The SandBar

Volume 14:4 October 2015

Legal Reporter for the National Sea Grant College Program

The Arctic Council: The Next Frontier

Also,

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Battling the Sea and One Another in N.C.

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Our Staff

Editor:
Terra Bowling, J.D.

Production & Design:
Barry Barnes

Contributors:
Autumn Breeden
John Juricich
Amanda Nichols
Pierce Werner

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ISSN 1947-3966 NSGLC-15-02-04 *October 2015*
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: Barry Barnes at bdbarne1@olemiss.edu.

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 NA140AR4170065, the National Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi School of Law. 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.

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Recommended citation: Author's Name, *Title of Article*, 14:4 SANDBAR [Page Number] (2015).

Cover page photograph of Phoenix Peak in Seward, Alaska courtesy of Dan Logan.

Contents page photograph of the coast of Svalbard in Norway courtesy of Neil Moralee.

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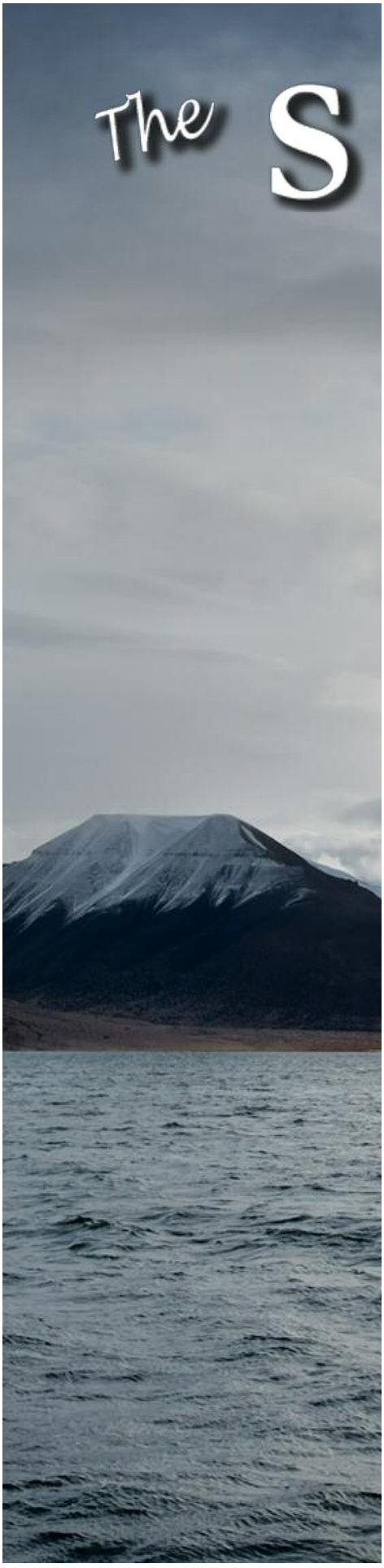

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The Arctic Council: The Next Frontier

John Juricich[1]

Byron Peak in Alaska courtesy of Paxson Woelber.

With the increasing international focus on climate change and Arctic issues, the political importance of the Arctic has never been more visible. This summer, the United States took over the chairmanship of the Arctic Council. In September 2015, President Barack Obama became the first sitting president to travel to the Arctic when he flew to Alaska for a three-day, climate-focused visit. Despite these recent forays of the U.S. government in the Arctic, most Americans remain uniformed about the implications of these events. However, because of the lucrative economic prospects emerging in the Arctic region, non-Arctic countries such as China, Japan, Italy, the United Kingdom, Germany, and India are informed, and are seeking to influence and to participate in the Arctic Council's deliberations.

What is the Arctic Council?

The Ottawa Declaration of 1996 formally established the Arctic Council as a high-level intergovernmental forum to provide a means for promoting cooperation, coordination, and interaction among the Arctic States.[2] Overarching goals of the Council include sustainable development and environmental protection in the Arctic. The Council is composed of eight voting nations that have territory inside of the Arctic Circle—Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, Russian Federation, Sweden, and the United States—as well as six Permanent Participant groups that represent the indigenous peoples' organizations across the Arctic.[3] The Arctic Council is the only circumpolar forum for political discussions on Arctic issues, involving all the Arctic states, and with the

Polar bear family courtesy of Casey Marwine.

active participation of its Indigenous Peoples. The Arctic Council Working Groups engage in issues such as monitoring, assessing, and preventing pollution in the Arctic, climate change, biodiversity conservation and sustainable use, emergency preparedness and prevention, as well as living conditions of Arctic residents. Opportunities abound in the Arctic, and the United States is sitting on its threshold as the new Chair of the Arctic Council.

