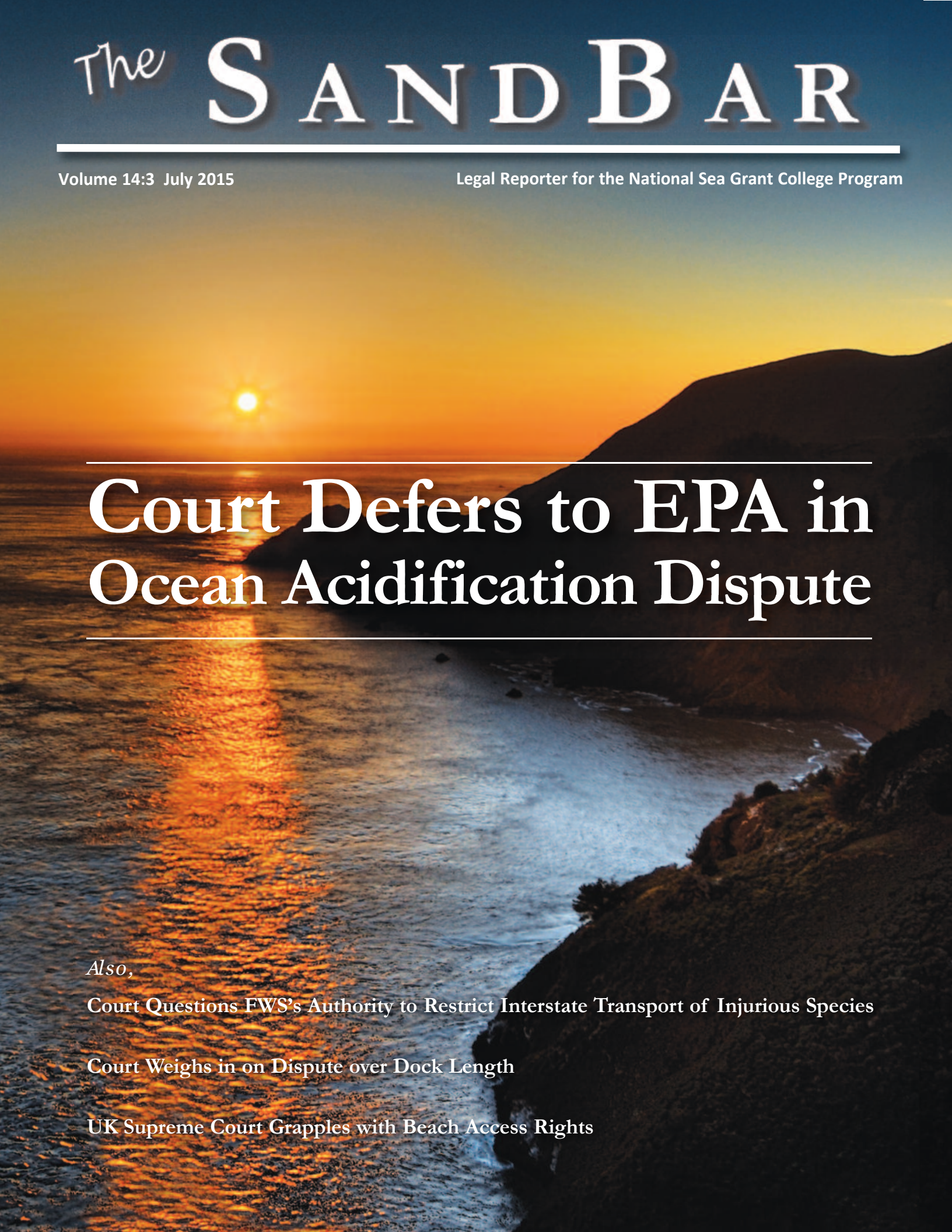
The SandBar

Volume 14:3 July 2015

Legal Reporter for the National Sea Grant College Program



Court Defers to EPA in Ocean Acidification Dispute

Also,

Court Questions FWS's Authority to Restrict Interstate Transport of Injurious Species

Court Weighs in on Dispute over Dock Length

UK Supreme Court Grapples with Beach Access Rights

Our Staff

Editor:
Terra Bowling, J.D.

Production & Design:
Barry Barnes

Contributors:
Autumn Breeden
Stephanie Showalter Otts
Jesse Reiblich
L. Kyle Williams

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

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

ISSN 1947-3966 NSGLC-15-02-03 *July 2015*
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 NA140AR4170065, 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.

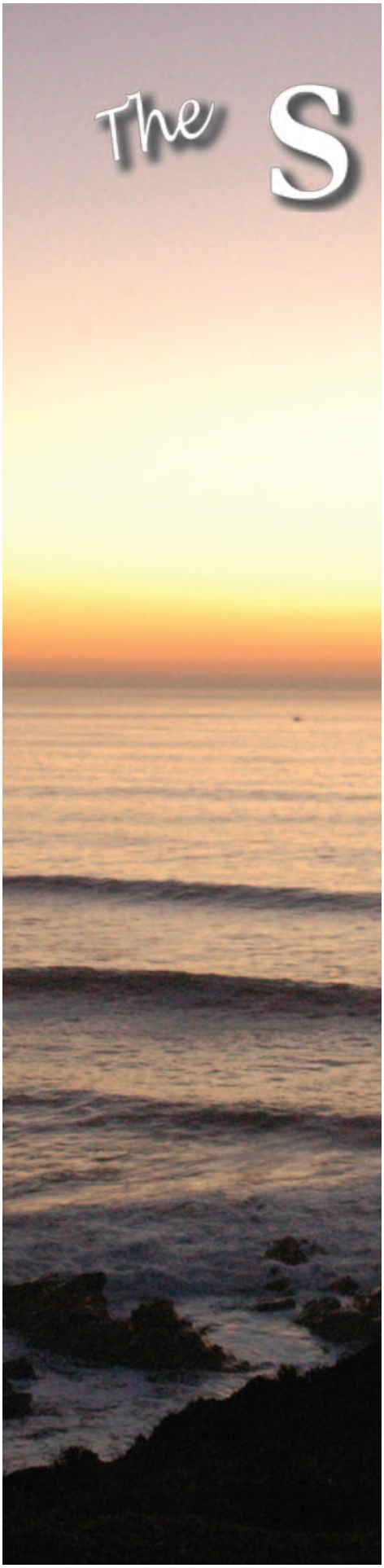
The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the National Sea Grant Law Center or the U.S. Department of Commerce.

