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The SandBar

Legal Reporter for the National Sea Grant College Program

U.S. Supreme Court Says Some Groundwater Discharges Fall Under CWA

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Cover page photograph of an ocean view in Maui, Hawaii, courtesy of Francois Dufour.

Contents page photograph of a tree-top with mocking bird at Alii Kula Lavender Farm in Maui, Hawaii, courtesy of Forest and Kim Starr.

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U.S. Supreme Court Says Some Groundwater Discharges Fall Under CWA

Terra Bowling

Ocean view in Maui, Hawaii, courtesy of Internet Age Traveler Media.

In April, the U.S. Supreme Court held that the federal Clean Water Act (CWA) requires the federal government to regulate some groundwater pollutants that discharge into navigable waters.[1] The CWA prohibits the addition of any pollutant from a point source to navigable waters without the appropriate permit. In this case, the Supreme Court had to determine "whether the Act 'requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, here, 'groundwater.'"[2]

Background

The pollutants at issue in this case come from a wastewater treatment plant operated by Maui County, Hawaii. Approximately 3 to 5 million gallons of treated wastewater per day are injected by the County into the groundwater via underground injection control (UIC) wells. Pollutants from the wastewater injections travel about half a mile and are discharged into the Pacific Ocean.

Environmental groups filed suit over the plant's activities, claiming that Maui County violated the CWA by discharging the pollutants without a CWA permit. The County argued that discharges are regulated by the CWA only when pollutants are directly discharged into navigable waters. The federal district court ruled in favor of the environmental groups, and the Ninth Circuit affirmed.[3] The appellate court held that when the pollutants are "fairly traceable" to the point source and are more than minimal amounts, the CWA applies.

Other federal circuit courts have previously ruled on the issue. The Fourth Circuit court reached the same conclusion as the Ninth Circuit but used a different test for determining when the CWA applies to groundwater discharges, holding that the CWA only covers groundwater when there is a "direct hydrological connection" between the groundwater and the navigable waters.[4] In contrast, the Sixth Circuit held that groundwater was not a point source under the CWA, and groundwater pollution could not give rise to CWA liability under a "hydrological connection" theory.[5] The Supreme Court granted *certiorari* to resolve the split and provide clarity on the scope of the CWA.

Following the Supreme Court's grant of cert in *Hawaii Wildlife Fund*, the U.S. Environmental Protection Agency (EPA) issued an Interpretive Statement on the application of the CWA to groundwater.[6] The EPA concluded that the discharge of pollutants to groundwater is excluded from the Act's permitting requirements, regardless of a hydrological connection between groundwater and navigable water.

Supreme Court Ruling

In a 6-3 opinion by Justice Stephen Breyer, the Supreme Court overturned the Ninth Circuit's ruling. The Court rejected the "fairly traceable" test, but it also rejected the argument to entirely exclude groundwater from CWA permitting requirements. The court found the former argument too broad, and the latter too narrow. Instead, the Supreme Court found that the groundwater discharges would fall under the CWA permitting requirements based on a "functional equivalent" standard. The Court stated, "[w]e consequently understand the permitting requirement, §301, as applicable to a discharge (from a point source) of pollutants that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters."[7] Essentially, an "addition" will be regulated under the CWA when directly deposited from a point source or "when the discharge reaches the same result through roughly similar means."

The Court stated that many factors would be necessary to decide if the functional equivalent standard is met, noting that time and distance would be the most important. Other relevant factors include: the nature of the material through which the pollutant travels; the extent to which the pollutant is diluted or chemically changed as it travels; the amount of the pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source; the manner by or area in which the pollutant enters the navigable waters; and the degree to which the pollution (at that point) has maintained its specific identity. The Court pointed out that other courts would provide additional guidance through forthcoming rulings. Further, the EPA may provide administrative guidance on when the standard is met.

Justice Clarence Thomas and Justice Samuel Alito wrote separate dissents. Justice Thomas' dissent, which was joined by Justice Gorsuch, asserted that a permit should only be required when a point source discharges pollutants directly into navigable waters. Justice Alito's opinion alleged that the Court's functional equivalent test did not provide the necessary guidance and could therefore result in arbitrary and inconsistent application. The Court declined to rule on whether the pollution at issue met the standard and remanded the case to the Ninth Circuit. In June, the Ninth Circuit remanded the case to the U.S. District Court for the District of Hawaii, which will apply the new "functional equivalent" standard to the case.

