The SandBar

Volume 8:4, January 2010

Legal Reporter for the National Sea Grant College Program

Carp Crusade:

Great Lakes Prepare to Battle Asian Carp

And,

Climate Change: Public Nuisance Cases Clear Preliminary Hurdles

Ohio's Public Trust Doctrine

California's Water Efficiency Standards

Federal Update 2009

From the Editor

Welcome to a new vision of *The SandBar*!

Our goal for the redesign is to provide more in-depth coverage on current issues in ocean and coastal law and to make the pages more enjoyable for the reader. We hope you like the redesign, but we realize that we might need further changes. We welcome your comments, negative as well as positive. As always, suggestions for features or other content are welcome.

This edition of *The SandBar* contains several articles highlighting emerging legal issues. Director of the National Sea Grant Law Center, Stephanie Showalter, provides a look at lawsuits that have been filed claiming that industry activities contribute to global warming and constitute a public nuisance. She describes procedural issues that the plaintiffs have to overcome to bring their cases to trial. “A Line in the Sand” discusses a recent Ohio appeals court decision limiting the state’s public trust doctrine. And, “Carp Invasion” looks at legal actions taken to prevent a voracious invasive species, Asian carp, from infiltrating the Great Lakes.

In a story on Rhode Island’s decision to withhold approval for a proposed LNG terminal, Jonathan Proctor notes the reluctance of the court to defer to a state agency decision. Finally, we provide a summary of federal legislation passed in 2009 that could affect the Sea Grant community.

Please enjoy the issue and let us know how we are doing!

Terra Bowling, J.D.

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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*.

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Climate Change

Public Nuisance Cases Clear Preliminary Hurdles

by Stephanie Showalter, J.D., M.S.E.L.

Photograph courtesy of Ohio Environmental Development Corp.

During the past several years, a number of lawsuits have been filed against the oil and gas industry, large power companies, and automakers on public nuisance grounds. The plaintiffs claim the defendants' activities, which involve or encourage the emission of carbon dioxide, contribute to global warming and therefore constitute a public nuisance.

Litigation as a means of environmental protection is not new—Congress has rarely tackled an environmental problem on its own initiative. Litigation has traditionally been the driver of environmental law and policy in the United States. In the late 1960s and early 1970s, ordinary citizens, with the help of legal advocacy groups such as the Environmental Defense Fund, began filing lawsuits against companies who were polluting the air, water, and land around their homes, schools, and playgrounds. These lawsuits were grounded in common law concepts that were well known to judges. Homeowners with contaminated wells or land argued that they were due compensation because the company was negligent, for example, by failing to exercise reasonable care in the operation of its facility. Families with sick children argued that companies who discharged soot and toxic chemicals into the air were creating a nuisance that should be stopped.

As the citizens' victories mounted, awareness of the pollution problem grew. Public pressure for government action eventually resulted in a flurry of environmental lawmaking in Congress. In the late 1970s, Congress passed the Clean Water Act, the Clean Air Act, the National Environmental Policy Act, and a dozen other environmental statutes. Many of those statutes authorized ordinary citizens to challenge federal agency actions in court. Such oversight authority was unprecedented. The citizen suit provisions ensured that litigation would continue to be a powerful tool, albeit a polarizing one, for environmental protection.

Public Nuisance

The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public."[1] According to the Restatement, an activity unreasonably interferes with a public right if "the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience."[2] Over the years, courts have found a wide variety of activities to constitute public nuisances, including storing explosives in the middle of a city, keeping diseased animals, emitting excessive smoke, dust, and odors, and obstructing a public highway.[3]

A climate change lawsuit based on the theory of public nuisance has a number of challenges. First, what

public rights are the defendants allegedly interfering with? The Environmental Protection Agency (EPA) recently announced that "greenhouse gases (GHGs) threaten the public health and welfare of the American people."[4] The EPA concluded that GHGs emissions, as the primary driver of the current climatic changes, may result, for example, in longer heat waves and increases in asthma attacks due to increased ozone pollution.[5]

So, there is the possibility that the emission of GHG could interfere with public health. But, are the defendants' actions "unreasonable"? In public nuisance cases, an activity is considered unreasonable if the gravity of the harm to the public right outweighs the utility (benefit) of the activity.[6] The question at trial will be whether the benefits derived from burning coal to generate electricity or manufacturing gasoline to power cars outweighs the potential harm to the American public from a warmer world. That question is much more complex and nuanced than whether the benefits derived from manufacturing explosives in a city center outweigh the risk of harm to that city's residents.

Standing

For years, it was unclear whether the public nuisance cases brought in federal court would ever reach the stage where such issues are decided. As a threshold matter, all plaintiffs must establish that they have a right, or standing, to bring their claim in court. According to the U.S. Supreme Court, a plaintiff has standing when (1) she has suffered a particularized injury; (2) the injury is fairly traceable to the defendant's actions; and (3) a favorable decision by the court will redress that injury.[7] All three elements pose problems for climate change plaintiffs.

First, because climate change is a global problem, every person on the planet is potentially harmed by GHG emissions making it difficult for a plaintiff to establish a "particularized injury." Second, while there is solid scientific evidence that the Earth is warming, it is impossible to link the emissions from one region, let alone from one factory, to climate change impacts such as more heat waves or higher sea levels. Third, even if a court rules in the plaintiff's favor and required emission reductions from power plants, for example, GHGs are still entering the atmosphere from thousands of other sources. The ruling would not prevent or redress the plaintiff's injury.

