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Also,

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Contents page photograph of Tillamook Bay courtesy of Janet Lackey.

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U.S. Supreme Court Issues New Regulatory Takings Opinion

Morgan L. Stringer[1]

Photograph of the St. Croix River courtesy of Jenni Konrad.

A regulatory taking occurs when a government regulation is so burdensome on a landowner that the land effectively loses all economic value or usefulness to that landowner. If this occurs, the Fifth Amendment of the U.S. Constitution requires the government to give the landowner "just compensation." In June, the U.S. Supreme Court issued a new ruling regarding how private property boundaries should be defined in regulatory takings cases.[2]

In *Murr v. Wisconsin*, the Court addressed the question, "What is the proper unit of property against which to assess the effect of the challenged government action?"[3] At issue specifically in *Murr* was whether two contiguous lots under common ownership should be considered as a whole or as distinct pieces of property for takings purposes. If the lots are considered as a whole, the government action may not be considered a taking, as the combined lots may still retain some economic value or usefulness. The narrower a property

is defined, the more likely it will be that the government regulation is too burdensome, and thus, result in a regulatory taking requiring compensation.

Background

The plaintiffs are siblings who received two adjacent lots from their parents, Lot E and Lot F. The lots are located along the St. Croix River in Troy, Wisconsin. The Murrs' parents purchased the lots separately, and the lots were owned separately by the family business and the parents personally. The lots were transferred to the Murr siblings in common ownership in the mid-1990s.[4] The siblings wanted to relocate a cabin on Lot F to a different section of the same lot. They planned to sell Lot E to cover the costs of the relocation project.

At issue specifically in Murr was whether two contiguous lots under common ownership should be considered as a whole or as distinct pieces of property for takings purposes.

The St. Croix River is a federally designated Wild and Scenic River and development is limited in the area to preserve the scenic and recreational values of the river. Wisconsin regulations prohibit the use of lots as building sites unless "they have at least one acre of land suitable for development."[5] Due to the terrain of Lot E and Lot F, each lot had less than one acre suitable for development. Lots that do not meet this requirement may be allowed as building sites if one of two conditions are met: 1) the lot was in separate ownership from abutting lands on January 1, 1976 or 2) the "lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area."[6] Adjacent lots under common ownership, however, may not be sold or developed as separate lots if they don't meet the minimum size requirements.

These regulations, which were also incorporated into the St. Croix County zoning ordinances, prohibited the Murrs' development plans. Because the adjacent lots were under common ownership and neither met the minimum size requirements, they could not be sold or developed separately. In a sense, the lots had become one. The Murrs, however, could use the larger combined lot as a building site as it would meet the one-acre requirement. The Murrs sought a variance from the St. Croix County Board of Adjustment to allow the separate sale or use. The Board denied the Murrs' request and the state courts upheld the Board's decision.

Lower Court Rulings

With their procedural remedies with the Board exhausted, the Murrs filed a regulatory takings claim in the St. Croix County Circuit Court. They claimed that the state and county regulation deprived them of all use of Lot E, because it could not be sold or developed as a separate lot. The circuit court held that there was no regulatory taking, because the Murrs could still use the property in other ways, including repairing the existing cabin or building a structure across the two lots.[7]

The Wisconsin Court of Appeals affirmed, finding that the regulations did not effect a regulatory taking. The appellate court ruled that the petitioners could not reasonably have expected to use the lots separately, because they should have known about the existing regulations. In addition, the regulation's impact on the property value was less than ten percent.[8] The property, therefore, retained some economic value. The Supreme Court of Wisconsin declined to hear the case, but the U.S. Supreme Court granted *certiorari*.

