The SandBar

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Legal Reporter for the National Sea Grant College Program

U.S. Supreme Court Issues Ruling in Fish Shredding Case

Also,

Drawing the Line in the Sand: Judge Determines Town's Rights to Local Beach

Piracy on the High Seas

New Jersey Dune Construction Limited by Eminent Domain Act

Proposed Rule by EPA Regarding Oil Dispersants

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Cover page photograph of a boat on the Gulf of Mexico courtesy of Jim Mullhaupt.

Contents page photograph of sand dunes on Point Pleasant Beach in New Jersey courtesy of Robin Zebrowski.

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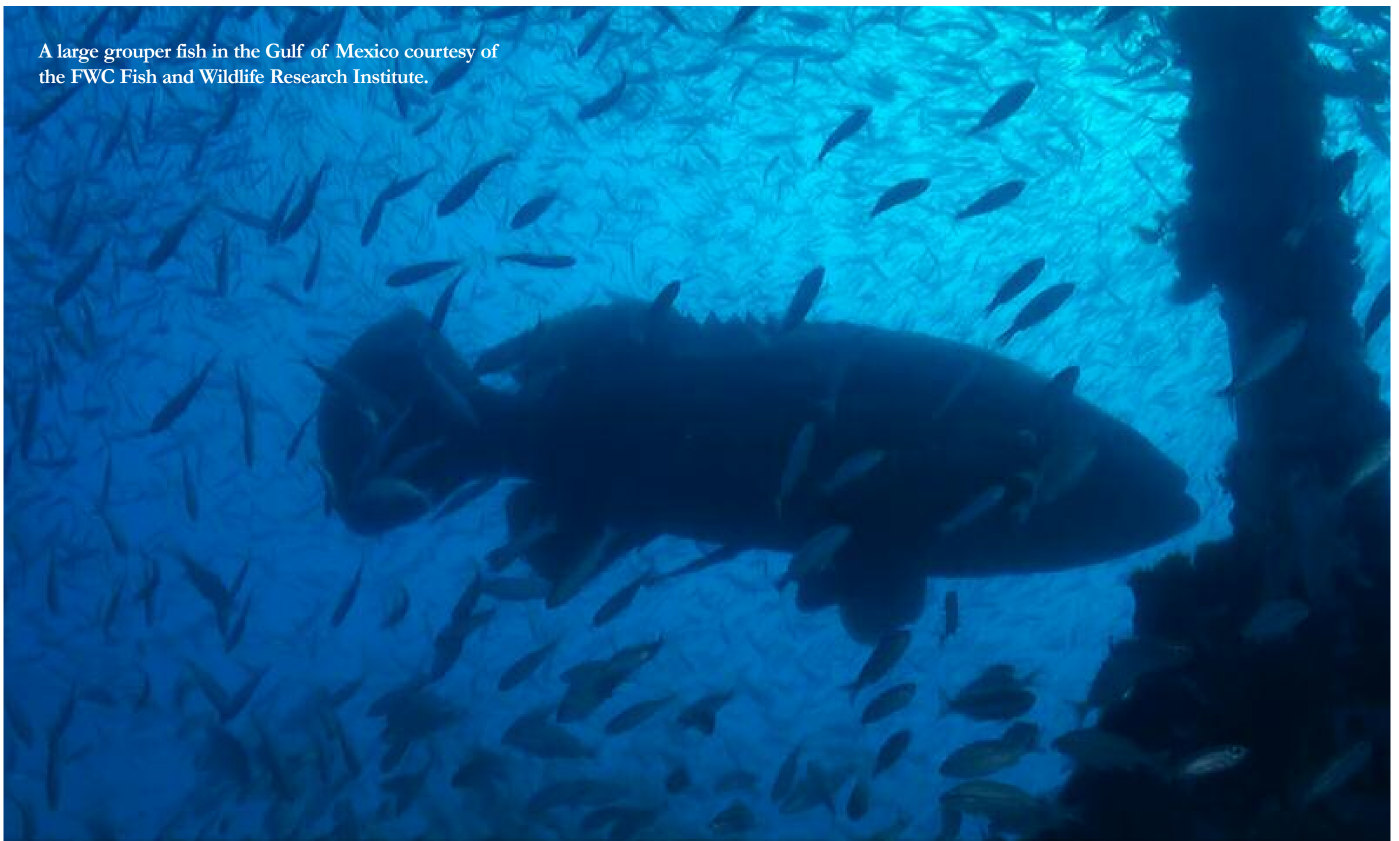
U.S. Supreme Court Issues Ruling in Fish Shredding Case

Terra Bowling


A large grouper fish in the Gulf of Mexico courtesy of the FWC Fish and Wildlife Research Institute.

