WATER LOG

Volume 30, Number 4 *A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium* December 2010

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Cover photograph of a beach house undermined by beach erosion courtesy of "Old Shoe Woman" on Flickr.

Court Weakens Public Beach Access in Texas

Niki L. Pace, J.D., LL.M.

On November 5th, the Texas Supreme Court issued its much-anticipated decision regarding rolling easements along Gulf of Mexico beaches. In a somewhat surprising decision, the court concluded for the first time that the public's right to access the beach did not "roll" with the vegetation line following a storm event. In distinguishing between shoreline changes as a result of erosion versus shoreline changes as a result of storm events, the court has substantially weakened Texas's long history of public beach access along its Gulf of Mexico beaches.

Beach Access in Texas

For almost 200 years, Texans have enjoyed public access to their Gulf beaches. The beaches provide a source of transportation, commerce, and recreation. In Texas, the beach generally refers to the area between the mean low tide mark and the vegetation line. The mean high tide mark delineates the "wet beach" from the "dry beach." Landowners may own property extending to the mean high tide mark but the "wet beach" is held by the State in public trust. Because of Texan's historic use of the "dry beach," a public easement often exists along Gulf beaches.

Beaches are dynamic systems that shift and migrate as a result of naturally occurring events like wave induced erosion and coastal storm events. To address the migratory nature of shorelines (and therefore the migration of the dry beach), Texas recognizes a rolling easement to preserve existing public access to beaches. In other words, where the State can prove a historic use of the dry beach, the law recognizes a public access easement that migrates (or "rolls") with the vegetation line.

In 1959, Texas enacted the Texas Open Beaches Act (OBA) to provide an enforcement mechanism for protecting public access to Texas beaches bordering the Gulf of Mexico. The OBA embodies Texas's public policy of "free and unrestricted access" along publically owned beaches and to privately owned beaches where the public has acquired an easement.[1] In 2009, Texans went a step further and incorporated the OBA into the state Constitution.[2]

Lawsuit History

This case began when a property owner challenged the Texas General Land Office's (GLO) attempt to remove her house from the public beach for violation of the OBA. Carol Severance, a California resident, purchased the property on Galveston Island's West Beach in 2005, which she used as rental property. At that time, Severance received notice that should the property become located on the public beach as a result of natural processes (like erosion), the State could forcibly remove structures located on the public beach.[3] In September 2005, winds from Hurricane Rita shifted the vegetation line further inland, and in 2006, the GLO concluded that the house was wholly located on the public beach. The GLO offered Severance $40,000 to relocate or remove the house. In response, Severance filed a lawsuit in federal court challenging the GLO's authority.

The case reached the U.S. Court of Appeals for the Fifth Circuit in 2009.[4] In resolving Severance's claims, the Fifth Circuit determined that it required greater clarification on matters of Texas property law before fully settling the matter. As property issues are a matter of state law, the Fifth Circuit turned to the Texas Supreme Court for guidance. The Fifth Circuit certified three questions to the Texas Supreme Court:

(1) Does Texas recognize a rolling public beachfront access easement along Gulf of Mexico beaches whose boundary migrates with the vegetation line, without proof of prescription, dedication or customary rights in the property?
(2) If so, is the easement derived from common law or from the Texas Open Beaches Act?
(3) To what extent, if any, is a landowner entitled to compensation under Texas statutory law or the Constitution when an easement rolls over her property, when no easement has been found by dedication, prescription, or custom?

As summarized by the Texas Supreme Court, "The central issue is whether private beachfront properties on Galveston Island's West Beach are impressed with a right of public use under Texas law without proof of an easement."[5] After reviewing Texas property law, the majority concluded that no such right existed.

Rolling Beachfront Easements

The Texas Supreme Court focused on whether the public's right to use and access Gulf of Mexico beaches migrated with the vegetation line without proof of the easement. Turning to the principles of property law, the court rejected the notion that any right existed "without proof of prescription, dedication, or customary rights in the property."[6] In essence, a rolling easement can exist but it must be proven based on principles of property law.

Properties and easements located along beaches and water bodies face the challenges of shifting sands and storm events which alter the otherwise static property lines. While recognizing rolling easements under Texas law, the court distinguished between boundaries that migrate as a result of natural erosion and boundary changes that occur suddenly due to storms (avulsive events). That is to say, where the vegetation and mean high tide lines move gradually, the easement rolls with the migration and the State is not required to seek a new judicial determination of the easement for each movement. However, where an avulsive event moves the mean high tide line and vegetation line suddenly and perceptibly, the land subject to the public easement is lost. In this situation, the State must establish a new easement for the newly created dry beach. To the extent the State is unable to prove an easement for this new dry beach area, no public access easement exists. Essentially, an easement rolls with erosion but the easement does not roll following a storm event.

Regarding the Severance property, the court determined that the public lost access to the beach there because the vegetation line moved as a result of Hurricane Rita rather than by gradual erosion. The court went on to acknowledge that this decision did not mean that the State could not attempt to prove a public easement along the property in question. Rather, the court concluded the easement that previously existed along the dry beach did not migrate on to the private property following the hurricane.

Dissent

Justice Medina, joined by Justice Lehrmann, dissented from the majority asserting that the majority's "vague distinction … jeopardizes the public's right to free and open beaches, recognized over the past 200 years, and threatens to embroil the state in beach-front litigation for the next 200 years."[7] According to the dissent, Texas law does recognize rolling beachfront access easements regardless of whether the vegetation line migrated as a result of storm event or natural erosion. In support, the dissent points to the overwhelming evidence that Texans have used the beaches for almost 200 years as establishing an implied public beachfront access easement.

In further support, the dissent notes prior Texas judicial decisions supporting the rolling easement concept and surmises that the majority's departure from existing law will result in both the loss of public access and the loss of state funds due to increased litigation. Likewise, according to the dissent, Texas public policy (in particular the OBA) reinforces the concept of rolling easements: "Requiring that existing easements be re-established after every hurricane season defeats the purpose of the OBA: to maintain public beach access."[8]

The dissent goes on to find that rolling easements are a creature of Texas common law rather than the OBA (which provides an enforcement mechanism but does not create property rights). Also, because the easements roll as a result of natural forces, the dissent concludes that a property owner is not entitled to compensation when the easement rolls onto their property.