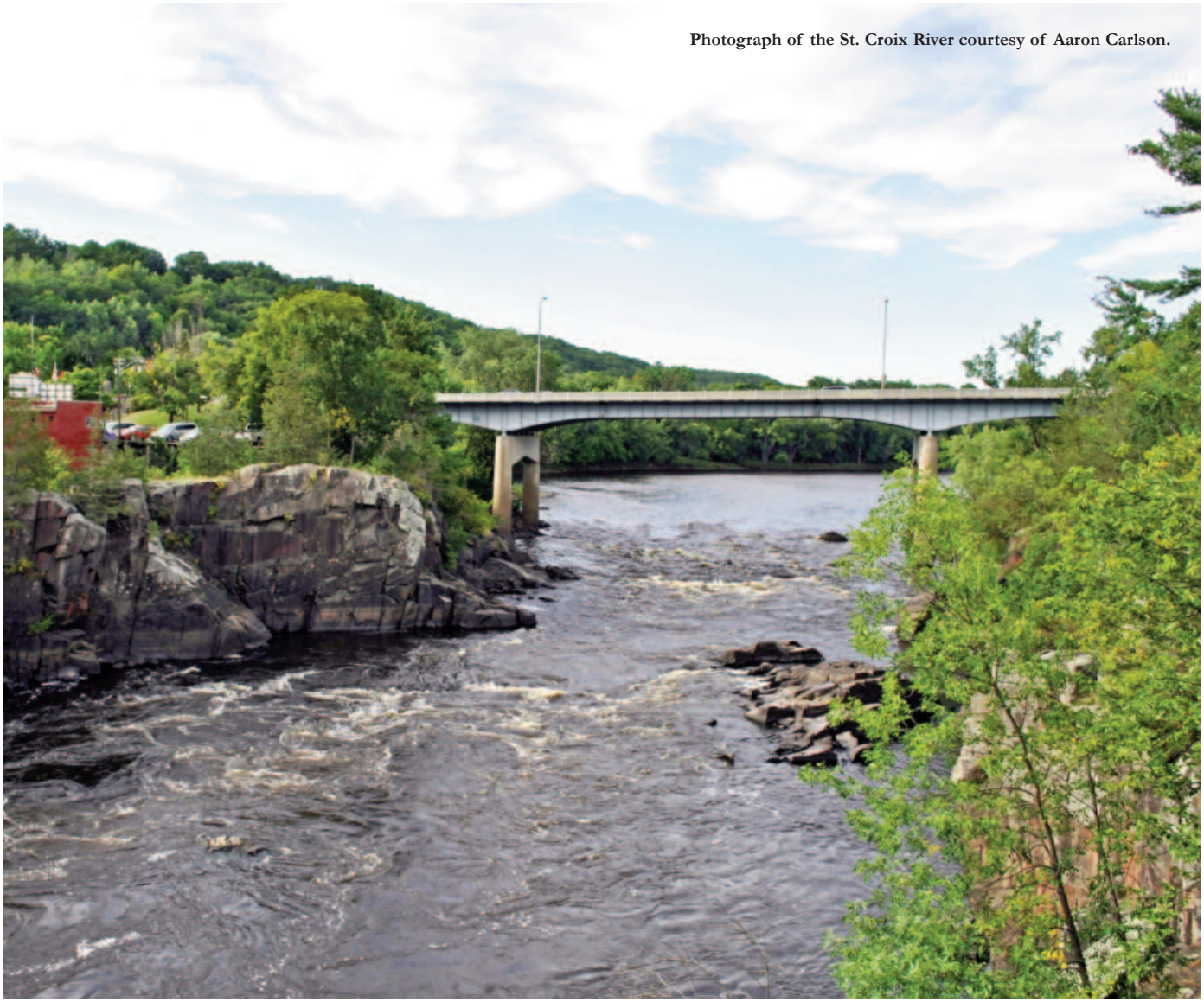
U.S. Supreme Court

The U.S. Supreme Court's opinion, written by Justice Anthony Kennedy, pointed out that there was no bright-line rule for when a regulatory taking occurred but rather a balancing test. This balancing test weighs the government's interest in public good against the individual's property rights. So, the ultimate question then is the balance between a regulation's impact on property value against the remaining value of the property. The Court pointed out that before this balancing test can take place, the "denominator question," or the bounds of the property, must be determined.[9]

The denominator question is vital to regulatory Takings Clause cases. The denominator is the total value of the property burdened by the regulation, which is then weighed against the economic burden of the regulation. This is significant because the larger the denominator, then the more burdensome a regulation must be to find a regulatory taking.

The Court outlined four factors that courts must consider to answer the "denominator question." The factors are: "(1) the treatment of the land under state and local law, (2) the physical characteristics of the land, and (3) the prospective value of the land."[10] The answers to these inquiries will determine whether "reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."[11]

The first factor, treatment of the land under state and local law, should be given great weight, particularly to how the land is divided. A reasonable landowner should



Photograph of the St. Croix River courtesy of Aaron Carlson.

know about restrictions that were in effect before he took ownership, as well as regulations that take place after or due to a change in land ownership.[12]

The second factor requires courts to examine the physical characteristics of the property. These characteristics include "the physical relationship of any distinguishable tracts, the parcels to topography, and the surrounding human and ecological environment."[13] Another physical characteristic that may be considered is if the property is in an area that is "subject to or may become subject to, environmental or other regulation."[14]

Third, the court must determine the property value under the regulation at issue. The Court directed courts considering this issue to pay close attention to the regulated property's effect on other property values. The Court stated that if other properties increase in value due to the regulated property's loss in value, then that property value factor will balance out.[15]

After examining these four factors in the context of the Murrs' case, the Court found that the first factor weighed in favor of the State of Wisconsin, because regulations for property mergers are used frequently and are legitimate. Furthermore, the Murrs should have known that the land would be treated as a single property when they acquired the property as common land owners.[16] Secondly, under the physical characteristics test, the Court reasoned that the terrain and narrowness of the Murr property indicated that the lots' reasonable uses are limited. Additionally, since the land is adjacent to the St. Croix River, then the landowners should have anticipated regulation.[17] Third, the properties are worth more together than each lot being sold separately.[18] Furthermore, more value is added by merging the properties together due to the resulting increased privacy, a larger recreational area, and more land for property improvements.[19] Therefore, the Court held that Lots E and

F were merged and should be treated as a single parcel, thereby affirming the ruling of the Wisconsin Court of Appeals.

