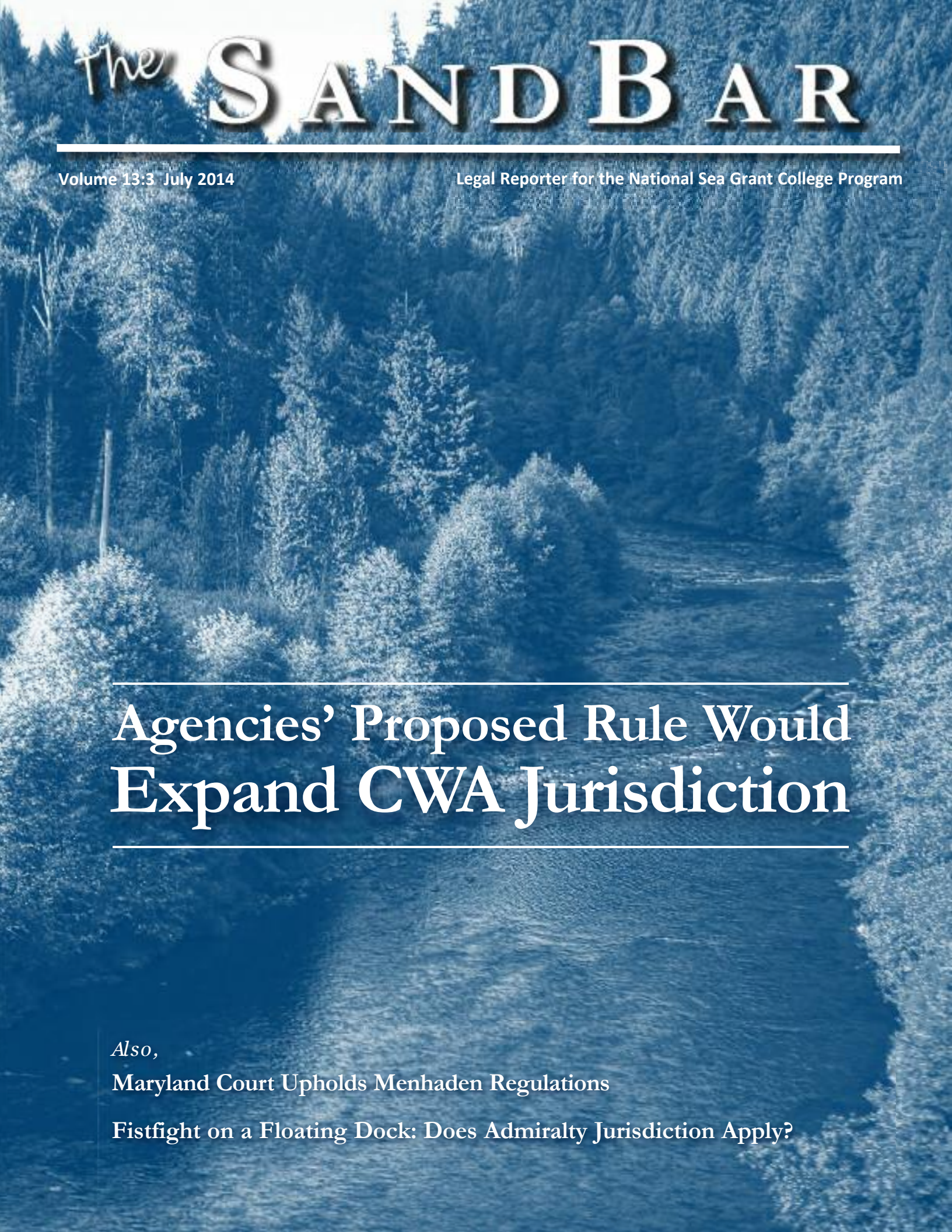
The SANDBAR

Volume 13:3 July 2014

Legal Reporter for the National Sea Grant College Program



Agencies' Proposed Rule Would Expand CWA Jurisdiction

Also,

Maryland Court Upholds Menhaden Regulations

Fistfight on a Floating Dock: Does Admiralty Jurisdiction Apply?

Our Staff

Editor:
Terra Bowling, J.D.

Production & Design:
Barry Barnes

Research Associates:
Allan J. Charles
Austin Emmons
Jesse E. Hardval
Phoenix Iverson

Follow us on Facebook at:
http://www.Facebook.com/nsglc

Follow us on Twitter at:
http://www.Twitter.com/sglawcenter

ISSN 1947-3966 NSGLC-14-02-03 *July 2014*
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.

The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the National Sea Grant Law Center or the U.S. Department of Commerce.

Recommended citation: Author's Name, *Title of Article*, 13:3 SANDBAR [Page Number] (2014).

Cover page photograph of the Cascade Stream in Wicopee, Oregon; courtesy of Wendell Wink.

Contents page photograph of Chesapeake Bay; courtesy of Vince Kelley.