Conclusion

Undoubtedly, the majority's newly announced distinction between gradual and avulsive events will cause greater confusion over public access along Texas beaches. Already, the decision has stymied efforts at beach renourishment along Galveston's west end. Texas Land Commissioner Jerry Patterson halted a project following the court's decision. Patterson cited concerns that the project would benefit private landowners rather than the public.[9] Texas law prohibits expenditures of public money for the benefit of private property.

Endnotes

1. Severance v. Patterson, No. 09-0387, 2010 WL 4371438, at *3 (Tex. Nov. 5, 2010).
2. Tex. Const. Art. 1, § 33 (2009).
3. *Severance v. Patterson*, 2010 WL 4371438, at *8.
4. Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009). *See also* Brian Fredieu, *U.S. Fifth Circuit Weighs in on Texas Open Beaches Act*, 29.2 Water Log 1 (2009).
5. *Severance v. Patterson*, 2010 WL 4371438, at *1.
6. *Id.* at *8.
7. *Id.* at *15 (J. Medina, dissenting).
8. *Id.* at *20.
9. Harvey Rice, *State calls off big Galveston beach project*, Houston Chronicle, Nov. 16, 2010, available at http://www.chron.com/disp/story.mpl/metropolitan/7295713.html.

Tough New Offshore Drilling Rules

Nicholas Lund, J.D.

The administration's decision to lift the drilling moratorium before its November 30th expiration was preceded by Department of Interior (DOI)'s adoption of new drilling and workplace safety rules in late September. Originally outlined in Secretary Salazar's May 27th Safety Report to President Obama, both safety rules were issued under an emergency rulemaking process and are therefore effective immediately. Despite the lifting of the drilling moratorium, production from the 33 rigs affected by the ban cannot begin until they can prove compliance with the Drilling Rule, a process that could take months.

The Drilling Safety Rule addresses technical aspects of wellbore integrity and well control equipment and procedures. It establishes new requirements for blowout preventers and auto-shear devices – safety equipment that failed on the Deepwater Horizon rig. The Rule also requires third-party or Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM) inspection and approval for several pieces of equipment, including blind-shear rams, casing and cementing programs and drilling fluid replacements. Finally, the Rule requires that each rig have an undersea submarine capable of closing blown-out pipes – and a trained crew to operate it. Finding enough qualified inspectors to man the rigs has been a challenge – administration officials call the current number of inspectors "woefully inadequate" - but rigs should restart production as soon as they are in compliance.[1]

The Workplace Safety Rule requires rig operators to develop and maintain a safety and environmental management system (SEMS). It makes mandatory 13 elements of a previously voluntary program called API RP75. Newly mandatory elements include increased hazard analysis, training procedures, operating procedures and environmental information. Emergency response and control organization is also addressed, with evacuation and oil spill contingency plans all required to be in place and validated by drills. Should an accident occur, this rule hopes to prevent the type of catastrophe suffered by the Deepwater Horizon crew, 11 of whom perished after the blowout.

BOEM had previously imposed similar requirements on offshore lessees through Notice to Lessees 2010-N05 (NTL-05). However, a Louisiana district court struck down NTL-05 on October 19, 2010 for failure to comply with the Administrative Procedures Act during the rulemaking process.[2] In light of the new Drilling Safety Rule and the Workplace Safety Rule, the court's decision regarding NTL-05 appears of limited significance.

Endnotes

1. Jennifer Dlouhy, *Plan Would Step Up Monitoring of Oil Rigs*, Fort Worth Star-Telegram, Oct. 23, 2010, *available at:* http://www.star-telegram.com/2010/10/23/2569999/plan-would-step-up-monitoring.html.
2. Ensco Offshore Co. v. Salazar, No. 10-1941, 2010 WL 4116892 (E.D. La. Oct. 19, 2010).

Mabus Panel Recommends BP Funds for Gulf Restoration

Nicholas Lund, J.D.

An Obama-appointed group tasked with setting the direction for government efforts to restore the Gulf has announced its recommendation to create a Gulf Coast Recovery Fund to manage recovery efforts. Led by Navy Secretary and former Mississippi governor Ray Mabus, the panel revealed its plan on September 27th and quickly won approval from the President. The goal of the plan is to create a stable fund that will result in long-term restoration projects. President Obama took the first step of the Mabus plan on October 5th by signing an executive order establishing the Gulf Coast Ecosystem Restoration Task Force, to be led by EPA administrator Lisa Jackson. This group will begin planning for long-term restoration projects until Congress can establish a permanent restoration council.

Though Mabus did not provide an estimate of the overall costs of the project, it is expected to be in the billions of dollars. The money for the Recovery Fund is expected to come not from the $20 billion BP has already vowed to set aside to compensate Gulf residents who lost property and livelihoods, but rather from anticipated civil and criminal liabilities levied against BP. Estimates for this sum range from $5 to $15 billion, depending on whether the BP is convicted of gross negligence – the conscious and voluntary disregard of the use of reasonable care – for causing the spill.[1]

Endnotes

1. John M. Broder, *Panel Wants BP Fines to Pay for Gulf Restoration*, New York Times, Sept. 28, 2010, at A017.

Tribe Loses Challenge to Tamiami Trail Bridge Project

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Recently, the Miccosukee Tribe of Indians of Florida (the Tribe) challenged the federal government's plans to construct a bridge that would replace a mile of the Tamiami Trail in order to greatly increase the amount of water flowing southward into the Everglades National Park. The Tribe litigated their challenges on two fronts. In the first suit, they alleged violations of the National Environmental Policy Act, the Federal Advisory Committee Act, and the Water Resources Development Act. In the second suit, the Tribe asserted violations of the Endangered Species Act. Both suits sought injunctions to stop the construction of the bridge until the federal government had complied with environmental laws. The district court dismissed the Tribe's claims for lack of subject matter jurisdiction, concluding that specific language Congress inserted in an appropriations act exempted the bridge from environmental laws. The Eleventh Circuit affirmed the district court's ruling, concluding that a congressional act had deprived the federal courts of subject matter jurisdiction over the Tribe's claims.

