The SandBar

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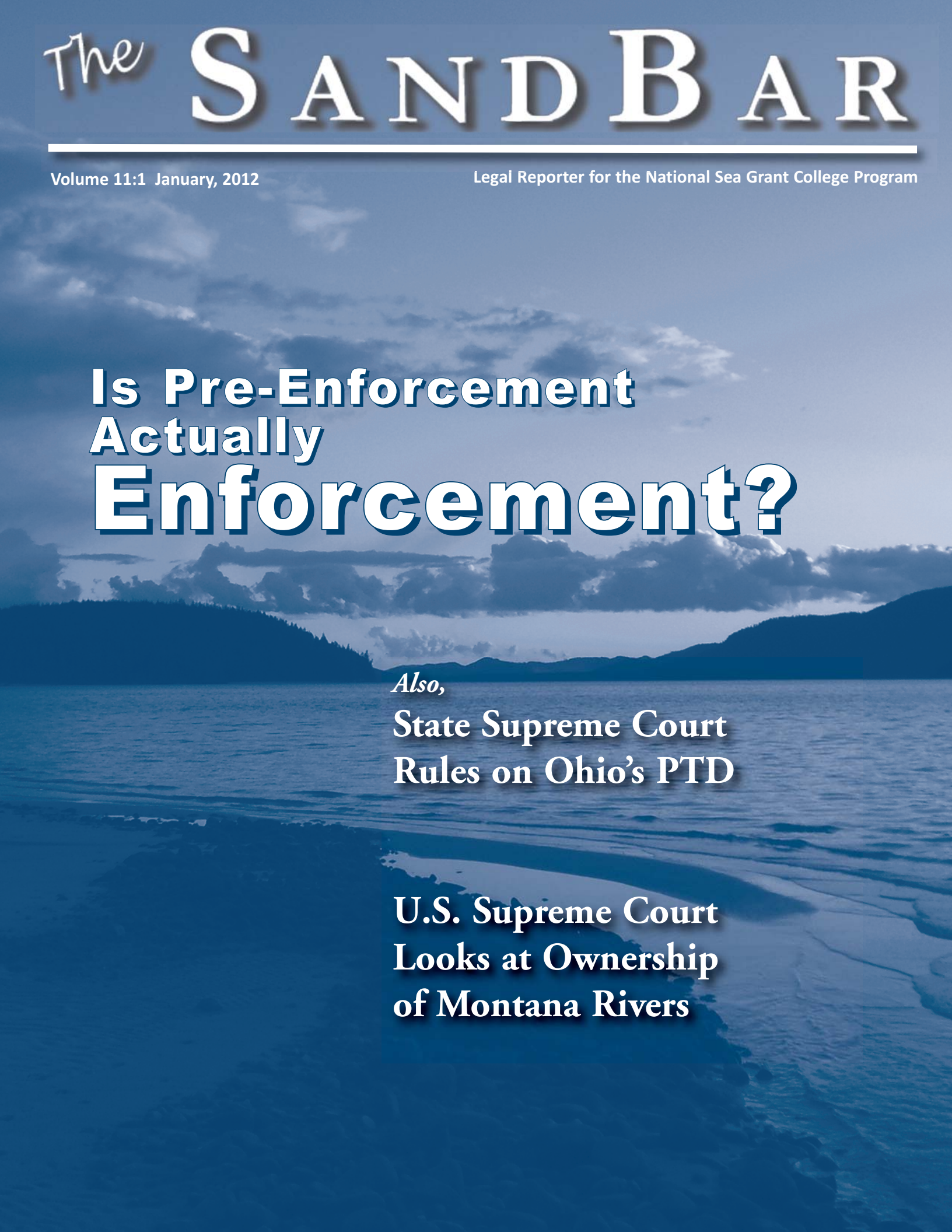
Legal Reporter for the National Sea Grant College Program



Is Pre-Enforcement Actually Enforcement?

Also,

State Supreme Court Rules on Ohio's PTD

U.S. Supreme Court Looks at Ownership of Montana Rivers

From the Editor

Happy New Year from the National Sea Grant Law Center!

As we begin 2012, we look forward to new exciting projects and opportunities, from fulfilling research requests to participating in conferences. Please let us know if your program has any research needs in the upcoming year. We can address legal questions through our advisory service, which is provided free to the Sea Grant College Program and its constituents.

I'd also like to take this opportunity to note that Waurene Roberson, our web developer and publication designer, retired at the end of December. Good luck Waurene, and thank you for 13+ years of dedicated service!

If you have any suggestions, requests or recommendations for The SandBar, please let us know. We'd love to hear from you. Again, happy new year, and here's hoping we all meet the goals we set for the new year!

As always, thanks for reading *The SandBar*!

Terra

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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*.

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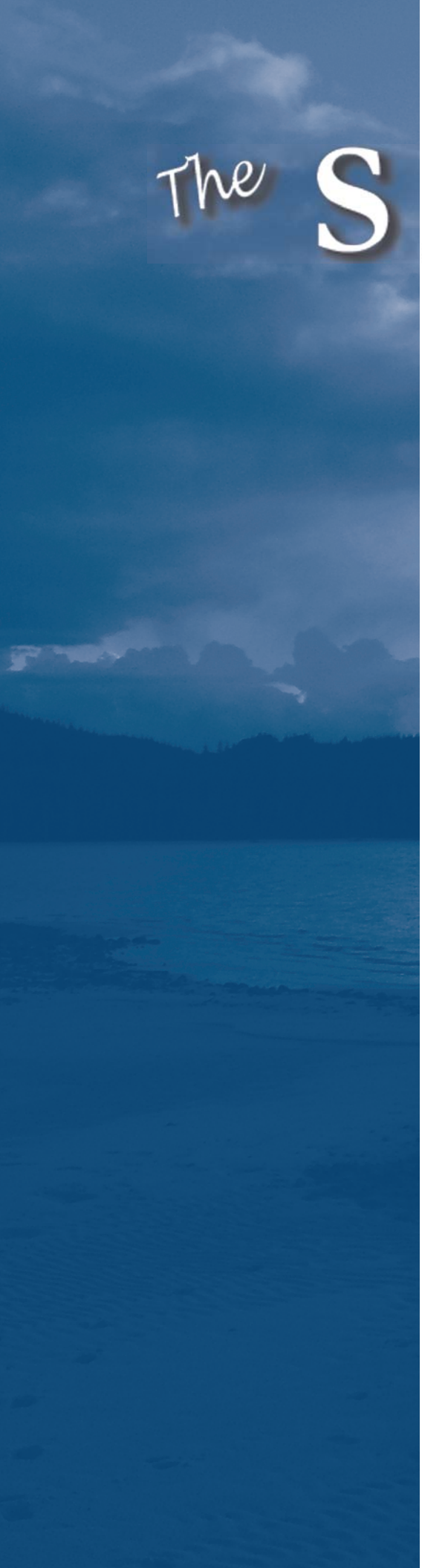

