The SandBar

Volume 9:1, April 2010

Legal Reporter for the National Sea Grant College Program

Catawba River Dispute

Supreme Court rules private parties may intervene

Water Diversion Project

Transfer halted over invasive species concerns

Who wins, nature or commerce?

Controversy abounds over oyster farm in the Point Reyes National Sea Shore

From the Editor

Spring brings a reminder of the beauty of our nation's natural resources. A look at current natural resources law, however, reminds us of the the struggles to allocate and protect those resources. In this edition of *The SandBar*, we highlight several of these conflicts.

We first turn to our nation's rivers. In *South Carolina v. North Carolina*, the states disagree over allocation of water from the Catawba River. In a 5-4 decision, the U.S. Supreme Court recently ruled that private entities may intervene in the dispute. In "Water Project Diverted," we explore a U.S. district court's decision to halt a water diversion project over concerns that the effects of the project, specifically the potential for invasive species introduction, had not been properly addressed. And, finally, in "A Heated Controversy," we look at the Vermont Supreme Court's decision regarding thermal effluent discharge from a nuclear power station into the Connecticut River.

Highlighting a conflict between conservation and commercial use, we examine the dispute over an historic oyster farm located in the Point Reyes National Seashore. Looking to another shoreline use dispute, we report the Ninth Circuit's ruling that shore defense structures erected above the mean high water line, but now located at or below the line due to erosion may create trespass liability.

Thanks for reading *The SandBar*. As always, suggestions or comments are welcome.

Terra

Our Staff

Editor:
Terra Bowling, J.D.

Production & Design:
Waurene Roberson

Research Associates:
Michael McCauley, 2L
Jonathan Proctor, 3L

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-10-02-01 *April 2010*
ISSN 1947-3974

The SandBar is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *The SandBar,* contact:

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

The SandBar is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under award NA090AR4170200, the Sea Grant Law Center, Mississippi Law Research Institute, and University of Mississippi Law Center. 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.

This newsletter was prepared by the Sea Grant Law Center under award NA090AR4170200 from NOAA, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Sea Grant Law Center or the U.S. Department of Commerce.

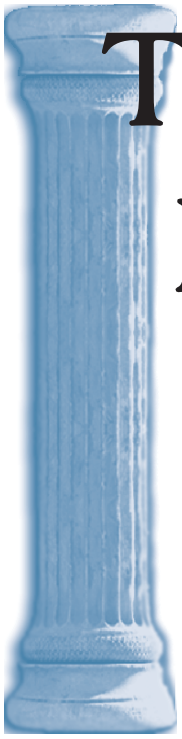
Recommended citation: Author's Name, *Title of Article*, 9.1 SandBar [Page Number] (2010).

Cover photograph of the Catawba River courtesy of Catawba Riverkeeper Foundation, Photo by Nancy Pierce.

Contents page photo courtesy of Waurene Roberson.

The SandBar

Contents



The Supreme Court Runs Through It:

Private Entities May Intervene in Catawba River Dispute

by Terra Bowling, J.D.

In January, a dispute over water rights to the Catawba River heated up when the U.S. Supreme Court ruled that private water users, including Duke Energy, could intervene in a dispute between South Carolina and North Carolina.[1]

Background

The Catawba River stems from the Blue Ridge Mountains in North Carolina and flows for 300 miles through the city of Charlotte and into Lake Wateree in South Carolina.[2] The river serves as the border between the two states for approximately ten miles. In 2008, the Catawba was named as the most endangered river in the United States due to increasing pressures on the river.[3]

In 2007, South Carolina filed suit in the U.S. Supreme Court, claiming North Carolina's authorization of upstream transfers exceed its equitable share of the river. South Carolina specifically objected to the North Carolina Environmental Management Commission's issuance of two permits, one to Charlotte for the transfer of up to 33 million gallons per day (mgd), and one to the North Carolina cities of Concord and Kannapolis for the transfer of 10 mgd. The state also objected to a statute that "grandfathered" a 5 mgd transfer by the Catawba River Water Supply Project (CRWSP). South Carolina asked the Court to equitably apportion the river, enjoin North Carolina from authorizing transfers in excess of the state's equitable share, and to strike down North Carolina's permitting statute authorizing the water transfers.

The Court agreed to hear the case pursuant to "original jurisdiction," which allows it to hear a case that has not proceeded through a lower court. The Supreme Court has original jurisdiction in just a few instances, including disputes between two or more U.S. states. As in this case, the issues often involve natural resource apportionment.