Moving Forward

Moving forward, courts will need to apply the new test to the scientific details of each case. Shortly after the Court issued its opinion, the Court granted *certiorari* in the Fourth Circuit case mentioned above. The Supreme Court immediately vacated the Fourth Circuit's opinion and remanded the case for further proceedings in light of the *County of Maui* case.

The Court's decision has already had an impact in other cases—in one Rhode Island case stemming from a beach club's wastewater system, the parties agreed to settle following the Court's ruling.[8] In that case, the federal district court had previously deferred to the EPA's interpretive statement and held that the treated wastewater from the club that seeped into the groundwater did not require a CWA permit. After the *County of Maui* decision, the parties agreed that the portion of the opinion deferring to the EPA's interpretive statement should be vacated. In addition, the beach club agreed to install a filtration system and dispose of waste offsite.

Endnotes

1 Cty. of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020).

2 *Id.* at 1468. *quoting* petition for Certiorari i.

3 Hawai'i Wildlife Fund. v. County of Maui, 881 F.3d 754 (9th Cir. 2018).

4 Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir. 2018).

5 Kentucky Waterways All. v. Kentucky Utilities Co., 905 F.3d 925 (6th Cir. 2018).

6 U.S. Environmental Protection Agency, Interpretive Statement on Releases of Pollutants from Point Sources to Groundwater, April 15, 2019.

7 *Cty. Of Maui, Hawaii,* 140 S.Ct. at 1477.

8 Conservation Law Found. v. Longwood Venues & Destinations, No. 20-01024 (1st Cir. May 26, 2020).

New "Waters of the United States" Rule Finalized: Will it Stand?

Catherine Janasie[1]

Wetlands in Beaverton, Oregon, courtesy of Napoleon Benito.

Since being decided in 2006, the *Rapanos v. United States* decision has created uncertainty in what constitutes "Waters of the United States" (WOTUS) under the Clean Water Act (CWA).[2] The source of this uncertainty is that the case had no majority opinion, causing two different tests to emerge. Following the *Rapanos* decision, all of the U.S. Circuit Courts of Appeals adopted Justice Kennedy's "significant nexus" test for determining if a waterway constitutes a WOTUS, and the Obama Administration's 2015 Clean Water Rule attempted to incorporate this test into CWA regulations. The second test came from Justice Scalia and focuses on whether a waterway is permanent or has a physical connection to a WOTUS. The new 2020 Navigable Waters Protection Rule issued by the Trump Administration aims to comply with Justice Scalia's test.

Direction for Change

In February 2017, President Trump issued Executive Order 13778 directing the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies) to review and revise or rescind the 2015 Clean Water Rule. The Executive Order directly asked the Agencies to consider "promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution" while also protecting waterways from pollution.[3] Despite the federal courts' adoption of Justice Kennedy's significant nexus test, the Executive Order also directed the agencies to define WOTUS "in a manner consistent with" Justice Scalia's *Rapanos* test.

The Executive Order directly asked the Agencies to consider "promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution" while also protecting waterways from pollution.

Getting the Agencies' new 2020 WOTUS rule in place was a two-step process. First, the Agencies needed to repeal the 2015 Clean Water Rule, which the agencies did in October 2019.[4] Next, the Agencies had to write a new rule defining WOTUS. After receiving over 620,000 comments on their draft rule, the Agencies finalized their Navigable Waters Protection Rule on January 23, 2020.[5] However, the Agencies did not officially publish the rule in the Federal Register until April 21, 2020, making the effective date for the rule June 22, 2020.[6]

Navigable Waters Protection Rule

With the 2020 Rule, the Agencies have stated that they have written a streamlined regulatory definition that provides four simple categories of jurisdictional waters that are WOTUS and twelve clear categories of waters that are excluded. The four types of jurisdictional waters under the 2020 Rule are: 1) "territorial seas and traditional navigable waters"; 2) "perennial and intermittent tributaries that contribute surface water flow to such waters"; 3) "certain lakes, ponds, and impoundments of jurisdictional waters"; and 4) "wetlands adjacent to other jurisdictional waters."[7]

Both territorial seas and traditional navigable waters have consistently been covered by WOTUS regulations interpreting the reach of the CWA.[8] The 2015 Rule included lakes, ponds, and impoundments based on their distance to regulated waters, usually regulating them when they were within 1,500 feet of a regulated water.[9] In comparison, the 2020 Rule only includes lakes, ponds, and impoundments if it is a traditional navigable water, or contributes surface water flow to or is flooded by a jurisdictional water in a typical year.[10] The remaining two categories of jurisdictional waters, tributaries and wetlands, are more impacted by the 2020 Rule.