In 2007, the Supreme Court opened the door for public nuisance climate change cases when it determined that the State of Massachusetts had standing to pursue its claims against the EPA.[8] The Court concluded that Massachusetts had suffered a particularized injury, the loss of state-owned coastal property due to sea level rise, which was caused by climate change. Even though EPA's contribution to climate change (its failure to regulate carbon dioxide emissions from cars and trucks) was quite minimal, the agency's lack of action still contributed to Massachusetts' injury. Since the Court could order the EPA to take action that would reduce emissions thereby "slowing" global warming and reducing the risk of harm, a favorable ruling would redress at least some of Massachusetts' injuries.

The Supreme Court's ruling on standing in *Massachusetts v. EPA* has changed the legal landscape for public nuisance litigants. Several cases originally dismissed by district court judges for lack of standing were recently given new life on appeal. In September in *Connecticut v. AEP*, the Second Circuit granted standing to eight states and the City of New York to pursue their claims again five fossil fuel-burning utilities. Then in October, the Fifth Circuit in *Comer v. Murphy Oil* ruled that private landowners along the Mississippi Gulf Coast had standing to pursue their claims against several oil and energy companies for damages related to Hurricane Katrina, which the plaintiffs argue was stronger due to global warming.

Photograph courtesy of Nova Development Corp.

Political Question

Defendants in public nuisance climate change cases have argued that even when plaintiffs can establish standing their claims should be dismissed as "political questions," which are precluded from judicial review. The political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."[9] Courts have generally interpreted the doctrine quite narrowly, applying it primarily in cases seeking judicial rulings on whether states had the proper form of republican government guaranteed by the Constitution.[10] Such cases are obviously unlikely to arise today, although some foreign policy issues, such as whether a state of war exists between the United States and another country, are also considered to be political questions.[11]

The political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."

This defense has met with great success in the district courts. In *Connecticut v. AEP*, the District Court for the Southern District of New York dismissed the states' claims because resolution of the issues would require "identification and balancing of economic, environmental, foreign policy, and national security interests" – decisions which are traditionally "consigned to the political branches, not the Judiciary."[12] In 2007, the District Court for the Northern District of California dismissed a public nuisance suit against the major automakers because it "would have an inextricable effect on interstate and foreign policy – issues constitutionally committed to the political branches of government."[13] Most recently, in September 2009, the Northern District dismissed the claims of an Inupiat Eskimo village against several oil and energy companies on similar grounds.[14]

The plaintiffs, however, have had much better luck on appeal. In October, the Second Circuit reversed the New York District Court concluding that, despite the "political overtones" of the global warming cases, nothing in the Constitution prevents the courts from hearing such disputes.[15] The Fifth Circuit reached a similar conclusion in *Comer*.[16]

Conclusion

While plaintiffs are beginning to clear some initial procedural hurdles, they are a long way from a final decision on the merits of their claims. The defendants are likely to appeal the recent circuit court decisions to the Supreme Court and, even if the cases proceed to trial in the district courts, it will be difficult for the plaintiffs, especially in *Comer*, to prove causation. Regardless of the eventual outcome of these cases, the actions of the courts will place additional pressure on Congress to take action on climate change and GHG emissions. Unless Congress acts soon, courts may take the lead in establishing emission standards.

Endnotes

1. Restatement (Second) of Torts § 821B(1) (1979).
2. *Id.* § 821B(2)(a).
3. *Id.* § 821B, comment (b).
4. Press Release, Environmental Protection Agency, *Greenhouse Gases Threaten Public Health and the Environment*, Dec. 7, 2009.
5. *Id.*
6. *See* Restatement (Second) Torts § 826, comment (a).
7. *See* Massachusetts v. EPA, 549 U.S. 497, 517 (2007).
8. *Id.*
9. U.S. v. Munoz-Flores, 495 U.S. 385, 394 (1990).
10. Philip Weinberg, *"Political Questions": An Invasive Species Infecting the Courts*, 19 Duke Envtl. L. & Pol'y F. 155, 157 (2008).
11. *See id.*
12. Connecticut v. American Electric Power Co., 406 F.Supp.2d 265, 274 (S.D.N.Y. 2005).
13. People of California v. General Motors Corp., 2007 WL 2726871 at *14 (N.D. Cal. Sept. 17, 2007).
14. Native Village of Kivalina v. ExxonMobil Corp., 2009 WL 3326113 (N.D. Cal. Sept. 30, 2009).
15. Connecticut v. American Elec. Power Co., Inc., 582 F.3d 309, 325 (2nd Cir. 2009).
16. Comer v. Murphy Oil USA, 585 F.3d 855, 870 (5th Cir. 2009).

2009 Federal Legislative Update

111 Public Law 5 – American Recovery and Reinvestment Act of 2009 (H.R. 1)
Provides, among other things, funds for the National Oceanic and Atmospheric Administration for operations, research, facilities, procurement, acquisition, and construction.

111 Public Law 11 - Omnibus Public Land Management Act of 2009 (H.R. 146)
Authorizes the Coastal and Estuarine Land Conservation Program and provides appropriations for ocean exploration, the National Oceanic and Atmospheric Administration Undersea Research Project Act, the Ocean and Coastal Mapping Integration Act, the Integrated Coastal and Ocean Observation System Act, and the Ocean Acidification Research and Monitoring Act.

