Legal Reporter for the National Sea Grant College Program

The SANDBAR

Volume 5:3, October 2006

Ninth Circuit Issues First Wetlands Decision Post-*Rapanos*

Northern California River Watch v. City of Healdsburg, 2006 WL 2291155 (9th Cir. August 10, 2006)

Allyson L. Vaughn, 3L, University of Mississippi School of Law

The Ninth Circuit Court of Appeals recently affirmed a lower court decision that a pond used by a California city to discharge wastewater constitutes "navigable waters of the United States" subject to the Clean Water Act (CWA). This decision marks the first circuit court application of the Supreme Court's ambiguous 4-4-1 opinion in *Rapanos v. U.S.*[1]

Basalt Pond

Basalt Pond, located in California near the Russian River, was created when a large gravel mining pit filled with surface water. The pond, which contains 58 acres of surface water and has a volume of 450 to 740 million gallons, is separated from the river by a levee.

The City of Healdsburg discharges wastewater from a secondary waste treatment plant into Basalt Pond. The yearly volume of wastewater discharged into the pond is 420 to 455 million gallons. Because the annual outflow from the sewage plant is almost equal to the total volume of the pond, Basalt Pond should overflow its banks on a routine basis. It does not

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District Court Preempts Massachusetts' Oil Spill Prevention Act

United States v. Massachusetts, 2006 U.S. Dist. Lexis 50093 (D. Mass. July 24, 2006)

Rick Silver, 3L, University of Mississippi School of Law

On July 24, 2006, the U.S. District Court for the District of Massachusetts ruled that several provisions of Massachusetts' Oil Spill Prevention Act (OSPA) were preempted by federal law and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution. As a result, the state has been enjoined from enforcing certain provisions of OSPA.

Background

In April 2003, the Bouchard Barge was transporting oil when it collided with an outcropping of rocks, sending thousands of gallons of oil into Buzzards Bay. The Bouchard oil spill "soiled about ninety miles of Buzzards Bay beaches and coastline, killed hundreds of birds and marine life, contaminated thousands of acres of shellfish beds, and seriously harmed the overall marine environment of the Bay."[1] In an attempt to prevent future oil spills, the Massachusetts legislature enacted OSPA, which regulated vessels transporting oil in state waters.

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Fourth Circuit Demands Tougher Sentence for First-Time Offender

Coast Guard Withdraws Live-Fire Training Proposal in Great Lakes

Safety Zones; U.S. Coast Guard Water Training Areas, Great Lakes, 72 Fed. Reg. 520 (Jan. 5, 2007).

On January 5, the Coast Guard (CG) withdrew its notice of proposed rulemaking (NPRM) involving the establishment of safety zones throughout the Great Lakes and the restriction of vessels during live fire gun exercises. Although the Coast Guard is authorized to conduct such training exercises in, on, and over the waters of the United States, public concerns over the exercises prompted withdrawal of the notice.

Public Comment

On August 1, 2006, the Coast Guard issued the NPRM, which outlined thirty-four safety zones located three nautical miles from the shoreline of the Great Lakes. The proposal included permanent safety zones "to provide the public with more notice and predictability when conducting infrequent periodic training exercises of brief duration …"

The NPRM provided a period for public comment until August 31; however, due to strong public interest, the Coast Guard extended the opportunity for public comment. Comments came from a variety of sources, including members of Congress, state and local government representatives, environmentalists,

See Tougher Sentence, page 18

The Legal Viability of the 2001 UNESCO Underwater Cultural Heritage Convention

Thomas Street, 2006 National Sea Grant Fellow, Office of the Assistant Administrator, National Ocean Service[1]

In 2001, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted an international convention focused upon the governance of Underwater Cultural Heritage (UCH).[2] Currently, ten States have become signatories to the UNESCO UCH Convention: Panama, Bulgaria, Mexico, Nigeria, Croatia, Paraguay, Portugal, Spain, Libya, and Lithuania, with the agreement coming into force after ratification by twenty States. The agreement is applicable in the maritime zones created by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). In fact, the UNESCO UCH Convention was drafted in large part to address the lack of specificity inherent in the two provisions of UNCLOS that extended to UCH.

UNCLOS provides for eight maritime zones. The first maritime zone is interior waters, which are those waters located landward of the baseline, as established under Articles 5 and 7. The second maritime zone is the territorial sea. Article 3 provides each coastal State with the ability to designate a territorial sea not to exceed 12 nautical miles (NM), as measured from the baseline. The third maritime zone is the contiguous zone. Article 33 allows a coastal State to declare a contiguous zone to no more than 24 NM from the baseline. The fourth maritime zone is the Exclusive Economic Zone (EEZ). Article 56 notes that the EEZ extends to "the waters superadjacent to the seabed and of the seabed and subsoil [not to exceed 200 NM from the baseline . . .] The fifth maritime zone is the continental shelf, which pursuant to Article 76, is that area of the "seabed and subsoil . . . that extend[s] beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 [NM] from the baselines . . . where the . . . continental margin does not extend up to that distance." In two situations (provided for by Article 76), the continental shelf may extend beyond this distance. The sixth maritime zone is the high seas. The high seas are those aspects of the oceanic water column not located in the EEZ, territorial sea, archipelagic waters, or in the internal waters of any State. The seventh maritime zone is the Area, composed of the mineral resources of the seabed and subsoil located beyond the jurisdiction of any State. The eighth and last maritime zone is archipelagic waters. Archipelagic waters are those areas of the ocean that fall within the baselines of an archipelagic State, pursuant to Articles 46-50.

Photograph of underwater exploration courtesy of ©Nova Development Corp.

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Court Rules on Lease of Lands in Alaska's Northwest Planning Area

Tortious Claims Against Ocean City Drown on Appeal to the Third Circuit

Bilyeu v. Ocean City, 2006 U.S. App LEXIS 24881 (3rd Cir. Oct. 2, 2006)

Madeline Bush, 2L, Vermont Law School

On September 11, 1999, Jeffrey Bilyeu drowned off the coast of Ocean City, New Jersey's 30th Street Beach. Danette Bilyeu, Jeffrey's wife, brought claims against the city for the wrongful death of her husband. The Third Circuit Court of Appeals affirmed a the district court's grant of summary judgment in favor of the city, finding that it was immune from suit under the New Jersey Tort Claims Act (NJTCA).

Background

On the day of the accident, Jeffrey had been swimming in shallow waters with the Bilyeus' son, Matthew, when a powerful riptide washed the child from shore. Jeffrey made an effort to save his son; however, Jeffrey became trapped in the strong current gained control of Jeffrey as well. Danette was able to pull Matthew from the dangerous waters, but was unable to reach her husband. No lifeguards were on duty, so by the time lifeguards from a nearby beach reached Jeffrey, he could not be resuscitated. Danette, on behalf of Jeffrey and the rest of her family, filed suit, alleging that Ocean City's "negligent supervision" and "failure to warn" was were the cause of her husband's death.

Immunity from Suit

Prior to the Bilyeu family's misfortune, Ocean City had implemented a beach nourishment program that dredged millions of cubic yards of sediment from the ocean and repositioned it closer to shore. The central issue in the case was whether the nourishment program changed the status of the beach from unimproved to improved, negating the city's immunity from suit. The NJTCA gives immunity to public entities for "an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."[i] Immunity from such suits is an essential protective measure not only for the public entity, but also for the general public. Besides the costs associated with defending claims arising from injury on unimproved property, establishing safe unimproved property would be far too demanding for a public entity to manage. Without the immunity claim, the public may not have access to unimproved public property like Ocean City's 30th Street Beach.

