

The SAND BAR

Volume 18:1 January 2019

Legal Reporter for the National Sea Grant College Program

The Dusky Gopher Frog - What Exactly is its Habitat?

Also,

Fate of the “Frankenfish”: The USDA’s Final National Bioengineered Food Disclosure Standard and its Impact on Aquaculture

Diver Wins Claim for Chemical Burns Suffered During Point Reyes Restoration Project

No Remedy Yet for D.C. Residents with Sewage-Filled Basements

Court Dismisses Challenge to Marine National Monument Designation

Our Staff

Editor:

Terra Bowling

Production & Design:

Barry Barnes

Contributors:

Catherine Janasie

Amanda Nichols

Grace M. Sullivan

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*, visit: nsglc.olemiss.edu/subscribe. You can also contact: Barry Barnes at bdbarne1@olemiss.edu.

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

THE SANDBAR is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under award NA180AR4170079, 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*, 18:1 *SANDBAR* [Page Number] (2019).

Cover page photograph of Pony Ranch Pond in Mississippi, courtesy of John A. Tupy.

Contents page photograph of Walter Place Pond in Holly Springs, Mississippi, courtesy of Visit Mississippi.



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



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



The University of Mississippi complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, handicap, veteran or other status.

ISSN 1947-3966 NSGLC-19-02-01 January 2019
ISSN 1947-3974



The SANDBAR

CONTENTS

**The Dusky Gopher Frog - What Exactly
is its Habitat? 4**

**Fate of the “Frankenfish”: The USDA’s
Final National Bioengineered Food
Disclosure Standard and its Impact
on Aquaculture 7**

**Diver Wins Claim for Chemical Burns
Suffered During Point Reyes Restoration
Project 10**

**No Remedy Yet for D.C. Residents with
Sewage-Filled Basements 12**

**Court Dismisses Challenge to Marine
National Monument Designation 14**

THE DUSKY GOPHER FROG - WHAT EXACTLY IS ITS HABITAT?

Catherine Janasie¹



Photograph of a baby dusky gopher frog, courtesy of Kevin Enge.

The dusky gopher frog, a mid-size frog about three inches long, can be black, brown, or gray in color, giving the frog its “dusky” name. “Gopher” comes from the frog’s tendency to spend the majority of the time underground in burrows or stump holes in open canopy forests. One of the dusky gopher frog’s most recognizable and loveable traits is that it uses its front legs to cover its eyes when it feels threatened. The frog, listed as endangered under the Endangered Species Act (ESA), currently only lives in Mississippi, but its historic range included Louisiana

and Alabama as well. The U.S. Fish & Wildlife Service (FWS) designated land in Louisiana, known as Unit 1, as critical habitat based on the presence of ephemeral ponds on the property. Unit 1 landowners challenged the designation, which both the U.S. District Court for the Eastern District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit upheld.² The Supreme Court of the United States recently vacated and remanded the Fifth Circuit’s decision, leaving open the question of whether the frog’s critical habitat in Louisiana will remain.³

The ESA and Critical Habitat

Congress passed the ESA in 1973 to protect both imperiled species and their ecosystems. The ESA is administered by the FWS for terrestrial species and the National Marine Fisheries Service (NMFS) for designated marine species. Section 4 of the ESA lays out how a species can be listed as either endangered or threatened under the Act. When the FWS or NMFS lists a species, the Act directs the agency to designate critical habitat, which are areas that are essential to the species' conservation but usually does "not include the entire geographical area" that the species could occupy.⁴

Section 3 of the ESA defines critical habitat and specifies that it can be either currently occupied or unoccupied by the species. Specifically, unoccupied habitat can be designated when it is determined to be essential to the species' conservation. While a critical habitat designation must be based on the best scientific data, FWS or NMFS is required to consider the economic impacts of the designation, along with any impact on national security and any other relevant impact. The agencies have the authority to exclude an area from critical habitat if the impacts of the designation outweigh its benefits, unless the exclusion will result in the species' extinction.⁵

The Dusky Gopher Frog's Critical Habitat

The FWS listed the dusky gopher frog as endangered under the ESA in 2001. Essential to the frog's life cycle are ephemeral, seasonal ponds where they breed. When the ponds fill during the winter, the frogs lay eggs in the ponds where the eggs hatch and become tadpoles. The seasonal nature of the ponds is critical, as it keeps large, predatory fish that could eat the developing frogs from also living in the ponds.⁶

The frog's habitat used to extend from coastal Louisiana, through Mississippi, and into Alabama. However, over 98% of the longleaf pine forests where the frog used to live have been cut down due to timber plantations, agriculture, and urban development. The frog has not been seen in Alabama since 1922 and Louisiana since 1965.⁷ Presently, the frog is only known to exist in two counties in southern Mississippi. At the time of the species' listing in 2001, there were only about 100 remaining dusky gopher frogs.