Tributaries

Under the 2015 Rule, a tributary qualified as a WOTUS if it exhibited a bed, bank, and ordinary high water mark, regardless of how often, how much, or how long water flowed in the tributary. Under the 2020 Rule, a tributary is included if it flows to a jurisdictional water either perennially – meaning it has surface water flowing year-round - or intermittently – meaning that it has a continuous flow "during certain times of the year and more than in direct response to precipitation."[11]

Tributary in Twanoh State Park, Washington, courtesy of David Seibold.

However, ephemeral waters - waters that only flow due to precipitation - are not included as a jurisdictional water. The 2020 Rule provides an example to try to flesh out the difference between intermittent and ephemeral waters, stating that an ephemeral water would be one that is only flowing due to a snow fall, while an intermittent water would be one that flows continuously due to melting snowpack for a more continual time period like weeks or months.[12]

Wetlands

Another change from the 2015 Rule deals with the wetlands covered by 2020 Rule. The 2015 Rule considered a wetland as a WOTUS based on its location to regulated waters, including any wetland within 1,500 feet of a regulated water. The 2020 Rule changes this considerably, only covering wetlands that abut the other jurisdictional waters. The 2020 Rule defines "abut" as "when a wetland touches a territorial sea, traditional navigable water, tributary, or lake, pond, or impoundment of a jurisdictional water at least at one point or side." The 2020 Rule does allow for some separation of the wetland from other jurisdictional waters. A wetland can still be a WOTUS if it is separated from a jurisdictional water by certain natural features like berms or banks, as well as similar artificial features if it "allows for a direct hydrological surface connection."[13]

Groundwater and the *Maui* Decision

Groundwater has traditionally not been considered a WOTUS, and the 2020 Rule continues this trend. However, in discussing their decision to not regulate groundwater, the agencies included language that could be seen as a reference to the factual circumstances of the recent *County of Maui, Hawaii v. Hawaii Wildlife Fund* decision, which involves the injection of a pollutant into groundwater, which then travels around a half mile before reaching the Pacific Ocean.[14] In regards to its decision to exclude all groundwater from WOTUS, the 2020 Rule states:

> The agencies acknowledge that, in certain circumstances, pollutants released to groundwater can reach surface water resources. However, the statutory reach of "waters of the United States" must be grounded in a legal analysis of the limits on CWA jurisdiction that Congress intended by use of the term "navigable waters," and an understanding and application of the limits expressed in Supreme Court opinions interpreting that term. This final rule does that, while also supporting the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and regulators.[15]

There is some uncertainty about how this interpretation in the 2020 Rule will work with the *Maui* decision, in which the Supreme Court ruled that groundwater discharge could be covered by the CWA if it meets the Court's "functional equivalent" standard. In fact, in his concurrence, Justice Kavanaugh concludes that the "functional equivalent" standard adheres to Justice Scalia's opinion in *Rapanos*, the standard which the 2020 Rule aims to interpret.[16]

Conclusion

Legal challenges have been filed to both the Agencies' rescission of the 2015 Clean Water Rule and the new 2020 Navigable Waters Protection Rule. In addition, courts may have to decide whether the 2020 Rule complies with the recent *Maui* decision in regards to groundwater regulation. In the meantime, it seems that what constitutes a WOTUS under the CWA will continue to remain up in the air.

Endnotes

1 Senior Research Counsel, National Sea Grant Law Center.

2 547 U.S. 715 (2006).

3 Exec. Order No. 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule' (Feb. 28, 2017).

4 Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019).

5 U.S. Envtl. Prot. Agency, Overview of the Navigable Waters Protection Rule 1 (2020).

6 The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020) [hereinafter Navigable Waters Protection Rule].

7 *Id.* at 22338.

