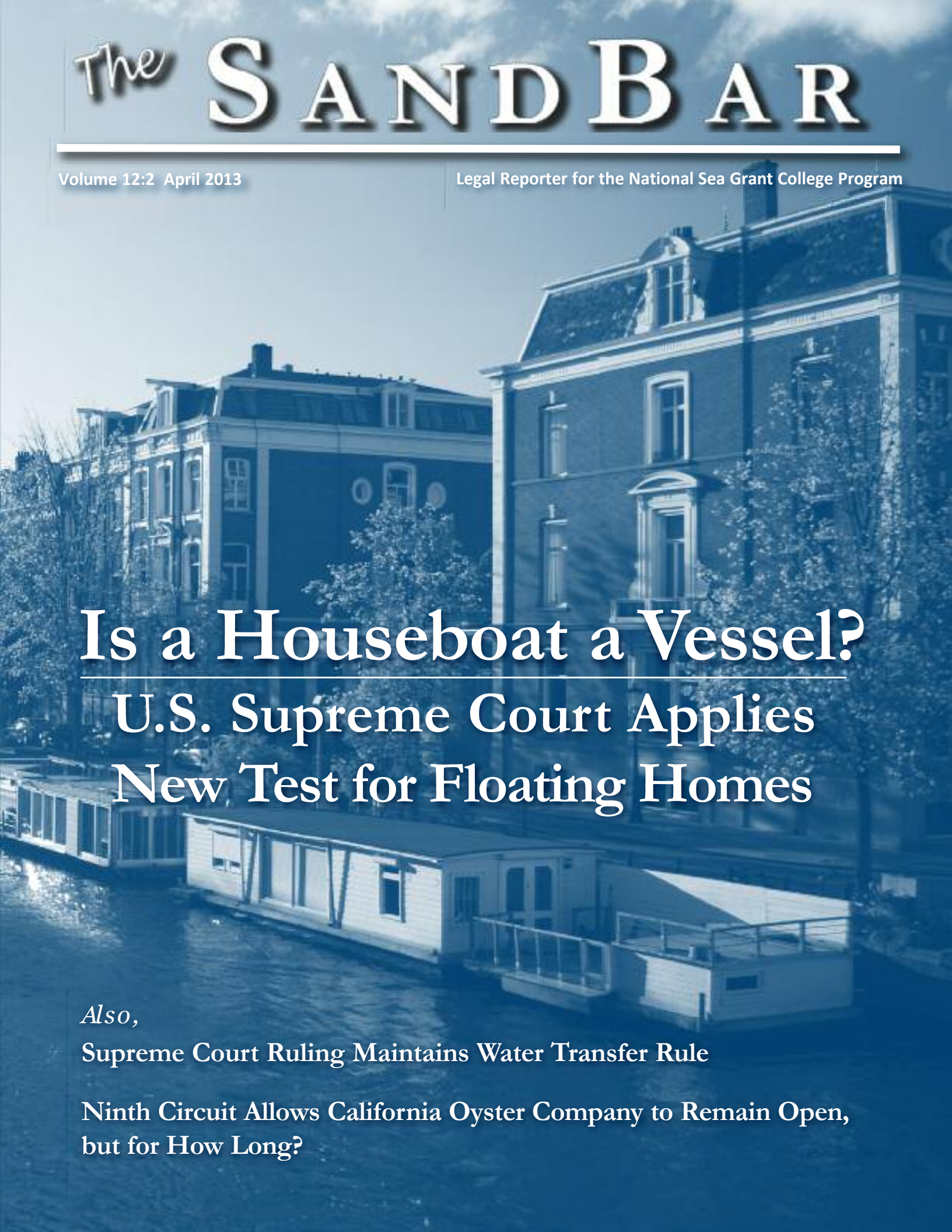
The SandBar

Volume 12:2 April 2013

Legal Reporter for the National Sea Grant College Program



Is a Houseboat a Vessel?

U.S. Supreme Court Applies New Test for Floating Homes

Also,

Supreme Court Ruling Maintains Water Transfer Rule

Ninth Circuit Allows California Oyster Company to Remain Open, but for How Long?

Our Staff

Editor:
Terra Bowling, J.D.

Production & Design:
Barry Barnes

Research Associates:
Anna Outzen
Evan Parrott
Benjamin Sloan

Now, follow us on Facebook at:
http://www.Facebook.com/nsglc

Now, follow us on Twitter at:
http://www.Twitter.com/sglawcenter

ISSN 1947-3966 NSGLC-13-02-02 *April 2013*
ISSN 1947-3974

THE SANDBAR is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR,* contact: Barry Barnes at bdbarne1@olemiss.edu.

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

THE SANDBAR is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under award NA090AR4170200, the National Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi School of Law. The U.S. Government and the Sea Grant College Program are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon.

Recommended citation: Author's Name, *Title of Article*, 12:2 SANDBAR [Page Number] (2013).

Cover page photograph of house boats, courtesy of Zer0_PT Productions.