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Contents

Is Pre-Enforcement Actually Enforcement? 4

State Supreme Court Rules on Ohio's PTD 7

U.S. Supreme Court Looks at Ownership of Montana Rivers 10

The Battle of Saugatuck Dunes Continues 12

Polar Bear Litigation Update 14

Littoral Events 16

Photograph of wetlands courtesy of NRCS.

IS PRE-ENFORCEMENT ACTUALLY ENFORCEMENT?

Christopher Motta-Wurst[1]

The U.S. Supreme Court will soon decide if property owners may challenge Environmental Protection Agency (EPA) compliance orders alleging violations of the Clean Water Act (CWA) in court prior to the EPA's enforcement of the orders. The Court's decision in the case will likely affect the agency's ability to address suspected violations, as well as how the recipients of these orders react to the orders.

Background

Chantell and Michael Sackett purchased an undeveloped piece of residential property in Idaho with intentions of building a single family home on the land. After the Sacketts filled a portion of the property with dirt and rock in preparation for construction, the EPA issued a compliance order instructing the couple to return the land to its original state. The agency alleged that because the Sacketts' property contained wetlands, the couple violated the CWA by discharging pollutants into the waters of the United States without a permit. The order stated that noncompliance would result in either civil penalties of up to $32,500 per day of violation or administrative penalties of up to $11,000 per day for each violation.

The Sacketts sought a hearing with the EPA to argue that their land did not in fact contain wetlands as the EPA claimed. The EPA denied a hearing, and the Sacketts filed a claim in federal district court alleging that the issuance of a compliance order without a hearing is a violation of their procedural due process rights. The district court dismissed the Sacketts' claims, and the couple appealed to the U.S. Court of Appeals for the Ninth Circuit.

Ninth Circuit Findings

The Ninth Circuit affirmed the district court's ruling that the CWA "precludes judicial review" of compliance orders until the EPA brings an enforcement action.[2] The Ninth Circuit noted that the purpose of compliance orders is to quickly identify environmental problems without getting immediately bogged down in litigation. The court ruled that the compliance order itself does not amount to an enforcement action because the CWA does not empower the EPA to assess penalties until the EPA can prove that the CWA was actually violated.[3]

The court rejected the Sacketts' argument that the compliance order constituted a due process violation. The court reasoned that the only way not allowing judicial review for pre-enforcement administrative orders violates due process is when the potential consequences for violating CWA compliance are so "onerous and coercive" that they "foreclose all access to the courts" and create "a constitutionally intolerable choice."[4] The court did not find that there was a "constitutionally intolerable choice" because the Sacketts could seek a permit from the U.S. Army Corps of Engineers to fill their property and build a house, and, if that was denied, they could appeal immediately to a district court. The court also reasoned that the civil penalties that the Sacketts could incur from noncompliance are subject to judicial, not agency, discretion. This means that any penalty would take into account a wide range of factors, including seriousness of violation, economic benefit as result of violation, good-faith efforts to comply, and economic impact of penalty, and would be imposed after the Sacketts had a chance to present their case in a judicial forum.[5]

U.S. Supreme Court

The Sacketts appealed to the U.S. Supreme Court and were granted cert on June 28, 2011, with oral arguments to be heard on January 9, 2012. The Court will address whether the Sacketts can seek pre-enforcement judicial review of the compliance order, and if not, whether that results in a due process violation. The EPA's merits brief argues that the compliance order was not a substantive enforcement action, but merely notice that the agency might seek penalties or pursue a judicial enforcement action; therefore, the Sacketts could not pursue a pre-enforcement challenge until the EPA took a judicial enforcement action. Addressing the due process claims, the agency points out that instead of seeking judicial review, the plaintiffs have the option of addressing the order by either restoring the land, consulting with the appropriate agencies to find a solution, or move forward under the assumption that the CWA did not apply to their land and asserting so in a later enforcement suit.

In briefs submitted to the Court, the Sacketts and their supporters, which include the American Civil Rights Union, the Institute for Justice, the Center for Constitutional Jurisprudence, and the National Federation of Independent Business Small Business Legal Center, argue that the administrative compliance order mechanism creates a system where property owners are essentially left no choice but to comply with a government order without obtaining any sort of judicial review. They contend that this system is the very system that the due process clause was designed to prevent.[6]

Under the CWA, the EPA Administrator may issue a compliance order "on the basis of any information available."[7] The Sacketts argue that if the statute is read literally there is no mechanism to determine if the information is accurate, resulting in

a system with an inherent potential for abuse. The Sacketts contend that the idea that the head of an executive agency can issue an order that carries the weight of law after finding a violation, on the basis of any information available, "is repugnant to the Due Process Clause of the Fifth Amendment."[8]