In light of these policy considerations, the New Jersey Supreme Court liberally interprets the term "unimproved." The court determined that the a property is improved if it undergoes a "substantial physical modification from its natural state," and if the physical modification creates a hazard that "did not *previously* exist and which requires management by the public entity."[ii] The court concluded that if all of the facts supported that the beach is unimproved property, then the district court's grant of summary motion in favor of Ocean City should be upheld. If the facts alleged demonstrated that there is a "genuine issue of material fact," then the district court erred in granting the summary judgment.[iii]

An oceanography expert testified that "Ocean City's beach nourishment program substantially modified the natural state of the beach," producing sandbars that are more favorable to riptide formation.[iv] The expert also reported that the "dangerous condition" of the riptide on the 30th Street Beach was a result of

alternatives in the Final EIS. The court found that the Preferred Alternative chosen by the BLM was actually a middle ground alternative, because "it places numerous limitations on the leases, including mandatory deferment and no permanent surface occupancy restriction in some areas."[6]

Third, NAEC argued that the Final EIS did not adequately describe and discuss mitigating measures. Under NEPA, the EIS must contain "a reasonably complete discussion of possible mitigating measures."[7] The Ninth Circuit found that BLM satisfied this requirement through stipulations and Required Operating Procedures, which avoid or reduce the environmental impacts from the oil and gas leasing activities. Also, it was impossible to have more site specific mitigation measures because BLM does not know which areas of the NWPA may be developed. To offset this uncertainty, BLM acknowledged that further protective measures may be implemented with subsequent permitting actions.

Fourth, NAEC claimed that the Final EIS failed to adequately consider cumulative impacts from amending the Northeast EIS (the other planning area within the NPR-A). The Final EIS must address "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement."[8] BLM issued a Notice of Intent to amend the Northeast EIS, which normally triggers a cumulative impact analysis. However, the Notice of Intent indicated that the cumulative impacts from modifying the Northeast EIS would be addressed during the amendment process. Therefore, the Ninth Circuit held that the cumulative impacts analysis did not have to occur at this stage.

ESA Claim

Finally, NAEC argued that BLM violated the ESA because the BiOp prepared by the Fish and Wildlife Service (FWS) failed to asses the entire agency action and ignored the uneven distribution of the Stellar eiders and spectacled eiders, two endangered species within the NWPA. Pursuant to the ESA, the Secretary must "ensure that an action of a federal agency is not

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Photograph of spectacled eider courtesy of USGS.

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Federal Preemption

The federal government and various members of the shipping industry filed suit against Massachusetts, arguing that several provisions of OSPA were preempted by federal law governing maritime oil transportation. The challenged provisions of OSPA (1) "[prohibit] vessels with certain design characteristics from docking, loading, or unloading in Massachusetts waters, (2) [set] forth manning and navigation watch requirements for towing vessels and tank barges, (3) [require] vessels carrying oil in certain Massachusetts waters to 'take on and employ' a Massachusetts licensed pilot, (4) [require] tank vessel operators to implement alcohol and drug testing policies and procedures, and to equip their vessels to carry out such testing, (5) [mandate] tugboat escorts for tank vessels traveling in certain waters of Massachusetts, (6) [require] tank vessels to follow mandatory vessel routes through Massachusetts waters, and (7) [require] any vessel carrying oil in Massachusetts waters to present a certificate of financial assurance to the Massachusetts Department of Environmental Protection."[2]

The U.S. argued that those provisions were in violation of the Supremacy Clause of the U.S. Constitution and subject to preemption, since they were already being regulated by federal statutes and the U.S. Coast Guard via the Ports and Waterways Safety Act of 1972 (PWSA). The Supremacy Clause of the U.S. Constitution states that "the Laws of the United States . . . shall be the Supreme Law of the land."[3] Under the Supremacy Clause, state law may be preempted by federal law when Congress enacts a regulatory scheme so comprehensive that it occupies the entire field of regulation (field preemption) or when compliance with both state and federal law is not possible (conflict preemption). Federal regulations issued by a federal agency also may preempt state law, as long as the agency is acting within authority delegated to it by Congress.

After analyzing each one of the challenged provisions, the court determined that those areas were already regulated by federal law. For instance, the court noted that since Title II of the PWSA grants the federal government the exclusive authority to regulate the manning of tank vessels, then there is simply no room for further OSPA requirements. The court also found that the extent of the federal regulations was quite broad and that each challenged provision of OSPA was already being regulated by the U.S. Coast Guard. For example, the court found that the OSPA drug and alcohol testing provision directly conflicted with Coast Guard test-

Photograph of oil spill damage assessment team courtesy of NOAA's Photo Library.

ing regulations and was therefore preempted. As a result, the court held OSPA was preempted by either the PWSA or other federal statutes.

The court also relied, in part, on the Supreme Court decision of *U.S. v. Locke*, which involved a similar regulatory scheme by the state of Washington.[4] Both the court here and in *Locke* believed that allowing individual states to enact regulation in this area would frustrate the congressional desire of achieving a uniform and national scheme of tank vessel regulation.[5]

Conclusion

The court did not rule on the merits of the OSPA, only whether or not federal law in the area of tank vessel regulation preempted it. Massachusetts has appealed the court's decision to the U.S. Court of Appeals for the First Circuit. "We will fight the federal government to ensure our waters and our coastlines are protected from the types of accidents that necessitated the [OSPA] in the first place," said Massachusetts Attorney General Tom Reilly. "We must continue fighting for these important regulations for the health and well-being of our environment."[6].

Endnotes

1. *U.S. v. Massachusetts*, 2006 U.S. Dist. LEXIS 50093 at *3-4 (D. Mass. July 24, 2006).
2. *Id.* at *4-5.
3. U.S. Const. art. VI, cl. 2.
4. *U.S. v. Locke*, 529 U.S. 89 (2000).
5. *Id.* at 110; *U.S. v. Massachusetts*, 2006 U.S. Dist. LEXIS 50093 at *16.
6. Press Release, Office of the Massachusetts Attorney General, AG Reilly Fights Feds to Protect Buzzards Bay (Sept. 7, 2006), *available at* http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1718.

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likely to jeopardize the continued existence of any threatened or endangered species"[9] and must issue a biological opinion "evaluating the nature and extent of jeopardy posed to that species by the agency action."[10] NAEC challenged FWS's no jeopardy determination in the BiOp because it used assumptions about oil and gas activities supplied by the BLM. The Ninth Circuit held that BLM did not violate the ESA by providing such assumptions, because insufficient information existed about exact locations of oil and gas activity and the BiOp "properly relied on a reasonable and foreseeable oil development scenario."[11]

Conclusion

The Ninth Circuit affirmed the lower court's decision that the BLM's Final EIS did not violate NEPA or the ESA. Subsequent to the court's decision, a separate action was filed in the District Court for the District of Alaska involving the DOI's planned lease of land around Teshekpuk Lake.[12] The district court struck down the department's plan, finding, among other things, that it had violated NEPA and the ESA.[13]

Endnotes

1. 42 U.S.C. § 4332(2)(C).
2. *Id.* § 4332(2)(C)(i)-(iii).
3. *NAEC v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006).
4. *Id*. (quoting 5 U.S.C. § 706(2)(A)).
5. *Id*. at 977.
6. *Id*. at 978.
7. *Id*. at 979 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)).
8. *Id*. at 980 (quoting 40 C.F.R. § 1508.25(a)(2)).
9. 16 U.S.C. § 1536(a)(2).
10. *Id.* § 1536(b).
11. *NAEC v. Kempthorne*, 457 F.3d at 981.
12. *National Audubon Society v. Kempthorne,* No. 1: 05-cv-00008-JKS (D. Alaska, Sept. 25, 2006).
13. *Id*.