Once the Court determined the proper denominator was the merged lots, the court easily concluded that there was no compensable regulatory taking. The Murrs have not had all economic use of the property destroyed by the regulation. The Court suggested that the plaintiffs could use the property for residential purposes. Furthermore, the property value decreased by less than ten percent due to the regulation. Additionally, the Murrs have no reasonable expectation of being able to sell the land separately, because the regulation that merged the properties existed before they became common owners, and they should have known that. Furthermore, the regulation was reasonable, because the regulation was enacted through coordination between federal, state, and local government to preserve the St. Croix River and the nearby land.[20]

Dissent

Chief Justice John Roberts dissented. He agreed with the Court's decision that there was no regulatory taking. However, Roberts disagreed with the use of the factor test to define the denominator. Roberts argued that state law should determine how the property at issue is defined.[21] After the denominator is determined under state law, then Roberts would proceed with the balancing test to determine if there was a regulatory taking, including economic impact of the regulation, the owner's investment backed expectations, and the character of the regulation.[22] Roberts also argued that the denominator analysis set forth by the majority favors the government, because it will lead to definitions of the "parcel" that are based on the reasonableness of government regulation that property owners should have anticipated.[23] Roberts was also concerned that this could lead to lots being single parcels for one takings claim and separate parcels for another, which would be "just another opportunity to gerrymander the definition of private property to defeat a takings claim."[24]

Conclusion

Going forward, the lower courts will evaluate the denominator in takings claims under the new four-factor test set forth by the U.S. Supreme Court. This may lead to more court rulings that adjacent or connected property holdings should be considered as a single parcel for the purposes of a takings analysis. In turn, this may lead to less findings of regulatory takings requiring compensation. This could enable the government to impose more regulations without having to compensate property owners. The balancing test established by the court still would allow for regulations to be weighed against individual parcels of land, but the burden of reaching that standard is higher now. If the court finds that the "denominator" should be individual parcels, then the state may have to pay large sums of money to compensate for regulatory taking. Under the Supreme Court's analysis, property owners have to be much more aware of how their property will be classified and what regulations may be impose. Otherwise, property owners may be caught off guard if a regulation is not deemed a taking when their land is considered as a "parcel as a whole."

Endnotes

1 2018 J.D. Candidate, University of Mississippi School of Law.

2 Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

3 *Id.* at 1943.

4 *Id.* at 1940-41.

5 *Id.* at 1943 (quoting Wis. Admin. Code §§ NR 118.04(4), 118.03(27), 118.06(1)(a)(2)(a), 118.06(1)(b) (2017)).

6 WISC. STAT. § 111.08(4)(a).

7 Murr, 137 S. Ct. at 1941.

8 *Id.* at 1943.

9 *Id.* at 1943-44.

10 *Id.* at 1945.

11 *Id.*

12 *Id.*

13 *Id.*

13 *Id.*

14 Murr, 137 S. Ct. at 1945-46 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J. concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit").

15 *Id.* at 1946.

16 *Id.* at 1948.

17 *Id.*

18 *Id.* at 1949.

19 *Id.* at 1948.

20 *Id.* at 1949-50.

21 *Id.* at 1950 (Roberts, C.J., dissenting).

22 *Id.*

23 *Id.* at 1955-56.

24 *Id.* at 1956.

Oregon Oyster and Dairy Farms at Odds

Kaelyn Barbour[1]

Photograph of Tillamook Bay courtesy of Ronald Woan.

In 2016, Hayes Oyster Company filed a lawsuit in federal district court against the Oregon Department of Environmental Quality (DEQ) alleging that Tillamook dairy farm practices were polluting the watershed and affecting the water quality. The company claimed that water quality standards set by the DEQ did not adequately regulate the discharge of fecal coliform in shellfish habitat. Although the court dismissed the suit for lack of subject matter jurisdiction, the case highlights the complex balance of the environmental management of conflicting industries.