Recommended citation: Author's Name, *Title of Article*, 14:3 SANDBAR [Page Number] (2015).

Cover page photograph of a view of the Pacific Ocean from the California coast courtesy of John B. Mueller.

Contents page photograph of a view of the Pacific Ocean from the California coast courtesy of Wonderlane Design.

Sea Grant
Law Center

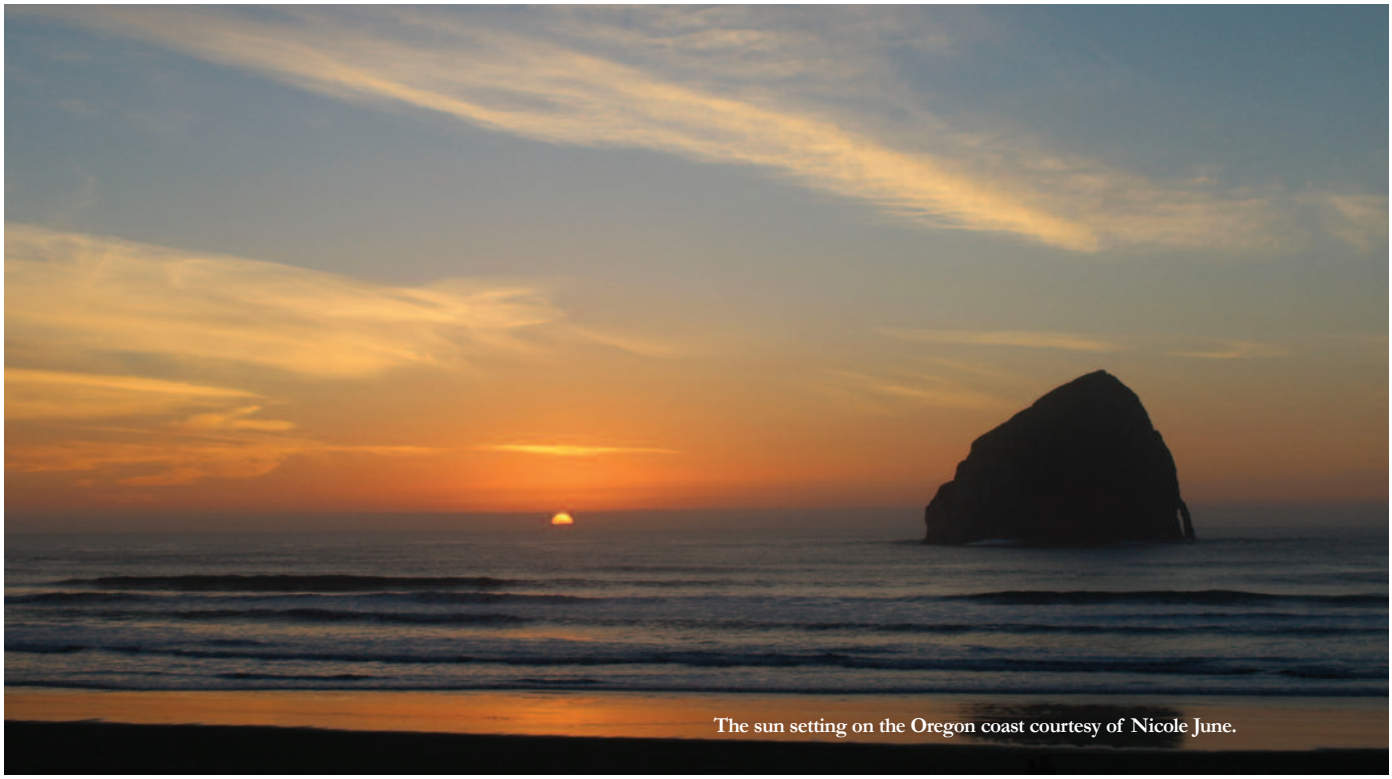


The SandBar

Contents

Court Defers to EPA in Ocean Acidification Dispute

L. Kyle Williams[1]



The sun setting on the Oregon coast courtesy of Nicole June.

Ocean acidification is a phenomenon in which the pH of ocean waters gradually decreases. Low pH waters have damaging effects on certain marine organisms, including causing "difficulties forming and maintaining calcium carbonate-based shells and skeletons . . . [and causing a] decrease [in] the saturation states of important biominerals such as aragonite and calcite [which] is chemically corrosive and can dissolve the shells of small crustaceans and immature shellfish."[2] Moreover, these effects can be felt further up the food chain, causing harm to the marine environment as a whole.

In March, the U.S. District Court for the Western District of Washington ruled on a challenge to the Environmental Protection Agency's (EPA) approval of Oregon and Washington's lists of impaired waters created pursuant to the Clean Water Act (CWA). The Center for Biological Diversity, a non-profit environmental group, and other plaintiffs (collectively, CBD) alleged that the EPA's approval was arbitrary and capricious, because the lists failed to identify any coastal waters as being impaired by the effects of ocean acidification.

Background

The CWA governs national water quality and requires states to promulgate standards for all bodies of water within their borders.[3] Every two years, pursuant to § 303(d) of the CWA, states must generate a list of impaired waters that do not meet the state water quality standards and submit this list to EPA for approval.[4] In creating their own water quality criteria, both Washington and Oregon have at least some standards that implicate ocean acidification. For example, both states require waters of the state to be of sufficient quality to prevent

The Pacific Ocean viewed from the beach at Ocean Shores, WA courtesy of G. D. Taber.

degradation that would negatively affect fish and aquatic life.[5] However, neither state has listed any marine waters as impaired due to the effects of ocean acidification.

