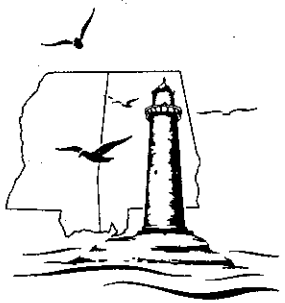
WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



ARTICLES

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WATER LOG

The *Water Log* is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

If you would like to receive future issues of the WATER LOG free of charge, please send your name and address to: Coastal and Marine Law Research Program, University of Mississippi Law Center, University, Mississippi 38677. We welcome suggestions for topics you would like to see covered in the WATER LOG.

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REDFISH MANAGEMENT UPDATE: STATE MARINE FISHERIES COMMISSION v. ORGANIZED FISHERMEN OF FLORIDA, 503 So.2d 935 (1987).

In the July-September, 1986 WATER LOG we ran the article "Redfish Management in the Gulf: A Regulatory Challenge." Since that time disputes over redfish quotas have continued throughout the Gulf States. The current conflict between the Florida State Marine Fisheries Commission and commercial fishing interests in that state is a good example of issues which still remain unresolved. The fishermen have challenged the Commission's authority to set a bag limit and to prohibit sale of redfish.

The Florida legislature empowered the Florida Marine Fisheries Commission (MFC) to set rules governing fishing within the state's salt waters. Pursuant to such authority the Commission promulgated rules intended to "protect, manage, conserve, and replenish Florida's depleted red drum." 503 So.2d at 936. The rules proposed to (1) limit bag and possession to five fish, (2) prohibit their sale, (3) close the season for two months, and (4) restrict recreational gear. The prohibition on sale would, in effect, impose "gamefish" status on Florida redfish.

Florida law requires approval by the Governor and Cabinet before the Commission's rules become effective. In this instance, before executive review began, Organized Fishermen of Florida (OFF—a group representing commercial fishing interests) filed suit seeking to have the rules declared invalid. They argued that the proposed rules were an improper exercise of delegated legislative authority.

The case first went before the Division of Administrative Hearings. The hearing officer ruled that both the bag limit and prohibition on sale were invalid because their effect upon commercial fishermen was disproportionate. Furthermore, he reasoned, commercial fishermen were not primarily responsible for the redfish problem. The hearing officer concluded that the Commission had exceeded its authority by conferring gamefish status on redfish. Such decisions, he wrote, were essentially political and thus should be reserved for direct legislative action.

The Florida Marine Fisheries Commission, joined by the Florida Conservation Association, appealed the hearing officer's ruling to Florida's First District Court of Appeals. The appellate court reversed the decision and ruled in favor of the state on all issues presented. It stated:

> The specific rule-making authority delegated to the Commission clearly encompasses the imposition of a bag limit and the prohibition on commercial sale which were found to be invalid in the instant case. The hearing officer's conclusion that such restrictions are not fair and equitable because of their "overwhelmingly adverse" effect on commercial fishermen overlooks the fact that these specifically

delegated powers inherently encompass results which would have varying impacts on different groups. 503 So.2d at 938.

The court further noted that the uneven impact argument propounded by OFF was particularly unconvincing where, as in this case, the restrictions were "equally applicable to all the people of the state." 503 So.2d at 939.

The proposed regulations were one choice among several alternatives intended to achieve the goal of a 50-fold increase in the rate of escapement of juvenile redfish into the adult spawning population further offshore. The failure of OFF to challenge the Commission's goal or to produce evidence that the rules selected were arbitrary and capricious weakened their case. Without such argument on their part, the court was left to presume that the proposed rules were a reasonable exercise of the Commission's authority.

On April I, 1987 the appellate court denied a motion of OFF for rehearing. That same day the Governor and Cabinet met to review the proposed rules as required by statute. Although the rules had survived judicial review, they did not survive that of Florida's executive branch. The Cabinet declared that, as a matter of policy, if anyone is excluded from a fishery, everyone must be excluded. (Conferring gamefish status on redfish obviously violates this policy, and strong argument can be made that bag limits do as well.) The Cabinet then requested the Marine Fisheries Commission to prohibit all harvest of redfish pending development of rules that allow catch by both commercial and recreational fishermen. The MFC is currently revising the regulations to conform to the Cabinet's policy.

