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Court Upholds NEPA's Application in the EEZ

Natural Resources Defense Council v. United States Department of the Navy, No. CV-01-07781 (C.D. Cal. Sept. 19, 2002).

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

The U.S. District Court for the Central District of California recently held that, although the United States Navy need not subject its entire Littoral Warfare Advanced Development Program to environmental review, the National Environmental Policy Act does apply "to federal actions which may affect the environment in the [Exclusive Economic Zone]."[1]

Background

The Navy's Littoral Warfare Advanced Development Program (LWAD Program), initiated in 1996, oversees the sea testing of experimental anti-submarine technologies. According to the Navy, the "LWAD meets the need for at-sea testing of Littoral Anti-submarine Warfare (LASW) technologies by providing the science, planning, and logistics support framework to enable cost-effective, LASW experimentation and demonstration."[2] Individuals seeking to test their developmental anti-submarine technologies apply to participate in the LWAD Program. Once selected to participate, the Navy facilitates and supports the sea testing of the participant's technology. As noted in the opinion, "[t]he purpose of the sea tests is to provide a robust, 'real world' environment for the testing and demonstration of anti-submarine warfare technologies that the Navy may want to acquire."[3] The sea tests generally involve the use of active sonar or other tactical acoustic systems. These systems are capable of generating intense sounds which can adversely affect whales, dolphins and other marine life.

Cetaceans primarily rely on a highly developed sense of hearing and many utilize echolocation to find prey and navigate in the underwater realm. High intensity sounds, such as those generated by anti-sub-

See NEPA, page 5

Mussel Byproducts from Harvesting Rafts are Not Pollutants

Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc., 299 F.3d 1007 (9th Cir. 2002).

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

The Ninth Circuit Court of Appeals recently ruled that a mussel harvesting facility in Puget Sound did not violate the Clean Water Act by operating without a discharge permit. The court adopted a narrow interpretation of the term "pollutant," excluding the natural byproducts of mussels grown utilizing harvesting rafts.

Background

The Clean Water Act prohibits the "discharge of any pollutant by any person" into the navigable waters of the United States unless such discharge is conducted

See Mussels, page 10

Table of Contents

No EIS Necessary for Kohala Project

Ka Makani 'O Kohala Ohana Inc., v. Department of Water Supply, 295 F.3d 955 (9th Cir. 2002).

S. Beth Windham, 3L

The Ninth Circuit recently reviewed whether the Kohala Project, a transbasin water diversion system on the Big Island of Hawaii, constituted a major federal action requiring an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA). The court determined that the preliminary stages of the Kohala Project did not meet the level of "major federal action" and did not require an environmental impact statement.

The Kohala Project

The County of Hawaii Department of Water Supply (DWS) initiated planning for a transbasin water diversion system on the Big Island of Hawaii, known as the Kohala Project, that would transfer 20 million gallons of ground water each day for the development of coastal resorts. The United States Geological Survey (USGS) assisted in the project by studying groundwater availability in a basal aquifer, which resulted in two studies used by DWS to show the benefits of the project. The USGS also entered into four Joint Funding Agreements with DWS in which the costs of the studies were divided evenly, costing $800,000 each.

Congress passed an appropriations bill in 1991 giving the County of Hawaii $500,000 for an EIS for the Kohala Project. DWS used $30,000 of the grant to pay contractors and notified the Department of Housing and Urban Development (HUD) which was in charge of distributing the funds, that it wished to extend the time frame for using the funds as the Kohala Project was placed on hold due to the economic climate. In 1999, Congress authorized the use of the remaining funds in other water system improvement projects, which were completed in 2000.

"Major Federal Action"

Ka Makani, a citizens' coalition, brought suit to enjoin work on the Kohala Project until an environmental impact statement was completed. NEPA requires a federal agency to conduct an environmental assessment, and usually an EIS, for every "major federal action significantly affecting the quality of the human environment."[1] The EIS must include the unavoidable environmental effects of the action and alternatives to the action.

While there are no hard and fast rules for determining whether an agency's proposed action is a "major federal action," the Court reviewed the "nature of the federal funds used and the extent of federal involvement" in the project to determine if NEPA applied.[2] Regarding federal funding, the court reviewed the federal expenditures in relation to the cost of the overall program, not simply the amount of money spent by the federal government.

In the Kohala Project, the total federal funding offered was $1.3 million, or less than two percent of the entire project cost of $80 million. The State of Hawaii had spent more than $3 million on the project and intended to raise additional funding through State and county bonds. The Ninth Circuit concluded that the small amount of federal funding alone did not make the Kohala Project a "major federal action."

Regarding the degree of federal involvement in the project, the Court noted that the USGS and HUD lacked decision-making power, authority and control over the project. The USGS only played an advisory role in the preliminary research studies and DWS retained all of the final decision making power. Likewise, HUD provided advice and information limited to the special purpose grant from Congress and not the entire Kohala Project.

The court distinguished the Kohala project from two other cases involving federal involvement in highway projects that were federal in origin and had federal oversight and control in the early stages of the projects. In the Kohala Project, federal activity was limited to funding preliminary activities including scientific studies and the EIS, while the project itself remained under DWS control.

NEPA Exemption

Projects that consist only of exempted activities, which include "environmental and other studies, resource identification and the development of plans and strategies,"[3] do not need to comply with NEPA. Ka Makani, the plaintiff, argued that the Kohala project did not fall into an exempted category excluding it from NEPA compliance, as the entire project must be considered. The citizens' coalition relied on the "connected actions provision" which states "all activities related on a geographic or a functional basis must be aggregated and evaluated as a single project."[4] The court determined that the HUD special purpose grant was designated for use in preparing an EIS that would result in no significant impact on the environment. It concluded that the connected actions provision did not apply because it existed to ensure combined environmental impacts were addressed, and the preliminary activities had no effect on the environment. Thus, the court ruled that an EIS was not required.

