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Supreme Court Says Navy May Continue Sonar Training

Winter v. NRDC, 129 S. Ct. 365 (2008).

Terra Bowling, J.D.

The Supreme Court has ruled that the Navy may continue the use of mid-frequency active sonar in its training exercises off the coast of southern California. The ruling overturns a portion of the Ninth Circuit's preliminary injunction requiring the Navy to suspend or limit its use of sonar when marine mammals are in the vicinity.

Background

The Navy uses mid-frequency active (MFA) sonar during training exercises off the coast of Southern California. In the exercises, ships, aircraft, and submarines use the sonar to identify submerged targets, such as enemy submarines. Many environmentalists, including the Natural Resources Defense Council (NRDC), contend that the sonar causes serious injury, including hearing loss, decompression sickness, and strandings, to the 37 species of marine mammals inhabiting Southern California waters. The Navy contests this claim, citing a forty-year record of conducting the exercises with no documented injuries to marine mammals.

The Navy planned to use mid-frequency sonar in fourteen large-scale training exercises off the coast of Southern California between February 2007 and January 2009. The Navy completed an environmental assessment on the exercises, concluding that they would not have a significant impact on the environment.

NRDC and other environmental groups brought suit against the Navy claiming that the training exercises violated several federal laws. Primarily, NRDC claimed that the Navy violated the National Environmental Policy Act (NEPA) in its failure to prepare an environmental impact statement (EIS) before conducting the exercises. The plaintiffs sought a preliminary injunction to stop the MFA sonar training.

In granting a preliminary injunction, a plaintiff must show a likelihood of success; a likelihood that he will suffer irreparable harm absent preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest. In August 2007, the federal district court issued a preliminary injunction prohibiting the use of MFA sonar during training. The district court found that because there was a likelihood of success on the plaintiffs' NEPA claim and a possibility of irreparable harm to the marine mammals, the balance of harms tipped in favor of the plaintiffs.

On appeal, the Ninth Circuit found the injunction overbroad and remanded the case. The district court then entered an injunction imposing six restrictions on the Navy's training exercises. Among other requirements, the restrictions mandated that sonar be shut off when a marine mammal was spotted within 2,200 yards and that MFA should be powered down in "surface ducting" conditions. The Navy appealed these requirements.

In the meantime, the Navy sought relief from the Executive Branch. Citing national security reasons, President Bush and the

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Council on Environmental Quality (CEQ) granted the Navy exemptions from NEPA and the Coastal Zone Management Act that would allow the Navy to continue its exercises without first preparing an Environmental Impact Statement (EIS). In light of these orders, the Navy sought to vacate the two aforementioned requirements in the preliminary injunction. The Ninth Circuit upheld the injunction, finding that it was warranted by the possibility of irreparable injury to the marine mammals. The appellate court also questioned the actions of the executive branch in issuing the orders.

The U.S. Supreme Court granted certiorari to hear the case. In granting cert, the Court looked at whether the lower courts abused their discretion in granting the preliminary injunction regarding the two contested requirements.

Possibility of Irreparable Injury

The Supreme Court first looked at the standard used by the lower courts in granting the preliminary injunction. The Court noted the lower court's finding that when a plaintiff demonstrates a strong likelihood of success on the merits, a preliminary injunction may be entered based on only a "possibility" of irreparable injury. The court found that this standard was "too lenient,"¹ citing precedent requiring plaintiffs seeking a preliminary injunction to show that without an injunction irreparable injury is "likely."

Abuse of Discretion

The Court held that even if the NRDC had shown a likelihood of success on the merits and irreparable injury, it would deny injunctive relief based on the Navy and the public's interest in national security. The Court found that the lower courts did not seriously consider the balance of harm to the parties, especially the harm to the public interest in national defense. The Court emphasized the lower court's lack of deference to Navy officers' judgments about how the injunction would reduce the effectiveness of the Navy's training. The Supreme Court

noted the Navy’s testimony that the threat posed by enemy submarines required extensive sonar training that could not be accomplished under the preliminary injunction restrictions. In this instance, the Court found that the balance of harms “tip strongly in favor of the Navy.”²

The Supreme Court found that the lower courts abused their discretion in requiring the Navy to shut down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel. The Ninth Circuit had found that because marine mammal sightings were rare and because the Navy had shutdown MFA beyond its self-imposed zone of 200 yards during prior exercises, the shutdown would not be overly burdensome. The Supreme Court noted, however, that the injunction would expand the radius from 200 to 2,200 yards and that if the shutdowns occurred during critical times it could delay training for several days, imposing a significant burden on the Navy.

The Court found that the lower courts also abused their discretion in requiring the Navy to power down during “surface ducting” conditions. Surface ducting is “a phenomenon in which relatively little sound energy penetrates beyond a narrow layer near the surface of the water.”³ The Ninth Circuit had found that the

rule was reasonable, citing the rarity of surface ducting and the fact that the Navy had certified other training groups without performing surface ducting. The Supreme Court again disagreed, finding that because submariners take advantage of the phenomenon to avoid being detected by sonar and because the phenomenon is rare, it is particularly important for the Navy to be able to train under these conditions.

Conclusion

The majority held that the possible harm to the marine mammals was outweighed by the Navy’s need to conduct realistic training with active sonar to respond to underwater threats from enemy submarines. Justice Ginsburg wrote a dissenting opinion, joined by Justice Souter, finding that the lower courts did not abuse their discretion in granting the preliminary injunction. The dissent concluded that the Navy undermined NEPA in seeking an exemption from the White House. The majority did not consider the executive orders in its opinion. ❧

Endnotes

1. *Winter v. NRDC*, 129 S. Ct. 365, 375 (2008).
2. *Id.* at 378.
3. *Id.* at 380.



Above, photograph of dolphins courtesy of NOAA’s Sanctuaries Collection, Photographer Tom Kieckhefer.



Below, photograph of humpback whale fluke courtesy of OAR/NURP, National Marine Mammal Lab, Photographer, J. Waite.



Minnesota Requires Permit for Ballast Water Discharges in Lake Superior

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

In September, a second state began asserting authority over ballast water discharges. Ballast water is a significant vector for the introduction of invasive species into coastal waters. Ships take on water, which is held in ballast tanks, to provide stability when they are not fully loaded. Some ships will then discharge that water at port as they are loading cargo. Since water contains a variety of organisms, including viruses, ballast water discharges can introduce non-native species to coastal environments which may flourish at great expense to the natural environment. The zebra mussel, for example, most likely entered the Great Lakes through ballast water.

Minnesota Permit

Vessels wishing to discharge ballast water into Minnesota state waters must now obtain a permit from the Minnesota Pollution Control Agency (MPCA).¹ Michigan was the first state to require a ballast water permit, but its permit only applies to ocean-going vessels. Minnesota has gone a step further requiring both ocean-going and Great Lakes-only (“lakers”) vessels to obtain permits. Minnesota has also set treatment standards, as opposed to Michigan’s requirements for specific technology.

Under state law, the MPCA has the authority to develop permitting programs for the prevention of pollution.² The MPCA’s new State

Disposal System (SDS) general permit applies to all vessels transiting the Minnesota state waters of Lake Superior that are (1) designed, constructed, or adapted to carry a minimum ballast water capacity of 8 cubic meters or more and (2) 50 meters in length or more. Vessels that carry ballast water in permanently sealed tanks, discharge ballast water directly to an on-shore treatment facility or another vessel, or implement flow-through or flush ballast water management techniques approved by the MPCA do not need to obtain permit coverage. Vessels of the Armed Forces and vessels operating within the Duluth Captain of the Port Zone are also exempt.