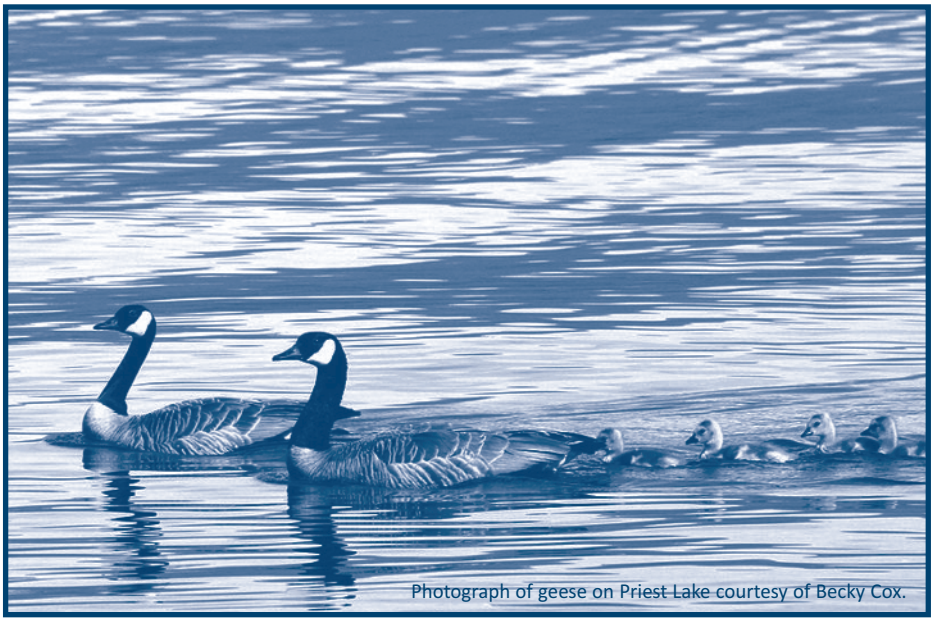
The Sacketts also claim that they do not have the options suggested by the lower courts. The lower courts contended that the Sacketts could apply for a fill permit from the Corps, and, if denied, they would get an immediate hearing in district court on the merits.[9] However, the Sacketts point out that the "average applicant for an individual permit spends 788 days and $271,596 in completing the process."[10] Also, once a compliance order has been issued, "no permit application will be accepted until the compliance order has been resolved."[11] Further, if the Sacketts were to go the route of just ignoring the compliance order they claim that there is no assurance that all, or possibly any, of the potentially crippling $9 million a year in fines for failing to obey the compliance order would be absolved by the court following a decision on the merits.[12] For those reasons, the Sacketts argue that they have suffered a deprivation of property without due process of law and administrative compliance orders violate due process because they do not allow for meaningful review.[13]

Conclusion

The ruling by the Supreme Court could potentially affect more than just a small piece of property in Idaho. A ruling in favor of the EPA would mean that the compliance order system would remain intact and property owners who receive compliance orders would have to either file for expensive permits or ignore the order and then explain themselves in court and hope the fines would be absolved. However, a broad ruling in the Sacketts' favor would limit the EPA's ability to issue compliance orders, a mechanism that allows the EPA to resolve pollution problems quickly because all orders would be subject to judicial review.

Endnotes

1. 2012 J.D. Candidate, Univ. of Mississippi School of Law.
2. Sackett v. U.S. E.P.A., 622 F.3d 1139 (9th Cir. 2010).
3. *Id.* at 1145-46.
4. *Id.* at 1146.
5. *Sackett*, 622 F.3d at 1146-47.
6. Brief for Institute of Justice of Amicus Curiae in Support of Petitioners at 3, Sackett v. U.S. E.P.A., No. 10-1062 (U.S. petition for cert. granted Jun. 28, 2011).
7. 33 U.S.C. § 1319(a)(3).
8. Tennessee Valley Authority v. Whitman, 336 F.3d 1236, 1258 (11th Cir. 2003).
9. *Sackett*, 622 F.3d at 1146.
10. Brief for Center for Constitutional Jurisprudence and National Federation of Independent Business Small Business Legal Center of Amicus Curiae in Support of Petitioners at 15, Sackett v. U.S. E.P.A., No. 10-1062 (U.S. petition for cert. granted Jun. 28, 2011) citing Rapanos v. United States, 547 U.S. 715, 721 (2006).
11. Brief for The American Civil Rights Union of Amicus Curiae in Support of Petitioners at 8, Sackett v. U.S. E.P.A., No. 10-1062 (U.S. petition for cert. granted Jun. 28, 2011) citing 33 CFR 326.3(e)(1)(ii) (2011).
12. *Id.* at 9.
13. Greg Stohr, Mike and Chantell Sackett vs. The EPA, Bloomberg Businessweek, Aug. 11, 2011.



Photograph of geese on Priest Lake courtesy of Becky Cox.

State Supreme Court Rules on Ohio's PTD

Evan Parrott[1]

Recently, the Supreme Court of Ohio held that the public trust boundary in the state of Ohio extends to the natural shoreline, which is "the line at which water usually stands when free from disturbing causes."[2] *In its attempt to clarify the terms in Ohio's public trust laws, the court's decision raised more questions regarding the parameters of public trust rights in Ohio.*

Photograph of Ohio shoreline courtesy of Ohio Sea Grant.

Ohio's Public Trust Doctrine

The public trust doctrine is a principle of English common law that reserves tidelands and lands below navigable waters to the state in trust for the benefit of the public. Ohio was granted title to lands along Lake Erie in trust upon obtaining statehood in 1803.[3] After its admission to the union, each state's law regarding its public trust lands and waters developed independently.