The Ninth Circuit also rejected a claim that the plain language of HUD regulations for special purpose grants required the completion of an EIS. The court concluded that HUD regulations only required an EA or EIS if the project was not covered by an exemption from NEPA review.

Conclusion

The Ninth Circuit ruled that because HUD's administration of a special purpose grant to prepare an EIS and the USGS involvement in preliminary studies failed to rise to the level of a major federal action, a federal EIS for the entire Kohala Project was not required.

ENDNOTES

1. 42 U.S.C. § 4332(2)(C) (2002).
2. 295 F.3d 955, 960 (9th Cir. 2002), *citing Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988).
3. 24 C.F.R. § 58.34(a)(1) (2002).
4. 295 F.3d at 962, paraphrasing 24 C.F.R. § 58.32(a).

Court Rejects Rehearing on Banned Shrimp Case

Turtle Island Restoration Network v. Evans, 2002 WL 434815 (Fed. Cir. 2002).

S. Beth Windham, 3L

The Court of Appeals for the Federal Circuit rejected a petition for a rehearing en banc in *Turtle Island Restoration Network v. Evans.*[1] The Federal Circuit previously decided banned countries may import shrimp if the individual shipments contained equipment to prevent harm to sea turtles.[2] While the court failed to issue an opinion on the merits, Circuit Judges Garjarsa and Newman filed a lengthy dissent.

The dissenting judges began their analysis by noting that the majority reached its conclusion through unreasonable statutory interpretation. Section 609 (b)(1) of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act bans "the importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely sea turtles"[3] unless the nation has been certified by the President. The majority claimed section 609 only prohibited the importation of shrimp from uncertified countries without TED equipment.

The dissent argued that section 609 bans importation of shrimp unless the foreign nation is certified by adopting measures similar to those promulgated by the United States or harvesting in an area that does not endanger sea turtles. They faulted the majority for concluding that 609 did not ban particular shipments if they were harvested with TED-equipped trawlers. Instead, the dissent argued TED-equipped fleets still may drown some sea turtles and are at best 97% effective.

The dissent found that section 609 clearly bans the importation of shrimp harvested with mechanical trawlers unless the harvesting nation is certified. They also expressed concern that the majority's holding would have a detrimental effect on the incentive for foreign nations to participate in the certification process and the long-term survival of sea turtles.

The dissent also criticized the majority for failing to follow legislative history. Congress had two goals behind section 609; to protect sea turtles globally and to protect the domestic shrimp industry from competition. The majority held that protection of sea turtles was not the policy behind the act, but rather the protection of the U.S. domestic shrimp industry, and argued that TED installation on vessels not serving the US market would not affect the domestic shrimp industry. The dissent countered that by only requiring TEDs on a small percentage of foreign vessels, the foreign shrimp industry has smaller costs and stands at a competitive advantage to US shrimpers. The dissent claims the majority failed to protect the domestic shrimp industry and refused to address the protection of sea turtles at all. The dissent concluded by stating the majority "unreasonably construed a statute that was written to protect turtles so as not to protect them."[4]

ENDNOTES

1. *Turtle Island Restoration Network v. Evans*, 2002 WL 434815 at *1 (Fed. Cir. August 8, 2002).
2. *Turtle Island Restoration Network v. Evans*, 299 F.3d 1373 (Fed. Cir. 2002). For an analysis of the original case *see Windham, S. Beth, Court Allows Banned Countries to Import Shrimp*, 12: 1 SANDBAR 1 (2002) (available online at http://www.olemiss.edu/orgs/SGLC).
3. 103 Stat. 988, 1037 (1990).
4. *Id.* at *13-14.

NEPA, from page 1

marine technologies, can cause loss of hearing, disruption of feeding and migration patterns, and may be linked to mass strandings or beachings. After a mass stranding in the northern Bahamas in 2000, a government task force, led by the National Marine Fisheries Service, concluded that the Navy's use of a military sonar device was the "most plausible" cause of the stranding.[4]

The Lawsuit

Concerned for the welfare of cetacean populations and frustrated with the Navy's lack of compliance with environmental statutes, the Natural Resources Defense Council (NRDC) filed suit seeking to enjoin the Navy from conducting further sea tests until the Navy completed environmental studies as required by the National Environmental Policy Act (NEPA). The NRDC claimed NEPA requires the Navy to evaluate the LWAD Program in a program-wide environmental impact statement. The NRDC also argued that each individual sea test was an agency action subject to environmental review. In addition, the plaintiffs alleged violations of the Endangered Species Act, the Marine Mammal Protection Act, and the Marine Sanctuaries Act.[5]

The Navy filed a motion for summary judgment on the basis that the plaintiffs did not have standing to challenge the Navy's program.[6] The Navy also argued that the LWAD Program is not a reviewable final agency action and the Navy's activities in the EEZ are not subject to environmental review under NEPA.

NEPA

NEPA requires all federal agencies to prepare a detailed environmental impact statement for "major federal actions significantly affecting the quality of the human environment."[7] The NRDC argued that the LWAD Program, as a whole, is a major federal action and the Navy is required to prepare an environmental impact statement for its activities under the LWAD Program. The Navy countered by claiming that NEPA does not apply outside of the United States territory and territorial sea and, even if it does, the LWAD Program is not a federal action which can be challenged by the plaintiffs.

The Navy argued that because some of the tests take place in international waters, NEPA does not apply to its activities under the LWAD Program. In general, United States laws do not apply outside US borders absent an express Congressional mandate. In this situation, however, the court found that the presumption against the extraterritorial application of US laws does not apply, because the planning for the LWAD Program occurs entirely within the boundaries of the United States. The federal activity regulated by NEPA is the decision-making process of the agencies, not the underlying project. Because, the decision-making process surrounding the approval of sea tests occurs within the United States, the application of NEPA to the LWAD Program is not extraterritorial.

