

The SandBar

Legal Reporter for the National Sea Grant College Program

Draft Biological Opinions Protected from Release Under FOIA



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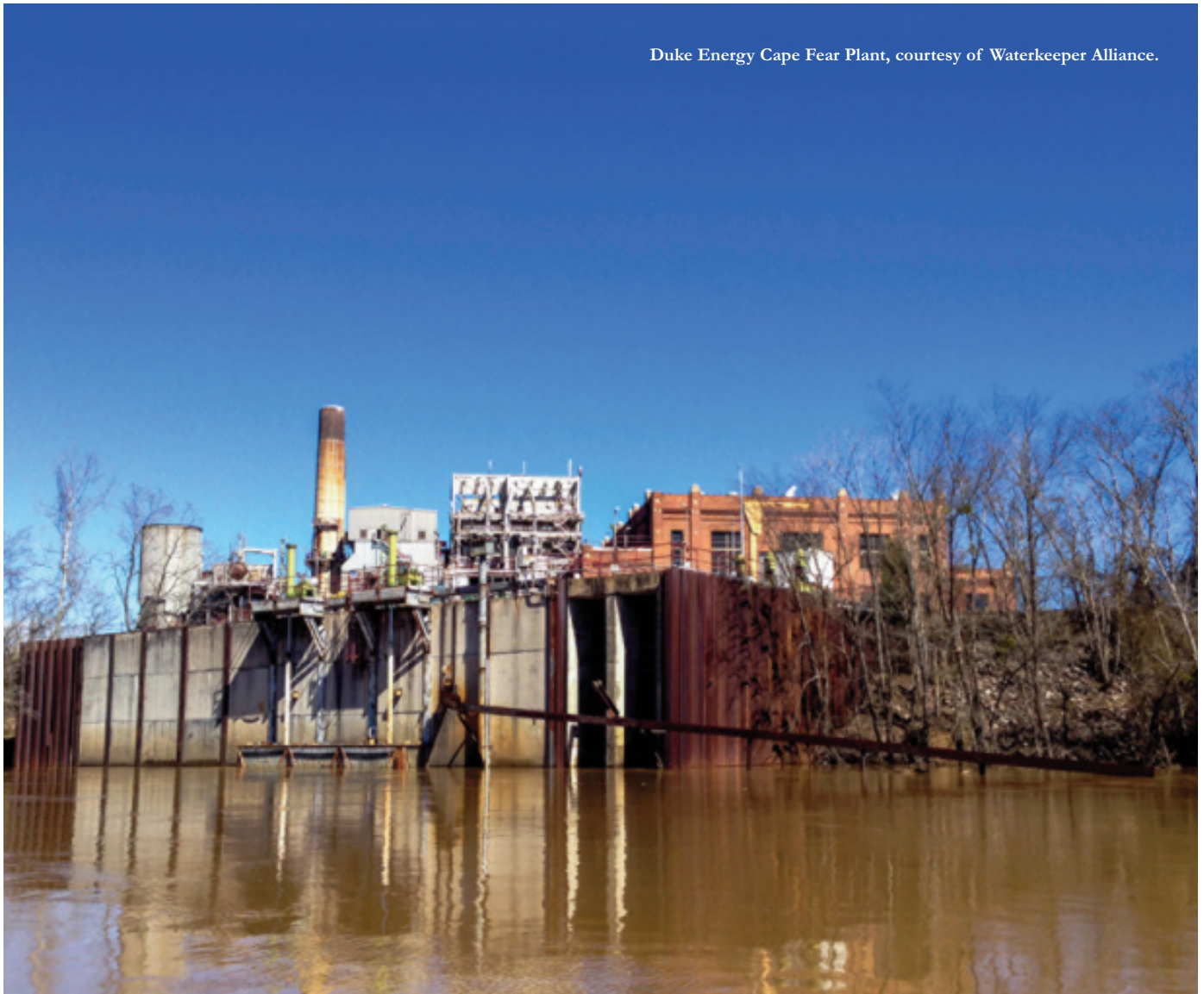
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Draft Biological Opinions Protected from Release Under FOIA

Sierre Anton¹

Duke Energy Cape Fear Plant, courtesy of Waterkeeper Alliance.



The U.S. Supreme Court has ruled that the Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service (FWS) are not required to release documents requested through the Freedom of Information Act (FOIA) that are deemed “drafts” by the agencies.² This ruling, the first written by recent addition to

the court Justice Amy Coney Barret, could help protect from public disclosure agency communications that are deemed deliberative. On the other hand, it could also reduce transparency and limit the success of the general public or advocacy groups obtaining pre-decisional documents from agencies.