In filing its complaint, CBD argued the waters of both Washington and Oregon were harmed by ocean acidification. Their challenge alleged that Washington and Oregon's lists of impaired waters should have included marine waters affected by ocean acidification. Specifically, they alleged EPA's approval of the lists runs contrary to the evidence before them and that the two states failed to consider readily available water quality data when they created their 303(d) lists.

Agency Deference

The overarching principle reaffirmed by the district court in this case is judicial deference to agency decision-making, especially when agency expertise is required to reach such decisions and where an agency is interpreting its own regulations. Generally, the Administrative Procedure Act (APA) permits judicial review of agency actions, unless the agency's enabling statute expressly provides otherwise. The "arbitrary and capricious" standard of review is highly deferential to agencies: a court must affirm agency decisions so long as the agency has articulated a rational connection between facts found and the choice made.[6] The court must set aside agency decisions that are "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."[7]

After establishing CBD had standing—the right to bring a matter before the court—the district court analyzed and ultimately rejected a great deal of evidence presented to it by CBD. The general rule, as established by the APA, is that judicial review is conducted pursuant to the administrative record in existence at the time of the agency action. Though the court enjoys some discretion to admit additional evidence, there are very few exceptions that sanction such admission. In this case, CBD was permitted to introduce pH-monitoring datasets for Washington waters to ensure the agency had considered all relevant factors prior to making its decision. The court noted that that evidence was available at the time EPA made its decision. The court rejected other evidence accumulated after the EPA's decision, noting that agency decisions "must not be judged with hindsight."

The first of two substantive arguments advanced by CBD was that EPA ignored evidence, when it approved Washington and Oregon's 303(d) lists, that illustrated marine water impairment within both states due to ocean acidification. The court found that EPA's method of reviewing the evidence within the record was not implausible or contrary to the evidence. Notably, the court went further and said the record contained "no documentation of adverse effects on wild aquatic life populations in Washington or Oregon attributable to ocean acidification."[8] In the court's opinion, because

the science regarding the effects of climate change on the ocean continues to develop, it would be improper for courts to try to influence agency decision-making in either direction where two rational choices exist. In sum, the court refused to second-guess EPA's finding that the evidence before it did not conclusively show the waters in question to be impaired by the effects of ocean acidification.

In its second argument, CBD claimed that the states ignored certain pH data and because EPA failed to independently evaluate this data, its approval of the states' 303(d) lists was arbitrary and capricious. Again, the court held that EPA was entitled to great deference. For example, although Washington did not include any marine pH data when making its listing decision, the state explained that it left out the data due to questions regarding its reliability. The court held EPA's decision to approve the list was statutorily permissible since the state had provided a reasoned explanation for the choices it made. Ultimately, the court found EPA's conclusion that both states satisfactorily assembled and evaluated available water quality data pertaining to ocean acidification was not arbitrary and capricious.

Conclusion

The district court's grant of summary judgment for the EPA reaffirms the oft-cited administrative law principle of agency deference. This administrative law norm helps to prevent the judiciary from heavy-handedly interfering in the regulatory process—a traditionally quasi-legislative activity. As the science behind ocean acidification becomes more established, courts might choose to take more active positions. Either way, this is likely not the last case involving ocean acidification that will come before the courts in the near future. Although, as has been illustrated in this challenge by CBD, overcoming the strong deference accorded to agencies is not a simple feat.

Endnotes

[1] 2016 J.D. Candidate, University of Mississippi School of Law.

[2] Ctr. For Biological Diversity v. U.S. E.P.A., 2015 WL 918686 at *1 (W.D. Wash. Mar. 2, 2015).

[3] 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(d)(1).

[4] *Id.*

[5] *Ctr. For Biological Diversity*, 2015 WL 918686 at *3.

[6] 5 U.S.C. § 706(2)(A).

[7] *Id.*

[8] *Ctr. For Biological Diversity*, 2015 WL 918686 at *24.

Photograph of the sun setting over the Pacific Ocean from a view of the San Francisco Bay courtesy of Tony Webster.

Court Questions FWS's Authority to Restrict Interstate Transport of Injurious Species

Autumn Breeden[1] and Stephanie Showalter Otts[2]

Photograph of a yellow anaconda courtesy of Emmanuel Keller.

On March 19, 2015, the U.S. District Court for the District of Columbia granted the request of the United States Association of Reptile Keepers (USARK) for a preliminary injunction in its lawsuit challenging the U.S. Fish and Wildlife Service's (FWS) constrictor snake regulations. Although this litigation is still in the early stages, the court's opinion raises questions about common understandings of the FWS authority under the Lacey Act and could have significant impacts on the agency's invasive species program.

"Injurious Species" Listing

On March 6, 2015, the FWS issued a regulation declaring the reticulated python, DeSchauensee's anaconda, green anaconda, and Beni anaconda as "injurious" under the Lacey Act. The Lacey Act is one of the oldest wildlife protection statutes in the United States. It was enacted in 1900 to help states protect their native wildlife by prohibiting the interstate transport of wildlife killed or taken in violation of state law. Title 18 of the Lacey Act, often referred to as the "injurious species provision," authorizes the FWS to prohibit the

Photograph of a Burmese python courtesy of Emmanuel Keller.

importation and shipment of species "deemed to be injurious or potentially injurious to the health and welfare of human beings, to the interest of forestry, agriculture, and horticulture, and to the welfare and survival of the wildlife or wildlife resources of the United States."[3]

The 2015 Final Rule was part of the FWS's ongoing efforts to prevent the introduction and spread of large constrictor snakes in the United States. The FWS first took action in 2012, listing four species as injurious: Burmese python, yellow anaconda, and northern and southern African pythons. The Burmese python is a notorious invasive species. Native to Southeast Asia, the Burmese python are among the largest snakes on the planet. Likely introduced to south Florida through the pet trade, the Burmese python is currently thriving in its adopted home. Since 2002, over 2,000 pythons have been removed from Everglades National Park.[4] Burmese pythons compete with and prey on native wildlife, and their introduction can significantly alter food webs and ecosystems.

