

The SANDBAR

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Legal Reporter for the National Sea Grant College Program

Obama Administration Announces National Ocean Policy

Consolidating the BP Oil Spill Litigation An Overview of the Lawsuits

Controversy Continues to Swirl Around Oil and Gas Drilling in the Arctic



F r o m t h e E d i t o r

As summer comes to an end, environmental law issues seem to be heating up. In July, in an historic moment for the protection of the U.S. oceans, coasts, and Great Lakes, the Obama administration issued an executive order adopting the final recommendations of the Ocean Policy Task Force. The policy, along with the newly created National Ocean Council is aimed at protecting and restoring U.S. coastal areas, while ensuring continued use of and public access to marine and coastal resources.

The Gulf oil spill continues to reverberate through the legal community. On August 10, the U.S. Judicial Panel on Multidistrict Litigation agreed to consolidate the oil spill lawsuits in a federal court located in New Orleans. Research Associate Lindsey Etheridge provides an overview of the types of oil spill cases that have been consolidated. In this issue, we also take a look at continued controversy surrounding oil drilling in the Arctic. Specifically, we discuss a federal district court decision halting the development of oil and gas wells on leases in the Arctic's Chukchi Sea.

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

Terra

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OBAMA ADMINISTRATION ANNOUNCES NATIONAL OCEAN POLICY

Joanna C. Abe, 2011 J.D. Candidate, University of Mississippi School of Law

On July 19, 2010 President Obama issued an executive order establishing a National Policy for the Stewardship of the Ocean, Coasts, and Great Lakes and creating a National Ocean Council (NOC) to coordinate implementation of the policy.¹ Obama administration officials hope that the new policy will help conserve and sustain the nation's waters in the face of increasing competing demands, including recreational, scientific, energy, and security uses.² The executive order adopts recommendations issued by the Interagency Ocean Policy Task Force (Task Force).

The Interagency Ocean Policy Task Force

President Obama established the Task Force in June 2009 to develop recommendations for enhancing national stewardship of the nation's ocean, coasts, and Great Lakes. The Council on Environmental Quality (CEQ) led the Task Force, which was composed of 24 senior-level policy officials from a variety of federal government positions. The Task Force issued two interim reports³ culminating in the *Final Recommendations of the Interagency Ocean Policy Task Force* (Final Recommendations) in July.

In its Final Recommendations, the Task Force noted the environmental crisis spawned by the blowout of the Deepwater Horizon rig and the resulting oil spill, observing that it served as a reminder of "how vulnerable our marine environments are."⁴ Keeping that observation in mind, the Task Force set out to establish a new model for stewardship of the nation's ocean, coasts, and Great Lakes.

The new model includes a National Policy, as well as a stronger governing structure to ensure sustained and coordinated attention to ocean, coastal, and Great Lakes

issues. In furtherance of this, the Task Force recommended that the existing Committee on Ocean Policy be replaced by NOC and that a NOC steering committee be put in place to strengthen the link between science and management. The Task Force also proposed that the NOC coordinate with state, tribal, and local authorities through a new committee comprised of their designated representatives. It also called for strengthened coordination between the NOC and various White House entities, including the National Security Council, the Council of Environmental Quality, the Office of Science and Technology Policy, and the Office of Management and Budget.

The Final Recommendations also included an implementation strategy which identified nine National Priority Objectives (NPO) to pursue in furtherance of the National Policy. The NPOs were designed to bridge the gap between policy and action by outlining the general goals entities should strive to achieve, while leaving the details as to which actions should be taken to be worked out through the development of strategic action plans. The NPOs are:

- Adopt ecosystem-based management as the foundation for comprehensive ocean, coasts, and Great Lakes management;
- Implement ecosystem-based coastal and marine spatial planning;
- Inform decisions through increased knowledge so that ocean management and policy can better respond to changes and challenges and to improve understanding of ocean, coasts, and Great Lakes management through educating the public about them;

- Facilitate coordination and support of federal, state, tribal, local and regional management of the ocean, coasts, and the Great Lakes and, when appropriate, the international community.
- Strengthen the resiliency of coastal communities, as well as marine and Great Lakes environments and to enhance the ability of these environments to adapt to climate change impacts and ocean acidification.
- Establish and implement a strategy which would integrate science-based ecosystem protection and restoration strategies and align them with conservation and restoration goals at the Federal, State, tribal, local and regional levels.
- Enhance the water quality in the ocean, along the coasts, and in the Great Lakes through promotion and implementation of sustainable practices on land.
- Address environmental stewardship needs in the Arctic Ocean in light of the changing conditions brought about by climate and other environmental changes.
- Strengthen Federal and non-Federal ocean observing systems and other forms of data collection by integrating them into a national system and by integrating the national system into international observation efforts.