Why does the Arctic Council matter to the U.S.?

According to the global management-consulting firm A.T. Kearney's Global Business Policy Council, worldwide investment in the Arctic region could reach $100 billion over the next decade.[4] The opening of the Northwest Passage and Northern Sea Route could potentially decrease vessel travel times by forty percent, while the value of hydrocarbon deposits—crude oil and natural gas—located in the U.S. Arctic alone could exceed $1 trillion.[5] The Arctic produces forty percent of the world's palladium and twenty percent of its diamonds.[6] Not to mention the region also houses rich metal deposits. Unsurprisingly, this type of information has not gone unnoticed. China and Russia, in particular, are becoming evermore vigilant in tapping into the rich resources that the region can provide. In fact, as President Obama was wrapping up his recent visit to Alaska, Chinese naval vessels were spotted for the first time on the Bering Sea. Although Chinese officials state that the visit was non-threatening, the timing of their arrival shows force indicative of China's growing interest in the region. A different type of cold war—a colder war—is brewing for the resources and opportunities available in the Arctic region, and the new chair of the Arctic Council will have to recognize and balance these competing interests.

Environment v. Economic Growth

The United States is at a distinct advantage over competing countries, being the current Chair of the Arctic Council. Exactly what advantage the United States now has is an increasingly interesting question that will likely play out soon. Obviously, extensive drilling and ice breaking do not necessarily coincide with the goals of the Arctic Council; however, the United States can set a course for the Arctic region by implementing new, and utilizing already established, strategies to achieve sustainable development in the region while serving both the environmental protection goals of the Council and the economic and business aspects of expansion into the Arctic. For example, the United States could expand upon the Council's recent

The Arctic Circle Globe on Vikingen Island, Norway courtesy of Linda Martin.

trend to facilitate greater engagement with the private sector. In 2013, the Council established the Arctic Economic Council (AEC), aimed at facilitating Arctic business-to-business activities, promoting responsible economic development, and providing a circumpolar business perspective to the work of the Arctic Council.[7] The AEC just opened its doors to a permanent office and will play a dynamic role in the future of the Arctic region.

An intricate balance between the competing interests of sustainable economic development and preserving the environment in the Arctic region exists, and the United States must strike the balance properly. In doing so, the United States must also work to fulfill the goals advanced in the White House's 2013 National Strategy for the Arctic Region. In particular, to ensure the Arctic region stays "peaceful, stable, and free of conflict."[8] In achieving this goal, continued cooperation and coordination between all parties involved with the Arctic Council—countries, private corporations, and indigenous peoples—will be crucial.

Conclusion

Clearly, opportunities exist and are increasing in the Arctic region, and the world has taken notice. The United States, as current chair of the Arctic Council, will be the compass that sets the direction in which the resources in the Arctic will flow. It's yet to be seen whether the United States will capitalize on its new role. In any event, maintaining the environmental protection goals of the Council and taking advantage of the possibilities of sustainable development in the region will be the challenge the new Chair faces.

Endnotes

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

2 About the Arctic Council, http://www.arctic-council.org/index.php/en/about-us/arctic-council/about-arctic-council (last visited Sept. 9, 2015).

3 The Permanent Participation groups are the Arctic Athabaskan Council (AAC), Aleut International Association (AIA), Gwich'in Council International (GCI), Inuit Circumpolar Council (ICC), Russian Association of Indigenous Peoples of the North (RAIPON), and the Saami Council (SC). These groups have full consultation rights with the Council, but they do not have the power of a vote.

4 Paul A. Laudicina & Erik R. Peterson, *The Council Perspective: The Future of the Arctic*, 2 ATKearney Global Business Policy Council 1 (2015).

5 *Id.*

6 *Id.*

7 *Arctic Economic Council,* http://arcticeconomiccouncil.com/wpcontent/uploads/2015/01/AEC-Backgrounder.pdf (last visited Sept. 29, 2015).

8 *National Strategy for the Arctic Region*, May 10, 2013, *available at* http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf.