In November 2014, the U.S. Supreme Court heard a case on whether the Sarbanes-Oxley Act, a federal law enacted following the Enron scandal, could be used to convict a commercial fisherman who dumped undersized fish to avoid a fine. Federal prosecutors argued that the law was properly used to punish someone who destroyed evidence. The fisherman claimed that he should not be prosecuted under a law intended to regulate business practices. In February, the Supreme Court ruled on whether the Act covers the destruction of all types of evidence.

Background

John Yates was the captain of a 47-foot commercial fishing boat, "Miss Katie." In 2007, John Yates was fishing for grouper in federal waters in the Gulf of Mexico when he was stopped for inspection by a state conservation officer. Upon examination of Yates' catch, the officer noticed that several of the grouper in the haul appeared to fall short of the legally required 20–inch length. He measured the fish and found that 72 of the grouper were clearly under the legal limit. The officer issued Yates a citation and ordered him to crate the fish and bring them to shore.

Yates, hoping to avoid a federal fine, allegedly ordered his crew to dump several of the fish and replace them with larger fish. When they arrived back at port, the officer measured the fish again, and, to his surprise, found that the fish measured longer than they had at sea. Upon questioning by federal agents about the discrepancy, the crew confessed to dumping the fish under the captain's order. Yates was subsequently indicted on several charges, including under a provision of the Sarbanes-Oxley Act for destroying evidence.

Tangible Objects

Passed in 2002, the Sarbanes-Oxley Act was intended to address corporate fraud by reforming business practices. Section 1519 of the Act penalizes anyone who "knowingly ... destroys, conceals, [or] covers up, ... any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States."[1] The provision is often called the "anti-shredding provision" because it was intended to combat document shredding rampant in the Enron fraud scandal.

YATES ARGUED THAT THE TERM "TANGIBLE OBJECT" SHOULD ONLY APPLY TO RECORDS, DOCUMENTS, OR TANGIBLE ITEMS THAT RELATE TO RECORDKEEPING AND NOT FISH.

The U.S. District Court for the Middle District of Florida found that the term "tangible object" was broad enough to include the fish Yates threw overboard.[2] A jury subsequently found Yates guilty of destroying or concealing a "tangible object with the intent to impede, obstruct, or influence" the government's investigation into the undersized grouper. He was sentenced to thirty days in prison.

On appeal, Yates argued that the term "tangible object" should only apply to records, documents, or tangible items that relate to recordkeeping and not fish.[3] The Eleventh Circuit disagreed, finding that a fish is a "tangible object" within the meaning of 18 U.S.C. § 1859. The court reasoned that undefined words in a statute, such as tangible object, "are given their ordinary or natural meaning."[4]

Distant view of a boat on the Gulf of Mexico courtesy of Antoine Gaddy.

Appeal to the Supreme Court

In April 2014, the U.S. Supreme Court granted certiorari in the case.[5] The Court considered whether Yates was deprived of fair notice that destroying fish would fall under the purview of § 1519. Yates's brief to the court argued that he did not have fair notice that he could be convicted under the provision.[6] He noted that the term "tangible object" is ambiguous and undefined. Several organizations filed amici briefs in support of Yates's arguments, including a group of criminal law professors, the National Association of Criminal Defense Lawyers,

Photo of a grouper fish courtesy of Malcolm Browne.

several commercial fishing associations, as well as Michael Oxley, one of the co-authors of the Sarbanes-Oxley Act. Generally, the amici briefs alleged that the government was overzealous in using the law to prosecute the fisherman, as the law was intended to prevent shredding of business records, not fish.

In response to Yates's arguments, the government maintained that the phrase "tangible object" should be construed to any physical evidence relevant to a federal investigation.[7] The government argued that the law is a "straightforward ban on destroying evidence." The government also cited instances in which it had used § 1519 to prosecute the destruction of evidence, including most recently to convict a friend of the Boston Marathon bombing suspect for helping conceal supplies linked to the bombing.

Decision

In a 5-4 ruling, the Supreme Court overturned Yates's conviction, ruling that offloading undersized fish was not comparable to shredding evidence.[8] Justice Ruth Bader Ginsburg, writing for the majority, found that the law was intended to address financial recordkeeping. The Court ruled that a tangible object, under the Act, "must be one used to record or preserve information."[9]

The dissent argued that Congress intended the Sarbanes-Oxley Act to cover the destruction of any type of evidence that might be useful in a federal investigation. Justice Elena Kagan, in particular, noted, "A person who hides a murder victim's body is no less culpable than one who burns the victim's diary. A fisherman, like John Yates, who dumps undersized fish to avoid a fine is no less blameworthy than one who shreds his vessel's catch log for the same reason."

