The SandBar

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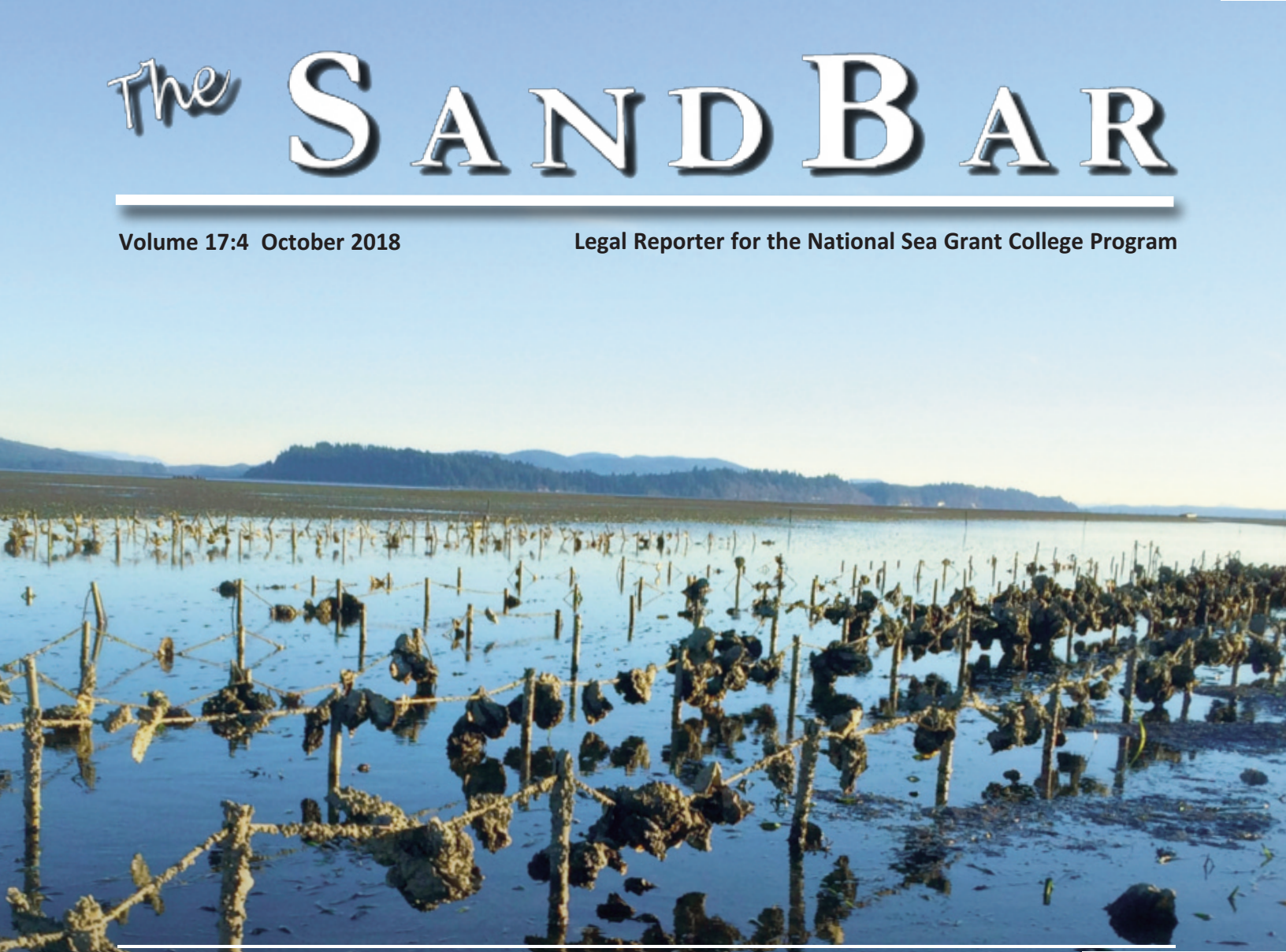

Pesticide or Pestilence?

Washington Restricts Imidacloprid Use in Commercial Shellfish Aquaculture

Also,

Our Staff

Editor:
Terra Bowling

Production & Design:
Barry Barnes

Contributors:
Catherine Janasie
Amanda Nichols
Morgan L. Stringer
Grace M. Sullivan

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Sea Grant Law Center, Kinard Hall, Wing E, Room 258, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: tmharget@olemiss.edu. We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

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Cover page photograph of an oyster bed in Willapa Bay, Washington courtesy of Tara Schmidt.

Contents page photograph of Willapa Bay, Washington courtesy of Willapa Lens Media.