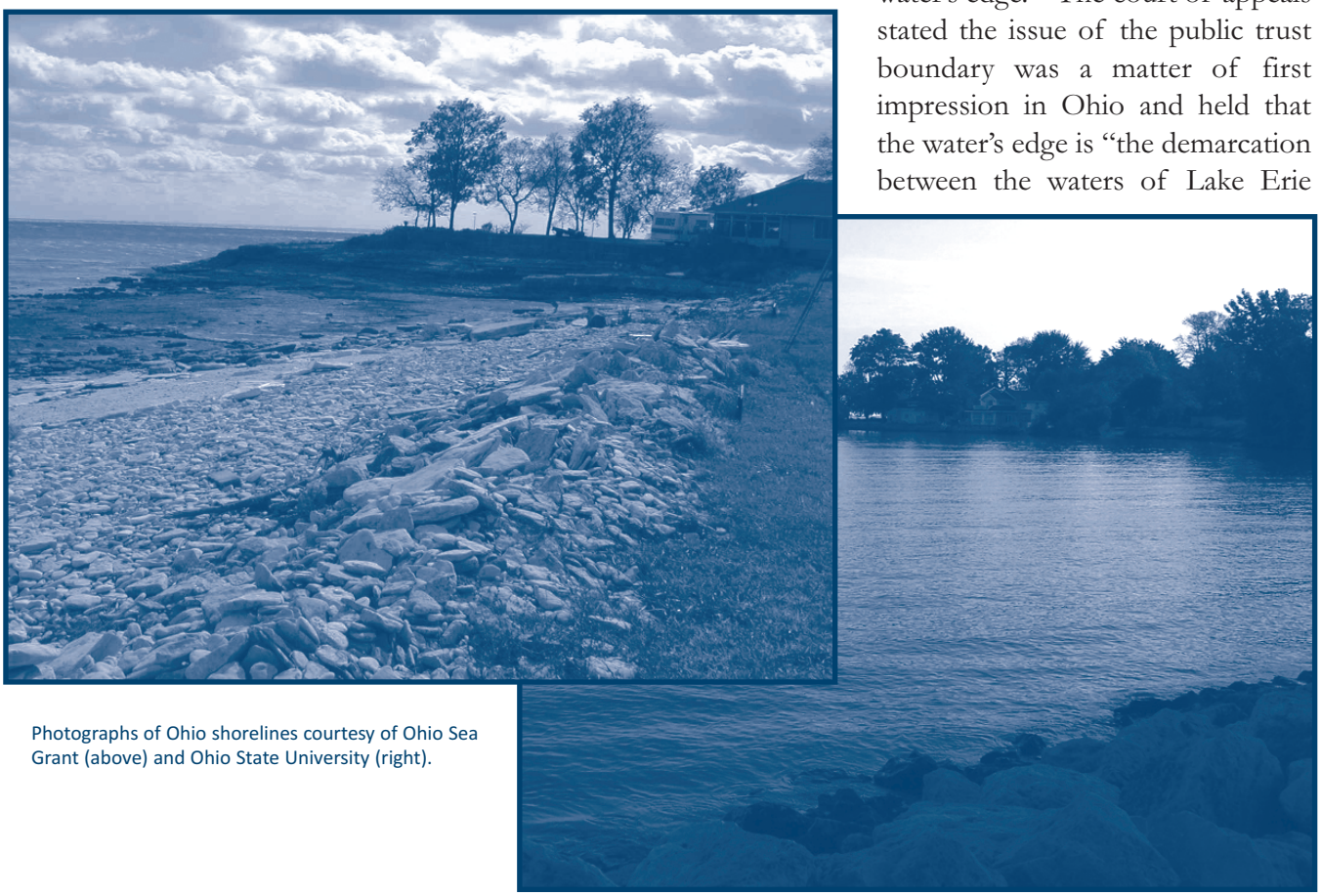
In 1917, Ohio passed the Fleming Act to codify the state public trust doctrine.[4] While many states define the boundary between private property and the public trust in terms of the ordinary high water mark (OHWM); the Fleming Act uses the term "natural shoreline."

Lower Court Decision

At issue in this case is the definition of "natural shoreline" under state law. The case began in 2004 when the Ohio Department of Natural Resources (ODNR) instituted a policy prohibiting property owners along Lake Erie from exercising property rights on land lakeward of the OHWM without a lease, even if the land was specified as their personal property in their deed. Several property owners filed suit challenging the ODNR lease requirement and the delineation of the OHWM as their property boundary. The ODNR and the State of Ohio counterclaimed and two environmental groups intervened, requesting that the court establish the lands and waters up to the OHWM as belonging to the public trust. While the motions were pending, the ODNR abandoned its claims.

The trial court disagreed with all of the parties and found that the public trust boundary did not lie at either the high or low water mark. Instead, in granting summary judgment to the property owners, the court held that under Ohio law, the boundary line for public trust is a "movable boundary consisting of the water's edge, which means the most landward place where the lake water actually touches the land at any given time. . . . [A]nd that the location of this moveable boundary is a determination that should be made on a case-by-case basis."[5]

The remaining defendants and property owners appealed, all challenging the trial court's holding that the variable water's edge serves as the boundary for public trust rights. The court of appeals affirmed the lower court's ruling, holding the public trust boundary is the shoreline, which it defined as "the actual water's edge."[6] The court of appeals stated the issue of the public trust boundary was a matter of first impression in Ohio and held that the water's edge is "the demarcation between the waters of Lake Erie



Photographs of Ohio shorelines courtesy of Ohio Sea Grant (above) and Ohio State University (right).

and the land when submerged thereunder held in trust by the state of Ohio and those natural or filled lands privately held by littoral owners."[7] In real terms, the appellate court's decision means the public may walk along Lake Erie, but only as long as their feet stay in the water. Multiple parties from both the sides of the suit subsequently appealed the decision to the Supreme Court of Ohio.

Clarifying "Natural Shoreline"

Although the court of appeals noted that the issue regarding the boundary of the public trust was a matter of first impression in Ohio, the supreme court was quick to point out that the question had long been settled in Ohio law. In an 1878 Ohio Supreme Court case, *Sloan v. Biemiller*, the court stated "when a real estate conveyance calls for Lake Erie as the boundary, the littoral owner's property interest 'extends to the line at which the water usually stands when free from disturbing causes.'"[8] In 1916, the Ohio Supreme Court recognized the public trust doctrine and discussed the rights of both the public and the littoral property owners at length.[9] As part of the court's decision, it urged the General Assembly to pass legislation that would clarify Ohio's application of the public trust doctrine, specifically, to "determine and define what constitutes an interference with public rights, and that [would] likewise, in a spirit of justice and equity, provide for the protection and exercise of the rights of the shore owners."[10]

The General Assembly did just that with the Fleming Act of 1917.[11] However, the Fleming Act did not define the boundary as the OHWM, but instead used the term "natural shoreline."[12] The court stated that because the General Assembly enacted the Fleming Act in response to the court's request, the court would assume that the General Assembly crafted the act with Ohio common law in mind. Hence, when the Act defined "boundary of the 'territory' of the public trust as the 'natural shoreline,' it ascribed a meaning to that term consistent with the meaning set forth in the court's decisions, including *Sloan*."[13] In *Sloan*, the court referred to the public trust boundary as the location where the water usually stands when free from disturbing causes. Therefore, when the General Assembly referred to a "natural shoreline," it did not mean a location that changed "from moment to moment as the water rises and falls; rather . . . the location where the water usually stands when free from disturbing causes."