Most of the sea tests have been conducted on the high seas or in the United States Exclusive Economic Zone (EEZ). The EEZ is a zone extending seaward from the boundary of the territorial sea out to 200 miles. The EEZ, unlike the territorial sea, is not strictly considered part of the territory of the United States, but the United States does have certain "sovereign rights" within the area "for the purposes of exploring, exploiting, conserving and managing natural resources."[8] Furthermore, regarding natural resource conservation and management, "the United States does have substantial, if not exclusive, legislative control of the EEZ."[9] As a result, the court held "that NEPA applies to federal actions which may affect the environment in the EEZ."[10]

Having found that NEPA is applicable to federal agency actions in the EEZ, the court then analyzed whether the LWAD program was a federal action subject to NEPA review. Under NEPA implementing regulations, "proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement."[11] The court found that the LWAD Program, standing alone, was not subject to NEPA review. Apart from planning and conducting the individual sea tests, the LWAD Program is only engaged in general planning and does not create activities with an impact on the environment. The court held that environmental assessments are not required until the LWAD Program begins to engage in specific planning and commits resources for an actual sea test. Therefore, the Navy may continue to conduct its environmental analysis on a sea test by sea test basis. The Navy's summary judgment motion was granted with regards to the plaintiffs' challenge to the LWAD Program.

ESA

The NRDC also challenged the Navy's failure to consult with other federal agencies pursuant to the Endangered Species Act (ESA). The ESA requires

See NEPA, page 6

NEPA, from page 5

federal agencies to determine, in consultation with the Secretary of the Interior or Commerce, the impact its proposed actions will have on species protected by the Act.[12] Consultation may be formal or informal, but if an action "may affect a listed species or critical habitat," formal consultation is required.[13] The Act applies to all federal activities in the United States and on the high seas.[14] The Court held that, similar to the environmental impact statement process pursuant to NEPA, the Navy need not consult with the Secretary of Commerce on a program-wide basis. Consultation may proceed on a test by test basis.

Conclusion

The court determined that the Navy's decision to conduct environmental assessments for each sea test, instead of for the entire LWAD Program, was not arbitrary and capricious. The Navy, however, is still subject to the procedural requirements of NEPA. Before conducting a sea test in the EEZ, the Navy must prepare an environmental impact statement, consult with the proper agency officials as required by the ESA, and comply with all environmental statutes.

ENDNOTES

1. *Natural Resources Defense Council v. United States Department of the Navy*, No. CV-01-07781 Slip op. at 21 (C.D. Cal. Sept. 19, 2002).
2. LWAD Description, *available at* http://www.onr.navy.mil/oas/projects/lwad/default.htm .
3. *NRDC* at 2.
4. *Id.* at 6.
5. The court did not reach the merits of NRDC's claims regarding these environmental statutes, because Sea Test 02-2, the individual sea test challenged, was cancelled by the Navy.
6. The court held that the NRDC had standing to challenge the Navy's actions as the plaintiffs "provide[d] evidence that they have observed and enjoyed wildlife in many specific areas where LWAD operations have been conducted to date." *NRDC* at 13.
7. 42 U.S.C. § 4332(2)(C) (2002).
8. *NRDC* at 20 (*citing Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 534 (D.C. Cir. 1994)).
9. *Id.* at 21.
10. *Id.*
11. 40 C.F.R. § 1502.4(a) (2002).
12. 16 U.S.C. § 1536(a)(2) (2002).
13. 50 C.F.R. § 402.14 (2002).
14. 50 C.F.R. § 402.01 (2002).

Coast Guard Cannot Assert Salvage Liens for Mandatory Duties

U.S. v. Ex-USS Cabot/Dedalo, 297 F.3d 378 (5th Cir. 2002).

Magnolia Bravo, M.S., J.D.

The U.S. Court of Appeals for the Fifth Circuit recently ruled that the federal government cannot assert a salvage lien or seek salvage recovery for actions pursuant to the mandatory sections of the Clean Water Act (CWA).[1] Specifically, the Coast Guard was unable to recover its costs related to the salvage of a dilapidated aircraft carrier because its duties were required under federal law. Conversely, if the government had acted as a voluntary rescuer, the government could have brought the claim.

The *Cabot*

The *Cabot* was a light aircraft carrier used in World War II, later decommissioned and bought by the U.S.S. Cabot Dedalo Museum Foundation in 1989 to be docked permanently in Kenner, Louisiana as a floating museum. The Foundation stripped the ship of all operational equipment and moored it at the Press Street Wharf on the Mississippi River in New Orleans, Louisiana. When the mayor of Kenner withdrew his offer to provide mooring, the Dock Board at the Press Street Wharf requested the Foundation either begin paying dockage fees or move the ship. The Foundation took no action to remove the ship. In April, 1996, the U.S. Coast Guard informed the Foundation that they must move the *Cabot* by the first of June because of the immediate threat its dilapidated condition and moorings posed to the port. Again, the Foundation took no action, so the Coast Guard informed them that the government would respond to prevent oil pollution pursuant to the CWA, pursue civil penalties against the Foundation, and ultimately invoice the Foundation for any expenses incurred. In response, the Foundation declared bankruptcy. The Coast Guard proceeded to update the *Cabot*'s moorings, as well as remove chemical drums and oil from the ship.

A year later, the carrier *M/V Tomis Future* hit the *Cabot* while steaming downriver, damaging both the

Cabot and the wharf. Concerned with the safety of the *Cabot*'s moor, the Coast Guard ordered the Foundation to have a tugboat on standby to monitor the *Cabot* and to ultimately move the *Cabot* to a safe hurricane mooring site within three days. The Foundation failed to move the *Cabot*, so the Coast Guard informed them that it was assuming responsibility for the ship and would seek reimbursement for expenses under the CWA. The Coast Guard hired tugboats to monitor the *Cabot* for seven weeks, finally moving the ship downstream to a safe mooring. The Coast Guard incurred $500,868.94 of expenses in relation to the *Cabot*.