Despite the dissent's clear belief that the Sarbanes-Oxley Act should be used to protect all types of evidence, Yates is now cleared of charges under the Act. For now, the government will be limited to using these provisions to prevent the destruction of evidence that records or preserves information.

Endnotes

1 18 U.S.C. § 1519.

2 United States v. Yates, 2011 WL 3444093 (M.D. Fla. Aug. 8, 2011).

3 United States v. Yates, 733 F.3d 1059, 1064 (11th Cir. 2013).

4 *Id.*

5 Yates v. United States, 134 S. Ct. 1935 (2014).

6 Brief for Petitioner, Yates v. United States, No. 13-7451 (June 30, 2014).

7 Brief for the United States, Yates v. United States, No. 13-7451 (Aug. 19, 2014).

8 Yates v. United States, 135 S. Ct. 1074 (2015).

9 *Id.* at 1094.

DRAWING THE LINE IN THE SAND: JUDGE DETERMINES TOWN'S RIGHTS TO LOCAL BEACH

Marc Fialkoff, J.D.[1] and John McNally[2]

Rexhame Beach courtesy of Kate Hannon.

At the end of 2014, a Massachusetts Land Court came one step closer to resolving a two-decade long case regarding the ownership and access to a subdivision-adjacent beach.[3] The most recent decision resolved two critical questions: 1) ownership interest in the property called "Rexhame Beach" and 2) ownership of the right-of-way to five roads leading to the beach. In making its decision, the court reviewed not only the past two decades of case history but also reviewed colonial documents to determine the chain of title for the land.

Background and Procedural History

Rexhame Terrace subdivision "is an area of land near the ocean situated at the end of Marshfield Neck, between the South River and the Green Harbor River in the Town of Marshfield, located in Plymouth County."[4] Circuit Avenues North and South border the subdivision with five streets[5] running west to east through the subdivision. While the five streets run through the subdivision, one street, Winslow Avenue, extends past the end of the subdivision to land described as "beach lots" and the area known as "Rexhame Beach."[6]

In 1998, various property owners in Rexhame Terrace sued the Commonwealth and private citizens, claiming that Rexhame Beach ("the beach") was part of their parcels and that the public was trespassing on their land. Within the amended complaint, the plaintiffs requested a declaratory judgment[7] that the beach was in fact their land and to clear up the cloud over the title caused by two cases decided in the 1800s.[8] In 1999, the private citizen defendants filed a motion to stay to force the litigation between the plaintiffs and the Commonwealth to be resolved before commencing trial against the individual defendants.

Rexhame Beach courtesy of RDA Photos.

When the Commonwealth and the plaintiffs were about to settle in 2008, the Town of Marshfield filed a motion to intervene as the settlement would have adverse impacts on its citizens. Following the motion for intervention by the town, numerous motions for joinder of additional parties, as well as other procedural motions, a bifurcated trial was held in September 2014. The trial lasted thirteen days with more than twenty witnesses and six hundred exhibits and chalks, including ancient documents dating back to the mid-1600s.

Ownerships Interests in Rexhame: What Constitutes a Beach?

The plaintiffs claimed ownership over the Rexhame Beach property based on two arguments. First, they argued that their land was originally owned by Joseph Beadle, who was given the land in question plus the subdivision up to the highwater mark by virtue of the Colonial Ordinance of 1640. This assertion had been previously challenged in the *Briggs Thomas* cases in which the court determined that the public had an interest in the contested property based on a subsequent ordinance permitting public grazing on these beachfront lands. There, the court held that the ownership in the beach was vested in the town rather than Beadle's descendants.[9]

In a subsequent case, Briggs Thomas claimed no ownership in the beach, but rather argued he had a prescriptive right[10] in the beach because he grazed his cattle there. The court held that no prescriptive right existed, as the town had already laid down a road for public use and the beach was a "common place for fisherman, fowlers and haymakers…who time out of mind has used to turn out their horses on the beach for depasturing."[11] The court therefore determined that the *Briggs Thomas* cases had a preclusive effect on the plaintiff's case, meaning that since *Briggs Thomas I and II* already determined that the previous owners of the land did not have a property interest in the beach lots, the issue could not be re-litigated and was foreclosed from review.

Although the *Briggs Thomas* decisions had a preclusive effect on the ownership interests, the court had to determine what constituted a "beach" in the colonial period to demarcate where the plaintiff's interest ended and the town's interest began. Citing the primary definition for how Massachusetts defines a beach as "the area between ordinary high water mark and low mark, over which the tide ebbs and flows,"[12] the court looked to the evidence of the fauna and animals grazing on the land in question, as well as the topography of the land to determine where the beach actually began. From the expert testimony, it was determined that a coastal dune existed which separated the seaward portion of the land (what would constitute a beach) from marshes and wetlands that were on the landward side of the dune.