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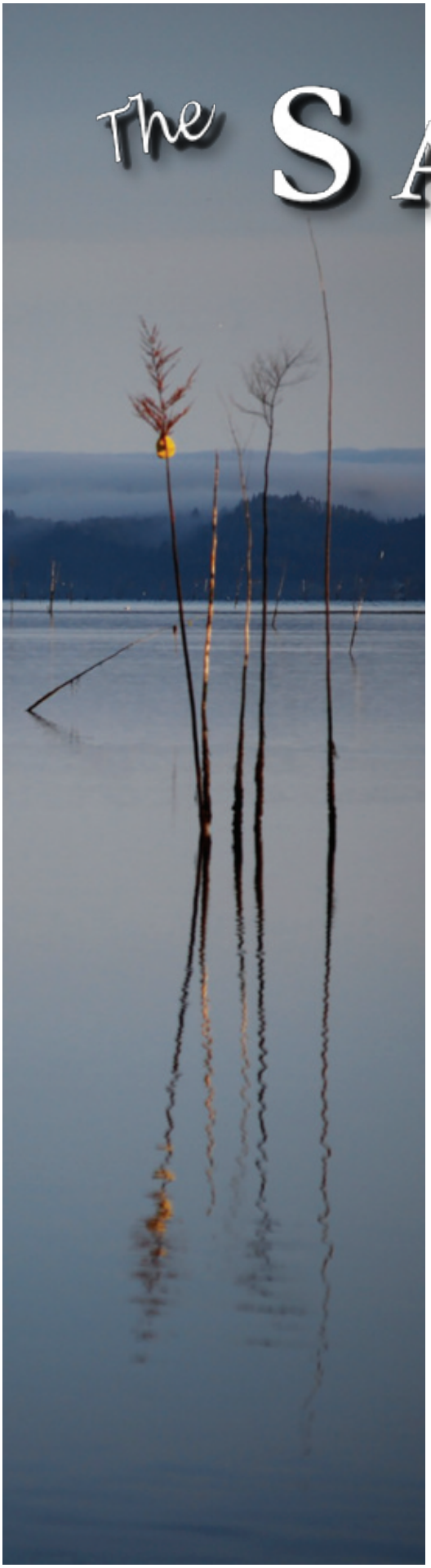

The SandBar

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Pesticide or Pestilence?

Washington Restricts Imidacloprid Use in Commercial Shellfish Aquaculture

Amanda Nichols[1]

Oyster farming on Willapa Bay courtesy of Willapa Lens Media.

According to the Environmental Protection Agency (EPA), pesticides are substances intended to prevent, destroy, repel, or mitigate any pest, and may include herbicides, fungicides, and various other substances.[2] While traditionally used in terrestrial agriculture, pesticides can also be utilized in the commercial aquaculture industry. Ideally, the use of pesticides in aquaculture limits the populations of harmful organisms and allows farmed shellfish and finfish to grow to maturity, after which they can be harvested and safely sold to consumers. However, when pesticides enter aquatic systems, the environmental costs can be high. For example, pesticides can cause unintentional fish kills and can also harm non-aquatic species, such as birds of prey after ingesting contaminated organisms. Because of this, some states have attempted to restrict the use of certain pesticides in commercial aquaculture due to their potential to cause great harm.

Background

Washington in particular has struggled in recent years with whether to limit the usage of one pesticide—imidacloprid—in shellfish aquaculture. Imidacloprid, a neonicotinoid, is a systemic neurotoxin used to kill harmful burrowing shrimp, pests that can decimate farmed shellfish populations. Burrowing shrimp live in deep holes in tidal flats, the digging of which can destabilize the seabed and result in a quicksand-like muck that can cause bottom-cultured oysters to sink and smother as they grow and mature. Imidacloprid was initially utilized as a replacement for Carbaryl, a pesticide that was phased out in 2009 due to its likely carcinogenic qualities and the harm it caused to Endangered Species Act-listed species, such as green sturgeon and salmon. While the EPA has established a tolerance for residues of imidacloprid in or on fish and shellfish,[3] it has not yet restricted use of the pesticide in agriculture or aquaculture. Accordingly, states like Washington must use their permitting authority to limit use of imidacloprid when warranted.

IMIDACLOPRID, A NEONICOTINOID, IS A SYSTEMIC NEUROTOXIN USED TO KILL HARMFUL BURROWING SHRIMP, PESTS THAT CAN DECIMATE FARMED SHELLFISH POPULATIONS.

Imidacloprid's rise in popularity and continued use in Washington has spurred severe criticism from environmental groups who emphasize its aquatic mobility, persistence in aquatic environments, and high toxicity to non-target invertebrates. However, industry representatives have voiced their concerns that, if the use of imidacloprid were to be restricted in the state, they would have no viable alternatives to control the shrimp, as everything from mechanical removal to alternative aquaculture techniques has been attempted and failed. In September 2018, the Washington Department of Ecology (Ecology) issued an opinion on imidacloprid use in the shellfish aquaculture industry when it finalized the denial of a permit from the Willapa-Grays Harbor Oyster Growers Association (WGHOGA) to use the pesticide on oyster beds in Willapa Bay and Grays Harbor.