Background

The Miccosukee Indians have resided in the Everglades for centuries, and Tribe members live and work on several reservations within the Everglades today.[1] Originally, they called the Everglades Pa-hay-okee, which means "Grassy Water." In 1948, however, Congress passed the Flood Control Act, which resulted in the construction of a series of levees and canals meant to control flooding in the Everglades, and promote agriculture and water supply. The Tamiami Trail (the Trail) was the first highway to cross the Everglades. The Trail, also known as U.S. Highway 41, acts as a dam to restrict water from flowing south into Everglades National Park, which greatly reduces the water flow into the Shark River Slough, the main water corridor of the Everglades.[2] Additionally, to prevent erosion of the roadbed, water levels of the surrounding swamp have been lowered by engineers, resulting in an even greater restriction of water flow that has been blamed for vast losses of wading birds, fish, and native plants.

In 2000, Congress passed the Water Resources Development Act (WRDA) which outlined a 30-year Comprehensive Everglades Restoration Plan (CERP), including the improvement of water flow through the Trail. In June 2008, the U.S. Army Corps of Engineers (Corps) issued its Final Limited Reevaluation Report and Environmental Assessment (LRR/EA) regarding improvements to the Trail, concluding that the most effective option for improving water flow through the Trail was Alternative 3.2.2.a—the construction of a mile-long bridge that would replace a mile of the current ground-level Trail, greatly increasing the amount of water that could flow southward into Shark River Slough.

On June 18, 2008, the Tribe sued the Corps (a.k.a. the NEPA suit), alleging that selection of Alternative 3.2.2.a violated the National Environmental Policy Act (NEPA), the Federal Advisory Committee Act (FACA), and the WRDA because, among other things, the federal government failed to prepare adequate statements of environmental impact with regard to the construction of the bridge. Additionally, the Tribe alleged that higher water levels would flood tribal lands. The Tribe requested an injunction to stop the bridge's construction.

Congress passed a continuing appropriations act on Sept. 30, 2008. Section 153 of that act spoke to the immediate building of the bridge: "Amounts provided by [the Act] for implementation of the Modified Water Deliveries to Everglades National Park shall be made available to the Army Corps of Engineers, which shall immediately carry out Alternative 3.2.2.a to U.S. Highway 41 (the Tamiami Trail) as substantially described" in the 2008 LRR/EA.[3]

The following month, the Tribe filed a separate suit against the Corps and the U.S. Fish and Wildlife Service (FWS) (a.k.a. the ESA suit), alleging violations of the Endangered Species Act (ESA) based on the FWS's failure to fully address the bridge's threat to two endangered bird species, the snail kite and the wood stork. The ESA suit, like the NEPA suit, sought an injunction to stop construction of the bridge until the federal government complied with the law.

Meanwhile, the Corps moved to dismiss the NEPA suit for lack of subject matter jurisdiction. However, the NEPA court denied the Corps's motion to dismiss and enjoined the Corps from building the bridge until it complied with environmental procedures, holding that § 153 was not specific enough to exempt the Corps from NEPA.[4]

Photograph courtesy of Tracy Enright, U.S.G.S.

In March 2009, Congress passed the Omnibus Appropriations Act (Omnibus Act), which stated that the Corps "shall, notwithstanding any other provision of law, immediately and without further delay construct or cause to be constructed" Alternative 3.2.2.a to the Trail consistent with the June 2008 LRR/EA.[5] Following the passage of the Omnibus Act, the NEPA court granted the Corps's renewed motion to dismiss the NEPA suit for lack of subject matter jurisdiction and dissolved the preliminary injunction it had entered earlier. The court held that the Omnibus Act had explicitly exempted the construction of the bridge from NEPA and FACA procedures when it added the phrase "notwithstanding any other provision of law." Additionally, the NEPA court rejected the Tribe's constitutional challenges to the Omnibus Act.[6] The Tribe appealed. On Aug. 31, 2009, adopting the reasoning of the NEPA court, the ESA court dismissed the ESA suit for lack of subject matter jurisdiction and invoked the doctrine of collateral estoppel to bar the Tribe from relitigating its constitutional challenges to the Omnibus Act. The Tribe also appealed this decision.

The Eleventh Circuit Decision

Although the lower court found an "explicit exemption" from the environmental laws, the Eleventh Circuit identified the phrase "notwithstanding any other provision of law" as a general repealing clause. In other words, when read in the context of the entire statute, the phrase repealed the need to comply with relevant environmental laws.

In reaching its conclusion, the court looked at the context of the "notwithstanding" clause. Because the "notwithstanding" clause split the verb phrase "shall … construct or cause to be constructed" and because the Omnibus Act used broad language ("notwithstanding any other provision of law"), the clause spoke directly to any laws regulating the construction of the bridge, environmental laws included.[7]

The phrase "immediately, and without further delay" signaled legislative intent for the speedy completion of the bridge. Hence, inclusion of the "immediacy" clause necessarily removed the bridge from the reach of those relevant environmental statutes that would inevitably delay the building of the bridge.

Likewise, because Congress directed that the Corps shall build the bridge, it denied the Corps any agency discretion in the matter. Since the Corps lacked agency discretion, the federal courts lacked subject matter jurisdiction. In other words, procedural statutes like NEPA, FACA, or the ESA can only proceed against an agency when the agency has choices between environmental alternatives.[8] Here, the court reasoned that the environmental statutes were inapplicable because the Corps was deprived of agency discretion by the congressional mandate to construct the bridge. Congress's command to build the bridge transformed the administrative action into a legislative action, and in so doing, Congress barred the Tribe from seeking judicial review of the administrative action because, in effect, there was no longer an administrative action for the court to review.

Conclusion

Because the Omnibus Act language did not meet the generally understood test for an explicit repeal, it described the exemption as a general repealing clause. Given that the court specified that "notwithstanding" clauses must be evaluated within the context of the statute as a whole, it properly limited its application so as to avoid any potential for congressional abuse or overuse to preclude the application of statutes like NEPA or the ESA. Additionally, the court reiterated that the Tribe's constitutional challenges to the Omnibus Act were without merit, and therefore affirmed the district courts' dismissals for lack of subject matter jurisdiction.