In the alternative, the plaintiffs argued that if the *Briggs Thomas* cases had a preclusive effect on their ownership interest, a 1916 Release Deed[13] granted to the property owner contained the beach property in its writings. The court, however, found this argument unconvincing because the language in the Release Deed was for the thirty-one acres of the upland beach area and did not contain language for the beach lots. Furthermore, the execution of the deed was only for those lands listed in the deed; therefore, the court could not comment on lands not explicitly listed in the document.

Road Access to Rexhame Beach

The second part of the opinion focused on whether the public had a right of way to access the beach lots under dispute. In dispute was whether the five roads that run west to east in the subdivision were private roads as a result of the Derelict Fee Statute, whether they were town or county roads, and the extent to which private roads are accessible by the public.

The primary road of concern was Winslow Avenue (Winslow), which the plaintiffs claimed to be a town road abandoned by statute and therefore a private right-of-way. In contrast, the defendants claimed that Winslow was in fact a

county road by virtue of a 1692 Layout developed at the time. The court ruled that Winslow and its extension were in fact county roads, which the public could use to access the beach lots. The court based its decision on the fact that Ocean Street, another road laid out in the same plans as Winslow, is a county road. Further, even though the 1692 and the 1721 Layouts did not explicitly call Winslow a county right-of-way, one of the property owners (Elijah Ames) acknowledged that Winslow was a road used consistent with the previous Layouts and that the roads were considered county right-of-ways.

While Winslow and its extension was the primary road at issue, the court attempted to resolve the ownership rights in the four other roads in the subdivision (Ames Avenue, Raleigh Road, Kent Avenue, and Waterman Avenue). In contrast to Winslow, the court found that these four roads are private right-of-ways. The town and Commonwealth had argued that the private roads were "open to public use" which is supported by the virtue of the fact that state law[14] enables these private roads to be plowed and sanded by the town and Department of Public Works and therefore are open for public use. Here, the court determined that the fact that public money and resources are put towards a private road does not convert the road from private use to public use. In this instance, the court concluded that the rights associated with these private right-of-ways are to be adjudicated at a later, "albeit limited trial."[15]

Conclusion

This case, in which the court examined colonial ordinances, road layouts, and the chain of title from the initial land grants by the Massachusetts Bay Colony, illustrated the complexity of beach access. While the court determined that the beach is held by the Commonwealth of Massachusetts and the Town of Marshfield and that Winslow is a county road which provides public access to the property, the court recognized that this was not the penultimate trial for this case. A limited trial was still needed to resolve the extent of the rights for the private roads not discussed in length in the opinion.

Although Judge Grossman ruled in favor of the town and the Commonwealth that Rexhame Beach is in fact public and not owned by the defendants, both sides claimed victories from the decision. Town Counsel Robert Galvin heralded the decision as "[w]e [the town] got what we wanted. We were looking for that adjudication that the town owned the beach and the public access to the beach."[16] In contrast, Brian Rogal, attorney for the plaintiffs claimed the decision reaffirmed certain privacy rights associated with community and road access through the subdivision, although he was disappointed with how the court ruled as to the upland portions of the property and how the town had control over these lands.[17]

Endnotes

1. Doctoral Student & Instructor, Department of Urban Affairs & Planning, School of Public & International Affairs, Virginia Tech.
2. Candidate for the Bachelor of Arts, Department of Political Science, Virginia Tech.
3. Coon v. McCabe, 2014 WL 746654, at* 1 (Mass. Land. Ct. Dec. 31, 2014).
4. *Coon,* 2014 WL 7466543, at *3.
5. The five streets in dispute are Ames Avenue, Raleigh Road, Winslow Avenue, Kent Avenue, and Waterman Avenue. *Id.*
6. *Id.* As discussed in footnote 1 of the opinion, there is a public beach north of the disputed area which is also known as Rexhame Beach. The court differentiates that beach from the area in questioning by the quotes to signify the designation by the parties in the case. *Coon*, 2014 WL 7466543, at *45 n.1.
7. As part of the four-part amended complaint, the plaintiffs requested the following: (1) a claim of trespass against individual defendants, (2) a quiet title claim, (3) remove the cloud on title resulting from the Briggs Thomas cases (cited in *infra note* 8), and (4) a declaratory judgment stating that the plaintiffs held the ownership in the property and that neither the individual defendants nor the Commonwealth had rights to the "beach."
8. Briggs Thomas v. Inhabitants of Marshfield, 27 Mass. 364 (1830) and Briggs Thomas v. Marshfield, 30 Mass. 240 (1832).
9. *Coon*, 2014 WL 7466543, at *30-31.
10. A *prescriptive right* is when an individual gains a non-possessory interest in land through long continuous use of the land in question. "prescription," West's Encyclopedia of American Law, edition 2. 2008. The Gale Group 28 Mar. 2015.
11. *Id.*, at *30-31 (citing Thomas II, 30 Mass. at 248).
12. *Id.*, at *32 (citing Hewitt v. Perry, 309 Mass. 100, 104 (1941)).
13. Under Massachusetts law, a Release Deed acts very similarly to a Quitclaim Deed in other jurisdictions. Massachusetts has a Release Deed as well as a Quitclaim Deed (the Quitclaim Deed in Massachusetts has more warranties than the Release deed which has no warranties). *Coon*, 2014 WL 7466543, at *15.
14. In relevant part, G.L. c. 40 § 6C states that "a city or town which accepts this section…may appropriate money for the removal of snow and ice from such private ways within its limits and open to the public use as may be designated by the city council or selectmen…). *Coon*, 2014 WL 7466543, at *41.
15. Coon, 2014 WL 7466543, at *44.
16. Lisa Kashinsky, *Local Homeowners Rejoice Decision to Declare Rexhame Beach Public*, Wicked Local Marshfield (January 6, 2015, 3:08 PM).
17. *Id.*