To qualify for coverage under the general permit, vessels must maintain a Ballast Water and Sediment Management Plan and a ballast water log book, employ best management practices to minimize the discharge of aquatic invasive species, submit annual discharge monitoring reports, and install treatment technology capable of meeting certain biological performance standards. MPCA’s biological performance standards are identical to the standards mandated by the International Convention for the Control and Management of Ships’ Ballast Water and Sediments,³ although MPCA chose not to set a standard for *vibrio cholera*. See Table 1.

For vessels constructed prior to January 1, 2012, treatment standards are to be met by January 1, 2016. For vessels constructed after January 1, 2012, performance standards should

Table 1.

Parameter	Limit
Organisms > 50 μm in min. dimension	< 10 viable organisms per cubic meter
Organisms 10 – 50 μm in min. dimension	< 10 viable organisms per mL
E. coli	< 250 cfu/100 mL
Intestinal enterococci	< 100 cfu/100 mL

be met prior to operation in Minnesota waters. Additional effluent limitations, such as limits on residual chlorine, and monitoring requirements may be imposed on a case-by-case basis depending on the type of treatment technology installed on each vessel.

The permit prohibits discharges of ballast water into designated portions of Lake Superior and the discharge of non-suspended solids. Because saltwater can be toxic to freshwater organisms, the discharge of ballast water to Minnesota harbors from vessels fully ballasted with seawater is also prohibited unless the vessel can demonstrate that the discharge will not jeopardize the harbor aquatic ecosystems.

Court Challenge

On October 22, 2008, the Minnesota Center for Environmental Advocacy petitioned the Minnesota Court of Appeals for a review of the SDS permit. The MCEA claims the MPCA failed to conduct proper non-degradation review. MCEA argues the “General Permit neither protects fully the existing uses of Lake Superior water, nor contains the highest statutory and regulatory requirements, the stringent controls and protections necessary to preserve Lake Superior’s existing high qualities and special characteristics.”⁴

The EPA requires states to develop statewide antidegradation policies which must, at a minimum, maintain and protect existing uses of water bodies.⁵ Where high quality waters constitute an outstanding national resource, water quality must be maintain and protected.⁶ “To preserve the value of these special waters, the [MPCA] will prohibit or stringently control new or expanded discharges from either point or non-point sources to outstanding resource value waters.”⁷ Lake Superior was designated an “outstanding resource value waters” (ORVW) in 1984.⁸

Under MPCA regulations, “no person may cause or allow a new or

expanded discharge of any sewage, industrial waste, or other wastes . . . to [identified] portions of Lake Superior.”⁹ In the remaining areas of Lake Superior, a new or expanded discharge is not allowed unless there is no prudent and feasible alternative.¹⁰ If a new or expanded discharge is permitted, MPCA is required to restrict the discharge “to the extent necessary to preserve the existing high quality, or to preserve the wilderness, scientific, recreational, or other special characteristics that make the water an outstanding resource value water.”¹¹

Before issuing the general permit, the MPCA determined that “most [ballast] discharges are not new or expanded.”¹² A new discharge is a “discharge that was not in existence on the effective date the outstanding resource value water was designated.”¹³ An expanded discharge is “a discharge that changes in volume, quality, location, or any other manner after the effective date the outstanding resource value water was designated . . . such that an increased loading of one or more pollutants results.”¹⁴

Because ships were discharging ballast water into Lake Superior in similar volumes prior to the 1984 designation of Lake Superior as an ORVW, the MPCA contends that the agency could permit these discharges without considering alternatives. The MPCA argues further that even if these discharges are considered

See Ballast Water, page 11

Photograph of container ship courtesy of (c) Wolcott Henry 2005/Marine Photobank.





Florida's Beach Renourishment Act Upheld

Walton County v. Stop the Beach Renourishment, Inc., No. SC06-1449 (Fla. S.Ct., Sept. 29, 2008).

Melanie King, J.D.

In 1995, Hurricane Opal caused severe damage to several Florida beaches, resulting in their placement on the critically-eroded beaches list by the Florida Department of Environmental Protection (FDEP). To repair the damage, the City of Destin and Walton County initiated a beach renourishment program for the renourishment of 6.9 miles of beaches and dunes under the state's Beach and Shore Preservation Act (BSPA).¹

Six beachfront homeowners objected to the renourishment project, claiming that the BSPA's process for restoring critically-eroded beaches deprives littoral property owners of their property rights without just compensation, a violation of the Fifth Amendment. The Florida Supreme Court recently rejected those claims and upheld the BSPA as constitutional.

Background

Under the Florida Constitution, the wet sand beach between the mean high water line (MHWL) and low water lines are held in trust for the public, which the State has a duty to protect under the public trust doctrine. However, coastal, or "littoral", landowners hold several exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction;² and (4) the right to the unobstructed view of the water. These are private property rights that cannot be taken without just compensation.

Under Florida law, the MHWL boundary between public and private land is based on the average high water line over a nineteen-year

period. Under the doctrines of erosion, reliction, and accretion, the boundary between public and private lands changes with gradual and imperceptible losses or additions to the shoreline.

Despite these common law littoral rights, when a beach restoration project is begun under the BSPA, the common law no longer operates "to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion" and an erosion control line (ECL) becomes the fixed property line between private and public lands.³ Under the BSPA, once a local government applies to the FDEP for funding for beach restoration, a shoreline survey is conducted to determine the MHWL for the area. The location of the ECL is based on the MHWL, the amount of erosion or avulsion, and protection of ownership of upland property. The upland owners' littoral rights are expressly preserved.⁴ The ECL is canceled if the project does not begin within a two-year period, is halted for six months, or the restored beach is not maintained.

Accordingly, after Destin and Walton County applied to the department for a joint permit under the BSPA, a coastline survey was conducted to determine the MHWL and an ECL was established at the surveyed MHWL. In July 2005, FDEP entered a final order issuing the permit.

Stop the Beach Renourishment (STBR), a not-for-profit association of six beachfront property owners, challenged FDEP's final order before the First District Court of Appeal, claiming that the order was issued pursuant to an unconstitutional statute. STBR asserted that § 161.191(1) of the BSPA, which fixes the shoreline boundary at the ECL, unconstitutionally divests upland owners of their common law littoral rights by severing these rights from the

uplands. Under the BSPA, if the ECL is located landward of the MHWL, the state becomes the owner of the uplands between the ECL and the MHWL. Because common law littoral rights attach to land abutting the MHWL, the state instead of the upland land owners becomes owner of land to which common law littoral rights attach. STBR argued that although § 161.201 expressly preserves littoral rights, these rights are an inadequate substitute for the owners' common law littoral rights.

The First District Court agreed and held that FDEP's final order issued pursuant to the Act results in an unconstitutional taking of the littoral rights to accretion and reliction. Furthermore, the court found that because the establishment of the ECL would allow the state to own property upland of the MHWL, the BSPA takes the littoral right of contact with the water from property owners. On appeal to the Florida Supreme Court, the court asked whether the BSPA unconstitutionally deprives upland owners of littoral rights without just compensation.

Avulsion

Although the lower court did not consider the doctrine of avulsion in its analysis, it was central to the Florida Supreme Court's decision. "Avulsion" is a sudden and perceptible loss or addition to land by the action of water. In contrast to the doctrines of erosion, reliction, and accretion, the doctrine of avulsion requires the boundary between public and private land to remain at the MHWL as it existed before the avulsive event. Because hurricanes can cause avulsion, with sudden and perceptible shoreline changes, the boundary between private and public property does not change with the changes in the shoreline caused by storms. Furthermore, under Florida common law, the public has the right to restore its shoreline lost to an avulsive event up to the MHWL.