Sea Grant
Law Center

The SandBar

Contents

Agencies' Proposed Rule Would Expand CWA Jurisdiction

Jesse E. Hardval[1]

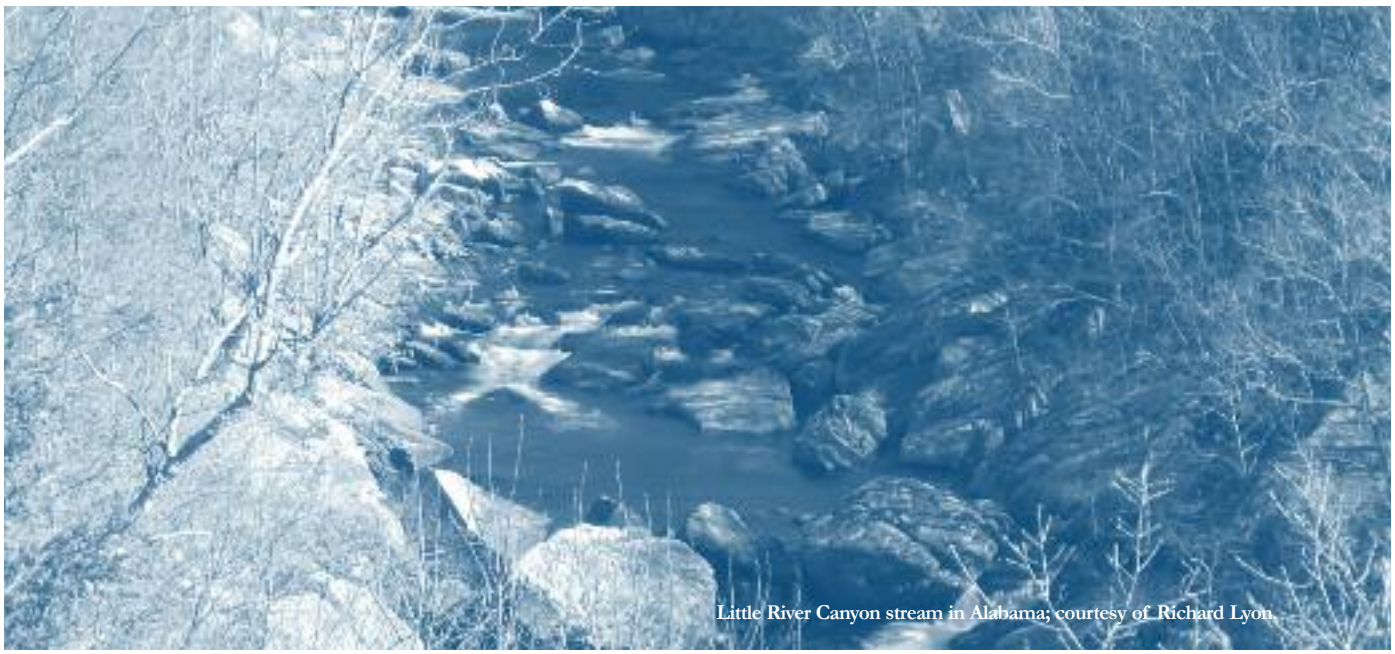
Last April, motivated by complex U.S. Supreme Court decisions in 2001 and 2006, the Environmental Protection Agency and the U.S. Army Corps of Engineers proposed a rule to streamline determinations of federal regulatory jurisdiction over navigable waters under the Clean Water Act. The agencies based the proposed rule on a scientific report, which synthesized more than one thousand scientific articles, and plan to create new classes of water bodies that are categorically subject to jurisdiction under the Act.

The Environmental Protection Agency; courtesy of Jareed Jarita.

Background

With its regulatory power rooted in the Commerce Clause of the U.S. Constitution, the Clean Water Act of 1972 (CWA) allows the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) to regulate navigable waters.[2] The states retain the power to regulate all other waters.[3] The CWA defines "navigable waters" as "waters of the United States."[4] Some thirty years ago, the Supreme Court established that this language allows for the regulation of some waters, like wetlands, that are not navigable in the traditional sense.[5] Still, the limit of this allowance has remained unsettled since the CWA's enactment.

In 2001, the Supreme Court gave a little guidance as to what waters are covered under the CWA's "waters of the United States" language. When the Corps refused to issue a fill permit to the Solid Waste Agency of Northern Cook County (SWANCC), litigation ensued to determine whether isolated ponds were protected under the CWA.[6] The Court ruled that the ponds, which were wholly within Illinois, were not "waters of the United States," so SWANCC did not need a permit to fill them.[7] It found no significant nexus between the ponds and a traditionally navigable water body. The Court ruled such a nexus was necessary for CWA jurisdiction to be extended to non-traditionally navigable water bodies.[8] It held that the presence of migratory birds did not create a significant nexus to navigability.[9]



Little River Canyon stream in Alabama; courtesy of Richard Lyon.

In 2006, the Court returned to the issue of navigability under the CWA after a Michigan resident, John Rapanos, backfilled wetlands on his property without a permit.[10] In a 4-4-1 decision, Justice Antonin Scalia's plurality opinion in *Rapanos* interpreted "waters of the United States" to cover only those bodies of water that are relatively permanent or continuously flowing, and described as streams, rivers, or lakes.[11] Nonetheless, a water that does not meet this test may still fall under CWA jurisdiction if a continuous surface connection exists between it and "bodies that are 'waters of the United States' in their own right."[12] This is known as the continuous surface connection test.