Piracy on the High Seas

M. Patrick O'Neal[1]

The *USS Stephen W. Groves* alongside an African submarine courtesy of the U.S. Navy.

In 2013, the release of *Captain Phillips*, a blockbuster movie starring Tom Hanks, brought the issue of Somali-based piracy to the forefront of American pop culture. The film chronicled the true story of Captain Richard Phillips who was taken hostage by Somali pirates in the Indian Ocean in 2009. Recently, the U.S. Fourth Circuit Court of Appeals issued a decision in a case involving the death of a fishing vessel captain and the intentional sinking of his vessel during a multinational counter-piracy operation, emphasizing the ongoing issues with piracy in Somali waters.[2]

Background

In 1991, when the Somali Civil War broke out, the government was overthrown and technologically advanced illegal foreign trawlers descended on the coastline displacing Somali fishermen. With the loss of their livelihood, many Somali fishermen responded by hijacking these illegal fishing vessels and holding them for ransom. Early on, this led to quick ransom payments because the companies backing these illegal fishing vessels did not want their illegal practices publicized. This "get rich quick" arrangement attracted poverty stricken people who were not fishermen to the practice and has resulted in the recent trend of well-organized and well-funded pirates.[3]

UN Resolution on Piracy

In 2008, because of the disruption these Somali-based pirates caused to the humanitarian efforts of the United Nations (UN) and the global shipping routes of the region, the UN adopted a resolution to combat piracy.[4] Under this resolution, multinational counter-piracy operations, with the consent of Somalia, were allowed to combat piracy in Somali waters. In August 2009, the North Atlantic Treaty Organization (NATO), through a multinational counter-piracy operation named Operation Ocean Shield (OOS), began providing security to the region.[5] One of the vessels that participated in OOS was the *USS Stephen W. Groves (USS Groves)*.

Wu Tien Li-Shou v U.S.

In March 2010, Somali pirates took the fishing vessel *Jin Chun Tsai 68* (JCT 68) and three members of the crew hostage. One of the hostages was the Taiwanese owner of JCT 68, Wu Lai-Yu. The Somali pirates used the JCT 68 as a base of operations from which they launched attacks using the skiffs stored onboard.

On May 10, 2011, the *USS Groves*, as part of OOS and under direction from the commander of NATO Task Force 508, engaged JCT 68. After an hour of fire from the *USS Groves*, the pirates aboard JCT 68 surrendered and a team from the *USS Groves* boarded the fishing vessel. Upon boarding, the team found weapons onboard and when they entered the sleeping quarters of Lai-Yu they found him dead. On May 11, 2011 the JCT 68 was intentionally sunk by the *USS Groves*, with Lai-Yu's body on board, on orders from the NATO task force commander.

Lai-Yu's wife filed a lawsuit in the U.S. District Court for the District of Maryland seeking damages for the accidental killing of her husband and the intentional sinking of his fishing vessel. The court dismissed. On appeal, the Fourth Circuit affirmed based on two doctrines of federal law. The first was the political question doctrine. The political question doctrine is an age-old doctrine in American judicial practice that supports the separation of powers that exist between the three branches of the federal government. Basically, the judicial branch will not "inject" itself into a situation that is "best suited for resolution by the political branches."[6] The Fourth Circuit noted that Mrs. Wu's claim would have the court "inject" itself into a multinational counter-piracy operation, a military action, which is best left to the other branches of the government. Furthermore, the court feared that taking on such a claim "would open the door to allegations that soldiers and sailors should treat more skeptically the clear orders of their supervisors."[7]