111 Public Law 32 – Regarding supplemental appropriations (H.R. 2346)
Provides unlimited reprogramming authority to the Secretary of the Army for Corps of Engineers funds, unlimited reprogramming authority to the Secretary of the Interior for Bureau of Reclamation, Water and Related Resources funds, and increases the cost ceiling for the Corps of Engineers' ecosystem restoration project in Upper Newport Bay, California.

111 Public Law 60 – To extend the deadline for commencement of construction of a hydroelectric project (H.R. 2938)
Allows the Federal Energy Regulatory Commission to extend the time period for commencement of the Price Dam hydroelectric project by up to three consecutive two-year periods.

111 Public Law 80 – Regarding appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies programs (H.R. 2997)
Requires the Natural Resources Conservation Service to provide financial and technical assistance through the Watershed and Flood Prevention Operations program to carry out various projects, including the Hurricane Katrina-related watershed restoration project in Jackson County, Mississippi. Also appropriates $800,000 to the Farm Service Agency to carry out a pilot program designed to increase the growth of reforested hardwood trees on Gulf Coast lands damaged by Hurricane Katrina.

111 Public Law 85 – Regarding appropriations for energy and water development and related agencies (H.R. 3183)
Appropriates funds for U.S. Army Corps of Engineers projects related to rivers and harbors, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related efforts.

111 Public Law 88 – Regarding appropriations for the Department of the Interior, environment, and related agencies (H.R. 2996)
Appropriates funds for the Minerals Management Service regarding offshore resource research and recovery and for oil spill research.

A LINE IN THE SAND

COURT LIMITS OHIO'S PUBLIC TRUST DOCTRINE

BY TERRA BOWLING, J.D.

In August, an Ohio appellate court ruled that the water's edge—not the ordinary high water mark—is the boundary between lands held in trust by the state and private lakefront property.[1] The ruling prevents the public from enjoying traditional public trust activities above the water's edge on the shores of Lake Erie in Ohio and contrasts with other states' public trust laws.

PTD

The public trust doctrine is an English common law concept stemming from Roman law that states that tidelands and lands below navigable waters are held by the state in trust for the public's interest. In *Shively v. Bowlby*,[2] the U.S. Supreme Court recognized the English doctrine of the public trust in tidal waters and that pursuant to the equal footing doctrine, states entering the union would automatically receive land beneath navigable waters below the high water mark.[3] Under the federal common law, the public trust doctrine encompasses waters and lands beneath navigable waters up to the "ordinary high water mark" (OHWM).[4] Many coastal states have adopted the OHWM as the boundary line for applying the public trust doctrine. For example, in *Glass v. Goekel*, the Michigan Supreme Court ruled that pursuant to the public trust doctrine, the public had the right to walk on the lakeshore up to the OHWM.

Pursuant to the equal footing doctrine, Ohio was granted title to lands along Lake Erie in trust up to OHWM upon statehood in 1803. Ohio passed the Fleming Act of 1917 codifying the state public trust doctrine.[5] However, the Act does not define the boundary in terms of the OHWM, but refers to the terms "natural shoreline" and "southerly shore" in reference to the extent of state trust lands. The state administrative code defines shoreline as "the line of intersection of lake Erie with the beach or shore."[6] Shore is defined as the "land bordering the lake."[7]

ODNR Asserts Ownership

When the Ohio Department of Natural Resources (ODNR) began asserting ownership rights over the southern shore of Lake Erie up to the OHWM, several property owners filed suit. The landowners disputed ODNR's assertion of trust ownership rights, the fact that the Department set the OHWM at 573.4 feet International Great Lakes Datum (IGLD), and the authority of ODNR to require landowners to lease land below the OHWM from the state.

The trial court certified the property owners as a class and sought to determine the extent of the state of Ohio's property rights. Two environmental groups intervened, arguing that the state held title to the area up to the OHWM in trust for the public. While the summary judgment motions were pending, the ODNR, acting with direction from the governor, filed a motion abandoning its assertion of authority and clarifying that it "no longer require[d] property owners to lease land contained within their presumptively valid deeds."

The court granted summary judgment in favor of the property owners stating "the State of Ohio has ownership in trust of the waters of Lake Erie and the lands beneath those waters landward as far as the water's edge, but no farther."[8] The court rejected the uniform boundary line stating "that the law of proper definition of the boundary line for the public trust territory of Lake Erie is the water's edge, wherever that moveable boundary may be at any given time, and that the location of this moveable boundary is a determination that should be made on a case-by-case basis."[9] The court also held that the lakefront owners have the right to exclude

the public from walking or using the privately owned shores of Lake Erie above the water's edge. Finally, the trial court's ruling reformed the littoral owners' deeds to the water's edge.

Appeal

The appellate court first looked at both the Fleming Act and earlier Ohio Supreme Court decisions. The court cited one decision holding "… the boundary of land, in a conveyance calling for Lake Erie and Sandusky [B]ay, extends to the line at which the water usually stands when free from disturbing causes."[10] The appellate court noted that "none of the parties to this hard fought contest, nor we ourselves, have found any other syllabus law of the Supreme Court of Ohio defining where littoral owners' property extends relative to Lake Erie. Other cases regarding littoral owners' property rights merely referred to the "shoreline" or the "natural shoreline."