Permit Grant and Application Withdrawal

WHGOGA originally asked for permission to use imidacloprid in 2015, when it applied for a permit to aerially spray the pesticide over thousands of acres of shellfish beds in Willapa Bay and Grays Harbor. Ecology initially granted the permit, which spurred an incredible amount of public outcry from federal agencies, conservation groups, restaurant owners, and residents. Ecology justified its decision by stating that imidacloprid was less toxic than Carbaryl, and its use would be unlikely to result in significant harm to the environment. It also noted that it would require that permittees conduct monitoring to ensure the absence of any significant harmful effects.

Critics of the decision, such as the National Marine Fisheries Service (NMFS), noted that burrowing shrimp are native to the area and play an important role in the ecosystem, including as prey for species such as Dungeness crab, green sturgeon, and salmon. NMFS also stated that use of the pesticide would "kill nearly all benthic organisms on acreage directly treated."[4] Furthermore, the U.S. Fish and Wildlife Service pointed to research that clearly indicated that the effects and damages of the imidacloprid spraying would not be limited to the treatment sites.[5] In response to this backlash and consumer pressure, several major companies, such as Taylor Shellfish Farms, pulled out of the permit, leading the remaining oyster growers to withdraw their permit application while the state conducted additional studies. In April 2017, WGHOGA renewed its permit application, again seeking to use imidacloprid to limit populations of burrowing shrimp in farmed oyster beds.

Tentative Permit Denial

In April 2018, Ecology determined that the environmental harm from WGHOGA's proposed imidacloprid use would be too great and tentatively denied its renewed request for a permit, meaning that the department's decision would be subject to a 35-day public comment period before finalization. During its environmental assessment, the department studied the available science from the EPA, Health Canada, and the European Food Safety Authority, along with hundreds of other new reports. Additionally, it conducted its own environmental review, finding that imidacloprid use could cause "significant, adverse, and unavoidable impacts to both sediment quality and invertebrates living in the sediments and water column."[6]

Specifically, Ecology detailed the following six environmental impacts as key reasons for denying WGHOGA's request for a permit: 1) significant, unavoidable impacts to sediment quality and benthic invertebrates; 2) negative impacts to juvenile worms and crustaceans in areas treated with imidacloprid and nearby tidal areas; 3) negative impacts to fish and birds caused by killing sources of food and disrupting the food web; 4) concern about non-lethal impacts to invertebrates in the water column and sediment; 5) a risk of impacts from imidacloprid even at low concentrations; and 6) increased uncertainty about long-term, non-lethal, and cumulative impacts.[7] The department also estimated that for every one acre of tideland that would be chemically treated by imidacloprid, the pesticide would spread out and affect five acres, causing significant impacts to the environment, even at low concentrations. Because of these findings and existing data, the department determined that WGHOGA's proposal could not meet the legal requirements of Washington's state environmental sediment and water quality protection laws.

Oyster shells on Willapa Bay courtesy of George Wesley & Bonita Dannells.

Final Permit Denial

On September 28, 2018, Ecology issued its final decision to deny WGHOGA's use of imidacloprid on oyster beds in Willapa Bay and Grays Harbor, deeming use of the pesticide to be too risky. More than 3,000 public comments regarding the proposed use of the pesticide further solidified the department's initial decision by identifying more than a dozen new journal articles directly related to the negative environmental impacts of neonicotinoids. Additionally, comments highlighted recent policy decisions made by Health Canada and the European Union that would support the denial of WGHOGA's permit application. Specifically, Health Canada's Pesticide Management Regulatory Agency proposed phasing out all agricultural and most other outdoor uses of imidacloprid over the next three to five years, while, in April, the European Union voted to ban three neonicotinoids, including imidacloprid, due to their potential to cause environmental harm.

The department informed WGHOGA of the permit denial by letter, within which it reiterated that a permit cannot be issued if a discharge "would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria."[8] However, the department also noted that WGHOGA would have the right to appeal the final decision to the Pollution Control Hearing Board within 30 days of receiving the letter.

Conclusion

It remains to be seen whether WGHOGA will challenge Ecology's final decision, and, if so, whether such a challenge would be successful. If the permit denial stands, aquaculturists in Willapa Bay and Grays Harbor will have to explore new ways to control burrowing shrimp populations in order to save their harvests from potential destruction. However, as industry representatives have noted, this will be a tall order considering that many other chemical and mechanical removal methods have failed in past attempts. Washington's apparent success in limiting the application of imidacloprid illustrates the power states have to limit pesticide use absent applicable federal regulations. Over the next several years, agriculturists and aquaculturists alike may have to contend with similar, state-level permitting decisions that could even further restrict their ability to access and use pesticides on their farms.

Endnotes

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

2 *What is a Pesticide?*, United States Environmental Protection Agency.

3 40 C.F.R. § 180.472.

4 Phuong Le, *Pesticide OK'd for Washington oyster beds amid concerns*, AP News (May 3, 2015).

5 *Id.*

6 *Shellfish growers' request to use neonicotinoid pesticide too risky for Washington's environment*, State of Washington Department of Ecology (April 9, 2018).