Conclusion

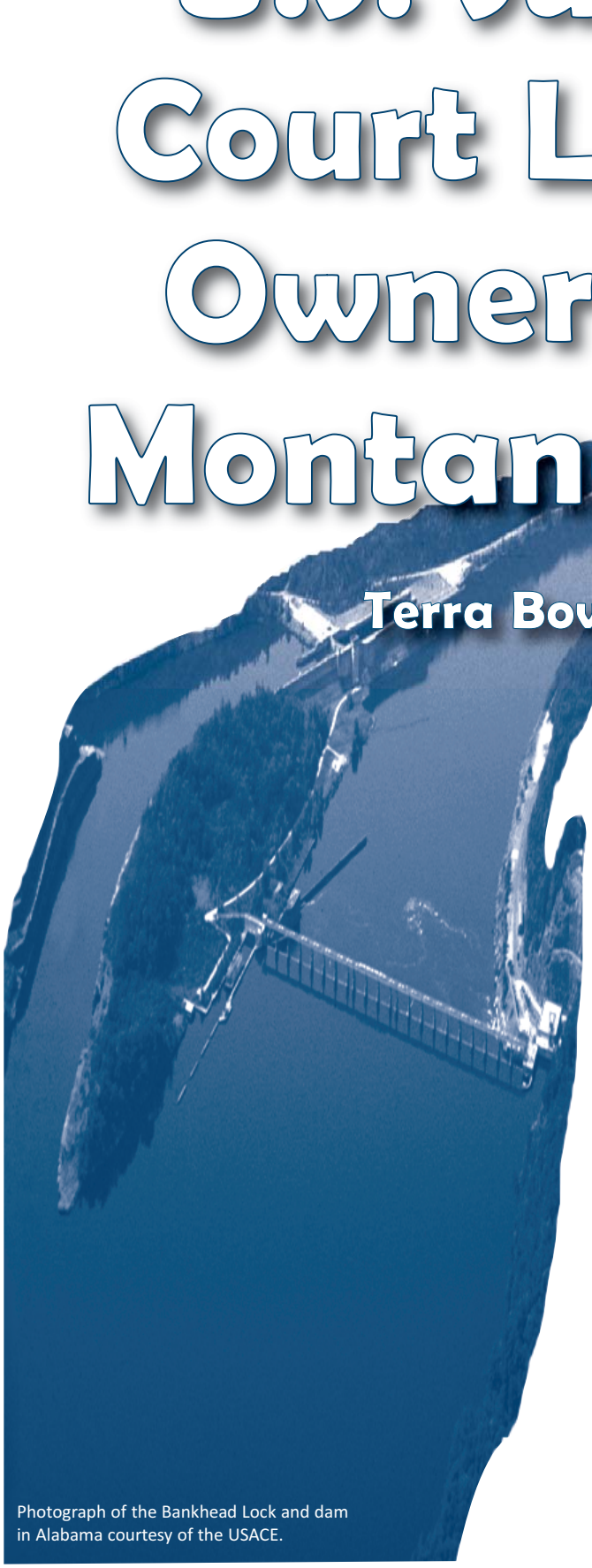
The Supreme Court of Ohio overruled the court of appeals' explanation of public trust boundary as the water's edge. Rather, the court ruled that the "natural shoreline" is "the line at which water usually stands when free from disturbing causes."[14] While the court accomplished its goal of clarifying the definitions of terms in Ohio's public trust laws, the question of where exactly the "line at which water usually stands when free from disturbing causes" exists will be an issue future courts and legislatures are left to figure out.

Endnotes

1. 2013, J.D. Candidate, Univ. of Mississippi School of Law.
2. State ex rel. Merrill v. Ohio Department of Natural Resources, No. 2009–1806, 2011 WL 4109588 (Ohio Sept. 14, 2011).
3. In the late 19th century, the U.S. Supreme Court established the equal footing doctrine, which ensured that states entering the union received land beneath navigable waters below the high water mark as the original thirteen states had. *Shivley v. Bowlby*, 152 U.S. 1 (1894).
4. Ohio Rev. Code Ann. § 1506.10-11 (2009).
5. *State ex rel. Merrill v. Ohio Department of Natural Resources*, at *4.
6. State ex rel. Merrill v. State, 2009 Ohio 4256, *16 (Ohio Ct. App. Aug. 21, 2009).
7. *Id.*
8. *State ex rel. Merrill v. Ohio Department of Natural Resource*s, at *11 (citing *Sloan v. Biemiller*, 34 Ohio St. 492 (1878)).
9. State v. Cleveland & Pittsburgh RR. Co., 113 N.E. 677 (Ohio 1916).
10. *State ex rel. Merrill v. Ohio Department of Natural Resources*, at *17 (quoting *State v. Cleveland & Pittsburgh RR. Co.*, at 683).
11. Ohio Rev. Code Ann. § 1506.10-11 (2009).
12. *Id.* § 1506.10.
13. *State ex rel. Merrill v. Ohio Department of Natural Resources*, at *19.
14. *Id.*

U.S. Supreme Court Looks at Ownership of Montana Rivers

Terra Bowling, J.D.



Photograph of the Bankhead Lock and dam in Alabama courtesy of the USACE.