Because the court viewed hurricanes such as Hurricane Opal as avulsive events, the court found that under the BSPA, by restoring storm-damaged lands, the State would not be doing anything that is not permitted under Florida common law, i.e. restoring the tidelands it owns

Photograph of beach renourishment in Palm Beach, FL courtesy of Marine Photobank.



below MHWL that were removed by the avulsive event. Thus, the Court reasoned that in such circumstances the Act does not deprive beachfront property owners of their littoral right to accretion and reliction.

Right of Contact

The district court found that the establishment of the ECL takes the littoral right of contact with the water from property owners; however, the Florida Supreme Court disagreed. The court stated that under Florida common law, the littoral right of contact with the water is an ancillary right to the littoral right of access to the water.

In other words, the right of contact with the water exists in order to preserve the right to access the water. “[B]ecause the Act safeguards access to the water and because there is no right to maintain a constant boundary with the water’s edge, the Act, on its face, does not

of littoral rights without just compensation. The court emphasized that its opinion “is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act.”⁷

In a dissenting opinion, Justice Lewis expressed strong disapproval of the majority opinion “because of the manner in which it has ‘butchered’ Florida law.”⁸ He argued that the right of contact with water is not ancillary to the right to access. Rather, contact with the water is “the legal essence of littoral or riparian land.” By definition, littoral and riparian property is land that is contiguous to or touches water, and in the case of littoral property, this touching must occur at the MHWL. Justice Lewis cited several Florida Supreme Court cases that have held that littoral rights cannot be separated from littoral lands and that these rights constitute property. He stated that “the private-property rights destroyed [by the majority opinion] are critical and of fundamental importance.”⁹

*. . . the right of contact
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unconstitutionally eliminate the ancillary right to contact.”⁵ However, in a footnote the court noted, “There is a point where [an unreasonably distant] separation [between the MHWL and private land] would materially and substantially impair the upland owner’s access, thereby resulting in an unconstitutional taking of littoral rights.”⁶

Conclusion

The court held that the BSPA, on its face, does not unconstitutionally deprive upland owners

Endnotes

1. The Beach and Shore Preservation Act is codified as FLA. STAT. §§ 161.011-161.45.
2. “Erosion” is the gradual and imperceptible wearing away land from a shore. “Accretion” is the gradual and imperceptible accumulation of land on a shore. “Reliction” is an increase in land by a gradual and imperceptible retreat of a water body.
3. FLA. STAT. § 161.191.
4. “If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.” FLA. STAT. § 161.141.
5. *Walton County v. Stop the Beach Renourishment, Inc.*, No. SC06-1449 at 34 (Fla. S.Ct., Sept. 29, 2008).
6. *Id.* at n.16.
7. *Id.* at 3.
8. *Id.* at 38.
9. *Id.* at 53.



EPA May Obtain Administrative Warrants Under TSCA

U.S. v. M/V Sanctuary, 540 F.3d 295 (4th Cir. 2008).

Neil B. Paradise, 3L, Florida State University School of Law

Trade in toxic ships is dangerous. Toxic chemicals can remain on ships for many years, causing harm to human health or the environment. The Fourth Circuit's recent decision in *U.S. v. M/V Sanctuary* helps ensure that toxic ships are properly decontaminated before they are converted to other uses or broken down.

The court held that the Environmental Protection Agency's (EPA) authority to inspect the premises under the Toxic Substances Control Act (TSCA) allows the agency to seek an administrative warrant in the event the site owner does not co-operate. In this instance, the court determined the agency was justified in seeking an administrative warrant to search the docked ship *M/V Sanctuary* when it had evidence of the presence of polychlorinated biphenyls (PCBs). The court further held that the district court was justified in granting a warrant and a preliminary injunction preventing the vessel owner from moving the vessel until the EPA's inspection was complete.

Background

The chemical known as polychlorinated biphenyls (PCBs) is a dangerous one. PCBs are toxic and persistent, may promote the formation of cancer tumors, and may also cause reproductive effects and developmental toxicity in humans. Since 1979, TSCA has prevented PCBs from being manufactured, processed, distributed in commerce, or used, unless used in a "totally enclosed manner" which results in insignificant human exposure to a PCB as determined by the EPA.¹ The export of PCBs is also restricted: exports for distribution in com-

merce require an exemption and exports for the purpose of disposal may obtain an exemption only if the concentration is above fifty parts per million (ppm).²

PCBs are often found on ships built before the 1979 ban, in particular on the plastics, rubbers, and other commercial nonmetal products used on these types of ships. Ex-navy ships built between 1940 and 1970 are almost certain to contain some amount of PCBs.

Restrictions on the export of these toxic ships are important because as the U.S. Navy has downsized its fleet, a global trade in "ship-breaking," or breaking down ships for scrap metal, has grown.³ After detailed coverage in a Pulitzer-prize winning investigatory journalism series published by the Baltimore Sun, U.S. navy ships are no longer sold directly for scrap. Additionally, no waivers have been granted for PCB-laden ex-naval ships since a lawsuit by environmental nonprofits in 2003 stopped the planned export of twelve ships to Britain.⁴

However, a creative path around these restrictions has evolved, as this case has revealed. The *M/V Sanctuary*, an old ex-navy ship built during World War II as a hospital vessel, was sold in 1989 to a nonprofit for humanitarian purposes. Unfortunately, the nonprofit failed to pay docking fees at its pier in Baltimore, and the Maryland Port Authority won default judgment in 2007 for failure to pay the fees. The ship was sold to Potomac Navigation, Inc. at a court-ordered public auction for \$50,000. Potomac had 60 days to tow the ship from Baltimore and stated its intent was to move the ship to Piraeus, Greece or another location for refurbishment, most likely for use as a storage unit or hotel platform.

Shortly before the planned towage, however, an environmental watchdog group (the Basel Action Network) e-mailed EPA and communicated its belief that the *Sanctuary* contained

PCBs and contended the planned towage to another location violated TSCA's ban on the export of PCBs. The EPA learned that PCBs were in fact present on the *Sanctuary* from a bidder on the ship who had tested the paint and found concentrations of PCBs over 50 ppm in four out of five samples. The EPA also learned from a ship recycling consultant that many buyers of ships built in the pre-ban period claim that they plan to repair and refurbish the ship but instead sell them for scrap in third world countries.

In early November, the EPA requested permission from Potomac to inspect the *Sanctuary* for materials containing PCBs pursuant to its TSCA authority. Potomac denied the EPA's request. The EPA then approached the district court and applied for and received an administrative warrant authorizing the inspection and a preliminary injunction preventing Potomac from moving the ship until the EPA could conduct its inspection and determine compliance with TSCA. Potomac appealed the issuance of the warrant and the injunction, and also contended that the EPA lacked authority to request a warrant under TSCA.

Warrant Authority

TSCA does not specifically confer warrant authority to the EPA. TSCA does explicitly authorize EPA to inspect a "premises or conveyance" that has substances regulated by the Act.⁵ Regulatory or enforcement authority vested by Congress in an agency generally carries all "modes of inquiry and investigation traditionally employed or useful to execute the authority granted."⁶ As such, federal courts have consistently held that regulatory agencies are authorized to apply for a warrant, so as to execute statutorily-granted inspection authority.

While TSCA explicitly grants EPA subpoena power, the Fourth Circuit determined that this power was not granted by Congress in lieu of warrant authority because the two powers cover different subjects of investigation. EPA's warrant authority stemmed from its authority to conduct a physical inspection of premises or conveyance, while the subpoena power involves

persons or entities who may be compelled to testify or produce information. The court held EPA may obtain administrative warrants to carry out its inspection authority under TSCA.