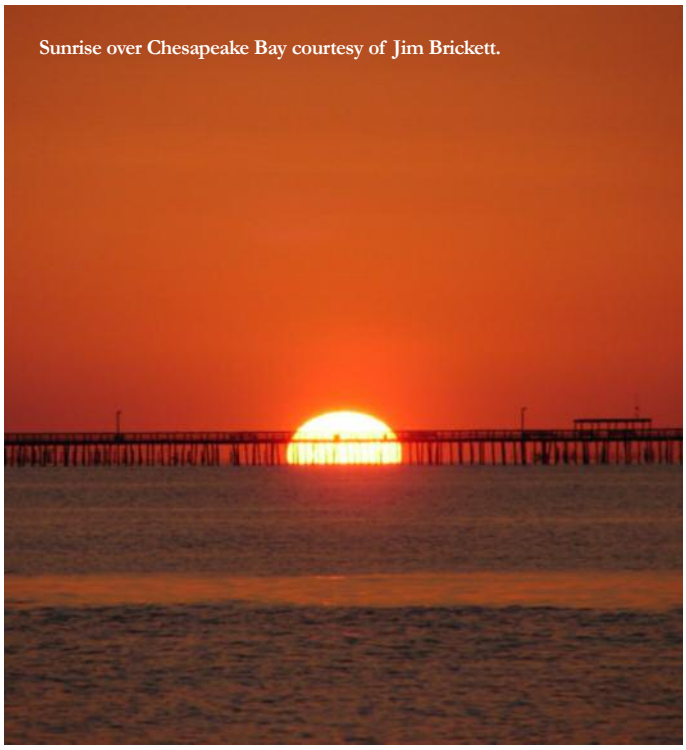
Third Circuit Considers Challenge to Chesapeake Bay TMDL

Autumn Breeden[1] and Amanda Nichols[2]

A lighthouse on Chesapeake Bay courtesy of Scott1349 Media.

Seven states fall within the Chesapeake Bay watershed, including Maryland, Virginia, West Virginia, Delaware, Pennsylvania, New York, and the District of Columbia (which acts like a "state" for Clean Water Act purposes).[3] The Chesapeake Bay is the largest estuary in the U.S., with a watershed area of 64,000 square miles that contains tens of thousands of lakes, rivers, streams, and creeks. The Bay itself has a surface area of 4,500 square miles and has 11,684 miles of shoreline, making it longer than the coastline from San Diego to Seattle.[4]

The Bay has been the subject of great ecological concern, as it is the recipient of large volumes of pollutants (roughly 300 million pounds of nitrogen annually).[5] This chemical influx has severely polluted the water and degraded habitats, negatively affecting populations of many fish and shellfish species, and greatly reducing recreational opportunities. In 2010, following years of contention over how to address the pollution, the EPA issued a Total Maximum Daily Load (TMDL) for the Bay.



Sunrise over Chesapeake Bay courtesy of Jim Brickett.

Trade associations affected by the pollutant limits soon brought suit challenging the TMDL. The groups alleged that the EPA exceeded its authority to set TMDLs by allocating pollutant loads from both point- and non-point sources and by establishing compliance timelines for the states. A federal court recently ruled on the case.

Background

In 1972, Congress enacted the Clean Water Act (CWA) in an effort to protect and restore the waters of the United States.[6] Under the CWA, states are given the power to set water quality standards. After these standards go into effect, there exists a two-pronged pollutant control framework—one for point sources and one for non-point sources. Point sources (distinct discharge points for pollutants such as drainpipes), are regulated through the CWA's National Pollutant Discharge Elimination System (NPDES). If pollutants cannot be reduced to acceptable water quality levels by regulating only point sources, the states must regulate non-point pollution, which stems from more widespread sources of pollution like farms or roadways with runoff.

To regulate non-point pollution, states submit a comprehensive list of polluted water bodies to the EPA, which will then require that the state establish TMDLs for those impaired waters. To help protect water quality, TMDLs specify the total amount of specific pollutants that may be discharged from non-point sources. In the case of the Chesapeake Bay, the seven watershed states jointly agreed that the EPA should draft the TMDL.