Court Upholds Protection of Critical Dune Area on Lake Michigan

Dune Harbor Estates, LLC v. Michigan Department of Environmental Quality, No. 06-81-AA-C30 (Mich. Cir. Ct. Aug. 9, 2006)

Rick Silver, 3L, University of Mississippi School of Law

The Circuit Court for the County of Ingham upheld the decision of the Michigan Department of Environmental Quality (DEQ) preventing a pipe and rock outflow from being built within a critical dune area along Lake Michigan. The construction would have helped control the water level of a man-made lake.

Background

Dune Harbor Estates (DHE) owns property within a "critical dune area" along Lake Michigan. Both DHE and Nugent Sand Company (NSC) are owned by Robert Chandonett. As part of a mining operation by NSC, the company dug a hole that filled with groundwater, creating a lake. At the conclusion of the project, Chandonett hoped to create a housing development around the man-made lake. However, the lake settled at 592 feet instead of its expected 584 feet.

To correct the problem, DHE planned to divert water from the man-made lake to Lake Michigan in order to maintain a constant water level of 586 feet. The proposed pipe would have been disguised by a "rock outfall" on the lakeward side of the dune. DHE claimed that if unable to divert the water, it would be forced to spend substantial sums of money in order to redesign the development, which would include losing a substantial amount of land.

Neither side disputes the fact that this proposed activity takes place within a "critical dune area" as defined under the Sand Dune Act. DHE sought a special exception permit, which the director of the DEQ did not grant. DHE appealed the director's decision.

Sand Dune Act

Section 35302(c) of the Sand Dune Act requires that environmental protection of "critical dune areas" be assured before the DEQ can authorize a petitioner's desired land use.[1] Under Michigan law, the decisions of the DEQ will not be set aside unless the petitioner can show that the agency's decision was not supported by competent, material, and substantial evidence, or there was a material error of law.[2]

Photograph of sand dunes courtesy of ©Nova Development Corp.

DHE argued for a reversal on several grounds. First, while DHE conceded that the Sand Dune Act permits the DEQ to regulate uses which significantly alter the characteristics of a critical dune area, DHE argued that their proposed activity did not "significantly" alter a critical dune area. The company claimed that its proposed rock outfall was only "a 400 square foot pile of rocks" and would not significantly affect the entire critical dune area, which constitutes miles of shoreline.[3] However, the court rejected this argument stating that requiring an activity to affect the

entire critical dune area would completely frustrate the purpose of the Sand Dune Act. The court noted that environmental problems often are the result of aggregated activities that, taken individually, do not harm the overall environment enough to make a noticeable difference.[4]

Next, DHE contended that the provision of the Sand Dune Act providing that any "structure" placed lakeward of a dune is prohibited without a variance did not apply, since the proposed rock outfall is not a structure. The court disagreed and found that DHE's proposed use would have "considerable size and imposing appearance" and, therefore, constitutes a structure.

The Sand Dune Act also provides a provision which allows the DEQ to grant a "special exception" variance if a practical difficulty will occur to the owner of the property if the special exception is not granted.[5] DHE argued that any other alternative to its proposed pipe and rock outfall would be impractical and expensive, and, therefore, the DEQ should grant them a variance. However, the court again sided with the DEQ in denying a variance to DHE based on the practical difficulty standard. In denying the variance, the court relied on Michigan case law which states that self-created problems "are not a proper basis for granting a variance."[6] The court agreed with the DEQ assessment which stated that DHE's decision "to proceed with a site development plan before the water level had stabilized and without adequate advice from hydrological experts made it a self-created problem."[7]

Conclusion

The court found that the director of the DEQ did not abuse his discretion and acted well within his authority in denying DHE's proposed project that would have affected a critical dune area along Lake Michigan's shoreline.

Endnotes:

1. Mich. Comp. Laws § 324.35302(c).
2. Mich. Comp. Laws § 24.306.
3. *Dune Harbor Estates, LLC v. Michigan Dep't of Envtl. Quality,* No. 06-81-AA-C30 at *4 (Mich. Cir. Ct. Aug. 9, 2006).
4. *Id.* at *5.
5. Mich. Comp. Laws § 324.35317.
6. *National Boatland, Inc. v. Farmington Hills Zoning Board of Appeals,* 380 N.W. 2d. 472 (Mich. Ct. App. 1985).
7. *Dune Harbor Estates,* No. 06-81-AA-C30 at *13.

Publication Announcement

The Law Center is pleased to announce the publication of an article by SandBar research associate Jim Farrell and Marie Quintin, *A Practitioner's Guide to Protecting Wetlands in a Post-Rapanos World*, 36 Environmental Law Reporter 10814 (2006).

The recent plurality opinion of the U.S. Supreme Court in *Rapanos v. United States* left questions about federal jurisdiction under the CWA. Justice Scalia's plurality opinion calls for a limited approach when analyzing which wetlands fall within the jurisdiction of the U.S. Army Corps of Engineers; however, Justice Kennedy's concurrence requires a "significant nexus" standard.

In this article, Farrell and Quintin help clarify the opinion and examine its impact on determining jurisdiction over wetlands. The authors first explain how to construe a plurality opinion. The article then explains the tests outlined by both Justices. The article also contains a "jurisdictional wetlands test," to help determine whether the federal government has jurisdiction over wetlands. The appendix provides a useful chart comparing the language used by Justice Scalia and Justice Kennedy.

Sunken Ship Subject to Admiralty Jurisdiction

The Puerto Rico Ports Authority v. Umpierre-Solares, 2006 U.S. App. LEXIS 18797 (1st Cir. July 27, 2006)

Terra Bowling, J.D.

The U.S. Court of Appeals for the First Circuit has ruled that the Puerto Rico Ports Authority (PRPA) is barred from enforcing a contract to raise and dispose of a sunken vessel. Additionally, the court held that the dispute was subject to admiralty jurisdiction, since the ship was obstructing passage in navigable waters.

Background

"La Isla Nena" sank off the coast of Puerto Rico in 1989 during Hurricane Hugo. In 1991, the United States Army Corps of Engineers (Corps) prompted the owner, the PRPA, to remove the vessel. The PRPA contracted to have the boat removed and disposed of by the defendants, which included a marine salvage company, Divers Service Center (DSC).

Photograph of sinking ship courtesy of NOAA's Office of Response and Restoration.

In 1992, DSC raised the vessel and moored it at a shipyard, but was unable to obtain the permits required to resink the ship. The PRPA and DSC modified the contract to dispose of the vessel in the "most convenient and speedy way possible."[1] DSC failed to take any action, however, and the vessel subsequently sank after a storm in 1998.

Admiralty Jurisdiction

In 2003, PRPA brought suit in a Puerto Rican court to require the defendants to dispose of the vessel. DSC removed the matter to federal district court based on the exclusive admiralty jurisdiction of the federal courts. The district court held that the PRPA was barred from enforcing the contract, because it waited eleven years to bring the suit.