The FWS has been criticized for not acting quickly enough to address the Burmese python threat and has admitted that it is an "example of a species that may not have become so invasive in Florida if it had been listed [under the Lacey Act] before it had become established."[5] The 2015 Final Rule attempted to more proactively address the threat, listing two species not yet sold or found in the U.S. (the DeSchauensee's anaconda and Beni anaconda) and two species (the reticulated python and the green anaconda) commonly sold in the U.S pet trade but not yet established in the wild.

Interstate Transport

In 2013, USARK filed an action in federal district court challenging the 2012 rule. The group claimed that banning interstate transportation of the listed snakes exceeded the authority granted to the Secretary of the Interior under the Lacey Act. Following the 2015 rule listing additional species, USARK amended its complaint to challenge that

rule as well. The 2012 and 2015 rules prohibit both the importation and interstate transportation of the eight listed constrictor snakes. While the language of 18 U.S.C. § 42 clearly prohibits the importation of injurious species into the United States, it does not directly refer to interstate transportation. In addition to importation, § 42 prohibits "any shipment between the continental United States, the District of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States." USARK contends that this provision bans only the shipment of injurious species between a state in the continental United States and either the District of Columbia, Puerto Rico, Hawaii, or other possession, and not the shipment between two states *within* the continental United States. USARK therefore claims the FWS exceeded its authority when it banned the interstate transport of reticulated pythons and green anacondas in 2015.

THE DISTRICT COURT FOUND NO REFERENCE IN THE LEGISLATIVE HISTORY AS TO THE LAW'S APPLICABILITY TO SOLELY DOMESTIC SHIPMENTS (I.E., SHIPMENT BETWEEN INDIVIDUAL STATES).

Defining Congressional Intent

In April, USARK filed an Application for a Temporary Restraining Order to enjoin implementation of the 2015 rule. To determine whether the FWS has authority to prohibit interstate transportation, the court first looked to the plain meaning of the statute. The court found that there was no apparent plain meaning, as § 42 could reasonably be interpreted multiple ways.

When text alone is not enough to show Congress's intent, the courts look to legislative history to gain context. In this case, the district court found that the legislative history of the 1960 Lacey Act amendments supported USARK's positions. Before 1960, the Lacey Act prohibited the importation of listed species "into the United States or any Territory or district thereof." It did not address domestic transportation. The 1960 amendments added the "any shipment between" language reference above. According to one Department of Interior witness, the amendments were intended to broaden the language "a bit" to prevent the introduction of the mongoose from Hawaii, Puerto Rico, and the Virgin Islands into the continental United States.[6] The district court found no reference in the legislative history as to the law's applicability to solely domestic shipments (i.e., shipment between individual states).

Statements made by Department of Interior officials during rulemaking proceedings in the 1970's strengthened the court's opinion regarding Congressional intent. The agency routinely stated that § 42 placed no restrictions on interstate shipments, except for those between the continental United States and Hawaii and the island territories.

The agency's interpretation of its statutory authority began to change in the 1980's and, when the FWS listed mitten crabs as injurious in 1989, the agency prohibited all interstate transportation. The FWS argued that this broader interpretation of § 42 has been accepted by Congress, as reflected in several recent invasive species laws. When Congress listed the zebra mussel as an injurious species in 1990, there was clear concern about the spread of the species outside the Great Lakes. Similar domestic concerns were present when Congress listed Asian carp in 2010. The legislative history of both listings "suggested that Congress understood the Lacey Act to prohibit all interstate transportation of listed species."[7] The district court, however, determined that this legislative history was not enough to support a finding that Congress had implicitly amended the Lacey Act.

Conclusion

"Although the question is close," the district court concluded that USARK demonstrated a likelihood of success on the merits and was entitled to injunctive relief.[8] However, "the potential for a new invasive constrictor species becoming established in any part of the United States is an extremely serious threat to the public interest."[9] The court, therefore, limited the scope of the preliminary injunction, which went into effect on June 2, 2015. Although USARK members will be permitted to continue interstate transport of the reticulated python and the green anaconda, the regulation will remain in force in Florida and Texas – the two states most at risk from an introduction due to their favorable climate. Although USARK was successful in obtaining the preliminary injunction, the litigation is not over and the ultimate fate of FWS authority to limit interstate transport under the Lacey Act remains unclear.

Endnotes

1 2017 J.D. Candidate, University of Mississippi School of Law.

2 Director, National Sea Grant Law Center.

3 18 U.S.C. § 42.

4 http://www.nps.gov/ever/learn/nature/burmesepythonsintro.htm

5 United States Assoc. of Reptile Keepers, Inc. v. Jewell, No. 13-2007, 2015 WL 2207603, at *4 (D.D.C. May 12, 2015).

6 *Id.* at *16.