Chesapeake Bay TMDL

The development of the Chesapeake Bay TMDL began with the Chesapeake 2000 Agreement, where the EPA and the seven Bay states made commitments to reducing pollution in the Bay. The "Phase I Watershed Improvement Plans" (the first submission by the states) were drafts proposing target pollutant limitations and outlining how the states would achieve them. The EPA made adjustments and incorporated them into its final Chesapeake Bay TMDL. This final TMDL included point and non-point source limitations on nitrogen, phosphorous, and sediment. It also set target dates for pollution reduction—with a final date for these reduction measures to be in place by 2025—and required "reasonable assurance" that the states would comply.[7]

In January 2011, Farm Bureau sued the EPA under the CWA. It claimed that the EPA exceeded its statutory authority by including deadlines and allocations of waste loads in the TMDL and by requiring "reasonable assurance" from the states that they could meet watershed implementation plans, which intruded on the states' regulatory role. The district court, noting that it was a question of first impression whether a TMDL could include more than an allowed quantity of pollutants, granted summary judgment in favor of the EPA.[8] Farm Bureau appealed.

Chevron

A court's examination of whether an agency overstepped its authority is governed by the two-step analysis provided in *Chevron v. NRDC*.[9] In step one the court asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter."[10] When Congressional intent remains ambiguous, however, courts proceed to "step two" where the agency's interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[11]

With respect to Farm Bureau's case, the Third Circuit concluded that the phrase "total maximum daily load" was ambiguous. The court noted that the term "total" is not expressly defined in the CWA, which allowed for the EPA's interpretation of TMDL requirements. The court then moved to step two to examine the reasonableness of the agency's interpretation of the CWA.

Step Two - Reasonable Interpretation

The Third Circuit concluded that Farm Bureau's reading of the CWA would hinder the EPA's ability to balance all the competing possible uses of the resources that affect the Bay.[12] The court concluded that, "[w]e cannot, in these circumstances, conclude that Congress has given authority

Chesapeake Bay Bridge courtesy of Joshua Davis.

inadequate to achieve with reasonable effectiveness the purposes for which it has acted."[13] The court ultimately found that establishing a comprehensive, watershed-wide TMDL—complete with allocations amongst different kinds of sources, a timetable, and reasonable assurance that it would actually be implemented—was "reasonable and reflect[ed] a legitimate policy choice by the agency in administering a less-than-clear statute."[14]

Conclusion

Water pollution in the Bay is a complex and ongoing problem that cannot be solved without compromise. In the CWA, Congress encourages states and the EPA to work together to allocate the benefits and burdens of lowering pollution in our nation's waters. In the present case, the Third Circuit affirmed the district court's holding that the EPA was acting within its authority in implementing the Chesapeake Bay TMDL. While the Chesapeake Bay TMDL will require sacrifice by many, including the plaintiffs in this suit, it is a necessary consequence in the effort to lower pollution and restore health to the Bay.

Endnotes

1 2017 J.D. Candidate at University of Mississippi School of Law.

2 2016 J.D. Candidate at University of Mississippi School of Law.

3 *Chesapeake Bay* TMDL, EPA, http://www.epa.gov/chesapeakebaytmdl/.

4 Am. Farm Bureau Fed'n v. U.S. E.P.A., 792 F.3d 281 (3d Cir. 2015).

5 *Nitrogen* & Phosphorus, Chesapeake Bay Foundation, http://www.cbf.org/about-the-bay/issues/dead-zones/nitrogen-phosphorus.

6 *Am. Farm Bureau*, 792 F.3d at 288.

7 *Id.* at 291.

8 *Id.* at 295.

9 Chevron v. NRDC, 467 U.S. 837 (1984).

10 *Id.* at 842.

11 *Id.* at 844.

12 *Am. Farm Bureau,* 792 F.3d at 309.

13 *Id.*

14 *Id.*

Battling the Sea and One Another in N.C.

Pierce Werner[1]

North Topsail Beach in North Carolina courtesy of Lee Ruk.

Beach erosion is a serious issue for seaside communities and local governments, as well as private beachfront property owners. In an effort to save or preserve beaches in the face of the constant battle against erosion, private homeowners and local governments sometimes find themselves in conflict with each other. At the end of the day, the big question is often not just whether action should be taken to save the beach, but who should pay the cost.

The Evolving Dilemma

Barrier islands, such as those along the coast of North Carolina, naturally grow, shrink, change shape, and shift at the mercy of the ocean's currents. Erosion and accretion are natural phenomena; however, as more development has occurred, natural processes have been exacerbated. Projects like dredging and beach restoration, while beneficial to a particular community, may cause erosion beyond the immediate location, as they influence the flows of currents and surface water. While beach erosion is ubiquitous, the coast of North Carolina and her barrier islands are particularly hard hit, as rows of houses in these beachfront communities fall to the approaching sea, leaving the next row of property owners the job of preserving their beach. This process produces tension among all parties involved, as the interests of one property owner are pitted against another, as well as the interests of beachfront property owners against those of the larger community. Such tension sometimes plays out in the form of legal disputes. One such dispute is arising in the barrier island town of North Topsail Beach, North Carolina where oceanfront property owners are fighting to maintain their beach and fighting over who must pay for it.