In October, 1997, the Coast Guard moved the *Cabot* from Louisiana to Texas and, at about the same time, the Foundation sold the ship to Marine Salvage, who provided both wharfage and security services to the ship.

District Court Ruling

In 1999, the federal government, the Dock Board from Louisiana, and Marine Salvage sued to have the *Cabot* sold at a U.S. Marshal's sale. The district court in Texas authorized the sale and a shipwrecker bought the *Cabot* for $185,000. The district court ruled that Marine Salvage had a priority salvage lien, which should be paid first, upon sale of the *Cabot*. The Court then ruled that because the Coast Guard had acted voluntarily[2] in regards to the *Cabot*, the federal government should receive any remaining funds to pay its salvage lien. Marine Salvage appealed the decision because the district court did not evaluate the merits of its second lien for $56,872.39.

Mandatory vs. Voluntary Rescuer

Marine Salvage argued that the Coast Guard could not assert a salvage claim for its actions because the actions were mandatory.[3] The CWA establishes the Coast Guard's mandatory duty to respond to threatened oil pollution and spills.[4] If the Coast Guard has a mandatory duty to respond under CWA, they cannot recover on a salvage lien for costs associated with their actions. In addition, a public employee, such as a Coast Guard official, is not entitled to a salvage award if their services were performed in the line of duty.

The Court concluded that because it is firmly established that the Coast Guard has a mandatory duty to act under threat of oil pollution, the only issue left to determine was whether the Coast Guard's duty was mandatory or permissive, i.e. did the Coast Guard acted as a pollution abater or as a salver. The Court ruled that because the Coast Guard consistently asserted its authority under CWA throughout its

dealings with the Foundation, its duty was mandatory. Alternatively, the Court ruled, if the Coast Guard had originally told the Foundation that it was a salver, the Foundation could have stopped the Coast Guard by refusing the offer of help and thereby denied the salvage claim. Instead, when the Coast Guard took action, it did so pursuant to the broad authority of the CWA, which forced its command on the Foundation, firmly establishing itself as a pollution abater, not a salver.

Outcome

The Fifth Circuit ruled that the district court clearly erred in concluding the Coast Guard acted voluntarily and could therefore make a salvage claim. The Court remanded the case for further proceedings.

ENDNOTES

1. *See* 33 U.S.C. §§ 1321(c), (d), (j) (2002).
2. The district court relied on precedent set in *American Oil*, in which a tanker containing gasoline and oil caught fire. The Coast Guard, working alongside firefighters, purchased a specific kind of foam to fight such fires which was flown in by Air Force and Navy planes. The Fifth Circuit distinguishes this case because the Air Force and Navy, not the Coast Guard, had the made salvage claims and had not included any expenses incurred by the Coast Guard. In addition, Congress had expressly allowed both the Air Force and the Navy to make salvage claims and the local firefighters, not the Coast Guard, had legal responsibility for fighting the fire. *In re American Oil Co.*, 417 F.2d 164 (5th Cir. 1969).
3. Marine Salvage also argued that the district court clearly erred in finding the *Cabot* was in marine peril and the district court abused its discretion when making a salvage award based on the Coast Guard's unreasonable costs, but the Court declined to rule on these issues because it agreed with Marine Salvage's first claim.
4. 33 U.S.C. § 1321(b) (1) (2000).

Circuit Courts Apply *Solid Waste Agency v. Corps of Engineers*

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

In January 2001, the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, known as *SWANCC*, invalidated the Corps' Migratory Bird Rule which the Corps had been using to assert authority over isolated, intrastate wetlands.[1] In *SWANCC*, the Corps attempted to regulate activities taking place in ponds which had formed in pits originally used in a sand and gravel mining operation. Under Corps regulations, the definition of "waters of the United States" included waters "which are or could be used as habitat by birds protected by the Migratory Bird Treaty" or by other migratory birds crossing state lines.[2] Migratory birds could potentially use the gravel pits in question in *SWANCC*, but the ponds were not adjacent to a navigable water or tributary. The Supreme Court ruled that the Corps' attempt to regulate such isolated waters exceeded their authority under the Clean Water Act.[3]

As a result of the decision in *SWANCC*, millions of acres of wetlands in the United States no longer fall within the jurisdiction of the Corps. Today, states are scrambling to fill the enforcement gap created by the Supreme Court and lower courts are struggling to interpret and apply *SWANNC*. The Fourth and Seventh Circuit Courts of Appeals, in the decisions summarized below, recently addressed the question of the jurisdictional limits of the Corps of Engineers and EPA in light of *SWANCC*.

United States of America v. Interstate General Company, 2002 U.S. App. LEXIS 13232 (4th Cir. July 2, 2002).
In 1999, Interstate General Company pled guilty to knowingly discharging fill materials into a protected wetland in violation of the Clean Water Act (CWA) and entered into a consent decree with the United States. After the *SWANCC* decision, Interstate General sought to invalidate the consent decree, claiming the Supreme Court legalized the conduct underlying the criminal conviction. A motion to vacate a consent decree is only warranted if there has been "a fundamental or significant change in the law governing [the] case."[4]

The wetlands owned by Interstate General are adjacent to headwaters[5] of small streams which flow into larger creeks, which in turn flow into the Potomac River and the Chesapeake Bay. As the Chesapeake Bay is navigable, these wetlands are considered "adjacent to" tributaries of navigable waters. Interstate General argued that *SWANNC* limited the jurisdiction of the Corps solely to traditionally navigable waters and those wetlands directly adjacent to those waters. Interstate General, therefore, claimed that because their wetlands are not immediately adjacent to traditionally navigable waters, a CWA § 404 permit is not required. The Fourth Circuit disagreed.