Executive Order on Stewardship of the Ocean, Our Coasts, and the Great Lakes

The Executive Order of July 19, 2010 adopted the recommendations set forth by the Task Force in the Final Recommendations. The Executive Order provides for the establishment of the NOC and directs executive agencies to implement those recommendations under the guidance of the NOC. The Executive Order establishes that NOC will be co-chaired by the CEQ Chair and the Director of the Office of Science and

Technology Policy. A number of other federal agencies have also been named as members of the NOC, including the State, Defense, and Interior Departments, the National Science Foundation, and NASA.

The Executive Order adopts policies set forth in the Final Recommendations of the Task Force. The Executive Order set forth ten policies which include protecting, maintaining, and restoring health and biological diversity to the ecosystems of the ocean, coasts, and Great Lakes, as well as improving the resiliency of these ecosystems, communities and economies. The Executive Order also seeks to strengthen the conservation and sustainable uses of the ocean, coasts, and Great Lakes as well as the land which surrounds them. The Executive Order establishes as national policy the use of the best scientific knowledge and data to make decisions and respond to the changing global environment. It also seeks to increase scientific understanding of the ocean, coasts, and Great Lakes ecosystems as part of the globally connected systems of land, air, ice, and water. Finally, the Executive Order desires to foster and improve public understanding of the value of the ocean, coasts, and Great Lakes and to create awareness of the changing environmental conditions.

All executive agencies and other executive departments, with guidance from the NOC, are responsible for implementing the policies set forth in the Executive Order and in the Final Recommendations. Agencies and departments are required to prepare and publish a yearly report which describes the specific actions taken by the agency to implement the Executive Order. Agencies and departments are further required to coordinate and contribute resources which would assist in establishing a common information management system. Each agency or department is responsible for updating information and keeping it accessible.

Conclusion

President Obama's executive order adopting the final recommendations of the Ocean Policy Task Force is an historic moment for the protection of the U.S. marine and coastal areas. Federal agencies now have a mechanism, the NOC, to coordinate activities with respect to the oceans, coasts, and Great Lakes. Although the recommendations focus on protecting, restoring, and conserving these environments, the Executive Order recognizes the need to balance protection with sustained use of marine and coastal resources and public access to these treasured areas. To do this, the NOC is directed to encourage participation from every level of government, from federal agencies to state, tribal, and local government participation. The NOC must also educate and keep the public informed of the way that environmental changes impact our ocean, coasts, and Great Lakes and to inform them of ways to improve stewardship. It is anticipated that the NOC will hold its first meeting before the end of summer in order to begin implementing the policies outlined in the Executive Order.⁵

Endnotes

1. Exec. Order No. 13547, 75 Fed. Reg. 43,023 (July 19, 2010).
2. Press Release, Executive Office of the President, Obama Administration Officials Announce the Final Recommendations of the Ocean Policy Task Force, (July 19, 2010) *available at* http://www.whitehouse.gov/administration/eop/ceq/Press_Releases/July_19_2010.
3. The Task Force issued an *Interim Report* in September 2009 and an *Interim Framework for Effective Coastal and Marine Spatial Planning* in December 2009.
4. Final Recommendations of the Interagency Ocean Policy Task Force, July 19, 2010, *available at* http://www.whitehouse.gov/files/documents/OP_TF_FinalRecs.pdf.
5. Amy Harder, *Obama to Issue Policy for Managing Oceans and Coastline*, GOVERNMENT EXECUTIVE.COM, July 19, 2010, <http://www.govexec.com/dailyfed/0710/071910cdpm2.htm>.



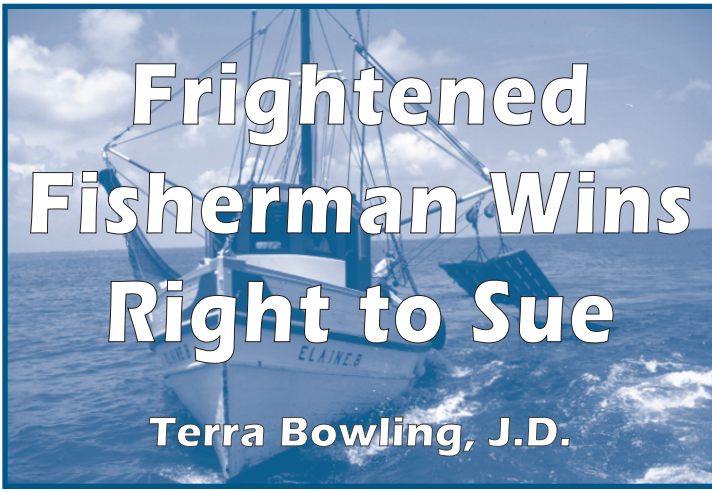
Photograph of Key Biscayne, Florida courtesy of NOAA, photographer Mr. William Folsom.

Photograph of Monterey, California wharf courtesy of NOAA, photographer Captain Albert E. Theberge.



Photograph of West Quoddy Head, Maine, courtesy of NOAA, photographer Captain Albert E. Theberge.