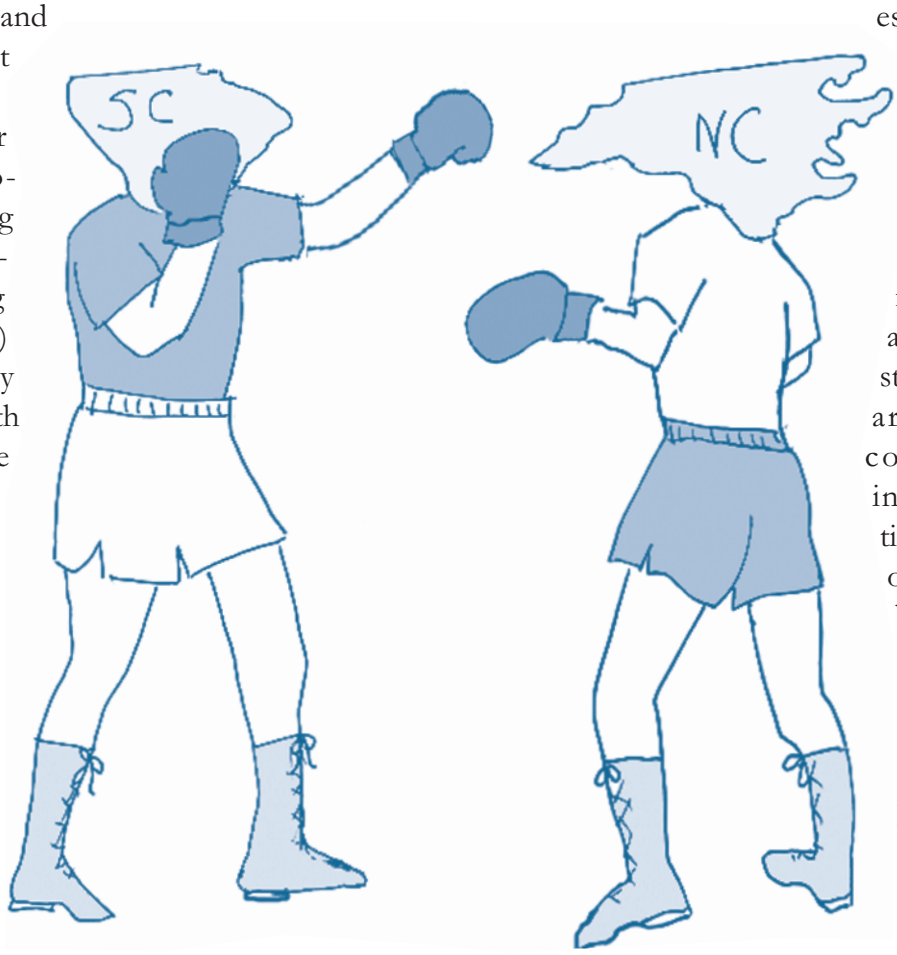
Intervention

After the case was filed, several parties, Duke Energy Carolinas (Duke Energy), the CRWSP, and the city of Charlotte, sought to intervene. The Court allows private parties to intervene, as long as they meet the standard for a nonstate entity's intervention in an original action as defined in *New Jersey v. New York*.[4]

In that case, the State of New Jersey sued New York and the city of New York for their diversion of the Delaware River's headwaters.[5] The Court allowed Pennsylvania to intervene, but when the city of New York moved to modify the decree more than twenty years later, the Court denied the

city of Philadelphia's motion to intervene. The Court found that "an intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state."[6]

In the Catawba River case, the CRWSP argued for intervention, asserting that its interest would not be adequately represented by either state because it supplies water to and is owned by counties from both states. Duke Energy sought to intervene citing an interest as the operator of eleven dams and reservoirs on the Catawba River that control the river's flow, as the holder of a fifty-year license governing Duke Energy's hydroelectric power operations, and as the entity that orchestrated the multi-stakeholder negotiation process culminating in a Comprehensive Relicensing Agreement (CRA) signed by seventy entities from both states in 2006. The city of Charlotte sought to intervene claiming that North Carolina could not represent its interests, since it was the holder of a permit authorizing the largest single transfer identified in the complaint and the potential source of other transfers in the complaint. Additionally, the city claimed that the State was required to represent other users whose interests were not aligned with Charlotte's.



The Court referred all three motions to a Special Master, who recommended that all three parties be permitted to intervene. In making its decision, the Special Master used a broad rule distilled from several Supreme Court cases in which nonstate parties participated as defendants, as well as cases in which they intervened. In an opinion by Justice Samuel Alito, the Court rejected the broad rule in favor of the *New Jersey v. New York* standard and held that two of the three proposed intervenors, Catawba River Water Supply Project and Duke Energy, satisfied the standard for intervention.

CRWSP

The Court concluded that the CRWSP could intervene, because as a bi-state entity it demonstrated a sufficiently compelling interest apart from the interests of other citizens of the states. Specifically, the Court noted that the CRWSP was established as a joint venture of both states, has an advisory board consisting of representatives from both counties, draws its revenues from its bi-state sales, and operates infrastructure and assets that are owned by both counties as tenants-in-common. In addition, the CRWSP relies on authority granted by both States to draw water from the Catawba River and transfer that water from the Catawba River basin. The Court concluded that because both states would likely argue for reduction of water to the CRWSP neither state would adequately represent the entity's interests.