Contents page photograph of John D. MacArther Beach State Park's boardwalk in Riviera Beach, Florida, courtesy of Doug Kerr.

Sea Grant
Law Center

The SandBar

Contents

Is a Houseboat a Vessel? U.S. Supreme Court Applies New Test for Floating Homes

Anna Outzen[1]

On January 15, 2013, the U.S. Supreme Court heard a case that began as a simple dispute between a city-owned marina and a boat owner about unpaid dockage fees and rule violations.[2] After over six years of legal disputes between the marina resident and the city, the ultimate issue faced by the Supreme Court became whether or not a "floating home" should be legally treated as a "vessel." If the Court found that this "floating home" was in fact legally a "vessel," it would subject these types of boats and their owners to a special branch of law specific to maritime issues. Many were concerned with the case's potential impact on the maritime industry as a whole, wondering if, for example, floating homes would be subject to the Coast Guard's licensing and registration procedures. Recognizing this case's importance, the Supreme Court took a new approach to determining whether or not floating homes were maritime vessels.

Background

In 2002, Fane Lozman bought a floating home to live in as his primary residence. Lozman's boat resembled a home in that it was made of plywood and had a sitting room, bedroom, closet, bathroom, and kitchen, as well as a stairway leading to an office space, and French doors on three of its sides. Furthermore, the boat had no steering mechanism, an unraked hull, and no way to generate or store electricity unless connected to the marina. The boat could not propel itself like most houseboats, but could only travel if being towed.

After Hurricane Wilma destroyed the marina where Lozman was docked, he had his boat towed to a marina operated by the City of Riviera Beach, Florida (City) in March of 2006, where he planned to permanently dock his floating home. Conflict between Lozman and the City quickly arose when Lozman challenged the City's massive redevelopment plan for the marina. The plan was halted and the City tried to evict Lozman based on claims that Lozman failed to muzzle his dog and used unlicensed repairmen to service his boat.[3] After an unsuccessful attempt to evict Lozman, the City revised its dockage agreements and marina rules in June of 2007. The City claims to have sent various informative letters to the marina residents, but Lozman contends that he never received a letter until March of 2009, when he received a notice that he had to bring his boat into compliance with the new rules by April 1st or his dockage agreement would be terminated. Lozman attempted to pay the fees by check, but the City returned his payment, claiming he was too late to renew his dockage agreement. The City then brought suit in order to recover the unpaid fees from Lozman and for trespass since he was no longer allowed to dock at the marina.

The City brought its lawsuit directly against the floating home – an action that is only allowed in admiralty court. In this special branch of law, businesses that provide necessary goods and services to vessels can file lawsuits against vessels themselves and seize them to ensure that businesses will be paid. Consequently, federal

admiralty courts only have authority to hear such cases if a boat qualifies as a "vessel" in the legal sense. The lower courts, finding that Lozman's home was a "vessel" and the case was properly brought in admiralty court, sided with the City and ordered it to be sold at public auction in order to pay the City what was owed.[4] The City, however, outbid others at this public auction. The City purchased the boat and had it destroyed. After Lozman's appeal, the Supreme Court had to decide whether or not these admiralty courts should have heard this case from the start.

THE LOWER COURTS, FINDING THAT LOZMAN'S HOME WAS A "VESSEL" AND THE CASE WAS PROPERLY BROUGHT IN ADMIRALTY COURT, SIDED WITH THE CITY AND ORDERED IT TO BE SOLD AT PUBLIC AUCTION IN ORDER TO PAY THE CITY WHAT WAS OWED.

What is a Vessel?

The term vessel is legally defined as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[5] The lower court found that Lozman's home fit within the terms of this definition because it could float and could be towed over water.[6] On appeal however, the Supreme Court rejected the lower court's "anything that floats" approach to determining vessel status because it too broadly interpreted the term "capable." The Court reiterated that "[n]ot *every* floating structure is a 'vessel,'" listing obvious examples such as "a wooden washtub, a plastic dishpan, [and] a swimming platform," and then stated that for vessel status, floating structures must be *practically* "capable of being used…*as a means of transportation on water*."[7] Consequently, the Supreme Court provided a new test for determining when floating structures have "vessel" status: "In our view, a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."[8]

The Court found this approach to vessel status was justified and supported by the bulk of previous cases. Specifically, the Supreme Court itself had previously held that a wharfboat was not a vessel because it was not designed for any transportation function, it did not transport freight from one place to another, and travelled under tow only once a year. In another case, the Court held that a dredge was in fact a vessel because it was regularly used and partially designed to be used to transport workers and equipment over water. Furthermore, the Supreme Court found that many lower courts supported its view, this test did not undermine any of the purposes of the major federal maritime statutes, and the text of the statute easily lent itself to such an interpretation.

City's Arguments

The City claimed that a test focused on a boat's purpose was too subjective and would be easily manipulated. Instead, the test should be as simple as possible since a court's jurisdiction could depend on a boat's vessel status. But the Court assured the City that under this new approach, it was only considering objective elements of purpose, such as physical characteristics and usage history. The Court also explained that this test would not always be determinative of "vessel" status, much less a court's jurisdiction, by characterizing this new test as guidance for borderline cases similarly dealing with a structure's capability of transportation. The Court assured that this test was in fact "workable" for those cases, much more so than an "anything that floats" test.