Background

In 2011, the EPA proposed a cooling water intake structure rule.³ Due to the rule's potential impacts on endangered aquatic species, the agency was required to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services). After the Services received the EPA's proposed rule in November 2013, they completed draft biological opinions (BiOps) concluding that the proposed rule would likely jeopardize threatened species. These drafts were shelved by the Services without sending them to the EPA. The Services continued consultation with the EPA, and the EPA sent a revised proposed rule to the Services in March 2014 that was significantly different from the November 2013 proposed rule. The Services then issued a joint final BiOp finding "no jeopardy" to listed species.

After the EPA issued its final rule, the Sierra Club submitted FOIA requests for records related to the Services' consultation with the EPA. The Services turned over many documents but invoked the "deliberative process" privilege to prevent disclosure of the November 2013 draft BiOps.

What is FOIA?

The FOIA requires federal agencies to make records available to requesting parties unless those records are protected. There are nine categories of exemptions for FOIA requests. This case centers on the deliberative process privilege. The deliberative process privilege protects documents and internal communications that are meant to facilitate discussion of the content of a final decision. This is intended to prevent agencies from operating like a they are "in a fishbowl" with any and all communications being at risk of disclosure and to preserve candid discussion and debate within agencies.⁴

The deliberative process privilege protects documents and internal communications that are meant to facilitate discussion of the content of a final decision.

Arguments from FWS and Sierra Club

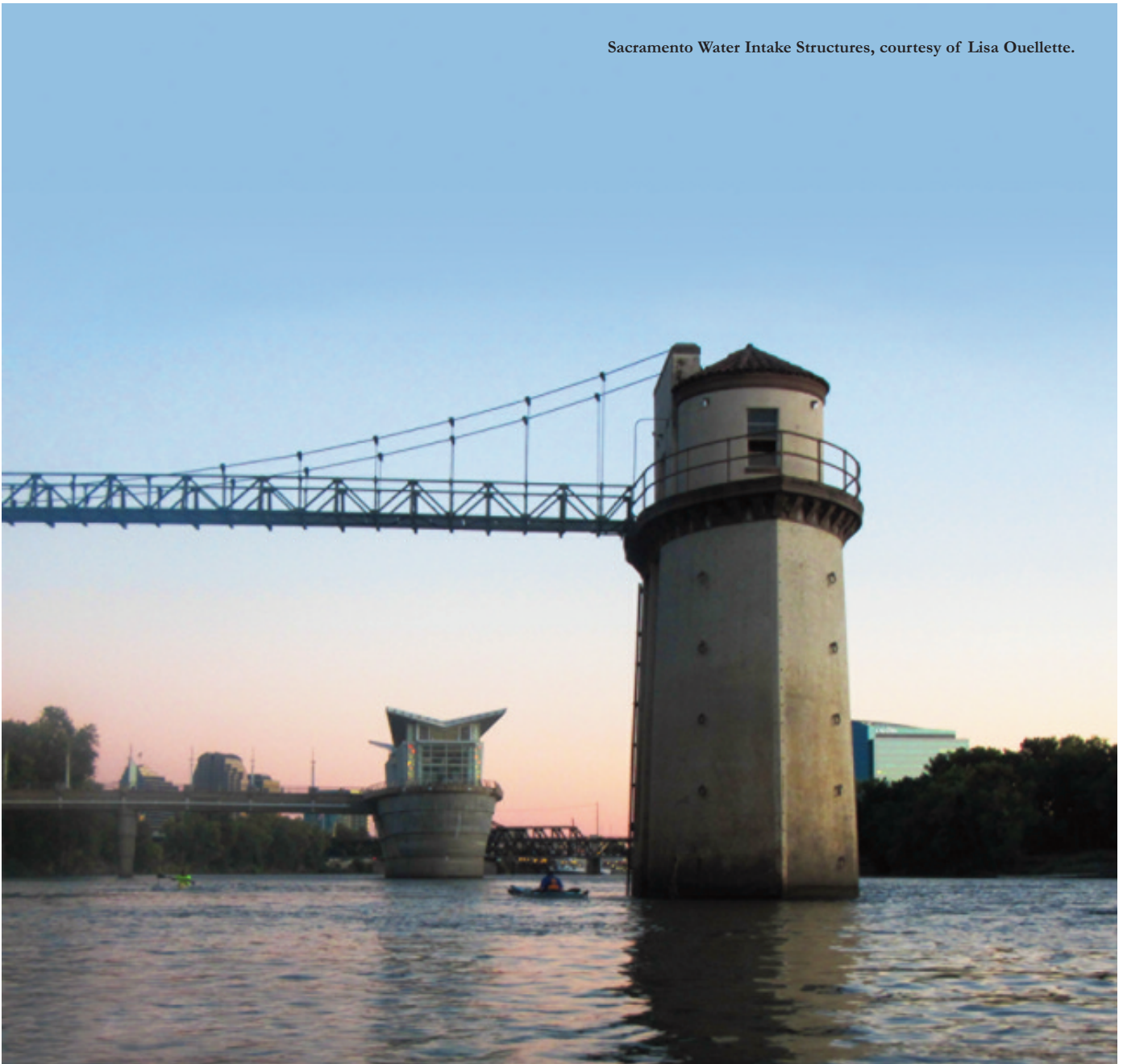
The Sierra Club filed suit in the U.S. District Court for the Northern District of California to obtain the draft BiOps related to the EPA's November 2013 proposed rule. The district court ruled in favor of the Sierra Club. On appeal, the Ninth Circuit affirmed the finding that the Services' draft "jeopardy" BiOps were final opinions on the November