District Court Did Not Err in Issuing Warrant and Preliminary Injunction

The Fourth Circuit gave "great deference" to the district court's finding of probable cause to issue the warrant. Courts can find probable cause for an administrative warrant based on either "specific evidence" from an existing violation, or a showing that reasonable legislative or administrative standards for conducting an inspection are met. The warrant based on the legislative standard in TSCA was met because there was a substantial basis for the district court to find that 1) PCBs were held on the *Sanctuary* and 2) EPA needed to access the ship to conduct an inspection so it could administer TSCA.

The court also found the preliminary injunction to be proper. The district court determined whether to issue a preliminary injunction by balancing the potential threat to the public against the harm to Potomac (which was economic). The court's injunction was proper, as the risk to human health was great due to the mobility of PCBs and their possible adverse effects in humans, which tipped the balancing scale sharply in favor of EPA (acting on behalf of the public interest).

Conclusion

In holding that EPA has the authority to request an administrative warrant to effectuate its responsibilities under the Toxic Substances Control Act, the Fourth Circuit ensured the EPA's ability to investigate a recalcitrant ship owner whom EPA had probable cause to investigate for violations of TSCA. The Fourth Circuit's decision takes another step in ensuring that toxic waste in older ships is cleaned up responsibly at home.✎

Endnotes

1. 15 U.S.C. § 2605(e)(2)(A)-(C).

2. See 15 U.S.C. §§ 2605(e)(2)(A), 2611(a)(2); 40 C.F.R. §§ 761.20(c), 761.97(a).
3. The industry is prevalent in areas such as Alang, India, where squalid conditions exist and worker and environmental protections are virtually nonexistent. See generally Pulitzer Prizes, 1998 Pulitzer Prize Winners in Investigative Journalism: The Shipbreakers (Gary Cohn and Will Englund), Baltimore Sun, <http://www.pulitzer.org/works/1998,Investigative+Reporting> (last visited December 1, 2008).
4. Gary Cohn and Will Englund, *Navy Halts Plans to Scrap Ships Abroad*, Baltimore Sun, Dec. 23, 1997; Press Release, Basel Action Network, *Environmentalists Warn of Illegal Export of Toxic Naval Vessel from Baltimore*, http://www.ban.org/ban_news/2007/071113_illegal_export.html (November 13, 2007) (last visited Dec 1, 2008).
5. *U.S. v. M/V Sanctuary*, 540 F.3d 295, 299 (4th Cir. 2008).
6. *Id.*

Photograph of Greenpeace painting "Danger Toxic" sign on hull of GLOBAL SAO PAUL courtesy of ©Greenpeace/Santosh Bane.



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“new or expanded,” the new treatment standards will reduce the potential for invasive species introduction and thus preserve the high quality of water in Lake Superior as required by MPCA regulations.¹⁵

Conclusion

Legislation to address ballast water discharges on the federal level, passed by the House of Representatives in April 2008, died at the end of the year. As a result, the Coast Guard, the Environmental Protection Agency, and the coastal states will continue to wrestle with how best to manage international sources of pollution whose impacts are primarily felt on the local level. Developing a state-federal partnership to manage ballast water discharges will not be easy and more litigation is expected.☹

Endnotes

1. A copy of Minnesota’s permit and additional information is available at <http://www.pca.state.mn.us/programs/ballastwater.html>.
2. MINN. STAT. § 116.07, subd. 4a.

3. The Ballast Water Convention has not yet entered into force.
4. *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, Petition For Writ of Certiorari at 2 (Minn. Ct. App. Oct. 22, 2008).
5. 40 C.F.R. § 131.12(a)(1).
6. *Id.* 131.12(a)(3).
7. MINN. R. 7050.0180 subp. 1.
8. MPCA, *Discharge of Ballast Water to Minnesota State Waters of Lake Superior – Request for Approval of Findings of Fact, Conclusions of Law, and Order, and for Authorization to Issue State Disposal System General Permit No. MNG300000* at 5 (Sept. 23, 2008).
9. Minn R. 7050.0180 subp. 3.
10. *Id.* subp. 6.
11. *Id.*
12. MPCA, *supra* note 8, at 5.
13. MINN. R. 7050.0180 subp. 2B.
14. *Id.* subp. 2C.
15. MPCA, *supra* note 8, at 5.



Court Dismisses Claim on Atoll

Kingman Reef Atoll Investments, L.L.C. v. United States, 541 F.3d 1189 (9th Cir. 2008).

Terra Bowling, J.D.

Home to hundreds of species of marine life, a small coral reef atoll located almost 1,000 miles south of Hawaii was targeted by the U.S. Fish and Wildlife Service (FWS) as a potential site for a National Wildlife Refuge. In the course of the designation, the atoll's rightful ownership was disputed between a private party and the United States government. When the private party brought suit to quiet title to the atoll, the courts found the challenge to ownership was time barred, leaving the U.S. as the rightful owner of the reef.

History of the Atoll

Kingman Reef Atoll was first claimed by the U.S. Guano Company in 1860, although the first reported western contact was at the end of the eighteenth century. In 1922, an employee of the Island of Palmyra Copra Company claimed the reef in the name of the U.S. for his employer to use as a fishing base. The company ceded the atoll to the Fullard-Leo family later that year. A decade later, the family approached the United States to inquire whether the government would like to purchase the islands. The United States began an investigation of the ownership of the island, which ended with the conclusion that an affirmative action on behalf of the government would establish that the atoll was a territory of the United States.

In 1934, President Roosevelt issued an executive order stating that the Kingman Reef was under the jurisdiction of the U.S. Navy. In 1937, members of the Fullard-Leo family sent a letter to their Congressional representative, noting that the reef was owned by the state or Navy and asking for compensation for their care of the island over the past fifteen years. The request was forwarded to the Navy, which declined to compen-

sate the family, claiming that the family had no vested rights in the reef. The family threatened suit. President Roosevelt issued a second executive order in 1941 establishing the atoll as a defensive sea area, and the Navy promulgated regulations to reflect access restrictions.

In the fifty years since, both the Navy and the Fullard-Leo family acted as owners of the atoll, granting third-party access to the island. In the 1990s, the FWS investigated the possibility of acquiring the atoll and nearby Palmyra Atoll for designation as a National Wildlife Refuge. During its initial investigations, the FWS determined that the Fullard-Leos owned the reef. However, soon after, the FWS learned of the Navy's interest in the atoll and began negotiations with the Department of the Defense to obtain the atoll for the refuge. The Department of Defense transferred its interest to the Department of the Interior (which houses the FWS), and the Kingman Reef National Wildlife Refuge was established on January 18, 2001.

In 2005, Kingman Reef Atoll Investments (KRAI) brought an action to quiet title to Kingman Reef under the Quiet Title Act (QTA).¹ The United States District Court for the District of Hawaii dismissed the action, finding that the action was time barred by the QTA.

The QTA

Sovereign immunity is a doctrine that prevents private parties from suing the federal government without its consent. In many instances, the immunity is waived by statute. The QTA, in fact, waives the federal government's sovereign immunity in civil actions by private citizens seeking to quiet title to property in which the United States has an interest. The waiver is subject to several exceptions, including a statute of limitations.

The QTA's statute of limitations requires a private party to bring an action "within twelve years of the date upon which it is accrued."² Under the QTA, an action accrues when the landowner or his

predecessors knew or should have known of the claim. The district court dismissed the case based on the fact that the statute of limitations had run, which deprived the court of subject matter jurisdiction to hear the merits of the case. The court noted that when a jurisdictional issue, such as statutory time limits, is distinct from the merits of the case, a court may dismiss the case for lack of subject matter jurisdiction.

Jurisdiction

On appeal to the Ninth Circuit, KRAI first argued that the statute of limitations was not jurisdictional and the lower court should not have dismissed the case for lack of subject matter jurisdiction. The Ninth Circuit rejected this contention relying on its own precedent and recent U.S. Supreme Court decisions that have upheld jurisdictional treatment of statutory time limits.