As a result of limited resources, the FWS did not designate critical habitat for the dusky gopher frog until 2012. At first, the FWS only proposed critical habitat in Mississippi. However, due to concerns that a hurricane or other event could wipe out the species in Mississippi, reviewers of the proposed designation commented that an area in Louisiana or Alabama was needed to conserve the species. Due to these comments, the FWS designated Unit 1 based on the presence of ephemeral ponds, which are rare and hard to reproduce, making the area in the FWS' eyes essential to the conservation of the species.⁸

The Landowners' Claims

Weyerhaeuser and the other Unit 1 property owners were concerned about the impact a critical habitat designation could have on future plans to develop the property. When critical habitat is designated on private property, it does not directly limit the landowner's use of the property. However, critical habitat is subject to Section 7 consultation under the ESA. Thus, if a landowner seeks federal funding or a federal permit for an action that may affect designated critical habitat, the landowner would have to work with the agency through the Section 7 consultation process, which can be costly, time intensive, and restrictive as to what can be done on the property.

Unit 1 is part of the New Orleans metropolitan area, and the landowners plan to develop the site in the future. Since Unit 1 may have wetlands, the landowners are concerned any development would require a federal Clean Water Act permit, which would trigger Section 7 consultation. Thus, Weyerhaeuser and the other property owners challenged the critical habitat designation on two grounds.

First, the landowners argued that the designation was unlawful, claiming that the frog could not currently live in the closed canopy forest of Unit 1. Thus, the area cannot be considered habitat for the frog. This argument revolves around the fact that the FWS had determined that the frog needed an open-canopy forest for habitat, and Unit 1 is currently a closed canopy forest. The FWS contends that Unit 1 is still essential for the conservation of the frog due to the ephemeral ponds and could be habitable with reasonable changes. In addition, FWS disputes that the frog would not be able to currently survive in Unit 1.

Second, the landowners argued that the FWS should have excluded Unit 1 from critical habitat due to the economic impact of the designation. The landowners contended that since Unit 1 cannot currently serve as habitat for the frog, the biological benefit to the species equals zero. In comparison, they argue that the FWS estimated that the economic impact of the designation of Unit 1 to be up to \$33.9 million. Thus, the landowners claim that the FWS improperly weighed the costs and benefits, asserting that it considered the benefits from the entire designated critical habitat instead of just the benefits from Unit 1.

The Court Decisions

In regards to the landowners' claims, the district court found in favor of the FWS, as did the Fifth Circuit. As to the question of whether the designation of Unit 1 as critical habitat was lawful, the Fifth Circuit held that there is no habitability requirement for critical habitat under the ESA. The court stated that the ESA "requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.'"⁹



Photograph of a dusky gopher frog, courtesy of Kevin Enge.

The Supreme Court vacated the Fifth Circuit's ruling, finding that critical habitat must be habitat for the species. In making this decision, the Court relied on the text of the ESA, which states that the agency must "designate any habitat of such species which is then considered to be critical habitat."¹⁰ Specifically, the Court stated that despite the fact that Unit 1 met the definition of unoccupied critical habitat under the statute based on the FWS's determination that the area is essential to the species' conservation, the area must still be considered habitat for the species. Since "habitat" is not defined under the ESA, the Court remanded the case to the Fifth Circuit to determine if Unit 1 can be considered habitat for the frog.

In regards to the landowners' second claim, both the district court and the Fifth Circuit held that the FWS's decision not to exclude Unit 1 was a discretionary decision that is not reviewable under the Administrative Procedure Act (APA). In fact, the Fifth Circuit noted that the only other circuit court to address the issue, the Ninth Circuit, determined that the decision was not reviewable, as had every federal district court that has considered the issue. The reasoning behind these decisions was that the ESA provides no standards to review the FWS's decision to not exclude an area from critical habitat due to economic impacts.¹¹ As a result, the Fifth Circuit did not review the landowners' claim that the FWS improperly weighed the costs and benefits of designating Unit 1.