The PRPA appealed the ruling, citing lack of jurisdiction. The PRPA claimed that the case had been improperly removed to federal court, since the contract involved a "dead ship" to which admiralty jurisdiction did not apply. The dead ship doctrine is applicable when "[a ship's] function is so changed that it has no further navigation function."[2]

The First Circuit declined to determine whether the ship was, in fact, a "dead" or "live" ship. The court agreed with the marine company that in either case the claim was subject to admiralty jurisdiction, because the contract related to the removal of an obstruction to navigation in San Juan Bay.

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Arkansas Regulations not Preempted by Migratory Bird Treaty Act

Noe v. Henderson, 456 F.3d 868 (8th Cir. Aug. 7, 2006)

Terra Bowling, J.D.

The Eighth Circuit Court of Appeals has ruled that the Migratory Bird Treaty Act (MBTA)[1] and the regulations promulgated under it do not preempt Arkansas regulations involving captive-reared mallard ducks.

Background

Arkansas Game and Fish regulations require that those maintaining captive-reared mallard ducks must keep the ducks in covered pens, comply with monthly reporting requirements, and obtain approval from the Arkansas Game and Fish Commission before releasing the birds.[2] W.H. "Dutch" Noe, owner of Ducks & Ducks, Inc., Tommy Taggart, owner of Mallard Magic, and Brian Herndon, owner of Big Creek Hunting, were cited by the Commission for violating the regulations.[3] After refusing to comply with the Arkansas regulations, Noe and Taggart's Wildlife Breeder/Dealer permits issued by the Commission were revoked.[4] The three men filed a complaint in federal district court, arguing that the Arkansas regulations were preempted by the MBTA. The United States District Court for the Eastern District of Arkansas held that the MBTA did not preempt the Arkansas regulations. Noe, Taggart, and Herndon appealed the decision.

Federal Preemption

State law may be preempted by federal law in several ways. In examining a preemption claim, a court will determine whether 1) Congress has explicitly prohibited state regulations; 2) Congress has implicitly prohibited state regulation by "pervasively occupying the entire regulatory field;" 3) state laws are in direct conflict with federal laws; or, 4) a federal agency, acting within its delegated authority, has shown intent to preempt state law.[5]

The Court of Appeals agreed with the district court's finding that Congress did not occupy the entire field of permit requirements for captive-reared mallard ducks, because it was not specifically included in the MBTA. The court also found that neither the MBTA nor the regulations made pursuant to it conflicted with or expressly prohibited the Arkansas regulations. The court interpreted § 711 of the MBTA to permit the states to regulate the breeding and sales of captive-reared mallard ducks and other migratory birds reared in captivity for food, as long as the states acted in accordance with federal law. As a result, the Eighth Circuit affirmed the district court's decision.

Endnotes

1. 16 U.S.C §§ 703-712.
2. Ark. Game & Fish Comm'n Code §§ 15.01, 15.05, 15.11(B), 15.12, and 15.13(D).
3. *Noe v. Henderson*, 373 F. Supp. 2d 939, 941-42 (D. Ark. 2005).
4. *Id*.
5. *Noe v. Henderson*, 456 F. 3d 868, 869 (8th Cir. Aug. 7, 2006).

Photograph of migratory birds courtesy of Nova Development Corp.

Company Not Exonerated for Snuba Diving Death

Fish and Wildlife Service Must Comply with Endangered Species Act Requirements

Center for Biological Diversity v. Kempthorne, 466 F.3d 1098 (9th Cir. 2006)

Allyson L. Vaughn, 3L University of Mississippi School of Law

The Ninth Circuit Court of Appeals recently held that when the U.S. Fish and Wildlife Service (FWS) makes a "warranted but precluded" finding under the Endangered Species Act (ESA) it must comply with the explicit requirements provided by the ESA.

Photograph of Hawaii courtesy of ©Nova Development Corp.

Background

On February 8, 2000, the Center for Biological Diversity and the Pacific Rivers Council (collectively, the Center) petitioned the FWS to list the Sierra Nevada Mountain Yellow-Legged Frog (the Frog) as endangered under the ESA. Approximately eight months later, the FWS published an initial finding indicating that the Frog may require listing. After the initial finding, the FWS began a status review to determine the appropriateness of listing. The FWS failed to release its finding within the twelve month period required by the ESA, and the Center filed suit in the Northern District of California. The district court required the FWS to issue its finding.

The FWS published its twelve-month finding on January 16, 2003 (the Frog Decision), which found that listing the Frog was necessary but "precluded by other higher priority listing actions."[i] At the time, the highest priority for the FWS was to comply with court orders and judicially approved settlements, with all remaining funds were applied to emergency listings and listings of higher priority species.[ii] The FWS listed the Frog as a "candidate" species for future listing purposes and assigned a priority ranking of "three" on the 12-level scale where "one" constitutes an emergency. A candidate is a species for which the FWS has sufficient information on file regarding the "biological vulnerability and threats to support a proposal … but for which preparation and publication of a proposal is precluded by higher-priority listing actions."[iii]

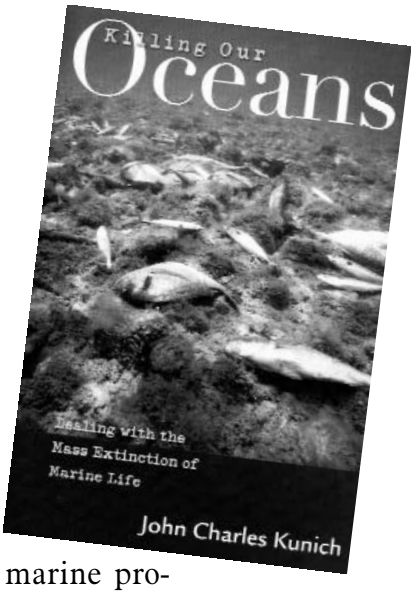
The ESA requires a finding of "warranted but precluded" to be published in the Federal Register and to include "a description and evaluation of the reasons and data on which the

See Snuba Diving, page 15

Book Review

Killing our Oceans: Dealing with the Mass Extinction of Marine Life

John Charles Kunich (Prager 2006)



Stephanie Showalter

Despite the heightened attention the plight of the world's oceans received following the release of the reports of the U.S. Commission on Ocean Policy and Pew Oceans Commission a few years ago, very little has changed with respect to our management of the oceans. Fishing continues to deplete already overexploited stocks, destructive harvesting techniques associated with the aquarium trade threaten coral reefs around the world, coastal development destroys essential habitat, and pollution fills the oceans with toxic chemicals and dangerous plastic waste. Mostly out of sight, the complex web of ocean life is under attack.

In *Killing our Oceans*, John Charles Kunich sounds a passionate plea for action to save ocean "hotspots," key areas that are rich in species diversity. Our knowledge of marine biodiversity and its effects on ecosystems lags far behind our knowledge of terrestrial biodiversity. For example, between 1987 and 2004, only 9.8 percent of the published research addressed marine biodiversity.[1] Despite dozens of international treaties, including the Convention on Biological Diversity, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the U.N. Convention on the Law of the Sea, and hundreds of domestic laws, the destruction continues. Kunich argues that international and domestic laws to prevent extinction are ineffective and nothing more than a "dangerous placebo."

Killing our Oceans is rather light on legal analysis. Chapter 2 does cover the biodiversity-related provisions in several major international treaties, but provides little more than a summary. Even less detail is provided on the extensive domestic legal efforts of such countries as Australia to protect ocean habitats through marine protection areas. Kunich, however, did not intend to write a law review article. His goal, as stated in the preface, "is to educate and to persuade people that something of incredible value is being irretrievably lost, right now, right below the waves, and we need to take swift action to prevent it." *Killing our Oceans* is written for a general audience. Kunich's explanations of key scientific terms and legal concepts are easy to understand and free of excessive jargon. Even if Kunich's arguments reach only one policymaker willing to raise the issue, *Killing our Oceans* is a valuable contribution to the conservation movement.