Background

In 1928, Jesse Hayes, founder of Hayes Oyster Company, planted oyster seed in the Tillamook Bay after neighboring Netarts Bay's oyster population was depleted.[2] Hayes' grandson runs the operation today, leasing 600 acres of oyster plats in Tillamook Bay for its shellfish growing operation. The company alleges that pollutants from nearby dairy farms are threatening its business.

The DEQ regulates the commercial oyster industry in Tillamook Bay in accordance with its Tillamook Management Plan for Commercial Shellfish Harvesting (Plan). The Plan is designed to comply with the U.S. Food and Drug Administration's National Shellfish Sanitation Program (NSSP).[3] The NSSP sets standards for commercial fish harvesting, including standards for the allowance of fecal coliform bacteria in waters that grow shellfish.

In addition to NSSP standards, Oregon must comply with § 303(d) of the Clean Water Act, which requires the state to set Total Maximum Daily Loads (TMDLs) for waters

that the state identified as "impaired."[4] TMDLs set the amounts of pollutants that can be discharged into the watershed. Hayes asserted that the TMDLs set by the DEQ for Tillamook Bay are not reasonably calculated to meet water quality standards for shellfish growing waters.

TMDLs

There are two types of TMDL allocations: 1) wasteload allocations and 2) load allocations. Wasteload allocations include point sources, such as wastewater treatment plants or concentrated animal feeding operations (CAFOs), subject to the National Pollutant Discharge Elimination System permitting program. Load allocations are developed for nonpoint sources, like runoff that contains pollutants from multiple sources, such as manure from dairy farms.

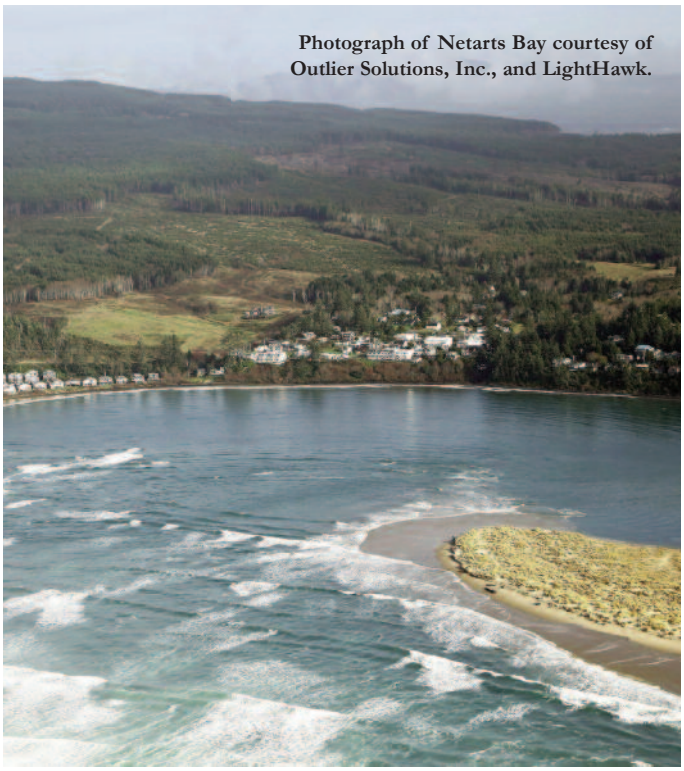
Hayes took issue with the DEQ's determinations regarding both types of TMDL allocations. First, the company alleged that the DEQ established wasteload allocations that did not meet water quality standards for growing shellfish for *all* of Tillamook Bay. Hayes argued that the current wasteload allocations only allow certain portions of Tillamook Bay to meet water quality standards for growing shellfish. Hayes contended that the DEQ's TMDL for 2001 for Tillamook Bay is deficient, because it does not meet the TMDL standard required by § 303(d).

Second, Hayes took issue with the DEQ's alleged adoption of a "zero load allocation" for dairy farms with CAFO permits. The terms of the CAFO permits require zero discharge to surface waters; however, manure application is allowed when done in accordance with an Animal Waste Management Plan. The oyster company argued that runoff from manure land application is discharged into surface water, increasing fecal coliform bacteria levels and affecting the water quality for shellfish.

The oyster company made a number of additional claims in its complaint, including public nuisance and unconstitutional taking of property under the state and federal constitutions. The DEQ moved to dismiss the case for lack of subject matter jurisdiction.

Subject Matter Jurisdiction

The court granted the DEQ's motion to dismiss citing four reasons. First, the court reasoned that the unjust taking of property under the Fifth Amendment to the U.S. Constitution should have been brought in state court first. Second, the court reasoned that all of Hayes' claims are barred by Eleventh Amendment sovereign immunity. The only way to overcome this sovereign immunity is if a state, or state agency and its officials, waives immunity by making it clear that it submits to federal jurisdiction. The court determined that the DEQ did not submit to federal jurisdiction in this instance. Third, the court ruled the



Photograph of Netarts Bay courtesy of Outlier Solutions, Inc., and LightHawk.