However, the Supreme Court went against the lower courts, finding that the decision to exclude Unit 1 due to economic impacts is reviewable by the courts. The Court first noted the basic presumption that claims are reviewable under the APA, and the exception for the non-reviewability of actions "committed to agency discretion by law" should be applied narrowly.¹² Although the ESA uses the word "may," which gives the agency discretion to

exclude an area from critical habitat, the Court noted that the agency is required to weigh the costs of the designation against the benefits. The Court decided that judging whether the agency did this balancing correctly is the type of claim federal courts often review to determine if an agency's decision is lawful under the APA. Once again, the Court remanded to the Fifth Circuit to determine whether the FWS's decision to not exclude Unit 1 was arbitrary and capricious under the APA.

Conclusion

With the remands, we must wait and see how the Fifth Circuit decides the fate of Unit 1. It is important to note that the decision only applies to critical habitat designations where the area designated is currently unoccupied by the listed species. Further, we could be looking at a regulatory change concerning unoccupied critical habitat. In 2016, the Obama Administration changed the regulations concerning unoccupied critical habitat to allow FWS or NMFS to consider occupied and unoccupied habitat at the same time. This past summer, the Trump Administration proposed updating the ESA regulations to change this process. Under the proposed rule, unoccupied habitat could only be considered after the agencies consider the areas currently occupied by the species. Further, the agencies could only designate unoccupied areas if the occupied areas would be inadequate or less efficient for the species' conservation. We will also have to wait and see what the final rules require, as well as whether those rules will face legal challenges. Thus, a lot remains up in the air concerning unoccupied critical habitat under the ESA. ❧

Endnotes

- ¹ Senior Research Counsel, National Sea Grant Law Center.
- ² *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452 (5th Cir. 2016).
- ³ *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018).
- ⁴ 16 U.S.C. § 1532(5)).
- ⁵ *Id.* at § 1533(b)(2).
- ⁶ *Designation of Critical Habitat for Dusky Gopher Frog*, 77 Fed. Reg. 35,118 (June 12, 2012).
- ⁷ U.S. FISH & WILDLIFE SERV., MISSISSIPPI GOPHER FROG FACT SHEET (2012).
- ⁸ *Designation of Critical Habitat for Dusky Gopher Frog*, 77 Fed. Reg. 35,118 (June 12, 2012).
- ⁹ *Markle Interests, L.L.C.*, 827 F.3d at 468.
- ¹⁰ 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added by the Court).
- ¹¹ *Markle Interests, L.L.C.*, 827 F.3d at 473-74.
- ¹² 5 U.S.C. § 701(a)(2).

FATE OF THE “FRANKENFISH”:

THE USDA’S FINAL NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD AND ITS IMPACT ON AQUACULTURE

Amanda Nichols¹



Photograph of a jumping salmon, courtesy of Thomas Björkan.

The term “GMO” generally refers to a genetically modified (GM) plant or animal that has been given new traits either by: 1) combining genetic material from unrelated species; or 2) inserting heavily modified DNA into an organism’s genetic code.² Over the past few years, controversy has grown regarding the prevalence of GMOs in agriculture. While proponents of GM food products argue they have generally been proven safe for human consumption, critics allege that credible, independent feeding studies do not exist, and, thus, the true safety of GMOs is unknown. To promote transparency regarding the presence of GMOs in certain foods, a push for mandatory GMO labeling laws has emerged at both

the state and federal levels. These laws can directly affect the labeling and sale of genetically modified aquacultural products—informally termed “frankenfish” by critics.

Background

Until recently, the use of GMOs in the United States was solely regulated under the Coordinated Framework for Regulation of Biotechnology (“Coordinated Framework”).³ The Coordinated Framework is a risk-based system that ensures new biotechnology products are safe for the environment as well as human and animal health. It is based on existing laws governing conventional (non-organic) products that are designed to protect public health and the

environment and is administered by several federal agencies, including: 1) the USDA's Animal and Plant Health Inspection Service (APHIS); 2) the Food and Drug Administration (FDA); and 3) the Environmental Protection Agency (EPA). Depending on its characteristics, a product may be subject to the jurisdiction of one or more of these agencies, and regulatory officials from the three agencies regularly communicate and exchange information to ensure that any safety or regulatory issues that may arise are appropriately resolved.