Endnotes

1. Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, Nos. 09-14194, 09-14539, 2010 WL 3581910, *1 (11th Cir. Sept. 15, 2010).
2. *Id.* at *2.
3. *Id.* at *3.
4. Section 153 "neither mentioned NEPA by name, nor included the key phrase 'notwithstanding any other provision of law,'" language typically used with exemptions or limited repeals. Miccosukee Tribe, 2010 WL 3581910 at *3.
5. *Id.*
6. The Tribe challenged that constitutionality of the Omnibus Act alleging vagueness, delegation, separation of powers, bill of attainder, due process, and equal protection. *Id.* at *4.
7. *Id.* at *8.
8. *Id.* at *10.

Photograph of white ibis in Everglades courtesy of Heather Henkel , U.S.G.S.

Louisiana's Lawsuit Against BP to Remain in Federal Court

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In October, a Louisiana district court denied the State of Louisiana's request to remand its lawsuit against BP to state court. Following the Deepwater Horizon oil spill, Louisiana filed suit against BP for violations of Louisiana state laws, particularly for harms to Louisiana wildlife as a result of the oil spill. Louisiana originally filed suit in state court, but BP later filed a motion to move the case to federal court. Louisiana challenged the removal; however, the district court found that removal was merited on the basis of subject matter jurisdiction and diversity jurisdiction.

Background

As is well known, on April 17, 2010, the Deepwater Horizon oil rig exploded, resulting in the loss of eleven lives and the largest oil spill in U.S. history. A month later, the State of Louisiana sued BP, as owner and operator of a Minerals Management Service Mineral Lease, and others (collectively BP) in state court.[1] Louisiana alleged that BP had harmed fish and wildlife, in violation of Louisiana state law. Specifically, Louisiana argued that BP failed to comply with state laws governing the exploration and the production of minerals. The state claims this dereliction on the part of BP led to the explosion aboard the Deepwater Horizon, which released oil, minerals, and other contaminants into the Gulf of Mexico. Louisiana further alleged that BP's failure to timely contain the spill resulted in death and injury to Louisiana aquatic life and wildlife.

Louisiana only asserted claims under a Louisiana statute which held that any person who "kills, catches, takes, possesses, or injures any fish, wild birds, wild quadrupeds, and other wildlife and aquatic life" in violation of this law, or any relevant federal law, is liable to Louisiana for the value of any unlawfully harmed creature.[2] Louisiana expressly stated that it was bringing this action solely upon this state law and would not, at any time, raise claims under federal law.

Despite the State's sole reliance on state law, BP removed the action from state court to federal court on June 17, 2010. In support of removal, BP asserted that the federal court had original subject matter jurisdiction over the case because the activity occurred on the outer continental shelf. Pursuant to 43 U.S.C. § 1349(b)(1)(a), the district courts of the United States have jurisdiction to hear cases "arising out of, or in connection with any operation conducted on the outer Continental Shelf…."[3] BP also asserted that the court had original subject matter jurisdiction under 28 U.S.C. § 1331, which states that the district courts have original jurisdiction over all civil actions which arise from federal law.[4] In this case, BP asserted that Louisiana's claims arose under the Outer Continental Shelf Lands Act (OCSLA), which is a federal statute.[5] Following the removal action, Louisiana filed a motion in the federal court seeking to remand the case back to state court, asserting that the matter was improperly removed.

Well-Pleaded Complaint Rule

Federal courts are courts of limited subject matter jurisdiction, meaning, they only have jurisdiction to decide certain types of cases. One explicit grant of jurisdiction to federal courts is a federal question lawsuit. In a federal question case, the claims of the case arise under federal law. The well-pleaded complaint rule provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint."[6] Determination that a cause of action presents a federal question depends upon the allegations of the plaintiff's well-pleaded complaint. When a plaintiff has a choice between federal and state claims, she may proceed in state court "on the exclusive basis of state law, thus defeating the defendant's opportunity to remove."[7] In this case, Louisiana argued that the well-pleaded complaint rule barred the action from being removed to federal court.

The court noted, however, that the rule only applies to removal based on 28 U.S.C. § 1331. BP asserted that the court had federal question jurisdiction based not only on 28 U.S.C. § 1331, but also based on the OCSLA. The court accepted Louisiana's argument that the well-pleaded complaint rule prevented the action from being removed solely on the basis of 28 U.S.C § 1331, but stated that nothing prevented BP from

removing the action if OCSLA jurisdiction existed pursuant to 43 U.S.C. § 1349.[8]

OCSLA Jurisdiction

The OCSLA provides that "the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf…."[9] In deciding whether the statute granted jurisdiction, the court conducted a two-part analysis.

First, the court examined whether the activities that caused the injury could be classified as an "operation conducted on the outer Continental Shelf" and whether that "operation" involved the exploration or production of minerals.[10] Because BP was indeed exploring and producing minerals from the outer Continental Shelf, the court found that BP's activities fell within the scope of the OCSLA.

Second, the court considered whether Louisiana's claims "arise out of, or in connection with the operation."[11] The court employed a simple "but-for" test to determine this. In other words, the court asked, "but for" the operation, would Louisiana's claims have arisen? Because the oil and contaminants would not have entered Louisiana's waters, killing the wildlife, "but-for" BP's drilling and exploration operation, the case satisfied this requirement. Therefore, because the two-part test was satisfied, the court determined that it had original subject matter jurisdiction under the OCSLA.

Admiralty Jurisdiction

Louisiana also argued that, even if the court had jurisdiction under the OCSLA, the case should still be remanded based on Louisiana's maritime law claims.[12] Maritime law claims do not arise under federal law. Claims not based on federal law may only be removed on the basis of diversity of citizenship. Diversity of citizenship means that the opposing parties in a case are citizens of different states. Such diversity grants a federal court jurisdiction over a case.