Robert O'Dell

EXECUTIVE REVIEW OF FISHERY REGULATIONS IN THE GULF STATES IN LIGHT OF *STATE v. ORGANIZED FISHERMAN OF FLORIDA*

Introduction

Recent happenings in Florida concerning redfish regulations (see: *Redfish Update* ... in this issue) set the stage for a look at executive authority in the area of fishery regulation in states bordering the Gulf of Mexico. A primary tenet of administrative law is that legislatures may delegate rule-making powers to administrative bodies. 73 C.J.S. §25. Probably because the functions of administrative agencies are of an administrative, executive, or ministerial nature, as well as being quasi-legislative, and often quasi-judicial, they are generally situated within executive infrastructures. 73 C.J.S. §10. However, the degree of executive involvement in activities of agencies and commissions created by legislation varies widely according to the authorization for a particular body. This diversity is illustrated by differences in the level of executive involvement in fishery regulation authorized by the five Gulf states.

Considerable similarity is found in the statutes that delegate rule-making authority over marine fisheries to various agencies within the Gulf states. The legislature of each state has created a "commission", or department headed by a "commissioner" (Alabama), authorized to promulgate rules for taking living marine resources. Each of the authorizing statutes calls for the governor to make appointments of commission members, or the commissioner (Alabama). The commission or department of each state can be said to be an executive agency in that it has administrative and/or enforcement powers in addition to rule-making authority.

Of concern here, however, is one outstanding difference in the statutes. They fall into opposite groups on the issue of the gubernatorial review of fishery regulations. The wildlife statutes of Florida and Alabama allow the governor to approve or disapprove regulations proposed by the administrators. In Louisiana, the Administrative Procedure Act vests similar authority in the Governor. The statutes of Mississippi and Texas permit no such executive control.

More detailed discussion of the statutes of each state is in order. Such discussion is followed by analysis of the Florida situation in the wake of *State v. Organized Fishermen of Florida* and subsequent developments in that state.

Statutory Authority for Executive Review of Fishery Regulations

1. Alabama

The statutes at Ala. Code §§9-2-1 *et seq.* (1980) establish the Department of Conservation and Natural Resources and give it authority to regulate the marine fishery, among other powers and duties. The Department is headed by a "Commissioner of Conservation and Natural Resources," who is appointed by the Governor and holds office at his pleasure. The

Commissioner has directorship over all functions and duties of the Department, including rule-making for marine fisheries. All rules promulgated by the Department are subject, however, to executive review.

The Advisory Board of Conservation and Natural Resources consists of the Governor, Commissioner of Agriculture and Industries, the Director of the Agricultural Extension Service of Auburn University (ex officio), and ten other members appointed by the Governor. It has responsibility to review all rules recommended by the Commissioner and "to recommend amendments or repeals thereof or additional rules or regulations and by a two-thirds vote of those present at any meeting and with approval of the governor to amend, or repeal such rules and regulations or to make and promulgate additional rules or regulations." Ala. Code §§9-2-15 (1980).

2. Florida

Management responsibility is vested in the Marine Fisheries Commission (MFC), situated within the Department of National Resources. Fla. Stat. §§370.025 to 370.027 (1983). The seven members of the MFC are appointed by the Governor to serve four-year terms. Rule-making authority is delegated to the MFC, subject to "final approval by the Governor and Cabinet sitting as head of the Department of Natural Resources."

Greater detail as to Florida law is provided subsequently under the heading of "A Case Analysis".