The Economics of Beach Nourishment

Historically, beach renourishment projects are funded by a variety of sources including both public and private money. Federal, state, and local governments all employ programs to fund beach renourishment programs; however, it has recently become complicated in North Carolina. As one commentator noted, "[f]ederal money for such projects has withered in the past decade, and even the property owners who would benefit are balking at paying their share …"[2] To that point, a group of beachfront property owners recently filed suit against the Town of North Topsail Beach (Town) in an effort to avoid assessments for part of the cost of the effort to save their beach and their homes.

Topsail Tension

Beach erosion is nothing new for North Topsail, as less than 10 years ago there was a row of homes seaward of the current beachfront homes that were condemned in 2008 and 2009 when the land underneath the houses began eroding. The erosion continued, leaving the next row of houses to fight the erosion caused by the incoming sea. After studies and consultation with experts, the Town began a multi-phase project to save the beach and oceanfront properties with a shoreline and inlet management project, which included realignment of the adjacent New River Channel as the first phase.

In February 2013, the New River Inlet Channel Realignment Project was completed and the Town issued a press release stating that the 566,244 cubic yards of sand removed from the channel was used to rebuild 1.5 miles of beach on the north end of Topsail Island. The press release noted, "[t]he intent of the project design is to provide wave and current protection to the north end of North Topsail Beach and the sand placed on the beach will provide erosion mitigation."[3]

The Channel Realignment Project was financed from the Town's existing beach fund and from special obligation bonds. In connection with the future phases of the work, the Town was pursuing financial support from the State of North Carolina and from Onslow County, both of which would arguably benefit directly from the overall activity.

After the completion of the Channel Realignment Project, which was meant to be a long-term solution to the beach erosion, the Town and its residents still faced the issue of severe erosion near the adjacent inlet. Structures were being threatened in a similar way to the houses that had been previously condemned. The Town decided to undertake a Sandbag Revetment Project.

The Town conducted public hearings and ultimately adopted a special assessment resolution stating that the 39 beachfront properties that would benefit most directly from the Sandbag Revetment Program would be subject to a special assessment tax for 50% of the project, while the Town would pay for the other 50%. After the Sandbag Revetment was permitted and installed in order to protect the structures at the north end, a group (not all) of those 39 property owners commenced a lawsuit against the Town of North Topsail Beach and several of its consultants and contractors who were involved in the implementation of the Channel Realignment and Sandbag Revetment projects. That case, *CM Wiford Enterprises, LLC, et al. v. Town of North Topsail Beach, et al.*, is pending in Onslow County, North Carolina.

The group of property owners have asserted various causes of action premised on their littoral rights.[4] Specifically, they are seeking to recover damages to their property caused by the continuing erosion of the beach and to avoid paying the special assessments for their portion of the costs expended in the effort to save their properties. The claims of the property owners hinge on the idea that their littoral rights were infringed upon when actions in other areas negatively impacted the beaches and sand in front of their houses.

Conclusion

The case illustrates issues confronted by, not only North Carolina beach communities, but all barrier island communities facing the threat of losing homes to erosion. Beach renourishment and conservation projects, while they help maintain beaches, may impact littoral rights of oceanfront property owners. The case is months away from being heard, and may be delayed even further as a result of the recent hurricane hitting the coast of the Carolinas. *The SandBar* will continue to track the case and provide future updates.

Endnotes

1 Pierce Werner is a Senior Liberal Studies Major in the Sally McDonnell-Barksdale Honors College at the University of Mississippi.

2 Henderson, B. (2011, February 27). As NC Beaches Erode, Debate Rises. *The Charlotte Observer*.

3 Town of North Topsail Beach. (2013). New River Inlet Channel Realignment Project Successfully Restores North End of Topsail Island [Press Release]. Retrieved from http://www.ntbnc.org/Documents/HOME%20020713%20Press%20Release%20New%20River%20Inlet%20Project%20Complete.pdf.

4 These are the rights of an oceanfront property owner to 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.

Litigation Update: California's Shark Fin Law Upheld

Amanda Nichols[1]

Fresh shark fins drying on a sidewalk in Hong Kong courtesy of Nicholas Wang.