The Fourth Circuit Court of Appeals narrowly interprets the Supreme Court's holding in *SWANCC* to apply only to the Migratory Bird Rule. The Court states that "the Supreme Court's actual holding is limited to one particular application of 33 C.F.R. § 328(a)(3),"[6] namely the exercise of jurisdiction over isolated wetlands. As the

Fourth Circuit had reached the same conclusion in 1997, finding the Corps had exceeded its authority by promulgating § 328(a)(3),[7] *SWANNC* effected no fundamental or significant change in the law. Consequently, Interstate General was not entitled to the invalidation of the consent decree.

Furthermore, the Corps had not asserted jurisdiction in this case based upon the Migratory Bird Rule. These wetlands are adjacent to tributaries of navigable waters. The Fourth Circuit found that the Corps' jurisdiction over adjacent wetlands of tributaries is still intact.

United States v. Krilich, 2002 U.S. App. LEXIS 18445 (7th Cir. September 9, 2002).

The factual background in *Krilich* is similar to *Interstate General*. Robert Krilich was charged with violating the Clean Water Act after he discharged fill material into Illinois wetlands without the proper permit. Krilich entered into a consent decree with the United States. After the decision came down in *SWANCC*, Krilich petitioned to have the consent decree invalidated, claiming the EPA did not have jurisdiction over the wetlands covered by the decree.

In 1992, the Seventh Circuit ruled that the "EPA's construction of 'waters of the United States' as including intrastate, nonadjacent or 'isolated' wetlands"[8] exceeded its authority under the Clean Water Act. The consent decree between the EPA and Krilich reflected this limitation on the EPA's authority and stipulated that certain wetlands on Krilich's property were waters of the United States. After the ruling in *SWANCC*, Krilich argued that the wetlands in question were isolated and sought to invalidate the consent decree by subjecting the EPA to the same jurisdictional limitation as the Corps. The Seventh Circuit rejected Krilich's claims as there was no fundamental change in the law which would warrant invalidating the consent decree, as the parties were already operating under the 1992 restriction and had stipulated that the wetlands were indeed "waters of the United States."

Although the court disposed of the case on other grounds, in its opinion the Seventh Circuit narrowly interprets *SWANCC*. The court states, similar to the Fourth Circuit in *Interstate General*, that *SWANCC* only invalidated the Corps' exercise of jurisdiction over isolated wetlands pursuant to the Migratory Bird Rule. The Seventh Circuit further indicated that *SWANCC* did not destroy EPA's traditional jurisdiction over wetlands adjacent to navigable waters.

Conclusion

Although *SWANCC* eliminated millions of acres of isolated wetlands from the jurisdictional reach of the Corps, it is apparent from the above cases that Circuit Courts are reluctant to further erode the authority of the Army Corps of Engineers. Both the Fourth and the Seventh Circuits limit *SWANCC* to the Migratory Bird Rule and do not extend the Supreme Court's holding to other aspects of the Corps' jurisdiction. In these Circuits, EPA and the Corps retain the authority to regulate discharges into navigable waters, tributaries, and the wetlands adjacent to both.

ENDNOTES

1. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
2. 40 C.F.R. § 328.3(a)(3) (2001).
3. For an in-depth analysis of the Supreme Court's ruling in *SWANCC*, *see Treadwell, Supreme Court Invalidates Corps' Migratory Bird Rule*, 21:1 WATER LOG 1 (2001) (available online at http://www.olemiss.edu/orgs/SGLC).
4. *United States of America v. Interstate General Company*, 2002 U.S. App. LEXIS 13232, at *7 (4th Cir. July 2, 2002).
5. Headwaters refer to the source of a river or stream.
6. *U.S. v. Interstate General Company*, at *11.
7. *See United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).
8. *United States v. Krilich*, at *2 (*citing Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310, 1316 (7th Cir. 1992)).

In contrast, it is important to note that the Fifth Circuit, in April 2001, broadly interpreted *SWANCC*. In *Rice v. Harken Exploration Company*, the court held "that a body of water is subject to regulation under the CWA [only] if the body of water is actually navigable or is adjacent to an open body of navigable water." (250 F.3d 264, 269 (5th Cir. 2001)). For an analysis of this decision, see *Pake, Fifth Circuit Defines Scope of Oil Pollution Act*, 22:2 WATER LOG 1 (2001), available online at http://www.olemiss.edu/orgs/SGLC . Circuit court decisions interpreting *SWANCC* will be covered in future issues of THE SANDBAR.

Mussels, from page 1

pursuant to a National Pollutant Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency (EPA) or an authorized state agency.[1] The Department of Ecology is the state agency authorized to issue NPDES permits in Washington State.

Taylor Resources, Inc. (Taylor) began its mussel-harvesting operations in Puget Sound in the early 1990s. The company operates two facilities, which produce more than 20,000 pounds of mussels per year. Mussel brood stock is attached to suspension ropes anchored to the sea floor and surrounded by netting to prevent predation. Taylor does not add any feed or chemicals to the water to assist in the production of the adult mussels. However, as a result of natural processes, the mussels do produce and release feces, shells, and dissolved materials, such as ammonium and inorganic phosphate, into the Sound.

Prior to beginning operations, Taylor applied for and received all necessary permits required by the Washington State Environmental Policy Act and the National Environmental Policy Act. Taylor, however, operates without a NPDES permit. When Taylor applied for a permit pursuant to the Clean Water Act, the Department of Ecology informed the company that a NPDES permit was not required. The Department took the position that operations like Taylor's do not violate the Act, because "shellfish farmers do not need to add fish food (nutrients) to the water to promote shellfish growth."[2]

The Appeal

Appellants, Association to Protect Hammersley, Eld, and Totten Inlets (APHETI), filed suit against Taylor Resources under the citizen suit provisions of the Clean Water Act. APHETI is an organization composed of approximated 3000 members, residents of the southern shores of Puget Sound. APHETI argued that Taylor's operations discharged pollutants into Puget Sound in violation of the Act, urging the court to enjoin Taylor from continuing operations until it obtained a NPDES permit for those discharges.