8 The CWA defines territorial seas as waters that extend from the low-water mark of the coast out to three miles. 33 U.S.C. § 1362(8). Traditional navigable waters refer to waters that were or could be used in commerce and includes waters subject to the ebb and flow of the tide.

9 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37053, 37114-15 (2015).

10 Navigable Waters Protection Rule, *supra* note 6, at 22338-39.

11 *Id.* at 22338.

12 *Id.* at 22275.

13 *Id.* at 22251.

14 140 S.Ct. 1462 (2020). See a full description of the Supreme Court's decision on page 4 of this issue.

15 Navigable Waters Protection Rule, *supra* note 6, at 22318.

16 *County of Maui, Hawaii*, 140 S.Ct. at 1478-79.

U.S. Supreme Court Rules in Blackbeard Shipwreck Copyright Case

Terra Bowling

In March, the U.S. Supreme Court ruled on a copyright infringement suit over videos and photos taken of the recovery of Blackbeard's sunken pirate ship.[1] The photographer, Frederick Allen, alleged that the State of North Carolina committed copyright infringement by using his products without permission. The Supreme Court had to decide whether sovereign immunity protected the state from the copyright infringement suit or if a federal copyright statute waived that immunity.

Cannon recovered from Queen Anne's Revenge shipwreck, courtesy of Zach Frailey.

Background

Intersal, Inc., a marine salvage company, discovered the shipwreck off the coast of North Carolina in 1996. Blackbeard had seized the French slave ship in 1717, renaming it the *Queen Anne's Revenge*. He navigated the vessel through the Caribbean and up the North American coast. The ship's tenure as a pirate ship was cut short in 1718 when Blackbeard ran it aground on a sandbar off the coast of Beaufort, North Carolina. Under state and federal law, the wreck belongs to the state. The state contracted with Intersal to recover the shipwreck. Intersal, in turn, contracted with Allen to document the operation. Allen made videos and photos of the recovery efforts, registering copyrights for his works.

In 2013, Allen objected when the state published some of his works on its website without his permission, and the state settled with Allen for $15,000. The state then passed "Blackbeard's Law," which placed "all photographs, video records, or other documentary materials of a derelict vessel or shipwreck," and "relics, artifacts or historic materials" in the custody of the State or a state agency.[2] The law essentially designated all of Allen's photos and videos from the shipwreck as public works. The state subsequently used Allen's videos and photographs without his permission, and Allen filed suit in the U.S. District Court for the Eastern District of North Carolina.

The district court sided with Allen, dismissing the state's sovereign immunity argument. Sovereign immunity prevents courts from hearing suits brought by individuals against a non-consenting state. However, the U.S. Supreme Court has ruled that sovereign immunity may be waived if two conditions are met: 1) Congress must have enacted unquestionably clear language abrogating (i.e., revoking) the states' immunity from the suit, and 2) a constitutional provision must permit Congress to abrogate the states' sovereignty. Allen claimed the Copyright Remedy Clarification Act of 1990 (CRCA) removed states' sovereign immunity in copyright infringement cases. The CRCA states that a state "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court" for copyright infringement.[3] Although it was clear that Congress's passage of the CRCA met the first condition, it wasn't evident that it met the second.

Congress passed the CRCA in the early 1990s. Simultaneously, it passed the Patent Remedy Act, which operated similarly to the CRCA but abolished states' immunity from patent infringement suits. The U.S. Supreme Court invalidated the Patent Remedy Act in 1999.[4] In *Florida Prepaid*, the Court looked at whether Article I of the Constitution could be used to authorize Congress to waive state sovereign immunity. Article I, also called the Intellectual Property Clause, authorizes Congress to grant both copyrights and patents. Citing previous Supreme Court precedent, the *Florida Prepaid* Court concluded that Congress could not use its Article I powers to abrogate state immunity.

The federal district court acknowledged the *Florida Prepaid* ruling, but it found that even if Article I could not be used, Section 5 of the Fourteenth Amendment would allow the waiver of sovereign immunity. Section 5 of the Fourteenth Amendment allows Congress to abrogate the States' immunity as part of its power "to enforce" the commands of the Due Process Clause.