The environmental groups challenged the trial court's ruling that the public trust is demarcated by the line the water of the lake touches at any given time. The plaintiffs argued that federal law, including the *Shively* decision and the Submerged Lands Act, requires the shoreline to be located at the high water mark. The court rejected these arguments, noting that the *Shively* court "specifically recognized that state law determined the scope of the public trust in land beneath navigable waters in this country." And the SLA "recognizes that state law governs the determination of ownership in the land under the Act."

The court ruled that the claim regarding the Department's placement of the OHWM at 573.4 feet IGLD was moot. During the course of the litigation ODNR had stopped enforcing this policy.

Finally, the groups appealed the ruling that littoral property owners may exclude the public from using the lands below the high water mark of Lake Erie. The court recognized that under Ohio law, littoral owners have the right to exclude the public from their property. And, although the court recognized that the public does have the right to walk on the shoreline, the court explained that those rights are limited to "the area of the public trust." Essentially, the public may walk along the lake, as long as their feet remain wet.

Landowners' Claims

On appeal, the littoral landowners challenged the trial court's finding that the boundary of the public trust territory is not the low water mark. The landowners had argued that "because the 'shoreline' is the line separating the water and the shore, and the 'shore' describes the land between high and low water marks, the common meaning of the 'shoreline' must be the low water mark."[11] The court declined to adopt the low water mark standard. Although the court agreed that the meaning of shore is "the land between low and high water marks," it found that "this does not mean that the boundary of the territory for purposes of the public trust doctrine should be set at the low water mark. Instead, shoreline is the line of actual physical contact by a body of water with the land between the high and low water mark undisturbed and under normal conditions."[12]

The property owners also appealed the trial court's ruling reforming the littoral owners' deeds to the water's edge. On appeal, the court found that the reformation of the deeds was an error, since the issue went beyond the scope of class certification. Furthermore, the court found the issue was not properly before the trial court.

Conclusion

The court concluded that "by setting the boundary at the water's edge, we recognize and respect the private property rights of littoral owners, while at the same time, provide for the public's use of the waters of Lake Erie and the land submerged under those waters, when submerged. The water's edge provides a readily discernible boundary for both the public and littoral landowners."[13] The ruling will likely be appealed.

Endnotes

1. State ex rel. Merrill v. State, 2009 Ohio 4256 (Ohio Ct. App. Aug. 21, 2009).
2. Shivley v. Bowlby, 152 U.S. 1 (1894).
3. The Supreme Court made the public trust doctrine applicable to the non-tidal waters of the Great Lakes in Illinois R.R. Co. v. Illinois, 146 U.S. 387 (1892).
4. *Shivley*, 152 U.S. at 13.
5. Ohio Rev. Code Ann. § 1506.10-11 (2009).
6. Ohio Admin. Code 1501:6-10(U).
7. *Id.* 1501-6-10(T).
8. *State ex rel. Merrill* , 2009 Ohio 4256 at *9.
9. *Id.* at *10.
10. Sloan v. Biemiller, 34 Ohio St. 492 (1878).
11. *State ex rel. Merrill*, 2009 Ohio 4256 at *116.
12. *Id.* at *117.
13. *Id.* at *129.

California's Water Efficiency Standards
Ninth Circuit Orders Further Review

by Jonathan Proctor, 3L, University of Mississippi School of Law

The U.S. Court of Appeals for the Ninth Circuit recently ruled on California's efforts to institute water efficiency standards for residential clothes washers.[1] The court reversed the U.S. Department of Energy's (DOE) denial of the California Energy Commission's (CEC) waiver request to allow the state to institute the standards. Finding the DOE's denial arbitrary and capricious, the court ordered a more thorough examination of CEC's waiver application.

Background

In an effort to alleviate the state's severe water crisis, in 2002 the California Legislature ordered the CEC to establish water efficiency standards for residential clothes washers. Accounting for a reported 22% of an average household's water usage, washing machines are prime candidates for increased water efficiency regulation.[2] The proposed standards required machines to meet a certain "water factor" (WF) ratio calculated by dividing a washer's gallons of water used per load by its water capacity.[3] For example, a machine with five cubic feet of capacity that uses 50 gallons of water per load would have a WF of 5.0. The CEC proposed a two-tiered system of implementation: (1) requiring all washing machines sold in California to have a 8.5 WF ratio by January 1, 2007, and (2) requiring a 6.0 WF ratio by January 1, 2010.[4] According to the CEC, its proposed washing machine regulations would "result in annual water savings equal to the City of San Diego's current water usage."[5]

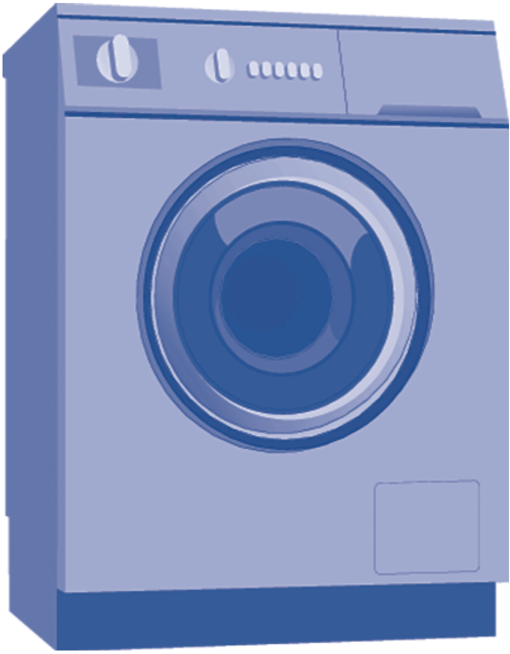
However, the federal Energy Policy and Conservation Act (ECPA) expressly preempts states from regulating "energy efficiency, energy use, or water use of any product covered by federal energy efficiency standards."[6] As such, the CEC requested a waiver from the DOE that would allow California to regulate water efficiency standards for residential washing machines.