The City also argued that even under the Court's new test, Lozman's boat was practically capable of transportation because it was in fact used for transportation. The Court, however, found that "actual use" was not proven because Lozman's floating home only moved over water while being towed and only moved significant distances twice in seven years with no passengers or cargo aboard.

Houseboat or Vessel?

To determine whether Lozman's houseboat was a vessel, the Court turned to the physical attributes and usage history of the floating home. The boat's physical attributes – rooms similar to living quarters and French doors as opposed to watertight portholes – did not convince the Court that this boat was designed for maritime transport. Similarly, the boat's inability to be steered or independently produce electricity, coupled with the fact that it could only travel if being towed and had only done that a few times, led the Court to find that the boat was not used for transportation. In short, the Supreme Court found that no characteristics of Lozman's boat, other than its floating ability, suggested that it was designed to a practical degree for transporting people or things over water.[9] Therefore, in a 7-2 vote, the Supreme Court reversed the lower courts' judgments in holding that Lozman's floating home was not legally a vessel under admiralty law. The City therefore improperly seized Lozman's floating home in the first place.

Dissent

The two dissenting justices agreed that determining whether Lozman's home was a vessel depended on whether it had a maritime transportation purpose or function, but disagreed that the test for establishing this purpose was whether a "reasonable observer" would find a maritime purpose based on the craft's physical characteristics and activities. The dissent argued that although it seems an objective inquiry, this "reasonable observer" standard introduces a subjective "I know it when I see it" component into the analysis. For example, the dissent disagreed with the majority's consideration of Lozman's boat's style of rooms and windows which have no relation to maritime transport. Secondly, the dissent found the majority's analysis of the craft's usage history to be "strange" and "confusing" for acknowledging that the craft traveled far distances carrying "people and things," but then concluding that a reasonable observer would not find that the craft was designed to any practical degree to engage in such transportation. The dissenters also believed that more facts were needed about Lozman's boat in order to make a proper vessel inquiry. The majority, however, found that the dissenters did not propose a more workable test and that although they believed more facts were needed, neither Lozman nor the City made such a request, so the majority opinion would stand.

Conclusion

In light of the ruling, Lozman will now return to district court seeking compensation for the value of his now destroyed floating home and living expenses for the time after his home was destroyed, as well as reimbursement for over $300,000 in legal fees that have accumulated since the fight started nearly seven years ago.[10] In addition, the Eleventh Circuit Court of Appeals recently reinstated a lawsuit Lozman filed in 2008 claiming the city's actions resulted in the violation of his civil rights.[11] A judge had dismissed the claim, finding that Lozman's allegations had been addressed in state court. The Eleventh Circuit ruled, however, that Lozman is entitled to bring a separate suit based on a separate allegation of wrongful conduct. But Lozman's potential plans do not stop there. He has also reported that he is seriously considering returning to the Riviera City Beach marina and docking his new floating home there as well.[12]

Endnotes

1. 2013 J.D. Candidate, University of Mississippi School of Law.
2. Lozman v. City of Riviera Beach, No. 11626, 2013 WL 149633 (U.S. Jan. 15, 2013).
3. *Id.*
4. City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approx. Fifty-Seven Feet in Length, No. 09-80594-CIV, 2009 WL 8575966 (S.D. Fla. Nov. 19, 2009).
5. 1 U.S.C. § 3 (2011).
6. *Lozman*, 2013 WL 149633, at *4.
7. *Id.* at *4.
8. *Id.*
9. *Id.* at *5.
10. Jane Musgrave, *Lozman Wins Again; Says he will seek millions from Riviera Beach for alleged civil rights violations*, Palm Beach Post, Apr. 2, 2013.
11. Lozman v. City of Riviera Beach, Fla., 11-15448, 2013 WL 1285868 (11th Cir. Apr. 1, 2013).
12. Nina Totenberg, *Supreme Court: Floating Home Still A Man's Castle*, NPR (Jan. 15, 2013).

Supreme Court Ruling Maintains Water Transfer Rule

Benjamin Sloan[1]