The United States District Court for the Western District of Washington granted summary judgment in favor of Taylor Resources, finding that the mussel-harvesting rafts did not violate the Clean Water Act as the facilities did not discharge a pollutant into the Sound and the rafts were not a point source.[3] The Ninth Circuit affirmed the findings of the lower court.

Mussel Byproduct Not a Pollutant

Included in the Clean Water Act's definition of pollutant are the following: solid waste, sewage, garbage, chemical wastes, biological materials and agriculture waste.[4] To determine the scope of the term "pollutant," the court looked to the general rule of statutory interpretation which states "[w]hen a statute contains a list of specific terms and a general item, we usually deem the general item to be of the same category or class as the more specifically enumerated items."[5] Utilizing this doctrine, the Ninth Circuit read the term "biological materials" narrowly and in context with the other pollutants listed. The court refrained from adopting a general definition of "biological materials", which would include materials naturally occurring in the environment. Rather, the court stated that because "biological materials" follows the terms solid waste, sewage, garbage, and sewage sludge, it should be interpreted as "waste material of a human or industrial process."[6]

. . . Congress did not intend living shellfish and the natural chemical and biological matter emitted from them to be considered pollutants.

In reaching this conclusion, the court relied on the fact that most biological materials considered pollutants under the Act are materials that have been transformed in some way by human activity. For example, if a facility is processing fish or shellfish and discharging skin, scales, shells, etc. into the water, those biological materials have been altered from their natural state by human hands and would require a NPDES permit in order to be discharged into navigable waters. As the mussel shells and the byproduct from the living mussels discharged by Taylor's facilities "come from the natural growth and development of the mussels and not from a transformative human process," the court held that those materials are not "biological materials" and, therefore, not a pollutant under the Act.[7]

Furthermore, the legislative history of the Clean Water Act indicates that Congress did not intend living shellfish and the natural chemical and biological matter emitted from them to be consider pollutants.[8] The court reasoned that because Congress listed the protection and propagation of shellfish as one of the

goals of the Act, it would be absurd to consider the natural discharges of those same shellfish to be violations of the Clean Water Act.

Harvesting Rafts Not a Point Source

The Ninth Circuit also reviewed whether Taylor's harvesting rafts were point sources subject to regulation under the Clean Water Act. A "point source" is "any discernable, confined and discrete conveyance" and includes concentrated animal feeding operations.[9] EPA also regulates Concentrated Aquatic Animal Production Facilities ("CAAPF") as point sources under the NPDES permit program.[10]

CAAPF are any operations that grow or hold "[c]old water fish species or other cold water aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year."[11] Although Taylor's mussel harvesting facilities fall within the statutory definition of a CAAPF, Taylor's operations are specifically excluded from the EPA regulations because Taylor does not feed the mussels.[12] Because Taylor's operations do not met the feeding requirements, the court stated that the rafts were not point sources.

Conclusion

As the natural byproducts of living mussels are not pollutants as defined by the Act and non-feeding CAAPF operations are not point sources, Taylor Resources was not required to seek, or the Department of Ecology to issue, a NPDES permit for the mussel operations.[13]

ENDNOTES

1. 33 U.S.C. §§ 1311(a), 1342 (2002).
2. *APHETI v. Taylor Resources*, 299 F.3d 1007, 1011 (9th Cir., 2002), *citing* Department of Ecology August 18, 1997 letter to APHETI.
3. *Id.* at 1011.
4. 33 U.S.C. § 1362(6) (2002).
5. *APHETI*, 299 F.3d at 1016, *citing Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834 (9th Cir. 1999).
6. *Id.* at 1016.
7. *Id.* at 1017-18.
8. *Id.* at 1016.
9. 33 U.S.C. § 1362(14) (2002).
10. 40 C.F.R. § 122.24(a) (2002).
11. 40 C.F.R. Pt. 122, App. C(a) (2002).
12. EPA excludes "facilities which feed less than 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding." *Id.*
13. On September 12, 2002, EPA issued proposed effluent guidelines for the Concentrated Aquatic Animal Production Industry. The guidelines apply to facilities producing 100,000 pounds per year utilizing one of the following production systems: recirculating, flow through, or net pens. EPA issued the guidelines to address concerns regarding the rapid growth of the aquaculture industry, potential for discharge of drugs and chemicals, and potential release of non-native species and pathogens. For more information on the proposed guidelines, visit the EPA's website at www.epa.gov/guide/aquaculture.

Coast Guard May Seize Individuals from Foreign Vessels

United States v. Best, 2002 WL 31080306 (3rd Cir. Sept. 18, 2002).

Joseph M. Long, 2L

The Third Circuit recently addressed the issue of whether a U.S. District Court may exercise personal jurisdiction over a defendant seized from a foreign vessel on the high seas and charged with violations of immigration law. Applying the doctrine known as the *Ker-Frisbie* rule, the court followed the precedent that an illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. Furthermore, no exception to the doctrine interrupted U.S. jurisdiction over the vessel captain and crew.