In addition to the Coordinated Framework, President Obama signed the National Bioengineered Food Disclosure Law ("Disclosure Law") into effect in 2016, which amends the Agricultural Marketing Act of 1946 and requires that the federal government establish rules governing the labeling of GMO products within two years of enactment. The Disclosure Law also expressly preempts state laws that purport to regulate GMO labeling in a similar fashion. Specifically, the Disclosure Law charges the USDA's Agricultural Marketing Service (AMS) with establishing a standard for disclosing the presence of bioengineered ingredients in a rule that is to be entitled the National Bioengineered Food Disclosure Standard ("Standard"). On December 21, 2018, the USDA published its final rule for the Standard.⁴

The Final Rule

The USDA's final rule contains multiple provisions that both directly and indirectly impact the aquaculture industry, including those related to definitions, disclosure methods, listed foods, exemptions from disclosure, and preemption. Perhaps most notably, the USDA's rule eschews the term "genetically modified organism" and its abbreviation "GMO" in favor of the term "bioengineered food" and its abbreviation "BE." The definition of "bioengineered food" specifically excludes foods where modified genetic material is not detectable and includes provisions for how regulated entities can use records to demonstrate such. Furthermore, the rule provides four different methods for companies to disclose the presence of GM products in food when modified genetic material is detectable. Companies may either: 1) include clearly written disclosure text on their product's nutrition information panel; 2) place the USDA's new symbol for "bioengineered food" somewhere on the packaging; 3) include a QR code on the packaging that consumers can scan with smartphones; or 4) include a text message disclosure on the packaging, such as "Text [word] to [phone number] for bioengineered food information."

Additionally, the final rule puts forth a "List of Bioengineered Foods" meant to help regulated entities determine whether a food must bear a BE disclosure. The list specifically includes GM salmon produced by the company AquaBounty, meaning that foods containing the

fish either in whole or in part must disclose the presence of BE technology through one of the four above methods. Updates to the List will be made through rulemaking on an annual basis.

PERHAPS MOST NOTABLY, THE USDA'S RULE ESCHEWS THE TERM "GENETICALLY MODIFIED ORGANISM" AND ITS ABBREVIATION "GMO" IN FAVOR OF THE TERM "BIOENGINEERED FOOD" AND ITS ABBREVIATION "BE."

Further, the final rule provides exemptions from disclosure for products containing an inadvertent or technically unavoidable presence of bioengineered substances. In order to qualify, up to 5% of the substances can be present in foods for each ingredient, however, the rule makes no allowances for the intentional presence of BE ingredients. The rule also exempts incidental additives present in food at an insignificant level so long as they do not have any technical or functional effect in the food.

Finally, the final rule reiterates the Disclosure Law's preemption of similar state GMO laws, meaning that no state may directly or indirectly establish or continue enforcement of any food or seed requirement relating to the labeling or disclosure of whether any food or seed is BE or was developed or produced using bioengineering. However, the rule also notes that states are permitted to adopt standards identical to federal rules, including those related to monetary damages and injunctive relief.

Impact on GM Salmon

In addition to the final rule's general provisions, its promulgation could mean a great deal for the future of GM salmon in the United States—AquaBounty's AquAdvantage salmon, in particular. AquaBounty's GM Atlantic salmon utilize a growth hormone-regulating gene from the Pacific Chinook salmon as well as a gene from an ocean pout that allows the fish to grow year-round. While these traits may seem quite favorable for farmed fish, AquaBounty has faced significant pushback from the United States in selling its GM product.

In November 2015, the FDA approved AquaBounty's application to sell AquAdvantage salmon to U.S. consumers, a decision marking the first time a GM animal had ever been approved to enter the U.S. food supply. However, a rider to the 2016 Omnibus Appropriations Act banned its import until the appropriate governmental agency could mandate labels for the product. Following the Act's passage, the FDA



Chinook salmon, courtesy of Chris Pasley/USFWS.

issued an Import Alert for the salmon, meaning that all future shipments of AquaAdvantage salmon into the United States could be refused admission without physically examining the product in each shipment. As one might expect, this Alert severely imperiled AquaBounty's plans to market its salmon to U.S. consumers.