Hayes could not seek injunctive relief in federal court using its state law claims, because sovereign immunity also covered the state law claims. Finally, the court ruled that it did not have subject matter jurisdiction over the case because the public nuisance claim did not involve a federal question—nuisance is a state law claim.[5]

Conclusion

Although the case was dismissed, Hayes Oyster Company has indicated that it will refile in Oregon state court.[6] Hayes noted that it has been unable to harvest oysters during eight of the past ten seasons due to elevated bacteria levels.[7] Area dairy farmers maintain that they are adequately regulated and that other sources contribute to fecal coliform bacteria in the area.[8]

Endnotes

1 2019 J.D. Candidate, Vermont Law School.

2 *150 Years of Oyster Farming*, Tillamook Headlight Herald, July 14, 2009.

3 Hayes Oyster Co. v. Oregon Dep't of Envtl. Quality, No. 3:16-cv-02028-JE, slip op. at 3 (D. Or. Apr. 17, 2017).

4 33 U.S.C. § 1313(d)(1)(C).

5 Gunn v. Minton, 568 U.S. 251 (2013).

6 Mateusz Perkowski, *Conflict Brewing Between Oyster Farm, Tillamook Dairies*, Capital Press (Apr. 25, 2017).

7 *Id.*

8 *Id.*

An Unprecedented Override in Fisheries Management Leads to Uncertainty

Morgan L. Stringer[1]

Photograph of a flounder courtesy of Roban Kramer.

Last January, the Atlantic States Marine Fisheries Commission (ASMFC) determined that New Jersey was out of compliance with the region's summer flounder fishery management plan (FMP). In July, Secretary of Commerce Wilbur Ross overruled the Commission determination. The Secretary's unprecedented action has left many unsure about how FMPs will be enforced in the future.

Background

The ASMFC is the result of an interstate compact between Atlantic coastal states, and it works in coordination with NOAA and the U.S. Fish and Wildlife Service to manage fisheries along the Eastern United States. Pursuant to the Atlantic Coastal Fisheries Cooperative Management Act, the ASMFC prepares and adopts fishery management plans (FMPs) to manage Atlantic coastal species.[2] Member

states are required to implement and enforce FMPs adopted by the ASMFC.[3] ASMFC annually reviews each state's implementation and enforcement of the FMPs and reports those findings to the Secretary of Commerce and Interior (Secretaries). If the ASMFC finds that a state is not complying with FMPs, it must notify the Secretaries who are required to undertake a review and make a determination regarding noncompliance. If the Secretaries find that a state has failed to carry out its responsibilities, the Secretaries are directed to declare a moratorium for fishing in the fishery in question within the waters of the noncompliant state.[4]

One of the species managed by the ASMFC is summer flounder. Overfishing is a serious issue for the summer flounder population. Summer flounder are 42% below the population level considered necessary for sustainability. Further, the population decreased nearly 25% from the flounders' peak population in 2010.

SUMMER FLOUNDER ARE 42% BELOW THE POPULATION LEVEL CONSIDERED NECESSARY FOR SUSTAINABILITY.

An assessment found that if the summer flounder population falls another 14%, then the population would reach critical threshold.[5] Reaching this threshold would mean that ASMFC would be required to impose strict quotas and region-wide bans on catching the flounder.[6] To increase the sustainability and prevent summer flounder from approaching this critical threshold, the ASMFC imposed new minimum size requirements and catch limits for the summer flounder fishery.

New Jersey rejected the ASMFC's new rules and formulated its own, less-stringent plan. New Jersey claimed that its plan would effectively preserve the summer flounder population within the state.[7] The ASMFC rejected New Jersey's plan and found the state out of compliance with the summer flounder FMP.[8] New Jersey state officials urged the Secretary of Commerce Wilber Ross to intervene in the dispute, claiming the ASMFC's restrictions would lead to the "destruction" of recreational flounder fishing.[9]

Secretary Ross's Override of ASMFC

In July, Secretary Ross notified the ASMFC that he found New Jersey to be in compliance with the summer founder FMP, finding that the New Jersey plan was adequate to accomplish summer flounder sustainability.[10] According to the ASMFC, this is the first time the Secretary has failed to uphold an ASMFC finding of noncompliance.[11] The Secretary's decision quickly drew controversy from conservationists, officials, and scientists, in part because of its unprecedented nature and because he failed to seek input from the Regional Administrator of NOAA Fisheries' Greater Atlantic Region Office.[12]

What Happens Now?