Next, KRAI argued that the district court erred in dismissing the case based on the statutory time limit, because the time limit issue was “intermeshed” with the ownership issue. As noted above, a court can only dismiss for lack of subject matter jurisdiction when the jurisdictional elements are distinct from the merits of the case. In this instance, the Ninth Circuit found that the issue was whether the plaintiff had notice of the government’s claim, not whether the claim was valid.

Statute of Limitations

Next, KRAI objected to the district court’s finding that their claim was time barred by the statute of limitations. The court again noted that under the QTA, the statute of limitations requires a private party to bring an action “within twelve years of the date upon which it is accrued” and that an action accrues when the landowner or his predecessors knew or should have known of the claim. KRAI argued that the district court erred in its decision that the action had accrued under the QTA. The Ninth Circuit disagreed.

The court found that action began to accrue in 1938 when KRAI’s predecessor of the reef, the Fullard-Leos, exchanged communications with

the Navy. In a letter to their state congressman, the Fullard-Leos had acknowledged state or Navy ownership of the reef. The Navy’s response to the letter and the Fullard-Leos subsequent threat to sue served as the Fullard-Leo’s acknowledgement of the United States’ ownership claim under the QTA. Therefore, the statute of limitations on the QTA claim ran out in 1950.

Abandonment

Finally, the company claimed that even if the statute of limitations had run on the Fullard-Leos’ claim, the United States had abandoned its interest in the reef in the years between 1938 and 2000. KRIA first cited the Navy’s failure to exclude the public from the reef as evidence of abandonment. The court dismissed this argument, noting settled principles of law providing that the United States cannot abandon its claims to property by inaction or adverse possession. KRIA next cited government employees’ actions indicating the government’s abandonment of the property, namely the employees’ acknowledgment of the Fullard-Leo’s ownership. The court found that a reasonable person could not take employees’ remarks as evidence of ownership. The court found that the United States cannot abandon its interest in property unless it clearly and unequivocally abandons its interest by documentation from a government official authorized to make such decisions.

Conclusion

The Ninth Circuit affirmed the district court’s decision. On January 6th, President Bush signed several proclamations establishing marine national monuments in several large tracts of U.S. controlled waters in the Pacific Ocean. The designations encompass the Kingman Reef and Palmyra Atoll. The designation will limit fishing or any other commercial activity in the waters. ☹

Endnotes

1. 28 U.S.C. § 2409a.
2. *Id.* at § 2409a(g).



Alaska Denies Compensation for Shorter Salmon Season

Vanek v. State of Alaska, Board of Fisheries, 2008 Alas. LEXIS 132 (Alaska Sept. 19, 2008).

Jonathan Proctor, 2L, University of Mississippi School of Law

The Supreme Court of Alaska recently decided that commercial fishing permits are not property and, therefore, not subject to compensation under federal or Alaska takings law.

Background

When a federal or state government takes or damages a property owner's rights of use and enjoyment of that property, traditionally the owner is entitled to compensation for his or her loss. At first glance, this appears to be the case of commercial salmon fishermen in Alaska, who saw their season shortened by more than two weeks as a result of a change in policy of the State of Alaska Board of Fisheries (Board). The key question is whether the commercial fishermen's permits are property. If so, then the fishermen would be entitled to compensation for their losses.

In 1978 the Board enacted the Upper Cook Inlet Salmon Management Plan to regulate gillnet and recreational salmon fishing in the area. At the time, commercial gillnet and recreational fishermen were allowed to fish from July 1 through August 15 each year in the Kenai, Kasilof, and Susitna rivers.¹ From 1982 to 1996, commercial drift gillnet salmon fishing was allowed in the Upper Cook Inlet from June 25 to December 31. In 1996, the creation of the Northern District Salmon Management Plan closed the season for drift gillnet fishing on August 9 and barred those fishermen from operating in restricted areas of Cook Inlet.² Finally, in 1997 the Board changed the gillnet season dates for the Kenai and East Forelands sections of the Central District from June 25 to July 8 and from August 15 to August 10.³ The net result of these changes was the gillnet season being shortened by more than two weeks.

The salmon fishers sued in 2005, asking an Alaska state court to either overturn the Board's changes to the season or to compensate them for what would surely be a loss in productivity. The Alaska Supreme Court accepted their appeal after their case was dismissed in 2006 for lack of legally recognized property interests.

Taking

Due to extensive amendments in 2005 to the regulations in question, the State's primary argument was that the fishermen's claim was moot. A case is considered moot when there is no longer any actual controversy. Typically, a moot case is dismissed; however, Alaska law permits such a case to continue if "the issues presented are so important to the public interest as to justify overriding the mootness doctrine."⁴

To determine if a case meets the public interest exception to the mootness doctrine, the court looks at three factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, would allow the issue to evade review, and (3) whether the issues presented are so important to the public interest to warrant the exception. The fishermen's claim met the public interest exception because the Board could further amend the regulations and the court had the opportunity to decide a matter which could potentially reappear.

On appeal, the fishermen argued that the regulations effected a taking of entry permits requiring just compensation. The fishermen's claim that the permits are property was largely based on the fact that they may be transferred to other parties and may be used as collateral for loans,⁵ just as a homeowner can sell or mortgage his property. Permits have been treated as property in other situations. For example, the Alaska Supreme Court has held permits are property for inheritance, tax, and child support purposes.⁶ The fishermen argued that if the costs of property attach to per-

mits, then logically they should also entitle their owners to the benefits of property. The fishermen argued specifically that permit holders should be compensated for their losses resulting from the decrease in the length of the salmon season. At the very least such reasoning would place strict limitations on the government's ability to regulate the fishing industry as a whole.

Despite these arguments, the court adopted the State's contention that a permit allows its owner to fish subject to the Board's regulations. Essentially, the permits have no more value than any other government-approved license, the terms of which may be amended at any time. Though the permits are transferable, those transfers are still subject to approval by the Alaska Commercial Fishing Entry Commission (CFEC) and permits may not be leased by their holders. The fishermen's claim that the permits may be used as collateral for loans is true, but only in very limited and highly regulated circumstances. Permit holders are not free to use those permits in any manner they see fit; the CFEC and the Board of Fisheries define the conditions and terms of how permits may be used. The high level of government oversight lends weight to the notion that the permits are more similar to licenses than the tradition concept of property.

The fishermen further argued that the applicable statute only allows the state legislature to modify or revoke a permit without compensation,⁷ not the Board. The Court was not persuaded by this reasoning, focusing instead on the first clause of that statute explicitly stating that an entry permit is a "use privilege" and not property.⁸ Additionally, in delegating the authority to regulate fishing to the Board, the legislature essentially approved of and adopted the Board's decisions in advance. Alaska law specifically permits the Board to "[establish] open and closed seasons and areas for the taking of fish."⁹

Conclusion

Though the Supreme Court of Alaska agreed to hear the case under the public interest exception

to the mootness doctrine, it declined to apply takings law to the fishermen's permits. In doing so, the court made clear that such permits are not property in the traditional sense, and, therefore, their holders are not entitled to compensation due to changes in government regulation. It is important to note that the Alaskan fishermen in this case held traditional fishing permits and not Individual Fishing Quotas (IFQs), which have stronger property characteristics.