With the inclusion of AquaAdvantage salmon on the final rule's List of Bioengineered Foods, it would seem that the time is drawing near when the FDA may lift the Import Alert and allow the GM fish to enter the U.S. market. However, the FDA must still provide labeling guidance on AquaAdvantage salmon before it can lift the Alert. While AquaBounty is hopeful that this will happen shortly, it notes that there is no assurance that such guidance will be issued anytime soon.⁵ However, the company's CEO has commented that the issuance of the final rule is a "major step forward."⁶

Conclusion

It remains to be seen exactly what impact the USDA's final rule will have on GM aquacultural products. Proponents are hopeful that the rule will provide necessary transparency for consumers by allowing them to make informed decisions while protecting the innovation that is critical to the sustainability of agriculture.⁷ However, critics argue that the

way the USDA has written the rule will erode consumer confidence by providing unwarranted exemptions and utilizing unfamiliar terms such as "bioengineered."⁸ Whatever the result, aquaculturists should be aware of how the new requirements may affect the labeling and sale of their products. Mandatory compliance with the rule begins on January 1, 2022. ❧

Endnotes

- ¹ Ocean and Coastal Law Fellow, National Sea Grant Law Center.
- ² *What are GMOs?*, GENETIC LITERACY PROJECT.
- ³ *How the Federal Government Regulates Biotech Plants*, UNITED STATES DEPARTMENT OF AGRICULTURE.
- ⁴ 7 C.F.R. § 66 (2018).
- ⁵ Christine Blank, *New Labeling Rule Paves Way for GM Salmon to Enter US Market* (Dec. 21, 2018), www.seafoodsource.com.
- ⁶ Press Release, *AquaBounty Technologies, Inc., Issuance of USDA Labeling Rule* (Dec. 20, 2018).
- ⁷ Phillip Brasher & Spencer Chase, *USDA Issues GMO Disclosure Rules*, AGRI-PULSE (Dec. 20, 2018, 10:00 AM).
- ⁸ *Id.*

DIVER WINS CLAIM FOR CHEMICAL BURNS SUFFERED DURING POINT REYES RESTORATION PROJECT

Terra Bowling



Point Reyes National Seashore, courtesy of Andrew Seles.

Last year, a commercial diver hired to assist with restoration of the Point Reyes National Seashore in California filed suit against two companies contracted by the National Park Service to complete the project. Matthew Zugsberger alleged that while removing treated lumber from a former aquaculture site, he suffered severe

chemical burns. He made several claims against the companies, including general maritime law claims for maintenance and cure, negligence, wrongful termination, fraud, and labor claims. In September, a court ruled on the maintenance and cure claims, finding that Zugsberger must be compensated for injuries incurred during the project.¹

Point Reyes National Seashore, courtesy of Zug Zwang.



Background

Galindo Construction, Zugsberger's employer, was awarded a subcontract from T.L. Peterson to remove oyster racks from the former Drakes Bay Oyster Company site. The oyster company was closed in 2014 following a legal battle over the federal government's decision not to renew the company's oyster lease. In order to remove the remnants of the aquaculture operation, Zugsberger and other employees attached chains to the oyster racks that were then removed using a mini excavator on a barge. He was not wearing full dive gear or protective hazmat gear while working at the site. During the course of the project, Zugsberger experienced burns on his exposed skin.

A physician examining Zugsberger stated, "The patient reports development of progressive erythema, progressing to blistering and ultimately desquamation of all exposed skin to include chiefly trunk, back, extensor and flexor surfaces of bilateral UE after skin exposure to water at a commercial dive site where he has been employed removing pilings and creosote treated lumber from a site in western Marin county."² The burns were "[c]linically consistent with chemical burn likely secondary to petrochemical or other toxic exposure."³


Maintenance and Cure

Zugsberger filed suit for maintenance and cure, negligence, wrongful termination, fraud, and labor claims. He filed a motion for partial summary judgment for maintenance and cure, payment of past maintenance and cure, and to set the maintenance rate. Generally, "maintenance" covers living expenses during recovery and "cure" covers medical expenses.

The court first noted the summary judgment standard for maintenance and cure in admiralty cases. "Plaintiff need not show that there are no disputes of material fact that he was injured exactly as claimed, the extent thereof, or even causation."⁴ Instead, a plaintiff must have been: 1) employed as a seaman, 2) injured in the service of the ship, and 3) incurring expenses for medical treatment, board, and lodging.