In this case, the court recognized that maritime claims could not be removed to federal court unless diversity of citizenship was found. The court noted that this was true even if it had both OCSLA jurisdiction and admiralty jurisdiction because the Fifth Circuit has never held that where OCSLA and maritime law overlap, the case is removable without regard to citizenship.[13] Because BP's corporate citizenship resides in Texas and Louisiana, the court noted that it did not matter whether Louisiana's claims arose under federal law. BP was permitted to remove based on diversity of citizenship.

Conclusion

The court found that it had original jurisdiction under the OCSLA and that neither the well-pleaded complaint rule nor admiralty jurisdiction barred BP from removing the case to federal court. The court also rejected Louisiana's argument that sovereign immunity precluded removal. The case will remain in federal court before U.S. District Court Judge Carl Barbier. Judge Barbier presides over more than 300 other consolidated lawsuits spawned by the oil spill that will be heard in federal court in New Orleans.

Endnotes

1. *In re* Oil Spill by the Oil Rig Deepwater Horizon, No. 2179, 2010 WL 3943451, at *1 (E.D. La. Oct. 6, 2010).
2. La. Rev. Stat. Ann. § 56:40.1.
3. 43 U.S.C. § 1349(b)(1)(a).
4. 28 U.S.C. § 1331.
5. *In re Oil Spill*, 2010 WL 3943451, at *1.
6. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).
7. Medina v. Ramsey Steel Co., Inc., 238 F.3d 674, 680 (5th Cir. 2001).
8. *In re Oil Spill*, 2010 WL 3943451 at *2.
9. 43 U.S.C. § 1349.
10. *Id.* § 1349(b)(1).
11. *In re Oil Spill*, 2010 WL 3943451, at *3.
12. *Id.* at *4.
13. *Id.*

Photograph of shoreline cleanup in Port Fourchon, LA courtesy of the U.S. Coast Guard, Petty Officer 3rd Class Patrick Kelley.

Drilling Ban Lifted

Feds Accused of "Manipulating" Court Jurisdiction

Nicholas Lund, J.D.

After a Louisiana district court judge issued an injunction against the deepwater drilling ban installed by the Department of the Interior (DOI) in May, the DOI appealed the decision to the Fifth Circuit.[1] At the same time, the DOI decided to revoke its initial moratorium and install a second, nearly identical, moratorium in its place. This was a controversial move. The Interior defended its new moratorium as being based on new information and coming after a "reasoned decision-making process," while the Defendants, a group of shipping and coastal services companies, claimed that the new moratorium was simply designed to skirt the district court's injunction.

With a new moratorium in place, the DOI moved to dismiss the district court complaint that resulted in the stay of the first moratorium. The Interior argued that the defendant's case was moot because the challenged moratorium no longer existed. However, the judge refused to dismiss the shipping companies' complaint. Federal agencies, he wrote, are not allowed to "manipulate the federal jurisdiction of U.S. courts" by voluntarily ceasing challenged actions while retaining the ability to reinstitute those actions once the challenge is rendered moot.[2]

The DOI appealed this decision to the Fifth Circuit, where a divided three-judge panel ruled to overturn the district court decision and dismiss the shipping companies' challenge as moot.[3] The majority wrote that since the first moratorium was the sole subject of the challenge, and since that moratorium had been rescinded by the Secretary of the Interior, the court no longer had appellate jurisdiction over the matter.[4] Circuit Judge James Dennis dissented, perceiving an ability of the Fifth Circuit to rule on the second moratorium in place of the first and claiming that "[t]his decision shirks our responsibility to render judgment on the matter before us."[5]

The Defendant shipping companies returned to the same Louisiana district court that placed a stay on the first moratorium asking for a stay on the second moratorium.[6] The district court judge heard oral arguments on October 6th, but his decision was preempted by an announcement from the DOI that it would be lifting the second ban before its November 30th expiration date. The DOI announced the creation of two new drilling safety rules that will "significantly" reduce the risks of deepwater drilling (see *Tough New Offshore Drilling Rules*, page 5). The lifting of the moratorium was met with moderate criticism from both sides. Industry representatives were pleased that the ban had ended, but realized that it would take both time and money to comply with the new rules and restart production. On the other hand, environmental groups such as the Natural Resources Defense Council consider the move premature in light of the fact that the exact causes of the spill are still under investigation.[7] With regards to moratorium-related lawsuits still being litigated, it is likely that the decision to lift the moratorium will serve to moot all remaining claims.

Photograph courtesy of the U.S. Coast Guard, Petty Officer 1st Class Adam Eggers.

Endnotes

1. Hornbeck Offshore Services, LLC v. Salazar, 2010 WL 3219469 (5th Cir. 2010).
2. Court's Ruling on Defendant's Motion to Dismiss, Hornbeck Offshore Services, LLC v. Salazar, No. 10-1663 (E.D. La.
3. Hornbeck Offshore Services, LLC v. Salazar, No. 10-30585 (5th Cir. Sept. 29, 2010).
4. *Id.* at 2-3.
5. *Id.* at 7.
6. Rebecca Mowbray, *Moratorium Ruling Promised; Judge Hears Arguments on Second Lawsuit*, New Orleans Time-Picayune, Sept. 30, 2010 at C08.
7. Stephen Power, *Gulf Drilling Ban Is Lifted,* The Wall Street Journal, Oct. 13, 2010, at A1.

Groups Petition EPA to Make Rules on Dispersant Use

Nicholas Lund, J.D.

In the wake of the spill, BP poured nearly two million gallons of chemical dispersants into the Gulf of Mexico. The dispersants, primarily a chemical called Corexit, help break large blobs of oil into smaller bits that sink more quickly – and are thus less likely to wash onshore – and are more readily eaten by bacteria. What is clear is that the dispersants did their job: far less oil has washed up on Gulf beaches than feared. What is not clear is what other effects the massive use of dispersants will have on human and ecosystem health. Seeking to force the EPA to find answers to these questions before dispersants can be used again, a coalition of environmental organizations, shrimpers and community groups led by Earthjustice filed a petition asking the Agency to formulate rules on how the chemicals can be used in the future.