2013 proposed rule, not deliberative communications, and therefore not covered under the deliberative process privilege exemption. The Services appealed to the U.S. Supreme Court.⁵

The Services argued that draft opinions are expressly contemplated and protected in the Endangered Species Act (ESA) consultation requirements, which restrict the FWS from issuing a final BiOp until the EPA finishes reviewing the draft opinion. ESA regulations state "if requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives." This means that before the "final" BiOp is published, the Services must provide a draft to the requesting agency. Along with this, the ESA also states that "the Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency." Essentially, this means the Services cannot issue its final BiOp while the requesting agency is still reviewing the draft. The Services argued that in drafting this provision Congress anticipated further review and possible changes by the Services after the EPA's receipt of the draft, and thus draft BiOps should qualify for the deliberative process exemption.

The Sierra Club argued that while these BiOps were labeled "draft" opinions, they had the "operative effect" of changing the EPA's course, and thus they should be treated as final agency actions. The Supreme Court stated in *NLRB v. Sears* that this "operative effect" language is the deciding factor in whether or not an agency action is final.⁷ The Sierra Club contended that labeling these documents as drafts and not transmitting them to the EPA, but rather continuing consultation, was the Services' way of giving the EPA a "sneak-peak" at the upcoming jeopardy decision and a chance to change course and avoid creating a record of jeopardy regarding its proposal. The Sierra Club claimed that if these opinions were covered by the deliberative process exemption, it would create an incentive for agencies to simply label every document a draft, no matter how polished or finalized it was, in order to protect it from FOIA requests. This would in effect create a "secret" administrative record that was not subject to discovery.

The Supreme Court found in favor of the FWS's interpretation, stating that the Sierra Club's understanding of "operative effect" was flawed. The Court stated that the "real operative effect" references only legal consequences, and not practical consequences.⁸ Essentially, a BiOp is considered final when it leads to "direct and appreciable legal consequences" that "alter the legal regime to which [EPA] is subject." In other words, the fact that the draft BiOp caused the EPA to revise its proposed rule is not enough to say it had an "operative effect" because it did not affect the legal regime that the EPA operates under. If the



draft BiOps had been sent to EPA, it would have required EPA to make a decision based on the procedures of the ESA. However, since it was never sent, this decision-making requirement was never triggered. Thus, there was no direct legal consequence of the draft biological opinion.

The majority opinion claimed that the Sierra Club's concern that this would create an incentive to label all communications and decisions as "drafts" is unfounded, since "determining whether an agency's position is final for purposes of the deliberative process privilege is a functional rather than formal inquiry."¹⁰ The deliberative process privilege will not necessarily apply just because an agency has simply labeled a final decision as a "draft."

Dissent

The dissent, written by Justice Breyer and joined by Justice Sotomayor, argued that the determination of whether a document is final or deliberative is entirely dependent on its function within an agency's decision-making process. Justice Breyer claims there are five factors in determining whether or not a draft's function is final or deliberative: 1) If further deliberation about the draft's content is not merely possible, but likely, then it is deliberative; 2) If the draft opinion or its contents are transmitted to the agency, it is likely deliberative; 3) If the draft triggers a choice for the agency over how to proceed, it is not deliberative; 4) If the draft would likely be published by the consulting agency anyway,



it is not deliberative; 5) If legal consequences flow from the draft opinion, such as the services' inability to issue a final opinion, or the requesting agency is faced with deciding how to proceed, then the draft is not deliberative. The dissent would have the court of appeals decide whether or not the FWS BiOp qualifies as final or a draft based off of these factors. Justice Breyer indicated that the NMFS BiOps were still working documents, as they had marks and highlights, denoting an unpolished document. The FWS BiOps, however, seem to be final documents pending nothing more than signatures. Ultimately, this dissent has no binding authority, but it offers an alternative way to identify whether an action has an operative effect.