The Fourth Circuit also affirmed the decision of the district court based on the discretionary function doctrine. Under this doctrine, courts are prohibited from hearing claims based upon the exercise of a discretionary function of a federal agency.[8] A discretionary function is conduct by a governmental agency that "involves an element of judgment or choice."[9]

To determine whether the discretionary function applies the court must first ask whether the case involves a question of judgment or choice by the federal agency. Decisions made by military commanders are made in the heat of battle and must be made quickly. In the case of a military action the court stated that this was "the very essence of a discretionary function."[10] More specifically the court stated, "Operational decisions such as whether to sink a damaged pirate mothership in the waters off of the Horn of Africa count as discretionary functions, too."[11] Therefore, the decisions made by NATO and American commanders fall under the discretionary function exception. Mrs. Wu asserted that the NATO and American commanders abused their discretion on a myriad of military tactical decisions. In response, the court said that the fact that the actions of both are deemed discretionary "exempts those choices from judicial review."[12]

Conclusion

Somali pirates have, for some time now, wreaked havoc on the safety of fishermen and humanitarian efforts alike. Since the adoption of the UN resolution on anti-piracy the number of attacks by pirates has dropped dramatically.[13] However, the UN's resolution to deter such acts of violence on the high seas, through multi-nation counter-piracy operations, has created an interesting dilemma for courts.

The possibility of litigation ensuing from the missteps of such operations is foreseeable; yet, in order for these operations to be successful, the decisions made by commanders must be given some deference. The Fourth Circuit, in determining that the validity of such decisions is not a question for the courts, provides these anti-piracy operations with the ability to make tough decisions without fear of litigation.

Endnotes

1 2016 J.D. Candidate, University of Mississippi School of Law.

2 777 F.3d 175 (4th Cir. 2015).

3 Ishaan Tharoor, *How Somalia's Fishermen Became Pirates*, TIME (Apr. 18,2009) (chronicling the historical beginnings of Somali-based piracy).

4 *Security Council Condemns Acts of Piracy, Armed Robbery Off Somalia's Coast, Authorizes for Six Months 'All Necessary Means' to Repress Such Acts*, United Nations (June 2, 2008).

5 *Counter-Piracy Operations*, N. Am. Treaty Org. (Mar. 26, 2015).

6 777 F.3d 175, 180.

7 *Id.* at 181.

8 28 U.S.C. § 2680(a).

9 777 F.3d 175, 184 (4th Cir. 2015) (quoting *Berkovits v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988)).

10 777 F.3d 175, 184 (4th Cir. 2015).

11 *Id.* at 185.

12 *Id.*

13 *Number of Actual and Attempted Piracy Attacks in Somalia from 2008 to 2014*, Statista (2015).

New Jersey Dune Construction Limited by Eminent Domain Act

Amanda Nichols[1]

In 2012, Hurricane Sandy ripped its way up the East Coast, leaving devastation and despair in its wake. As a result, the federal government enacted the Disaster Relief Appropriations Act (DRA), also known as the "Sandy Relief Act," in January of 2013. The DRA gave the U.S. Army Corps of Engineers roughly $3.5 billion to fund projects aimed at preventing damage like that experienced with Sandy. In response, New Jersey drafted the Disaster Control Act (DCA), which served to delineate exactly how the state would utilize these newfound funds.

Under the authority of the DCA, the Township of Long Beach recently attempted to take private property belonging to the Minke Family Trust for the purpose of sand dune construction and other flood-prevention measures. In response, the Minke Trust alleged that this taking was improper under the Eminent Domain Act (EDA) because the Township did not first provide just compensation or initiate a complaint for condemnation of the property.[2]

New Jersey sand dune construction project courtesy of Hypnotica Studios.

The Eminent Domain Act

The New Jersey EDA allows the state to take property from private owners for necessary governmental operations. Before property is taken, however, the affected private party must be justly compensated. Further, if a private party does not give up his property willingly, the state must initiate a condemnation action to forcibly take the property under the proper authority.

There is a general exception to this rule provided by the DCA. A municipality can enact a taking of private property without a condemnation proceeding in two situations. Such action can be taken when (1) "there exists a threat or danger to life and property by reason of the damage to or the destruction of sand barriers and other natural or manmade barriers which protect the municipalities," or (2) "it is necessary to the health, safety, and welfare of the municipality to repair, restore, or construct such protective barriers."[3]

Background

In September 2013, New Jersey's Governor Chris Christie enacted Executive Order No. 140 establishing the Office of Flood Hazard Risk Reduction Measures within the New Jersey Department of Environmental Protection (NJDEP). The order also gave municipalities the power to, "enter upon and take possession and control of property necessary for the construction of Flood Hazard Risk Reduction measure[s]."[4]