The widespread use of chemical dispersants began in Alaska following the Exxon-Valdez spill. In the years since that clean-up effort, health problems including liver and kidney disorders have been blamed on worker exposure to the chemicals. A number of Alaskan environmental and health groups joined in the Earthjustice petition. In the Gulf, some workers have experience respiratory problems potentially linked to exposure to the dispersants, which were sprayed from airplanes and pumped below the sea. Additionally, little is known about the long-term effects of the chemicals on marine life. The National Commission on the BP Oil Spill acknowledged the government's lack of knowledge of dispersant effects, admitting that "[l]ittle or no prior testing had been done on the effectiveness and potential adverse environmental consequences of subsea dispersant use, let alone at [high] levels."[1]

The Earthjustice coalition's petition asks the EPA to develop rules on exactly how and when dispersants can be used in future spills. It also asks the agency to require companies that develop the chemicals to disclose ingredients and to better test the chemicals for toxicity. The coalition also sent the EPA a 60-day notice of intent to sue for violations of the Clean Water Act. The coalition claims that the EPA has failed perform its nondiscretionary duty of publishing "a schedule identifying the water in which dispersants … may be used" and "the quantities at which such dispersants … can be used safely."[2] Under the Clean Water Act, the EPA is required to develop National Contingency Plan (NCP) for oil spill clean-ups which includes a schedule laying out the types of dispersants used, the waters they are allowed in, and the quantities of chemical permitted.[3] The EPA's failure to develop this schedule, Earthjustice claims, led to "confusion, concern, and uncertainty" during the spill response.

Endnotes

1. Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Use of Surface and Subsea Dispersants During the BP Deepwater Horizon Oil Spill 1 (2010) *available at*: http://www.oilspillcommission.gov/document/use-surface-and-subsea-dispersants-during-bp-deepwater-horizon-oil-spill.
2. *See* Press Release, Earthjustice, How Toxic are Oil Dispersants? Groups Press EPA to Find Out Before Next Spill, Oct. 13, 2010 *available at:* http://www.commondreams.org/ newswire/2010/10/13-6. The EPA's duty to set a schedule and quantities of dispersal use are required under 33 U.S.C. § 1321(d)(2)(G)(ii) (2006) and § 1321(d)(2) (G)(iii) (2006), respectively.
3. 33 U.S.C. § 1321(d)(2)(G)(i)-(iii) (2006).

Photograph of airplane spraying dispersant courtesy of the USAF, Sgt. Adrian Cadiz.

BOEM to Tighten NEPA Oversight for Offshore Drilling

Nicholas Lund, J.D.

The Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM), then operating as the Mineral Management Service (MMS), has been roundly criticized in the wake of the BP Oil Spill for its cursory and uncoordinated application of National Environmental Policy Act (NEPA) procedures to offshore drilling activities.[1] The criticism focused on MMS's use of "categorical exclusions" to relieve offshore drilling operations of the burden of comprehensive environmental review. The White House Council on Environmental Quality (CEQ) released a report on August 16th recommending changes BOEM should adopt to "promote more robust and transparent implementation of NEPA practices, procedures and policies."[2]

NEPA requires environmental reviews whenever a federal project would have significant impacts on the human environment. The law allows agencies to determine activities that don't significantly effect the human environment and exclude them from NEPA review.[3] Among these "categorical exclusions" defined by MMS were exploratory drilling and extensions of the five or ten-year leases typically offered to offshore drilling projects.[4] In exploration and lease renewal situations, MMS allowed a "tiered" NEPA response: applying previously developed environmental assessments to new actions. When BP applied to drill an exploratory well that would later become the ill-fated Macondo well, it filed just 13 pages of environmental analysis in which no alternatives were considered, no mitigation measures were proposed and "[n]o agencies or persons were consulted regarding potential impacts associated with the proposed activities."[5]

In the wake of the spill, several lawsuits were filed by environmental groups challenging the use of categorical exclusions by MMS. Defenders of Wildlife sued the MMS, DOI and Secretary Salazar in a federal district court in Alabama, claiming the agencies were arbitrary and capricious in their allowance of CEs for exploratory drilling. The suit was stayed while the parties negotiated, and the CEQ reconsidered the application of NEPA to offshore drilling activities. In their August report, CEQ recommended that BOEM adopt several revisions to their NEPA practices in order to sufficiently evaluate potential environmental risks. Several recommendations address specific criticisms of the Macondo review. For instance, one recommendation asks applicants to consider impacts associated with low-probability catastrophic spills, events that had previously been excluded as not being reasonably foreseeable. Another asks the BOEM to review the use of categorical exclusions "in light of the increasing levels of complexity and risk – and the consequent potential environmental impacts – associated with deepwater drilling."[6]

Photograph of pelican leaving a perch on an oil boom courtesy of the U.S. Coast Guard,U.S. Coast Guard, Petty Officer 3rd Class Erik Swanson.

The recommendations orbit around the premise that relying on old NEPA procedures in a new world of deepwater drilling will only lead to more catastrophe. The potential dangers of deepwater offshore drilling are no longer out of mind because they are out of sight. The BOEM immediately agreed to adopt the CEQ's recommendations, and began its review of categorical exclusions in early October.[7]

Endnotes

1. *See* Juliet Eilperin, *U.S. Exempted BP's Gulf of Mexico Drilling from Environmental Impact Study*, Washington Post, May 5, 2010, at A04.
2. Press Release, CEQ, Council on Envtl. Quality Releases Report on its Review of Mineral Management Service NEPA Procedures (Aug. 16, 2010) (on file with author).
3. 40 C.F.R. § 1508.4.
4. DOI, Dep't Manual, Chapter 15: Managing the NEPA Process – Minerals Management Service (2004).
5. BP Exploration & Production, Initial Exploration Plan – Mississippi Canyon Block 252 (2009).
6. CEQ, Report Regarding the MMS's NEPA Policies, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development, 4-5 (2010).
7. Press Release, BOEM, BOEM Begins Review, Invites Public Comment on Categorical Exclusions (Oct. 7, 2010) (on file with author).

