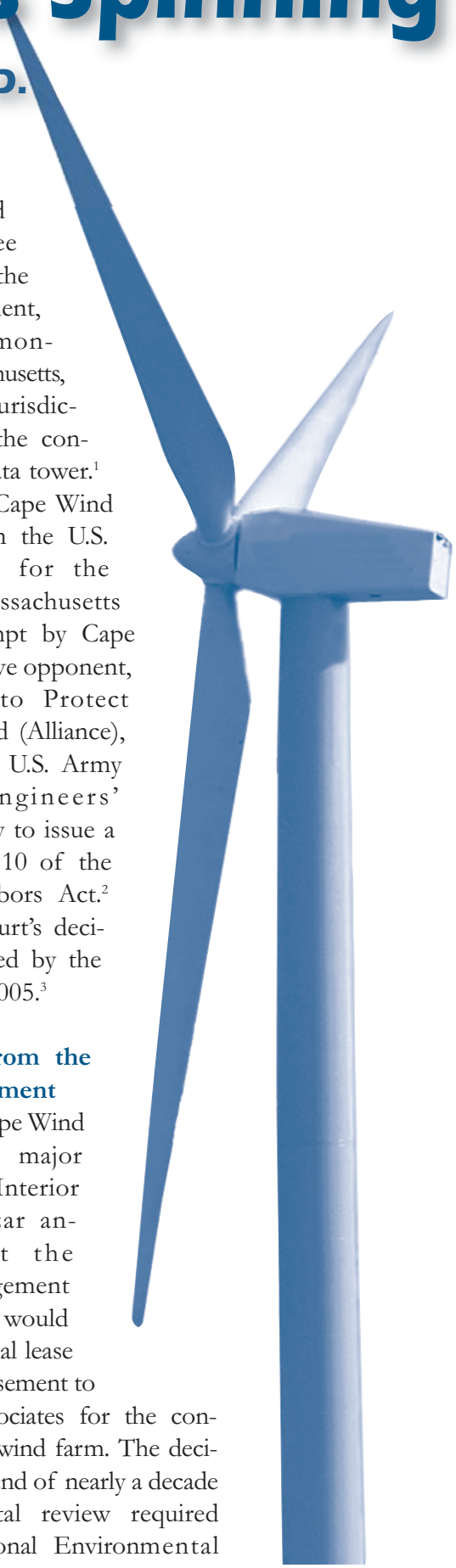
Cape Wind Keeps Spinning

Nicholas Lund, J.D.



More than nine years after it was originally proposed, an offshore wind project planned for Massachusetts' Nantucket Sound has cleared several more regulatory hurdles and won another round of litigation, bringing it closer than ever to the start of construction. Cape Wind Associates, LLC (Cape Wind) won final approval from the Department of the Interior in April and from the Federal Aviation Administration a month later. In August, the Mass. Supreme Judicial Court ruled 4-2 that the state's Energy Facilities Siting Board (EFSB) can authorize local permits despite opposition from local groups. If Cape Wind can win final approval from the state Department of Public Utilities (DPU), construction on the 130-turbine offshore farm could begin before the year is out.

Background

In July 2001, Cape Wind Associates announced its intention to construct the country's first offshore wind farm on Horseshoe Shoal, in federal waters surrounded by Cape Cod, Nantucket, and Martha's Vineyard. Cape Wind would generate more than 420 megawatts, enough to provide nearly half the electricity needs for Cape Cod and the islands. Cape Wind's large footprint - plans originally called for 170 turbines covering 25 square miles of ocean - and unique coastal location have resulted in fierce opposition from some local groups. Environmental groups claim the project will harm the Sound's environment and wildlife. Coastal towns and citizens (most famously the late Sen. Ted Kennedy) take issue with the potential aesthetic impacts of the farm. Several local Indian tribes claim that Horseshoe Shoal is sacred ground and that the project would obscure their view of the rising sun during ceremonies.

However, with support from an equally varied base including Massachusetts Governor Deval Patrick and groups like the Massachusetts Audubon Society and the American Lung Association, Cape Wind has survived numerous lawsuits and regulatory hurdles. In the first round of litigation, in August 2003, the First Circuit determined that because Cape Wind could be constructed more than three miles offshore the federal government, not the Commonwealth of Massachusetts, had exclusive jurisdiction to permit the construction of a data tower.[1] Later that year, Cape Wind won again when the U.S. District Court for the District of Massachusetts denied an attempt by Cape Wind's most active opponent, The Alliance to Protect Nantucket Sound (Alliance), to challenge the U.S. Army Corps of Engineers' (Corps) authority to issue a permit under § 10 of the Rivers and Harbors Act.[2] The District Court's decision was affirmed by the First Circuit in 2005.[3]

Green Light from the Interior Department

In April 2010, Cape Wind scored another major victory when Interior Secretary Salazar announced that the Minerals Management Service (MMS)[4] would offer a commercial lease and associated easement to Cape Wind Associates for the construction of the wind farm. The decision marked the end of nearly a decade of environmental review required under the National Environmental

Policy Act (NEPA), which requires impact statements whenever a "major Federal action significantly affecting the quality of the human environment" is proposed.[5] Triggered by federal involvement in the permitting of Cape Wind, NEPA required first the Corps then the MMS[6] to create a comprehensive Environmental Impact Statement (EIS) outlining the various environmental impacts of Cape Wind, as well as several alternative projects. The EIS was finalized in January of 2009, and the MMS next decided whether to issue a final approval.