7 *Id.*

8 Letter from Rich Doenges, Southwest Region Manager, Water Quality Program, State of Washington Department of Ecology, to Ken Wiegardt, President, Willapa-Grays Harbor Oyster Growers Association, (Sept. 27, 2018).

Way Down Yonder on the Docket:

Florida/Georgia Water Dispute Sent Back for Further Review

Grace M. Sullivan[1]

The Apalachicola River courtesy of Doug McGrady.

On June 28, 2018, the U.S. Supreme Court issued a ruling that will, in effect, continue a decades long water dispute between Florida and Georgia. Florida sought to limit Georgia's water consumption from the Apalachicola-Chattahoochee-Flint river basin (ACF Basin). A Special Master appointed by the Court oversaw eighteen months of discovery and a five-week trial, ultimately recommending that the Supreme Court dismiss the case in February 2017. The Supreme Court, however, declined to accept the recommendation and remanded the case back to the Special Master. The Court found there was more work needed to determine how much water would reach Florida as a result of a Georgia consumption cap and whether that amount of water would redress the harm claimed by Florida.

History of the ACF Basin Dispute

The dispute between Florida and Georgia over use of the ACF Basin has spanned nearly thirty years. A drought in 2012 almost wiped out the oyster industry in the Apalachicola Bay region in Florida, which incited the present legal action. In November 2013, Florida requested permission from the U.S. Supreme Court to sue Georgia for "equitable apportionment" of the ACF Basin. Florida complained that Georgia's overuse caused the collapse of the oyster industry and sought to limit the amount of water that Georgia could take from the ACF Basin. The Supreme Court, as the only court with jurisdiction to hear a lawsuit between two states, prefers that states resolve water disputes among themselves.[2] Here, however, the states have attempted and failed to formally negotiate a cooperative agreement out of court

since 1992, so the Supreme Court granted permission for Florida to bring a suit in October 2014.[3]

The U.S. Army Corps of Engineers (Corps) is an important player in the historic water dispute, because it operates dams and reservoirs along the ACF Basin, namely the Woodruff Dam, which controls the amount of water that ultimately reaches Florida via the Apalachicola River. However, as a government entity, the Corps exercised its sovereign immunity to not be made party to this lawsuit or legally bound by any decision from the Supreme Court. The Special Master and the Supreme Court ultimately disagreed on the necessity of the Corps as a party to the lawsuit.

The Court's Ruling

The Supreme Court in *Florida v. Georgia* did not rule on the merits of the entire dispute but rather on the single issue of redressability. The Special Master found that Florida failed to show that its injuries could "effectively be redressed by limiting Georgia's consumptive use of water from the [ACF] Basin without a decree binding the Corps."[4] The Court first asked whether: 1) Florida suffered harm as a result of the decreased flow into the Apalachicola; 2) Florida showed that Georgia took more than its equitable share of water from the Flint River; and 3) Georgia's inequitable use of ACF Basin waters injured Florida. Both the Supreme Court's opinion and the Special Master's report assume the answer is "yes" to these questions.

THE SUPREME COURT IN *FLORIDA V. GEORGIA* DID NOT RULE ON THE MERITS OF THE ENTIRE DISPUTE BUT RATHER ON THE SINGLE ISSUE OF REDRESSABILITY.

The opinions focused their discussion on the question of "Would an equity-based cap on Georgia's use of the Flint River lead to a significant increase in stream flow from the Flint River into Florida's Apalachicola River?"[5] The Special Master had determined that Florida did not meet its burden of proof of "clear and convincing evidence" to show that an equity-based cap would lead to an increased stream flow to Florida.[6] The majority opinion, however, held that the clear and convincing evidence standard used by the Special Master was too strict.

The Supreme Court outlined its approach to determining Florida's required burden of proof like a mosaic of standards from prior equitable apportionment cases. Most notably, the Court said that a complaining state, where two or more states have an equal right to reasonable use of a water system, has a "much greater" burden of proof than a private party seeking an injunction.[7] The Court followed with precedent from another case, which requires the complaining state to show that its right to the water is not merely technical but is tied to a corresponding benefit.[8] Finally, the Court noted that equitable apportionment is flexible rather than formulaic and must consider all relevant factors.[9]

The majority opinion determined that the Special Master was too strict in requiring that Florida show by clear and convincing evidence that a decree from the Supreme Court would redress its injuries. Instead, the Court said that Florida's duty is to show that "an effective remedial decree" could be fashioned by the court to redress its injuries. Further, the Supreme Court charged the Special Master to delve into the question of whether a cap on Georgia's water use would increase water in the Apalachicola River, as well as how much water would need to be conserved from Georgia and ultimately reach Florida in order to redress its injuries.