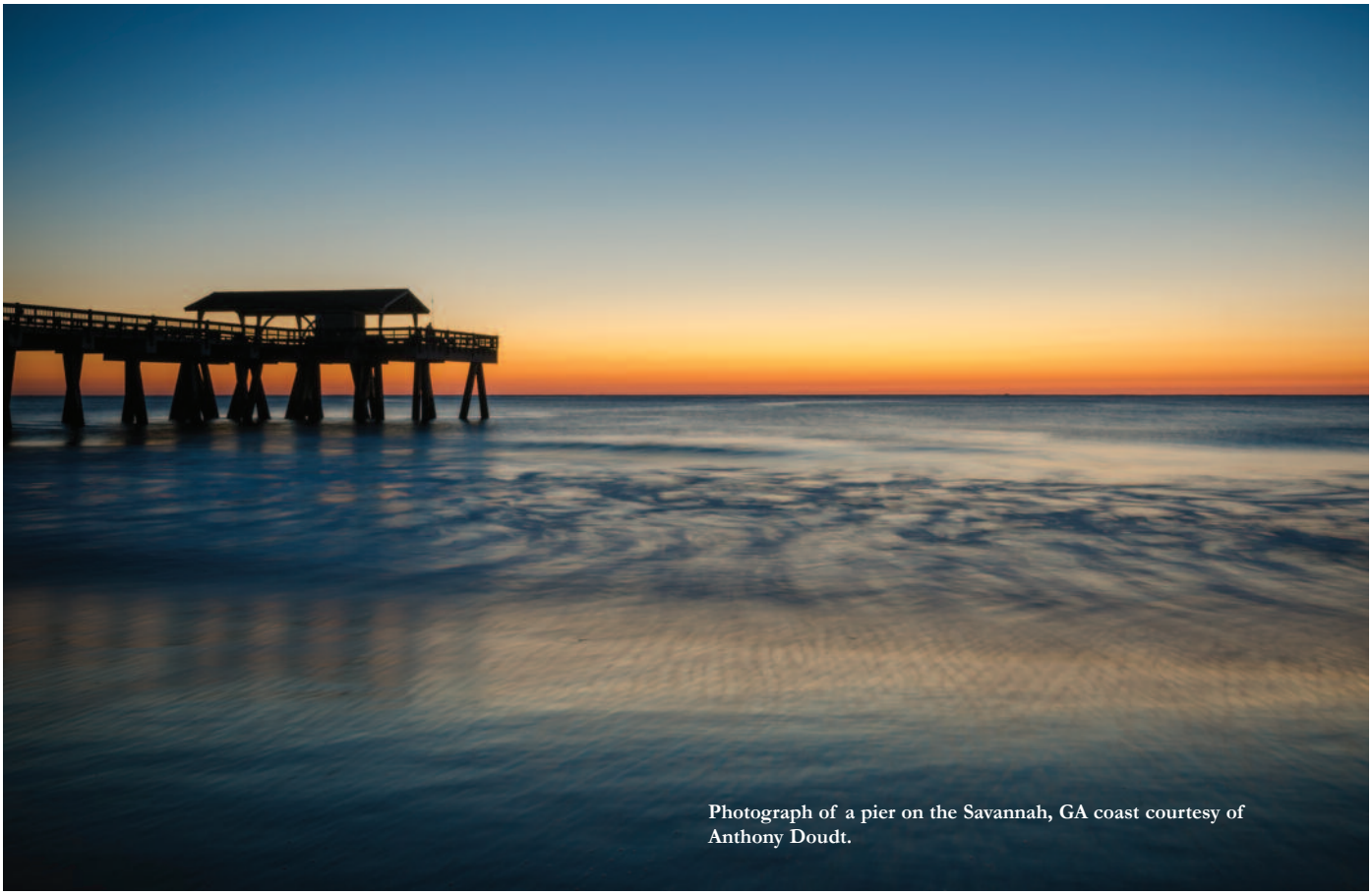
7 *Id.* at *22.

8 *Id.* at *49.

9 *Id.* at *48.

Court Weighs in on Dispute over Dock Length

Autumn Breeden[1]

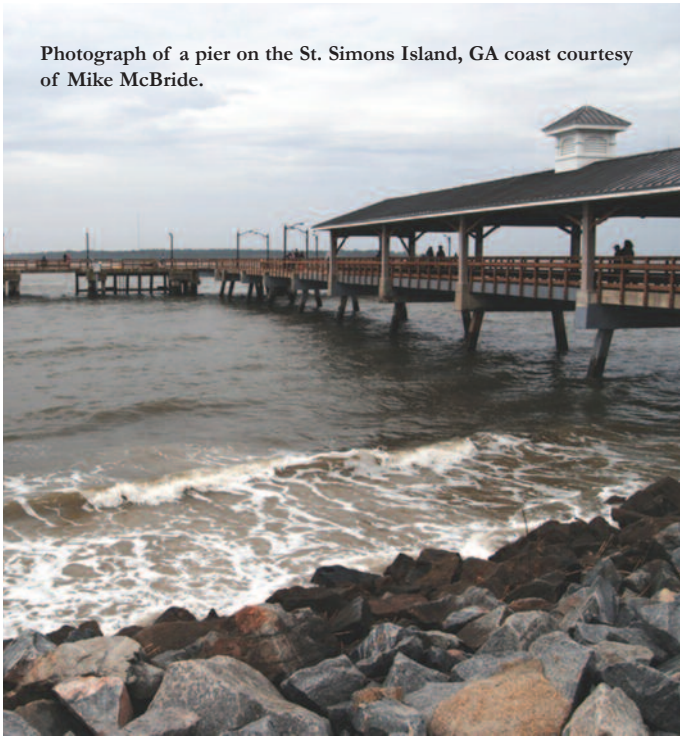


Photograph of a pier on the Savannah, GA coast courtesy of Anthony Doudt.

The Georgia coastline has 590 square miles of tidal salt marsh, accounting for nearly one-third of the total saltwater marsh found along the East Coast. Saltwater marsh is a critical part of the oceanic food chain: marsh grasses provide a place where fish, shrimp, and crabs thrive. Coastal property owners generally have the right to install piers and docks in order to access the water. As marsh grasses tend to thin out without adequate sunlight, coastal managers seek to prevent structures, such as docks or piers, from completely blocking that sunlight. A recent Georgia case illustrates the inherent tension between protecting the environment and facilitating water access.[2]

Background

The construction of docks and piers along the Georgia coast is regulated by the U.S. Army Corps of Engineers and the Georgia Department of Natural Resources, Coastal Resources Division (CRD). On the federal level, permits are required under the Rivers and Harbors Act for structures in or affecting navigable waters and under the Clean Water Act for structures affecting wetlands. The Corps has delegated authority to the CRD to issue permits for private, single-family non-commercial recreational docks under Programmatic General Permit (PGP0083).