The U.S. Court of Appeals for the Ninth Circuit ruled that a fishing boat captain who was frightened when a freighter nearly missed his vessel and then struck another vessel, killing its captain, could bring a claim for negligent infliction of emotional distress, despite the fact that the captain did not witness the incident at issue.¹ The Ninth Circuit found that when a negligent party has severely injured or killed a third party, a plaintiff does not have to witness the incident to have a cause of action, but only must be within the zone of danger created by the defendant's conduct.

Background

On July 13, 2007, Brian Stacy, captain of the *Marja*, was trolling for salmon with a covey of fishing vessels off of Point Reyes, California, "the foggiest point on the Pacific coast."² Stacy's radar picked up the 291-foot freighter *Eva Danielsen*, which was one mile away and headed on a collision course with the *Marja*. Stacy sent a signal to the freighter, which narrowly avoided the *Marja*, but came close enough for Stacy to hear its engine and feel its wake. Shortly after, the *Eva Danielsen* hit another fishing vessel, the *Buona Madre*. The *Eva Danielsen* reported the collision and assisted in looking for survivors, but after performing a brief search continued on its way. Stacy heard radio traffic indicating the collision had been between the *Eva Danielsen* and the *Marja* and advised those on the radio that he had not been struck. The search was then suspended. The captain of the *Buona Madre*, Paul Wade, was later found dead.

Stacy filed suit against the owners and operators of the *Eva Danielsen* for the negligent infliction of emotional distress. He claimed that the freighter was proceeding at an unsafe speed without a proper lookout, proper radar equipment, or proper signals in violation of the International Navigation Rules Act. He claimed that the incident caused

him to seek psychiatric help and to miss work. Relying on a previous Ninth Circuit case, *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), the U.S. District Court for the Northern District of California dismissed the claim. The court ruled that "even if a claim may be brought under a zone of danger theory, the claim must be premised on the plaintiff's having experienced a 'psychic injury' by 'witnessing another being seriously injured or killed,' while simultaneously being threatened with physical injury to him or herself."³ Because Stacy did not see the freighter hit Wade's boat, the court dismissed the case.

Zone of Danger

Relying on a Supreme Court opinion, *Consolidated Rail Corp. V. Gottsball*, 512 U.S. 532 (1994), the Ninth Circuit panel stated that the federal standard for a claim of negligent infliction of emotional distress requires a "tort to be committed by a defendant subjecting a plaintiff to emotional harm within 'the zone of danger' created by the conduct of the defendant."⁴ According to the court, the "zone of danger" doctrine allows recovery of damages in these types of claims if the plaintiff was both located in the dangerous area created by the defendant's negligence and frightened by the risk of harm. The court found that the issue the lower court should have considered was whether Stacy himself was within the zone of danger, not whether he witnessed another incident while he was physically threatened. Because Stacy alleged that he was endangered by the vessel and suffered emotional distress as a result of the negligent actions of the defendants, the court reversed the district court's dismissal.

One judge dissented from the opinion, reiterating the lower court's finding that *Chan* requires a victim to witness harm to another person to recover under a negligent infliction of emotional distress claim. In a footnote, the majority dismissed this reasoning, stating that *Chan* dealt with a psychic injury from witnessing another being seriously injured or killed, not a psychic injury from a direct encounter. The case was remanded to the district court to determine whether Stacy may recover damages for the incident.✎

Endnotes

1. Stacy v. Danielsen, 2010 U.S. App. LEXIS 13222 (9th Cir. June 29, 2010).
2. *Id.* at *1.
3. Wade v. Tschudi, Shipping Co. A.S., 2009 U.S. Dist. LEXIS 2719 (N.D. Cal. 2009).
4. Stacy, 2010 U.S. App. LEXIS 13222 at *4.

CONSOLIDATING THE BP OIL SPILL LITIGATION

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cases are proposed class actions. The lawsuits name all of the major companies involved as defendants, including British Petroleum (BP), Transocean (the owner/operator of the Deepwater Horizon oil rig), Halliburton Energy Services (the provider of cementing operations of the well), and Cameron International Corporation (the manufacturer/supplier of the rig's blow-out preventers). In this article, they will collectively be referred to as "the companies."

In the wake of the Deepwater Horizon oil spill, over 300 lawsuits have been filed against the companies involved. In July, the United States Judicial Panel on Multidistrict Litigation (Panel) met in Boise, Idaho, to discuss consolidating many of those cases. On August 10, the panel agreed to consolidate the litigation in a federal court located in New Orleans.

Background

The Panel consists of seven judges from courts across the country. The Panel's duty is to determine whether lawsuits filed in different federal districts have one or more questions of fact in common. If it finds that cases involve similar factual issues, the Panel transfers the cases to one district for consolidated pretrial proceedings. The Panel also selects the judge or judges who will preside over the proceedings.