Sovereign Immunity

Another important distinction between the Supreme Court's holding and the Special Master's report is whether the Corps absence from the case is outcome-determinative. After the Corps declined to waive its sovereign immunity, Georgia moved to dismiss Florida's complaint because it failed to join a necessary party. Florida opposed the motion to dismiss by conceding that it had no quarrel with or claim for relief against the Corps, and the Special Master, according to Florida's concession, denied the motion and allowed the case to proceed without the Corps as a party.[10]

The Corps operates the Woodruff Dam, which controls the flow of water into Florida's Apalachicola River. The Corps makes decisions according to water availability and follows the protocol of its self-published Master Manual. During seasons of normal water flow it allows a certain amount of water to flow through the dam, but during seasons of drought it may restrict the flow through the dam in order to retain water in the reservoir. Because the Corps operates the dam at its discretion and is not a named party in the case, the Corps will not be bound by any decision from the Supreme Court with respect to allocation of water among the states. Nor would the Corps have a duty to make sure the increased water from a possible consumption cap in Georgia makes it to Florida.

Both the dissenting opinion and the Special Master's report express concern about this factor and suggest that the Corps' absence from the case would make an equitable cap ineffective to redress Florida's injuries. The majority,

The Chattahoochee River courtesy of Ken Lund.

however, quoted the Corps' most recent Master Manual to support a conclusion that the Corps' discretion would not preclude a decree for relief. The manual states that the Corps will review any Supreme Court decision and "consider any operational adjustments that are appropriate in light of that decision."[11]

Conclusion

The Supreme Court presented its decision to remand *Florida v. Georgia* as a refusal to shirk its Constitutional duty to resolve interstate water disputes. The Court reiterated that even where drafting an equitable decree is difficult, technical, complicated, the duty must be fulfilled. On August 9, 2018, the Court appointed a new Special Master in the case, who could further delay an answer by choosing to rehear the original proceedings in addition to considering the Court's new questions.[12] The Court remanded the case because additional factual findings are necessary, and it suggested that approximation and estimation might be the key to an equitable answer for Florida and Georgia in the future.

Endnotes

1 Grace M. Sullivan, 2L at the University of Mississippi School of Law.

2 Florida v. Georgia, 138 S. Ct. 2502, 2509 (2018).

3 *Id.*

4 Report of the Special Master at 30, *Florida v. Georgia* 138 S. Court. 2502 (2018) (No. 142 Orig.).

5 *Florida*, 138 S. Court at 2519.

6 Report of the Special Master at 47.

7 United States v. Willow River Power Co., 324 U.S. 499, 505 (1945); Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931).

8 Kansas v. Colorado, 206 U.S. 46, 109 (1907).

9 South Carolina v. North Carolina, 558 U.S. 256, 271 (2010).

10 *Florida*, 138 S. Court at 2531.

11 *Id.* at 2526.

12 Tony Moro, *Supreme Court Discharges Veteran Special Master in 'Florida v. Georgia' Water Dispute*, The National Law Journal (2018).

Texas Supreme Court Says Local Bag Ban Must Be Trashed

Terra Bowling

Photograph of plastic bags courtesy of Victor Andronache.

The use of plastic bags is a contentious issue across the United States. Some state laws ban or limit plastic bag use while others prohibit local governments from regulating plastic bags. Ban advocates worry about litter and plastic pollution. They claim the bans will cut down on fossil fuels used for manufacturing. Opponents claim plastic bag bans hurt the economy, creating a consumer tax and compelling people to shop online. They also say single-use plastic bag alternatives are more harmful to the environment in the long run. These bans and "bans on bans" are regularly being challenged in court. Most recently, the Texas Supreme Court struck down a local ordinance banning merchants from providing single-use plastic bags.[1]

Background

The City of Laredo enacted an anti-litter ordinance that prohibited merchants from providing "single use" plastic and paper bags to customers. The stated objectives of the ordinance were: 1) to "promote beautification of the city" through litter prevention; 2) to reduce costs of removing bags from the municipal sewer system; and 3) to protect life and property from flooding caused by the bags clogging stormwater channels.[2] The Laredo Merchants Association sued the city, arguing that the Texas Solid Waste Disposal Act (Act) preempted the ordinance. Pursuant to the Texas Constitution, a city ordinance may not conflict with state law.

THE CITY OF LAREDO ENACTED AN ANTI-LITTER ORDINANCE THAT PROHIBITED MERCHANTS FROM PROVIDING "SINGLE USE" PLASTIC AND PAPER BAGS TO CUSTOMERS.

The Act states that "[a] local government ... may not adopt an ordinance ... to ... prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law..."[3] The trial court granted summary judgment in favor of the city, finding that the Act and the ordinance could be interpreted in a way that both could be effective. The court of appeals reversed that decision, holding that the Act preempted the ordinance. The city appealed to the Texas Supreme Court.