Background

The Coast Guard intercepted the *Coreiro de Deus*, a Brazilian cargo vessel, on a suspected smuggling route to St. John's Island and St. Thomas Island off the coast of the Virgin Islands. After numerous unanswered radio communications with the vessel, the Coast Guard deployed a four-man team to conduct a safety inspection of the ship. The initial radar detection, the initial contact, and the safety inspection of the *Coreiro de Deus* occurred within the contiguous zone of the United States. The Contiguous Zone extends twelve miles seaward from the U.S. territorial sea and allows the U.S. to exercise the control necessary to prevent infringement of customs, fiscal, immigration, or sanitary laws and regulations.[1]

In the crew's initial attempts to communicate with Coast Guard officials, one crewman of the ship displayed a Brazilian flag to the Coast Guard officers. Upon searching the vessel, the Coast Guard discovered paperwork from Brazil and one document with a stamp from Suriname. The Coast Guard claimed that these documents did not reveal the nationality of the boat.

The boat was pulled closer to shore and inspected by agents of the Immigration and Naturalization Service (INS). The inspection uncovered thirty-three hidden Chinese nationals whom were interview by INS agents, along with the vessel's captain, Captain Best, and his crew. After these interviews, the government informed Best and his crew of their rights concerning criminal charges on alien smuggling.

The Appeal

A grand jury indicted Best and his crew with conspiring to bring illegal aliens and bringing illegal aliens to the U.S. Best filed a motion to dismiss with the District Court arguing that the U.S. lacked personal jurisdiction over Best and had violated international law by not receiving consent from Brazil to seize him and his crew. The District Court concluded that the U.S. violated international law and dismissed the indictment. The government filed a motion for reconsideration, which the District Court denied. The government filed a notice of appeal to the Court of Appeals for the Third Circuit.

Personal Jurisdiction

Under U.S. Supreme Court precedent, known as the *Ker-Frisbie* rule, a U.S. court's power to try a defendant is ordinarily not affected by the manner in which the defendant is brought to trial.[2] In other words, a defendant properly may be brought into

court for trial even though he was arrested illegally. The Supreme Court has also held that "illegal arrest or detention does not void a subsequent conviction."[3]

However, two judicially created exceptions have eroded the *Ker-Frisbie* doctrine over the years. The first exception, originally invoked in *U.S. v. Toscanino*, invalidates the *Ker-Frisbie* doctrine when government conduct during the arrest "shocks the conscience."[4] *Toscanino* created the requirement that the *Ker-Frisbie* doctrine must yield to the demands of due process and that the court "must divest itself of jurisdiction over a person of the defendant where it has been acquired as the result of the government's deliberate, unnecessary, and unreasonable invasion of the accused constitutional rights."[5] Yet, the court recognizes that this exception is limited by its particular facts. For *Toscanino* to apply, the governmental conduct must be "sufficient to convert an abduction which is simply illegal into one which sinks into a violation of due process."[6] The court found that the actions of the Coast Guard and INS did not reach this standard.

. . . a U.S. court's power to try a defendant is not affected by the manner in which the defendant is brought to trial . . .

The second exception makes the *Ker-Frisbie* doctrine inapplicable if "a treaty of the United States is directly involved."[7] The District Court relied on this exception claiming that the Coast Guard's actions violated international law. The Third Circuit held that this was not an accurate reading of the exception. The Third Circuit determined that, in order for a court to lose its jurisdiction over an accused individual, a treaty must exist and the treaty must "specifically" prohibit the abduction of foreign nationals.[8]

In the case at hand, the court did rely on this exception, but determined that "unless the government's seizure of Best was in violation of a treaty between the United States and Brazil, the District Court has jurisdiction over Best."[9] The court further noted that jurisdiction exists despite the "potential violation of international law."[10]

The court then addressed Best's argument that, although a treaty between the United States and Brazil does not exist, the District Court did not have jurisdiction because of Presidential Proclamation No. 7219, extending the U.S. Contiguous Zone. Best argued that the Proclamation limits the United States' ability to punish individuals to its contiguous zone. In response, the court notes that the Proclamation specifically states that "nothing in the Proclamation amends existing Federal or State law"[11] and the *Ker-Frisbie* doctrine is unaffected by the language of the Presidential Proclamation.

Conclusion

The Third Circuit found that, because a U.S. court's power to try a defendant is not affected by the manner in which the defendant is brought to trial, the seizure of Best and his crew does not affect the United States' ability to try the defendants for immigration violations. At the time of the arrest, the United States and Brazil were not members to any binding treaty that would govern Best's adjudication or make the government's arrest of Best illegal. Further, the Presidential Proclamation does not affect the scope of the *Ker-Frisbie* doctrine. Because no exception to the doctrine is applicable to the facts at hand, the U.S. could claim jurisdiction over Best.

ENDNOTES

1. April 29, 1958, art. 24. 15 U.S.T. 1606, 516 U.N.T.S. 205. President Clinton extended the U.S. Contiguous Zone in 1999: A coastal nation may establish the territorial and contiguous zones as to "exercise the control necessary to prevent infringement of [their] customs, fiscal, immigration, or sanitary laws and regulations within [their] territory or territorial seas." Presidential Proclamation 7219, 64 Fed.Reg. 48701 (Aug. 2, 1999).
2. *Frisbie v. Collins*, 342 U.S. 519 (1952).
3. *Gerstein v. Pugh*, 420 U.S. 103, 199 (1975).
4. *U.S. v. Toscanino*, 500 F.2d 267, 273 (2d Cir. 1974).
5. *Id.* at 275.
6. *U.S. ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir. 1975).
7. *Ford v. U.S.*, 273 U.S. 593, 605-06 (1927).
8. *U.S. v. Matta-Ballesteros*, 71 F.3d 754, 762 (9th Cir. 1995) (*citing U.S. v.Alvarez-Machain*, 504 U.S. 655, 644-66 (1992)).
9. *Best*, 2002 WL 31080306 at *4.
10. *Id.* The Third Circuit relied on Supreme Court precedent found in *U.S. v. Alvarez-Machain*, 504 U.S. at 669, and *Cook v. U.S.*, 288 U.S. 102, 122 (1933).
11. Presidential Proclamation 7219, 64 Fed.Reg. 48701 (Aug. 2, 1999).