At the hearing on July 29, the Panel considered the transfer of a number of the cases filed against the companies involved in the Deepwater Horizon oil spill. The cases on the docket included 24 from Alabama, 10 from Florida, 33 from Louisiana, 8 from Mississippi, and 2 from Texas.¹ The lawsuits contain many similar allegations, such as negligence, strict liability, and public nuisance, by various people, including fishermen, real estate owners, and seafood business owners. Consolidating these cases should allow for a more efficient fact-finding process as well as consistent pretrial rulings on the facts surrounding the events of April 20, 2010.

This article provides a sampling of the oil spill cases that have been consolidated. Many of the 77

Commercial Fishing Claims

Commercial fishermen are one of the most obvious classes of plaintiffs. In a case from Alabama,² James F. Mason, Jr., a shrimper, is suing the companies on behalf of himself and his company, K & J, Inc., which operates an 82-foot shrimp boat. He also seeks to represent all commercial fishermen in Alabama who work in the Gulf of Mexico. He asserts that the oil has prevented normal fishing and shrimping operations in the Gulf and that he and other shrimpers, fishermen, and oystermen will lose income as a result.

Mason accuses the companies of several negligent acts leading to the explosion of the oil rig, such as failing to properly operate the Deepwater Horizon, failing to properly train and supervise employees on the rig, and failing to properly inspect equipment on the rig. He also alleges that the companies were negligent in their response to the accident because they did not promptly and adequately warn people of the spill and the resulting danger. Particularly, he claims that the companies downplayed the nature, size, and extent of the leak and did not take the necessary measures to control the oil slick.

Mason avers that the companies are liable to him and to the entire class of Alabama shrimpers, fishermen, and oystermen for damages suffered as a result of the companies' negligent acts. He seeks compensation, as well as punitive damages.

In another lawsuit, John T. Harris, a commercial fisherman in Florida, is suing the companies for negligence, strict liability, and strict products liability.³ He is in the business of catching and selling primarily

Gulf red snapper, grouper, and tilefish and holds a Gulf reef fish permit. He seeks to represent all commercial fishermen in the Gulf of Mexico who hold a Gulf reef fish permit.

Harris claims that the companies were negligent in the operation of the Deepwater Horizon oil rig, which caused the discharge of thousands of gallons of crude oil into the Gulf of Mexico. He also asserts that the companies are strictly liable for all damages suffered by commercial fishermen. When a person or company is strictly liable for damages, it does not matter whether they acted negligently or committed any wrongdoing. Liability is based on the fact that the nature of the conduct causing the harm created a foreseeable risk of injury or damage to another person or property. In this case, the fishermen only have to prove that they suffered damages and show that the oil spill caused those damages.

In addition, Harris claims that Cameron International, the company that manufactured the blow-out preventers on the Deepwater Horizon, should be held strictly liable under strict products liability. When a product contains a defect, and that defect causes injury or damage to a person or property, the company that manufactured the product may be held strictly liable. The function of blow-out preventers is to shut off an oil well when there is a leak. Harris asserts that the blow-out preventers were defective and failed to operate properly, causing thousands of gallons of oil to spill into the Gulf. Harris seeks compensation and punitive damages.

Property Owners' Claims

Property owners are alleging damage to their property, as well as loss of income from decreased tourism. In an Alabama case,⁴ Peter Burke and three other property owners are suing the companies on behalf of themselves, as owners of property on the Gulf Coast, and on behalf of all similarly-situated Gulf Coast property owners. Burke rents his properties to tourists visiting the beach and has had difficulty finding renters because of the uncertainty of the oil spill situation and the expectation that oil may reach the coast.

Burke and the other property owners allege that the companies negligently and recklessly caused and/or allowed thousands of gallons of crude oil to spill into the Gulf of Mexico, causing damage to their properties and businesses. They also accuse the companies of trespass and nuisance. They claim that

the release of the oil, whether negligently, intentionally, or recklessly, constitutes trespass onto their property, and such trespass makes the property less valuable, less profitable, and unmarketable. They assert that the release of oil also constitutes a nuisance because it disturbs their right to use and enjoy their property.

Finally, the property owners claim that the companies should be held strictly liable for all damages suffered by Gulf Coast property owners. They assert that the companies' activities of drilling and transporting oil is abnormally dangerous and ultrahazardous, creating strict liability.

The property owners seek several forms of relief, including an injunction requiring the companies to clean up the oil spill, compensation, punitive damages, and loss of income damages, all with interest.

Tourists' Claims

In one lawsuit, a citizen of Arkansas and a citizen of Missouri are suing the companies, claiming that they have been deprived of their planned vacations to Gulf Shores, Alabama.⁵ George Jett and Onalee Fore each paid nonrefundable money to rent vacation homes in Gulf Shores. They planned to enjoy the beach and engage in fishing activities. They claim that the closure of fishing in the Gulf has interfered with their vacation plans and caused them to lose money.

Jett and Fore seek to represent all tourists who have lost money as a result of their vacation plans being ruined by the oil spill. They allege negligence against the companies for causing and/or allowing the rig explosion and oil spill. They claim the companies are liable to them and to other people who have lost money paid on rental homes, fishing charters, and other recreational activities. They seek compensation, including attorney's fees and interest and punitive damages.