Duke Energy

The Court next found that Duke Energy would be allowed to intervene, since it showed "unique and compelling interests." The Court noted that Duke Energy operates eleven dams and reservoirs in both

States that generate electricity for the region and control the flow of the river, noting "that any equitable apportionment of the river will need to take into account the amount of water that Duke Energy needs to sustain its operations and provide electricity to the region."[7] Further, there is no other similarly situated entity on the Catawba River, setting Duke's unique interests apart from the class of all other citizens. The Court also noted Duke's interest in protecting the terms of its existing FERC license and the CRA that Duke helped negotiate.

Photograph of spider lilies on the Catawba River courtesy of Catawba Riverkeeper Foundation.

Charlotte

The Court concluded that Charlotte did not carry its burden of showing a sufficient interest for intervention. The Court found that Charlotte "occupies a class of affected North Carolina users of water, and the magnitude of Charlotte's authorized transfer does not distinguish it in kind from other members of the class."[8] The Court further noted that, unlike the CRWSP, the viability of Charlotte's operations was not "called into question" by the litigation. Its interest is solely as a user of North Carolina's share of the Catawba River's water. The Court concluded, "Charlotte's interest falls squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens."[9]

Conclusion

With water quantity issues on the rise, the Court's ruling may point to more intervention by private water users in these types of cases. However, not all of the Supreme Court Justices agreed with the opinion.

Justices Roberts, Thomas, Ginsburg, and Sotomayor dissented from part of the opinion. Although the dissenting Justices agreed with the denial of Charlotte's intervention, the Justices would have also denied Duke Energy and CRWSP's motions for intervention.

The dissent reasoned that "[a] judgment in an equitable apportionment action binds the States; it is not binding with respect to particular uses asserted by private entities. Allowing intervention by such entities would vastly complicate and delay already complicated and lengthy actions."[10]

The case will continue with a hearing by the Special Master, who will then report back to the Supreme Court. As noted in the dissent, those not allowed to intervene may still file briefs as *amici curiae*, or "friends of the court."

Endnotes

1. South Carolina v. North Carolina, 130 S. Ct. 854 (2010).
2. http://www.catawbariverkeeper.org/about-the-catawba/catawba-wateree-facts/ .
3. *Id.*
4. 345 U.S. 369 (1953).
5. *Id.* at 370.
6. *Id.*
7. 130 S. Ct. at 866.
8. *Id.* at 867.
9. *Id.*
10. *Id.* at 877.

Controversy abounds over oyster farm in the Point Reyes National Seashore

by Terra Bowling, J.D.

Nature v. Commerce

In Drakes Estero, a marine estuary twenty-five miles northwest of San Francisco, harbor seals and other wildlife have shared the bay with an oyster farm since the 1930s.[1] When the federal government purchased the land from property owners in 1962 to create the Point Reyes National Seashore, the owners retained the right of occupancy and use until 2012.[2]

When the National Park Service indicated that it would not renew the oyster farm's permit, a controversy ignited between the family who owns the farm and the National Park Service. The conflict, which has been framed as a battle between nature and commerce, has scientists, residents, and political figures, including Senator Dianne Fienstein, landing on both sides of the debate.[3]

Reports

Kevin Lunny and his family, which had farmed nearby for three generations, purchased the oyster company in 2005.[4] After Lunny began operations, the National Park Service (NPS) issued a series of reports presenting scientific information that described negative effects of the oyster farm on the Drakes Estero ecosystem.[5] Among other things, the report stated that the farming operations were disrupting harbor seals and eelgrass. Lunny claimed that the NPS was trying to force him out of his lease.[6]

See Nature v. Commerce, page 15

Photograph of Point Reyes National Seashore is a public domain photograph from the Wikimedia Commons website.

Ninth Circuit Rules Against Littoral Property Owners

BY JONATHAN PROCTOR, 3L, UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW

The United States Court of Appeals for the Ninth Circuit recently ruled that shore defense structures erected above the mean high water line (MHWL), but now located at or below the line due to erosion, may create trespass liability and give rise to violations of the Rivers and Harbors Act.[1]

Background

At issue are tidelands held in trust by the federal government for a Native American tribe. Through the 1855 Treaty of Point Elliot signed by the United States and several Native American tribes, the U.S. acquired much of what is now Washington state and established reservations for the respective tribes. One such tribe, the Lummi, was initially relegated to Chah-choosen Island; however, following an executive order from President Grant in 1873, the Lummi Reservation boundaries were expanded to include the tidelands up to "the low-water mark on the shore of the Gulf of Georgia" on the coast of Washington.[2] Much of the land adjacent to this low water mark was subsequently divided into parcels and sold.

The parcel owners eventually erected shoreland defense structures both on dry land and on tidelands leased from the Lummi Nation. Both the Lummi and the individual homeowners declined to renew the lease in 1988, the expiration of which prompted the U.S. government, on behalf of the Lummi Nation, to demand that the homeowners either remove the shoreland defense structures or lease the tidelands. Following the homeowners' inaction, the U.S. filed suit for trespass, violations of the Rivers and Harbors Act (RHA), and violations of the Clean Water Act (CWA).