Justice Anthony Kennedy created a different test for determining CWA regulatory jurisdiction in his concurring opinion in *Rapanos*. After examining the purposes and objectives of the CWA, he ruled that it was the intent of Congress that all waters affecting the chemical, physical, and biological integrity of traditionally navigable waters should fall under the scope of the CWA.[13] Kennedy, in clarifying the significant nexus test from *SWANCC*, ruled that the extent of the chemical, physical, and biological connections determines if a significant nexus exists. This test extends the scope of regulatory jurisdiction to cover non-traditionally navigable waters that are substantially connected to other jurisdictional waters.[14] But not all connections will support the extension of CWA jurisdiction. Merely speculative or insubstantial connections are not significant nexuses, and do not allow the CWA's jurisdiction to be extended.[15] Most courts have found that Justice Kennedy's opinion, as the "narrower" opinion, is controlling and have applied the significant nexus test to jurisdictional determinations.

The Proposed Rule

The tests from *Rapanos* call for case-by-case analyses to determine whether waters that are not traditionally navigable fall within the scope of CWA jurisdiction. These analyses are complex, expensive, and time consuming. The proposed rule seeks to categorically extend the scope of the CWA to two classes of non-traditionally navigable waters: tributaries of traditionally navigable waters and water bodies adjacent to traditionally navigable waters.[16] The agencies hope that establishing these classes of "waters of the United States" will reduce confusion and time consumption within the regulatory and permit application processes.[17] Also, the rule seeks to extend CWA jurisdiction to encompass a third class, "other waters," in certain instances.[18]

The agencies based the rule on scientific information from over one thousand articles the EPA synthesized into a single report.[19] The report reached four major conclusions. First, streams strongly influence the functioning of downstream waters no matter how small or how frequently they flow.[20] Second, wetlands with bidirectional hydrologic connections to downstream waters, like those within riparian areas and floodplains, strongly influence downstream waters.[21] Third, wetlands that lack a bidirectional hydrologic connection to downstream waters, like vernal pools and prairie potholes, can still influence downstream waters.[22] And finally, "the effects of small water bodies in a watershed need to be considered in aggregate."[23] After reviewing these conclusions in light of the tests for CWA jurisdiction, the agencies created three classes of non-traditionally navigable waters: "tributaries," "adjacent waters," and "other waters."[24]

First, based on the scientific report, the proposed rule classifies "tributaries" within the definition of the "waters of the United States" and therefore categorically within the scope of CWA regulation.[25] The new rule defines "tributary" as a water that: (1) creates geographic features; (2) has an ordinary high water mark; and, (3) contributes flow to traditionally navigable waters directly or through other waters.[26] For wetlands, lakes, and ponds, however, the rule allows "tributary" classification upon satisfaction of only the third requirement, the contribution of flow.[27] No distinction is made between continuously flowing waters and ephemeral waters when determining if the waters fall within the "tributaries" category, a distinction required by Justice Scalia's test.[28]

The proposed rule also classifies all "adjacent waters" as waters within the definition of the "waters of the United States" and within the scope of federal regulatory power.[29] The rule defines "adjacent waters" as bordering, neighboring, or contiguous with traditional navigable waters.[30] It defines "neighboring" as within the riparian area or floodplain of, or sharing a shallow subsurface or confined surface connection with, a traditionally navigable water or a "tributary."[31]

With respect to "other waters," the agencies' proposed rule retains the case-by-case analysis. For other waters to be jurisdictional, a significant nexus must be shown.[32] In some instances these analyses will consider the waters within a group of similarly situated waters.[33] This type of grouping is consistent with the report's aggregation conclusion.[34] The rule defines "other waters" as waters that are neither traditionally navigable nor "tributaries," "adjacent waters," or excluded waters.[35] Excluded waters include waste treatment plants consistent with the CWA, prior converted cropland, and waters over which the agencies have not asserted jurisdiction based on policy matters.[36]

THE PROPOSED RULE ALSO CLASSIFIES ALL "ADJACENT WATERS" AS WATERS WITHIN THE DEFINITION OF THE "WATERS OF THE UNITED STATES" AND WITHIN THE SCOPE OF FEDERAL REGULATORY POWER.

Conclusion

The objective of the proposed rule is to reduce confusion concerning the scope of the Clean Water Act. But it may raise more questions than it answers. Will the proposed rule accomplish this goal? Costly, complex, and time consuming case-by-case determinations are still needed for the "other waters" category. Furthermore, do the definitions of "adjacent waters" and "other waters" violate the continuous surface connection test from the *Rapanos* plurality? Those definitions seem to rely solely on Justice Kennedy's significant nexus test. Will this rule finally calm the Clean Water Act's jurisdictional ebb and flow? If history is any indication, more litigation on the scope of the Clean Water Act's jurisdiction is all but assured.

Endnotes

1 2015 J.D. Candidate, University of Oregon School of Law.
2 33 U.S.C § 1251(a).
3 U.S. Const. Amend. 10.
4 33 U.S.C § 1362.
5 United States v. Riverside Bayview Homes, Inc., 474 US 121, 133 (1985).
6 Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 165 (2001).
7 *Id.* at 167.
8 *Id.* at 159.
9 *Id.* at 172.
10 Rapanos v. United States, 547 U.S. 715, 719 (2006).
11 *Id.* at 732.
12 *Id.* at 742.
13 *Id.* at 759 (Kennedy, J., concurring).
14 *Id.* at 780.
15 *Id.*
16 Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,198 (Apr. 21, 2014).
17 *Id.* at 22,190.
18 *Id.* at 22,211.
19 *Id.* at 22,222. *See* U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (2013).
20 Definition of "Waters of the United States" Under the Clean Water Act, *supra* note 16, at 22,222.
21 *Id.* at 22,223.
22 *Id.*
23 *Id.* at 22,196.
24 *Id.* at 22,198.
25 *Id.*
26 *Id.* at 22,199.
27 *Id.*
28 *Id.* at 22,206.
29 *Id.* at 22,198.
30 *Id.* at 22,199.
31 *Id.*
32 *Id.*
33 *Id.* at 22,211.
34 *Id.*
35 *Id.*
36 *Id.* at 22,189.