Divers' Claims

In one case from Mississippi, Jessica Staley, a certified diver, is suing the companies for damages.⁶ She also seeks to represent all other Mississippi residents who are certified divers and have been deprived of diving in the Gulf since the oil spill. She accuses the companies of numerous negligent acts, including failing to properly operate the Deepwater Horizon, failing to properly inspect equipment on the rig, and failing to adequately train and supervise employees on the rig.

She seeks compensation, punitive damages, interest, and attorney's fees.

Conclusion

Other lawsuits that the Panel considered in the consolidation hearing included claims by a boat transportation company that supplies jobs to the people of Louisiana,⁷ a tour guide and charter fishing company,⁸ and at least one of the families of a worker who died in the oil rig explosion.⁹

Twenty-three attorneys argued before the Panel on July 29. Those representing Gulf Coast residents and businesses pushed for the lawsuits to be transferred to a federal district court in New Orleans, nearest the disaster. The defendant companies would have preferred that the cases be moved to the oil-centric Houston area. The panel ruled, "Upon careful consideration, we have settled upon the Eastern District of Louisiana as the most appropriate district for this litigation. Without discounting the spill's effects on other states, if there is a geographic and psychological 'center of gravity' in this docket, then the Eastern District of Louisiana is closest to it."¹⁰

Endnotes

1. In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (July 29, 2010) (hearing order).
2. Mason v. Transocean, Ltd., 2010 U.S. Dist. Ct. Pleadings 298885 (S.D. Ala April 29, 2010).
3. Harris v. Transocean, Ltd., 2010 U.S. Dist. Ct. Pleadings 129 (N.D. Fla. May 4, 2010).
4. Burke v. BP Corp., 2010 U.S. Dist. Ct. Pleadings 195 (S.D. Ala. May 13, 2010).
5. Jett v. BP, 2010 Dist. Ct. Pleadings 228 (S.D. Ala. June 14, 2010).
6. Staley v. Cameron Int'l Corp., 2010 U.S. Dist. Ct. Pleadings 181 (S.D. Miss. May 4, 2010).
7. Nova Affiliated, S.A. v. BP, 2010 U.S. Dist. Ct. Pleadings 1313 (E.D. La. April 30, 2010).
8. Fish Commander, LLC v. BP, 2010 U.S. Dist. Ct. Pleadings 1339 (E.D. La. May 4, 2010).
9. Roshto v. Transocean, 2010 U.S. Dist. Ct. Pleadings 1156 (May 7, 2010).
10. In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (Aug. 10, 2010) (transfer order).



Photograph of booms fastened on Mississippi beach courtesy of Melissa Schneider, Mississippi-Alabama Sea Grant Consortium.



CONTROVERSY CONTINUES TO SWIRL AROUND OIL AND GAS DRILLING IN THE ARCTIC

Terra Bowling, J.D.

A federal district judge has halted the development of oil and gas wells on leases in the Arctic's Chukchi Sea.¹ The judge found that the federal government failed to analyze the environmental impacts of drilling before offering approximately 29.4 million acres of public lands for lease. The decision follows the massive Gulf of Mexico oil spill and several decisions by President Obama to suspend planned exploration drilling and leases in Alaska.

Background

The Chukchi Sea is northwest of Prudhoe Bay in Alaska. As one would imagine, the Arctic ecosystem, with its remote location and hostile weather conditions, is not ideally situated for drilling infrastructure. Additionally, the area is environmentally sensitive, as it is habitat to polar bears, walrus, and endangered whales, as well as home for native Alaskan subsistence hunters and fishermen. However, in 2008, the Minerals Management Service (since renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement) managed the sale of "Lease Area 193," the first lease sale in the Arctic since 1991.

A unit of Shell had planned to drill three exploratory wells this summer, but those plans were halted following the Gulf oil spill when the Obama administration suspended consideration of any applications for exploratory drilling in the Arctic until 2011 and extended a moratorium on permits to drill new deepwater wells for six months. The administration also suspended a planned 2011 lease sale in Bristol Bay and four lease sales in the Chukchi and Beaufort seas.

NEPA

Following the 2008 lease sale, the Native Village of Point Hope, the city of Point Hope, and the Inupiat

Community of the Arctic Slope, along with several environmental groups filed suit claiming that the lease sale, as well as the Final Environmental Impact Statement (FEIS) for the sale, violated the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Administrative Procedures Act (APA). The court focused on NEPA claims.

NEPA requires the preparation of an Environmental Impact Statement (EIS) for any major federal action "significantly affecting the quality of the human environment."² NEPA's objectives are to require the federal agency to "consider every significant aspect of the environmental impact of a proposed action," and to ensure that the agency "inform[s] the public that it has indeed considered environmental concerns in its decisionmaking process." NEPA aims to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . ."³ The groups sought an injunction claiming that the final EIS did not adequately analyze the impacts of the lease sale on the environment and human communities; was missing essential information on the Chukchi Sea; failed to adequately analyze the impacts of the lease sale in the context of climate change; understates the risks of an oil spill; fails to fully analyze cumulative impacts on threatened species; and provides a misleading analysis of the effects of seismic surveying.