Photograph of a pier on the St. Simons Island, GA coast courtesy of Mike McBride.

PGP0083 was first issued in 1996 and establishes the maximum dimensions (width and length) for private docks. PGP0083 has been re-issued in 2001, 2007, and 2012. The 2007 version of PGP0083 included a maximum dock area of 3,000 square feet, with no limit on length, and a 50% credit for using grated decking materials. Applicants using grated decking materials, which are designed to allow more sunlight to pass through than traditional wood decking, could build to a maximum of 4,500 square feet.

In 2012, the Corps re-issued PGP0083. The 2012 version maintained the 3,000 square foot limit, but restricted the length of the walkway to 1,000 feet. In addition, the Corp reduced the credit for use of grated decking to 25% after CRD determined the original credit was inaccurately inflated. The credit reduction limited docks to a maximum length of 1,250 feet and maximum area of 3,750 square feet.

Following the re-issuance of PGP0083, the Center for Sustainable Coast (Center) filed a lawsuit challenging the Corps' decision to reissue the permit with the 25% credit. The Center argued that the Corps violated the Administrative Procedure Act (APA), the Rivers and Harbors Act (RHA), and the National Environmental Policy Act (NEPA) by failing to adequately consider the shading impacts of grated docks. The Center contends that grated decking does not allow that much more sunlight through than traditional wood docks, and therefore use of grated decking does not justify dock expansions.

Summary Judgment

Both parties moved for summary judgment seeking a quick resolution to the litigation. Under the APA, courts may only set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[3] The court found the Center's claims that the Corps' decision to include a 25% credit was arbitrary and capricious under the RHA and NEPA to be without merit.

NEPA requires a government agency to take a "hard look" at the environmental impact of proposed actions and prepare environmental impact statements for actions that will significantly affect the environment. Agencies often start the environmental review process by preparing an environmental assessment to determine whether the proposed action will have a significant effect.

As part of its environmental analysis, the Corps commissioned the National Oceanic and Atmospheric Administration (NOAA) to perform a comprehensive study of total marsh acreage in Georgia subject to PGP0083 and the percentage shaded by dock structures. NOAA found that, in 2010, the maximum shade coverage caused by docks in any of the Georgia coastal counties was .04%. NOAA predicted that maximum shade coverage by 2030 would be .09%.

On the basis of this study, the Corps concluded that shade from docks constructed in compliance with a general permit containing a 25% expansion credit would have a "minimal effect on the marsh, because of the small percentage of the marsh actually affected."[4] The Center did not challenge the accuracy of the NOAA study or identify any particular concerns with the Corps' use of the study. Based on the information in the administrative record, the court concluded that the Corps' decision to re-issue PGP0083 was not arbitrary and capricious.

Conclusion

Ultimately the court found that it "must afford [the Corps] great deference when reviewing its assessment of the data" and upheld the Corps' decision to reissue PGP0083. Coastal property owners along the Georgia coast can therefore continue to take advantage of the 25% expansion credit if they choose to use grated decking.

Endnotes

1 2017 J.D. Candidate, University of Mississippi School of Law.

2 Ctr. for a Sustainable Coast v. Army Corps of Eng'r, 2015 WL 1505976 (S.D. Ga. March 31, 2015).

3 *Id.* at *2.

4 *Id.* at *3.

UK Supreme Court Grapples with Beach Access Rights

Stephanie Showalter Otts[1]

Across the Atlantic, a familiar battle has been taking place. In 2006, Newhaven Port and Properties Limited (NPP) restricted access to a beach that had been used by the residents of Newhaven for recreational purposes for over 80 years. East Sussex County attempted to register West Beach as a village green, an action that would have required NPP to allow access. NPP challenged the registration of the beach, claiming the public had no right to use the beach and registration would interfere with its ability to conduct operations at the port.[2]

West Beach is an artificial beach that was created by the accretion of sand following the construction of a breakwater for the nearby harbor. The beach is entirely covered at high tide, and therefore considered foreshore (the area of the beach between the low and high water mark). In most of the United States, under the public trust doctrine, state governments hold the foreshore in trust for the public, which has the right to access for navigation, fishing, and recreation.[3]

History of the PTD

The origins of the public trust doctrine are usually recited as such. From the beginning, the seas have been viewed as a resource common to all mankind. The modern concept that certain lands and waters should be held in trust for the public to access for fishing, navigation, and recreation has its roots in Rome. The Institutes of Justinian, codified in 535 C.E., states that

> *by the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitationes, monuments, and buildings which are not, like the sea, subject only to the law of nations.*

After the fall of the Roman Empire, feudal law reigned throughout Europe. In England, the Crown claimed ownership of the shore and rivers and the authority to transfer such lands into the hands of private individuals for their exclusive possession and use. English kings commonly issued writs barring fishing and fowling on rivers. River navigation, however, was essential to the continued success of the growing merchant class and private ownership of rivers interfered with the transport of goods and services.

In 1215, King John of England signed the Magna Carta. One of the Magna Carta's provisions required the removal of "all fish-weirs" from rivers throughout England, except those along the English coastline. Although the Crown continued to hold title to navigable waters, the beds of rivers, and the seashore and could transfer title to private individuals, the public now had protected fishing and navigational rights. After 1215, the British public enjoyed unrestricted access to navigable waters for commerce, navigation, and fishing.

After the American Revolution, the United States succeeded to England's interest in the colonial lands. The United States, in turn, passed title to the shores and lands underneath lakes, rivers, and the oceans to each state upon statehood. States hold the public title to submerged lands under navigable waterways for the benefit, use, and enjoyment of all citizens. The scope of the public's right under the public trust doctrine is determined by state law, and most states recognize access rights for recreational uses, including bathing, swimming, and other shore activities.