Conclusion

This decision has led to conversation regarding the future of public disclosure requirements and open government. Some argue the decision creates a roadblock for advocacy agencies and watchdog groups, while others argue it will allow agencies to discuss matters more candidly and will

encourage effective rulemaking. Regardless, the case has been remanded back to the U.S. District Court for the Northern District Court of California with instructions that the BiOp be considered a draft opinion for purposes of the deliberative process privilege. 🐾

Endnotes

¹ 2022 J.D. Candidate, University of Mississippi School of Law.

² U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777 (2021).

³ 76 Fed. Reg. at 22,174.

⁴ EPA v. Mink, 410 U.S. 73, 87 (1973).

⁵ Sierra Club v. U.S. Fish and Wildlife Serv., 925 F.3d 1000 (2019).

⁶ 50 C.F.R. § 402.14(g)(5).

⁷ N. L. R. B. v. Sears, Roebuck & Co., 421 U.S. 132, 160 (1975).

⁸ *Id.* at 159.

⁹ *U.S. Fish & Wildlife Serv.*, 141 S. Ct. 777.

¹⁰ *Id.*

Tribal Immunity Bars Coastal Access Suit

Terra Bowling



Trinidad Bay in Humboldt County, California, courtesy of Julia Guerra.

In January, a California appeals court held that tribal sovereign immunity barred a suit to establish a public easement on coastal property owned by the Cher-Ae Heights Indian Community of the Trinidad Rancheria (Tribe).¹ The court rejected the plaintiffs' argument that a common law exception to sovereign immunity applied to Indian Tribes. The ruling upholds the Tribe's common law immunity from litigation traditionally enjoyed by sovereign powers.

Background

The Tribe purchased coastal property in Humboldt County, California that included Trinidad Bay, a naturally protected small boat harbor. The Tribe applied to the Bureau of Indian Affairs (BIA) to take the property into trust for the benefit of the Tribe. The Coastal Zone Management Act (CZMA) requires federal agencies to certify that any federal activity affecting a coastal zone is consistent to the maximum extent

practicable with the state's coastal management policies.² The BIA concluded that the Tribe's proposal was consistent with state coastal policies, including public access requirements in the California Coastal Act. Under the CZMA, a state may approve of or object to the federal consistency determination.³ The California Coastal Commission, the agency charged with managing the state's coasts, agreed that the Tribe's proposal would not interfere with the public's right to access the coast.

As a result of the Tribe's petition, Jason Self, Thomas Lindquist, and other members of the public ("beach users") filed an action challenging the transfer of the property into federal trust status. The plaintiffs use the boat-launching beach adjacent to Trinidad Bay for both recreational and business purposes. They argued that if the federal government held title to the land, it could interfere with their access to the beach. The beach users sought to quiet title to a public easement for vehicle access and parking on the property, alleging that the prior owner of the property dedicated a portion of it to public use, either expressly or impliedly.

The Tribe entered a special appearance at the trial court, moving to quash service of process and to dismiss the complaint for lack of subject matter jurisdiction due to sovereign immunity. The trial court granted the motion and dismissed the case with prejudice. The beach users appealed.

Sovereign Immunity

The appellate court first noted that Indian Tribes generally have sovereign immunity with two exceptions: if a Tribe has waived its immunity or if Congress has authorized the suit. Neither of those exceptions applied in this case. The beach users contended that a common law exception to sovereign immunity that typically applies to states and foreign governments should also apply to the Tribe. Under the "immovable property exception," sovereigns, such as states and foreign governments, are not immune to property disputes outside of their territorial boundaries.

The appellate court disagreed that the exception extended to Tribes for several reasons. First, the U.S. Supreme Court has never applied this exception to a Tribe and recently declined to decide whether the exception applied in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018). The court also held that foreign sovereign immunity is not comparable to Tribal immunity, as Tribes are not foreign sovereigns.

The court noted three additional reasons to let Congress decide whether the exception should apply to tribes. First, deferring to Congress on tribal immunity has been the Supreme Court's standard practice for decades. Second, supporting tribal land acquisition is a key feature of modern federal tribal policy. Finally, this particular case did



not provide the grounds to extend the immovable property exception to tribes, as the beach users' concern over whether they would lose public access is speculative, and the CZMA protects the public interest in coastal access.