Maryland Court Upholds Menhaden Regulations

Phoenix Iverson[1]

Atlanta menhaden; courtesy of Brian Gratwicke.

In June 2013, the Maryland Department of Natural Resources (DNR) declared the Atlantic menhaden fishery closed for the season. The reason? New DNR regulations imposing a lower quota for fish caught in Maryland state waters.

Following the closure, local fishermen Burl Lewis and Larry Powley filed suit against the DNR, arguing that the regulatory action was based on faulty science and in violation of procedure. Initially, the fishermen sought an injunction from the court that would allow them and other fishermen to continue fishing until the court could rule on these issues.[2] Dorchester County Circuit Court Judge David Mitchell denied their request for an injunction and held a trial on May 28, 2014.

Atlantic Menhaden Fishery

Atlantic menhaden is a migratory fish species that ranges from as far north as Nova Scotia to as far south as Florida. Atlantic menhaden is a key link in the marine food chain, because it is a forage fish eaten by predator fish and sea birds.

The decline of menhaden has the potential to disrupt and damage many other species. Striped bass, a particularly important fish species in Maryland for both environmental and economic reasons, are beginning to show "signs of stress, malnutrition, and disease."[3] These problems have been linked to the recent decrease of menhaden as an available food source.[4] The number of Atlantic menhaden living to at least one year has dropped below 10% of established levels. This drop represents an unprecedented

Menhaden fishing boats; courtesy of Peter Hedlund.

low point for the species. Without proper management and conservation, this species, which is vital to the health and well being of the Atlantic coast, will continue to suffer.

Atlantic Menhaden Management

As authorized by the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Atlantic States Marine Fisheries Commission (ASMFC) manages the Atlantic menhaden fishery through Amendment 2 of the Interstate Fishery Management Plan for Atlantic Menhaden (Menhaden FMP).[5] ASMFC members include Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia. Pursuant to the MSA, any fishery management plan implemented by ASMFC must be based on the best scientific evidence available.[6] The fishery management plan must also work to prevent overfishing.[7]

According to ASMFC, "the 2010 benchmark stock assessment and the 2012 stock assessment update indicate that Atlantic menhaden are experiencing overfishing."[8] In response to this update, ASMFC adopted Amendment 2 to the Menhaden FMP. The catch limits imposed by Amendment 2 represent a "20% reduction from the average landings from 2009-2011 and an approximately 25% reduction from 2011 levels."[9] After adopting Amendment 2, ASMFC informed its member states that they should reduce the harvest of menhaden by 20%. Based on this information, the DNR set its quota at 5.12 million pounds. On June 29th, 2013 the DNR declared the menhaden fishery closed because the quotas were reached.

Scientific Evidence Excluded

In seeking to have the season reopened, the plaintiffs argued that the regulation was a violation of the MSA because it was not based on the best available science.[10] Outside of the courtroom, Lewis took issue with the classification of Atlantic

menhaden as a migratory species. He argued that based on his experience, there was a local population of menhaden that lived in the Chesapeake Bay and did not migrate; therefore, the studies done by the ASMFC were not accurate.[11] The Director of Fisheries Service for the DNR countered that a lack of scientific data prevents the conclusion that a separate stock of menhaden exist in the Chesapeake Bay.[12]

However, the fishermen were unable to make this argument in court. Lewis attempted to testify that the best available science was not being used for this regulation, but the court excluded his testimony based on the fact that he was not a scientist. According to reports, the plaintiffs planned on calling two DNR employees, who were also DNR's expert witnesses, to argue that the best available science was not used in enacting this regulation; however, the court granted DNR's motion to not allow those witnesses.[13]

THE DIRECTOR OF FISHERIES SERVICE FOR THE DNR COUNTERED THAT A LACK OF SCIENTIFIC DATA PREVENTS THE CONCLUSION THAT A SEPARATE STOCK OF MENHADEN EXIST IN THE CHESAPEAKE BAY.

The Court's Ruling

Without the aid of expert testimony, the plaintiffs were left with only the individual testimony of Lewis and Powley. This testimony was limited to the alleged negative economic effects the regulation had on the fishing industry and their personal experience as fishermen. At the conclusion of the plaintiffs' case, Judge Mitchell granted the state's motion for summary judgment and upheld the regulations.[14] In delivering his opinion Judge Mitchell said that, "while . . . the evidence . . . produced in trial 'clearly addresses the economic impact' . . . 'their case is still lacking the ability to sustain their burden placed on them by the law.'"[15] Essentially, the court ruled that the plaintiffs did not produce enough evidence to prove that the regulation implemented by the Department was not based on the best available science.