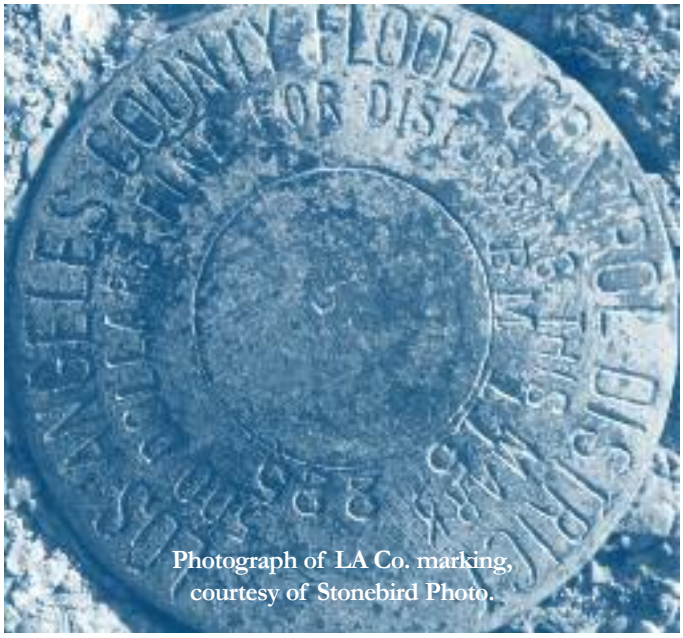
In early January, the U.S. Supreme Court considered a case that could have made it more difficult for municipalities across the country to meet the requirements of the Clean Water Act (CWA) while operating their storm water management systems.[2] The Court considered whether or not polluted water flowing from a concrete drainage canal into a river should be considered a discharge of a pollutant under the CWA. The Ninth Circuit had previously held that a discharge occurred, but the Supreme Court reversed, holding that there must be an addition of a pollutant and not merely a transfer of a pollutant before a violation can occur.[3]

Background

The Los Angeles County Flood Control District (District) oversees a large storm water management system (MS4) comprised of concreted canals that drain into surrounding rivers. This water can become heavily polluted requiring the District to acquire National Pollutant Discharge Elimination System (NPDES) permits to discharge it pursuant to the CWA. The CWA defines discharge as "any addition of any pollutant to navigable waters from any point source."[4] The key word here is *addition*. To aid compliance, there are pollution monitoring stations in the MS4 and in the adjacent rivers.

What is a Discharge?

Initially, the district court heard four claims brought by the National Resources Defense Council and Santa Monica Baykeeper (environmental groups) relating to pollution exceedances in four separate rivers receiving water from the District's sewer system.[5] The district court ruled against the environmental groups because it did not find the evidence showing that the District actually had control over the pollution found in the municipal sewer system to be strong enough to hold the District liable for it.[6]



Photograph of LA Co. marking, courtesy of Stonebird Photo.

However, the Ninth Circuit disagreed, writing that the detected violations at selected monitoring sites along two of the rivers were sufficiently under the control of the District to create liability for the pollution. At these sites, the waters in the sewer system, which the District has sole control over, had not yet come into contact with the unimproved sections of the river.[7] Because the stormwater system was sufficiently distinct from the unimproved sections of the river, the court found there was in fact a discharge of pollutants triggering a violation of the District's NPDES permit.[8]

Photograph of a flag pole in front of the U.S. Supreme Court building, courtesy of Mark Fischer.

Following this decision, the District appealed to the Supreme Court on the sole question of whether a discharge of a pollutant had occurred when water drained from an improved section of the sewer system into unimproved sections of nearby rivers. The Ninth Circuit defined the stormwater management system as a point source of pollution under the CWA, triggering the need for a NPDES permit. However, the Supreme Court reversed, citing *South Fla. Water Management Dist. v. Miccosukee Tribe*, in which the Court held that a discharge is not created when an entity simply transfers water from one part of a body of water back into the same body of water – known as the Water Transfer Rule.[9] Therefore, the District did not violate its permit because there was no discharge. It did not add any pollutant to the waters. It simply transferred the pollution from one part of these two rivers into another part of these rivers.

Conclusion

While both sides agreed that the water leaving the District's stormwater management system was heavily polluted beyond levels allowed by its NPDES permit, the Court did not want to upset precedent. The Court very narrowly defined its ruling based on the facts of the case and maintained its previous ruling on the Water Transfer Rule.

Endnotes

1. J.D. Candidate 2014, Univ. of Mississippi School of Law.
2. Los Angeles County Flood Control Dist. v. Natural Res. Def. Council, 133 S. Ct. 710 (2013).
3. *Id.* at 713.
4. 33 U.S.C. § 1362(12).
5. 33 U.S.C. § 1342(p); Natural Res. Def. Council, Inc. v. County of Los Angeles, 636 F.3d 1235, 1244 (9th Cir. 2011).
6. *Los Angeles*, 133 S. Ct. at 712 (2013).
7. Natural Res. Def. Council, Inc. v. County of Los Angeles, 636 F.3d 1235, 1244 (9th Cir. 2011).
8. *Id.* at 890.
9. S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004).

Ninth Circuit Allows California Oyster Company to Remain Open, but for How Long?

Evan Parrott[1]

For nearly 80 years, an oyster company has operated in a bay just north of San Francisco, California. Currently, that company is the Drakes Bay Oyster Company (Company). However, the company shares a bay with a governmentally protected marine estuary that harbors and protects aquatic wildlife. In late 2012, Kenneth Salazar, the U.S. Secretary of the Interior (Secretary) declined to renew the company's permit because he determined that the estuary's long-term environmental condition would be better served by not allowing the oyster company to continue operating along the bay. The oyster company and its owner brought a suit challenging the Secretary's decision.