The defendants argued that Zugsberger did not meet the first element, since the ship he was working from was not in navigable waters. The court dismissed this argument, finding that the area in question, Drakes Estero, was historically used in interstate commerce, as illustrated in a Land Use Survey presented by the plaintiff. The court noted the medical records supported the fact that the plaintiff sustained an injury. Finally, the court noted that there was no question that he incurred expenses for maintenance and cure. The court ruled that Galindo owed Zugsberger maintenance and cure under maritime common law, since the diver incurred the injury in service of the ship.

The court then had to determine the appropriate amount of maintenance and cure. The court stated that the plaintiff's burden to provide an evidentiary basis for maintenance was "feather light." The court found Zugsberger's claims for actual monthly expenses to be reasonable compared with past maintenance rates awarded in the Northern District of California. The court ruled that the company must pay over \$33,000 for past maintenance and \$53 a day moving forward until he has reached maximum cure for his injuries.

Next, the court looked at the cure owed to Zugsberger. The court ordered the company to pay \$32,000 for past medical expenses. Since he has not reached "maximum medical improvement" the court ordered the defendants to pay the cost of further treatments. The court will consider the remaining claims separately. 

Endnotes

¹ United States ex rel. Zugsberger v. T L Peterson, Inc., No. 4:17-CV-02277-KAW, 2018 WL 4700457 (N.D. Cal. Sept. 28, 2018).

² *Id.* at *1.

³ *Id.*

⁴ *Id.* at *3.

NO REMEDY YET FOR D.C. RESIDENTS WITH SEWAGE-FILLED BASEMENTS

Grace M. Sullivan¹

Twenty-one D.C. residents had what a federal judge called “the distinct misfortune” of living on Delafield Place in November 2016.² At that time, the basements of each of the residents’ single-family homes were filled with more than two feet of raw sewage, including industrial and commercial waste. The residents described the eruption of sewage from their basement toilets as “overwhelming,” “nauseating,” and “terrifying.”

Background

A few days before the November 18, 2016 failure, the D.C. Water and Sewer Authority (WASA) had been attempting to perform maintenance work on its sewer system. WASA hired remediation companies to clean up the mess and mitigate the damage in the Delafield Place homes, but, according to the residents, the clean up crews only exacerbated the problem. The residents alleged the remediation crew tracked sewage into other parts of the houses, disposed of their personal items, and exposed asbestos by removing tiling in the basements.

The residents, who are all African-American, brought ten total claims against WASA and the remediation companies (defendants) in the U.S. District Court for the District of Columbia. The court grouped the residents’ claims into three categories: violation of federal environmental statute claims, civil rights claims, and negligence claims. The defendants then filed a motion to dismiss the action. On October 2, 2018, the court found no merit in the environmental statute claims or the civil rights claims, granting the defendants’ motion to dismiss. In doing so, the court dismissed all of the residents’ federal question claims, and it refused to exercise supplemental subject matter jurisdiction over the negligence claims, which are normally heard by the local court.

Environmental Law Claims

The bulk of the residents’ claims alleged violations of three federal environmental laws: the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Toxic Substances Control Act (TSCA). The court dismissed these claims in part for failure to provide notice to the proper parties and in part for failure to state a claim.

RCRA requires a plaintiff to notify the Environmental Protection Agency, the state in which the alleged violation has occurred, and any party alleged to have contributed to the violation at least ninety days before bringing a suit. The statute is meant to hold liable “any person...contributing to...handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or environment.”³ The notice requirement in CERCLA calls for a plaintiff to notify the president of the United States, the state where the alleged violation occurred, and any alleged violator no less than sixty days before filing a suit.⁴ The statute is meant to establish liability for “any person who...accepted any hazardous substances for transport to disposal or treatment facilities...from which there is a release...which causes the incurrence of response costs, of a hazardous substance.”⁵ TSCA requires notice to the EPA and all alleged violators no less than sixty days before filing suit.⁶ The statute is meant to regulate hazardous, man-made chemical substances and assign liability where use of these substances presents an “unreasonable risk of injury to health or environment.”⁷

The court acknowledged that the plaintiffs sent a letter of notice to WASA regarding all three claims within the proper amount of time before filing suit. Still, the court held that notice was insufficient because the EPA, the president, and the defendant remediation companies had not been given notice of the suit. The opinion referenced legislative intent that the statutory notice requirements are meant to expedite relief for public health and environmental safety, implying that the plaintiffs’ failure to provide notice deprived defendants of the opportunity to remedy the violations.⁸

Further, the court held that, even if the plaintiffs had given proper notice, none of the three statutes applies to sewage or offers anything more than injunctive relief for ongoing violations or specific clean up cost reimbursement. RCRA and CERCLA are both subject to the definitions in RCRA. A plain reading of the definition for “hazardous waste” alone would lead one to believe that sewage falls under the definition: “solid waste...which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in...



illness or pose a substantial present or potential hazard to human health or the environment....” However, the court pointed out that § 27 of RCRA specifically excludes sewage from the category of “solid waste.” Notably, the court did not discuss in depth the applicability of TSCA to the plaintiffs’ claims regarding asbestos.