The legal requirement that fishery management plans be based on the best available science provides a mechanism by which individuals and groups can challenge a state or regional management body. With the support of scientific evidence these groups may very well be successful in these challenges. In this instance, Judge Mitchell ruled in favor of the State and the new regulation placed on the Atlantic menhaden fishery will remain in place. Cases such as this one are not uncommon, as states try to achieve a balance between conservation, economic, and recreational interests.

Official Reactions

Following the decision, state officials reacted positively to the ruling. Maryland Attorney General Douglas F. Gansler hailed the decision as a victory for the long-term health of the Chesapeake Bay.[16] Maryland DNR Secretary Joseph Gill said that, "we are very pleased by [the] ruling, which confirmed DNR's authority to manage Atlantic menhaden by regulation to comply with the Atlantic States Marine Fisheries Commission."[17] Gill went on to say that, "the decision supports the tireless efforts and professionalism of our team, and their commitment to using the best science available."[18] The focus of this case was on whether accurate and reliable science supported the new regulation. Those representing the Department and the state of Maryland certainly believe that there is no question it was.

Endnotes

1 2015 J.D. Candidate, Cumberland School of Law.

2 Tim Wheeler, *Court Denies Bid to Reopen Menhaden Fishery*, THE BALTIMORE SUN (Nov. 7, 2013, 12:06 p.m.).

3 *Atlantic Menhaden Campaign*, THE PEW CHARITABLE TRUST: ENVIRONMENTAL INITIATIVES, http://www.pewenvironment.org/campaign/atlantic-menhaden-campaign/id/85899364506 (last visited June 6, 2014).

4 *Id.*

5 Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891.

6 16 U.S.C. § 1851.

7 16 U.S.C. § 1851.

8 *Species – Atlantic States Marine Fisheries Commission*, ATLANTIC STATES MARINE FISHERIES COMMISSION, http://www.asmfc.org/species/atlantic-menhaden (last visited June 6, 2014).

9 *Id.*

10 Josh Bollinger, *Watermen Lose Suit against DNR*, The Star Democrat (May 29, 2014, 6:00 p.m.).

11 *Id.*

12 *Id.*

13 *Id.*

14 A Motion for Summary Judgment is when a party to a case argues that the other party has either not presented the evidence necessary to prove their claim or that the only conclusion based on the available evidence is that the party making the motion is entitled to a judgment in their favor.

15 Bollinger, *supra* note 10.

16 Press Release, Maryland Attorney General, AG Gansler Succeeds in Defending Vital Chesapeake Bay Menhaden Protections (May 29, 2014).

17 Tyler Butler, *Lawsuit by Watermen Against Maryland DNR Comes to an End*, WBOC 16 (May 29, 2014, 6:31 p.m.), http://www.wboc.com/story/25646569/lawsuit-by-watermen-against-maryland-dnr-comes-to-an-end.

18 *Id.*

Fistfight on a Floating Dock: Does Admiralty Jurisdiction Apply?

Austin Emmons[1]

After a fistfight erupted on a floating dock in navigable waters, one of the injured parties filed suit in state court to recover for his injuries. Others involved in the altercation filed a petition for limitation of liability in federal district court. The district court held that the claim was not a maritime tort and dismissed the petition for lack of federal admiralty jurisdiction.[2] On appeal, the U.S. Court of Appeals for the Second Circuit had to determine whether the claim was subject to federal admiralty jurisdiction.[3]

Background

On May 28, 2010, Sapna Tandon and Robert Doohan III (collectively, Tandon) took several friends on the *Up and Over*, a thirty-nine-foot fiberglass powerboat designed for recreational purposes, to Captain's Cove Marina[4] and docked the *Up and Over* by the marina's restaurant. Around the same time, Frank Genna and his friends arrived at Captain's Cove and docked at the floating dock; they then took the water taxi to the restaurant. The two groups did not dine with each other but left the restaurant at the same time. While Tandon's group was boarding the *Up and Over*, one of their friends fell into the water and was injured. Genna's group saw the fall and began to laugh, which prompted Tandon's group to begin yelling "unspecified but presumably unfriendly comments."[5] Genna's group then boarded the water taxi, and both the water taxi and the *Up and Over* left the main dock at the same time.

According to a member of Tandon's group, the water taxi headed towards the floating dock, while the *Up and Over* headed in the opposite direction towards the Long Island Sound. The friend, who fell while boarding the *Up and Over*, was bleeding and needed medical treatment. As a result, Doohan docked the *Up and Over* at the floating dock so that Tandon could examine the friend's injuries.

In contrast, Genna stated that the *Up and Over* began chasing the water taxi once it left the main dock. While chasing the water taxi, the passengers on the *Up and Over* yelled, screamed, and threw a beer bottle at Genna's group on the water taxi.

Captain's Cove Marina; courtesy of Susannah Anderson.

After the water taxi and the *Up and Over* docked at the floating dock, a fistfight broke out between the two groups. During the fight, a passenger from the *Up and Over* hit Genna and knocked him into the water. According to a witness, Genna appeared to be unconscious and was floating facedown in the water. Genna, however, claimed that he was physically held underwater. Due to the lack of oxygen, Genna claimed that he suffered severe injuries.