On appeal, the Fourth Circuit overturned the decision. The Fourth Circuit reasoned that nothing distinguished the CRCA from the Patent Remedy Act; therefore, Section 5 could not be used to waive sovereign immunity. Because the Fourth Circuit invalidated a federal statute, the U.S. Supreme Court agreed to hear the case.

Supreme Court Ruling

The Court first dealt with whether Article I could be used to waive sovereign immunity. Following the *Florida Prepaid* precedent, the Court held that Congress' Article I power to provide copyright protection did not authorize Congress to waive state immunity from copyright infringement suits. The Court explained that to overrule *Florida Prepaid*, it would need a "special justification." As the Court noted, "Allen offers us nothing special at all; he contends only that if the Court were to use a clause-by-clause approach, it would discover that *Florida Prepaid* was wrong (because, he says again, the decision misjudged Congress's authority under the Intellectual Property Clause)."[5]

Next, the Court addressed whether Section 5 of the Fourteenth Amendment would give Congress authority to waive immunity from copyright infringement suits. The Court noted that the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." Congress may enforce this prohibition through Section 5. The Court has consistently held that Congress may use Section 5 as a basis to waive sovereign immunity and subject states to suit in federal court; however, "[f]or an abrogation statute to be 'appropriate' under Section 5, it must be tailored to 'remedy or prevent' conduct infringing the Fourteenth Amendment's substantive prohibitions."[6] The Court examined whether Congress's enactment of the CRCA was in line with the Fourteenth Amendment. "For Congress's action to fall within its Section 5 authority, we have said, '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[7] In *Florida Prepaid*, the Court held that the Patent Remedy Act's "indiscriminate scope" was too "out of proportion" to any due process problem. Given the identical scope of the CRCA and the Patent Remedy Act, the Court found that it could not reach a different result than it achieved in *Florida Prepaid*. The CRCA could not pass the "congruence and proportionality test," as the indiscriminate scope was out of proportion to any due process problem.

The Court ruled unanimously in favor of North Carolina. Justice Elena Kagan wrote for the court. The opinion noted that Congress was not prevented from enacting a valid copyright protection law in the future. Kagan explained that in passing the CRCA, Congress had acted before the "congruence and proportionality" test had been established. A more tailored statute that would proportionally redress or prevent due process violations could be a solution. "That kind of tailored statute can effectively stop States from behaving as copyright pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice."[8]

Justice Clarence Thomas wrote a concurring opinion addressing the Court's deference to precedent. He expressed that the approach requiring "special justifications" to overcome precedent "does not comport with our judicial duty under Article III."[9] He also disagreed with the Court's discussion of potential future copyright law, contending that the Court should not advise Congress on its legislative authority. Finally, he noted his belief that the question of whether copyrights are property for purposes of the Fourteenth Amendment Due Process clause has not been answered.

Justice Stephen Breyer also wrote a concurrence, with Justice Ruth Bader Ginsburg joining. Breyer questioned why an individual injured by a state's violation of its duty to protect property had no redress. "[O]ne might think that Walt Disney Pictures could sue a State (or anyone else) for hosting an unlicensed screening of the studio's 2003 blockbuster film, Pirates of the Caribbean (or any one of its many sequels)."[10] However, recognizing that *Florida Prepaid* precedent controlled, he concurred in the judgment.

Endnotes

1 Allen v. Cooper, 140 S. Ct. 994 (2020).

2 N.C. Gen. Stat. Ann. § 121-25.

3 17 U.S.C. § 511(a).

4 Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

5 *Allen*, 140 S. Ct. at 1003.

6 *Id.*

7 *Id.*

8 *Id.* at 1007.

9 *Id.*

10 *Id.* at 1009.

Corps of Engineers Must Prepare EIS for Dakota Access Pipeline

Mikayla Mangle[1]

The Dakota Access Pipeline installation between farms in New Salem, North Dakota, courtesy of Tony Webster.

The Dakota Access Pipeline is designed to carry crude oil from North Dakota to Illinois, crossing over multiple waterways in the process. One of the waterways in the pipeline's path is an artificial reservoir, Lake Oahe, which the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe rely on for drinking, agriculture, industry, and sacred religious and medicinal practices. During the leasing process, the Tribes urged the U.S. Army Corps of Engineers (Corps) to prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) due to the possible catastrophe that could result from an oil spill. In the most recent decision regarding this case, the U.S District Court for the District of Columbia ruled that the Corps did not resolve the NEPA violations, and, therefore, must prepare an EIS under NEPA.[2]

Lake Oahe and Oahe Dam in South Dakota, courtesy of NASA.