In December, the U.S. Supreme Court heard oral arguments in a case involving a dispute over the ownership of the beds and banks of three Montana rivers. The case arose when several parents of Montana schoolchildren filed suit in 2003 claiming that riverbeds underlying ten federally-licensed hydroelectric dams were part of Montana's "school trust lands," and, as such, the owner of the dams, PPL Montana, owed the state compensation for use of the riverbeds. Montana joined the suit, arguing that it had title to the riverbeds under the equal footing doctrine, a theory stating that upon entry to the Union, states acquire a trust ownership of navigable waters and the underlying riverbeds within their boundaries.

The Montana Supreme Court concluded that the rivers in question were navigable at the time the state entered the Union in 1889; therefore, the state has held title to more than 500 miles riverbeds since that time. In making its decision, the Montana Supreme Court applied the U.S. Supreme Court's "navigability-for-title" test, which states that waters are navigable "…when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are

or may be conducted in the customary modes of trade and travel on water…"[1] Notably, the court accepted the lower court's interpretation of the navigability-for-title test as "somewhat 'fluid'" in that it "allowed present day usage to be probative as to navigability of a river at the time of statehood."[2] The Montana Supreme Court's holding would allow the state to collect tens of millions of dollars in back rent from PPL Montana, as well as millions more in future payments.

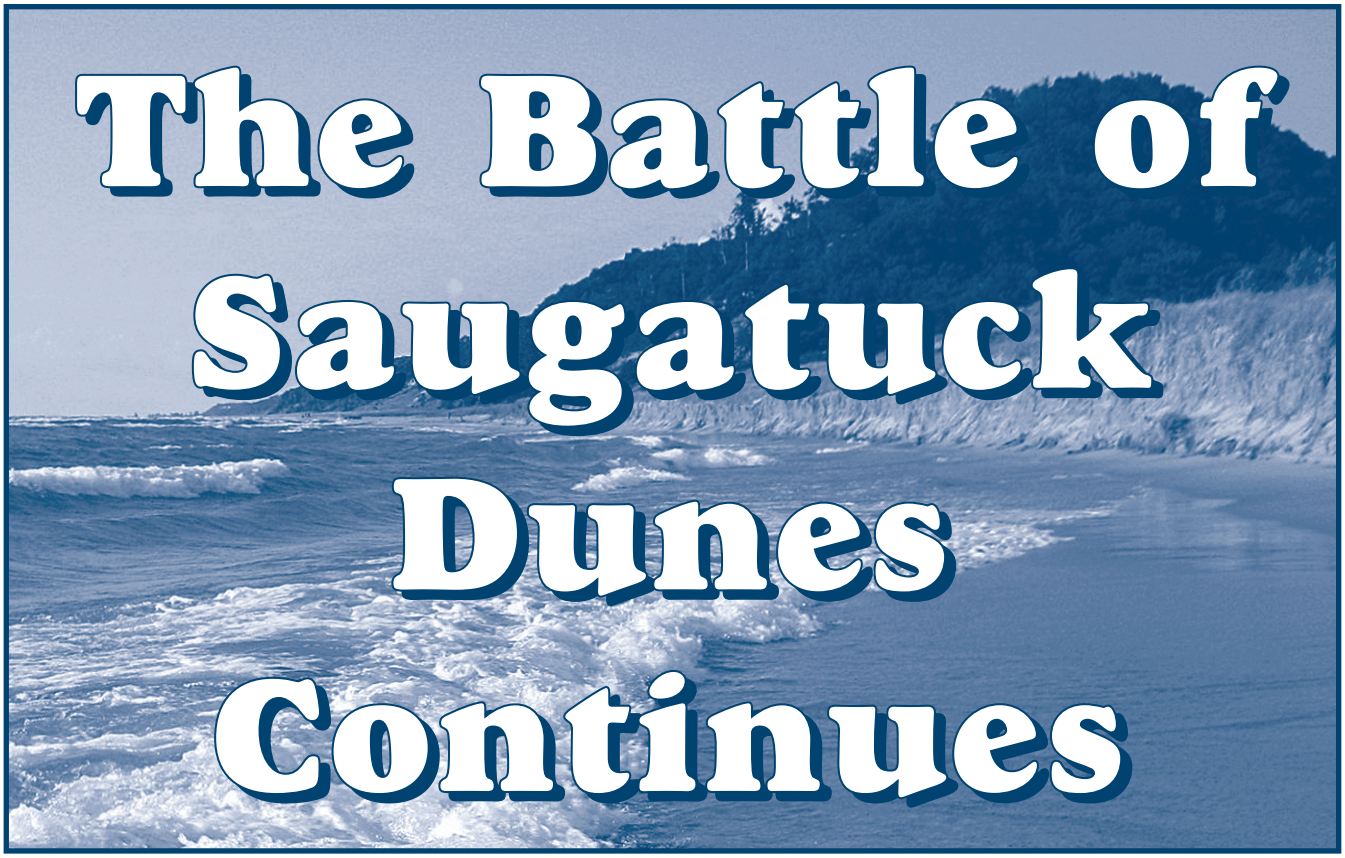
On cert, the U.S. Supreme Court will consider "Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question 'very liberally construed' in the State's favor?" In its merits brief, PPL Montana argued that courts should strictly construe the navigability-for-title test and look at whether individual segments of the river could be commercially traveled at the time of statehood. Application of PPL Montana's theory could result in a patchwork of ownership, with the state ownership interspersed with private or federal ownership. The state maintains that the navigability test should look at longer stretches of the river, avoiding the patchwork of ownership that would result from a segment-by-segment analysis. In addition, the state argues that present-day recreational use should be taken into consideration when examining whether a river was navigable at statehood. Because this case involves an ownership dispute between the State and a private company, the U.S. Supreme Court's decision could have broad implications for public rights in several Montana Rivers, including public access and compensation for their use.

As *The SandBar* went to press, the Court heard oral arguments in the case. The main arguments presented by the parties centered on portages, or the practice of carrying watercraft over land around river obstacles. Specifically, the parties presented arguments on when portages defeat navigability. If the boat must be lifted out of the river and carried around an obstacle, is the river still considered navigable? Does the length of the portage matter—would 5 feet or 10 feet defeat navigability? Or do portages only confirm that the river is being used for commerce and is navigable? A ruling by the U.S. Supreme Court could clear up the issue.