If the Court had agreed with the fishermen's argument and deemed these permits to be property, the precedent would allow for the possibility of any number of claims seeking to curb the government's role in commercial fishing. One of the chief difficulties that would surely have arisen had the fishermen been allowed to continue their suit and won would be the implication that permit owners have an exclusive right to fish. The government would have a difficult, if not impossible, time trying to regulate fishing seasons, establishing permissible zones in which to allow fishing, etc. This runs contrary to the Alaska Constitution, which provides that "in their natural state, fish, wildlife, and waters are reserved to the people for common use."¹⁰ Taken to its logical end, the fishermen's claim of just compensation would create a new classification of property, the boundaries of which would be prohibitively difficult to define. ♡

Endnotes

1. ALASKA ADMIN. CODE 5, § 21.363.
2. *Id.* at § 21.358.
3. *Id.* at § 21.310.
4. *Akpik v. State of Alaska, Office of Mgmt. & Budget*, 115 P.3d 532, 535 (Alaska 2005).
5. *Vanek v. State of Alaska, Board of Fisheries*, 2008 Alas. LEXIS 132, at *12 (Alaska Sept. 19, 2008).
6. *Id.* at *20.
7. ALASKA STAT. § 16.43.150(e).
8. *Id.*
9. ALASKA STAT. § 16.05.251(a)(2).
10. AK Const. Art. 8, § 3.





Sailboat Passenger Partially Liable for Loss of Taste and Smell

Evans v. Nantucket Cmty. Sailing, Inc., 2008 U.S. Dist. LEXIS 85628 (D. Mass. Oct. 22, 2008).

Terra Bowling, J.D.

The United States District Court for the District of Massachusetts recently held that a passenger struck by a boom during a sailboat race, an injury that resulted in her loss of taste and smell, was partially liable for her injuries due to her failure to pay attention during the race.

The Race

Julianne Evans had grown up sailing sunfish sailboats in Michigan every summer until the age of 12. Evans' interest in sailing was renewed more than twenty-five years later during a summer in Nantucket when she learned of weekly sunset sailing races hosted by a local sailing club, Nantucket Community Sailing (NCS). On the night of the first races of the summer, Evans went to Jetties Beach to inquire about joining the club and getting sailing lessons. At the club, Evans was placed on a Hunter 140 sailboat with one of the club's instructor's, Ronan O'Siochru, shortly before the races began.

For fifteen minutes prior to the race, O'Siochru worked with Evans on basic sailing skills, noting that she seemed capable and comfortable on the boat. The race began without incident and O'Siochru and Evans' boat sailed unimpeded for twenty minutes. During the fifth leg of the race, however, as Evans' boat approached a buoy marking the course, another sailboat manned by an NCS instructor, Donncha Kiely, was on the same path. Under general maritime laws, Kiely's boat had the right of way and O'Siochru was required to yield. As both instructors performed a series of maneuvers to avoid a collision, the boats came within a couple of feet of each other. During this

time, Evans remained with her back to the instructors, oblivious to their communication. As the boats neared each other Kiely gave a command indicating that his "boom" would come across the boat in Evans' direction. Had Evans been paying attention, she could have moved her head out of the way of the boom. She did not, however, and the boom struck the upper part of Evans' neck. Evans was taken to a hospital where an X-ray and a CT scan showed no evidence of fracture or trauma. She was discharged, complaining of neck pain.

Injuries

Over the next several months, Evans noted that she had lost her sense of taste and smell. However, due to other, more pressing medical issues, she did not bring the problem to the attention of a doctor for several months. In 2004, upon seeing a specialist for taste and smell disorders, she learned that her loss of the sense of taste and smell was permanent. Evans then brought suit against both O'Siochru and Kiely.

Evans saw the defendants' expert, Dr. Robert Henkin who diagnosed Evans with a smell disorder and hypothyroidism, a condition that can cause a loss of smell and taste. A third doctor diagnosed Evans with varying taste and smell disorders. In light of the doctors' testimony that taste and smell disorders are a common side effect of head injuries and other causative evidence, including testimony that Evans ate a soap labeled as chocolate after the accident, the court found that Evans' taste and smell disorders were proximately caused by the head injury she received during the sailboat race and not hypothyroidism.

Negligence

While Evans claimed that the instructors were negligent under general maritime law, the

instructors claimed that Evans was comparatively negligent for failing to pay attention during the race and not moving out of the way before the boom struck her neck. The court had to apportion negligence for Evans' injuries.

The court found that both instructors were partially negligent for their violation of navigational rules. The court found that Kiely was negligent for misjudging the distance between the boom and Evans and that O'Siochuru was negligent for failing to take early or substantial action to avoid the collision. The court found that both instructors were at fault for failing to maintain a proper distance between the racing sailboats.

However, the court agreed that Evans was partially at fault for failing to pay attention during the race. The court noted that Evans was not paying attention to the communications between O'Siochuru or Kiely during the incident. Given Evans' past sailing experience and ability, the court reasoned that Evans should have noticed the proximity of the other boat and taken precautions to protect herself. The court found that because Evans did not act with reasonable care to avoid injury, her negligence was a contributory, proximate cause of the injuries.

The court next had to apportion fault. The court noted that neither of the helmsmen were acting prudently by racing in close proximity, however, the court found that, as the helmsman of the yielding vessel, O'Siochuru had a duty to take early and substantial action to avoid a collision and apportioned his fault at 35%. Kiely's was 25%.

The court found that Evans' fault was "significant," not-

ing her testimony that she was not paying attention "at all" to the "chit chatting" between the helmsmen. The court found her 40% liable for her injuries.

Conclusion

Finally, the court assessed damages. The court found that damages of \$150,000 would adequately compensate Evans for her injuries, noting the "loss has affected her enjoyment of gardening, eating, particularly in restaurants, entertaining at home by cooking, whether with her sister or others, babies and men."²

Due to Evans' negligence, her damages of \$150,000 were reduced by 40%, for a total of \$75,000. The court also awarded Evans prejudgment interest of over \$15,000.☺

Endnotes

1. A boom is a horizontal part of the boat attached to the mainsail. In this case, the boom extended three feet beyond the boat.
2. *Evans v. Nantucket Cmty. Sailing, Inc.*, 2008 U.S. Dist. LEXIS 85628 at *22 (D. Mass. Oct. 22, 2008).

Photograph of sailboats courtesy of ©Nova Development Corp.





Oregon Court Upholds Crab Pot Regulations

Fishermen Against Irresponsible Reallocation, Inc. v. Fish & Wildlife Commission, 2008 Ore. App. LEXIS 1296 (Or. Ct. App. Sept. 24, 2008).

Terra Bowling, J.D.

The Court of Appeals of Oregon upheld two administrative rules limiting the number of crab pots that could be used by commercial fishing vessels. The court held that the Oregon Fish and Wildlife Commission acted within its statutory authority when adopting the rules, because the allocation system was consistent with the legislature's goal of promoting equitable allocation of available food fish.

Background

The Commission adopted two rules limiting the number of crab pots that could be used in the fishery. Under the rules, the number of crab pots allocated to each permit holder depended on documented landings of Dungeness crab. The rules initially gave operators of small vessels a competitive advantage over larger vessels.

Commercial fishermen challenged the rules, contending that the Commission was not authorized to implement its own regulatory system for crab pots, because the legislature had its own regulatory system in place. The court had to determine whether the Commission had in fact exceeded its statutory authority in adopting the rules.

Commission's Authority

The court first examined the legislature's grant of authority to the Commission. The legislature established the "equitable utilization of available food fish" as one of the food fish management goals of the state.¹ The court found that that the crab pot allocation system was consistent with this statutory goal.

Furthermore, under ORE. REV. STAT. § 506.119, the legislature granted the Commission the authority to implement policies and plans for the management of food fish and to promulgate rules to carry out commercial fishing laws. Another statute, ORE. REV. STAT. § 508.921 specifically charged the Commission to "establish a system for restricting participation in the Oregon ocean Dungeness crab fishery."