DOE denied the waiver request, citing three reasons: (1) the proposed effective date fell short of the three-year minimum waiting period required after a waiver is granted, (2) CEC did not provide enough data to support its claim of unusual and compelling water interests, and (3) the "proposed regulation would make a class of washers unavailable in California."[7] The CEC subsequently requested that the Ninth Circuit review the DOE's denial. After determining that it had the proper jurisdictional authority to hear the CEC's petition for review, the court considered whether the DOE's reasons for denying the waiver were arbitrary and capricious. If so, the denial would be struck down.

Three-Year Waiting Period

The ECPA requires that state regulations take effect no less than three years after the DOE grants a waiver for such standards.[8] The CEC's waiver request proposed an implementation date of January 1, 2007 for Tier One and January 1, 2010 for Tier Two.[9] The DOE ruled on the waiver request on December 28, 2006; clearly the first phase of implementation would not meet the three-year minimum waiting period.

However, the court determined that rather than denying the proposal as a whole, the DOE could have either rejected only the first phase of implementation or accepted the proposal with instructions to extend the effective date of one or both phases. Essentially ignoring the DOE's claim that the petition offered no data regarding the necessity of an effective date that did not meet the statutory three-year requirement, the court focused instead on "the DOE's wholesale rejection of the CEC's analysis on the basis that the proposed waiver could not be implemented according to its proposed timeline."[10] Ultimately, the court found such an out-of-hand dismissal to be arbitrary and capricious given the aforementioned alternatives.



Unusual and Compelling Interests

The court next turned to the DOE's second stated reason for denying the waiver petition: that the CEC did not establish California's unusual and compelling interests requiring such water efficiency standards. The ECPA demands that a requesting state prove that its interests "are substantially different in nature or magnitude than those prevailing in the United States generally" and that the costs and benefits of such regulation are "preferable or necessary" when measured against the costs and benefits of alternative approaches.[11]

Though the DOE did agree that California's chronic water crisis render its water interests "substantially different in nature or magnitude" from the rest of the country, it disagreed that the proposed standards were "preferable or necessary when measured against alternative approaches."[12] Primarily, DOE contended that CEC had failed to meet this requirement by failing to provide underlying data and analysis to support its petition.

DOE's claims that the CEC failed to provide adequate data supporting its proposals were unfounded, reasoned the court, based on a study provided by the CEC. The study, conducted by California Pacific Gas & Electric, not only supported the CEC's proposals, but also included the type of cost analysis that the DOE deemed absent in the CEC's petition.[13] Without determining whether data provided by the CEC was sufficient to meet its burden of proving that its proposed standards were "preferable or necessary when measured against alternative approaches," the court found DOE's failure to consider the available evidence to be to be arbitrary and capricious.

Unavailability of Top-Loading Washers

Essentially, the DOE's third reason for denying the CEC's waiver petition (that such standards would make a class of washing machines unavailable in California) was based on the fact that "no top-loading residential washer[s] in the current market . . . would comply with the [proposed] 6.0 WF level."[14] The DOE's reliance on products currently available, however, did not take into account the possibility that more efficient washing machines may enter the market in time for the proposed standards. The court found the DOE's failure to consider such probable improvements to be "a clear error of judgment," once again striking down the arbitrary and capricious denial.[15]

Conclusion

Though not an ultimate victory for the CEC, the court's ruling does require a more thorough examination of its proposed water efficiency standards for residential washing machines. Whether the CEC's proposal will withstand DOE scrutiny under the ECPA is unknown, but this ruling does indicate support of measures to alleviate California's water crisis.

Endnotes

1. Cal. Energy Comm'n v. Dep't of Energy, 2009 U.S. App. LEXIS 23715 (9th Cir. Oct. 28, 2009).
2. *Id.* at *4.
3. *Id.*
4. *Id.* at *17.
5. *Id.* at *5.
6. *Id.*
7. *Id.* at *6-*7.
8. 42 U.S.C. § 6297(d)(5)(A).
9. *California Energy Commission*, 2009 U.S. App. LEXIS 23715, at *17.
10. *Id.* at *22-*23.
11. *Id.* at *23, *citing* 42 U.S.C. § 6297(d)(1)(C)(i)-(ii).
12. *Id.* at *24, *citing* 71 Fed. Reg. 78, 163 (Dec. 28, 2006).
13. *Id.* at *25.
14. *Id.* at *27, *citing* 71 Fed. Reg. 78, 167 (Dec. 28, 2006).
15. *Id.* at *29, *citing* Envtl. Def. Ctr. v. EPA, 344 F.3d 832, 858 n.36 (9th Cir. 2003).