Preemption

On appeal, the Texas Supreme Court closely examined whether the legislature intended to preempt local regulations like the ordinance. The court noted that the language of the Act clearly showed that the state's broader interest in "controlling the management of solid waste,"[4] as well as a narrow and specific interest in preempting local regulation of containers or packages for solid waste purposes. The city argued that it didn't enact the ordinance for the purpose of solid waste management. Ultimately, the court did not agree, finding the ordinance was adopted for solid waste management purposes. "The Ordinance's stated purposes are to reduce litter and eliminate trash—in sum, to manage solid waste, which the Act preempts. The Ordinance cannot fairly be read any other way."[5]

The city also argued that "bag" did not fall within the Act's definition of container or package. Specifically, the city thought the Act should only apply to containers or packages that have already been discarded or to trash receptacles, not new plastic bags. The court found that the city's interpretation was not consistent with a plain reading of the Act.

Finally, the city argued that it should be allowed to regulate under its local government authority. The court noted that although the city may have the power to regulate, it was regulating in a manner unauthorized by state law. The court affirmed the court of appeals' decision. The court remanded the case to the trial court for consideration of attorney fees and costs.

Conclusion

Until the Texas Legislature acts to allow local bans, local governments are prohibited from enforcing local bag bans. In July, the Texas Attorney General sent letters to 11 Texas cities warning that continued use of plastic bag bans is illegal.[6] Despite the "ban on bans," retailers can decide if they want to continue issuing plastic bags. Consumers can also choose to keep using their reusable bags.

Endnotes

1 City of Laredo v. Laredo Merchants Ass'n, 2018 WL 3078112 (Tex. June 22, 2018).

2 Laredo, Tex., Code of Ordinances § 33-501.

3 TEX. HEALTH & SAFETY CODE § 361.0961(a)(1).

4 *Id.* § 361.002(a).

5 *City of Laredo,* 2018 WL 3078112, at *6.

6 Andy Jechow and Brittany Glas, *Austin, other Texas cities get bag ban warning after court ruling*, kxan.com (July 2, 2018).

More Information

For more information on plastic ban legislation by local governments and the impact of state laws, please see the NSGLC's recent response to an advisory request at http://nsglc.olemiss.edu/Advisory/pdfs/plasticbag.pdf. The memo examines the state laws that prohibit local governments from setting local standards on plastic bag use, state laws that ban or limit plastic bag use, and actions by local governments. It also discusses the policy arguments used by advocates for and against plastic bag use, as well as some considerations for Sea Grant professionals related to Sea Grant's nonadvocacy best practices.

The NSGLC's advisory service is a legal research service provided free of charge to the Sea Grant College Program and its constituents. Please note, the information is legal research provided for education and outreach purposes and does not constitute legal advice or representation. Please see our website for past requests at http://nsglc.olemiss.edu/Advisory.

How an Obama Administration Regulation Just Became Law in Half the Country

Morgan L. Stringer[1]

In 2015, the Obama Administration issued a rule to clarify which waters fall under the "waters of the United States" protected by the Clean Water Act. The 2015 Waters of the United States Rule (WOTUS Rule) never went into effect due to litigation by various states, environmental organizations, and manufacturing and agricultural groups. The Sixth Circuit Court of Appeals issued a nationwide stay of the rule in 2016.[2] However, in January 2018, the U.S. Supreme Court held that WOTUS challenges must be litigated at the district court level first.[3] While the battle to repeal the 2015 Rule progressed in the courts, the Trump Administration sought to use executive power to repeal the rule.

In February 2017, President Trump issued an executive order directing the EPA and the U.S. Army Corps of Engineers to revise or rescind the 2015 WOTUS Rule.[4] The agencies published "The Suspension Rule," delaying the effective date for the 2015 WOTUS Rule until 2020.[5] In the meantime, the agency's 1980 interpretation of "waters of the United States" would apply. In August 2018, however, the U.S. District Court for South Carolina issued a ruling that effectively makes the Obama Administration's WOTUS Rule the law of the land, at least for 26 states.

The court found that the agencies did not follow the Administrative Procedure Act (APA) in promulgating the Suspension Rule. The APA requires a "notice-and-comment period," whereby federal agencies publish a proposed rule which the public is invited to comment on. After examining the comments and any new information, the agency publishes the final rule and addresses concerns raised by the comments. The final rule then becomes a regulation.[6] The South Carolina District Court held that the Trump Administration improperly excluded comments on the merits of the 2015 or 1980 Rule. When issuing a suspension rule that effectively reinstates a prior regulation, comments regarding the rule's substance and merits must be considered.[7] The Trump Administration argued that the Suspension Rule did not "repeal and replace" the 2015 Rule, but rather was a mere suspension to provide clarity pending litigation over the 2015 Rule. The court noted that regulations facing legal challenges are not a rarity, and the administrative procedures must still be followed.[8] Therefore, the court stayed the Suspension Rule, meaning that the 2015 WOTUS Rule finally went into effect.

The court found that the agencies did not follow the Administrative Procedure Act (APA) in promulgating the Suspension Rule.