Background

NEPA requires a federal agency proposing a federal action to first prepare an environmental assessment (EA) to determine whether the federal action has the potential to cause significant environmental effects.[3] An EA typically sets forth the need for the proposed action, any alternatives to the proposed action, and the environmental impacts of the proposed action. Based on the EA, an agency can either issue a finding of no significant impact (FONSI) or determine that the significant environmental impacts of an action require the preparation of a more detailed EIS. Ultimately, an EIS will be prepared if an agency determines its action will significantly affect the quality of the human environment.

The Corps prepared an EA for the pipeline and issued a FONSI. The Tribes filed suit against the Corps, claiming the construction of the pipeline violated the National Historic Preservation Act (NHPA) and NEPA. In 2016, the U.S. District Court for the District of Columbia dismissed the challenge, finding that the Tribes would be unlikely to prevail on their NHPA claim.[4] However, political protests against the pipeline grew, leading the Corps to publish notice of their intent to prepare an EIS. The Corps later decided not to publish an EIS following the change in administration in 2017 when a presidential memorandum encouraged acceleration of construction of the pipeline. The Cheyenne River Tribe then filed a second motion on Religious Freedom Restoration Act grounds, which the court rejected, finding that the Tribe would have a low likelihood of success on the merits.[5]

After the court's rejection of the Tribe's NHPA and religious freedom claim, the Tribes again brought action against the Corps, this time claiming that the Corps violated NEPA by not preparing an EIS. The court remanded the EA to the Corps to consider certain NEPA violations, including the agency's failure to address expert comments on pipeline flaws that could result in an oil spill.[6] In March, the court addressed whether the Corps resolved these issues.

The Corps Fails to Resolve NEPA Violations

The court first examined whether the agency had adequately considered whether the pipeline's effects would be "highly controversial." In a NEPA review, to determine whether a federal project will have a significant effect on the environment, the proposed project's "context" and "intensity" must be examined.[7] In order to evaluate the "intensity" of a proposed project, a multitude of factors must be examined, one of which is, "the degree to which the project's effects on the quality of the human environment are likely to be highly controversial."[8] The court noted that the protests that took place near Lake Oahe did not make the construction of the pipeline a highly controversial action. In order for an action to be considered highly controversial for purposes of a NEPA review, it must be more than people being agitated by the project; rather there must be "something 'scientific or some other evidence that reveals flaws in the methods or data relied on by the project.'"[9] The court relied on a recent D.C. Circuit opinion reviewing an agency's finding that a project was not highly controversial under NEPA.[10] In that opinion, the court held that to bypass the "highly controversial" standard, the agency must have actually succeeded in resolving the scientific controversy and it cannot merely attempt to do so.

The Tribe's experts found multiple "scientific controversies" surrounding the pipeline. The first involved the pipeline's leak detection system. The Tribe's experts argued that there were reasons to doubt the efficacy of the pipeline's leak detection system, since the system had an overall low detection rate. The court found that the Corps ultimately failed to comment on many of the expert's concerns regarding the system and, further, the Corps gave no assurance to the experts that a possible leak would be detected. Therefore, the court determined that the Corps did not resolve the scientific controversy regarding the leak detection system.

The second controversy involved the operator safety record. The experts argued that to analyze the magnitude of an oil spill, the agency should consider the history of its operator. However, the Corps made no such report on the history of the operator and did not give a reason as to why a report on the history of the operator was never made. The court determined that the Corps giving no reason for not including a report on the history of the operator did not resolve this controversy.

The third controversy the court discusses is the Tribe's expert's concerns regarding the pipeline's performance during harsh winter conditions. The experts argued that ice can trap oil during an oil spill and would make cleanup of an oil spill extremely difficult. The Corps did not prove that oil trapped by ice would counteract the difficulties in cleaning up an oil spill like they argued and, according to the court, did not resolve this controversy.