The trial court issued partial summary judgment in favor of the U.S. on all counts, ordering the homeowners to remove their shore defense structures seaward of the MHWL. In addition, the owner of one parcel was ordered to pay a $1,500 fine for CWA violations.[3]

Common Law Trespass

On appeal, the Ninth Circuit first reviewed the question of whether the presence of the homeowners' shoreland defense structures on Lummi property constitutes trespass. Though otherwise close enough to shore to be governed by state law, the Lummi tidelands at issue fall under federal common law, due to their status as Native American lands.[4]

A federal common law claim for trespass may be met by proving that either a person "intentionally ... causes a thing [to enter land in the possession of another] ... [or] fails to remove from the land a thing which he is under a duty to remove."[5] The homeowners did not dispute that their shore defense structures were in Lummi tidelands, but instead countered the trespass claim by making the following arguments: 1) Washington state owns the tidelands, not the U.S.; 2) the structures were built landward of the MHWL and are therefore immune from trespass actions based on erosion; and 3) that the homeowners lacked the required intent and causation needed to amount to trespass.

The argument that Washington owns the tidelands stems from the "equal footing doctrine": in order "[t]o put newly admitted states on an 'equal footing' with the original states, the doctrine creates a strong presumption that newly admitted states acquire title to lands under navigable waters upon their admission to statehood."[6] However, this presumption can be overcome when the federal government has specifically reserved such lands, such as in the case of federal Indian reservations. Further, the state of Washington waived any right or title claims to the contrary when it entered the Union.

Waterfront property boundaries, by their very nature, are subject to the ebb and flow of the tides and often slowly move seaward or landward over time. When land erodes, the shorefront property owner

loses land; if land builds up due to accretion, the shorefront owner gains property. Following an extensive discussion of ambulatory property boundaries and the reciprocal relationship between tideland and upland property owners, the court determined that the homeowners in this case may not interfere with the natural processes of erosion and accretion without providing the Lummi with compensation or coming to some agreement.

The homeowners claimed that some structures lie in Lummi tidelands due to shifts in the property boundary caused by erosion and that they had no intent to place structures on Lummi tidelands. They claim this lack of intent defeats the trespass claim. The court disagreed. Regardless of whether the homeowners caused or intended the boundary line's shift, a successful trespass claim does not turn on intent. Merely erecting the structures and refusing to remove them upon the change in the MHWL is enough to satisfy the trespass claim.

RHA Violations

Section 10 of the RHA prohibits the unauthorized obstruction of U.S. navigable waters, unauthorized construction in U.S. navigable waters, and any modifications to the flow and capacity of U.S. navigable waters. The homeowners admit that they were not authorized to maintain the shoreland defense structures below the MHWL, but appealed the trial court's finding that their failure to remove the structures amounted to an RHA violation.

Though not specifically prohibited by the RHA, courts have determined that even structures which were previously legal must be removed once they fall within the scope of § 10 prohibitions.[7] Further, the purpose of § 10 is not only to prevent the construction of obstructions to navigable waters, but to ensure "that navigable waterways remain free of obstruction, because even initially legal structures can subsequently interfere with navigation."[8]

Whether the shoreland defense structures actually obstruct navigation is ultimately immaterial. By qualifying as a "breakwater, bulkhead, ... or other structure" and modifying the course and location of the water, the unauthorized structures create RHA liability for the homeowners.[9] Additionally, the court rejected the argument that structures built landward of the MHWL should not be subject to the RHA. "Just as one who develops below the [MHWL] does so at his peril, those who build too close to the [MHWL] also run the risk that their structures eventually may become obstructions."[10] The Ninth Circuit therefore agreed with the district court's finding of RHA violations.

CWA Violations

The district court only found the owners of one home, the Nicholsons, in violation of the CWA due to their discharge of fill material below the MHWL while reconstructing their defense structures. The Ninth Circuit, however, was unconvinced that the Nicholsons actually discharged any fill material. Ultimately reversing the district court's summary judgment against the Nicholsons, the Ninth Circuit held that construction on dry, fast land does not necessarily lead to a discharge of pollutants into navigable waters.

Conclusion

Now that the homeowners have been found liable for trespass damages, they may be more willing to renegotiate a lease agreement with the Lummi Nation. As the Ninth Circuit noted, "This action was avoidable. Perhaps the parties still will be able to reach an amicable settlement."[11]

Endnotes

1. U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009).
2. *Id.* at 1180.
3. *Id.* at 1182.
4. *Id.* (citing *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n. 8 (9th Cir. 1994)).
5. *Id.* at 1183 (quoting Restatement (Second) of Torts § 158 (2009)).
6. *Id.* (citing *Idaho v. United States*, 533 U.S. 262, 272-73 (2001)).
7. *See* U.S. v. Alameda Gateway Ltd., 213 F.3d 1161, 1167 (9th Cir. 2000).
8. *Milner*, 583 F.3d at 1192.
9. *Id.* (citing 33 U.S.C. § 403).
10. *Id.* at 1193.
11. *Id.* at 1197.