The practice of shark finning is garnering more and more attention in recent years. The practice, dating back the 14th Century Ming Dynasty in China, involves catching sharks, cutting off their fins, and throwing them back to sea where they are left to sink and die.[2] These fins are then collected and sold for use in the production of traditional Chinese dishes, like shark fin soup.

California passed legislation to address shark finning in 2011. The state law makes it a misdemeanor to possess, sell, trade, or distribute shark fins in California.[3] Following enactment of the law, the Chinatown Neighborhood Association (CNA) filed for a preliminary injunction in the U.S. District Court for the Northern District of California in order to prevent enforcement of the ban. After the district court denied CNA's request for

a preliminary injunction, CNA appealed to the Ninth Circuit, alleging that the state ban was preempted by federal law and that it illegally interfered with interstate commerce. The court ultimately affirmed the district court's initial dismissal of CNA's case and, as a result, upheld California's Shark Fin Law.

Preemption Argument

Under the Supremacy Clause of the U.S. Constitution, federal law preempts inconsistent state law. On appeal, CNA argued that the federal Magnuson-Stevens Fishery Conservation and Management Act (MSA) preempted California's Shark Fin Law, because it interfered with the federal government's authority under the MSA to manage shark fishing within the exclusive economic zone (EEZ). The Ninth Circuit rejected this argument, because CNA could not identify any actual conflict between the two regulatory schemes. While the court noted that California's law somewhat restricts the use of sharks lawfully harvested from the EEZ, the MSA does not require that a certain number of sharks be harvested from the EEZ. Even if it did, the court noted that "[t]he use of approximately 95% of any legally fished shark for shark oil, shark meat, shark skin, etc. is still permitted" under the California regime.[4]

The court noted that, sometimes, conflicts do arise when a federal scheme is comprehensive and exclusive. However, because the MSA has a provision that calls for state-level participation in implementing its objectives, it is clearly cooperative in nature. Ultimately, the court refused to rule that the MSA preempted California's Shark Fin Law.

Commerce Clause Argument

The Commerce Clause of the U.S. Constitution gives Congress the power to regulate commerce between the states, Tribes, and foreign nations. The "dormant Commerce Clause" limits the power of states to enact laws that would impose substantial burdens on interstate commerce. CNA alleged that California's shark fin law is *per se* invalid under the dormant Commerce Clause, because it disrupts commerce in shark fins between California and out-of-state destinations.

The court rejected this argument and noted that a state *can* regulate commerce as long as one party is located in California. Even when a state law has significant extraterritorial effects, it does not violate the Commerce Clause, so long as those effects result from regulation of in-state conduct. Because California meets this standard, the ban is not *per se* invalid.

CNA next claimed that, even if the law isn't *per se* invalid, it should be struck down under common law due to the excessive burden it imposes on interstate commerce in contrast to the local benefits it confers. The court noted that, in order for a judicial assessment of the benefits of a state law to be warranted, the state statute must either discriminate in favor of in-state commerce or impose a significant burden on interstate commerce. CNA could not establish evidence pointing to either one of these requirements. Furthermore, the court reasoned that the shark fin law's purpose of "conserv[ing] state resources, prevent[ing] animal cruelty, and protect[ing] wildlife and public health" were legitimate matters of local concern that did not amount to discrimination. This, taken in conjunction with the cooperative nature of fisheries management, meant that there was no significant interference with interstate commerce.

FURTHERMORE, THE COURT REASONED THAT THE SHARK FIN LAW'S PURPOSE OF "CONSERV[ING] STATE RESOURCES, PREVENT[ING] ANIMAL CRUELTY, AND PROTECT[ING] WILDLIFE AND PUBLIC HEALTH" WERE LEGITIMATE MATTERS OF LOCAL CONCERN THAT DID NOT AMOUNT TO DISCRIMINATION.

Conclusion

Because CNA could not make any adequate, factual showings to support their preemption or Commerce Clause arguments, the court affirmed the district court's ruling and upheld the legality of California's Shark Fin Law. This ruling, along with the implementation of similar bans in states such as Texas, could prove vital in curbing a global shark fin market that is responsible for the deaths of up to 73 million sharks annually.[4]

Endnotes

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

2 *See* Cullen Manning, *A Fight Between Cultural Traditions, The Supremacy Clause, and Environmental Concerns: California's Ban on Shark Fins*, 14.4 THE SANDBAR 12 (2014).