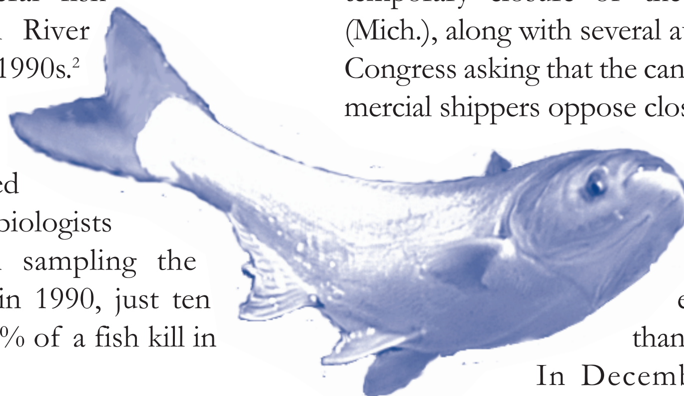
Carp Crusade

Great Lakes States Prepare to Battle Asian Carp

by Terra Bowling, J.D.

This December, several Illinois agencies poisoned an estimated 200,000 pounds of fish to mitigate the risk that Asian bighead and silver carp, voracious invasive species closing in on the Great Lakes, would pass through a canal into Lake Michigan while an electronic barrier was undergoing maintenance. The effort—said to be one of the largest fish kills in Illinois history—netted only one 22-inch bighead Asian carp, but some fear that other carp may have sunk to the bottom, undiscovered.[1]

The massive fish kill underscores the fear of the problems Asian carp could bring to the Great Lakes. Originally imported by Southern catfish farmers in the 1970s to control algae, several fish escaped into the Mississippi River watershed during floods in the 1990s.[2]



Prolific and ravenous, the fish have devastated native fish populations as they have moved north. For example, although biologists netted no Asian carp when sampling the Mississippi and Illinois rivers in 1990, just ten years later the carp made up 97% of a fish kill in an area south of St. Louis.[3]

In addition to the devastating effect on the ecosystem, the fish are also a hazard to boaters and fishermen on the water. In response to noise from boats or predators, the fish, which can weigh up to 100 pounds, leap out of the water, injuring those in their path. In the Illinois River, for example, the Asian carp infestation has kept residents away from recreational pursuits.[4] Scientists and officials fear that if the Asian carp make it into the Great Lakes, it will have similarly devastating environmental and economic effects.

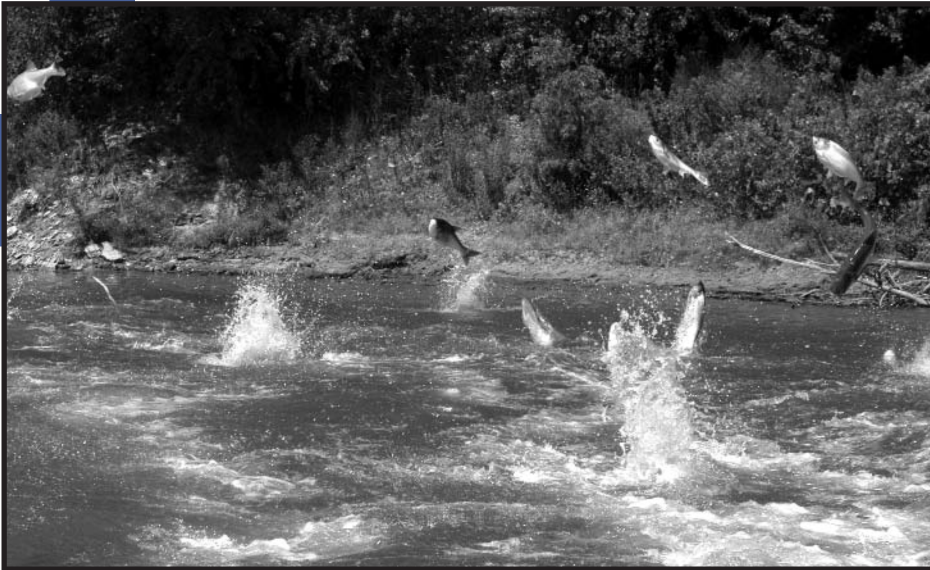
Canal Closure?

The Chicago Sanitary and Ship Canal, built over 100 years ago to aid shipping, as well as to allow Chicago to move sewage downriver, links the Mississippi River system to the Great Lakes and would be the primary pathway through which carp would move into Lake Michigan. The U.S. Army Corps of Engineers has constructed electric barriers to prevent the Asian carp from passing through the canal. Because the carp could bypass the barriers via floodwaters, the Environmental Protection Agency (EPA) has allotted $13 million for projects to prevent fish from riding floodwaters into the Great Lakes. Despite these efforts, DNA results indicate that Asian carp are present less than eight miles from Lake Michigan.

In the face of the massive problem, politicians, commercial fishermen, and residents have called for at least a temporary closure of the canal.[5] Senator Carl Levin (Mich.), along with several authors, is circulating a letter in Congress asking that the canal be closed. Predictably, commercial shippers oppose closure. About 24 million tons of oil, coal, and other products move through the canal on barges and ship owners argue that the canal is more economical and less polluting than using roads or rails.[6]

In December, Michigan filed a complaint in the U.S. Supreme Court against Illinois and the Corps seeking an injunction to close some of the locks on the canal and connecting channels, to operate electric barriers in the canal at full strength, and to monitor for and eradicate Asian carp.[7] Minnesota and Wisconsin have filed briefs supporting Michigan. Ohio has filed a shorter memo supporting the petition to reopen and modify the case.