The final issue raised by the Tribe's experts involved the "worst case discharge," which is described as the maximum amount of oil that could possibly leak from the pipeline before a spill is detected and stopped.[11] The Tribe's experts argued that the Corps did not provide an actual time for how long it would take to detect a leak from the pipeline, that the Corps left uncertainty regarding the amount of time it would take to shut down the pipeline if an oil spill occurs, and that the Corps did not address concerns regarding adverse weather conditions. The court concluded that the Corps did not resolve these controversies in their Spill Model Report. The Corps left too much uncertainty regarding the time it would take to detect a leak from the pipeline. The Corps did not consider human or machine error in their report regarding shutdown time of the pipeline. Lastly, the Corps did not fully consider the issues that adverse weather could bring during a possible oil spill. Therefore, the Corps did not resolve this controversy.

Ultimately, the court concluded that the Corps did not resolve the controversies regarding the pipeline and an EIS must be conducted by the Corps. On July 6, 2020, the district court judge vacated the Corps' decision to grant Dakota Access an easement under the Mineral Leasing Act and ordered that the pipeline be shut down during the environmental review process.

Endnotes

1 2022 J.D. Candidate, Tulane Law School. Mangle is the 2020 Sea Grant Legal Diversity Intern at the National Sea Grant Law Center.

2 Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 2020 WL 1441923 (D.D.C. Mar. 25, 2020).

3 *National Environmental Policy Act Review Process*, EPA (January 24, 2017).

4 Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I), 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

5 Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II), 239 F. Supp. 3d 77, 100 (D.D.C. 2017).

6 Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III), 255 F. Supp. 3d 101, 147 (D.D.C. 2017).

7 *Standing Rock Sioux Tribe*, 2020 WL 1441923, at *13.

8 *Id.*

9 *Id.* (*quoting* WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 81 (D.C. Cir. 2019)).

10 Nat'l Parks Conservation Ass'n v. Semonite, 916 F. 3d. 1075 (D.D.C. 2019).

11 40 C.F.R. § 194.105(b)(1).

12 Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (D.D.C. July 6, 2020).

No Such Thing as an Accident:
U.S. Supreme Court Oil Spill Decision Sheds Light on Maritime Contract Law

Madeline Doten[1]

Oil spill on the Delaware River from *Athos I*, courtesy of NOAA.

In the home stretch of a nearly 2,000-mile journey, the oil tanker *Athos I* struck an abandoned anchor resting in the riverbed, causing 264,000 gallons of crude oil to flood the Delaware River.[2] The U.S. Supreme Court recently ruled on liability for the 2004 oil spill, providing some clarity to maritime contract law. In a 7-2 opinion, the Court held that the plain language of the parties' contract created a guarantee that the tanker would safely dock in New Jersey. The Court ruled that one of the parties in the case, CITGO Asphalt Refining Co. (CARCO), breached its contract when the oil tanker crashed into the anchor, preventing it from safely reaching the docking site, and, therefore, must pay the cleanup costs associated with the spill.

Background

In the year following the Exxon Valdez oil spill, Congress passed the Oil Pollution Act of 1990 (OPA). This legislation was enacted to encourage prompt cleanup of oil spills by identifying the entity responsible for the costs of cleanup, regardless of fault. The "responsible party" pays for cleanup, and if done so in a timely manner, the party may be reimbursed by the Oil Spill Liability Trust Fund (OSLTF) for any costs exceeding a statutory limit.[3] The "responsible party" and the trust fund may then pursue legal action against other entities responsible for the spill in order to recoup cleanup costs.

In the present case, *Athos I* was owned by Frescati Shipping Co. and chartered to Star Tankers, who then subchartered *Athos I* to CARCO. Because Frescati was the owner of *Athos I*, it was deemed the "responsible party" under OPA and therefore had to cover the costs of cleanup. Frescati promptly assisted with cleanup; thus, its liability was limited to $45 million by the OPA. The OSLTF then reimbursed Frescati for the remaining $88 million associated with the cleanup costs. Subsequently, Frescati and the federal government pursued legal action against CARCO to recoup those cleanup costs, claiming that CARCO had breached the safe-berth clause of its contract when the tanker struck the abandoned anchor.