Conclusion

The court upheld the trial court's ruling that tribal immunity barred the beach users' suit, finding the beach users' arguments for applying an exception to the immunity unpersuasive. The court's decision is consistent with prior U.S. Supreme Court rulings. One appellate court judge concurred with the court's decision. The concurrence stated that the court should have found the immovable property exception applies to tribes, as outlined in Justice Clarence Thomas' dissent in *Upper Skagit*; however, the exemption would still be preempted in this case by Congress' review of petitions to bring land into the federal trust. ✎

Endnotes

¹ Self v. Cher-Ae Heights Indian Cmty. of Trinidad, 60 Cal. App. 5th 209 (2021).

² 16 U.S.C. § 1456(c).

³ 16 U.S.C. § 1456(c)(3)(A).

Park and Pray:

Court Says Church Can Offer Parking for Beachgoers

Betsy Montague¹



Sunset on St. Pete Beach, courtesy of Amanda Anderson.

A Florida federal district court recently ruled that the City of St. Pete Beach could not prevent a local church from offering free parking to the public.² The city had previously fined Pass-a-Grille Beach Community Church for violating a city ordinance regulating commercial parking lots after the church permitted beachgoers and tourists to use its free parking lot. In particular, the court enjoined the city from “prevent[ing] or attempt[ing] to prevent the church from continuing to allow the general public to use its parking lot, soliciting charitable donations on the lot, and evangelizing those who park in its lot.”³

Background

Pass-a-Grille Beach Community church is located across the street from Pass-a-Grille Beach and has around 80 parking spaces, the majority of which remain empty aside from Sundays. The church has allowed the general public to use its parking lot to easily access the beach since 1957. According to the church, such offerings help attract people to the congregation and afford it a “unique opportunity to serve the community and reach out to people who may not otherwise come to the church.”⁴

Beginning in 2016, the church’s youth group decided to evangelize, pray for, and seek donations for their mission

trips from people parking in the church's parking lot. Donations were not required, as the church's donation box states that no payment is necessary to use the parking lot. The church hoped to use its "biblically-based hospitality" to help people enjoy a fun day at the beach with friends and families. In June 2016, the City began citing the church with violations of various municipal parking restrictions on commercial parking lots in response to complaints filed by neighbors of the church. The neighbors found the extra traffic from the tourists using the church's lot to be a nuisance.⁵

The city's Special Magistrate for Code Enforcement held a hearing on the notice of violation and dismissed the litigation stating that the church was allowed to accept donations provided that they did not advertise the parking as a "fundraiser." Following the magistrate's decision, some of the church's neighbors remained unhappy and continued to bring their complaints to city officials regarding the church's parking practices. In 2020, the city fined the church \$1,000—this time, however, under a land regulation ordinance that prohibits the church from allowing anyone not engaged in a "legitimate church purpose" from utilizing its parking lot. Under the land regulation ordinance, the city faced a fine of \$500 every time someone who was not a "customer" or "patron" of the church parked in its lot. In response to the citation, the church filed a complaint in federal district court, seeking an injunction against enforcement of the land use regulation restricting the use of its parking lot.

RLUIPA

The church claimed that its free parking practices were protected by the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), which prohibits local governments from imposing "substantial burdens" on churches through enforcement of regulations unless such enforcement is required to further a compelling government interest. As a result, the central issue in the case boiled down to whether the church's religious beliefs regarding its use of the parking lot were sincere, as required under RLUIPA, or the church's stated beliefs were merely offered to circumvent the city's land use ordinances and obtain donations during off-hours.

The city claimed the church's beliefs were not sincere because the congregation did not always offer free parking; rather, they charged for parking or accepted voluntary donations from time to time. The court dismissed this argument, observing that a religious group is free to change its mind over time, and the fact that the church did not always offer free parking in the past did not mean that the church's religious beliefs were not sincere. The court was satisfied with the church's explanation of its religious basis for its position, as attested to by filings and testimonies from the church's ministers that were submitted into evidence.

In reaching its decision, the court reasoned that attracting new members is an important goal of all community and religious groups and, likewise, giving away something for free is a "time-honored strategy used to generate attention, create interest, and attract new customers."⁶ While the court based its decision on RLUIPA grounds, the court also considered the functionality of the city's policy and stated "it is difficult to imagine how the city's current policy of limiting the church's use of its parking lot to 'legitimate church purpose' could ever be workable in a practical sense."⁷ For example, if members from the church's youth group met at the church but then chose to move the meeting across the street to the beach, would this constitute a "legitimate church purpose?" Keith Haemmelman, the church's senior minister, commented on the city's policy stating, "[y]ou couldn't be a church member and go to the beach."⁸ Further, if non-religious community groups such as a Boy Scout Troop or Alcohol Anonymous held its meetings in church's building but also went across the street to swim, would either serve a "legitimate church purpose?"