The Township of Long Beach subsequently adopted Resolution 14-1006.01 on October 6, 2014. This Resolution stated that the municipality had the power to

create perpetual shore protection easements on private property without first instituting a complaint for condemnation or offering just compensation under the EDA. Under this resolution, the town sought to acquire perpetual easements for beachfront tracts of private property on which to conduct renourishment efforts (such as dune construction) that would help protect against any future hurricanes. Long Beach also enacted Ordinance 14-32, which allowed the town to construct public access walkways to the perpetual easement properties that were made public under Resolution 14-1006.01. This Ordinance served to elaborate on the Corps' requirement that "beaches replenished with Federal funds be open and accessible by public access points no more than one-half mile apart."[5]

Acting under these local resolutions, and with the ultimate goal of beach renourishment in mind, Long Beach sought to take a tract of oceanfront property owned by the Minke Family Trust. The Trust challenged the Township's action, filing a lawsuit alleging violations of the EDA. Specifically, the Trust alleged that Ordinance 14-32 was arbitrary, capricious, and unreasonable. Additionally, the Trust argued that Resolution 14-1006.01 was invalid and did not constitute a transfer of a shore protection easement to the Township and the State.

Summary Judgment Granted

The Trust's primary argument was that, regardless of the language of Resolution 14-1006.01 and the DCA, the town must comply with the traditional requirements of the EDA. The court agreed, finding that the town was *not* exempt from the procedural demands of the EDA. According to the court, the proper action when dealing with property owners who have not voluntarily granted easements is to initiate a condemnation action. The court reasoned that, since Hurricane Sandy hit in 2012, the NJDEP and the town had at least two years to initiate the condemnation process. To neglect this step, the court noted, violated the EDA's due process requirement.

Further, the Trust alleged that the town did not have a qualifying "emergency" as required by the DCA to move forward without condemnation proceedings. On this claim, the court agreed with the town and determined that the danger of another storm like Sandy *did* constitute a sufficient emergency under the language of the DCA. While the town was correct on this point, its failure to properly pursue condemnation under the EDA ultimately caused the court to grant the Trust's motion for summary judgment. The court reasoned that, although the town was correct in its emergency determination, the language of the DCA does not surpass that of the EDA. If the town wanted to properly acquire a perpetual interest in the Minke land, it could have initiated a condemnation proceeding as early as 2012. The fact that the town intended to compensate private parties after the takings did nothing to mitigate this error.

Separate Trial Ordered

The Trust also sought to invalidate Ordinance 14-32. Under the Ordinance, Long Beach assumed power to create a public access easement. This action was initiated after the town decided to impose a public access easement on plaintiffs' property from a previous location that the town had chosen in order to comply with the requirements of the Corps.

Here, the court determined that it simply did not have enough information to rule on the issues because the town did not give a sufficient justification for its adoption of the ordinance. However, in New Jersey, "there is no requirement that evidence be presented providing a factual foundation for [an] ordinance."[6] As a result, the court chose to allow the parties the opportunity for a separate trial to decide the issue of these counts. Accordingly, the Township's motion to dismiss the Trust's counts was denied, and the court left the question of the validity of Ordinance 14-32 largely unanswered.

Conclusion

Pursuant to the EDA, the New Jersey Supreme Court ruled that the Township of Long Beach was not allowed to seize property for public use without *first* providing just compensation and pursuing a condemnation action. While dune construction and other flood-prevention measures could prove vital in mitigating destruction that could accompany another storm like Sandy, local governments in New Jersey must be careful not to overstep the bounds of due process when seeking to acquire property. The issue of Ordinance 14-32 and public access easements will return to the court after each party is allowed adequate time for discovery and pretrial motions. The Township of Long Beach is also currently engaged in a pending suit with several other local residents over similar property acquisitions.

Endnotes

1 2016 J.D. Candidate, University of Mississippi School of Law.

2 Minke Family Trust v. Twp. of Long Beach, No. OCN-L-3033-14 (N.J. Super. Ct. Feb. 13, 2015).

3 *Id.* at 9.

4 *Id.* at 4.

5 *Id.* at 7.

6 Hirth v. City of Hoboken, 337 N.J. Super. 149, 165-66 (App. Div. 2001).

Proposed Rule by EPA Regarding Oil Dispersants

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In January, the U.S. Environmental Protection Agency (EPA) issued a proposed rule concerning the regulation of chemical dispersants used in the aftermath of oil spills.[2] The 247-page proposed rule is an attempt by the EPA to better equip emergency officials responding to future oil spills. The new rule is meant to bolster oil spill response capabilities and clear up existing uncertainties regarding dispersants and other spill-mitigating substances.