Although the concerns over Asian carp are new, the suit contesting the operation of the canal is not. The states are seeking to reopen a case first filed over 100 years ago in which several Great Lakes states claimed that the canal was harming the lakes by lowering water levels.[8] The case has been modified several times, with the Court limiting the amount of water that may be diverted from



Photograph of Asian Carp leaping behind a boat courtesy of the University of Missouri, photographer J.L. Jenkins.

Lake Michigan.[9] The court's order allows states to bring additional complaints regarding the canal. Although the Supreme Court has not yet agreed to reopen the case, the states are relying on the original case to maintain jurisdiction.

In its current brief, Michigan alleged an interstate public nuisance, arguing that an Asian carp invasion "will cause enormous and irreversible harm to the public rights in [Great Lakes] waters."[10] Under common law, a public nuisance is defined as a condition, action, or failure to act that unreasonably interferes with a right common to the general public.[11] Michigan specifically alleged that the invasion would cause "significant impairment" to the fishing industry, which has an estimated economic value of $7 billion.

On January 6th, the Water District, the State of Illinois, and the U.S. filed their response. The briefs argue that the Asian carp issue does not fall within the original consent decree, that they are doing everything possible to fight the carp's' progress, and that the harm alleged is speculative. If the Supreme Court does decide to reopen the case, it will have to balance the interests of the Great Lakes states in protecting the ecosystem from the Asian carp with Illinois' interest in keeping the canal open. With the irreparable and expensive harm that could be caused by Asian carp in the Great Lakes, Michigan has a compelling case.

Endnotes

1. Kari Lydersen and Peter Slevin, *Fish Kill Called Necessary to Save the Great Lakes*, The Washington Post, Dec. 6, 2009.
2. Environmental Protection Agency, Asian Carp and the Great Lakes, http://www.epa.gov/glnpo/invasive/asiancarp/ (last visited Jan. 4, 2010).
3. Eric Sharp, *Killer Carp! Coming soon to a Great Lake near You?* Detroit Free Press, Sept. 3, 2006 at 1.
4. *Id.*
5. John Flesher, *Lawmakers Seek Emergency Steps to Halt Asian Carp*, Star Tribune, Dec. 11, 2009.
6. Ed Brayton, *Final Step on Asian Carp Protection Difficult to Achieve*, The Michigan Messenger, Dec. 14, 2009.
7. Motion to Reopen and for a Supplemental Decree, Petition, and Brief and Appendix in Support of Motion, Wisconsin v. Illinois, 449 U.S. 48 (1980), *available at* http://www.michigan.gov/documents/ag/Motion-Petition-Brief_305173_7.pdf .
8. Wisconsin v. Illinois, 278 U.S. 367 (1929).
9. 289 U.S. 395 (1933); 388 U.S. 426 (1967); 449 U.S. 48 (1980).
10. Motion to Reopen and for a Supplemental Decree, Petition, and Brief and Appendix in Support of Motion, *supra* note 7.
11. Restatement (Second) of Torts § 821B(1) (1979).

Construction of LNG Terminal Proceeds

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The U.S. Court of Appeals for the First Circuit recently affirmed a district court decision rejecting the Rhode Island Coastal Resource Management Council's (CRMC) regulatory barriers to a proposed Liquefied Natural Gas (LNG) terminal.[1] The court ruled that the CRMC did not have the authority to prevent dredging for the LNG terminal under the Natural Gas Act (NGA) or the Coastal Zone Management Act (CZMA).

Background

Weaver's Cove Energy, LLC (Weaver's Cove) proposed building and operating an LNG terminal in the waters of Mount Hope Bay and the city of Fall River, Massachusetts.[2] Original plans for the facility would have involved the waters of both Rhode Island and Massachusetts; however, an amended proposal in 2003 placed the project completely within Massachusetts, save for some dredging in a federal navigation channel in Rhode Island waters.[3] Many local residents and politicians objected to the facility's placement, citing concerns over increased traffic in the waterway, detrimental environmental effects, and even possible terrorist attacks. Many viewed the concerns as a case of NIMBY (Not-in-my-backyard) activism.[4]

Upon filing an application with the Federal Energy Regulatory Commission (FERC) as required under the NGA, Weaver's Cove received conditional approval for the project. The approval was conditional on CRMC approval of the plan as consistent with the state's Coastal Resource Management Plan (CRMP). Under the CZMA, all federal agency activities within the coastal zone affecting land or water use must be consistent with the affected state's management program "to the maximum extent practicable."[5] The Rhode Island CRMC refused to grant federal consistency approval. The agency also declined to issue a state license, called an "assent", which is required by the state for activities listed in the CRMP. The CRMC claimed that both the consistency certification and assent applications were incomplete due to a lack of documentation regarding the upland disposal of dredged materials and the absence of a water quality statement.[6]

After a year of CRMC inaction following the submission of its original application, Weaver's Cove made separate requests to the National Oceanic and Atmospheric Administration (NOAA), FERC, and the Secretary of Commerce to conclusively presume concurrence. Although the CZMA requires federal consistency with state law, the CZMA also contains a provision stipulating that if a state fails to act on a consistency request within six months, the state's concurrence is "conclusively presumed."[7] None of the federal agencies provided such a determination, forcing Weaver's Cove to file suit for declaratory and injunctive relief.