At the heart of this case was the subcharter contract between CARCO and Star Tankers. The U.S. Court of Appeals for the Third Circuit found that the contract between CARCO and Star Tankers created an express warranty of safety through its safe-berth clause. The U.S. Supreme Court granted *certiorari* to determine whether this warranty was established.

CARCO's Contract

The Supreme Court agreed with the appellate court's ruling that an express warranty of safety was created in the safe-berth clause of the parties' contract. The Court's opinion, written by Justice Sotomayor, explained that analysis of this issue "starts and ends with the language of the safe-berth clause."[4] This clause provided that the charterer "shall" choose a safe docking site so that the "[v]essel [could] proceed thereto, lie at, and depart therefrom always safely afloat."[5] The ordinary meaning of the terms "safe" and "always," the Court reasoned, establish an express warranty of safety, regardless of the fact that the term "warranty" was never used. In other words, this clause unambiguously guaranteed that *Athos I* would safely dock in New Jersey. Further, the Court noted that the use of the word "shall" designates a requirement of the party. Indeed, establishing a safe docking site is the entire reason behind inclusion of a safe-berth clause in a charter contract.

The Court also dismissed CARCO's argument that the safe-berth clause merely imposed a duty of due diligence when selecting the docking site. CARCO argued that this clause did not impose strict liability, or liability without consideration of actual fault. The Court reasoned that this argument was without merit as CARCO and Star Tankers provided no language in the safe-berth clause that limited CARCO's liability to "due diligence." That the parties did not include this language in the safe-berth clause, the Court reasoned, is proof that the parties did not mean to impose a liability limitation.

Similarly, the Court dismissed CARCO's argument that its ship captain had a duty to evaluate the tanker's route to New Jersey. The Court contended that the captain's duty did not take away the responsibility of the charterer to select a safe berth, a responsibility clearly established in the safe-berth clause. Thus, the plain language of the safe-berth clause established an express warranty of safety that *Athos I* would safely arrive and dock in New Jersey, and when this did not occur, CARCO breached the safe-berth clause of its contract with Star Tankers.

The Dissent

The dissenting opinion, authored by Justice Thomas and joined by Justice Alito, found that the plain language of CARCO's contract with Star Tankers contained no warranty of safety. Justice Thomas contended that the term "warrant" was not used in the safe-berth clause, yet this term was used to establish warranties throughout the rest of the parties' contract. Because other sections of the contract contained express language that established a warranty, the dissent argued that it would not interpret the language of the safe-berth clause as establishing the same. Furthermore, Justice Thomas argued that the majority's statement of fact argument was not controlling on the issues. In a short paragraph within the majority opinion, the majority argued that the safe berth clause contained a statement of material fact in relation to the conditions of the selected berth. Justice Thomas, however, argued that this theory was incorrectly used, as the condition of the berth was not a statement of fact, but merely an inference. Finally, Justice Thomas stated that the majority's interpretation of the parties' safe-berth clause applies only to the specific contract at issue.

Conclusion

The Supreme Court sided with the Third Circuit in its decision that imposed liability on CARCO for the oil spill in the Delaware River. CARCO breached its contract with Star Tankers when it did not provide a safe route to its docking site, and thus CARCO must reimburse Frescati and the United States for the cleanup costs associated with the spill — a $100 million-plus reimbursement. The Supreme Court's decision provides some clarity to future contract disputes in the maritime setting and helps to elucidate liability for future maritime incidents.

Endnotes

1. 2022 JD Candidate, Stetson University College of Law. Doten is the 2020 NSGLC Summer Intern.
2. CITGO Asphalt Ref. Co. v. Frescati Shipping Co., 140 S. Ct. 1081, 1085–1086 (2020).
3. 33 U.S.C. §§ 2702(a), 2704, 2708.
4. *CITGO*, 140 S. Ct. at 1088.
5. *Id.* at 1088 (citing Addendum to Brief for Petitioners 8a).

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Littoral Events

American Fisheries Society
Virtual Annual Meeting

August 29 – September 3, 2020

For more information, visit: https://afsannualmeeting.fisheries.org

2020 Floodplain Management Association Annual Conference
Virtual Meeting

September 8-11, 2020

For more information, visit: https://floodplain.org/page/AnnualConference

National Coastal Estuarine Summit
Virtual Meeting

September 29 – October 1, 2020

For more information, visit: https://estuaries.org/summit