Genna and his wife filed suit in Connecticut state court against Captain's Cove for various torts, and Captain's Cove responded by filing a third party complaint against Tandon, Doohan, and other passengers on the *Up and Over*. Genna then filed a second amended complaint to add Tandon, Doohan, and the other passengers as third party defendants. Tandon and Doohan filed a petition for limitation of liability in the U.S. Court for the District Court of Connecticut. A petition for exoneration from or limitation of liability is peculiar to admiralty law, and it limits a vessel owner's liability for a covered claim to the value of the vessel and its freight.[6] The district court held that there was not federal admiralty jurisdiction because the

floating dock did not meet the "test" for federal admiralty jurisdiction and dismissed the petition. Tandon appealed, and the Second Circuit had to determine whether the claim was subject to federal admiralty jurisdiction.

Federal Admiralty Jurisdiction

In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, the U.S. Supreme Court laid out the location and connection test for determining federal admiralty jurisdiction over a tort claim.[7] First, the court has to decide whether the alleged tort meets the location test by looking at whether the tort "occurred on navigable water or was caused by a vessel on navigable water."[8] Next, the court must analyze whether the tort meets both prongs of the connection test. For the first prong, the court must examine "whether the general type of incident involved has a potentially disruptive effect on maritime commerce," and for the second prong, it must determine "whether the general character of the activity giving rise to the incident bears a substantial relationship to traditional maritime activity."[9] Under 28 U.S.C. § 1333(1), admiralty tort jurisdiction will only be proper if the location test and both prongs of the connection test are met.

Location Analysis

In this case, the injuries from the alleged tort occurred on the floating dock and in the surrounding navigable water. Since the dock is in a fixed location and attached to the harbor floor, it is considered to be land. Thus, the fistfight occurred on land and in navigable water. However, the Second Circuit did not resolve the difficult question of where the underlying tort occurred. The court believed making a location determination was unnecessary because the tort claim could not meet the connection test.

Connection Analysis

When describing the incident for the disruptive effect prong of the connection test, the "description should be general enough to capture the possible effects of similar incidents on maritime commerce, but specific enough to exclude irrelevant cases."[10] The Second Circuit concluded that the incident in this case was "a physical altercation among recreational visitors on and around a permanent dock surrounded by navigable water."[11]

Based on the general description, the court held that a physical altercation on and around a dock was not a realistic threat to maritime commerce for four reasons. First, a physical altercation on and around a dock "cannot immediately disrupt navigation."[12] Second, such a physical altercation "cannot immediately damage nearby commercial vessels."[13] Third, the court only considered physical altercations on permanent docks and not those on a vessel on navigable water. While the court found that a physical altercation on a vessel could result in harm to a vessel or cause a vessel to change its course, the court held that a physical altercation on a dock posed no such threats to maritime commerce. Fourth, while only considering physical altercations between recreational visitors and not those between maritime employees, the court found that there could not be "a potential effect on maritime commerce by injuring those who are employed in maritime commerce."[14]

As for the substantial relationship prong of the connection test, the court concluded that the issues in this case had little or no relation to issues within the scope of admiralty law.

Conclusion

The U.S. Court of Appeals for the Second Circuit did not determine the location of the alleged torts in *Tandon*, but did rule that the torts did not meet the connection test. Thus, the court held that "federal admiralty jurisdiction does not reach the claims at issue here, because this type of incident does not have a potentially disruptive effect on maritime commerce."[15] Therefore, the appellate court affirmed the district court's dismissal of Tandon's petition for limitation of liability due to lack of subject matter jurisdiction.

Endnotes

1. May 2016 J.D. Candidate, University of Mississippi School of Law.
2. In re Doohan, No. 12-cv-252 (JCH), 2012 U.S. Dist. LEXIS 188989, at *25 (D. Conn. Dec. 19, 2012).
3. Tandon v. Captain's Cove Marina of Bridgeport, Inc., No. 13-461, 2014 WL 2016551, at *1 (2d Cir. May 19, 2014).
4. Captain's Cove Marina is located in Bridgeport, Conn. on the waters of Black Rock Harbor and Cedar Creek and has water access to the Long Island Sound.
5. *Id.*
6. Limitation of Liability Act, 46 U.S.C. § 30505.
7. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995).
8. *Tandon*, 2014 WL 2016551 at *8 (citing *Grubart*, 513 U.S. at 534).
9. *Id.*
10. *Id.* at *9.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at *10.
15. *Id.* at *1.

Crashed Airplanes, Beached Submarines, and Sovereign Immunity

Allan J. Charles[1]

Driftwood Beach on Jekyll Island; courtesy of Evangelio Gonzalez.

In late 2010, Georgia's Jekyll Island community learned that 20th Century Fox would be filming part of *X-Men First Class* on their beaches. The local chamber of commerce estimated that between room rentals and other expenses, the county would see $5 million in revenue from the film. However, part of the deal called for certain aesthetic changes to the beach's landscape. Those changes included adding a beached submarine, a crashed aircraft, Caribbean sand, and hundreds of non-native palm trees. The Georgia Department of Natural Resources' (DNR) approval of the changes resulted in a lawsuit.[2] Ultimately, the grievance over the approval morphed into a citizen's suit against the state.

Background

This wasn't the first time Jekyll Island residents had seen their beach landscape changed for a film. In 1989, the DNR issued a permit to allow for significant landscape alterations to the beaches for the film *Glory*. In that instance, the DNR issued a permit allowing the use of heavy machinery to alter the beaches.