The district court agreed with Weaver's Cove. According to the district court, the CRMC required neither the disposal information nor the water quality certificate. Also, CRMC's extended inaction amounted to a "conclusive presumption" under the CZMA. Moreover, the court found that the NGA preempted the CRMC's assent process, relying in part upon a 2005 amendment to the NGA granting FERC "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."[8] The First Circuit, concluding that the issue was ripe for litigation and that it had the proper jurisdiction to hear CRMC's appeal, agreed to review the district court's decision.

CZMA

The CRMC maintained that the clock hadn't begun to run on its allotted time to rule on the consistency request because the Weaver's Cove application was incomplete. Despite CRMC's arguments, the court found that documentation regarding the acceptance of dredged material was not required for the CRMC to make its decision. The court reasoned that the CRMC did not require such documentation because Weaver's Cove did not intend to dispose of the dredged material in Rhode Island; by requesting such documentation, the CRMC was essentially attempting to regulate the internal activities of a neighboring state.

Photograph courtesy of NOAA's Photo Library, Personnel of NOAA Ship THOMAS JEFFERSON.

"[F]or the purposes of CZMA consistency review, [the court is] only concerned with the requirements of the CRMP" with respect to the disposal of dredged material and the definition of "approved upland facilities."[9] Neither the Rhode Island CRMP nor the CZMA suggest that Rhode Island may somehow determine what constitutes a satisfactory upland disposal site located in another state. As such, the court upheld the district court's conclusion that the CRMC's concurrence was presumed.

NGA

Under the NGA, FERC has "exclusive authority" over matters related to the "siting, construction, expansion, or operation" of liquefied natural gas terminals.[10] The question is whether this authority applies to Weaver's Cove's proposed dredging and, if so, whether the CRMC is preempted from ruling on the matter. The court examined this question through the prism of conflict preemption, which arises when compliance with a state law and a federal law is impossible or when a state law stands in the way of Congressional objectives.

Finding that FERC had the clear and exclusive authority over the proposed terminal's construction, the court held that CRMC's attempts to circumvent FERC's approval resulted in a conflict between state and federal law. In such a scenario, Congressional objectives prevail and state law may not be used to prohibit or delay FERC-approved projects.[11] The court agreed with the district court that FERC's approval preempted CRMC's licensing process, allowing Weaver's Cove to move forward.

Conclusion

Though Rhode Island may have legitimate concerns regarding the disposal of dredged material, its refusal to grant either a federal consistency determination or a state assent did not stop approval of the development. The case shows the reluctance of the court to defer to state agency decisions that create obstacles to federally approved projects.

Endnotes

1. Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council, 2009 U.S. App. Lexis 23491 (1st Cir. Oct. 26, 2009).
2. *Id. at* *1.
3. *Id.* at *12.
4. Editorial, *Win for energy security*, The Providence Journal, Dec. 3, 2009.
5. 16 U.S.C. § 1456(c)(1)(A).
6. *Weaver's Cove Energy,* LLC, 2009 U.S. App. Lexis 23491 at *14.
7. 16 U.S.C. § 1456(c)(3)(A).
8. *Weaver's Cove Energy,* LLC, 2009 U.S. App. Lexis 23491 at *3 (*quoting* 15 U.S.C. § 717b(e)(1)).
9. *Id.* at *31.
10. *Id.* at *34-35 (*quoting* 15 U.S.C. § 717b(e)(1)).
11. *Id.* at *39.

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Littoral Events

Land Grant and Sea Grant National Water Conference

Hilton Head Island, South Carolina
February 21-25, 2010

The conference provides opportunities for water scientists, engineers, educators, and managers to share knowledge and ideas, to identify and update emerging issues, and to network with leading researchers, educators, and innovators from academia, government, and the private sector. The conference is hosted by a team of educators from Land Grant and Sea Grant Institutions around the nation in cooperation with leaders from USDA and NOAA. Visit www.usawaterquality.org for more information.

Ocean Sciences Meeting

Portland, Oregon
February 22-26, 2010

The 2010 Ocean Sciences meeting will address the challenge of developing predictive tools based on models and field observations to protect marine resources. The meeting will feature presentations from scientists whose findings have affected decisions affecting coastal issues, as well as extension specialists and decision makers who have translated scientific findings into management actions. For additional details and registration, visit http://www.agu.org/meetings/os10/ .

National Hurricane Conference

Orlando, Florida
March 29-April 2, 2010

The primary goal of the National Hurricane Conference is to improve hurricane preparedness, response, recovery, and mitigation in order to save lives and property in the United States and the tropical islands of the Caribbean and Pacific. In addition, the conference serves as a national forum for federal, state and local officials to exchange ideas and recommend new policies to improve Emergency Management. Please visit http://www.hurricanemeeting.com/ for more details.

The Sea Grant Law and Policy Journal's 2010 Symposium

Oxford, Mississippi
March 30-31, 2010

The Symposium will feature presentations on articles published in the spring edition of The Sea Grant Law and Policy Journal. This year's theme is "Addressing Uncertainty of Environmental Problems: The Challenges of Adaptive Management." The Journal, published by the National Sea Grant Law Center, provides a forum for the timely exploration and discussion of legal topics of relevance to the Sea Grant network. Details and a registration form are available at http://nsglc.olemiss.edu/ .