3. Louisiana

The Louisiana Wildlife and Fisheries Commission is established in the executive branch of state government. La. Rev. Stat. Ann. §56:1 (West 1987). The Commission consists of seven members appointed by the Governor, and confirmed by the Senate, to serve terms of six years. The Commission has express authority to adopt rules and regulations for "comprehensive control of birds, shellfish, finfish, and wild quadrupeds, . . . not inconsistent with . . . provisions of the Louisiana Administrative Procedure Act." La. Rev. Stat. Ann. §56:6(c)(10) (West 1987). Louisiana's Administrative Procedure Act grants the Governor authority to "suspend or veto any rule or regulation . . . except as provided in R.S. 49:967." La. Rev. Stat. Ann. §49:970 (West Supp. 1987). Although section 49:967 exempts the Commission from certain requirements of the Administrative Procedure Act, section 970, above, applies to its rule-making.

Administrative and enforcement activities concerning wildlife are the province of the Louisiana Department of Wildlife and Fisheries. The Department's Office of Coastal and Marine Resources oversees enforcement and regulatory functions within marine waters. The Secretary (Executive Director) of the Department is appointed by, and serves at the pleasure of, the Governor. His salary is fixed by the Governor and he "perform[s] his functions under the general control and supervision of the governor." La. Rev. Stat. Ann. §36:604 (West 1985).

The extent of the Governor's authority over the Department's exercise of primarily executive functions (such as enforcement and administration) should not be considered extraordinary. The provision of an executive veto power over primarily legislative rule-making is, however, the subject of discussion (under Florida law) of the final section of this article.

4. Mississippi

In Mississippi, fisheries management responsibility is vested in the Commission on Wildlife Conservation and its executive subordinate, the Department of Wildlife Conservation (DWC). The Commission is composed of five members appointed to five year terms by the Governor with advice and consent of the Senate.

The Executive Director of the DWC is appointed by, and serves at the will of, the Commission. The Commission also appoints two advisory committees to assist it in policy formulation. A committee is assigned to each of the DWC's two bureaus, the Bureau of Marine Resources and the Bureau of Fisheries and Wildlife.

The Executive Director of the DWC is responsible for submission of an annual report to the Governor and legislature. But, the Governor has no express authority over regulatory processes other than initial appointment of Commissioners. Pertinent statutes are codified at Miss. Code Ann. §§49-1-1 to 49-15-109 (1973).

5. Texas

The Texas Parks and Wildlife Commission consists of nine members serving staggered six year terms. Members are appointed by the Governor with advice and consent of the Senate. Tex. [Parks & Wild.] Code Ann. §11.012 (Vernon, Supp. 1987). The Commission has authority to "regulate the means, methods, manners, and places in which it is lawful to take or possess wildlife resources." Tex. [Parks & Wild.] Code Ann. §61.052 (Vernon, Supp. 1987). Regulation of taking of wildlife resources is by proclamation of the Commission.

The Parks and Wildlife Department is an agency of the state under the policy direction of the Commission. Tex. [Parks & Wild.] Code Ann. §11.011 (Vernon 1976). The Department's director is appointed by and serves at the will of the Commission. The Department is the administrative and enforcement agency for wildlife management.

Texas legislates a strong commission. Neither the Texas wildlife management statutes nor state administrative procedure law provide for veto or review of proposed regulations by the Governor.

A Case Analysis

State Marine Fisheries Commission v. Organized Fishermen of Florida, 503 So. 2d 935 (Fla. App. 1987), and its aftermath, present the basis for a case study of executive review of proposed fishery regulations. An analysis of executive action on proposed redfish regulations, in light of Florida statutory and case law, is the purpose of this section.

According to Florida law: "The paramount concern of conservation and management measures shall be the continuing health and abundance of marine fisheries resources of this state." Fla. Stat. Ann. §370.025 (2)(a) (1983).

Authority to regulate fisheries to achieve the legislature's stated policy of "management and preservation of Florida's renewable marine fishery resources . . . for optimum sustained benefits" is vested in the Marine Fisheries Commission. Fla. Stat. Ann. §§3703.025 (1983). This responsibility includes express authority to prohibit sale of species and to set bag limits. Fla. Stat. Ann. §370.027(2)(1983). Yet, after more than a year of intensive study and after court determination that its proposed redfish rules were fair and equitable, the Commission's rules were rejected as contrary to executive policy. The Cabinet announced its policy of non-exclusion of commercial interests subsequent to court review, at a hearing attended by hundreds of fishermen.