When the DNR issued a Letter of Permission (LOP)[3] authorizing the alterations for *X-Men First Class*, two Jekyll Island residents, David and Melinda Egan, brought suit. Their claim, joined by the Center for a Sustainable Coast (Center), argued that the practice of issuing LOPs instead of permits ran afoul of the Shore Protection Act, which requires the DNR to issue permits for any shore altering activities.[4]

Sovereign Immunity

Initially, the case was dismissed on the theory of "sovereign immunity," or the notion that the state is protected from being sued without consent. Governmental immunity has been diminished in some instances, through legislation and judicial decisions, to allow certain claims against the state. In this case, the claim was brought for injunctive relief, which is a petition to stop an action, usually a harmful one, before it occurs. In *IBM v. Evans*, a Georgia appellate court ruled that injunctive relief is an exception to sovereign immunity.[5]

Relying on *IBM v. Evans*, the appellate court held that the DNR's actions in issuing LOPs was outside the scope of its authority and that the common law forbids the state from performing illegal acts and shielding itself from suit through sovereign immunity.[6] The case was appealed to the Georgia Supreme Court. Before the state's highest court could hear the case, however, the Shore Protection Act was amended to allow the DNR to issue LOPs.[7] Generally, if an activity sought to be stopped with an injunction takes place before the judge can hear the case, then granting or denying the injunction is moot and the case is dismissed. Fortunately for the Egans, the court found the case was not moot for two reasons.

GENERALLY, IF AN ACTIVITY SOUGHT TO BE STOPPED WITH AN INJUNCTION TAKES PLACE BEFORE THE JUDGE CAN HEAR THE CASE, THEN GRANTING OR DENYING THE INJUNCTION IS MOOT AND THE CASE IS DISMISSED.

First, even though legislation had been passed specifically allowing the state to issue such letters, the state had not yet been enjoined from issuing such letters, nor had it voluntarily stopped issuing them. Second, the issue was not moot because the Center could still seek injunctive relief if the letter did not comply with the state's statutory definition for a LOP.

The court then addressed the appellate court's reliance on *IBM v. Evans* in its holding. After a review of the case, the state supreme court found the *IBM v. Evans* decision unsound for four reasons: 1) the Georgia Constitution authorizes only the General Assembly to waive sovereign immunity; 2) the Georgia constitution does not provide an exception to the General Assembly's exclusive authority to waive sovereign immunity; 3) *IBM v. Evans* mischaracterizes a waiver of sovereign immunity as an exception; and 4) cases relied on in *IBM v. Evans* predate or ignored the impact of incorporation of sovereign immunity in the state. The court ultimately held that sovereign immunity is a bar to injunctive relief at common law and overturned *IBM v. Evans*.

Overturning *IBM v. Evans* has two important outcomes. First, sovereign immunity is now a bar to the claim of injunctive relief. More importantly, the state's system of checks and balances has changed. Before, the judiciary could create exceptions or waivers to sovereign immunity to reach equitable outcomes. Now, only the legislative branch may waive sovereign immunity. Aggrieved citizens are not completely without recourse, however. The Georgia Constitution has many waivers to sovereign immunity. For example, sovereign immunity does not protect the unlawful conduct of public officials in their individual capacity.

Conclusion

The state's argument prevailed, but ultimately the Egans and the Center got an equitable outcome. Twentieth Century Fox took care of the beaches during and after the project. While filming, all the fuel and hydraulic lines were diapered to prevent oil leaks. After filming, Mike Demell and his team from Environmental Services were hired to clean the debris left from the film, import the appropriate sand back to the beach, re-plant more than 30,000 plants, and install a sprinkler system. Local authorities say that the beach is in better condition now than before.[8]

Endnotes

1. 2014 JD Candidate, University of Mississippi School of Law.
2. Georgia Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 755 S.E. 2d 184 (Ga. 2014).
3. Letters of permission means written authorization from the department to conduct a proposed activity in an area.
4. Permits must be approved and issued by the State Shore Protection Committee. Under the Shore Protection Act, the committee must hold a public meeting at which the project is considered to allow for public notice. *See* GA. CODE ANN. § 12-5-239(a).
5. Int'l Bus. Machines Corp. v. Evans, 453 S.E. 2d 706 (Ga. 1995).
6. Ctr. for a Sustainable Coast, Inc. v. Georgia Dep't of Natural Res., 319 Ga. App. 205, 209 (2014).
7. *See* GA. CODE ANN. § 12-5-234(a)(5).
8. Katie Carpenter, *Jekyll Idyll: Bringing Back a Beach After the X-Men Fly Away*, PRODUCED BY, Oct. 2013, at 50-52.

Survey It Ain't So: Home Mistakenly Built on Coastal Park Property Must Be Removed

Terra Bowling, J.D.

After a developer mistakenly constructed a $1.9 million home on public park land in Rhode Island, the owner of the property, the Rose Nulman Park Foundation, filed suit.[1] The trial court ordered the developer to remove the home. On appeal, the court affirmed.

Background

The park, described as "a diamond on the necklace that is Rhode Island's beautiful coastline," was established by the Foundation as a public park to be used for "recreation and contemplation."[2] The agreement dedicating the park stipulates that if the park is used in any manner other than intended, the trustees of the Rose Nulman Park Foundation must pay $1.5 million to the New York Presbyterian Hospital.

In 1984, Robert C. Lamoureux, owner of Four Twenty Corporation, purchased a parcel of land abutting the Nulman property. Lamoureux enlisted an engineering firm to produce a site development plan and to help obtain the necessary permits for construction of a single-family residence on the property. The plan included a boundary survey.