Next, the court addressed the scope of the stay of the Suspension Rule. The Trump Administration argued that the scope should be narrowed either to the District of South Carolina or states within that federal circuit. The plaintiffs argued that individual members of its group enjoyed waters across the country recreationally. For example, members enjoyed kayaking and fishing across the nation. Therefore, a nationwide stay provided the only adequate relief. The court agreed and issued the nationwide stay.

Despite the nationwide stay, it is not truly effective nationwide. Federal district courts in Georgia, North Dakota, and Texas issued preliminary injunctions to prevent the 2015 WOTUS Rule from going into effect pending litigation over the merits of the rule. The District Court of North Dakota granted a preliminary injunction to 13 states challenging the 2015 WOTUS Rule. The Southern District of Georgia followed suit, granting a preliminary injunction to 11 other states.[9] On September 18th, the Southern District of Texas issued its ruling in favor of a preliminary injunction for Texas, Louisiana, and Mississippi.

The district courts reasoned that they did not want the states to "switch over" to the 2015 Rule while courts still heard challenges to it.[10] The 27 states under these rulings follow the 1980 Rule, while the 23 remaining states fall under the nationwide injunction and follow the

Photograph of a dock in Florida courtesy of Matt Kieffer.

2015 Rule. Essentially, half the country follows different federal regulations. Additionally, upcoming district court rulings on the merits of the 2015 Rule may lead to contradictory rulings. These splits in which waters fall under federal jurisdiction signify that the Supreme Court may, at long last, decide what "waters of the United States" actually means; or at least, once again, what it does not mean.

Endnotes

[1] Morgan L. Stringer is a 2018 graduate of the University of Mississippi School of Law and a legal consultant.

[2] In re Dep't of Def., 817 F.3d 261 (6th Cir. 2016).

[3] Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018).

[4] Exec. Order 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017).

[5] Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

[6] 5 U.S.C. § 553(c).

[7] South Carolina Coastal Conservation League v. Pruitt, No. 2-18-cv-330-DCN (D.S.C. Aug. 16, 2018).

[8] *Id.* at 13.

[9] North Dakota v. Envtl. Protection Agency, No. 3:15-cv-00059-DLH-ARS, (D.N.D. March 23, 2018); Georgia v. Pruitt, No. 2:15-cv-79, (S.D. Ga. June 8, 2018).

[10] Texas v. Envtl. Protection Agency, No. 3:15-cv-00162, (S.D. Tex. Sept. 12, 2018).

Groundwater in California - Does the Public Trust Doctrine Apply?

Catherine Janasie[1]

Many know that California is a powerhouse in agricultural production. In fact, California grows over a third of the vegetables and two-thirds of the fruits and nuts grown in the United States. Also well known are California's water woes. For instance, from 2011 to 2017, California faced a historic drought. Not surprisingly, agriculture is a huge water user in the state, irrigating about 9.6 million acres and using roughly 80% of all the water used in the state. Recently, a case put a county's groundwater use and its surface water resources in the spotlight. In particular, an environmental group asked the courts to determine whether the County of Siskiyou (County) and the State Water Resources Control Board (Board) need to consider the state's public trust doctrine when approving groundwater use in the region.

Background

Siskiyou County is located in Northern California and borders Oregon. The county is the second most ecologically diverse county in the United States and has a rich agricultural tradition. The agricultural commodities of the county include livestock, field crops, and in particular, strawberries. Located in Siskiyou County, the Scott River is a tributary of the larger Klamath River. In addition to providing vital habitat for coho salmon, the river is also popular among rafters and kayakers. Efforts have been made in the region to have agricultural entities use water more efficiently and to restore habitat for salmon.

The Scott basin in Siskiyou County is considered a critical groundwater resource under the state's Sustainable Groundwater Management Act (SGMA). The SGMA was signed into California law in 2014 with the goal of providing a framework for groundwater management in the state. The Act requires high and medium priority basins to cease over drafting groundwater and bring these basins to sustainable levels within 20 years or by a set date. This is the first regulation in California aimed at conserving and sustaining groundwater sources. Further, the SGMA is meant to be a locally driven process that will provide the opportunity for public input and participation.

The Public Trust Doctrine

The Public Trust Doctrine has a firm basis in Roman and English common law, and these legal regimes recognized water and its associated tidelands as an important common resource. The courts in the United States decided to follow the English common law, establishing that states hold the title to the tidelands and submerged lands below navigable waters in trust for the benefit of the residents of the state.

The Public Trust Doctrine has a firm basis in Roman and English common law, and these legal regimes recognized water and its associated tidelands as an important common resource.

The seminal United States Supreme Court case on the Public Trust Doctrine is *Illinois Central Railroad Co. v. Illinois*. In the case, the Court outlined the contours of the public trust and differentiated it from other property interests, stating that "the state holds title to the lands under the navigable waters" of the state "in trust for the people of the state" for the purposes of navigation, commerce, and fishing. The Court also prohibited the transfer of trust property unless it benefits the trust, such as through building wharves and docks.