Finally, the court dismissed the claims, because the plaintiffs did not allege that the violations were continuous or ongoing, as the three environmental statutes require. According to the court, each statute only provides for injunctive relief, so that even if the plaintiffs had given proper notice and the statutes were applicable to sewage, a claim for relief under these statutes would be moot because the sewage leak was not ongoing.

Civil Rights Claims

The plaintiffs also brought claims under three civil rights statutes, each alleging racial discrimination. The court said that all three claims were encompassed in the remediation language of the third statute; therefore, they were effectively reduced to one claim. The applicable statute reads, “every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .”¹⁰

The court interpreted the civil rights statute to mean that the plaintiffs needed to show that each defendant acted under color of state law and with discriminatory intent in allowing the infrastructure failure and subsequent deluge of

sewage at Delafield Place. The plaintiffs argued that WASA’s status as a government agency and the remediation companies’ contractual relationship as an agent of WASA meant that their actions regarding the sewage failure were under color of state law. The court rejected this argument. It said that status alone was not enough to determine that certain actions were done under color of state law; the action must be part of the agency’s “custom or policy.”¹¹ To show discriminatory intent, the plaintiffs argued that the sewage leak affected a community that was entirely African-American. Because the plaintiffs’ argument did not speak to the intent of the defendants, the court rejected this argument as insufficient. The court, therefore, dismissed all civil rights claims.

Conclusion

The court declined to exercise supplemental jurisdiction over the plaintiffs’ common law negligence claims after dismissing all of the claims that were questions of federal law. The court noted that there is extensive precedent for the federal district court to decline to hear common law claims after the federal claims over which the court has original jurisdiction have been dismissed. The common law claims would now need to be filed in the District of Columbia court system.

The record of the case does not dispute at least one important fact: in the fall of 2017, the basements on Delafield Place filled with raw sewage, a material that any layperson might call “hazardous waste.” The residents, however, have not yet found legal remedy in the judicial system. On November 2, 2018, the plaintiffs filed a timely appeal to the D.C. Circuit Court. The appeal has been assigned a case number, although no future hearing dates have been set. ❧

Endnotes

- ¹ Grace M. Sullivan, 2L at the University of Mississippi School of Law.
- ² *Miller v. D.C. Water and Sewer Authority*, No. 17-cv-0840 (D.D.C. Oct. 2, 2018).
- ³ 42 U.S.C. § 6972.
- ⁴ *Id.* § 9659.
- ⁵ *Id.* § 9607(a).
- ⁶ 15 U.S.C. § 2619.
- ⁷ *Id.* § 2601(a)(2).
- ⁸ *Miller* at 15.
- ⁹ 42 U.S.C. § 6903(5).
- ¹⁰ *Id.* §§ 1981-1983.
- ¹¹ *Miller* at 29.

COURT DISMISSES CHALLENGE TO MARINE NATIONAL MONUMENT DESIGNATION

Terra Bowling



Red-tailed tropicbirds, courtesy of Vincent Collins.

President Obama designated the Northeast Canyons and Seamounts Marine National Monument in 2016 under the Antiquities Act. The monument, which encompasses 4,913 square miles off the coast of New England, marked the first marine national monument in the Atlantic Ocean. Commercial fishing groups objected to the designation, questioning whether the Antiquities Act gives the president authority to designate marine monuments. This fall, the U.S. District Court for the District of Columbia ruled on the challenge.¹

Background

The Antiquities Act grants the President the authority to establish national monuments to protect “...historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government...”² The President may reserve parcels of land as part of the monument; however, the reserved land must be “confined to the smallest area compatible with the proper care and management of the objects to be protected.”³