Background photograph of Lummi Indian Fish Camp circa 1895 courtesy of NOAA's Historic Fisheries Collections.

A Heated Controversy

The Vermont Supreme Court Upholds Thermal Discharge Variance for Connecticut River

by Michael McCauley, 2L, University of Mississippi School of Law

The Vermont Supreme Court recently upheld an amendment to a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act (CWA), allowing an energy company to increase the temperature of discharge water it released into the Connecticut River.[1] Despite affirming the variance, the court held that the state may set stricter thermal effluent standards than contained in the CWA.

Background

Entergy Vermont Yankee (Entergy) operates a nuclear power station along the Connecticut River. To generate electricity, the plant uses heated water to create steam, which turns turbines to drive generators. Steam that has passed through the turbines must be condensed, requiring removal of heat. To remove the heat and lower the temperature of the nuclear reactors, water is drawn from the Connecticut River into a cooling system. The heated water may either be discharged through "closed cycle cooling" in which the water is mechanically cooled or through "open cycle cooling" in which the water is discharged back into the river. Water discharged back into the river is considered a pollutant under § 316(a) of the CWA and is regulated through NPDES permits.

In 2003, Entergy sought a variance to its permit, which would allow it to increase thermal discharge. The Vermont Agency of Natural Resources (ANR) issued an amended NPDES discharge permit allowing Entergy to increase thermal discharge and raise the temperature of the Connecticut River by one degree from July 8 through October 14.

A number of local environmental groups, including The Connecticut River Watershed Council, Trout Unlimited, and Citizens Awareness Network (collectively, CRWC), appealed the decision to the Vermont Environmental Court. CRWC's primary concern was retaining the water quality for American shad, whose population in the river above the reactor has dwindled from over 37,000 in 1991 to only a few hundred in 2005. The Environmental Court approved the ANR decision, but imposed monitoring and additional temperature conditions to the amended permit.

CRWC appealed the Environmental Court's decision by arguing "(1) the court misapplied various aspects of the CWA; (2) the court failed to properly apply the Vermont Water Quality Standards; (3) and the court exceeded the scope of its authority by including substantive conditions to the amended permit."[1] Entergy and ANR cross-appealed, arguing that the CWA should override state requirements.

CWA

To receive a variance from applicable thermal discharge standards, including state water quality standards, § 316 of the CWA requires the discharger to demonstrate that alternative thermal limits will not

cause significant harm to aquatic life.[2] "Whether or not a thermal variance is appropriate turns on whether a balanced, indigenous, population (BIP) of fish and wildlife can be adequately protected."[3]

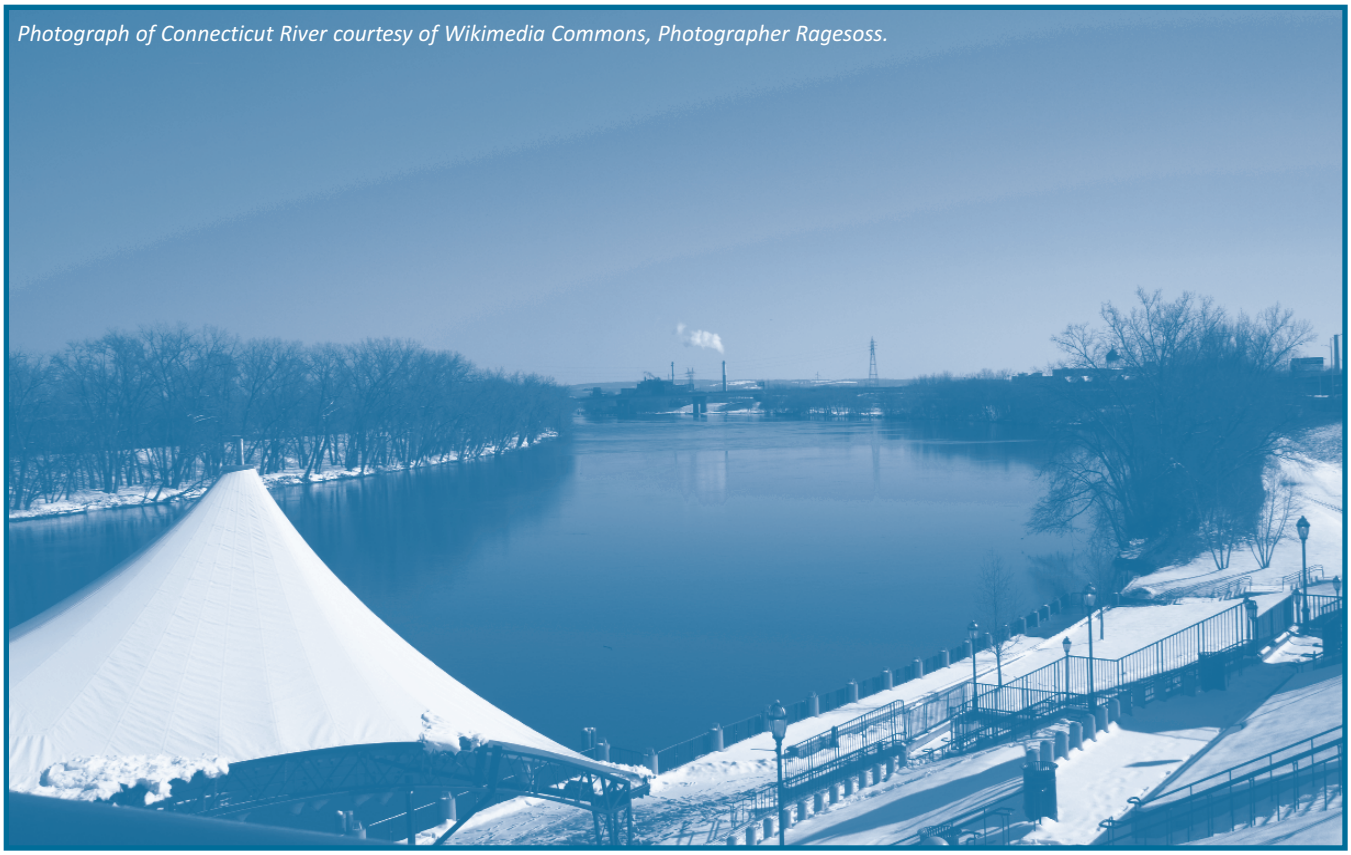
The CRWC argued that the Environmental Court erred in several aspects of applying § 316(a). First, the CRWC stated that the Environmental Court erred in failing to analyze the appropriate "body of water" affected by the thermal plume. The CRWC argued that the court should have included an analysis of Holyoke Dam, located fifty miles below Entergy's reactor. The Vermont Supreme Court held that it was unnecessary to analyze potential impacts further downstream, noting that "the applicable body of water is only that which is affected by Entergy's thermal plume."[5] Relying on testimony that the plume could not be detected past Turner's Falls Dam, a point farther upstream than Holyoke Dam, the Vermont Supreme Court held that the Environmental Court did not err in its definition of the applicable body of water.