That approval came with the issuance of a Record of Decision in April. The MMS decided to approve the project with a few modifications. Secretary Salazar ordered the number of turbines reduced from 170 to 130, reconfigured the layout so the turbines were further away from Nantucket, and required new color-schemes and lighting schedules to improve visibility for humans and birds. The announcement from Secretary Salazar is considered "by far the most important decision for [Cape Wind]."[7]

FAA Approval

Less than a month later, Cape Wind cleared another hurdle when the FAA declared that the project will not significantly interfere with planes or radar. The May decision was the fourth time the FAA had ruled on the project, the first three decisions lapsing after 18-month delays. The FAA changed its rating from "presumed hazard" to "no hazard" after Cape Wind agreed to pay $1.5 million to the agency for radar modifications made to ensure that radar connections between planes and the FAA will not be disrupted by the turbines.

MA Court Case

Cape Wind's most recent victory came in the courtroom, where Massachusetts' highest court ruled that the EFSB could issue nine important local and state permits. The decision allows Cape Wind to acquire the permits in one stop from the EFSB rather than dealing individually with local governments and organizations, some of which are staunchly opposed to the project. The issue came to a head in 2007, when the Cape Cod Commission (Commission) denied approval of Cape Wind's development of regional impact (DRI) report on the two transmission lines needed to connect the wind farm to the mainland. Instead of appealing that decision, Cape Wind applied to the EFSB under a state law allowing that group to issue composite local permits when an electric company cannot meet standards set by a local agency.[8] The Commission and the Alliance (Plaintiffs) sued when the EFSB approved the project in May 2009, and the suit was joined with an appeal from a state Superior Court decision affirming EFSB's jurisdiction over the project.[9]

The plaintiffs relied on the public trust doctrine for their first major argument, claiming that the EFSB could not authorize transmission lines across state tidelands held in trust for the public without express authority from the legislature. The court disagreed, however, ruling that EFSB's enabling legislation gave them proper authority to act in place of the state Department of Environmental Protection and administer public trust rights.

Next, the plaintiffs argued that the EFSB erred in limiting its focus to the impacts of the transmission lines rather than the entire project. Again the majority sided with Cape Wind, ruling that the EFSB could only consider impacts of facilities to be located within state waters. To allow the EFSB to consider impacts of the wind farm itself and therefore potentially deny a necessary permit based on those impacts, the court ruled, would give the state agency improper authority over a primarily federal project. Regardless of any local opposition to Cape Wind, the majority ruled, local groups cannot control the fate of the project by denying a minor, related permit.

Two judges dissented on these points. Justices Marshall and Spina wrote that allowing the EFSB to grant transmission lines across state tidelands without what they saw as legislative authority sets "a dangerous and unwise precedent" with "far-reaching consequences."[10] Finding a lack of express authority for the siting board to exercise such authority, the dissenters wrote that they would reverse on this point alone. Next, using the recent BP oil spill in the Gulf of Mexico as an example, the dissenting justices warned that a state's failure to consider all the impacts of an offshore energy project, even if located in federal waters, can have "catastrophic effects."[11]

An End in Sight?

Potentially, few hurdles remain before Cape Wind can become the nation's first offshore wind farm.

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Rrrrr They Pirates? Court Says No

Terra Bowling, J.D.

For the first time since 1820, a U.S. court has issued an opinion on piracy. The U.S. District Court for the Eastern District of Virginia dismissed piracy charges against six Somali nationals who had fired on the *USS Ashland* in the Gulf of Aden.[1] The court found that because the men did not rob the ship or its crew, their acts did not constitute piracy under U.S. law. The court reasoned that due process prevented the court from applying a new definition of piracy referencing customary international law.

Background

At around 5:00 a.m. on April 10, 2010, the defendants approached the *USS Ashland* in a small skiff. As the skiff drew even with the ship, at least one person on the skiff shot a firearm at the Navy ship. The crew returned fire, which destroyed the skiff and killed one of the passengers. The rest of the crew members were taken into custody. Upon inspection of the burning skiff, crew members noted an AK-47 style firearm.

The pirates were indicted by a federal grand jury for piracy, attack to plunder a vessel, assault with a dangerous weapon, conspiracy to use firearms during a crime of violence, and use of a firearm during a crime of violence.[2] The defendants argued that the piracy charge should be dismissed, because they never boarded or took control of the ship or took anything of value from it. The government countered, arguing that "piracy, as defined by the law of nations, does not require the actual taking of property; rather, any unauthorized armed assault or directed violent act on the high seas is sufficient to constitute piracy."[3]

Piracy, Defined

The defendants were charged with piracy under 18 U.S.C. § 1651, which states "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." The statute does not specifically identify what qualifies as "piracy as defined by the law of nations."

In interpreting the statute, the court turned to the only case to ever directly examine the definition of piracy under § 1651, *U.S. v. Smith*, 18 U.S. 153 (1820). In *Smith*, the Supreme Court found that piracy, under the law of nations, was robbery on the sea. The court found "that the discernable definition of piracy as 'robbery or forcible depredations committed on the high seas' under § 1651 has remained consistent and has reached a level of concrete consensus in United States law since its pronouncement in 1820." The government failed to prove that U.S. case law showed that "piracy in violation of the law of nations" included conduct outside of robbery or seizure of a ship.