In January 2011, construction was complete and Lamoureux entered into a purchase agreement with a prospective buyer to sell the house for approximately $1.9 million. Prior to purchasing the house, the buyer conducted a survey which revealed that the house was entirely located on the Nulman Park property. Lamoureux attempted to purchase the property from the Foundation but was denied. The trustees noted that the $1.5 million penalty provision prevented them from selling or building on the property, and they informed Lamoureux that the house must be taken down or moved.

In March 2011, the Foundation filed suit against Lamoureux and Four Twenty Corporation, alleging trespass and seeking an order to require removal of the house from the property. The trial court noted that injunctive relief, in this case ordering removal of the encroaching building, is the appropriate remedy for trespass. Noting the "unfortunate situation" and Lamoureux's good faith reliance on the survey, the court nonetheless found that the situation did not qualify for any of the exceptions to injunctive relief for trespass. The court ruled in favor of the Foundation and ordered Lamoureux to remove the house.

The trial court noted that injunctive relief, in this case ordering removal of the encroaching building, is the appropriate remedy for trespass.

Trespass Exceptions

In past cases, Rhode Island courts have found exceptions to granting an injunction for a trespass: acquiescence, laches, and *de minimis*. Acquiescence might occur when a property owner does not object to encroachment on his property. Laches bars a claim if a plaintiff has waited an unreasonable amount of time to bring the claim. A *de minimis* trespass may arise if the encroachment on the property is only slight. In very few trespass cases, courts have "balanced the equities," or considered whether the injunction would disproportionately harm the defendant with minimal benefit for the plaintiff.

On appeal, Lamoureux argued that the trial court improperly granted the order to remove the house. Specifically, he claimed that the trial court erred in not balancing the equities. The Rhode Island Supreme Court summarily dismissed this argument.

Narragansett Beach coastline in Narragansett, RI; courtesy of Lal Beral.

The court noted that although balancing the equities is an option in certain instances, a trial court is not required to balance the equities before granting injunctive relief in a trespass action. Further, the decision to grant injunctive relief is within the discretion of the trial court judge.[3] And, although the trial judge was not required to balance the equities, he did so.

> *Not only did the trial justice acknowledge the great value placed on property rights, but he also meaningfully grappled with the relative hardships to the parties. He considered the "substantial financial burden" which an injunction would place on defendants, but concluded that the harm to the Nulmans that would result from a deliberate thwarting of their express intent in creating the Foundation outweighed the burden to defendants.*[4]

The court also discounted Lamoureux's argument that the court should rely on other cases in which courts balanced the equities when an encroaching party acted innocently and the hardship to the defendant far outweighed the harm to the plaintiff. The court noted that those cases would not apply in this instance, due to the potential harm to the park and Foundation trustees. The court cited the fact that the Trustees could potentially be liable for the $1.5 million penalty if the house remains on the property. In addition, encroachment on the park interferes with the public's use of the land. "This clear commitment of the land's use as community space satisfies us that any attempt to build on even a portion of the property would constitute an irreparable injury, not only to plaintiff but to the public."[5]

Conclusion

While sympathetic to the defendant, the Rhode Island Supreme Court ultimately ruled in favor of the Nulman Foundation. The court noted that it could not punish an innocent plaintiff by taking its property. According to news reports, Lamoureux has secured most of the permits necessary to move the house to a neighboring lot at a cost of about $300,000.[6]

Endnotes

1 *Rose Nulman Park Found. ex rel. Nulman v. Four Twenty Corp.*, 2013-68-APPEAL, 2014 WL 2640018 (R.I. June 13, 2014).

2 *Id* at *1.

3 *Id.* at *8. *Citing* Cullen v. Tarini, 15 A.3d 968, 982 (R.I. 2011).

4 *Id.* at *9.

5 *Id.* at *12.

6 Maya Srikrishnan, *Rhode Island Court Tells Developer to Move House*, L.A. Times, June 18, 2014.

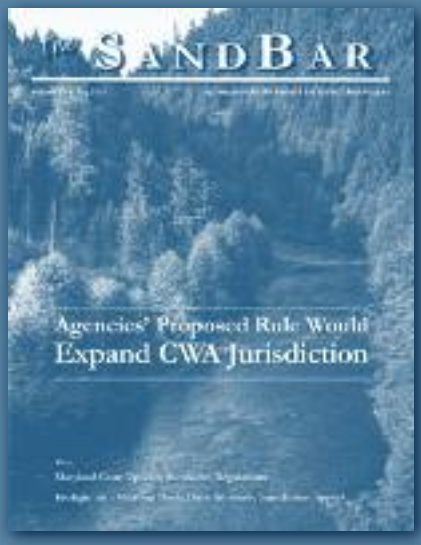
The University of Mississippi

THE SANDBAR

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

IMPORTANT ANNOUNCEMENT ABOUT THE SANDBAR

Volume 13 will be the last *printed* volume of *THE SANDBAR*, but you'll still be able to view new issues of *THE SANDBAR* electronically. If you do not already subscribe electronically, go to: **http://nsglc.olemiss.edu/subscribe**. Thanks for continuing to read!



Subscribe to *THE SANDBAR* Online

http://nsglc.olemiss.edu/subscribe