The CRWC also argued that the Environmental Court failed to require Entergy to demonstrate that prior discharges have not caused "prior appreciable harm." The court disagreed and ruled that Entergy's use of both prospective and retrospective evaluation of biological effects met the statutory requirements of the CWA. Entergy had provided extensive testimony from an expert with thirty-three years of experience studying that particular portion of the river. The court found that the Environmental Court reasonably relied on this testimony in determining that the BIP would be adequately protected.

Finally, CRWC objected to the Environmental Court's adoption of the representative important species chosen by Entergy. The group argued that more warm water species were chosen, which would not be as adversely affected by thermal plumes. The court rejected this argument as well, noting the special attention given to Atlantic salmon, the most thermally sensitive species on the list. Additionally, other species that CRWC insisted should have been used did not even use the main channel of the Connecticut River.

Vermont Water Quality Standards

CRWC also argued that the Environmental Court failed to apply the Vermont Water Quality Standards (VWQS), while Entergy argued that the federal provisions regarding thermal discharge variances should take precedence over the state requirements.



Photograph of Connecticut River courtesy of Wikimedia Commons, Photographer Ragesoss.

The court rejected Entergy's argument that the federal provisions regarding thermal discharge variances should take precedence over the state requirements. The court found that the federal requirements for the content of state water quality standards represent a floor and state standards may be stricter. The court held that Entergy's argument would have the effect of nullifying the VWQS. Though the court found the state water quality standards applicable, the court rejected CRWC's arguments that the court failed to apply the VWQS. The court held that the Environmental Court correctly analyzed both CWA and VWQS regulations in tandem rather than separately, but found no error in this analysis.

Environmental Court's Permit Conditions

The final issue concerned the additional conditions placed on the permit by the Environmental Court. These conditions included the installation of temperature sensors and required that between June 16 and July 7, the discharge be managed so that the temperature would not exceed 76.7 degrees. This was added out of concern for the shad populations. The CRWC, Entergy, and ANR all argued that the Environmental Court exceeded its authority in attaching these conditions.

The Vermont Supreme Court held that while the Environmental Court must allow proper deference to the agencies, it is granted broad discretion in reviewing ANR determinations, and this discretion necessarily includes the ability to impose permit conditions. However, the Court held that any additional conditions by the Environmental Court must be supported by adequate basis within the record. In the present case, the court found virtually no evidence in the record regarding the threshold temperature of 76.7 degrees, only "abstract concerns" without adequate findings to justify the condition. Nothing was referenced in the Environmental Court's ruling regarding temperature conditions. The court, therefore, ultimately upheld the permit but without these additional conditions.

Conclusion

The Vermont Supreme Court affirmed ANR's decision to grant Entergy a variance, but reversed the Environmental Court's additional conditions. Entergy hailed the decision a victory, insisting the variance request was based on scientific, peer-reviewed data and that the company is a responsible steward of the river.[6] However, the Vermont Supreme Court did confirm that the state may set thermal effluent standards stricter than the federal CWA standards. Additionally, it held that the Environmental Court could attach additional conditions to permits so long as there was sufficient evidence within the record to do so.