Background

The proposed rule has been in the works since 2001 but became even more pertinent after the 2010 Deepwater Horizon disaster, which precipitated the large-scale use of chemical dispersants across the Gulf—approximately 1.8 million gallons. These dispersants and the full range of their effects were not widely understood, although they were generally believed to be less toxic than the oil. This lack of information prompted a proposed rule that calls for more research and study of each dispersant in order to create an approved list of biological and chemical dispersants available to emergency officials in times of environmental crisis, limiting future risks to human health and the environment.

Assistant Administrator for the EPA's Office of Emergency Response Mathy Stanislaus stated, "Our emergency officials need the best available science and safety information to make informed spill response decisions when evaluating the use of specific products on oil discharges."[3] Stanislaus went on to say that much of what is included in the new rule is the result of lessons learned from use of spill-mitigating substances for oil discharge response in the past. The proposed rule is anticipated by the EPA to encourage research into and development of spill-mitigating chemicals and biological agents that are not only more efficient but also much safer and better understood.

The Changes

At its core, the proposed rule serves to strengthen the requirements for the use and testing of both new and existing dispersants for ocean oil spills. Specifically, research by companies developing the dispersants must satisfy requirements concerning the efficacy, toxicity, and environmental monitoring of dispersants and other chemical and biological agents.

The efficacy and toxicity of potential dispersants are of paramount importance in the new proposal. The rule would add new criteria, evaluation standards, and testing protocols for toxicity and efficacy that dispersants and other spill-mitigating chemicals and biological agents must adhere to in order to be accepted into the *National Oil and Hazardous Substances Pollution Contingency Plan* (NCP) Product Schedule of approved substances for use against oil discharge. The proposed rule also calls for revisions and retesting of dispersants that are currently in the Schedule under the same criteria that new products must meet. Existing products failing to adhere to the standards could be removed from the Schedule if not deemed safe or effective. The tests for toxicity must be conducted using two primary indicator species, widely utilized for their traits of identifying pollution while not being overly sensitive: mysid shrimp and silverside fish. The proposed testing protocols would also require that all dispersants be able to disperse at least 45% of oil in lab tests.

The proposed rule also addresses monitoring and reporting issues. EPA seeks to require the manufacturers of products to present more detailed information to the public and the EPA about the application and specific instructions for use of the products, as well as the toxicity data and safety information. Another crucial portion of the proposed rule is a call for extensive monitoring and submission of data to the EPA of both the long-term effects and a case-by-case reporting of each time certain practices are used. For example, any

Day 30 of the Deepwater Horizon oil spill in the Gulf of Mexico (2010) courtesy of Green Fire Productions.

sub-surface injection of dispersants would be very limited and extensively monitored, as proposed, based on the increased impact that below surface use has by exposing aquatic life and ecosystems to both the chemical and the oil.

What Now?

This is still only a proposal by the EPA and therefore must undergo a 90-day evaluation period where it is subject to public review and comments following formal publication in the Federal Register, the daily journal of the United States government. The proposed rule was officially published on January 22, 2015, and the comment period closed on April 22.

As of April 14, there were 108 submitted public comments, a not-insignificant amount considering this proposed rule is one of 1,891 documents (notices, rules, proposed rules, or presidential documents) published on or after December 4, 2014, under *just* the topic of the environment. This proposed rule is only one of 109 other proposed rules issued in the last 90 days from the EPA alone.

Current comments range from anonymous endorsements of the change, expressed contempt for any dispersant use whatsoever, and formal submissions from environmental organizations and companies including a request for an extension of the 90-day period on behalf of the American Petroleum Institute, National Ocean Industries Association, and Spill Control Organization of America. Comments also included a letter *opposing* an extension on behalf of Alaska Community Action on Toxics, the ALERT Project, the Citizens Coalition to Ban Toxic Dispersants, Cook Inletkeeper, Florida Wildlife Federation, the Government Accountability Project, Gulf Restoration Network, Louisiana Environmental Action Network, Louisiana Shrimp Association, Sierra Club, and Waterkeeper Alliance.

This 90-day period is an essential chapter in the fate of a proposed rule, especially one that has been 14 years in the making. The fate of the proposal remains to be seen. Following the close of the public comment period of April 22, the EPA will begin reviewing the submitted comments and preparing for final rulemaking. Until then, we wait.

Endnotes

1 Pierce Werner is a Junior Liberal Studies major at the Sally McDonnell-Barksdale Honors College of the University of Mississippi.

2 The proposed rule is within Subpart J of the *National Oil and Hazardous Substances Pollution Contingency Plan*.

3 Press Release, Environmental Protection Agency, EPA Proposal Strengthens Nation's Preparedness Level and Response to Oil Spills (Jan. 1, 2015).

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2015 American Water Resources Association Conference: Climate Change Adaptation

June 15-17, 2015
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For more information, visit: http://www.awra.org/meetings/NewOrleans2015

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