This result leads one to ask, is this degree of executive dominion over a legislatively created Commission appropriate? The Legislature has designated the Governor and Cabinet, as head of the Department of Natural Resources (DNR), to review proposed regulations for approval. This procedure, in effect, provides for executive veto over rules proposed by the Commission. The Commission, which falls under the authority of the DNR, is composed of seven members appointed by the Governor. Executive influence on policy-making is therefore great from the beginning. Furthermore, Florida law states that, "in considering a proposed rule recommended by the Commission, the Governor and Cabinet may only approve or disapprove the proposed rule." Fla. Stat. Ann. §370.027(3)(a). Arguably, declarations of policy by the Cabinet, such as in this instance, are improper and non-binding upon the Commission.

Section 370.025 of the Florida Statutes articulates fisheries policy for the state and makes such policy binding upon the Commission. Nowhere does the legislature declare a policy that commercial fishing of any species cannot be curtailed in favor of recreational fishing. To the contrary, the statutes vest in the Commission the power to designate "species that may not be sold." Fla. Stat. Ann. 370.025 (2)(e). If the Cabinet's policy statement contradicts this express MFC power, then the policy statement is probably ineffectual. But even if the policy declaration should be considered consistent with express authority of the MFC, it is subject to further scrutiny under Florida law.

The nature of the delegation of legislative authority to both the Cabinet (specifically) and the MFC (generally) is very important to an analysis of the effectiveness of the cabinet's action in this instance. In order to expedite such analysis it is necessary to first inquire: Did Florida's legislature provide for the Cabinet to declare policy on behalf of the Commission? A negative answer is supported by §370.025(3)(a) and by the fact that §370.025 "declares the policy of the state." This interpretation renders the Cabinet's policy statement invalid, since the MFC possesses only those powers delegated to it by the legislature.

On the other hand, if the answer is affirmative, and the legislature did intend for the Cabinet to have a role in setting policy, two limitations on the power of the Commission itself must be considered. The first is sufficiency of the delegation of legislative powers to allow the Commission to ascertain its authority. As the Florida Supreme Court stated in *Hutchens v. Mayo,* 197 So.

495 (1940) (citing *Arnold v. State*, 190 So. 543 at 544 (1939)): "Where a statute of the State empowering boards, bureaus, or commissions to promulgate rules is in question 'The test . . . is whether or not the act defines a pattern by which the rule or regulation must be made to conform.' " Florida's legislature apparently took pains to comply with this test when it set forth the fisheries policy of the state in the statutes authorizing the MFC to develop marine fisheries rules.

However, if the legislature intended the MFC to have latitude in policy matters, a second constraint on delegation of legislative authority remains to be considered. It is that the legislature cannot delegate legislative functions to an executive commission, though it may properly delegate matters of adminstrative detail. 16 C.J.S.§142. Recently, the Florida Supreme Court addressed this issue, in the area of policy making, stating: "Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy." *Askew v. Cross Key Waterways*, 372 So. 2d 913 (1979). If the recent pronouncements of the Florida Cabinet amount to declarations of "fundamental policy" they violate the so—called "doctrine of nondelegation of legislative power" and should be declared void if challenged in court.

Analysis of delegation of authority concerns for the recent Cabinet action on proposed redfish regulations can best be simplified using the following inquiries:

1) Has the legislature already articulated policy regarding gamefish status for redfish? If so, a conflicting policy statement by the Cabinet should be voided if challenged in court.
2) If the legislature has not spoken to the issue of gamefish status, has it provided sufficient guidance to satisfy the *Hutchens* test and allow for MFC action on the matter? If the legislature has not met this minimum standard for delegation of its legislative authority the MFC cannot act in areas where delegation of authority is lacking.
3) Does the Cabinet's action amount to a establishment of "fundamental policy" as prohibited by *Askew*?