There are some who praise Secretary Ross's decision as curbing overregulation in the fishing industry.[13] However, many critics of the Secretary's decision worry that his actions set a dangerous new precedent. Fish do not respect state boundaries and interstate cooperation is essential to successful management of marine stocks. The Secretary's action could completely derail the ASMFC's efforts to prevent the decline in summer flounder stocks. Fishermen in Rhode Island are already calling for the state to make its own rules and ignore the ASMFC's summer flounder regulations.[14] In the future, states might refuse to follow the FMPs for other stocks as well, with potentially far-reaching consequences for the health of the marine environment and the sustainability of the fishing industry.

Endnotes

1 2018 J.D. Candidate, University of Mississippi School of Law.

2 16 U.S.C. § 5104(a)(1).

3 *Id.*

4 *Id.* at § 5106(c).

5 Dave Abel, *Trump Administration Steps in on Fishing Limits, and the Implications Could Ripple*, Boston Globe (July 25, 2017).

6 *Id.*

7 *Id.*

8 Press Release, Atl. States Marine Fisheries Comm'n, Department of Commerce Decision May Impact ASMFC's Ability to Conserve Atlantic Coastal Fisheries (July 14, 2017).

9 Jack Tomczuck, *Christie Administration Wants Commerce Secretary to Halt Flounder Cuts*, Press of Atlantic City (Mar. 2, 2017).

10 Associated Press, *Commerce Department Defends Decision on Flounder Fishery,* Press Herald *(July 18, 2017).*

11 Press Release, *supra* note 8.

12 *Id.*

13 Abel, *supra* note 5.

14 *Id.*

15 *Id.*

Intertidal Rockweed: Private Property or a State Owned Marine Resource?

Alexandra Chase[1]

Briefing recently concluded in Maine's highest court to determine if intertidal rockweed, a species of seaweed, is private property or a public resource subject to management by the state of Maine for commercial harvest. Oral arguments to determine ownership rights of this valuable marine resource are scheduled for this fall.

Background

Rockweed is a marine algae that grows on rocks and other hard surfaces in parts of Europe and on the northeastern coast of North America. Once a rockweed plant has attached to a surface it will remain there, often surviving for decades. Commercial harvesting companies collect rockweed for use in agricultural products, animal feed additives, and human food, health and beauty products and supplements.

Maine has over 3,000 miles of rocky coastline and is home to one of the most fruitful seaweed habitats in the world.[2] The vast majority of seaweed harvested in Maine is rockweed, and with an annual value of $20 million, it is one of Maine's most valuable commodities.[3] The Maine Department of Marine Resources (DMR) manages the harvest of rockweed by determining the location, setting harvest restrictions (e.g., amount, minimum height), and issuing commercial licenses.

In late 2015, several coastal property owners sued Acadian Seaplants, a prominent global seaweed company, for harvesting rockweed from their private intertidal property without permission.[4] Under the Public Trust Doctrine in Maine, there is a limited public right to traverse private intertidal areas for the purposes of fishing, fowling, and navigation. The primary legal question facing the court was whether rockweed harvesting falls within the scope of the public trust easement. If it did, Acadian Seaplants would have the right to harvest. If not, the private property owners would have the right to block access.

Trial Court Ruling

In March 2017, the Maine Superior Court ruled in favor of the upland property owners, ruling that the "rockweed/seaweed growing in the intertidal zone is private property owned exclusively by the [land] owner, and is not owned by the State in trust for the public."[5] Citing prior case law, the court held that the right to take seaweed is a "right to take a profit from the soil" which belongs to the property owner.[6] Such rights, which are also known as a "profit a prendre," also include the right to harvest timber or mine gravel. A landowner may sell or give permission to a company or person to remove the soil or products of the soil, but the state cannot authorize an entity to do so without the property owner's consent.

The trial court considered whether the harvest of rockweed from the intertidal zone was a protected use pursuant to the Maine Public Trust Doctrine. The intertidal zone is the area of land between the highest and lowest ebb of the tide. The Colonial Ordinances of the 1640s established the low water mark as the dividing line between private property and submerged state owned lands, thereby granting upland owners title to the intertidal land. Maine is one of only five "low water" states where private title extends to the low water mark. Submerged lands below the low water mark belong to the state of Maine. Maine has the authority to permit the harvest of seaweed from state-owned lands. The problem in harvesting rockweed is that it primarily grows in the intertidal zone.

The Colonial Ordinances recognized and reserved limited public rights within the intertidal zone. Private intertidal land is subject to a public easement for fishing, fowling, and navigation.[7] The Maine Supreme Court held in *McGarvey v. Whittredge* that the terms "fishing, fowling, and navigation" provide context, but do not exclusively define the scope of public rights. The McGarvey court set forth a two-step analysis to determine whether the public has a right

Photograph of rockweed courtesy of Susannah Anderson.

to undertake a particular activity in the intertidal area. Maine courts must ask first, whether the activity falls readily with the express rights of "fishing, fowling, and navigation." If not, the court must consider whether the common law should be understood to include the activity.