Given these statutory grants of authority, the court found that the Commission acted well within its authority in promulgating the rules. "It is not our role to second-guess the quasi-legislative policy decisions of an agency where, as here, such decisions are clearly authorized by the legislature."²

The court next looked at the plaintiffs' contention that the legislature occupied the field of regulating the fishery. The legislature had adopted statutes for the fishery that required individuals to obtain entry permits, established eligibility requirements, and set forth limits on the transfer of vessel permits. Although the legislature had regulated the fishery to some extent, the court found that the regulations were not in conflict. Furthermore, the legislature's explicit grant of authority to the Commission to establish a system to restrict the fishery was broad enough to allow the Commission to promulgate regulations outside the statutory provisions implemented by the legislature. For these reasons, the court upheld the regulations.☺

Endnotes

1. ORE. REV. STAT. § 506.109(3).
2. *Fishermen Against Irresponsible Reallocation, Inc. v. Fish & Wildlife Comm'n*, 2008 Ore. App. LEXIS 1296 at *9 (Or. Ct. App. Sept. 24, 2008).



Resort Not Liable for Rental Company's Actions

Campbell v. Starwood Hotels & Resorts Worldwide, Inc., 2008 U.S. Dist. LEXIS 81121 (S.D. Fla. Oct. 14, 2008).

Terra Bowling, J.D.

A U.S. district court recently held that a resort was not vicariously liable for injuries caused when a motorboat struck a swimmer at the resort's beach. The court found, however, that there were issues of material fact regarding the resort's breach of duty to provide a safe swimming area and its duty to warn.

Background

As part of a cruise to the Bahamas, Colin Campbell made a day trip to the Grand Bahama resort. The resort offers beach and water sports activities to its guests and visitors. While swimming in the ocean past buoy markers in front of the resort, Campbell was struck by a motorboat. The boat was owned and operated by Ocean Motion, Ltd., which provides water sports and activities to guests of the resort and the general public.

Campbell brought suit against the resort, alleging that the resort negligently failed to provide a safe swimming area, failed to warn of a dangerous condition, and was vicariously liable for the acts of Ocean Motion. The resort filed a motion for summary judgment. The court may grant a summary judgment in favor of the moving party when there is no evidence that supports the nonmoving party's case.¹

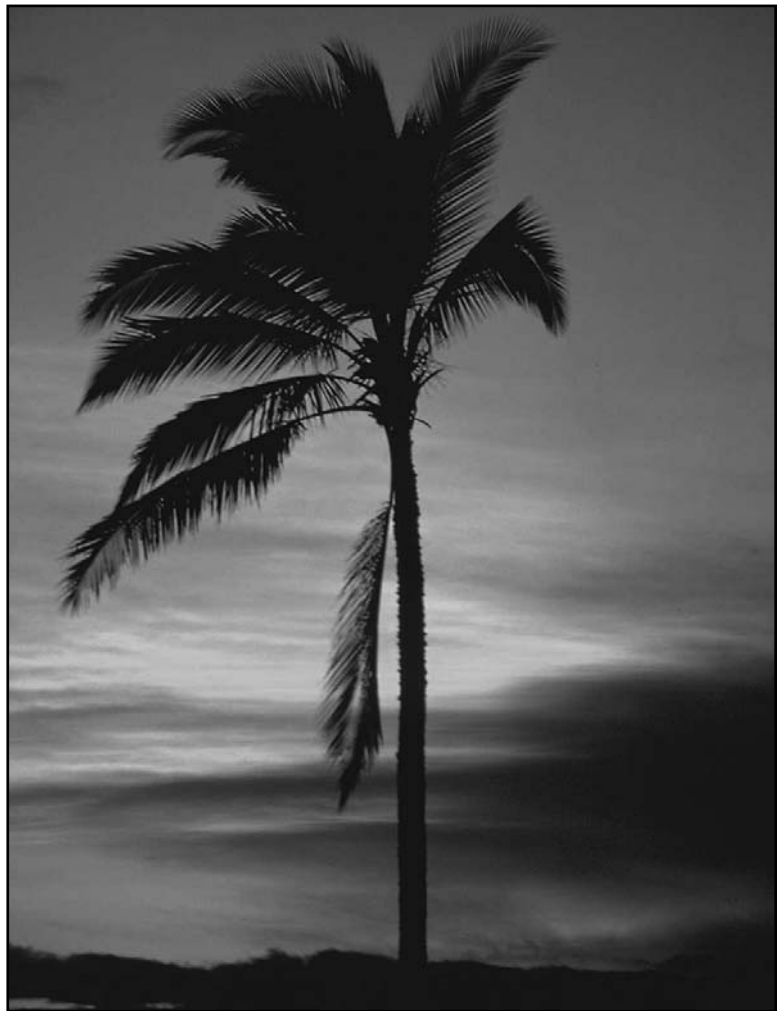
Jurisdiction

The court first had to determine whether United States admiralty law

applied to the case. For admiralty jurisdiction to apply, the incident must meet both the "locality" test, which requires that the tort takes place on navigable waters, and a "nexus" test, which requires that the incident have a significant relationship to a traditional maritime activity. Because Campbell was struck while in navigable waters, the court found that the locality test was satisfied.

To determine whether the nexus test was met, the court asked whether the incident could have a potentially disruptive impact on maritime commerce and whether there was a substantial relationship between the activity that caused the incident and traditional maritime

Photograph of tropical setting courtesy of Nova Development Corp.



activity. Because the owner of the vessel was not a party in this case, the activity that caused the incidents in this case had a substantial relationship to the hotel industry rather than traditional maritime activity. Because the duties of the hotel industry have little to do with maritime activity, the court found that the nexus test was not met in this instance; therefore, U.S. admiralty law did not apply.

Defendants' Duties

Based on various factors, the court determined that Bahamian law applied because the injury occurred in the Bahamas and it was where the

*Bahamian common
law requires landowners
to warn licensees
of known and
concealed dangers.*

relationship between the parties was centered. Under Bahamian common law, a person who enters land occupied by another can be considered an invitee, licensee, or trespasser. An invitee enters onto land with a "material interest in the purpose of the visit" while a licensee merely enters with the owner's permission.² A landowner owes a higher duty of care to invitees. Predictably, Campbell argued that he was an invitee while the resort insisted that he was merely a licensee. The court agreed with the resort that Campbell was a licensee because he was not engaged in any activity in which Defendants had a material interest, noting that Campbell was not a guest of the resort, did not purchase any goods or services at the resort, and did not speak to anyone at the resort.

Bahamian common law requires landowners to warn licensees of known and concealed dan-

gers. The court could not determine, at this stage in the case, whether the danger was "concealed," or whether plaintiff knew or should have known of the dangers beyond the buoys. Furthermore, because there was conflicting evidence regarding warning signs posted at the resort and warnings issued by lifeguards, the court could not conclude whether the resort met its duty to warn Campbell.

Finally, the court could not determine whether the resort owed a duty to Campbell when he left the resort property and entered the ocean. In some instances, even when a licensee is on adjacent property, the landowner owes a duty to the licensee if the land is within the landowner's "sphere of control." Due to these disputed issues of material facts, the court was unable to grant summary judgment on the resort's duty to Campbell.

Vicarious Liability

Finally, the court turned to the issue of whether Grand Bahama could be held vicariously liable for the actions of Ocean Motion. Although Campbell presented several facts establishing a financial connection between the resort and Ocean Motion, the court found that there were no facts to show that the resort had control over Ocean Motion's operation of watercraft. Therefore, the court granted the resort's motion for summary judgment on the issue of vicarious liability.