The court also dismissed the government's argument that the court should look to contemporary international law to define piracy. The court noted that international law is unsettled on the definition of piracy.

Finally, the court examined the due process implications of its interpretation. The court noted that in interpreting piracy under the law of nations "'courts must proceed with extraordinary care and restraint,' as there is no single, definitive source on what constitutes customary international law."[4] The requirement of due process "bars enforcement of 'a statute which either forbids or

requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"[5] The *Smith* court found that piracy under the law of nations specifically meant robbery at sea. "If the Court accepted the Government's request to adopt the definition of piracy from these debatable international sources whose promulgations evolve over time, defendants in United States courts would be required to constantly guess whether their conduct is proscribed by § 1651. This would render the statute unconstitutionally vague."[6]

The court granted the motion to dismiss the piracy charges; however, other charges against the men, including attack to plunder a vessel, acts of violence against persons on a vessel, assault with a dangerous weapon on federal officers and employees, conspiracy involving firearms during a crime of violence, and use of a firearm during a crime of violence, were undisturbed by the court's ruling. The U.S government has already signaled their intent to appeal the dismissal of the piracy charges.[7]

Endnotes

1. United States v. Said, No. 2:10cr57 (E.D. Va., August 17, 2010).
2. Press Release, U.S. Attorney's Office, Eastern District of Virginia, Alleged Somali Pirates Indicted for Attacks on Navy Ships (Apr. 23, 2010).
3. *Said*, at *2.
4. *Id.* at *3.
5. *Id.* at *4.
6. *Id.* at *19.
7. Steve Szkotak, *US Appealing Dismissal of Piracy Indictment*, The Washington Examiner, Sept. 11, 2010, *available at* http://www.washingtonexaminer.com/breaking/us-appealing-dismissal-of-piracy-indictment-102693934.html.

Cape Wind, from page 5

What may be the final regulatory battle is being fought this fall as the state DPU determines whether a pending 15-year deal between Cape Wind and utility company National Grid would result in acceptable electric rates for consumers. Opposition groups including the Alliance vow to challenge a positive DPU ruling in court and have already sued to challenge other aspects of the project, hoping to keep the project delayed. The DPU is expected to make a ruling in November.

Endnotes

1. Ten Taxpayers Citizen Group v. Cape Wind Associates, LLC, 278 F.Supp.2d 98 (1st Cir. 2003).
2. Alliance to Protect Nantucket Sound, Inc. v. United States Dept. of the Army, 288 F.Supp.2d 64 (D. Ma. 2003). For a detailed analysis of the District Court opinion, *see* Stephanie Showalter, *Cape Wind Associates Wind Round Two*, The Sandbar 2:4, 1 (2004) *available at:* http://nslgc.olemiss.edu/SandBar%20PDF/sandbar2.4.pdf.
3. Alliance to Protect Nantucket Sound, Inc. v. United States Dept. of the Army, 398 F.3d 105 (1st Cir. 2005). For more on the First Circuit opinion, *see* Jeffrey Schiffman, *Wind Farm Survives Another Challenge*, The Sandbar 4:1, 1 (2005) *available at*: http://nsglc.olemiss.edu/SandBar%20PDF/sandbar4.1.pdf.
4. The agency has since changed its name to the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE).
5. National Environmental Policy Act, 42 U.S.C. § 4332(C) (2010).
6. The Energy Policy Act of 2005 clarified that the MMS has regulatory authority over offshore wind projects.
7. Beth Daley, *FAA Determines Wind Farm Is 'No Hazard,'* Boston Globe, May 18, 2010.
8. Mass. Gen. Laws ch. 164, § 69K (2010).
9. Town of Barnstable v. Massachusetts Energy Facilities Siting Board, 25 Mass. L. Rept. 375 (Mass. Super., May 4, 2009).
10. Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Board, 457 Mass. 663, 702 (Mass. August 31, 2010).
11. *Id.*

Regulating Cooling Wa

Niki L. Pace, J.D., L.L.M.

Many industrial systems, such as power plants and offshore oil rigs, rely on circulating water for cooling. The water, often sourced from nearby waterways, contains numerous fish and other aquatic organisms that become mired in the intake system and eventually die. To address this problem, Congress authorized the Environmental Protection Agency (EPA) to regulate cooling water intake structures under the Clean Water Act. Since that time, an ongoing battle has ensued between EPA, industry, and environmentalists over how EPA should regulate the structures. In July, the U.S. Court of Appeals for the Fifth Circuit weighed in on the controversy.[1]

Background

The use of cooling water intake structures (CWIS) by industrial facilities accounts for an aggregate withdrawal of billions of gallons of water per day from the nation's waterbodies. The process also results in the impingement and entrainment of aquatic life. (Impingement refers to organisms trapped against the intake structure while entrainment refers to the uptaking of organisms into the cooling system). Recognizing the detrimental effects of impingement and entrainment on ecosystem health, the Clean Water Act authorizes the regulation of CWIS by requiring "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."[2]

As characterized by the Fifth Circuit, "Despite the seemingly straightforward mandate of § 316(b), successful and effective rule making under this section has been elusive."[3] The initial rule promulgated in 1976 was successfully challenged for procedural defects under the Administrative Procedure Act (APA), resulting in EPA's withdrawal of the remanded portions of the rule. This remained the status quo until 1995 when EPA entered into a consent decree with Riverkeeper and others wherein EPA agreed to issue permanent regulations under § 316(b).