The important realization to be achieved by running through the above questions is that there remain only narrow circumstances under which the Cabinet's policy declaration is valid. Findings which must be made to support the ruling are: 1) It does not conflict with policy set forth by the legislature; 2) That the Commission in general and Cabinet in particular have been given sufficient authority to set policy where the legislature has not spoken, (*Hutchens*); and 3) The articulated policy is not "fundamental" (Askew).

It appears that the Cabinet's action conflicts with both the first and third requirements. The legislature has spoken on the gamefish issue in the enabling legislation, and any ruling of the Cabinet which so clearly limits an express legislative delegation of authority might be deemed an assumption

of legislative powers. Even concerning the second requirement there appears to be a lack of authority for the Cabinet to declare policy for the Commission.

Conclusion

Under Florida law the Cabinet is deemed to be the head of DNR, the Commission's parent. But clearly the state legislature intended the Commission to exercise some degree of independence in setting fisheries policy for the state. Is independence possible when all regulations are subject to an executive veto? Florida's awkward and cumbersome administrative arrangement, where political pressures can easily derail regulatory procedure, seems to be a model for other states and agencies to avoid. Constitutional concerns over separation of powers and proper delegation of legislative authority also appear to permeate this quagmire of administrative law.

This fishery regulatory statutes of Mississippi and Texas do not provide for executive veto. They provide for gubernatorial appointment of commissioners who are then free from executive authority in rule-making. This system avoids constitutional and delegation of powers questions, time delays, and abuse of political process. If the legislature adequately ascertains statutory policy, and the governor makes appointments of qualified commission members, political jockying on specific rules is unnecessary and may often be counterproductive.

Recent developments in Florida illustrate problems that fisheries conservationists might encounter in endeavors to restrict commercial fishing in states providing for executive review of fishery regulations. The extent to which the Florida Marine Fisheries Commission can exercise independent professional fisheries management judgment, free from political pressures upon executive officers, is uncertain. Apparently issues are still to be decided, some on subtle points of law, before the fate of the redfish is determined in Florida and throughout the Gulf.

Robert O'Dell

PLASTICS IN THE MARINE ENVIRONMENT: A GROWING PROBLEM

Introduction

Although non-degradable plastics have been accumulating in the marine environment for more than two decades, only recently has the problem received significant attention. Several hundred thousand tons of waste plastic enter the marine environment each year, causing the deaths of an estimated two million sea birds and 100,000 sea mammals annually. Seals, dolphins, and whales are known to become entangled in nylon monofilament netting and packing bands. For birds, both entanglement and ingestion of plastics contribute substantially to mortality.

Plastic discards comprise the bulk of man-made debris that washes onto remote shorelines. A 1985 study found that 86 percent of man-made debris occurring in the North Pacific Ocean was plastic. A similar study undertaken in the Mediterranean found a 60 to 70 percent composition of plastics. Two factors have been identified as contributing to the seriousness and urgency of the problem: (1) the persistence of modern plastics, which are manufactured for durability, and (2) a stable or increasing rate of disposal of new plastic waste into the environment. Even if no more plastic waste were added to the environment, the resistance of existing waste to biodegradation and photodegradation would assure problems far into the future.

Evolution and Scope of the Problem

Following World War II, polymer plastics that are inexpensive and durable came into widespread use. The commercial fishing boom that began in the 1960s brought with it widespread use of monofilament nets which are now standard equipment on fishing vessels. Unlike the hemp, flax, or cotton nets used in the past, nylon nets are bouyant and resist degradation. The qualities bring with it both a blessing and a curse—a blessing in that their durability and bouyancy increase the productivity and efficiency of fishing operations; a curse in that lost and discarded nets increase the incidental mortality of fish, mammals and birds.

Household plastics contribute substantially to the waste problem. The low initial cost of plastic materials, coupled with recent elimination of Food and Drug Administration restrictions on their use as food packaging, has created a situation that will tend to accelerate both production and need for disposal.