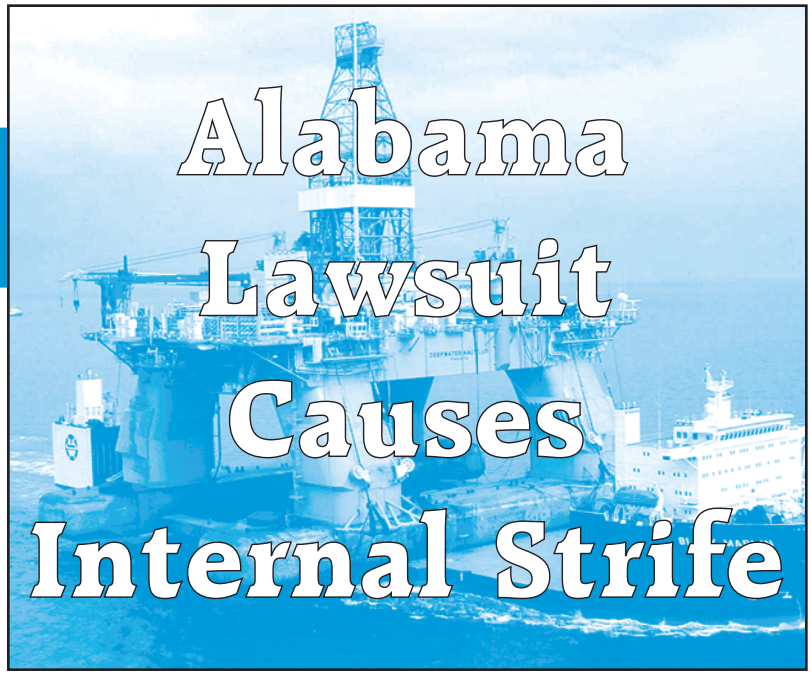

Photo of drill being transported courtesy of NASA

Nicholas Lund, J.D.

On August 12th, Alabama Attorney General Troy King filed suit against BP seeking punitive and compensatory damages resulting from "negligent or wanton failure to adhere to recognized industry standards" in the lead-up to the Deepwater Horizon spill.[1] Though a specific number was not included in the Complaint because of the ongoing nature of cleanup efforts, King sought damages for a wide range of past, present and future harms including cleanup costs, loss of tax revenue, environmental harms, and damage to State property.[2]

While Attorney General King's Complaint seemed to have the best interest of Alabamians in mind, it was filed against the wishes of one important citizen: Governor Bob Riley. Also on August 12th, the governor and other state officials filed a $148 million claim for lost tax revenue directly with BP, which has set up a $20 billion fund to deal with spill-related claims. The governor claimed that King's lawsuit would serve only to delay the claim process and "primarily served to enrich private attorneys rather than get the state needed damages."[3]

Governor Riley's fears were realized on September 16th, when BP announced that Alabama's claim was blocked because of the pending lawsuit. The governor was outraged, and said he was forced to cut another two percent of the state's education budget because the expected claim money would not be coming.[4] King defended his actions by saying that the lawsuit was intended to force BP into action, and equating Governor Riley to a "panhandler begging for crumbs" from BP.[5] Other states, including Mississippi and Florida, continue to calculate the damages to their respective coasts and plan to submit claims directly to BP. If those claims are not fulfilled, those states are prepared to take their disputes to court.

Endnotes

1. Complaint at ¶ 17, Alabama v. BP, No. 2:10-cv-00690-MEF-SRW (M.D. Al. Aug. 12, 2010).
2. *Id.* at ¶ 26.
3. Sebastian Kitchen, *Breakdown of $148M Claim to BP*, Montgomery Advertiser, Sept. 19, 2010, at NEWS.
4. Jeff Amy, *BP Refuses to Pay Alabama's Oil Spill Claim, Citing Lawsuit; State Education Budget Cut*, Alabama Press-Register, Sept. 16, 2010 *available at:* http://blog.al.com/live/2010/09/bp_refuses_to_pay_alabamas_oil.html.
5. Markesia Ricks, *King, Riley Continue to Spar Over BP Payments, Lawsuit, Proration*, Montgomery Advertiser, Sept. 17, 2010, at NEWS.

Fifth Circuit Denies Clean-up Costs under CERCLA

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On September 20, 2010, the Fifth Circuit Court of Appeals affirmed a Texas district court decision denying a methanol pipeline owner's claim for reimbursement of clean-up costs against an underground water pipeline installer.[1] The pipeline installer's employee had unknowingly damaged the methanol pipeline causing it to leak for several years and contaminating the ground around it. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a person is strictly liable for environmental contamination when the person "arranges for disposal" of a hazardous substance.[2] The issue in this case was whether the underground water pipeline installer had "arranged for" the disposal of the methanol within the meaning of the statute and was therefore liable. In making its decision, the court followed the precedent set by the United States Supreme Court in *Burlington Northern v. United States*.[3]

The *Burlington Northern* Decision

In 2009, the United States Supreme Court addressed the question of what it means to "arrange for" the disposal of a hazardous substance under CERCLA. In that case, a chemical supplier in California had used common carriers (businesses that provide transport of goods for a fee) to deliver hazardous substances to a buyer. The supplier was aware that leaks and spills often occurred during these shipments, so it took measures to encourage the carriers to use safe handling and storage. After many years, the chemicals had significantly contaminated the soil and groundwater. The state and federal governments spent over eight million dollars in clean-up efforts, then brought suit against the supplier for compensation for those clean-up costs.[4]

The case reached the Supreme Court, which reversed the Ninth Circuit Court of Appeal's grant of clean-up costs to the governments. The Supreme Court held that the Ninth Circuit's interpretation of "arrange for" conflicted with the plain language of the statute. The Ninth Circuit had held that an entity could arrange for disposal even if it did not intend to dispose of the hazardous substance. The court therefore held that the chemical supplier was liable as an arranger under CERCLA even though it had not specifically intended to dispose of the chemicals. Because the supplier had arranged for delivery of the hazardous substances and knew that chemical leaks and spills were likely to occur in the transfer process, arranger liability was not precluded.[5]

The Supreme Court, in reversing the Ninth Circuit's decision, explained that the language of the statute is unclear as to when an entity may be held liable as an arranger in cases where the entity neither (1) entered into a transaction for the sole purpose of discarding a hazardous substance, in which case the entity is clearly liable, nor (2) merely sold a product to a buyer that the buyer later disposed of, unbeknownst to the entity, in which case the entity is clearly not liable. "Less clear is the liability attaching to the many permutations of 'arrangements' that fall between these two extremes."[6] These cases require courts to examine the facts of each case and decide whether Congress intended the disputed conduct to fall within the scope of CERCLA's "arrange for" provision.