The court noted that NEPA review occurs as a four-stage process, with "more detailed environmental impact statements at the program's later, more site-specific stage." The stages include: 1) a five-year lease plan; 2) lease sales; 3) exploration; and 4) development and production. The reviews as part of the 2008 lease sale constituted the second stage of review. The defendants argued that the plaintiffs were improperly asking for a level of review that was not warranted until later phases.

In fact, a previous Ninth Circuit ruling found that NEPA does not require MMS to prepare an EIS that evaluates potential environmental effects on a site-specific level of detail at the initial oil and gas leasing stage. However, the plaintiffs argued that the MMS's NEPA obligation at the lease sale stage is to analyze the effects of development, "should it occur" and that once leases are issued, the defendants may conduct preliminary industrial activities without further approval.

Ruling

The court first addressed plaintiffs' claims that MMS failed to take a hard look at the effects of seismic surveying and failed to fully analyze cumulative effects to threatened eiders. The court found that the defendants took a requisite hard look at these areas and acknowledged that necessary mitigation measures can be implemented in stages 3 and 4.

Next, the court examined plaintiffs' claims that the EIS omits analysis of natural gas development despite industry interest and specific lease incentives for such development, and the fact that it analyzes only the development of the first field of one billion barrels of oil, despite acknowledging that this is the minimum level of development that could occur on the leases. The court found that the analysis of the first billion gallons of oil satisfies the hard look requirement in NEPA. However, the court agreed that the agency did not take the requisite hard look at the impact of natural gas exploration, "despite industry interest and specific lease incentives for such development."

The court also agreed with the plaintiffs' claim that the EIS suffers from missing information and data gaps. The court noted that the EIS "reflects dozens if not hundreds of entries indicating a lack of information about species/habitat, as well as a lack of information about effects of various activities on many species." The court agreed that the MMS failed to determine whether missing information in the EIS was relevant or essential under

40 C.F.R. 1502.22 and failed to determine whether the cost of obtaining the missing information was exorbitant. They ruled that the failure to comply with 1502.22 was an abuse of discretion.

Conclusion

The court concluded that "although much of the Agency's extensive investigation was appropriate, the Agency has failed to comply with NEPA in certain circumstances."⁴ The court ruled that all activity under Lease Sale 193 was enjoined pending review by Defendants of these issues. The court remanded the case to the Agency to satisfy its obligations under NEPA. However, on August 2nd, following a motion filed by Shell, the federal judge clarified his ruling. He stated that the injunction does not prevent seismic studies that had already been approved or were pending approval by the federal government.✎

Endnotes

1. *Native Vill. of Point Hope v. Salazar*, 2010 U.S. Dist. LEXIS 74086 (D. Alaska July 21, 2010).
2. 42 U.S.C. § 4332(C).
3. 42 U.S.C. § 4321.
4. *Native Vill. of Point Hope*, 2010 U.S. Dist. LEXIS 74086 at * 23.
5. *Judge OKs Limited Exploration for Oil in Chukchi Sea*, ANCHORAGE DAILY NEWS, Aug. 4, 2010.



Photograph of ice and open water in the Beaufort Sea north of Alaska courtesy of NOAA.

Environmental Reviews for “Roundup Ready” Crops Inadequate

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

In June, the U.S. Supreme Court issued its ruling in *Monsanto Co. v. Geertson Seed Farms*,¹ the first case the court has heard involving genetically modified organisms. Geertson Seed Farms, a conventional alfalfa farm, and environmental groups had sued the U.S. Department of Agriculture (USDA) over its decision to deregulate the use of “Roundup Ready” alfalfa without preparation of an environmental impact statement. In the late 1990s, Monsanto, the manufacturer of Roundup, genetically engineered (GE) a number of important agricultural crops, including alfalfa, canola, corn, soybeans, and sugar beets, to be resistant to the herbicide. These GE crops can withstand doses of Roundup, but not other brands of herbicides, that would otherwise kill them. Monsanto’s GE crops have proven to be quite popular with farmers. Ninety percent of the soybeans and seventy percent of the corn and cotton grown in the United States are Roundup Ready.²

Background

The current legal battle over Roundup Ready alfalfa started in 2004. That year, Forage Genetics, the company licensed by Monsanto to develop and grow the GE alfalfa seed, filed a petition with the Animal and Plant Health Inspection Service (APHIS) within the USDA for a determination that Roundup Ready alfalfa does not pose a plant pest risk. At the time, Roundup Ready alfalfa was regulated by APHIS as a “regulated article.” Pursuant to the Plant Protection Act of 2000, permits are required for the importation, interstate transportation, and environmental release of “regulated articles,” genetically engineered organisms considered to be plant pests. Anyone may petition APHIS for a determination that a particular regulated article should not be regulated because it does not pose a plant pest risk, i.e. it does not