Marine life suffers from plastics pollutin in two ways: ingestion and entanglement. It is now known that about 15 percent of the world's 280 known species of sea birds will ingest plastics. One common plastic item known to entangle marine life, beverage six-pack holders, has a life expectance of 450 years in sea water. The propensity of seemingly harmless debris to entrap birds and fish has led eight of the twenty-three coastal states to ban use of nondegradable plastic six-pack holders.

Remedial Measures

Studies and attendant publicity of the nature of the problem are bringing about positive responses. Congress appropriated a total of 2.5 million dollars for fiscal years 1985-87 to study the "ghost" net problem. The National Marine Fisheries Service was directed to conduct the study and identify practical solutions. The United States government has made research on the subject available to other countries and has stated support for plastic discharge control through international regulatory authority.

Ratification of Annex V of the MARPOL (1973 Marine Pollution) Convention, which seeks to regulate discharge of garbage from vessels at sea, is currently before the Senate. If ratified, Annex V will prohibit waste discharge from American vessels worldwide and from foreign vessels within U.S. waters. On February 17, Senator John Chafee (R-RI) introduced legislation to implement Annex V. A companion bill would prohibit disposal of items such as plastics and bottles within 25 miles of the U.S. coast. Congressman Gerry Studds (D-MA) has also introduced legislation to implement MARPOL Annex V. His bill proposes to prohibit disposal of plastic waste within 200 miles of the U.S. coast. Senator Lautenberg's (D-NJ) bill to implement Annex V would require, in addition, a study of alternatives for eliminating plastic pollution and dissemination of information about the problem to the public.

HR 537, introduced by Congressman Charles Bennett (D-Fla.), calls for research observers on driftnet fishing vessels in order to assess incidental bycatch of all types; a net bounty system to encourage retrieval of lost and discarded nets; and a seabird protection zone around the Aleutian Islands wherein driftnet fishing is prohibited. Identical legislation (S. 62) has been introduced by Senator Ted Stevens (S-Alaska). A bill entitled the "Plastic Waste Study Act of 1987" (H.R. 474) was introduced by Congressman Hughes (D-NJ) in January. It proposes a joint study of plastic waste problems by the Environmental Protection Agency and the National Oceanic and Atmospheric Administration. It also allows for an eighteen-month study period followed by a report and recommendations to Congress.

Conclusion

Although a need for more data regarding plastic wastes clearly exists, enough evidence is now available to warrant the taking of steps to deal with the problem. The bills discussed above are evidence of Congressional recognition of a need for remedial measures. While no one solution will resolve the issues surrounding plastics pollution, the following alternatives are offered as viable options.

By offering federal research dollars and tax incentives, industry could be encouraged to identify polymers that will readily break down in the marine environment. At the same time, degradability standards for plastic consumer items that are commonly found in the ocean could be developed at the federal level. Reduction in the quantity of raw plastic finding its way into the ocean could be accomplished by better effluent filtering. Effluent control is especially amenable to regulation by international treaty. Sources are easily identifiable, benefits are international in scope, and cure is obvious.

A system of drift net indentification would help alleviate the problem of "ghost" nets. A requirement for reporting lost nets would allow for more accurate determination of the scope of "ghost" net mortalities. It would also discourage negligent loss or discard of worn-out nets. Incentives for lost net retrieval could be enhanced by government-funded bounties.

The long-term solution to the plastic waste problem, however, lies more in changing attitudes than in adding to the regulatory burden. While limited regulatory regimens and penalties for those who wantonly pollute are necessary and desirable, there is no substitute for public understanding. Ultimately, users of the marine environment, islands in the sea as they are, must police themselves and resolve to act responsibly.

Robert O'Dell

*This article is a synopsis of a more detailed treatment of the issue prepared by the Program. For a copy of the complete article and a bibliography, write to Robert O'Dell, Coastal and Marine Law Research Program, University of Mississippi Law Canter, University, MS 38677.