In news reports, CRWC responded by stating Entergy's request was only made to save the company money at the expense of the ecological health of the river.[7] Entergy is in the process of renewing its NPDES permit and CRWC pledged it would appeal that decision as well. "This was the first round in what will be an ongoing battle," said David Mears, director of Vermont Law School's Environmental and Natural Resources Law Clinic, which represented CRWC and agued the case before the Supreme Court of Vermont.[8] In the end, this court decision may have little actual impact on the operation of Entergy's nuclear reactor. In February of 2010 Vermont's Senate voted 26 to 4 to shut down the nuclear plant, citing radioactive tritium leaks.[9]

Endnotes

1. In re Entergy Nuclear Vermont Yankee Discharge Permit 3-1199, 2009 VT 124 (Vt. 2009).
2. *Id.* at *13.
3. 33 U.S.C. § 316(a).
4. *Id.*
5. 2009 VT 124 at *19.
6. Howard Weiss-Tisman, *Vermont Supreme Court Upholds Discharge Ruling*, Brattleboro Reformer, Dec. 19, 2009, *available at* http://www.allbusiness.com/legal/legal-services-litigation/13625859-1.html .
7. *Id.*
8. Press Release, Vermont Supreme Court Issues Connecticut River Decision (Dec. 18, 2009) *available at* http://www.ctriver.org/newsroom/press_release_and_news_articles/?p=73.
9. Matthew L. Wald, *As Clock Ticks, Nuclear Plant Searches for Leak*, N.Y. Times, Feb. 26, 2010.

Water Project Diverted

Transfer halted over invasive species concerns

Photograph of the Missouri River Courtesy of the USGS.

Terra Bowling, J.D.

Citing concerns over invasive species, the U.S. District Court for the District of Columbia has ruled that a water withdrawal project is in violation of the National Environmental Policy Act (NEPA).[1] The project, called the Northwest Area Water Supply Project, would withdraw water from a reservoir on the Missouri River and transfer it across the continental divide into Canada for use in Minot, North Dakota and surrounding areas. The joint federal-state project, designed to provide drinking water that meets the "secondary" standards of the Safe Water Drinking Act to local communities and rural water systems in eight to ten counties in North Dakota, would include the withdrawal of over three and one-half billion gallons of water each year.

The concern over the project stems from the fact that the water is taken from the Missouri River Basin and deposited into the Hudson Bay Basin. Because the basins have distinct ecological characteristics and contain different species of fish and other aquatic organisms, the withdrawal and transfer of untreated water from one Basin into another could result in the introduction of invasive species, which can harm or eliminate indigenous species.

Prior Litigation

This litigation is not new. In 2002, the Province of Manitoba, Canada sued the Department of the Interior and the Bureau of Reclamation arguing that an initial Environmental Assessment (EA) and subsequent "Finding of No Significant Impact" (FONSI) pursuant to NEPA was arbitrary and capricious due to a failure to take a hard look at the inter-basin transfer of invasive species. In that case, the court agreed and ordered Reclamation to submit an additional EA. When Reclamation issued an Environmental Impact Statement (EIS) addressing water treatment options and reissued the EA and FONSI, Manitoba and the State of Missouri separately sued, again alleging NEPA violations.

NEPA

This time around, the D.C. District Court first looked at impacts of water withdrawal on the Missouri River. While the EA found the impacts would be low, the court disagreed. The court felt that the failure of Reclamation to consider the cumulative impact of other projects did not provide the requisite "hard look" under NEPA.

Reclamation will now have to provide closer analysis of the impacts.

The court next looked at the EA's analysis of water transmission risks, specifically the risk of introducing invasive species. Reclamation had determined that the risks of contaminated water breaching the pipeline were low. The court disagreed, stating that "It may be that the risk of a breach is low given the pipeline's construction, but that is not an excuse for Reclamation to refuse entirely to analyze the *consequences*. When the *degree* of potential harm could be great, *i.e.*, catastrophic, the *degree* of analysis and mitigation should also be great."[2]

Finally, the court looked at Reclamation's analysis of invasive species impacts on Canada. Reclamation found that it was not required by NEPA to take a hard look at the consequences of biota transfer. The court disagreed, noting that in its NEPA guidance, the Council on Environmental Quality "has determined that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis …"[3] The court concluded that NEPA requires analysis of transboundary effects resulting from federal actions; therefore, Reclamation must include this analysis in its EA.

Conclusion

The court ordered Reclamation to take a "hard look" at (1) the cumulative impacts of water withdrawal on the water levels of Lake Sakakawea and the Missouri River, and (2) the consequences of biota transfer into the Hudson Bay Basin, including Canada. Reclamation will now have to provide closer analysis of the impacts. Although these types of transfers can help solve water quantity issues, it is important to ensure that transferred water does not bring more problems than it solves.