“directly or indirectly injure or cause disease or damage in or to any plants or parts thereof.”³

Prior to its decision on Forage Genetics’ petition, APHIS had authorized almost 300 field trials of Roundup Ready Alfalfa over an eight-year period.⁴ The cat was already out of the bag, so to speak. To comply with the National Environmental Policy Act (NEPA), APHIS conducted an analysis of the potential environmental impact of the requested deregulation. The Environmental Assessment (EA), which accompanied APHIS’ decision to deregulate Roundup Ready alfalfa, was a mere 18 pages.⁵ A more-detailed Environmental Impact Statement (EIS) was not prepared because APHIS determined in the EA that the deregulation of Roundup Ready alfalfa would not have a significant effect on the environment.

Commercial planting of Roundup Ready alfalfa began in July 2005. The *Geertson Seed Farms* lawsuit was filed shortly thereafter. Sales and planting of Roundup Ready alfalfa seed continued, however, because the plaintiffs did not seek an order restraining the defendants’ actions while the court decided the merits of the case, known as preliminary injunctive relief. By the time the district court issued its ruling in early 2007 more than 3,000 farmers in 48 states planted an estimated 220,000 acres of Roundup Ready alfalfa.⁶

NEPA Violation

The district court determined that APHIS violated NEPA by not preparing an EIS. The court identified two primary problems with the EA prepared by APHIS. First, the court found that the agency failed to adequately consider the extent to which the herbicide-resistant gene could be transferred to organic and conventional alfalfa. Some genetic drift is unavoidable between GE

and non-GE crops. Farmers cannot control the way the wind blows or the path that bees and other pollinators choose. In addition, the court found that APHIS failed to adequately consider the extent to which deregulation would contribute to the development of Roundup-resistant weeds. Evidence is mounting that Roundup Ready agriculture is creating “superweeds” – weeds resistant to glyphosate, the active ingredient in Roundup and some other commercial herbicides.⁷ Given the known risk of genetic drift and weed resis-

ers, however, had planted alfalfa without permits based on APHIS’ administrative finding that it was no longer regulated. Should those farmers be required to pull out the existing crop, thereby bearing a significant financial burden for reasonable reliance on an APHIS administrative decision? In crafting the remedy for the NEPA violation, the district court judge attempted to find some middle ground. Farmers that had already planted their fields or purchased seeds could continue their operations if they complied with certain guidelines

suggested by APHIS, such as mandatory isolation distances between GE and non-GE fields. All future plantings of Roundup Ready alfalfa were banned until APHIS prepares a full EIS on the deregulation decision.

Appeal

APHIS, Monsanto, and Future Genetics appealed the district court’s order. After the Ninth Circuit affirmed the district court’s decision, the defendants appealed to the U.S. Supreme Court. The question on appeal was a narrow one: had the district court judge exceeded his authority by prohibiting all future plantings of Roundup Ready alfalfa pending completion of an EIS? The Supreme Court agreed with the defendants that the district court’s remedy was too broad. Upon review of a deregulation petition, APHIS may either deny the petition or “approve the petition *in whole or in part*.”⁸ The district court’s injunction, however, stated that “before granting Monsanto’s deregulation petition, *even in part*, the federal defendants shall prepare an [EIS].”⁹ The Supreme Court ruled that the district court’s injunction was improper because it prohibited the agency from pursuing “any deregulation – no matter how limited the geographic area..., how great the isolation distances..., how stringent the regulations governing harvesting..., how

robust the enforcement mechanisms..., and consequently – no matter how small the risk that the planting authorized under such conditions would adversely affect the environment... .”¹⁰

Conclusion

The case now returns to the district court for the judge to issue a new remedial order consistent with the

Photograph of alfalfa courtesy of the USDA.



tance, the court found that it was improper for APHIS to conclude that there would be no significant environmental impact. An EIS would have to be prepared.