EPA proceeded with the new rulemaking in three phases: Phase I (all new CWIS facilities above a set intake threshold, except new offshore oil rigs); Phase II (existing large power plants taking in more than 50 million gallons of water a day); and Phase III (existing facilities, new offshore oil rigs, new offshore liquefied natural gas facilities, and new seafood processing vessels). In this case, the legal challenges, discussed in more detail below, center around the EPA's use of cost-benefit analysis during the rulemaking process. Among other things, ConocoPhillips argued that EPA's rulemaking was arbitrary and capricious under the APA because the national standards for new facilities do not consider the facility location and because the EPA failed to conduct cost-benefit analyses.

Phase III Rule

During the Phase III rulemaking process, EPA distinguished between new and existing facilities. For existing facilities, EPA conducted a cost-benefit analysis of the three gallons-per-day CWIS category. However, for new facilities, EPA determined that comparing the costs to individual facilities to the benefits was impossible because the facilities had not yet been built.[4] Since a cost-benefit analysis was not feasible, the EPA instead examined the expected costs of compliance with uniform national standards and whether the industry could reasonably bear those costs.[5]

EPA focused its environmental impact analysis on the Gulf of Mexico, as this is the anticipated location for most new rig construction over the next 20 years.[6] As no studies specifically addressed entrainment or impingement for new rigs, EPA relied on the Southeast Area Monitoring and Assessment Program (SEAMAP) for information regarding icthyoplankton densities in the Gulf, which EPA observed, "were the same range of densities observed in the inland and coastal waters addressed in the Phase I rule making."[7]

Under the new rule, existing facilities' CWIS requirements are established on a case-by-case basis under the NPDES program;[8] individual permit writers

must use their best professional judgment in determining the requirements needed for each facility to "achieve the best technology available for minimizing adverse environmental impact at that facility."[9] New offshore facilities must apply national performance standards for 1) any rig considered a "point source" under the Clean Water Act's NPDES permitting program, 2) has a CWIS that uses at least 25% of intake water for cooling only, and 3) withdraws a minimum of two million gallons of water per day.[10] This national standard extends to all coastal and offshore oil and gas extraction facilities.

All facilities must minimize impingement where the permitting authority finds that endangered, migratory, sport or commercial species are threatened. Finally, a variance is available for any offshore facility that can show that compliance would result in "compliance costs wholly out of proportion to the costs the EPA considered in establishing the requirement … or would result in significant adverse impacts on local water resources other than impingement and entrainment, or significant adverse impacts on energy markets."[11]

Entergy Corp. v. Riverkeeper

While the Phase III rulemaking was occurring, a legal battle over the Phase II Rule made its way to the U.S. Supreme Court. In *Entergy Corp. v. Riverkeeper*, the Supreme Court considered whether § 316(b)'s statutory requirement for "best technology available for minimizing adverse environmental impact" precluded a cost-benefit analysis.[12] In the appealed decision, the Second Circuit had interpreted this language to mean the "technology that achieves the greatest reduction in adverse environmental impacts."[13] Although the Court considered this reading "plausible," the Court reasoned that the language could also mean "technology that *most efficiently* produces some good."[14]

The Court found that the statutory language allowed the EPA some discretion in determining what extent of reduction is necessary under the circumstances; the language did not preclude a cost-benefit analysis. The Court concluded that while the EPA may use a cost-benefit analysis in rulemaking, the EPA is not required to do so. The EPA "is afforded discretion to consider to what degree, if any, costs and benefits should be weighted in determining the 'best technology available for minimizing adverse environmental impact.'"[15] The Supreme Court remanded the Phase II Rule for existing facilities to the EPA.

In light of the *Entergy Corp.* decision, the EPA sought remand of the Phase III Rule pertaining to existing CWIS in the instant case. The remand would allow EPA to reevaluate its Phase III Rule on existing facilities in conjunction with the EPA's review of the Phase II Rule on existing facilities (as remanded by the U.S. Supreme Court in *Entergy Corp.*). The Fifth Circuit found this request "imminently reasonable" and non-prejudicial to the other parties and therefore granted the motion.

Economic Achievability

Before addressing ConocoPhillips' substantive challenges to the EPA's Phase III Rule, the Fifth Circuit first addressed ConocoPhillips' claim that EPA violated the APA notice provisions by advancing a different interpretation of § 316(b) at the litigation stage. In other words, the court asked "whether the EPA's interpretation of § 316(b) … is sufficiently different from the interpretation it proffered in the Proposed Rule to constitute a violation of the notice provision for informal rule making set forth in § 4 of the APA."[16] According to ConocoPhillips, the EPA gave notice that it would employ a cost-benefit analysis for new CWIS in its rulemaking but later abandoned that rationale during the appeal in favor of an "economic achievability" analysis. Further, ConocoPhillips maintained that the EPA's economic achievability test "is sufficiently different from the 'cost-benefit' test announced during rule making that it amounts to a mere 'litigation position' and the agency's justifications for its Phase III Rule that

rest on the 'economic achievability' argument should be ignored."[17]

The court disagreed, first noting that the EPA's changed terminology does not necessarily denote changed methodology. Rather, "[t]he crux of the question is whether the EPA's justification argument on appeal so differs from the justification articulated during the rule making process to have deprived interested parties of the notice required by the APA."[18] The court reviewed the preamble of both the Proposed and Final Rules concluding that both preambles articulated EPA's interpretation of § 316(b) as allowing for a cost-benefit analysis but not requiring such analysis. In the Final Rule, EPA acknowledges that it lacked sufficient information to conduct cost-benefit analysis for new facilities; EPA therefore estimated compliance costs under national categorical standards for new CWIS and compared those costs to baseline benefits for existing facilities. After reviewing the language of the rules and EPA's statements at trial, the court concluded that the differences cited by ConocoPhillips represented "no material difference" in EPA's interpretation of its rulemaking authority.