Thus, all states must manage their public trust resources to these standards. However, states can extend the public trust to more lands or more uses within their state. In fact, many state courts have noted that the trust is not static and should evolve to accommodate changing conditions and the public's needs. For instance, in the famous "Mono Lake" case, the Supreme Court of California determined that the public trust required ecological effects to be considered when allocating water resources. Further, the court ruled that the doctrine requires consideration of diversions from non-navigable tributaries if those diversions will affect public trust resources.

PTD and Groundwater

In this case, the Environmental Law Foundation (ELF) asked the court to rule on whether the County and the Board have a public trust duty under California's common law to consider any potential negative impacts of groundwater well permits on the navigable Scott River. Thus, ELF was not claiming at this time that the County and Board had violated any duty under the public trust doctrine. Rather, it was simply seeking to establish that a public trust duty applied when groundwater extractions were negatively affecting a navigable waterway.

The County made two main arguments in trying to establish that no public trust duty existed. First, the County asserted that the public trust doctrine does not apply to the state's groundwater resources. Second, even if the public trust doctrine did apply, the County claimed that the SGMA had supplanted the doctrine as it applies to groundwater. In ruling against the County and the Board, the court relied heavily on the Mono Lake case mentioned above.

The decision in the Mono Lake case involved California's well-established water rights system, which had been codified in the 1913 Water Commission Act. The water right in question was a water diversion from non-navigable tributaries not covered by the public trust doctrine that would provide water to the City of Los Angeles. However, the diversion caused the water level in Mono Lake to drop, harming its scenic and ecological attributes. Noting that both the integrity of the lake and Los Angeles's need for water were important and valuable, the court ruled that the public trust must be considered, even if the diversions were from non-trust waters, due to the effect of the diversions on navigable, public trust waters.

The Court's Reasoning

In rejecting both of the County's arguments, the court relied heavily on the Mono Lake decision. First, the court found fault with the County's argument that the public trust doctrine does not cover groundwater. The court noted that the public trust doctrine does not apply to all groundwater, but when a diversion is from a non-navigable water source and affects a navigable waterway, the public trust is implicated. Thus, "the determinative fact is the impact of the activity on the public trust resource" and "whether the challenged activity allegedly harms a navigable waterway."

The court also rejected the county's contention that the SGMA supplanted any common-law duty of the County and Board, including the public trust doctrine. The court noted that statutes generally do not supplant common law doctrines, but statutes can if it appears that the legislature intended to "occupy to field" or, in other words, to completely cover the subject. Again, the court relied on Mono Lake's discussion of the relationship between the public trust doctrine and the state's water rights system. While noting the importance of each system, the Mono Lake court determined that both systems should be accommodated and neither occupied the field. Using the reasoning from the Mono Lake case, the court here noted that the state's water rights system was more comprehensive than the SGMA, especially considering that not all groundwater basins in the state are covered by the Act. Thus, the SGMA, like the water rights systems, could accommodate the public trust doctrine.

Conclusion

The court's conclusions could certainly greatly impact agricultural and other groundwater users in the state. But it is also important to note the limits of the court's decision. First, decision makers will only have to consider the public trust when groundwater withdrawals will negatively impact navigable waters. Second, only a consideration of the public trust is required. Thus, as long as the decision maker takes the trust into account, it could approve the water withdrawals if it finds the need for the water is greater than the value of the trust resources.

Endnotes

1 National Sea Grant Law Center, Research Counsel II.

2 *California Agricultural Production Statistics*, Cal. Dep't of Food and Agric.

3 *California is no stranger to dry conditions, but the drought from 2011-2017 was exceptional,* U.S. Drought Portal.

4 *Agricultural Water Use Efficiency*, Cal. Dep't of Water Res.

5 Envtl. Law Found. v. State Water Res. Control Bd., 237 Cal.Rptr.3d 393 (Cal. Ct. App. 2018).

6 *Agricultural Department*, Cnty. of Siskiyou Cal.

7 *Scott River Restoration*, Cal. Trout.

8 *SGMA Groundwater Management*, Cal. Dep't of Water Res.

9 146 U.S. 387 (1892).

10 *Id.* at 452.

11 Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709 (Cal. 1983).

12 Envtl. Law Found. v. State Water Res. Control Bd., 237 Cal.Rptr.3d 393, 396-97 (Cal. Ct. App. 2018).

13 Nat'l Audubon Soc'y, 658 P.2d at 732.

14 Envtl. Law Found., 237 Cal.Rptr.3d at 402-03.

15 *Id.* at 406.

16 *Id.* at 407-08.

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

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Long Beach, CA

For more information, visit: https://www.estuaries.org/2018-summit-general-info

2019 Gulf of Mexico Oil Spill and Ecosystem Science Conference

February 4-7, 2019
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For more information, visit: http://bit.ly/2019gomsci