The Clean Water Act and Coastal Zone Management Act: Celebrating 30 Years

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

Two keystone laws turned thirty years old this fall as the nation celebrated the successes of the Clean Water Act and Coastal Zone Management Act. The Clean Water Act (CWA) was passed in 1972 "to restore and and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] In the 30 years since the passage of that landmark legislation, great progress has been made towards its goal.

In June of 1969, the Cuyahoga River, which flows through Cleveland, Ohio, was so polluted that it caught on fire. The events of that summer galvanized the nation and eventually led to the passage of the CWA. Congress intended for all rivers in the United States to be "fishable" and "swimable" by 1983. Although that lofty goal has yet to be achieved, over two-thirds of US waters are safe for fishing and swimming, up from a mere 36% in 1970.[2] Over the years, the enforcement of the regulations of the CWA has virtually eliminated the direct discharge of pollutants from industrial sources. Fish and wildlife are starting to return to rivers formally incapable of supporting life. Formerly polluted beaches and lakes, such as the Jersey Shore and Lake Erie, are now prime recreational and tourist destinations.

Even with all that has been achieved under the Clean Water Act, federal, state and local governments struggle to meet the goals of healthy waters. Agricultural and urban runoff is largely unregulated and wetlands face continued threats from development and recent challenges to the CWA threaten the legal basis that has led to cleaner waters nationwide. The Cuyahoga River now supports all types of water-related activities unthinkable 30 years ago. In the next 30 years, the U.S. may achieve the goals of the CWA through strengthened enforcement and regulation.

The Coastal Zone Management Act was adopted in 1972 when Congress declared that it was the national policy of the United States "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."[3] The CZMA enabled the federal government to provide incentives to coastal states to manage their coastal zones and resources. All coastal states, except Illinois, participate in the program.

Over the years, the CZMA has allowed states to increase public access to the coast, improve coastal development, and protect and restore wetlands. More importantly, the CZMA requires all federal activities affecting a coastal zone to be "consistent" with the approved State management programs.[4] This consistency requirement has given the states significant authority over the development of their coastal areas.

With the pressures, from expanding populations and pollution, increasing on our Nation's coasts, coastal managers will continue to look to the CZMA for policy guidance and funding. Even though there are still major hurdles, such as climate change, to deal with in the future, the past 30 years under the CZMA has shown that federal-state partnerships can be successful. Hopefully, the CZMA regime will lead to even greater success in the next 30 years.

ENDNOTES

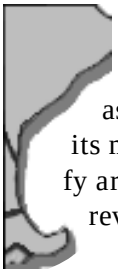
1. 33 U.S.C. § 1251(a) (2002).
2. A Prescription for Clean Water: How to Meet the Goals of the Clean Water Act, Clean Water Network, October 1997, *available at* www.cwn.org .
3. 16 U.S.C. § 1452(1) (2002).
4. 16 U.S.C. § 1456(c)(1)(A) (2002).

Coast to Coast

And Everything In-Between

In September 2002, the National Park Service embarked upon a Special Resource Study of the Chesapeake Bay Area to evaluate whether the Bay would be an appropriate addition to the National Park System. Four public hearings were held in September to disseminate information about the study and promote public participation. A draft study is due to be released in Spring 2003. To get involved in the process or to simply find out more information about the study, visit the National Park Service's website - www.chesapeakestudy.org.

On September 4, 2002, the U.S. House of Representatives passed legislation enabling the federal government to spend $250 million over five years to assist with the clean up of toxic sediments in the Great Lakes. The bill would amend the Clean Water act to authorize the Environmental Protection Agency "to make grants for remediation of sediment contamination in areas of concern and to authorize assistance for research and development of innovative technologies for such purposes." The bill, H.R. 1070, awaits Senate action.



The Gerry E. Studds Stellwagen Bank National Sanctuary in the Gulf of Maine is New England's only national marine sanctuary. The area was designated a sanctuary in 1992 due to its importance as a fishing grounds and whalewatching destination. For the first time since the Sanctuary's creation, its management plan is under review. Public meetings were held in September - October, 2002 to identify areas of concern, and final rules are due out in 2003. For more information on the Sanctuary or the review process, visit the Sanctuary's website - www.stellwagen.nos.noaa.gov .

The Indiana Department of Natural Resources recently received $1.5 million from the federal government as part of a settlement with Guide Corporation of Anderson, Indiana. In December 1999, Guide Corp. discharged approximated 1.6 million gallons of improperly treated wastewater into sewers leading to Anderson's treatment plant, resulting in damage to fish and wildlife along a 50 mile stretch of the White River. The total loss of fish was estimated at 187 tons, or 4.6 million fish. The settlement money will help Indiana DNR met its environmental mandates, as DNR is facing a multimillion dollar deficit following a huge budget cut by the Governor in February, 2002. DNR already used a portion of the settlement money to fund easement purchases and buffer strip establishment along the White River. Buffer strips enhance nutrient absorption, filter runoff, reduce flood damage, and improve wildlife habitat.

Around the Globe . . .

After six years, the moratorium on permitting new fish farms for salmon aquaculture was lifted by the British Columbia government. The decision was opposed by environmental groups and the Department of Fisheries and Oceans, who were concerned that the waste created by the fish farms is not adequately regulated, allowing disease and toxins to flow freely into the ocean, contaminating populations of wild fish. To address these concerns, the B.C. government claims to have regulations in place that will protect the environment and public while allowing for the growth of the aquaculture industry, estimating that over the next decade the aquaculture industry could create anywhere from 9,000 to 12,000 jobs and increase the province's yearly economic activity to more than $1 billion.

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* free of charge, contact: the Sea Grant Law Center, Kinard Hall, Wing 3, Room 262, 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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