Arbitrary Rulemaking?

Having lost on the economic achievability argument, ConocoPhillips additionally asserted that EPA's Final Phase III Rule was arbitrary and capricious. These allegations rested at least partially on the contention that § 316(b) mandated EPA engage in a cost-benefit analysis. The court summarily rejected these assertions in light of the U.S. Supreme Court's decision in *Entergy Corp v. Riverkeeper*, as laid out above, which made clear that "the EPA *may* but is not *required* to engage in cost-benefit analyses for CWIS rule making."[19] After dispensing with that element of the argument, the court went on to address ConocoPhillips' two remaining arguments: "1) It is arbitrary and capricious for the EPA to fail to conduct a benefits analysis for specific facility locations, and 2) it is arbitrary and capricious for the EPA to rely on the general 'qualitative' SEAMAP study, rather than on site-specific quantitative studies, to estimate the environmental impact of new CWIS."[20]

While regulations established under § 316(b) "require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impacts,"[21] EPA and ConocoPhillips' offered differing interpretations of the statute. ConocoPhillips argued that this language required EPA to consider the facility's physical location. On the other hand, EPA maintained the language applied to the CWIS's physical location.

To resolve the matter, the court employed the two-part analysis laid out in *Chevron, U.S.A. v. Natural Resources Defense Council*[22] (commonly referred to as *Chevron* deference). The first step of *Chevron* requires the court to determine whether the statute is silent or ambiguous on the issue. If so, the court would then conduct step two of *Chevron* whereby the court would defer to the agency's interpretation so long as the

Power Plant photograph courtesy of Arnoldius, Wikimedia Commons.

interpretation is based on a permissible construction of the statute. The court found that the statute clearly required that EPA consider the location of the CWIS, not the facility. In rejecting ConocoPhillips' interpretation, the court pointed out the illogical scenario under that interpretation wherein EPA would be required to consider the location of a terrestrial facility but not the location of the facility's remote CWIS.

Because the statute does not require considerations of the facility location, the court, considering the record as a whole, rejected ConocoPhillips' assertion that EPA's failure to conduct a benefits analysis for specific new facility locations was arbitrary and capricious. Rather, the court found that EPA's decision to rely upon economic achievability grounds was at least "minimally related to rationality"[23] in light of the information available to EPA during the rulemaking.

Turning finally to EPA's reliance on the SEAMAP data, ConocoPhillips criticized EPA's usage of the SEAMAP data in promulgating national categorical standards for new facilities. Rather, ConocoPhillips felt that EPA must either employ a case-by-case permitting regime or distinguish between deepwater and shallow water facilities in the rulemaking. Again rejecting ConocoPhillips' assertions, the court noted that "[c]onducting precise 'quantitative benefits studies' for facilities that have yet to be built is impossible, and there are no existing quantitative studies of impingement and entrainment for new facilities."[24] Reliance on the SEAMAP data was further bolstered by fact that most new offshore facilities will be located in the Gulf of Mexico (where the SEAMAP study took place). Returning once again to the location of the CWIS versus the facility, the court also noted that while offshore facilities may be located at varying depths, the CWIS will almost always be located near the surface of the water column. Therefore, EPA reasonably relied on the SEAMAP study to evaluate the adverse environmental impact of CWIS on offshore facilities located near the surface of the water column.

Conclusion

Ultimately, the court upheld EPA's Final Phase III Rule pertaining to new CWIS but remanded the portion of the Rule that regulated existing CWIS (as requested by EPA). Notably, the decision came on the heels of EPA's announcement of a planned survey intended to evaluate what the public is willing to pay to protect aquatic organisms from CWIS, a move some say shows support for a new cost-benefit analysis under the upcoming proposal.[25] The proposal was open for public comment through September 20, 2010.[26]