If the public trust doctrine in the United States is a derivative of directives found in the Magna Carta, one might think that citizens in the United Kingdom (UK) enjoy similar access rights. However, the UK Supreme Court in 1821 decided *Blundell v. Catterall*, a case involving the right to bring bathing carriages onto a beach. The majority found that access rights to a private beach could be acquired by usage or custom, but there was no general common law "right for all the King's subjects to bathe in the sea and to pass over the seashore for that purpose." Public access rights in the UK are, therefore, limited to navigation and fishing.[4]

One justice dissented in *Blundell*. Best J argued, citing the Institutes of Justinian, that no one is forbidden access to the seashore. This dissenting opinion has received more attention over the years, including a reference in the seminal New Jersey public trust doctrine case of *Matthews v. Bay Head Improvement Association*.[5]

Photograph of West Beach in Newhaven, England, United Kingdom courtesy of Diamond Geezer Media.

Beach Access Rights in the UK Today

Returning to the Newhaven case, the UK Supreme Court was clearly struggling with the modern implications of the *Blundell* holding. The majority articulated three possible conclusions with respect to the public's right to use the foreshore for bathing. First, as a matter of common law, members of the public have a right to use the foreshore, irrespective of the wishes of the owner. Second, there is implied permission to use the foreshore, unless the owner communicates a revocation. Or, third, members of the public have no rights and are therefore trespassers.

Ultimately, despite finding that the "issue is one of wide-ranging importance," the majority declined to rule on which of these three possibilities is correct.[6] The case was technically a challenge to the attempted registration of West Beach as a village green under the Commons Act 2006. There were statutory grounds upon which the court could decide the case, rendering a specific ruling on the common law rights of the public to use the foreshore unnecessary. The Commons Act only authorizes the registration of land that has been used by a significant number of local inhabitants "as of right" for at least two years. "As of right" under British law means, somewhat confusingly, without right. The UK Supreme Court concluded that NPP and its predecessors had granted the residents a license to use West Beach. Because the Newhaven residents had permission under the license to use the area, West Beach could not be registered as a village green.

Conclusion

New Haven and its residents may have lost this battle, but it appears they still have some fight left. The New Haven Town Council's website references an inquiry into the Town's right-of-way application for West Beach.[7] New Haven's experience is importance for legal scholars and beach access litigants in the United States, as some of our presumptions of the foundations of U.S. public trust law might be mistaken.

One justice, Lord Carnwath, wrote a concurring opinion that contains a short comparative analysis of the law in other nations. Interestingly, Lord Carnwath looked to the United States, and the case law in New Jersey specifically. "The development of the law in New Jersey is of particular interest as an illustration of how the law in [the UK] might have developed (and might yet develop) if the view of Best J had prevailed over that of the majority."[8]

Endnotes

1 Director, National Sea Grant Law Center.

2 Newhaven Port and Properties Ltd. v. East Sussex County Council and Newhaven Town Council, [2015] UKSC 7.

3 There are a few low water states, including Maine, Massachusetts, and Virginia, that allow private ownership of the foreshore.

4 Newhaven Port and Properties, *supra* note 2, page 11.

5 471 A.2d 355 (N.J. 1984).

6 Newhaven Port and Properties, *supra* note 2, page 17.

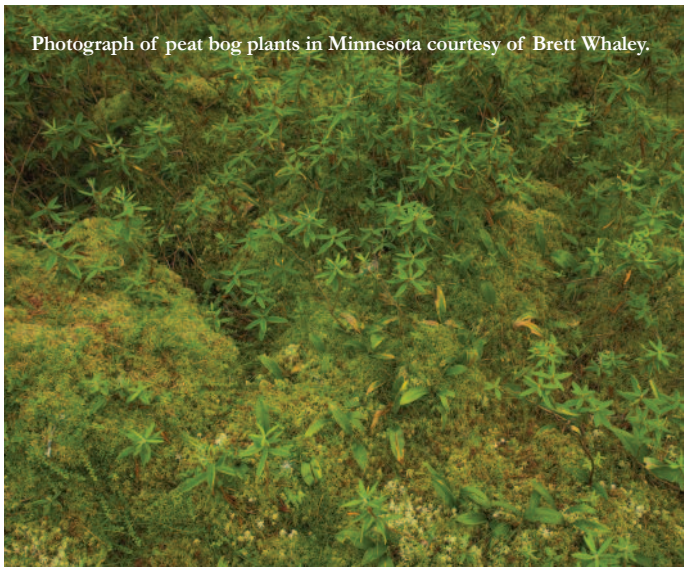
7 *The West Beach – Village Green*, Newhaven Town Council, http://www.newhaventowncouncil.gov.uk/the-west-beach-village-green.

8 Newhaven Port and Properties, *supra* note 2, page 44.

Eighth Circuit Finds that Corps' Jurisdictional Determination is Final Agency Action

Jesse Reiblich[1]

A U.S. Army Corps of Engineers (Corps) Approved Jurisdictional Determination (JD) is an official Corps determination that wetlands subject to the Clean Water Act (CWA) are present or absent from a piece of property. In *Hawkes Co. v. U.S. Army Corps of Engineers*, the U.S. Court of Appeals for the Eighth Circuit ruled that a JD is a final agency action under the Administrative Procedure Act (APA) and therefore ripe for immediate judicial review.[2] This decision splits with the Fifth and Ninth Circuit Courts of Appeal on the same issue, perhaps paving the way for ultimate guidance from the U.S. Supreme Court.



Photograph of peat bog plants in Minnesota courtesy of Brett Whaley.

Background

The CWA requires landowners to obtain permits if they wish to undertake certain types of work or development on properties with wetlands qualifying as waters of the United States (WOTUS).[3] Sometimes the presence of jurisdictional wetlands is clear and there is no question that a permit is needed. But if a landowner is unsure whether his property features WOTUS, the landowner can request the Corps to issue a JD declaring that it does or does not.

Hawkes Co, Inc. mines and processes peat in northwestern Minnesota and sought to expand its operations. Initially, the Corps made a preliminary determination that the property where Hawkes wanted to expand its operation fell under its jurisdiction. Hawkes challenged the preliminary determination, which, if finalized, would assert jurisdiction over the property. The Corps ultimately issued a JD concluding that the property contained WOTUS because the property had a significant nexus to the Red River.