Endnotes

1. The Daniel Ball, 77 U.S. 557 (1870).
2.. PPL Mont., LLC v. State, 2010 MT 64, P98 (Mont. 2010).

Photograph of hydroelectric dam courtesy of the USACE.



Photograph of Saugatuck Dunes courtesy of John Haberstroh.

The Battle of Saugatuck Dunes Continues

Barton Norfleet[1]

Saugatuck Dunes is a historic and geographically diverse area of land located around the mouth of the Kalamazoo River on the shores of Lake Michigan. For the last eleven years, a battle over the rights to develop a piece of land within the dunes has been raging between the Township of Saugatuck and a development company, Singapore Dunes. Recently, a judge rejected a consent agreement between the parties, and the battle over developments in Saugatuck Dunes continues.

Development Dispute

The Saugatuck Lake Michigan and Kalamazoo River Coastal District, or Saugatuck Dunes for short, consists of around 2,000 acres of relatively undisturbed dunes and woodlands which contain a web of interconnected historic sites.[2] These historic sites include the Felt Estate, established by millionaire Dorr Felt, who gained his millions by inventing the comptometer (an early mechanical calculating machine); the Mt. Baldhead Dune, a famous Native American burial site; the Saugatuck Chain Ferry, which is America's only remaining hand-cranked chain ferry; and many other sites of national and local historic significance.[3] The land also boasts a myriad of natural geographic features; bordered by Lake Michigan on the east, Saugatuck contains beaches, dunes, woods, harbors, wetlands, old Native American trails, and the mouth of the Kalamazoo River.[4]

Between 2004 and 2006, Singapore Dunes bought 200 acres of Saugatuck Dune land known as the "Denison property," which fans out east from the shore of Lake Michigan and lies north of the Kalamazoo River. Concerned with effects the development might have on the site, the Township took steps to limit development on the land. In May 2005, the Township proposed a new zoning ordinance requiring all public land in and around the Denison property be preserved and that all privately owned land be used only for low intensity uses. These restrictions essentially prevented Singapore's development plans.

Singapore Dunes filed suit against the Township, claiming violation of its due process and equal protection rights, as well as several other claims. The Township reacted, filing motions and counterclaims. Ultimately, the town accepted Singapore Dunes' proposed settlement. In July, Singapore Dunes filed a

motion asking the court to approve the consent agreement between itself and the Township of Saugatuck.[5]

The Consent Agreement

The proposed agreement would allow the company to construct a twenty-five suite hotel, a sixty-six slip marina, several residential units, associated retail spaces, and a number of recreational facilities such as tennis courts, bicycle/horse paths, a skeet-shooting range, and several observation towers. The agreement requires Singapore to submit to prohibitions on Singapore's use of the land and requires the company to obtain permits through the Township Planning Commission.

Several non-parties, including environmental groups such as the Saugatuck Dune Coastal Alliance, the Laketown Alliance for Neighborly Development, and the Kalamazoo River Protection Association, as well as several concerned residents filed a motion requesting a "fairness hearing" on the agreement. The non-parties claimed that their rights of notice and public hearing requirements regarding the consent agreement were violated under the State of Michigan Open Meetings Act. They also alleged that the developer had intentionally tried to bankrupt the Township through legal fees, which forced the town into accepting the agreement.

Hands Tied

The court's decision rested on the validity of the consent agreement. The court found that the agreement "impermissibly ties the hands of the future Township Boards." The court cited Section 18 of the agreement, which prohibits the Board from ever implementing new zoning ordinances on the Denison property. The court also cited Section 4 of the agreement, which prevents the Board from rejecting certain site plans if the rejection is due to the Township's application of standard site plan approval criteria. The court noted that this section effectively takes away the Township's ability to use its preservation authority to review any future developments on the Denison property. The court also pointed out that the consent agreement does not address the developer's original claims. For these reasons, the court rejected the proposed agreement, which makes the non-parties' motion for a "fairness hearing" irrelevant for the time being.

Conclusion

The court's ruling does not end the case. The court stated that if the parties can negotiate a revised consent agreement addressing these issues, it will consider the renewed agreement. The court also required that Singapore and the Township provide notice and public hearings regarding any new agreement and that any procedures for accepting and considering non-party comments would be set by the court. The non-parties considered this ruling as a huge victory on their behalf, according to the President of the Saugatuck Dune Coastal Alliance.[6] However, the case is still pending and there will likely be more battles before it reaches a conclusion.

The court found that the agreement "impermissibly ties the hands of the future Township Boards."

Endnotes

1 2012 JD Candidate, Univ. of Mississippi School of Law.

2. James Schmiechen, Historic Site Inventory: Saugatuck Dunes, Saugatuck Dunes Coastal Alliance (July 2008), http://sdhistoricalsociety.org/historic_site_inventory.htm.

3. *Id.*

4. Saugatuck Dunes Coastal Alliance, Geography, http://saugatuckdunescoastalalliance.com/geography/index.php (last visited Nov. 14, 2011).

5. Singapore Dunes LLC vs. Saugatuck Township, et al, (1:10-cv-210)(W.D. Mich. Nov. 11, 2011).

6. Jim Hayden, *Judge Throws Out McClendon-Saugatuck Township Deal Over Duneland*, The Holland Sentinel (Nov. 1, 2011).

Polar Bear Litigation Update

April Killcreas[1]

As covered in the last edition of *The Sandbar*,[2] this summer a federal district court upheld the Fish and Wildlife Service's decision to list the polar bear as threatened under the Endangered Species Act (ESA), ruling against environmental groups seeking to have the species listed as endangered.[3] However, on October 17, the court issued two additional rulings regarding the agency's polar bear rule.[4]

In its first ruling, the court rejected further challenges to the rule under the ESA; however, the court did find that the Fish and Wildlife Service (FWS) failed to conduct the appropriate environmental review under the National Environmental Policy Act (NEPA) prior to extending protection and conservation measures to the polar bear through a Special Rule in 2008. In its second ruling, the court ruled that polar bear trophies are no longer eligible for import.