Endnotes

1. ConocoPhillips v. EPA, —- F.3d —-, 2010 WL 2880144 (5th Cir. July 23, 2010).
2. 33 U.S.C. § 1326(b).
3. *ConocoPhillips*, 2010 WL 2880144 at *2.
4. 71 Fed.Reg. 35,034.
5. *Id.* at 35,025-29.
6. *ConocoPhillips,* 2010 WL 2880144 at *5.
7. *Id.* at *4.
8. The NPDES program regulates the discharge of pollutants from a point source under the Clean Water Act. Any point source discharging a regulated pollutant is subject to this provision and must obtain a permit for the discharge from EPA. 33 U.S.C. § 1342.
9. *ConocoPhillips,* 2010 WL 2880144 at *5 (citing 71 Fed. Reg. 35,015).
10. 40 C.F.R. § 125.131(a).
11. *Id.* § 125.135.
12. Entergy Corp. v. Riverkeeper, 129 S.Ct. 1498 (2009).
13. *Id.* at 1506.
14. *Id.* (emphasis in original).
15. *ConocoPhillips*, 2010 WL 2880144 at *4.
16. *Id.* at *8.
17. *Id.* at *9.
18. *Id.*
19. *Id.* at *13 (emphasis in original).
20. *Id.*
21. 33 U.S.C. § 1326(b).
22. 467 U.S. 837, 842-43 (1984).
23. *ConocoPhillips*, 2010 WL 2880144 at *15.
24. *Id.*
25. Russell Prugh, *Sparks Continue to Fly Over Cooling Water Intake Structures as Fifth Circuit Approves Oil and Gas Phase III Rule and EPA Issues Contingent Valuation Survey*, Marten Law News, August 12, 2010 (available at http://www.martenlaw.com/newsletter/20100812 -cooling-water-intake-structures).
26. EPA, Cooling Water Intake Structures – CWA § 316(b), http://water.epa.gov/lawsregs/lawsguidance /cwa/316b/index.cfm .

Privately-Owned Wetlands and the ESA

Mary McKenna, 2011 J.D. Candidate, University of Mississippi School of Law

Recently, after an endangered plant species was discovered on and removed from privately-owned wetlands, the Ninth Circuit considered whether privately-owned wetlands situated adjacent to navigable waters and their tributaries were considered "areas under Federal jurisdiction" for the purposes of the Endangered Species Act regulation.[1] Although the court found the term "areas under Federal jurisdiction" ambiguous, it was unconvinced that the U.S. Fish and Wildlife Service (FWS) had interpreted the term, ultimately holding that "areas under Federal jurisdiction" did not include the privately-owned land at issue, thereby affirming the district court's ruling and the granting of summary judgment to the defendants.

Background

William and Frank Schellinger own 21 acres of private property comprised of grasslands containing seasonal vernal pools, wetlands, seasonal creeks, and vernal swales in Sebastopol, California. Their 21 acres (the Site) are adjacent to the Laguna de Santa Rosa, a tributary of the Russian River, which is a navigable water of the United States under the Clean Water Act (CWA).[2]

When the Schellingers began to develop the Site in 2003, the U.S. Army Corps of Engineers (Corps) designated 1.84 acres of the Site adjacent to the Laguna de Santa Rosa as wetlands subject to the CWA. In so doing, the Corps qualified that particular portion of the Schellingers' wetlands as "navigable waters" and therefore, "waters of the United States" under the CWA.

In 2005, while on a walk along the Site's wetlands, Robert Evans, an amateur naturalist, discovered what he believed to be the endangered plant species Sebastopol meadowfoam.[3] After this discovery, the California Department of Fish and Game Habitat (CDFG) Conservation Manager Carl Wilcox, CDFG biologist Gene Cooley, and Project Manager for the Site's development Scott Schellinger, visited the Site to further investigate, at which time Wilcox confirmed the presence of Sebastopol meadowfoam on the Site's wetlands. Wilcox lifted the plants and their substrates out of the wetland to determine whether the plants were rooted in the soil and thus naturally occurring. Because the CDFG employees suspected that the plants were not naturally occurring, Cooley later returned to the Site to gather evidence, whereupon he removed the Sebastopol meadowfoam plants, placed them in plastic bags, and transported them to the local CDFG office.

In 2006, Evans and Northern California River Watch (collectively River Watch) filed a complaint against Wilcox and Cooley[4] (collectively Wilcox) in the Northern District of California, alleging that the CDFG employees' treatment and removal of the plants violated ESA § 9(a)(2)(B), which makes it unlawful to remove, damage, or destroy an endangered plant species in "areas under Federal jurisdiction."[5] Although the Site is privately owned, River Watch argued that because the area was regulated wetlands under the CWA, the area was under federal jurisdiction and thus subject to the ESA prohibition.[6] Wilcox argued that the term "areas under Federal jurisdiction" only applied to land owned by the Federal government. The district court granted Wilcox's motion for summary judgment, concluding that River Watch could not prevail on its § 9(a)(2)(B) claims because, as a matter of law, River Watch could not establish that the wetlands qualified as "areas under Federal jurisdiction."[7] River Watch appealed.

Discussion

In reviewing an agency's interpretation of a statute, a court performs a two step analysis outlined in a U.S. Supreme Court case, *Chevron v. Natural Resources Defense Council*.[8] First, a court looks at whether Congress's intent is clear from the statutory language. If not, the next step is to consider whether the agency permissibly interpreted the statute.

River Watch and Wilcox argued that the text of § 9(a)(2)(B) was clear and plainly supported their respective positions. The United States, as amicus curiae,[9] urged the court to conclude that the text was ambiguous and that FWS's construction of the ESA was entitled to *Chevron* deference.[10] Under step one of *Chevron*'s analytical framework, determining whether the intent of Congress is clear, the court turned to statutory construction, engaging first in a textual analysis and second in a review of legislative history. In its textual analysis, the court determined that the meaning of "areas under Federal jurisdiction" was not immediately clear, nor explicitly defined in the ESA.