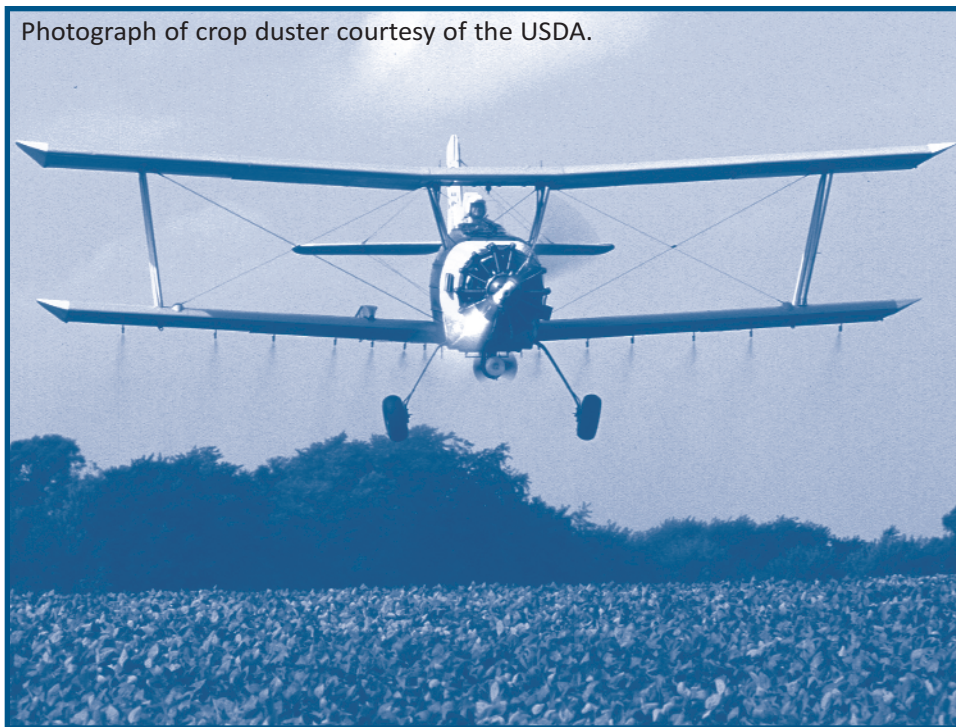
This ruling placed the district court judge in a difficult position. The NEPA violation warranted vacating APHIS’ deregulation decision. Roundup Ready alfalfa would once again be a “regulated article,” the planting of which would require a permit. Thousands of farm-

Supreme Court's opinion. While initial media coverage of the case framed it as a win for Monsanto,¹¹ it is a pretty minor victory. The defendants did not challenge the existence of a NEPA violation on appeal. The Supreme Court's ruling therefore does not change the status quo. Roundup Ready alfalfa cannot be planted until APHIS issues a new deregulation decision, presumably after the agency prepares a full EIS.

Alfalfa isn't the only Roundup Ready crop embroiled in legal controversy. In September 2009, a California district court ruled that APHIS' decision to deregulate Roundup Ready sugar beets violated NEPA.¹² Of key concern to the plaintiffs in this case were the environmental and economic impacts of cross-pollination of sugar beets, Swiss chard, and table beets grown in one valley in Oregon. Interestingly, the court focused on consumer choice, as opposed to consumer harm, finding that "the potential elimination of farmer's choice to grow non-genetically engineered crops, or a consumer's choice to eat nongenetically engineered food, and an action that potentially eliminates or reduces the availability of a particular plant has a significant effect on the human environment."¹³ Because APHIS failed to adequately consider the effects of gene transmission on conventional farmers and consumers, its finding of no significant environmental impact was unconvincing to the court. In August 2010, the court issued an order prohibiting all future plantings of Roundup Ready sugar beets until APHIS remedies its NEPA violations.¹⁴

As the battle over GE crops rages, the facts remain murky. Most of the controversy centers on impacts to organic agriculture. While genetic drift does occur, it is unclear whether, and to what extent, harm to the environment occurs. In fact, proponents of GE crops suggest that there can be an environmental benefit through less pesticide applications and less tillage. Economic impacts, however, can be severe if the fields of organic farmers are contaminated with the glyphosate-resistant gene and their access to organic markets thereby foreclosed. More information is clearly needed. Ideally these information needs would be met, at least in part, by APHIS' forthcoming environmental reviews.✎

Photograph of crop duster courtesy of the USDA.



Endnotes

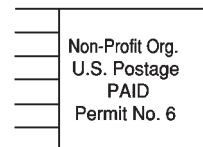
1. *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).
2. William Neuman and Andrew Pollack, *Farmers Cope with Roundup-Resistant Weeds*, THE NEW YORK TIMES, May 3, 2010.
3. *See*, 7 C.F.R. §§ 340.1, 304.6.
4. *Monsanto*, 130 S. Ct. at 2750.
5. Matt Jenkins, *Brave New Hay*, HIGH COUNTRY NEWS, June 11, 2007.
6. *Monsanto*, 130 S. Ct. at 2751.
7. Researchers have identified 10 Roundup-resistant weeds infecting 22 states. Neuman and Pollack, *supra* note 1.
8. 7 C.F.R. § 340.6(d)(3)(i) (emphasis added).
9. *Monsanto*, 130 S. Ct. at 2757 (emphasis in original).
10. *Id.* at 2759.
11. *See*, i.e., Andrew Pollock, *Justices Back Monsanto on Biotech Seed Planting*, NEW YORK TIMES, June 21, 2010; Brent Kendall, *High Court Sides with Monsanto in Alfalfa Case*, WALL STREET JOURNAL, June 22, 2010.
12. *Center for Food Safety v. Vilsack*, Orders regarding Cross-motions for Summary Judgment, Case no. C 08-00484 JSW (Sept. 9, 2009).
13. *Id.* at *13.
14. *Center for Food Safety v. Vilsack*, Order regarding Remedies, Case no. C 08-00484 JSW (Aug. 13, 2010).



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