The Supreme Court then looked at the common usage of the word "arrange" which the court determined "implies action directed to a specific purpose." The court concluded that an entity may only be held liable as an arranger under CERCLA when it "takes intentional steps to dispose of a hazardous substance."[7] The governments pointed out that CERCLA's definition of "disposal" includes unintentional acts such as leaking and spilling. Accordingly, they argued, Congress intended to impose liability not only on entities who directly dispose of hazardous substances, but also on those who know that some disposal in the form of leaks and spills is occurring in their sale and distribution of hazardous substances. The court rejected this argument and

instead concluded that the chemical supplier's mere knowledge that spills and leaks sometimes occurred during shipments was insufficient grounds to conclude that the supplier had "arranged for" the disposal of the chemicals within the meaning of the statute.[8]

Celanese Corporation v. Eby Construction

In the Fifth Circuit case, a methanol pipeline owner, Celanese Corporation, sued an underground water pipeline installer, Eby Construction Company, under CERCLA and the Texas Solid Waste Disposal Act (SWDA), which is the Texas counterpart to CERCLA.[9] Celanese claimed that Eby was liable for the clean-up costs Celanese had incurred in cleaning up a site contaminated by methanol leaking from one of its pipelines. In 1979, Eby had installed an underground water pipeline for the Coastal Water Authority of Texas. Eby had to run its pipeline underneath other pipelines in the area, including Celanese's methanol pipeline. During the excavation, one of Eby's employees struck something with his backhoe. He did not know what he had struck and did not investigate or report the incident.

Twenty-three years later, on October 1, 2002, Celanese discovered a leak in its methanol pipeline after someone reported a patch of dead grass at the site. Celanese repaired the pipeline and, along with federal and state agencies, cleaned up the site, removing over 232,028 gallons of methanol. The leak was traced back to the Eby employee's backhoe incident, which had created a dent in the pipeline. Over the years, the dent cracked and eventually penetrated the wall of the pipe, allowing methanol to leak.[10]

The district court found that Eby and its employee did not know that the Celanese methanol pipeline had been damaged and therefore concluded that Eby was not liable as an arranger for disposal of a hazardous substance under CERCLA or SWDA. Celanese had argued before the district court that Eby knew of the damage its employee had caused to the methanol pipeline and knew that it would cause a leak. At the Fifth Circuit, Celanese tried to raise another allegation – that Eby had consciously disregarded its obligation to investigate the backhoe incident to find out what the employee had struck. The Fifth Circuit, however, found that Celanese had waived this argument because it had not brought it up in the court below. The court explained, "[t]he general rule of this court is that arguments not raised before the district court are waived and will not be considered on appeal."[11]

Nevertheless, the court addressed the claim, finding that even if Celanese had not waived its conscious-disregard argument, Eby still would not be liable as an arranger under CERCLA or SWDA. Citing and explaining *Burlington Northern*, the court said that for it to find that Eby "arranged for" the disposal of methanol and hold Eby liable for the clean-up costs, it had to find that Eby took intentional steps or planned to release methanol from the Celanese pipeline.

Under the conscious-disregard argument, Celanese would claim that since Eby did not investigate the backhoe incident, it consciously disregarded its duty to investigate, which is tantamount to intentionally taking steps to dispose of methanol. The court compared the facts of this case to those of the *Burlington Northern* case. In *Burlington Northern*, the chemical supplier actually knew that leaks and spills were likely to occur during shipments and arranged for the shipments anyway. In this case, Eby had no knowledge that the methanol pipeline had been damaged and would cause methanol to leak. If the supplier in *Burlington Northern* was found not liable for clean-up costs, the Fifth Circuit could see no way to justify finding Eby liable for its less-culpable behavior.[12]

Conclusion

Congress enacted CERCLA in order to counteract the serious environmental and health risks threatened by industrial pollution. CERCLA is designed "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination."[13] The act, however, limits liability to four classes of potential responsible parties, one of which is "any person who…arranged for disposal…of hazardous substances."[14] Unless an alleged responsible party falls under one of the four classes, the party cannot be held liable for the contamination or the resulting clean-up efforts and costs.

Endnotes

1. Celanese Corporation v. Martin K. Eby Construction Company, Inc., No. 09-20487, 2010 WL 3620231 (5th Cir. Sept. 20, 2010).
2. 42 U.S.C. § 9607(a)(3) (2010). Also known as Superfund.
3. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009).
4. *Id.* at 1874-76.
5. *Id.* at 1877.
6. *Id.* at 1878-79.
7. *Id.* at 1879.
8. *Id.* at 1879-80.
9. *Celanese Corporation*, 2010 WL 3620231 at *1.
10. *Id.*
11. *Id.* at *2.
12. *Id.* at *3-4.
13. *Burlington Northern*, 129 S. Ct. at 1874.
14. 42 U.S.C. § 9607(a)(3).

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WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA10OAR4170078, the Mississippi-Alabama Sea Grant Consortium, the State of Mississippi, the Mississippi Law Research Institute, and the University of Mississippi Law Center. The statements, findings, conclusions, and recommendations are those of the author(s) and do not necessarily reflect the views of the Mississippi-Alabama Sea Grant Legal Program, the Mississippi-Alabama Sea Grant Consortium, or the U.S. Department of Commerce. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon.

Recommended citation: Author's name, *Title of Article,* 30:3 WATER LOG [Page Number] (2010).

MASGP-10-003-04
This publication is printed on recycled paper of 30% post-consumer content.
ISSN 1097-0649 *December 2010*

Sea Grant

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its goal is to increase awareness and understanding of coastal issues in and around the Gulf of Mexico.

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