3 Chinatown Neighborhood Ass'n v. Harris, 794 F.3d 1136 (9th Cir. 2015).

4 *Id.* at 1142.

5 *Id.* at 1147.

6 Danny Clemens, *Federal Court Upholds California Shark Fin Ban*, Discovery (July 28, 2015), http://www.discovery.com/tv-shows/shark-week/shark-feed/federal-court-upholds-california-shark-fin-ban/.

N.Y. Court Stirs the Waters with Recreational-Based Navigability Ruling

John Juricich[1]

In May 2009, Phil Brown, the editor of a publication called Adirondack Explorer, set off on a canoeing trip down the Lila Traverse, a waterway permitting canoeists to travel across a network of lakes, ponds, streams and canoe carry trails in the Adirondack Mountains. Eventually, Brown found himself paddling down the Mud Pond Waterway (the "Waterway"), which is a two-mile-long system of ponds and streams along the Lila Traverse. Coupled with the picturesque nature scenes Brown likely witnessed while navigating down the Waterway, he also paddled right past "no trespassing" signs and ignored a cable meant to block public access. The result of Brown's navigation of the Waterway: litigation.[2]

The Waterway in Question

The Brandreth family is the owner of thousands of acres of real property in a remote area of the Adirondack Mountains in the Town of Long Lake, New York. The land was conveyed by the State of New York to Benjamin Brandreth in 1851 and has since remained in the private ownership and control of descendants of the Brandreth family. The subject of the litigation at hand, the Mud Pond Waterway, crosses the northernmost corner of the Brandreths' property between two other water bodies: Lilypad Pond on the northeast and Shingle Shanty Brook on the northwest. Both of these bodies of water are part of the Lila Traverse. Assuming the section of the Waterway crossing over their land was their private property as well, the Brandreths placed "no trespassing" signs and a cable on the Waterway.

The Department of Environmental Conservation constructed a .8–mile carry trail between Lilypad Pond and Shingle Shanty Brook in order to permit canoe travelers to use the Lila Traverse without entering the Brandreths' property or using the Waterway. Brown asserted that canoeists are not required to use the carry trail, because the Waterway is navigable-in-fact and therefore open to public use, despite its location on private property. The Brandreths disagree, contending that the Waterway is their private property, and they are therefore entitled to exclude members of the public from using it.

So, does a private landowner have the right to block public access to a navigable body of water running over its land? In New York, the answer is no. In January, the Appellate Division of the State of New York's Supreme Court ruled that Phil Brown's canoeing along the Waterway was not trespassing, and held that the Brandreths were committing a public nuisance by placing a cable and "no trespassing" signs to deter public access to the Waterway. The reasoning behind the court's conclusion lies directly with the character of the Waterway itself—it is navigable-in-fact[3]. However, the reason the court deemed the Waterway to be navigable-in-fact could have wide-ranging effects on private property expectations and rights.

New York's Navigability-in-Fact Doctrine

Pursuant to New York's common law, a waterway on private property that is not navigable-in-fact is owned by the landowners, but a waterway that is navigable-in-fact "is considered a public highway, notwithstanding the fact that its banks and bed are in private hands."[4] The consequence of a judicial determination that a waterway is navigable-in-fact is that the waterway is deemed to *have always been open to the public in that character*, even though the landowners may not have believed it to be; thus, no trespass was committed by a traveler who navigated upon the water before a court ruled upon its navigability. So, the penultimate question, as is in the case of Phil Brown and Mud Pond Waterway, is what makes a waterway navigable-in-fact?