With respect to the first question, the trial court found that the harvesting of rockweed did not fall within the three traditional uses. Rockweed is a terrestrial plant and the court found rockweed harvesting to be more similar to the activities of cutting down trees or hunting wildlife than traditionally accepted fishing activities, such as lobster trapping or "dropping a line for fish."[8] Turning to the second question, the court failed to find support in the common law for recognizing rockweed harvesting as a public right. This finding was based primarily on the court's earlier conclusion that previous cases in Maine had classified seaweed harvesting as a right to take a profit in the soil that belonged to the property owner.

Conclusion

Acadian Seaplants has appealed the case to the Maine Supreme Judicial Court. The trial court's decision has been stayed pending the appeal, and the ownership rights to rockweed remains unsettled. In August, the Pacific Legal Foundation and the Property and Environment Research Center filed an amicus brief in support of the property owners, revealing the case is beginning to get some national attention from property rights advocacy groups. Oral arguments are scheduled for later this year. This will be an important case to watch as the Maine Supreme Court's ruling will have implications for both private property rights and public management of a valuable resource.

Endnotes

1 Ocean and Coastal Law Fellow, National Sea Grant Law Center.

2 Me Dept. Marine Resources, Bureau of Resource Mgmt. 2007 Research Plan (2007).

3 Me Sea Grant & Me Dept. Marine Resources, Rockweed Ecology, Industry & Mgmt. (2013).

4 Ross v. Acadian Seaplants Ltd., No. SC-CV-15-022, 2015 Me. Super.

5 *Id.* at 5.

6 Hill v. Lord, 48 Me. 83 (1861).

7 Bell v. Wells, 557 A.2d 168 (1989).

8 *Ross v. Acadian Seaplants*, at 4.

The Continuing Journey of WOTUS: Trump Administration Takes Action to Repeal Obama Era Rule

Morgan L. Stringer[1]

On February 28, 2017, President Trump issued an Executive Order directing the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to evaluate the "waters of the United States" (aka WOTUS) rule.[2] The EPA and Corps promulgated the rule in 2015 in an effort to clarify what waters are subject to federal authority under the Clean Water Act (CWA). In July, the agencies formally announced their intention to repeal the WOTUS rule.[3]

Muddying the Waters

One of the Clean Water Act's (CWA) provisions bans unauthorized pollutant discharges into navigable waters.[4] "Navigable waters" is defined by statute as "the waters of the United States, including the territorial seas."[5] Because that definition does not provide much guidance, responsibility falls to the EPA and Corps to further define the term through agency regulations and guidance. A regulatory definition of WOTUS was first issued by the agencies in the 1980s and amended several times in the subsequent decades.[6] The regulation is a frequent visitor in federal court.

The U.S. Supreme Court addressed the proper scope of WOTUS under the Clean Water Act most recently in 2006.[7] In *Rapanos v. United States*, the Court held that the "waters of the United States" should be defined as constitutionally broad as possible.[8] However, when it came to answering how expansive the "waters of the United States" definition should actually be, the Court struggled.

Rapanos v. United States did not result in a majority opinion. In a plurality opinion (meaning there was no clear majority), Justice Antonin Scalia proposed that the "waters of the United States" should be defined as "relatively permanent, standing, or continuously flowing bodies of water" that connect to traditionally navigable bodies of water and to "wetlands with a continuous surface connection to" those permanent waters.[9] Justice Anthony Kennedy in his concurring opinion offered a somewhat more expansive view, arguing that waters are covered by the Clean Water Act if they have a "significant nexus" to "traditional navigable waters." The split among the justices in *Rapanos* and the multitude of opinions – a plurality, two concurring, and two dissents – resulted in immediate and persistent confusion. Despite decades of litigation, the appropriate scope of jurisdiction remained unclear.

The Institution of the Rule, Critics, and Supporters

Following the *Rapanos* decision, the EPA and Corps sought to clarify what waters fell under CWA jurisdiction. At first, the agencies provided direction through the issuance of guidance documents. Then, in 2015, the EPA and Corps issued formal regulations revising the "waters of the United States" definition. The rule set forth an interpretation of WOTUS that would include within its scope large bodies of waters such as lakes and rivers, wetlands adjacent to such waters, and tributaries of these protected waters and wetlands.[10] The definition also included intermittent wetlands, which are dry during some part of the year.[11]

The 2015 regulation was highly controversial. Real estate developers, farmers, and other industry representatives strongly opposed the new rule. Critics of the rule believed it would halt economic growth and was an overreach of federal power.[12] Some critics even stated that the rule would allow the federal government to regulate puddles.[13]