Hawkes filed an administrative appeal explaining that the administrative record did not support the Corps' JD finding jurisdiction. The Corps' Deputy Commanding General for Civil Emergency Operations agreed and sustained Hawkes' administrative appeal. Despite this finding, the Corps issued a revised JD confirming the finding of jurisdiction, which it labeled a "final Corps permit decision."[4]

Hawkes sought judicial review of the revised JD in the U.S. District Court for the District of Minnesota. Hawkes argued that the property did not meet either jurisdictional test under the U.S. Supreme Court's decision in *Rapanos*.[5] Under *Rapanos*, the Corps has jurisdiction of a WOTUS when either of two tests is met: (1) the plurality's "relatively permanent" test; or (2) Justice Kennedy's "significant nexus" test.[6] The Corps moved to dismiss Hawkes' complaint on the basis that a JD is not a final agency action and therefore not subject to review under the APA. The district court granted the Corps' motion to dismiss. Hawkes appealed to the Eighth Circuit.

Circuit Court's Reversal

In reviewing the district court's decision, the circuit court applied the two-pronged test issued by the U.S. Supreme Court in *Bennett v. Spears*.[7] In that case the Court said that,

in order for an agency action to be final, two conditions must be met: (1) "the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature"; and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[8]

The district court found, and the circuit court agreed, that a JD clearly meets the first prong of the test. The court pointed out that Corps regulations explicitly refer to a JD as a "final agency action."[9] The court also explained that JDs are discrete actions not inextricably linked to the permitting process. A party can obtain a JD without seeking a permit, and vice versa, it can seek a permit without getting a JD.

However, unlike the district court below, the Eighth Circuit found that a JD meets the second criterion as well. In reaching this conclusion, the court noted that the JD "alters and adversely affects [Hawkes'] right to use their property in conducting a lawful business activity."[10] The court further explained that although the CWA did not cause the adverse effect on the property, agency action did.

The court took issue with a related argument raised by the Corps—that Hawkes had other adequate ways to contest the JD in court, and therefore a JD is not a final agency action for which there is no other adequate judicial remedy under the APA. The Corps argued that Hawkes could have followed through with the appeals process and appealed a denial, or they could have proceeded with mining peat and challenged the Corps' authority if it commenced an enforcement action against Hawkes. The court pointed to the prohibitive costs and lengthiness of the options suggested by the Corps as practical reasons for permitting judicial review of a JD.

The circuit court was particularly concerned with the practical implications of its ruling. "By leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction – rejected by one of their own commanding officers on administrative appeal – is consistent with the Supreme Court's limiting decision in *Rapanos*."[11] In the court's opinion, a "pragmatic analysis" compels the finding that a JD is subject to immediate judicial review.

By finding that a JD is subject to judicial review, the Eighth Circuit applied the Supreme Court's "flexible final agency action standard" from *Sackett*.[12] In *Sackett*, the Court did not find that these alternative options for contesting an EPA compliance order precluded judicial review.[13] Based on the court's finding that the JD was a final agency action ripe for judicial review, the court reversed the district court's dismissal and remanded the case back to that court for further proceedings consistent with its decision.

Conclusion

This decision establishes that JDs are subject to judicial review, at least in the Eighth Circuit. Judicial review of JDs represents a third option for landowners stuck in limbo, unsure whether their land is subject to the CWA's jurisdiction. Meanwhile, judicial review of JDs is currently not available to landowners in the Fifth and Ninth Circuits, because those courts have ruled that JDs are not final agency actions.[14] How the remaining circuits will treat JDs is yet to be seen, as is ultimate resolution of this issue by the U.S. Supreme Court.

Endnotes

1 Law Clerk to the Honorable Robert A. Molloy, Superior Court of the Virgin Islands. LL.M. 2013, J.D. 2011, University of Florida Levin College of Law; B.A. 2006, University of Florida.

2 782 F.3d 994 (8th Cir. 2015).

3 The CWA requires a permit from the Corps to discharge dredged or fill materials into "navigable waters," and a permit from the EPA (or state agency) to discharge any "pollutant" into navigable waters. See 33 U.S.C. §§ 1311(a), 1342, 1344. The statute defines "navigable waters" to mean "the waters of the United States." § *Id.* 1362(7).

4 782 F.3d at 998 ("advising appellants that the Revised JD was a 'final Corps permit decision in accordance with 33 C.F.R. § 331.10.'").

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

6 *Hawkes*, 782 F.3d at 999.

7 Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

8 *Id.*

9 33 C.F.R. § 320.1(a)(6).

10 782 F.3d at 1001.

11 *Id.* at 1001-02.

12 *Id.* at 997, n.1 (explaining that "[t]he [Supreme] Court has consistently taken a 'pragmatic' and 'flexible' approach to the question of finality, and to the related question whether an agency action is ripe for judicial review.").

13 Sackett v. EPA, 132 S. Ct. 1367 (2012).

14 Belle Co., LLC v. U.S. Army Corps of Eng'rs, 761 F.3d 383 (5th Cir. 2014), *cert. denied sub nom.* Kent Recycling Servs., LLC v. U.S. Army Corps of Engineers, 135 S. Ct. 1548 (2015); Fairbanks v. U.S. Army Corps of Eng'rs, 543 F.3d 586 (9th Cir. 2008).

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

11th Annual Great Lakes Restoration Conference hosted by the Healing Our Waters-Great Lakes Coalition

September 29, 30, and October 1, 2015
Chicago, IL

For more information, visit: http://conference.healthylakes.org

Environmental, Energy, and Resources Law 23rd Fall Conference

October 28-31, 2015
Chicago, IL

For more information, visit: http://bit.ly/23rdfall

National Working Waterfronts & Waterways Symposium

November 16-19, 2015
Tampa, FL

For more information, visit: http://conference.ifas.ufl.edu/nwwws