Conclusion

The district court granted the church's requested preliminary injunction, finding the city made no showing of a compelling government interest to enforce the land use regulation at issue against the church. The court based its decision on the grounds that there is a substantial likelihood that the church would prevail on the merits under RLUIPA. With the preliminary injunction in place, the church may continue allowing the public to use its parking lot and share its spiritual message while seeking free-will charitable donations from tourists and beachgoers who park in its lot. ✎

Endnotes

¹ 2021 J.D. Candidate, University of Mississippi School of Law.

² Pass-A-Grille Beach Cmty. Church, Inc. v. City of St. Pete Beach, No. 8:20-CV-1952-TPB-SPF (M.D. Fla. Jan. 26, 2021).

³ Preliminary Injunction at 2, Pass-A-Grille Beach Cmty. Church, Inc. v. City of St. Pete Beach, No. 8:20-CV-1952-TPB-SPF (M.D. Fla. Jan. 26, 2021).

⁴ Plaintiff's Verified Complaint Damages, Declaratory And Injunctive Relief Sought and Demand For Jury Trial at 8, Pass-A-Grille Beach Cmty. Church, Inc. v. City of St. Pete Beach, No. 8:20-CV-1952-TPB SPF (M.D. Fla. Jan. 26, 2021).

⁵ Paul O'Donnell, *Florida Church Says Offering Free Beach Parking Is a Religious Act. Judge Agrees*, RELIGIOUS NEWS SERVICE (Jan. 29, 2021).

⁶ Pass-A-Grille Beach Cmty. Church, No. 8:20-CV-1952-TPB-SPF, 14.

⁷ *Id.* at 18 n.21.

⁸ *Supra* note 5.

Army Corps Finalizes Nationwide Permits for Mariculture, But Will They Stand?

Catherine Janasie¹

On January 13, 2021, the U.S. Army Corps of Engineers (Corps) published a Final Rule for modified and new Nationwide Permits (NWP).² Among the new NWPs were three relevant to mariculture operations: NWP 48 for shellfish, NWP 55 for seaweed, and NWP 56 for finfish. The new NWPs became effective on March 15, 2021. However, uncertainty remains as to whether the Corps' districts will adopt the new permits and litigation challenging the permits looms.

Overview of Corps Permits

The Corps is authorized to issue permits under both § 10 of the Rivers and Harbors Act (RHA) and § 404 of the Clean Water Act (CWA). The RHA § 10 requires permits for “structures”—for mariculture operations, this might include cages, nets, racks, lines, pilings, ropes, trays, and tubes placed in navigable waters. The CWA § 404, on the other hand, requires permits for “dredge and fill” activities. In the mariculture context, the Corps has taken the position that distributing shellfish seed and installing shellfish gear does not qualify as a “fill” requiring a § 404 permit, but spreading gravel or shell without shellfish seed inside in order to create a suitable surface to grow shellfish does qualify. Further, certain mariculture activities may constitute a “dredge.” For example, a § 404 permit could be required for mechanical harvesting if it goes beyond incidental fallback by collecting sediment and depositing it in a different location.

The Corps authorizes projects under § 404 and § 10 through either individual or general permits. General permits authorize common activities that will have only minimal individual and cumulative environmental impacts. A NWP is a type of general permit that authorizes activities across the country. It is important to note that, despite its name, a NWP permit may not apply everywhere in the country. The Corps' thirty-eight districts implement the regulatory program for each NWP, and have discretion regarding adoption, so the use of general permits is not uniform throughout the districts.

Change to Terminology

In issuing the NWPs for shellfish, seaweed, and finfish operations, the Corps decided to use the term “mariculture”

instead of “aquaculture,” which was the term used by the Corps in its previous NWP 48 for shellfish. The three NWPs only authorize growing shellfish, seaweed, and finfish in coastal waters. Since mariculture occurs in marine and estuarine open-water environments, while aquaculture can occur in a much broader area including on land, the Corps decided that the term mariculture was more appropriate for operations covered by the NWP.³

Since mariculture occurs in marine and estuarine open-water environments, while aquaculture can occur in a much broader area including on land, the Corps decided that the term mariculture was more appropriate for operations covered by the NWP.