In a refreshing change, Kunich does more than simply lament the failure of the legal system to protect marine biodiversity. He offers an alternative to business as usual and promotes an incentives-based statutory approach to protecting marine hotspots. His model is the 1998 U.S. Tropical Forest Conservation Act (TFCA). Through the TFCA, eligible developing countries can obtain relief from official debt owed the U.S. and generate funds to support local tropical forest conservation activities. Kunich argues that a similar "debt for marine conservation activities" could succeed where traditional "command and control" efforts have failed. At this point, every option needs to be explored.

Endnote

1. Hendricks, I., et. al., 2006. Biodiversity Research Still Grounded. *Science* 312:1715.

Court Upholds Hydroelectric Project Relicensing

Oil Company Cleanup Halted by Injunction

Marrero Hernandez v. Esso Standard Oil Co., 429 F. Supp. 2d 469 (D.P.R. May 2, 2006)

Terra Bowling, J.D.

In April 2006, Esso Oil Company began a remediation project at the site of an old service station in Puerto Rico. When residents filed suit alleging that the project was causing widespread health problems, the United States District Court for the District of Puerto Rico granted a preliminary injunction, forcing the company to stop the project.

Background

The site of the old gas station had been contaminated by underground storage tanks that were leaking in violation of several federal environmental statutes, as well as Puerto Rico nuisance and tort laws. To repair the damage, Esso planned to drill more than thirty holes on the contaminated land and to excavate the soil. The remediation process would have taken approximately four months.

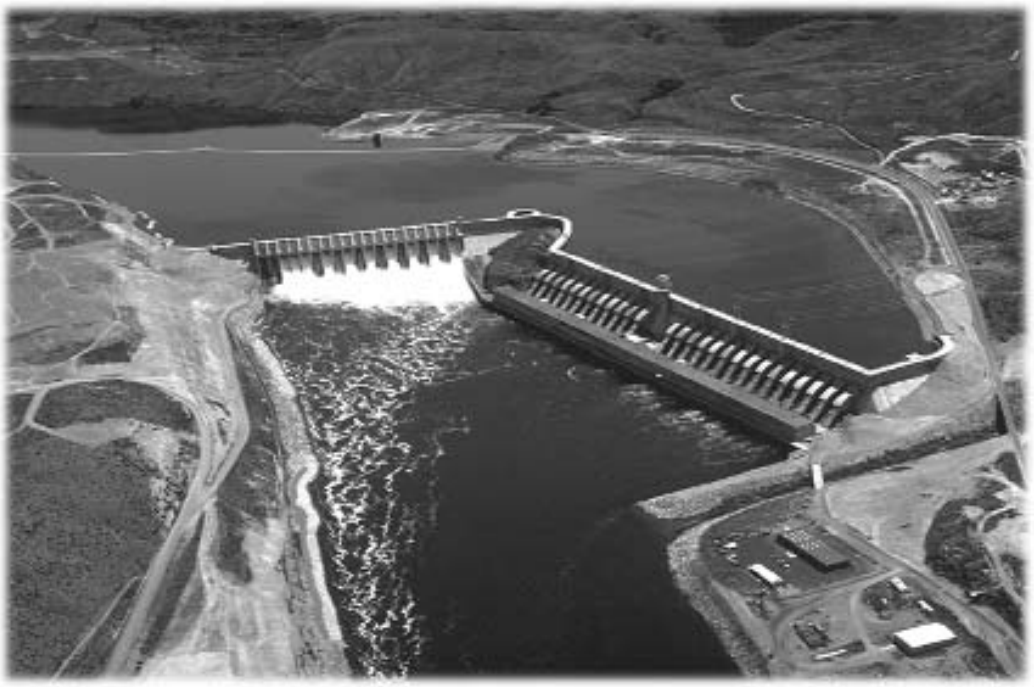
Soon after drilling began, residents of La Vega Ward in Barranquitas, Puerto Rico, began complaining of gasoline odors and reporting dizziness, shortness of breath, nausea, and headaches. An Esso representative was sent to examine the complaints, but the company continued drilling for the next several days, prompting more residents to seek medical care. The residents sought a temporary restraining order, which was converted to a request for a preliminary injunction under Puerto Rico's nuisance statute.

Nuisance Statute

The district court noted that "a plaintiff seeking injunctive relief under the nuisance statue must show that the activities being carried out by the defendant, due to the manner in which they are being carried out, transcend reasonable limits, and therefore impose a burden that exceed[s] that which he or she need bear."[i] In this case, the court found that the residents presented enough evidence to meet that test.

Several residents testified about the effect of the odors on themselves and family members, including children and the elderly. The residents were also able to introduce medical records confirming their symptoms.

Photograph of Washington hydroelectric dam courtesy of the University of Washington



Columbia River Basin Fish and Wildlife Program (Program) with regard to hatchery management provisions. The Program requires licenses to provide "full compensation for unavoidable fish losses or fish habitat losses thorough habitat restoration or replacement, appropriate propagation, or similar measures."[5] The court declined to address this issue, noting that it did not have jurisdiction because the tribe failed to raise the claim in its request for rehearing before the Commission.

Several of the license's flood control provisions were also challenged by the tribe. The tribe argued that the Commission did not have enough evidence to conclude that the flood control provisions in the license would provide ample flood protection. The court disagreed. The Commission had required Tacoma to conduct a computerized flood flow analysis, which demonstrated the efficacy of the license provisions, and took into account historical flooding data from an Army Corps of Engineers reports.

The tribe's final challenge to the license rested on an alleged violation of the Federal Advisory Committee Act (FACA). FACA applies to advisory committees which are established by federal agencies for the purpose of obtaining advice or recommendations. The tribe claimed that provisions in the license which required Tacoma to consult with a new Fisheries Technical Committee violated FACA. The court held that FACA was inapplicable to the Committee, because its purpose was to provide advice to Tacoma, not a federal agency.

Endnotes

1. See *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1165 (9th Cir. 2001).
2. *Id*. at 1165.
3. *Cowlitz Indian Tribe v. FERC*, 2006 U.S. App. LEXIS 19129 (9th Cir. July 2006).
4. 16 U.S.C. § 808(a)(3)(A).
5. *Cowlitz Indian Tribe*, 2006 U.S. App. LEXIS 19129 at *9.

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exonerating it from any liability stemming from negligence.

Limitation of Liability

Morning Star asserted that under the Limitations Act, even if it was negligent, it is entitled to limit its liability because it had no knowledge or privity with respect to the alleged negligence. Morning Star pointed to Yip's affidavit, which stated that "[p]rior to the incident . . . [,] Morning Star Cruises, Inc.[,] had no prior notice or knowledge or problems with the vessel, or procedures, or the 'SeaWalker' system."[3]

In rejecting Morning Star's argument, the court held that Yip's affidavit was insufficient to prove that Morning Star had no "knowledge or privity" with respect to the alleged negligence. The court reasoned that a court must first determine what acts of negligence caused the accident, and because there was no knowledge of what caused the drowning, the court could not accept an assertion that Morning Star was not contributorily negligent. Therefore, Morning Star was not entitled to reduced liability stemming from negligent acts to which it had no "knowledge or privity."

Conclusion

The United States District Court for the District of Hawaii held that there were issues of fact regarding Morning Star's alleged negligence that precluded Morning Star from exoneration through summary judgment. As a result, the court denied Morning Star's motion for summary judgment, and the case will proceed to trial.