HARMON COVE CONDOMINIUM ASSOCIATION, INC. v. MARSH

815 F.2d 949 (3rd Cir. 1987)

Intoduction

This case represents an appellate court's latest articulation of limits on the broad discretionary powers afforded to administrative agencies. The issue presented in *Harmon Cove* was whether the federal district court could order the Secretary of the Army Corps of Engineers, by writ of mandamus, to enforce a dredge and fill permit issued under §404 of the Clean Water Act to a New Jersey condominium developer. The Court of Appeals held that because there were no guidelines limiting the Secretary's discretionary enforcement power, judicial review of his enforcement decisions was precluded.

Courts have traditionally afforded an administrative agency, responsible for enforcement of the law within that agency's particular expertise, broad investigative and prosecutorial discretion in the absence of a contrary statutory command. Although broad discretion is given to agencies in their daily functioning, federal district courts are statutorily empowered to issue writs of mandamus "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C.A. §1361 (West 1976). As the holding of *Harmon Cove* illustrates, this seemingly expansive grant of power to the courts is actually much narrower than it appears.

Analysis

In the spring of 1974, Hartz Mountain Industries requested a permit from the Army Corps of Engineers to dredge and fill portions of the Hackensack River. They sought to build the Harmon Cove condominium complex, which would include a marina on the river. The Corps of Engineers issued the permit with special conditions attached. The permit expressly provided that Hartz Mountain Industries was responsible for taking all proper steps to insure the integrity of the structure and to protect moored boats from wave damage. Periodic maintenance dredging would be required within the permit's ten-year lifetime.

Hartz Mountain Industries constructed the condominium complex. On the last effective day of the permit, the Harmon Cove Condominium Association, composed of residents of the condominium complex, filed suit to compel the Secretary to enforce the special conditions of the permit issued to Hartz Mountain Industries. The Association alleged that Hartz Mountain Industries had delegated some of its duties under the permit to Hartz Mountain Associates, but that neither Hartz Mountain Industries nor Hartz Mountain Associates had complied with the special conditions of the permit. This failure was alleged to have caused damage to piers and embankments from wave wash. Also, damage to marina and other structures of the complex was alleged to pose dangers to condominium residents. Finally, the Association

contended that on several occasions it had requested the Corps to require Hartz Mountain Industries and Hartz Mountain Associates to comply with the conditions of the permit, but that the agency had failed to take action.

The district court dismissed the Association's petition, summarily stating that no jurisdiction exists for mandamus under the Federal Water Pollution Control Act (FWPCA). The court concluded that even assuming it could exercise this form of judicial review under the FWPCA, it would be inappropriate because the Secretary was not positively commanded to enforce permits, but rather could exercise discretion in enforcement.

The Third Circuit Court of Appeals granted review, and began by assuming (but without deciding) that judicial review through mandamus is not expressly precluded by the FWPCA. It then discussed past decisions of the United States Supreme Court establishing standards governing review. One decision stated that a court may compel an officer of the government to perform an official act only after the person seeking relief has exhausted all other means of relief, and the government officer or agency is positively commanded by law to perform the particular act, devoid of discretion. *Heckler v. Ringer,* 466 U.S. 602 (1984).

The court relied heavily upon the decision of the Supreme Court in *Heckler v. Chaney,* 470 U.S. 821 (1981), in reaching its final decision. In *Chaney,* the Court noted that the tradition of broad discretion given to administrative agencies arose in part from a recognition that an agency's refusal of enforcement is similar to a prosecutor's decision not to indict. The Court went on to say that Congress granted agencies broad discretionary power by limiting judicial review to that provided by the Administrative Procedures Act (APA). It then discussed the two conditions under the APA when judicial review is precluded: (1) when Congress has specifically expressed an interest to preclude judicial review altogether, and (2) when a statute is so ambiguously drawn that a court has no meaningful standards or guidelines against which to judge the agency's exercise of discretion. The Court stated that because agency decisions concerning enforcement action are generally committed to agency discretion, they are therefore presumptively immune from judicial review under the APA. This presumption, however, may be removed where the empowering statute has provided guidelines for the agency to follow in exercising its enforcement powers.