Point Reyes National Seashore

In 1962, Congress established the Point Reyes National Seashore and placed it under the control of the Secretary of the Interior. Two years later, Congress passed the Wilderness Act of 1964, which established a preservation system that would designate certain federally owned areas as "wilderness areas," which would subject the lands to protection for the use and enjoyment of the American people. Under this act, a parcel of land cannot be designated as a "wilderness area" as long as a commercial enterprise exists within its boundaries. In 1976, Congress passed the Point Reyes Wilderness Act, which designated more than 25,000 acres of the seashore as "wilderness" under the 1964 Wilderness Act. An additional 8,000+ acres were designated as "potential wilderness," which were lands that would become wilderness as soon as all obstacles, such as commercial establishments within the land, were removed. Drakes Estero, a marine estuary twenty-five miles northwest of San Francisco, is located within this potential wilderness area.

The Drakes Bay Oyster Company

Oyster farming has occurred in Drakes Estero since the 1930s. Specifically, the Johnson Oyster Company has operated along the shores of the Drakes Estero since the 1950s. In 1972, the United States government purchased the parcel of land where the company was located. However, the purchase agreement allowed the oyster company to continue to occupy and use the land until 2012, at which time a new permit would have to be issued by the National Park Service (NPS).

In 2005, Kevin Lunny purchased the Johnson Oyster Company. In January 2005, the NPS met with Lunny and provided him with a 2004 memorandum explaining that under the 1964 Wilderness Act and the Point Reyes Wilderness Act, the land on which the oyster company is located would be converted into wilderness when the occupancy and use agreement expires in 2012.

In 2009, Congress enacted legislation that enabled the Secretary of the Interior to issue a special use permit specifically for the Drakes Bay Oyster Company extending the current terms of the use and occupancy agreement for 10 years. In July 2010, the Company applied for the ten-year special use permit to continue farm operations past the 2012 expiration of the original occupancy and use agreement (i.e., until 2020).

The Secretary's Decision

The Interior Department, through the NPS, prepared an Environmental Impact Statement (EIS) to evaluate the environmental impact of the Company's special use permit request. In September 2011, the NPS released a draft EIS for public comment. Per Congressional direction contained in the 2009 legislation, the National Academy of Sciences (NAS)

assessed the Draft EIS and determined that many of its conclusions were "uncertain, exaggerated, or based on insufficient information."[2]

Once the NAS assessment was released, Lunny's counsel wrote the Secretary, requesting that he make his decision without regard to the NPS's Final EIS. In November 2012, the NPS released its Final EIS, and less than two weeks later, the Secretary issued his decision to allow the Company's permit to expire. The Secretary based his decision on several factors, including the fact that the federal government purchased the property with a reservation of use that explicitly expired in 2012, the Company was advised in 2005 that an additional permit would not be issued, and the Company's continued operation would violate the policies of the NPS regarding commercial use within designated wilderness. In regards to the EIS, the Secretary acknowledged the documented disputes of its contents, but felt that overall, the report supported the premise that the removal of the Company's oyster operations would benefit the Drakes Estero's long-term environmental condition.

Appeal of the Secretary's Decision

Lunny and Drakes Bay Oyster Company filed suit requesting the Northern District of California void the Secretary's decision and issue the Company a ten-year special use permit. They also filed a preliminary injunction requesting the court allow the Company to continue operating until the lawsuit is complete.[3]

The Northern District of California found that while it does have jurisdiction to review an agency's failure to act, the Secretary's action, or inaction in this case, falls under an exception set out in the Administrative Procedure Act (APA), which exempts from judicial review any agency action that was authorized to be committed with discretion. In this situation, Congress bestowed the Secretary with the discretion to make his decision without providing sufficient standards for the Court to review it pursuant to the APA. The only guidance Congress gave to the Secretary was the requirement to consider the recommendation of the NAS, which he followed. Because Congress' 2009 legislation specifically authorized the Secretary to make a decision specifically to address the Drakes Bay Oyster Company's special use permit, and the Secretary was afforded discretion in this decision, it is not subject to judicial review.

However, the Court went on to explain that even if it did have jurisdiction to consider the merits of the lawsuit, it would be unsuccessful. The Court found that Lunny and the Company could not establish that the Secretary's refusal to issue the new permit was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Instead, the Secretary considered the explicit terms of the conveyance from the Johnson Oyster Company to the U.S., used rationale that was rooted in law and policy, and explicitly acknowledged and followed the guidelines specified by Congress when it granted him the authority to make the decision. The Court also weighed the equities and public interests of all parties involved and found that the repetitive warnings the Lunnys received regarding the expiration of their permit outweighed the effects of the Company's closing. As a result of Lunny and the Company's failure to demonstrate a likelihood of success on the merits and the balancing of the equities leaning toward the government, the Court found that injunctive relief would not be proper, regardless of the jurisdictional bar.