Endnotes

1. 46 U.S.C §§ 181-195.
2. *Fukuoka v. Morning Star Cruises*, 2006 U.S. Dist. LEXIS 60666 at *8-9 (D. Hawaii. August 24, 2006).
3. *Id*. at *22-23.

Wetlands Decision, from page 1

do so, because the pond drains into an aquifer which seeps directly into the Russian River over a period of a few months.[2] Healdsburg did not possess a National Pollutant Discharge Elimination System (NPDES) permit authorizing its discharge of wastewater into the pond, but it did have a state water emission permit and permission from Syar Industries, Inc., the owner and manager of the pond.

District Court Decision

The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] To achieve this goal, the CWA requires individuals seeking to discharge pollutants into the "navigable waters of the United States" to obtain a NPDES permit from the Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers, or an authorized state agency.[4] "Navigable waters" are defined as "waters of the United States, including the territorial sea."[5] The issue before the court was whether Basalt Pond is a water of the United States and subject to the permitting requirements of the CWA.

The district court held that because the river is navigable, the adjacent wetlands, including Basalt Pond, are also covered by the CWA.[6] The court's decision was based on two Supreme Court decisions that preceded *Rapanos*, including one holding that found a "significant nexus" was required for the exercise of federal jurisdiction under the CWA.

The district court found a significant nexus based on a number of connections that exist between the two bodies of water. First, Basalt Pond and the Russian River are hydrologically connected. Water from the pond flows directly into the adjacent river over the man-made levee and drains into an aquifer that in turn flows into the river. In addition to the hydrological connection, the district court also found ecological connections including common fish, bird, and mammal populations. Finally, the chemical connection between the river and the pond is indisputable. The concentration of chloride in the groundwater between the pond and the river is drastically increased as a direct result of sewage drainage into the pond.

Ninth Circuit's Application of *Rapanos*

In *Rapanos*, the Supreme Court split right down the middle voting 4-4-1. The plurality opinion, authored by Justice Scalia, argued that only "wetlands with a continuous surface connection to bodies that are 'waters of the United States'" are protected under the CWA.[7] Justice Stevens, writing for the four dissenters, would have provided for expansive protection finding even tributaries of navigable waters to be protected under the CWA. However, Justice Kennedy's opinion is controlling because, although it did not receive support from more than half of the judges, it is based on the narrowest legal grounds.

Justice Kennedy argued that wetlands constitute navigable waters if the wetlands have a "significant nexus" to "navigable-in-fact waterways."[8] Kennedy further explained that a significant nexus exists when the wetlands, either alone or in combination with other lands in the area, "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[9]

Photograph of pond courtesy of Nova Development Corp.

Where a significant nexus exists, jurisdiction under the Clean Water Act exists.

The Ninth Circuit affirmed the district court's finding that a significant nexus exists between the Russian River and Basalt Pond. The court held that there was sufficient evidence of hydrological and ecological connections and physical and chemical impact to support the exercise of jurisdiction. The court rejected Healdsburg's arguments that two CWA exceptions applied in this case. Healdsburg first argued that the CWA regulations expressly exclude "waste treatment systems" from "waters of the United States."[10] The court rejected this claim because the pond is not part of a treatment system included in an NPDES permit. Healdsburg also argued that its operation qualified for the excavation operation exception. CWA regulations exclude from "waters of the United States" any "waterfilled depression" that serves as part of an ongoing excavation operation.[11] The court rejected this argument because evidence was presented that indicated all excavation operations at Basalt Pond had been discontinued.

Conclusion

As a result of the ruling, Healdsburg must acquire an NPDES permit prior to continuing the discharge of wastewater into the pond. Should the city fail to do so, the city could face civil and criminal liability for violating the CWA. Ultimately, this decision will require Healdsburg to reduce the level of chlorine in the water by treating it prior to discharge.

Endnotes

1. 126 S.Ct. 2208 (2006).
2. *Northern California River Watch v. City of Healdsburg*, 2006 WL 2291155 at *2 (9th Cir. August 10, 2006).
3. 33 U.S.C. § 1251(a).
4. *Id.* § 1311(a).
5. *Id.* § 1362(7).
6. 33 C.F.R. § 328.3(a)(7).
7. *Rapanos*, 126 S. Ct. 2208, 2226 (2006).
8. *Id.* at *2240.
9. *Id.* at *2248.
10. 33 C.F.R. § 328.3(a)(8).
11. *Id.* § 328.3(a).

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Laches

The PRPA also appealed the district court's ruling that it had waited too long to bring its claim. In making its decision, the district court had applied the doctrine of laches. Laches is an equitable doctrine that bars a lawsuit when one party has neglected to enforce a right for an unreasonable period of time, prejudicing the other party.

The PRPA argued that the court should have applied a Puerto Rican law which provided a 15-year statute of limitations for lawsuits related to professional services contracts. The court disagreed, noting that federal or state statutes of limitations do not apply in admiralty suits. The court did point out that the time limitations in federal or state laws could be used "to establish burdens of proof and presumptions of timeliness and untimeliness." However, the main inquiry is "whether the plaintiff's delay in bringing suit was unreasonable and whether defendant was prejudiced by the delay."[3]

The court noted that the PRPA knew since 1992 that La Isla Nena had not been resunk. Despite that knowledge, it made no attempt to force DSC to remove the vessel. In addition, the court found that the PRPA failed to provide a reasonable explanation for the lack of inaction. The eleven-year delay was therefore unreasonable. The court affirmed the ruling in favor of DSC and ordered the PRPA to pay for the costs of the litigation.

Endnotes

1. *The Puerto Rico Ports Authority v. Umpierre-Solares*, 2006 U.S. App. LEXIS 18797 at *3 (1st Cir. July 27, 2006).
2. *Id*. at *6-7.
3. *Id*. at *17.

Tougher Sentence, from page 2

any modification."[1] In a subsequent modification request submitted by Balfour, the Corps also authorized construction of a temporary bridge; however, the Corps explicitly prohibited "prop washing or jetting, techniques used to dredge and displace material from the bottom of a water course."[2]

Balfour began construction of the bridge in 1998. Two years later, the company had exceeded budget predictions, received an "abysmal safety record,"[3] and fallen far behind schedule. Recognizing the perilous state of its project, Balfour hired Hillyer as project manager. In addition to completing construction of the bridge on schedule, Hillyer reduced costs and won an award for "the safest project on the East Coast."[4] Unfortunately, the end of construction marked the beginning of a series of charges of permit violations.