ESA/NEPA Claims

After FWS promulgated its interim and final rules listing the polar bear as a threatened species under the ESA, the Center for Biological Diversity, Natural Resources Defense Council, and Greenpeace challenged the validity of the rule, contending that the rule violated both the ESA and NEPA. Specifically, the plaintiffs maintained that the agency's rule failed to extend adequate protections to the polar bear because FWS did not address greenhouse gas emissions as the underlying cause of rising Arctic temperatures which are reducing the species' sea ice habitat.

Though Judge Emmett Sullivan noted that he "understands [the] plaintiffs' frustration" with the agency's decision not to concentrate on climate change as the principal threat to the polar bear, the court ultimately held that, regarding the ESA challenge, FWS had "reasonably concluded that its Special Rule provides for the conservation of the polar bear even if it does not reverse the trend of Arctic sea ice loss."[5] Though plaintiffs contended that the rule unreasonably failed to address climate change as the predominant threat to the polar bear, the court found that FWS provided adequate evidence supporting its determination that extending full protection to the polar bear under the ESA would fail to remedy the climate changes threatening the species' habitat.

In addition to their ESA claims, the plaintiffs successfully challenged the agency's final rule under NEPA. Under NEPA, an environmental impact statement (EIS) is required for any "major Federal actions significantly affecting the quality of the human environment."[6] Each agency, including FWS, is responsible for determining whether certain classes of actions require an EIS, a less detailed environmental assessment (EA), or no assessment at all.

Because federal regulations identify "major Federal actions" as "new or revised agency rules, regulations, plans, policies, or procedures," FWS's decision to protect the polar bear as a threatened species is a clear example of a major federal action requiring at a minimum an environmental assessment under NEPA. FWS failed to conduct any form of environmental analysis under NEPA before promulgating its final rule for listing and protecting the polar bear as threatened. FWS contended that, first of all, rules providing for the protection of threatened species under the ESA are exempt from NEPA and, secondly, that the final rule for the polar bear was not a major federal action within the meaning of the statute. However, the court refused to grant the FWS an exemption from NEPA for promulgating

rules implementing protective measures for threatened species. To remedy the agency's failure to adhere to NEPA's requirements, the court vacated the final rule concerning the polar bears and reinstated the agency's interim rule pending the outcome of the agency's EA under NEPA.

Due to the court's ruling, FWS is now required to conduct a proper NEPA review of its final rule ordering protective measures for the polar bear. If the agency determines that the rule will not seriously affect the environment, the FWS may issue a FONSI (a finding of no significant impact) to reinstate the final rule, and the protections of the polar bear will continue as the rule specifies. If, however, the EA indicates that the implementation of the final rule will have a significant effect on the human environment, the FWS will be required to prepare an EIS. Because NEPA only mandates procedural requirements (the preparation of environmental review documents) rather than substantive changes, the FWS will not necessarily be required to respond to any concerns regarding climate change and the polar bear habitat raised by the EIS. Consequently, even if the EIS reveals that the polar bear rule will have a significant effect on the environment, the FWS will not be required to substantively change the rule that is currently in place. Provided that the FWS completes its requirements under NEPA, the court may reinstate the final rule as it is currently written.

MMPA Ruling

In its second opinion, the court ruled that because the FWS properly concluded that the polar bear was a depleted species under the Marine Mammal Protection Act (MMPA) as of the effective date of a final rule listing it as threatened under the ESA, the MMPA mandated that sport-hunted polar bear trophies were no longer eligible for import as a result of the species' depleted status. Further, the FWS did not err by administratively closing import permit applications for such trophies that were pending at the time the rule was issued.

Endnotes

1. J.D. Candidate, May 2012, Univ. of Miss. School of Law.
2. April Killcreas, *Polar Bears Listed As Threatened Under ESA*, 10:4 SANDBAR [8] (2011).
3. In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation, No. 08-764. 2011 U.S. Dist LEXIS 70172 (D.D.C. June 30, 2011).
4. In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation, No. 08-764. 2011 WL 5022771 (D.D.C. Oct. 17, 2011); In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig., 2011 U.S. Dist. LEXIS 119455 (D.D.C. Oct. 17, 2011).
5. Memorandum Opinion at *1-2, *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*.
6. 42 U.S.C. § 4332(2)(c).

Photograph courtesy of Ansgar Walk.

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Littoral Events

Legal Solutions to Coastal Climate Change Adaptation in Connecticut

Hartford, Connecticut
February 10, 2012

The Legal Solutions to Coastal Climate Change Adaptation in Connecticut Conference aims to enhance understanding and promote discussion of cutting-edge policy and legal approaches to climate change adaptation in coastal areas, with potential application to Connecticut. The conference is funded through the generous support of the National Sea Grant Law Center, Connecticut Sea Grant, the Connecticut Chapter of The Nature Conservancy, and the UConn School of Law Center for Energy and Environmental Law. More information is available at http://seagrant.uconn.edu/climatelaw/.

The ABA 41st Annual Conference on Environmental Law

Salt Lake City
March 22-24, 2012

The 41st Annual Conference on Environmental Law is for experienced lawyers across the nation and younger lawyers and law students alike. Anticipated topics will include dynamic discussions related to hydraulic fracturing, the rise of citizen suits, developments in air and greenhouse gas regulation, environmental challenges to energy and natural resource development, how regulatory agencies will adapt to funding cuts, and a survey of developments relevant to transactional lawyers. For more information, visit http://www.americanbar.org/groups/environment_energy_resources/events_cle/wl.html.

2012 Land Grant and Sea Grant National Water Conference

Portland, Oregon
May 20-24, 2012

The conference provides opportunities for water scientists, engineers, educators, and managers to share knowledge and ideas, to identify and update emerging issues, and to network with leading researchers, educators, and innovators from academia, government, and the private sector. The conference is hosted by a team of educators from Land Grant and Sea Grant Institutions around the nation in cooperation with national program leaders from USDA and NOAA. Please visit http://www.usawaterquality.org/conferences/2012/default.html for more information.