New Seaweed and Finfish NWPs

The NWPs include new permits for both seaweed and finfish operations. NWP 55 is for seaweed mariculture operations and identifies the potential for the seaweed industry in the United States. NWP 56 is for finfish mariculture operations. Both NWP 55 and 56 authorize only structures; neither authorizes any of the operational aspects of seaweed or finfish aquaculture activities.⁴ In particular, in response to comments received on the draft NWPs, NWP 56 distinguishes the Corps's authority to authorize the installation of finfish farm structures from the authority of the U.S. Environmental Protection Agency, Food & Drug Administration, and other agencies to regulate finfish farming activities.

In addition, both NWP 55 and 56 allow for multi-trophic mariculture operations, meaning the farm could be a mix of seaweed, finfish, and shellfish. Both NWPs also require a

pre-construction notification (PCN) to the Corps District Engineer.⁵ Finally, the permits only cover the RHA, as the Corps has taken the position that activities authorized by the NWP do not result in discharges that would implicate the CWA.⁶



Seaweed, courtesy of Doug Beckers.

Modified NWP 48 for Shellfish Mariculture

The Corps's Final Rule also included a modified NWP 48 for shellfish mariculture. The previous version of NWP 48, which took effect in 2017, limited the area of impacted submerged aquatic vegetation in project areas that have not been used for commercial shellfish aquaculture activities in the past 100 years to a half-acre. In the new modified NWP, the Corps has removed this limitation in favor of a PCN requirement for new and existing commercial shellfish aquaculture activities that will directly impact greater than a half-acre of submerged aquatic vegetation.⁷

In the modified NWP 48, the Corps took steps to respond to litigation in the State of Washington challenging the 2017 NWP 48. In *Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers*, an environmental group alleged that the 2017 NWP 48 violated the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). The U.S. District Court for the Western District of Washington held that the evidence did not support the agency's conclusion that the permit would have a minimal environmental impact, ultimately declaring the NWP 48 to be unlawful and setting it aside in the state of Washington.⁸ Two shellfish groups tried to stay this ruling, arguing that the federal district court

judge ignored scientific evidence supporting the Corps's determination that the permit would result in minimal environmental impacts, but the Ninth Circuit affirmed the district court's opinion in February.⁹

In response, the Corps made changes to the NWP 48 Decision Document that it relied on when issuing the 2021 NWP. The Decision Document now includes further discussions of impacts from shellfish aquaculture on submerged aquatic vegetation, benthic communities, birds, fish, and other species.¹⁰ The Corps has stated that the new Decision Document "provides a more rigorous analysis to support a finding, at a national level, that the NWP would authorize only those commercial shellfish mariculture activities that have no more than minimal individual and cumulative adverse environmental effects."¹¹

Uncertainty Remains

Although the new and reissued permits became effective in March, the Corps District Offices will decide whether or not to adopt or apply additional conditions to the permits. In addition, on February 8, 2021 the Center for Biological Diversity and other parties issued a 60-Day Notice of Intent to Sue based on claims that the NWPs violate the ESA.¹² Further, additional lawsuits could be likely based on the number of public comments received on the new and modified NWPs. ❧

Endnotes

¹ Senior Research Counsel, National Sea Grant Law Center.

² [Reissuance and Modification of Nationwide Permits](#), 86 Fed. Reg. 2744 (Jan 13, 2021) (to be codified at 33 C.F.R. Chapter 11).

³ *Id.* at 2788.

⁴ *Id.* at 2864-65.

⁵ *Id.*

⁶ *Id.* at 2852.

⁷ *Id.* at 2863.

⁸ *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, 417 F.Supp.3d 1354 (W.D. Wash. 2019).

⁹ *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, No. 20-35546, 2021 WL 509850 (9th Cir. Feb 11, 2021).

¹⁰ See [U.S. ARMY CORPS OF ENG'RS, DECISION DOCUMENT NATIONWIDE PERMIT 48](#) (2021).

¹¹ *Reissuance and Modification of Nationwide Permits*, *supra* note 2, at 2788.

¹² Center for Biological Diversity, 60-Day Notice of Intent to Sue: [Violations of the Endangered Species Act Regarding the Nationwide Permit Program](#) (Feb. 8, 2021).

Superstorm Sandy: Wreaking Havoc Nearly A Decade Later

Blake Tims¹



Aftermath of Hurricane Sandy in New Jersey, courtesy of Wavian Photos.