Supporters believed that this rule was the best way to preserve habitats and drinking water.[14] Environmental groups argued that if upstream water sources are not protected, then the larger navigable ones cannot be protected.[15] Additionally, they pointed out that states often lack sufficient resources to regulate and enforce anti-pollution measures.[16]

WOTUS Blocked

The WOTUS controversy led to multiple states filing suit in multiple jurisdictions. In *North Dakota v. Environmental Protection Agency*, a U.S. district court granted an injunction to prevent WOTUS from going into effect. The court held that the new definition of tributaries was too broad, because the waterways did not have a "chemical, physical, and biological integrity" effect on navigable-in-fact waters.[17] Additionally, the district court held that WOTUS violated the Administrative Procedure Act, because the final rule was not a "logical outgrowth" of the proposed rule.[18] The court granted an injunction to keep WOTUS from going into effect in those states that brought suit.

THE RULE SET FORTH AN INTERPRETATION OF WOTUS THAT WOULD INCLUDE WITHIN ITS SCOPE LARGE BODIES OF WATERS SUCH AS LAKES AND RIVERS, WETLANDS ADJACENT TO SUCH WATERS, AND TRIBUTARIES OF THESE PROTECTED WATERS AND WETLANDS.

A separate WOTUS case arose in the U.S. Court of Appeals for the Sixth Circuit. Prior to ruling on the merits, the court sought to determine whether the federal district courts or the appellate courts had proper jurisdiction. While the case was pending, the Sixth Circuit granted a nationwide stay on WOTUS.[19] In February 2016, the Sixth Circuit determined that the appellate courts, not the district courts, had jurisdiction to hear the case.[20] This made the lower court holdings on WOTUS, including *North Dakota*, moot. The Sixth Circuit has yet to rule on the merits of the case, so the stay remains in effect. If the EPA and Corps reissue the 2009 WOTUS rule, then the court may find that the case is moot.

Next Steps

In accordance with the Executive Order issued in February, the EPA and Corps are reviewing the 2015 rule and considering a revised definition. In revising the rule, the Executive Order requires the agencies to consider the president's economic growth policy and the "waters of the United States" definition that was outlined by the late Justice Scalia.[21] Already, the National Resource Defense Council indicated it will sue over a repeal of the rule.[22] The agencies are currently seeking public comments.[23] How "waters of the United States" will be defined in the future is uncertain, but the same cannot be said for controversy and litigation over the issue.

Endnotes

1 2018 J.D. Candidate, University of Mississippi School of Law.

2 Exec. Order 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017).

3 33 C.F.R § 328 (2017).

4 Stephen P. Mulligan, *Evolution of the Meaning of "Waters of the United States" in the Clean Water Act 2*, Congressional Research Service (2016) (citing 33 U.S.C. § 1311(a)).

5 33 U.S.C. § 1362.

6 Mulligan, *supra* note 4, at 1.

7 Rapanos v. United States, 547 U.S. 715, (2006).

8 Mulligan, *supra* note 4, at 8 (See Natural Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975)).

9 *Rapanos*, 547 U.S. at 742.

10 33 C.F.R. § 328.3 (2015).

11 *Id.* at § 328.3(b)(3)(ii).

12 Jenny Hopkinson, *Obama's Water War*, Politico (May 27, 2017); Prentiss Findlay, *South Carolina Environmentalists Alarmed by Proposed Clean Water Act Rule Repeal; EPA Schedules Public Input Sessions*, The Post and Courier (Aug. 26, 2017).

13 Amy Sherman, *Ted Cruz Says EPA Tried to Regulate Drainage Puddles and Ditches*, PolitiFact (March 31, 2016)

14 Findlay, *supra* note 12.

15 Hopkinson, *supra* note 12.

16 Mulligan, *supra* note 4.

17 *Rapanos*, 547 U.S. at 781.

18 North Dakota v. Envt'l Prot. Agency, 127 F. Supp. 3d at 1058 (citing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007)).

19 *In re* Envtl. Prot. Agency, 803 F.3d 804, 808-09 (6th Cir. 2015).

20 *In re* Dep't of Def., 817 F.3d 261, 270 (citing Nat'l Cotton Council v. Envtl. Prot. Agency, 553 F.3d 927, 933 (6th Cir. 2009).

21 Exec. Order 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017).

22 Coral Davenport, *E.P.A. Moves to Rescind Contested Water Pollution Regulation*, N.Y. Times (June 27, 2017).

23 Definition of "Waters of the United States"-Recodification of Pre-Existing Rules, 82 Fed. Reg. 34899 (July 27, 2017) (to be codified at 33 C.F.R. pt. 328).

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