Conclusion

After the district court's decision, Lunny and the Company appealed to the Ninth Circuit Court of Appeals. While the circuit court has yet to hear the appeal, it did grant an emergency injunction on February 25, allowing the Drakes Bay Oyster Company to remain open until the court considers the case.[4] While this certainly is victory for Lunny and his company, it remains to be seen how the Ninth Circuit will decide the case and what influence the Northern District of California's findings will have on the court's opinion regarding jurisdiction and the case's merits.

Endnotes

1. 2013 J.D. Candidate, Univ. of Miss. School of Law.
2. Drakes Bay Oyster Co. v. Salazar, No. 12-cv-06134-YGR, 2013 WL 451860 at *6 (N.D. Cal. Feb. 5, 2013). The NAS released its findings in a report titled *Scientific Review of the Draft Environmental Impact Statement Drakes Bay Oyster Company Special Use Permit.*
3. *Id.*
4. Drakes Bay Oyster Co. v. Salazar, No. 12-cv-06134 (N.D. Cal. Feb. 25, 2013).

President Obama Creates the San Juan Islands National Monument

Benjamin Sloan[1]

On March 25, 2013, President Barack Obama declared a new national monument, the San Juan Islands National Monument.[2] The monument covers 970 acres of land across 450 islands in northwest Washington State. The designation is one of five new national monuments designated in March by President Obama under the 1906 Antiquities Act.

The designation will protect some of the iconic vistas, plant and animal life, and archaeological sites that characterize the coastal Northwest. The islands' woodlands are comprised of Douglas fir trees, as well as maples, oaks, hemlocks and cedars. Its grasslands were maintained by native populations with controlled burns and are now home to plants such as the great camas, as well as cacti and threatened herbs. Orcas and porpoises live off the coast, and black-tailed deer, otters, minks, bald eagles and falcons live on the islands as well as a species of butterfly previously believed to be extinct.

The Bureau of Land Management will manage the monument as a part of the Landscape Conservation System. The proclamation prevents these lands from being sold or leased for mineral extraction or geothermal energy production. It also imposes new limitations on the use of vehicles, restricting them to designated roads and paths to protect sensitive wildlife such as the islands' 200 species of mosses. In addition, the designation protects traditional sites used by native populations and ensures access to these sites by these groups.

Photograph of the San Juan Islands' sunset, courtesy of Oregon's Bureau of Land Management.

Endnotes

1. J.D. Candidate 2014, Univ. of Mississippi School of Law.
2. Proclamation No. 8947, 78 Fed. Reg. 18789 (2013).

Federal Circuit Dismisses California Water Rights Claim

Anna Outzen[1]

Photograph of the Ventura River, courtesy of Wink Photography.

The Federal Circuit Court of Appeals recently ruled that water diverted via a fish ladder built to protect endangered steelhead trout is not a "taking" of water rights. The controversy began when a water district claimed that the government owed it compensation for requiring it to build the fish ladder.[2] In 2008, the court surprised many when it ruled that the government's action could be evaluated under the standards used for physical takings, situations in which the government is seeking to take ownership or possession of property, as opposed to regulatory takings where governmental action is restricting the use of property. In the lawsuit's most recent round, the court had to determine whether such a taking actually existed. In other words, the court had to determine whether the water district had a property right in the water that was allegedly taken by governmental action.

Background

Casitas Municipal Water District (Casitas) contracted with the U.S. Bureau of Reclamation for the construction and operation of the Ventura River Project (Project). The Project provides water to the residential, industrial, and agricultural customers of Ventura County, California, which is located in southern California near Los Angeles. The Project uses a dam to impound water, which is then diverted from the Ventura River into a canal that carries the water to Casitas Reservoir to be stored until distribution to customers. The reservoir's water, 40% of which comes from the Ventura River, is eventually distributed to Casita's customers through a conveyance system of pipelines, pumping stations, and balancing reservoirs.

When the West Coast steelhead trout was listed as an endangered species in 1997, Casitas was forced to make some changes in how the Project operated. The National Marine Fisheries Service (NMFS)

attributed the species' decline largely to water developments like dams and dewatering. As a result of this listing and a biological opinion (BiOp) issued by NMFS, the government required Casitas to construct a fish ladder facility. The fish ladder would help steelhead trout migrate upstream and avoid being diverted into the Casitas Reservoir. The water moving through the fish ladder with the trout also remains in the Ventura River, reducing the amount of water flowing to the Reservoir. Casitas formally opened the fish ladder facility in December of 2004.

The following month Casitas challenged the fish ladder requirement, due to their concerns that the fish ladder's operations would negatively impact their ability to meet their customer's water demands. As part of its lawsuit, Casitas raised a Fifth Amendment "takings" claim seeking compensation for the water lost because of the required diversions. The Fifth Amendment of the U.S. Constitution prohibits the government from taking private property for public use without just compensation.[3] One of the first issues a court must determine in a takings case is whether the claimants have an identifiable property interest. If they do not, there was nothing for the government to take. If they do, then the court must determine whether the government's action or interference constituted a compensable taking of that interest.