Conclusion

The court denied Grand Bahama's motion for summary judgment with regard to Campbell's claims of direct negligence. If the parties do not settle out of court, those issues will be decided in a later proceeding.✎

Endnotes

1. BLACKS LAW DICTIONARY 679 (2d Pocket Ed. 2001).
2. *Campbell v. Starwood Hotels & Resorts Worldwide, Inc.*, 2008 U.S. Dist. LEXIS 81121 at *13 (S.D. Fla. Oct. 14, 2008).



Federal Legislation 2008



110 Public Law 243 – Resolution Regarding the Management of Migratory and Transboundary Fish Stocks in the Arctic Ocean (S.J. Res. 17)

Directs the United States to initiate international discussions and take necessary steps with other nations to negotiate an agreement for managing migratory and transboundary fish stocks in the Arctic Ocean. The Resolution stipulates that the agreements should conform with the United Nations Fish Stocks Agreement and that the U.S. should consult with the North Pacific Regional Fishery Management Council and Alaska Native subsistence communities of the Arctic as the international agreements are negotiated and implemented.

110 Public Law 280 – Maritime Pollution Prevention Act of 2008 (H.R. 802)

Amends the Act to Prevent Pollution from Ships to implement MARPOL Annex VI. The Act permits the Administrator of the EPA to issue appropriate certificates in accordance with Annex VI for a documented U.S vessel and gives validity to certificates issued by the Secretary of the department in which the Coast Guard is operating or the Administrator.

110 Public Law 342 – Consent and Approval of Great Lakes-St. Lawrence River Basin Compact (S.J.Res.45)

Grants congressional consent to and approval of the Great Lakes-St. Lawrence River Basin Water Resources Compact.

110 Public Law 365 – Great Lakes Legacy Reauthorization Act of 2008 (H.R. 6460)

Amends the Clean Water Act to include aquatic habitat restoration activities in activities the Great Lakes National Program Office may implement for the remediation of sediment contamination in areas of concern. The Act authorizes funds for the remediation projects and for the development and use of new technologies and techniques for remediation through fiscal year 2013.

110 Public Law 394 – National Sea Grant College Program Amendments Act of 2008 (H.R. 5618)

Reauthorizes and amends the National Sea Grant College Program Act. The Act authorizes appropriations through fiscal year 2014. The Act also redesignates the Sea Grant Review Panel as the National Sea Grant Advisory Board and modifies its duties.

110 Public Law 398 – Clean Boating Act of 2008 (S.2766)

Amends the Clean Water Act to provide that no permit is required under the National Pollutant Discharge Elimination System for certain discharges incidental to the normal operation of recreational vessels.

110 Public Law 407 – Drug Trafficking Vessel Interdiction Act of 2008 (S.3598)

Amends federal criminal code with respect to submersible vessels and semi-submersible vessels without nationality operating beyond a country's territorial sea with the intent to avoid detection. The act imposes a fine and/or prison term of up to 15 years for such vessels and imposes a civil penalty of up to \$1 million.☺



International Law Update

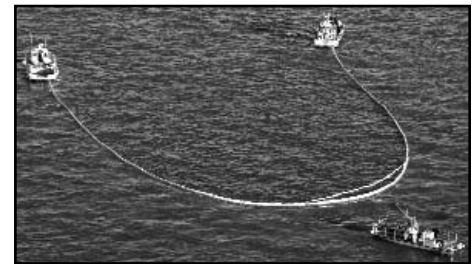


EU Emission Reduction

In December, the European Union reached the world's most expansive agreement to curb climate change. As part of the plan, the EU will auction industrial emission permits that had been previously issued free of charge. The plan seeks to cut carbon dioxide emissions by a fifth by 2020; however, the plan creates exemptions and offsets that environmentalists claim will lower the emission reductions.

Officers Liable for South Korean Oil Spill

The Government of the Republic of Korea has held two Indian officers on the supertanker *Hebei Spirit* liable for a December 2007 oil spill. Nearly 80,000 barrels of oil were spilled from the supertanker off South Korea's western coast. The officers had been exonerated of liability from a lower court. Intertanko and other maritime organizations have protested the decision, asserting that the captains dealt with the oil spill appropriately.



Photograph of oil spill cleanup courtesy of Jonathan R. Cilley, U.S. Coast Guard/Marine Photobank.



Nations May Hunt Pirates on Shore

In response to an increase in pirate attacks on the high seas, the United Nations has approved a U.S. sponsored resolution to allow "all necessary measures that are appropriate in Somalia" to search for pirates. The resolution will allow nations to go ashore in Somalia and use the nation's airspace in tracking the pirates.

Ship-Source Pollution Directive Upheld

In *Intertanko v. Secretary of State for Transport*, C-308/106 (June 3, 2008), the European Court of Justice held that the European Union's directive on ship source pollution is valid. The EU directive governs liability for accidental discharges of pollutants. The court held that its validity could not be challenged under MARPOL because the European Community is not party to the convention. The court also held that the directive could not be challenged under the United Nations Convention on the Law of the Sea (UNCLOS) because it does not establish rules intended to apply directly and immediately to individuals.✎



Photograph of debris picked up off the coast of Alaska courtesy of Ted Raynor/Marine Photobank.

Coast to Coast

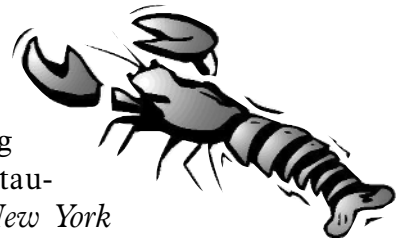
And Everything In-Between

Environmental Fugitives

The Environmental Protection Agency has published a most-wanted list for fugitives charged with environmental crimes. Among those on the list are a man who was involved in dumping nearly 500 tons of wheat tainted with diesel fuel into the South China Sea and a father and son team who imported Alfa Romeos that did not meet U.S. emission or safety standards. (*Associated Press*, Dec. 10, 2008).

Low-Priced Luxury

Lobster prices are the cheapest they have been in 25 years. Retailers report fewer people buying luxury products in the slow economy at a time when lobster fishermen are reporting record catches. The price drop is also attributed to the closing of Canadian processing plants that in the past had bought excess catch to sell to chain restaurants. The cheap price of lobster is expected to be temporary. (*New York Times*, Dec. 10, 2008).



Frozen Turtle Rescued

A nearly frozen loggerhead sea turtle that washed ashore on a Cape Cod beach is expected to recover. The 75-pound loggerhead sea turtle was taken to the New England Aquarium to recuperate from hypothermia. Aquarium officials report that the sea turtle, named Herb by his rescuers, is ready to move to a facility where he will be rehabilitated and released back into the sea in late spring or summer. More than sixty stranded sea turtles have been taken to the aquarium this year. (*Associated Press*, Dec. 13, 2008).



Photograph of loggerhead turtle courtesy of Mito Paz/Marine Photobank.

Melting Ice

New NASA satellite data shows that more than 2 trillion tons of land ice in Greenland, Antarctica, and Alaska have melted since 2003. The satellite data showed an increase in land ice in Alaska due to large winter snowfalls. The melting land ice has raised global sea levels about one-fifth of an inch in the past five years. (*Associated Press*, Dec. 16, 2008).

Recycled Raft

Two men aboard a raft made of plastic bottles and salvaged material recently completed a three-month voyage across the Pacific Ocean. The trip was part of a project to raise awareness about plastic debris and pollution in the ocean. The men reported eating a lot of peanut butter and fish during the voyage. (*Associated Press*, Aug. 28, 2008).



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*,

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Editor: Terra Bowling, J.D.

Publication Design: Waurene Roberson

Research Associates:

Neil B. Paradise, 3L
Jonathan Proctor, 2L

Contributors:

Melanie King, J.D.
Stephanie Showalter, J.D./M.S.E.L.

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Sea Grant Law Center
Kinard Hall, Wing E, Room 258
P.O. Box 1848
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