Hillyer's Permit Violations

The Corps discovered Hillyer's first permit violation one day before completion of construction. Having learned from DOT that Hillyer had ordered his employees to dump fill material from the project into wetlands at a nearby marina site, a Corps representative confronted Hillyer. After the Corps representative explained that the dumping constituted a violation of the permit and demanded that Hillyer cease the illegal activity, Hillyer "responded with profanity and essentially told the [Corps representative] that . . . he would do what he wanted."[5]

Soon after the bridge's opening, the Corps confronted Hillyer again - this time for a different permit violation. Balfour had ordered the prompt removal of the temporary bridge, because it needed the trestle transported and reassembled at another bridge project. Hillyer initially tried using a crane to extract the trestle's pilings, but sediment that had collected around the pilings prevented the crane from getting close enough to do the job. To remove the sediment, Hillyer first ordered his employees to use a clam bucket. When DOT informed Hillyer that his activity constituted dredging in violation of the permit, Hillyer resorted to another dredging technique, prop dredging with tugboat propellers. DOT approached Hillyer again, explaining that prop dredging violated applicable permit restrictions. Feigning compliance, Hillyer responded by requesting that DOT seek a permit modification to authorize the activity. In the meantime, however, Hillyer began assembling his workers in the evenings, ordering them to continue prop dredging under cover of darkness. When an employee informed Hillyer that DOT was capturing the clandestine operation on video, Hillyer instructed his crews to continue working. For more than a week,

Photograph of dredge courtesy of the U.S. Fish & Wildlife Service.

tugboats operated at night and without the use of navigation lights "in an obvious attempt to conceal the unpermitted activity from DOT."[6]

Hillyer's excavation operations "displaced roughly 5,500 cubic yards (about 500 dump truck loads) of sound bottom and disturbed 8.2 acres of shallow water habitat designated as 'high quality.'"[7] The government eventually charged both Balfour and Hillyer with violations of the Rivers and Harbors Act of 1899 and the Clean Water Act.

A Slap on the Wrist

After pleading guilty in May 2004, Balfour received a $400,000 fine, five years' probation, and was also required to reimburse DOT for $36,000 in mitigation costs. Hillyer pled guilty several months later, and the district court sentenced him to three years probation, 300 hours of community service, and a $10,000 fine.

On appeal, the government challenged the leniency of Hillyer's sentence. The district court had increased Hillyer's sentence "for 'ongoing, continuous, and repetitive discharge and release of a pollutant,'" but made a downward adjustment based on Hillyer's "acceptance of responsibility . . . [and the] lack of permanent environmental harm and the lack of public health risk."[8] The district court had considered that sentence "unduly harsh" and made another "downward departure under § 5K2.20 [of the U.S. Sentencing Guidelines Manual] for aberrant behavior."[9]

Downward Departures Based on Aberrant Behavior

The Fourth Circuit held that the district court improperly granted Hillyer a departure under § 5K2.20 for aberrant behavior. The Fourth Circuit explained that a court can only grant such a departure if the defendant "'committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.'"[10] Noting that the sentencing guidelines account for a defendant's criminal history, the Fourth Circuit further explained that "aberrant behavior must 'mean . . . something more than merely a first offense.'"[11]

In this case, Hillyer failed even to meet the guideline's threshold requirement of a "'single criminal occurrence or single criminal transaction,'" because his conduct resulted in multiple permit violations spanning more than a week.[12] Additionally, his violations required significant planning and were not of limited duration. By ordering his employees to engage in prop dredging only at night and for a period of almost ten days, Hillyer intentionally disregarded permit restrictions and designed a strategy that he hoped would avoid detection by DOT. Finally, given that the Corps had earlier reprimanded Hillyer for dumping fill material into nearby wetlands, Hillyer arguably did not have an immaculate record that would define his subsequent prop dredging operations as a "marked deviation from an otherwise law-abiding life."[13]

Conclusion

The Fourth Circuit indicated a willingness to consider a defendant's demonstrated commitment to environmental compliance; however, it refused to guarantee that adherence to previous permit restrictions would mitigate a defendant's sentence for future permit violations.

Endnotes

1. *United States v. Hillyer*, 457 F.3d 347, 349 (4th Cir. 2006).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 350.
7. *Id.*
8. *Id.*
9. *Id.* at 351.
10. *Id.* at 352 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K2.20(b) (2004)).
11. *Id.*
12. *Id.*
13. *Id.*

Shipwreck, from page 3

As indicated above, UNCLOS has two provisions that relate to the UCH. Article 149 provides that archeological resources found in the Area are to be "preserved or disposed" for the benefit of humanity as a whole, with particular regard paid to States with a historical or cultural link. Of the four subprovisions of Article 303, two are of paramount importance to this issue. The first, Article 303(2), allows States to exercise indirect authority over UCH located in the contiguous zone by "presum[ing] that their removal from the seabed would result in an infringement" of pertinent laws of its territory or territorial sea. The second, Article 303(4), notes that "[t]his article is without prejudice to . . . other international agreements and rules of international law regarding the protection of objects of an archeological or historical nature."

The United States and other major maritime powers (mainly the industrialized States of Europe, as well as Russia) have great concern with the legal viability of the UNESCO UCH Convention and do not support its implementation.[3] These concerns are largely grounded upon two main considerations: the treatment of warships and enhanced coastal State jurisdiction in alleged contravention to UNCLOS. Focusing upon the latter issue, this article will specifically analyze whether the UNESCO UCH Convention can be considered legally viable in light of UNCLOS in accordance with the Vienna Convention on the Law of Treaties.

Treaties and Treaty Interpretation

Treaties are perhaps the most important element of the modern international system and are necessary as they provide the mechanism by which States can interact with each other in a manner which entails "binding" obligations. Modern treaty law is codified by the Vienna Convention on the Law of Treaties (Vienna Convention) and is predicated upon long-existing customary international law. It is important to note that even as the United States has not acceded to the Vienna Convention, it accepts its provisions as evidence of binding customary international law. International treaty law provides a two-step methodology that addresses the possible reconciliation of successive treaties relating to the same general subject area, as is the case with the UNESCO UCH Convention and UNCLOS. The first step attempts to reconcile successive varying international agreements through interpretation so that both of the agreements can coexist. Under this method, "[a] harmonizing approach to the interpretation of two colliding treaties follows a relatively soft approach in order to coordinate agreements . . . If two treaties can be brought into harmony by an interpretation that coordinates their contents," more formal conflict resolution methods need not be invoked.[4] If this attempt fails, the second step utilizes the protocols of the Vienna Convention on the Law of Treaties, largely Article 30, to determine the legal priority and viability of each international agreement vis-à-vis the other. In regards to this second rule, Article 30 of the Vienna Convention is clear that first priority must always be given to the intent of the parties as expressed by any conflict and compatibility clause.[5] In this regard, Article 30 of the Vienna Convention notes, in part, that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." As the UNESCO UCH Convention has a provision which states that "[t]his Convention shall be interpreted and applied in the context of and in a manner consistent with international law, [including UNCLOS,]" this analysis will focus upon the legal status of the UNESCO UCH Convention under contemporary international treaty law in relationship to UNCLOS, the treaty that codifies most international oceans law.

The first step in treaty resolution attempts to reconcile agreements through interpretation. Attempting to interpret UNCLOS and the UNESCO UCH Convention so as to allow both to be executed is seemingly impossible due to explicit grants of authority in the UNESCO UCH treaty not provided for by UNCLOS. To be successful, the contents of both treaties need to be successfully harmonized so that the exe-

cution of one does not frustrate the intent and purposes of the other. As a baseline, it is important to remember that UNCLOS is considered to be the pre-eminent international agreement relating to the oceans with definitive limits placed upon the rights of States in each maritime zone. In balancing the interests of coastal and maritime States, UNCLOS provides tightly constrained grants of jurisdiction which state the explicit limits to which their powers extend in each maritime zone. In its broad delegation to coastal States to "regulate and authorize activities directed at [UCH]" in regards to the contiguous zone or "prohibit or authorize any activity directed at" UCH in terms of the EEZ or continental shelf, the UNESCO UCH Convention clearly attempts to provide enhanced coastal State jurisdiction contrary to UNCLOS.