Turning to legislative history, the court reviewed two committee reports that discussed the extension of the ESA's protection to plants.[11] The court concluded that the committee reports did not necessarily aid its interpretation because the reports used the term "federal land" in lieu of the statutory text "areas under Federal jurisdiction" and failed to define "federal lands." In short, the court concluded that the meaning of the term "areas under Federal jurisdiction" was not plainly clear from the text of the ESA nor was Congress's intent with regard to that term clear in the ESA's legislative history. The court, therefore, agreed with the United States that the term was ambiguous.

As the agency responsible for the protection and recovery of endangered plant species, the FWS "has the authority to interpret the ESA in rules carrying the force of law."[12] Under step two of the *Chevron* analysis, determining if an agency's interpretation of a statute is a reasonable construction of the law at issue, the court determined that the FWS had not explicitly interpreted the term "areas under Federal jurisdiction" and therefore no agency interpretation existed to which the court must defer under *Chevron*.[13] In other words, the court held that although the FWS had the authority to interpret the ESA through the promulgation of rules and regulations, the FWS had not yet done so, making the application of *Chevron* deference inappropriate.

Lacking any agency interpretation of "areas under Federal jurisdiction," the court proceeded to interpret the term. The court held River Watch's proposed construction of § 9(a)(2)(B) to be untenable because of potential overbreadth, arguing that River Watch's reading could be "expanded to apply to private lands which are subject to any sort of federal regulatory jurisdiction by any federal statute, i.e. everywhere."[14] Furthermore, River Watch had not established that the plain language of the ESA mandated that "waters of the United States" were "areas under Federal jurisdiction," and ultimately interpreted "areas of Federal jurisdiction" as not including all of the "waters of the United States" as defined by the CWA and its regulations. Therefore, the court affirmed the district court's ruling and granted summary judgment to Wilcox.

Conclusion

The court reiterated that while its decision was binding law, the agency remains the authoritative interpreter of the term "areas under Federal jurisdiction." In ruling that "areas under Federal jurisdiction" do not include all of the "waters of the United States" as defined by the CWA, the court is inviting the FWS to issue regulations or guidance specifically addressing the interpretation of the term, especially to achieve the objective of the ESA—protecting and conserving endangered species and their ecosystems. Until the FWS does interpret the term through the promulgation of rules and regulations

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Photograph of Sebastopol meadowfoam courtesy of Stan Shebs.

Who Owns Jersey Shore?

Terra Bowling, J.D.

On the heels of the U.S. Supreme Court's decision in *Stop the Beach Renourishment*, the New Jersey Supreme Court has ruled that dry beach produced by a government-funded beach replenishment program is not the property of the upland owners.[1] The court ruled that the expanded dry beach fell within the public trust doctrine and, therefore, the owners were not entitled to compensation for that land in eminent domain proceedings.

Background

As part of a redevelopment plan for beachfront areas the City of Long Branch (the City) sought to acquire oceanfront property, including the Liu family's commercial building. The building contained several businesses run by the Lius, as well as businesses leased to commercial tenants. After the Lius rejected an offer to purchase the property for $900,000, the City filed an eminent domain action to take littoral property owned by the Liu family.

In its complaint, the city described the Liu property according to a 1977 deed; however, due to a beach renourishment project in the 1990s, the Lius' beachfront had increased by more than two acres from the description given in their 1977 deed. The multi-million dollar beach renourishment project, funded by federal, state, and several municipal governments, produced approximately 225 additional feet of dry land seaward from the mean high water mark described in the deed. In the eminent domain proceedings, the Lius claimed that they should be compensated for the loss of the dry land added as a result of the beach renourishment.

The trial court denied the Lius' claim. The court noted that generally, the state holds in trust for the public land covered by tidal waters up to the mean high watermark. Several common law principles govern property rights of the upland owner and the state when the shoreline is altered. Under the common law principle of avulsion, a sudden addition to land caused by either natural or manmade forces, does not result in change of title to the land. The land seaward of the previous high water mark remains with the state. However, under the common law principle of accretion, which is the slow, imperceptible addition of sand, the upland owner gains title to the addition of dry beach. The trial court reasoned that the two-week beach renourishment project resulted in avulsion and ruled that the Lius did not gain title to the new dry land added to the shoreline. On appeal, an appellate court affirmed that decision but on different grounds. Instead of looking at common law principles, the panel found that policy reasons precluded the Lius from benefiting from the public renourishment project in the beach renourishment action. The Lius appealed.

Common Law

On appeal, the New Jersey Supreme Court turned to common law principles in making its decision. The court reiterated the fact that the State of New Jersey "owns in fee simple all lands that are flowed by the tide up to the highwater mark … and the owner of oceanfront property holds title to the property upland of the high water mark."[2] The court noted, however, that the shoreline "is in a constant state of flux" changing either imperceptibly over the years or swiftly due to natural causes or acts such as the beach renourishment program. The court reiterated that under common law, upland owners are entitled to dry land added by accretion, but lose land as a result of erosion. Under avulsion, however, the boundary line does not shift. "The prior mean high water mark remains the demarcation line between the property rights of the oceanfront owner and the state."[3] Further, the court recognized that "the law, generally, makes no distinction between whether an accretion or avulsion is the product of natural forces or manmade efforts.