The Court of Claims dismissed the takings claim, finding that the diversion was a restriction of the water district's use of the property and not a per se physical taking.[4] On appeal, the Federal Circuit overturned the decision, ruling that the takings claim should be analyzed under the "physical takings" test, since the government's actions resulted in a physical diversion of water.[5] The Federal Circuit remanded the case to the Court of Claims.

Beneficial Use

As an initial matter, the court had to determine the scope of the water district's property interest. California recognizes private property interests in public waters; however, there is no right to the water itself. At most a claimant has a right to use a certain amount of water for particular purposes. Furthermore, these use rights are limited to "beneficial use" of the water. The Court of Claims ultimately dismissed Casitas' takings claim, finding that it was not ripe since the water district did not show a reduction of beneficial use. The court ruled that there is no right of diversion separate from beneficial use. Further, the water district did not demonstrate a loss in beneficial use, since it failed to show a reduction in water deliveries to its customers.

On appeal, Casitas argued that diversion and storage of water for future use constituted beneficial uses of the water. According to the court, California law does not recognize diversion or diversion to storage of water as beneficial uses. California's Water Code explicitly provides that "[t]he appropriation [of water] must be for some useful and beneficial purpose, and when the appropriator… ceases to use it for such purpose[,] the right ceases."[6] Similarly, Casitas's license expressly states that the amount of the water to which Casitas has a right "is limited to the amount actually beneficially used," and the California Supreme Court has also stated that "an appropriative rights holder is entitled only to the amount of water beneficially used, not necessarily the entire amount diverted…"[7]

Conclusion

The Federal Court affirmed the trial court's dismissal of Casitas's takings claim. However, it was dismissed without prejudice, meaning Casitas could file this claim again if it can prove that the fish ladder facility prevented it from using its water rights. As long as Casitas is still delivering the maximum amount of water that it is allowed to sell to its customers, it will probably be unable to prove that its rights to beneficial use were affected.

Endnotes

1. 2013 J.D. Candidate, University of Mississippi School of Law.
2. Casitas Mun. Water Dist. v. United States, 2013 U.S. App. LEXIS 4067 (Fed. Cir. Feb. 27, 2013).
3. U.S. CONST. amend. V.
4. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100 (Fed. Cl. 2007).
5. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008)
6. CAL. WATER CODE § 1240.
7. *Casitas Mun. Water Dist*, 2013 U.S. LEXIS 4067, at *45.

Georgia Court Rules Wetlands Entitled to Buffer Protection

Anna Outzen[1]

Georgia's Erosion and Sedimentation Act[2] (Act) was passed in response to widespread water pollution and resource damage resulting from improper construction and development practices within the state. The Act's purpose is to strengthen the erosion and sedimentation control activities, thereby reducing water pollution and protecting the land, water, air, and all other resources of the state. In furtherance of this purpose, the Act established mandatory buffer zones along all state waters. Buffer zones are strips of trees and plants maintained along a stream or wetland that naturally filter out dirt and pollution before it reaches the water. Recently, conservation groups turned to the court system for clarification as to whether wetlands are considered "state waters" entitled to mandatory buffer protection under the Act.[3]

Background

In May 2010, the United States Army Corps of Engineers issued Grady County a permit to construct a 960-acre fishing lake northwest of Cairo, Georgia. Project plans included the construction of a 3,000-foot long and 65-foot tall dam, which would impound sections of Tired Creek, a tributary of the upper Ochlockonee River. The construction of the dam and impoundment of the lake would flood approximately nine miles of streams and destroy at least 129 acres of wetlands.

As a condition of the permit, the county had to get a variance from the Georgia Environmental Protection Division (EPD), authorizing the encroachment and disruption of the buffers along state waters at the site. In its application for the buffer variance, the county only sought a variance from the buffer requirements along the streams and failed to mention the wetlands located within the project area. EPD granted the variance for the buffers along the streams. Both the County's variance application and the EPD's decision were premised on the belief that wetlands were not "state waters" deserving of buffer protections under the Act, and therefore no variance was required for their inundation. Conservation groups Georgia River Network and American Rivers filed suit hoping to invalidate the variance for failure to consider all state waters, including the wetlands, within the project area.

The County and EDP Interpretation

The provision at issue mandates a "twenty-five foot buffer along the banks of all state waters," which is to be "measured horizontally from the point where vegetation has been wrested by normal stream flow or wave action."[4] All parties agreed that wetlands are in fact "state waters" for the purposes of the Act. The county and EPD, however, asserted that the state legislature's use of the term "banks" restricts the geographic scope of the Act in this particular context. They argued that "banks" means "stream banks," which the Georgia Natural Resources Board has described as "the point where the normal stream flow has wrested the vegetation."[5] Therefore, the county and EPD interpreted the statute to mean that buffers are only required for state waters with lines of wrested vegetation, and the wetlands in question in this case have no presence of wrested vegetation.