In *Massachusetts Lobstermen's Association*, several commercial fishing associations argued that the Antiquities Act does not give the President the authority to designate the Northeast Canyons and Seamounts for several reasons: “first, because the submerged lands of the monument are not ‘lands’ under the Antiquities Act; second, because the federal government does not ‘control’ the lands on which the Canyons and Seamounts lie; and third, because the amount of land reserved as part of the Monument is not the smallest compatible with its management.”⁴

The court first addressed the claim that the Antiquities Act does not cover submerged lands. The court cited U.S. Supreme Court precedent concluding that the Antiquities Act does, in fact, encompass submerged lands. The court noted that “executive practice” supported designation: past presidents have frequently reserved submerged lands as national monuments. For example, President George W. Bush designated the Papahānaumokuākea Marine National Monument in Hawaii in 2006. The court also reasoned that the ordinary meaning of “land” includes submerged land. Finally, the court rejected the notion that the National Marine Sanctuaries Act (NMSA) precludes Antiquities Act designations in marine areas. The court reasoned that, although both statutes address ocean conservation, “they do so in different ways and to different ends.”⁵ The Antiquities Act is focused primarily on preservation, while the NMSA addresses a broader range of values within a marine area, including recreation.

The court next addressed the argument that the federal government does not “control” the lands within the monument. The Antiquities Act specifies that designations may be “on land owned or controlled by the Federal Government....”⁶ The court rejected the plaintiff’s argument that the government must exercise “complete control” over the Exclusive Economic Zone. The court concluded that the government adequately controlled the area for the purposes of the Act.

Finally, the court addressed whether the monument was the smallest area compatible with the area’s management. The plaintiffs argued that the monument includes areas that are well outside the canyons and seamounts, which are the defining physical characteristics of the area. The court noted that “The Proclamation makes clear that the ‘objects of historic and scientific interest’ include not just the ‘canyons and seamounts’ but also ‘the natural resources and ecosystems in and around them.’”⁷

Conclusion

Ultimately, the district court granted the government’s motion to dismiss the challenge. The ruling confirms that the Antiquities Act may be used to establish marine national monuments. Despite this, change may still be

afloat for the Northeast Canyons and Seamounts Marine National Monument.

THE RULING CONFIRMS THAT THE ANTIQUITIES ACT MAY BE USED TO ESTABLISH MARINE NATIONAL MONUMENTS.

In two separate executive orders issued in 2017, President Trump ordered the review of certain national monuments and national marine sanctuaries. Executive Order 13,792 asked the Department of the Interior (DOI) to review certain monuments designated under the Antiquities Act.⁸ Executive Order 13,795 implemented the “America-First Offshore Energy Strategy” and directed the Department of Commerce to review sanctuaries and monuments established over the past ten years.⁹

Secretary of the Interior Ryan Zinke subsequently reviewed 27 monuments, including the Northeast Canyons and Seamounts. In December 2017, Secretary Zinke issued a final report that recommended changing management practices at the Northeast Canyons and Seamounts to allow its fisheries management council to make fishery management decisions.¹⁰ The President has not yet issued an executive order to implement these changes. 9

Endnotes

¹ *Massachusetts Lobstermen's Ass'n v. Ross*, 2018 WL 4853901 (D.D.C. Oct. 5, 2018).

² 54 U.S.C. § 320301(a).

³ *Id.* § 320301(b).

⁴ *Massachusetts Lobstermen's Ass'n*, at *1.

⁵ *Id.* at *7.

⁶ 54 U.S.C. § 320301(a).

⁷ *Massachusetts Lobstermen's Ass'n*, at *14.

⁸ *Review of Designations Under the Antiquities Act*, 82 Fed. Reg. 20429 (May 1, 2017).

⁹ *Implementing an America-First Offshore Energy Strategy*, 82 Fed. Reg. 20815 (May 3, 2017).

¹⁰ Memorandum for President, Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act, Ryan K. Zinke (Dec. 2017).



The University of Mississippi

THE SANDBAR

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



Littoral Events

2019 Gulf of Mexico Oil Spill and Ecosystem Science Conference

February 4-7, 2019
New Orleans, LA

For more information, visit: <http://bit.ly/2019gomsci>

American Shore & Beach Preservation Association Coastal Summit

March 12-14, 2019
Washington, D.C.

For more information, visit: <http://asbpa.org/conferences>

OceanVisions2019

April 1-4, 2019
Atlanta, GA

For more information, visit: <http://www.oceanvisions.org/oceanvisions19>