In 2012, Hurricane Sandy formed in the central Caribbean and intensified into a hurricane as it tracked north across Jamaica and the Bahamas. The hurricane moved northeast of the United States until turning west toward the mid-Atlantic coast on October 28, 2012. On October 29, 2012 Sandy transitioned into a post-tropical cyclone just prior to moving onshore near Atlantic City, New Jersey.² Sandy pushed an overwhelming amount of water into New Jersey and New York, dropped three feet of snow in West Virginia, and caused 20-foot waves on the Great Lakes. Hurricane Sandy was responsible for 182 deaths and

\$65 billion in damage in the United States, the second costliest weather disaster in American history behind only Hurricane Katrina.³

The storm's destruction included more than \$120 million in damage to 283 railcars and 83 locomotives owned by the New Jersey Transit Corporation (NJTC).⁴ As a result, NJTC sued several insurers seeking a declaration regarding the coverage provided under its property insurance program for water damage that occurred during the storm. Recently, a court ruled that the damage NJTC suffered was covered by a named windstorm provision in NJTC's property insurance policies.

Background

In July 2012, NJT secured coverage from eleven insurers in a multi-layered property insurance policy program for July 1, 2012 to July 1, 2013. The primary layer of coverage was responsible for the first \$50 million of insurance. After the primary layer was exhausted, the policies provided three layers of excess coverage. The second layer provided coverage up to \$100 million, the third layer provided an additional \$175 million, and the fourth layer provided \$125 million. This resulted in approximately \$400 million of coverage. The policies included a standard policy form and separate endorsements. The policies covered all perils and damage to NJT's property unless specifically excluded.



Aftermath of Hurricane Sandy in New Jersey,
courtesy of Hypnotica Studios.

Before Sandy hit, New Jersey transit officials decided not to move 343 locomotives and rail cars from the agency's Meadowlands Maintenance Complex in Kearny, NJ. Transit officials defended the move, saying the facility hadn't flooded in the past. The same rail yard did not experience flooding during Tropical Storm Irene in 2012.


After the storm, NJT notified its insurers of its losses. Thereafter, NJT's insurance broker sought a determination as to the amount of coverage provided for the Sandy-related

water damage to NJT's properties. In April 2013, NJT was notified by its insurers that coverage for water damage was limited by the \$100 million flood sublimit in the policies, and the excess carriers would pay no more than \$50 million in addition to the first-layer coverage.

NJT disagreed with the excess carriers' interpretation of the policies. NJT's insurance broker explained to the loss adjuster that none of the sublimits in the policies applied to losses caused by a "named windstorm" and asserted that NJT was entitled to the full \$400 million in coverage under the program for its Sandy-related property damage.

Plain Language

In October 2014, NJT filed an action against its insurers and sought a judgment declaring that the \$100 million flood sublimit did not apply to its claims for property damage associated with Superstorm Sandy and defendants were in anticipatory breach of their insurance contracts. The trial court granted NJT's motion for summary judgment.

On appeal, attorneys for the insurers contended the flooding that caused the damage was due to stormwater run-off and not the storm, which would have limited the payment.⁵ In November 2019, a three-judge panel disagreed and said the damage was covered by a "named windstorm" provision in the policies. The decision also stated that if the insurance companies had intended to limit claims for damage from a "storm surge," the policies would have said so "in plain language." One of the insurers also argued that NJT and its insurance broker owed a duty to explain the significance of the named windstorm provision. However, the appellate court held that there was no basis for recognizing this duty because no principal agency relationship existed and the insurance broker was merely engaged in arms-length negotiation on behalf of NJT. The insurers appealed to the New Jersey Supreme Court, which succinctly affirmed the decision, relying on the appellate court's analysis of the insurance policies' plain language.⁶ 

Endnotes

¹ 2022 J.D. Candidate, University of Mississippi School of Law.

² *Hurricane Sandy*, National Weather Service.

³ *Superstorm Sandy: How Storm Morphed From "Boring" to Killer Superstorm*, CBS NEWS, Oct. 25, 2013.

⁴ Colleen Wilson, *NJ Transit Wins Court Battle With Insurers for \$400 million in Superstorm Sandy Damage*, NORTHJERSEY.COM, Nov. 20, 2019.

⁵ *N.J. Transit Corp. v. Certain Underwriters at Lloyd's London*, 461 N.J. Super. 440, 221 A.3d 1180 (App. Div. 2019).

⁶ *N.J. Transit Corp. v. Certain Underwriters at Lloyd's London*, 2021 WL 261989 (N.J. Jan. 27, 2021).



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Littoral Events

Association of State Floodplain Managers Conference

*May 10-14, 2021
(Virtual)*

For more information, visit: <https://www.floods.org/conference>

Ocean Visions 2021 Summit

*May 18-20, 2021
(Virtual)*

For more information, visit: <https://www.oceanvisions.org/summit-2021>

Capitol Hill Ocean Week (JEDI)

*June 8-10, 2021
(Virtual)*

For more information, visit: <http://bit.ly/chow2021>