The Court's Interpretation

The court held that the Act required buffers for all state waters, including wetlands. The court found the county and EPD's definition of

"stream bank" irrelevant because this term is not present in the statute. Although the buffer provision does refer to a vegetation line, the court concluded that this phrase is used only to provide a point from which to measure buffers, not as a limitation on when buffers are required. Furthermore, according to the court, deference to EPD's interpretation would be improper because the agency had applied the buffer mandate inconsistently. Specifically, EPD had required buffers for coastal marshes and saltwater wetlands without any mention of the required wrested vegetation line.

The court concluded that the statute's use of the general terms "state waters" and "banks" indicated that the buffer provision applied broadly to all state waters, including wetlands. Furthermore, the statute includes a list of exceptions to the buffer requirement, such as along ephemeral streams and areas where drainage structures are needed. If the legislature intended to exclude wetlands, it could have done so by adding wetlands to this list of exceptions. The court also found that excluding wetlands from the buffer requirement would undermine the Act's intent to protect all state waters from pollution and strengthen the state's erosion and sedimentation control program. Therefore, the court ruled that "the Director [of EPD] exceeded his regulatory authority by issuing a buffer variance…that did not consider, account for, and authorize the project's encroachment on buffers for all state waters on the site, including wetlands."[6]

Standing

As a procedural matter, the county argued that the organizations did not have "standing" or authority to bring their lawsuit because their injuries stemmed exclusively from the federal permit authorizing the lake's construction, not the EPD's buffer variance. More specifically, the county argued that the flooding and destruction of wetlands and their buffers would result from carrying out the federal permit, and the issuance of the buffer variance was basically an automatic decision once the federal permit was issued. The court explained that although the groups' injuries will result from the flooding and destruction of the wetlands authorized by the federal permit, the issuance of the buffer variance is an additional source of injury.[7] Furthermore, the issuance of the variance was more than an automatic decision because the statute does not require EPD to grant such requests, EPD has their own criteria on which to base their review of variance requests, and EPD even required the County to amend its application upon finding that on-site streams had been left out of the federal permit. Therefore, the court found that the "Director's review of the variance request is more than a rubber stamp of the federal permit" and the conservation groups had standing to bring their claims against EPD and the county.[8]

Conclusion

The court's ruling that all state waters, including wetlands, require buffer protection should illicit a much more consistent application of the Act's buffer requirement from EPD in the future. Environmental and conservation groups believe that the court's ruling benefits anyone and everyone who swims in, fishes in, or drinks water in Georgia, reminding themselves of events that motivated the Act's passage as well as the Act's purpose—"to keep neighborhood streams from running orange when it rains."[9]

Endnotes

1. 2013 J.D. Candidate, University of Mississippi School of Law.
2. Ga. Code Ann. § 12-7-1 et seq.
3. Georgia River Network, et al v. Turner, et al, No. OSAH-BNR-EPD-ES-1308374-60-Miller (Ga. Admin. Hearings Jan. 14, 2013).
4. Ga. Code Ann. § 12-7-6(15)(A).
5. Ga. Comp. R. & Regs. r. 391-3-7-.01(x).
6. *Georgia River Network*, at 19.
7. *Id.* at 7.
8. *Id.* at 8.
9. Kathleen Sullivan, *Court Rules that All State Waters are Protected by Buffers*, Southern Environmental Law Center (Jan. 15, 2013) *available at* http://www.southernenvironment.org/newsroom/press_releases/court_rules_that_all_state_waters_are_protected_by_buffers/.

The University of Mississippi

THE SANDBAR

Sea Grant Law Center
Kinard Hall, Wing E, Room 258
P.O. Box 1848
University, MS 38677-1848

Littoral Events

Managing Our Nation's Fisheries: Advancing Sustainability Conference

Washington, DC • May 7 – 9, 2013

This conference follows up on the highly successful Managing Our Nation's Fisheries conferences held in 2003 and 2005. Managing Our Nation's Fisheries 3 will focus on how concepts, policies, and practice of fishery sustainability can be advanced to a higher level. Sessions will be of interest to members of the public, fishery participants, environmental advocates, fishery scientists and managers, policymakers, legislators, and journalists.

For more information, visit: www.cvent.com

ABA Water Law Conference

Las Vegas, NV • June 5 – 7, 2013

There in the Mojave Desert—where the subject of water is inescapable—water law experts will address emerging western, national, and international water issues against the backdrop of the most important recent water law developments. The two-day conference will feature panels comprised of leading in-house counsels, academics, government and NGO representatives, and private practitioners; keynote speakers; and a "hard hat" tour of the iconic Hoover Dam. The schedule will also include opportunities to network with speakers and fellow participants during breaks and receptions.

For more information, visit: www.americanbar.org

21st Annual Conservation Conference

Honolulu, HI • July 16 – 18, 2013

2013 marks the 21st annual Hawai'i Conservation Conference (HCC) this conference will bolster island conservation in Hawai'i and wider Pacific Islands. Highlights of the conference include: thought provoking keynote speakers; innovative panels and forums; a community event, novel lunch & reception, training opportunities, and more.

For more information, visit: http://hawaiiconservation.org