As reconciliation proves impossible, the second step in treaty analysis utilizes relevant provisions of the Vienna Convention to assess the legal priority and viability of pertinent instruments. Guidance for this is provided by Article 30 of the Vienna Convention which notes, in part, that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail." As the UNESCO UCH Convention states "[t]his Convention shall be interpreted and applied in the context of and in a manner consistent with international law, [including UNCLOS,]" the following analysis, as to each maritime zone, will illustrate how the UNESCO UCH Convention is fatally conflictive and cannot validly be applied in the context of UNCLOS.

Internal Waters, the Territorial Sea, and Archipelagic Waters

UNCLOS establishes the sovereign status of a State's internal waters. With the UNESCO UCH Convention's requirement that detailed archeological standards apply to UCH even within internal waters, the sovereignty of a coastal State is clearly impinged. This issue also extends to the territorial sea and archipelagic waters. In both of these additional zones, States are accorded sovereignty, subject to a number of limitations relating to innocent passage. Consequently, any affirmative requirement that archeological standards be applied in these maritime zones impinges upon coastal State sovereignty in a manner not prescribed by UNCLOS.

The Contiguous Zone

It is very likely that the provisions of the UNESCO UCH Convention relating to the contiguous zone "prejudice[s] the rights, jurisdiction and duties of States" under UNCLOS. As illustrated above, UNCLOS does not grant

See Shipwreck, page 22

Photograph of shipwreck courtesy of the U.S. Fish & Wildlife Service.

Shipwreck, from page 21

direct regulatory jurisdiction for coastal States over UCH in the contiguous zone, but rather provides indirect regulatory authority over UCH by equating removal from that zone as being a violation of pertinent laws of the territorial sea or a State territory. By directly extending powers to "regulate and authorize" activities related to UCH, the UNESCO UCH Convention consequently impacts the rights and jurisdiction of States as provided by UNCLOS.

The EEZ and the Continental Shelf

It is also likely that the provisions of the UNESCO UCH Convention granting coastal States the right to allow or forbid any activity directed towards UCH in its EEZ or on its continental shelf "prejudice[s] the rights, jurisdiction and duties of States" provided by UNCLOS. UNCLOS provides extensive provisions governing the exploitation, conservation, management and exploration of natural resources located in the EEZ and continental shelf. On the whole, States are afforded more rights in the EEZ than on the continental shelf. As UNCLOS has already established the rights and duties of States in this zone, any attempt by the UNESCO UCH to extend rights not contemplated by UNCLOS into these zones is problematic.

There are two other problematic issues in regards to the EEZ and continental shelf. The first is the requirement of prior notification for activities directed at UCH and for discoveries in the EEZ and on the continental shelf of both the flag State or State of nationality as well as any third party States. The second is the allowance of emergency jurisdiction to a coastal State in regards to UCH located in its EEZ or on its continental shelf for stabilization purposes. Both of these considerations clearly affect the rights, duties, and jurisdiction of State-parties.

The Area

The majority of the UNESCO UCH Convention's provisions as to the Area are a legally viable supplement to UNCLOS under international treaty law; however, there are some problematic components. The first is the granting of authority to States to engage in emergency remedial efforts for non-military UCH located in the Area. This is a grant of authority nowhere contemplated within UNCLOS. The second relates to the requirement that State parties require their nationals and vessels to provide prior notification of any activities directed at UCH and all discoveries, as discussed above.

Article 303(4) and the Future Development of UCH Management Measures

UNCLOS provides for detailed procedures by which subsequent agreements may be created and its relationship to any consequent agreements managed. In general, Article 311(3) requires that subsequent agreements not derogate from the basic principles underlying UNCLOS. However, Article 311(5) notes that Article 311 as a whole does "...not affect international agreements expressly permitted or reserved by other articles of the Convention." In possible relationship to this, Article 303(4) expressly states that it "is without prejudice to other international agreements and rules of international law regarding the protection of an archeological and historical nature." Some have argued that Article 303(4), in conjunction with Article 311(5), allows subsequent international agreements that relate to the UCH to derogate from the basic principles underlying UNCLOS (i.e., expanded coastal State jurisdiction). The viability of this argument is unclear through a plain interpretation of UNCLOS. The legislative history of Article 303, however, is quite clear that the drafters were very much against any expansion of coastal State jurisdiction in regards to UCH.

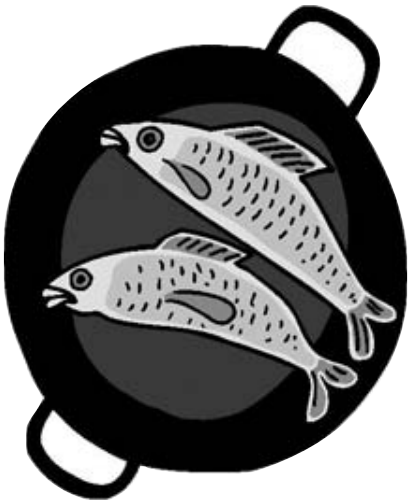
This issue, however, does not affect the UNESCO UCH Convention's application in relation to UNCLOS, due to the former's provisions stating that "[n]othing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including [UNCLOS]. This Convention shall be interpreted and applied in the context of and in a manner consistent with international

law, including [UNCLOS]." Consequently, as the UNESCO UCH Convention requires that it be interpreted in light of UNCLOS, it can be seen, based upon the analysis provided above, that the UNESCO UCH Convention is an invalid attempt at supplementing Articles 149 and 303 of UNCLOS pursuant to the Vienna Convention.

Endnotes

1. The views expressed in this paper are the author's alone and do not necessarily represent the position of the United States government or the Sea Grant Law Center.
2. UCH is, in general, sunken shipwrecks and submerged archeological sites. *See*, Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1995).
3. R. Blumberg, International protection of the underwater cultural heritage, in *Recent Developments in the Law of the Sea and China*, M. H. Nordquist, J. N. Moore, and K. Fu, eds. (Leiden: Martinus Nijhoff Publishers, 2006).
4. Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Berlin: Springer, 2003), 133.
5. Conflict and compatibility clauses are elements in international agreements that state the priority that other international agreements will play in regards to their interrelationship.

Study Finds Benefits of Consuming Seafood Outweigh Risk



The National Academies of Science, Institute of Medicine, has released a study finding that the benefits of eating seafood outweigh the risks of exposure to environmental contaminants. The study, "Seafood Choices: Balancing Benefits and Risks," was sponsored by the National Oceanic and Atmospheric Administration (NOAA), with support from the Food and Drug Administration.

The study was prompted by concern that environmental contaminants in some species of fish could be harmful. The researchers found that seafood is rich in nutrients, low in saturated fats, and may reduce the risk of heart disease, the leading cause of death in the United States. The report confirms seafood as a healthy choice, but recommends that people who eat seafood more than twice a week consume a variety of species to get a wide range of nutrients and to avoid buildup of environmental contaminants. The study also agreed with federal guidelines for the consumption of fish by women who are pregnant, nursing, or may become pregnant, and children under the age of 12. The study also pointed out that seafood has become safer in recent years, as a result of the decline of environmental pollutants like PCBs and pesticides.

A similar study "Fish Intake, Contaminants, and Human Health: Evaluating the Risks and the Benefits" has been released in the Journal of the American Medical Association. The studies both reached the same conclusion: the incorporation of seafood into American diets is important in reducing the risk of coronary disease. For more information, visit www.noaa.gov.

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THE SANDBAR is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under Grant Number NA16RG2258, 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. The views expressed herein are those of the authors and do not necessarily reflect the views of NOAA or any of its sub-agencies. Graphics from NOAA, USGS, University of Washington, and ©Nova Development Corp.

MASGP 06-008-03 *October, 2006*

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