Photograph of Lake Sakakawea courtesy of North Dakota Geological Survey

Endotes

1. Manitoba v. Salazar, 2010 U.S. Dist. LEXIS 19982 (D.D.C. Mar. 5, 2010).
2. *Id.* at *34.
3. *Id.* at *36.

Nature v. Commerce, from page 7

Last year, the National Academy of Sciences issued a report finding that the oyster farm did not appear to be harming the waters or wildlife of the area, including the native harbor seal population.[7] The report criticized the NPS, stating that one report "selectively presented, over-interpreted or misrepresented the available scientific information on potential impacts of the oyster mariculture operation."[8] The NPS apologized for its erroneous reports and denied that it was trying to force Lunny from his lease before it expires in 2012.[9]

. . . one report "selectively presented, over-interpreted or misrepresented the available scientific information on potential impacts of the oyster mariculture operation."

Lease Extensions

The National Park Service indicated that Lunny's land would revert to wilderness when the lease expired in 2012, as required by federal law.[10] Lunny lobbied for a lease extension.[11] Senator Dianne Feinstein got involved in the dispute at around this time.[12] She added a rider to the Interior Department's appropriations bill that would have required the Department to extend permits by ten years.[13] Soon after, however, the California Coastal Commission issued Lunny a $61,250 fine for placing shellfish in an area set aside for harbor seal protection. Lunny claimed the incident was the result of a mistake by one of his employees.[14] Senator Feinstein reacted by modifying her bill to allow, but not require, a permit extension.[15] Although Lunny's lease has not been extended, in February, the NPS issued its first ten-year lease to another rancher within the Point Reyes National Seashore.[16]

Conclusion

Many members of the community support the ranchers, noting its historical, as well as practical, importance to the area.[17] Others worry that extending the leases may set a precedent for other private or commercial operations in the nation's national parks.[18] Regardless, the contentious fight between the NPS and Lunny bring reminders of the struggle to allocate our shores for multiple uses.

Endnote

1. National Academy of Sciences, *Shellfish, Mariculture in Drakes Estero, Point Reyes National Seashore, California* (2009).
2. *Id.*
3. *Id.*
4. Julie Cart, *A Hotbed of Contention*, L.A. Times, Dec. 27, 2009, at A41.
5. NAS, *supra* note 1.
6. Leslie Kaufman, *Debate Flares on Limits of Nature and Commerce in Parks*, N.Y. Times, Nov. 1, 2009.
7. NAS, *supra* note 1.
8. *Id.*
9. Cart, *supra* note 4.
10. Kaufman, *supra* note 6.
11. Cart, *supra* note 4.
12. Rob Rogers, *Park Service Gives west Marin Ranches a Longer Lease on Life*, Marin Independent Journal, Feb. 13, 2010.
13. Cart, *supra* note 4.
14. *Id.*
15. *Id.*
16. Rogers, *supra* note 12.
17. Kaufman, *supra* note 6.
18. *Id.*

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

University, MS 38677
Non-Profit Org.
U.S. Postage
PAID
Permit No. 6

Littoral Events

Challenges of Natural Resource Economics and Policy (CNREP) 2010

New Orleans, Louisiana
May 26-28, 2010
The third national forum will highlight the status and challenges of socioeconomic research and policy in coastal systems. The conference goal is to generate future collaborative efforts while providing a prominent venue for current research, extension, and policy work. Keynote discussions will be part of a plenary discussion on the issue of climate change and coastal community vulnerability. Visit www.cnrep.lsu.edu <http://www.cnrep.lsu.edu> for more information.

Water Matters! Global Water Conference

Pittsburgh, Pennsylvania
June 3, 2010
The United Nations Environment Programme appointed Pittsburgh to be North America's host for World Environment Day 2010. This conference is part of Pittsburgh's answer to the call. The conference will focus on the future for and protection of the nation's waters and will highlight the region's leading water innovators, problem solvers, and applied technologies. The conference is open to the public and intended for all audiences. The cost to attend is $25. For registration or more information visit http://www.pittsburghwed.com/watermatters/ .

The Coastal Society 22nd International Conference

Wilmington, North Carolina
June 13-16, 2010
The conference, themed "Shifting Shorelines: Adapting to the Future," will feature presentations, panels, and posters on adapting to the changing landscape of ocean and coastal resource management. The conference, which provides a forum for interdisciplinary education and discussion on coastal issues, is open to non-members. For more information, visit http://www.thecoastalsociety.org/conference/tcs22/index.html .

The Working Waterways & Waterfronts National Symposium on Water Access 2010

Portland, Maine
September 27-30, 2010
The 2010 Working Waterways and Waterfronts National Symposium on Water Access will provide a forum for diverse waterfront users to address common dilemmas and share solutions. Building on the inaugural symposium in Norfolk, Virginia, in 2007, participants will increase awareness of the economic, social, cultural, and environmental values of waterfronts, and the important role of water-dependent uses in sustainable coastal communities. Visit http://www.wateraccessus.com/ for more details.