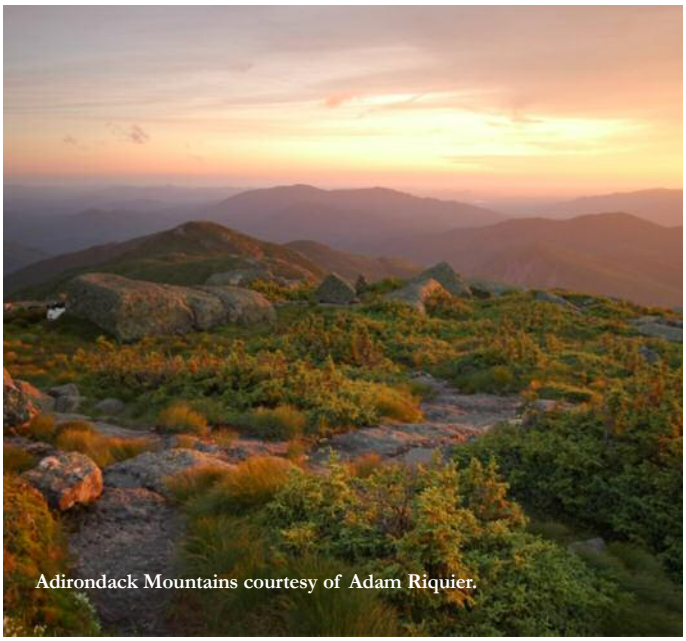
In short, a waterway is navigable-in-fact in New York when it can be utilized for trade or travel.[5] But what does "trade or travel" mean? Traditionally, this phrase only included those waters capable of navigation for commercial purposes; thus, small waterways running over

private property were not navigable-in-fact or open to the public because they were not capable of commercial navigation. However, and of utmost importance for recreational boaters such as canoers and kayakers, the *Brown* court made clear the phrase "trade *or* travel" in New York's definition of navigable-in-fact, encompasses recreational use of a waterway as a significant factor. Consequently, the distinction between waterways capable of commercial use versus mere recreational use is irrelevant. This nuance is paramount in regards to the issue of private property expectations and rights. The *Brown* court further held that "the [navigable-in-fact] test examines a waterway's capacity for use and not merely its actual use."[6] Therefore, a waterway is "navigable-in-fact" in New York when it has the capacity to be utilized for commercial *or recreational purposes*.

Applying New York's navigability-in-fact doctrine, the *Brown* court, aided by the evidence of Phil Brown's successful canoe trip, ultimately found the Mud Pond Waterway navigable-in-fact, and thus open to the public. Another key component of the *Brown* court's decision allows boaters on navigable-in-fact waterways to portage—or carry a watercraft across dry land to avoid obstacles on a waterway—on private property where absolutely necessary. So, Brown was not trespassing when he traveled down the Mud Pond Waterway through the Brandreths' property, nor was he trespassing when he avoided the rapids in the Waterway by portaging on the Brandreths' dry land.

Implications of Ruling and Dissent's Fears

Although very favorable to the public's recreational rights in navigable waters, this ruling has implications that could change the legal foundation of private land ownership. Under the *Brown* ruling, private property expectations, no matter how long those expectations have been honored and by whom, are essentially invalid if a waterway on private property is capable of being navigated for recreational use. The dissent in *Brown* voices this concern, in stating the majority's ruling "unnecessarily expand[s] [New York's] navigability-in-fact doctrine and destabilize[s] settled expectations of private property ownership by opening up remote, unpopulated, privately owned bodies of water as long as the public has some way, however arduous and recently acquired, of gaining access to them."[7] Even the *Brown* majority acknowledges this concern in noting the "troubling results left unaddressed" by this ruling, and it "share[s] the dissent's concern that the application of the rule in cases such as this may destabilize long-established *expectations* as to the nature of private ownership."[8]



Adirondack Mountains courtesy of Adam Riquier.

Conclusion

Phil Brown successfully canoed the Mud Pond Waterway—private property rights pitted against the public's use of waterways encapsulated in one simple sentence. Along with society's evolving uses of waterways, courts' definitions of navigability have also morphed to reflect such uses. No longer are the days when the only means of transporting goods were the nation's waterways; on the contrary, technology and time has transformed the use of the nation's waterways from commercial highways into recreational hotspots. However, as definitions change regarding what waterways are public and what waterways are private, constitutionally guaranteed private property rights are now at the forefront of a legal logjam.

Endnotes

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

2 Friends of Thayer Lake LLC v. Brown, 1 N.Y.S. 3d 504 (N.Y. App. Div. 2015).

3 "Navigable-in-Fact" is a legal term of art to describe waterways that can be navigated upon, and as a consequence, are incapable of private ownership and open to the public for navigation.

4 Adirondack League Club, Inc. v. Sierra Club, 706 N.E. 2d 1192, 1194 (N.Y. 1998).

5 It is important to note that every state has their own definition of "navigable-in-fact," so New York's definition may not import to another state under the same circumstances.

6 *Brown,* 1 N.Y.S. 3d at 510 (emphasis added).

7 *Id.* at 517 (Rose, J., dissenting).

8 *Id.* at 512 n. 5.

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