The court next looked at the Lius' claim that the court should disregard the common law distinctions between accretion/erosion and avulsion and find a "natural equity" as a basis for giving littoral owners direct contact with the water. The court declared that

this approach would be contrary to the public trust doctrine. "Moreover, natural equity is hardly a concept to be invoked by a property owner who is asking to be compensated in a condemnation action for new beachfront property created by a taxpayer-funded beach replenishment program. The primary purpose of the program is to protect the shoreline – public beaches and private beaches – from erosion." The court reasoned that the renourishment project protected the Lius' property from erosion.


Winslow Homer painting of Long Branch beach scene circa 1869.

Ultimately, the court rejected the Lius' claims. "In the end, under the public trust doctrine, the people of New Jersey are the beneficiaries of the lengthening of the dry beach created by this government funded program. Because the mean high water mark remains the boundary line between private and public property, there was no true loss of land to the Lius or gain to the state. In the context of this eminent domain action, the Lius cannot be recompensed for the taking of property they never owned."

Endnotes

1. City of Long Branch v. Jui Yung Liu, 2010 N.J. LEXIS 910 (N.J. Sept. 21, 2010).
2. *Id.* at *22.
3. *Id.* at *27.

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or guidance materials, however, those privately-owned wetlands subject to the CWA are not susceptible to the authority of ESA § 9(a)(2)(B).

Endnotes

1. Northern Cal. River Watch v. Wilcox, —- F.3d —- 2010 WL 3329681 (9th Cir. 2010).
2. 33 C.F.R. § 328.3(a)(7). Further, the CWA prohibits discharges of pollutants—including dredged soil, rock, sand, and cellar dirt—into the "navigable waters of the United States" without a special permit. 33 U.S.C. §§ 1311(a), 1344, 1362(6). Because their development plans of the Site included filling in and paving over parts of the Site designated as wetlands, the Shellingers applied for a special permit. *Northern Cal. River Watch*, 2010 WL at *2.
3. *Northern Cal. River Watch*, 2010 WL at *2. Evans notified a local biology professor who determined that, while Evans had identified only the common meadowfoam, Sebastopol meadowfoam plants were on the Site's wetlands. *Id.*
4. River Watch also named Robert Floerke, another CDFG employee as a defendant, and in 2007, filed a second amended complaint adding the Schellingers as defendants in violation of ESA § 9(g). *Id.* at *12, n. 7.
5. *Northern Cal. River Watch*, 2010 WL at *3. *See also* 16 U.S.C. § 1538(a)(2)(B).
6. *Northern Cal. River Watch*, 2010 WL at *5.
7. *Id.* at *3.
8. 467 U.S. 837 (1984).
9. Amicus curiae is literally "a friend of the court," a person or entity who is not a party to a lawsuit but may file a brief due to a strong interest in the subject matter.
10. *Id.* The United States argued that "areas under Federal jurisdiction" does not include privately-owned lands that are merely subject to regulatory jurisdiction under a federal statute. *Id.*
11. *Northern Cal. River Watch*, 2010 WL at *6. The two committee reports were (1) a House Conference Report that preceded the passage of the 1982 Amendments to the ESA, and (2) a Senate Report that preceded the passage of the 1988 Amendments to the ESA. *Id.*
12. *Northern Cal. River Watch*, 2010 WL at *7.
13. *Id.* at *8. The United States argued that three FWS rules and a guidance manual provided an interpretation of "areas under Federal jurisdiction," triggering *Chevron* deference. The court was not persuaded, convinced that the rules did not address the issue and that the handbook lacked the force of law. *Id.* at 8-9.
14. *Id.* at *11.

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Littoral Events

Shape of the Coast 2010

New Bern, North Carolina
November 5, 2010

The 2010 Shape of the Coast program will focus on the changing demographics and land-use patterns of coastal North Carolina. Other program highlights include an update from the chair of the N.C. Coastal Resources Commission (CRC); a panel discussion on appearing before CRC and challenging its decisions; an examination of the legal issues that arise when a coastal development fails; and a look at recent significant federal and state coastal cases and legislation. The program is co-sponsored by North Carolina Sea Grant, the North Carolina Coastal Resources Law, Planning and Policy Center, and the University of North Carolina School of Law. Register online at: http://www.nccoastallaw-.org/events.htm.

Environmental Law Fall Forum

Mobile, Alabama
December 3, 2010

The Mississippi-Alabama Sea Grant Legal Program's Environmental Law Fall Forum will look at FEMA's obligations under the ESA; takings and the *Stop the Beach Renourishment* decision; the current state of common-law climate change litigation; ethical considerations for attorneys and public officials; a look at regional water quantity issues; and CERCLA liability after *Burlington Northern* decision. The Legal Program has applied for 6 hours of continuing legal education credit in Mississippi and Alabama. Please visit: http://masglp.olemiss.edu/environmental_law_forum.htm .

National Conference on Science, Policy and the Environment

Washington, D.C.
January 19-21, 2011

The 11th Annual conference will feature the theme, "Our Changing Oceans." A number of symposia and breakout sessions will discuss aspects of marine spatial planning; The Role of Coastal Marine Spatial Planning in Stabilizing Food Security; Improving Ocean Governance through Multi-scale Ocean and Coastal Management; Ecosystem-Based Marine Spatial Planning in U.S. Waters; and From Policy to Practice – Creating the Will to Make Marine Spatial Planning Succeed. For more information, visit: http://ncseonline.org/conference/Oceans/cms.cfm?id=4028