Following *Chaney,* the Third Circuit, in this case, found that the Secretary's decision not to enforce the special conditions of the permit issued to HMI was presumptively unreviewable. The Association could rebut that presumption only by showing that the empowering statutes imposed an enforceable duty on the Secretary by providing guidelines for the Corps to follow in exercising its enforcement powers. To resolve this question the appeals court examined the permit itself, Section 10 of the River and Harbors Act, and Section 404 of the FWPCA. In each it found nothing that limited the Secretary's discretion.

Defeated on the issue of whether the Secretary had a duty to enforce the conditions of the permit, the Association advanced two more arguments: (1) that the limitations of discretion concerning content of the permit themselves acted as a guideline to enforcement; and (2) that finding no enforcement duty after a permit was issued would be anomalous and self-contradictory. The court ruled, however, that the Association offered no legal support for these arguments, and that they ignored the holding in *Chaney* and the statutory language of the River and Harbors Act and FWPCA.

The Court of Appeals concluded, then, that the Secretary's decision was committed exclusively to his discretion. Since the Secretary owed no duty to enforce the conditions of the permit, the Association failed to fulfill the requirements for mandamus relief. Furthermore, the court found that under the facts of the case, the citizen suit provision of FWPCA did not authorize an action against Hartz Mountain Industries or Hartz Mountain Associates. Therefore, the court found that the Association's claims were properly dismissed by the District Court.

Conclusion

As a result of this decision, the Harmon Cove Condominium Association is left totally without remedy. The Court of Appeals refused to recognize, without discussion as to their rationale, the Association's claim under the citizen suit provision of the FWPCA. While the outcome could have been the same under a citizen suit analysis, there was a substantial legal basis for the court to decide otherwise. Two views predominate of a court's power over an agency's decision-making under the citizen suit provision. The majority view, similar to the *Chaney* analysis, is that a court is empowered to compel an administrator to take action only if it finds that the administrator has the discretion to decide whether to begin an investigation, and if he decides not to, his decision is final.

The minority view was discussed and followed in a fairly recent district court opinion, *DuBois v. Environmental Protection Agency,* 646 F. Supp. 741 (W.D. Mo. 1986). Under this view, the administrator has a mandatory duty to enforce compliance once he "finds" a violation of an act. Furthermore, in *Dubois,* the district court found that the EPA Administrator had a mandatory duty to make a finding of whether there has been a violation. It noted that the spirit of the citizen suit provision is to give "the little guy" access to enforcement power of the federal government. In keeping with the spirit of the citizen suit provision, the Court of Appeals could have followed the *DuBois* case and forced the Corps to make a finding of whether there had been a violation. Had the Corps' initial investigation of the condominium residents' claims found that a violation of the act had occurred, then the court could have compelled the Corps to enforce the terms of the permit.

The Secretary of the Army Corps of Engineers, like any other agency head, generally cannot act against every technical violation of the statutes he is charged with enforcing. Likewise, an agency possessing expertise is much

better equipped than the courts to balance conflicting interests. Yet, it seems reasonable for courts to require of administrative agencies actions that further the purposes of their empowering statute when the agency arbitrarily decides not to exercise its enforcement power.

Melanie Smith

TULL v. UNITED STATES
55 U.S.L.W. 4571 (1987)

Introduction

Acknowledging the need to protect navigable waters and wetlands, Congress passed the Clean Water Act, section 404 establishes a permit program for the discharge of dredge or fill material into navigable waters, or the wetlands adjoining navigable waters. The statute authorizes relief in the form of temporary or permanent injunction. In addition, it provides for a civil penalty of up to $10,000 per day. The Clean Water Act does not speak to the issue of a jury trial for persons charged with civil violation of the Act.

In *Tull*, the United States brought suit against a real estate developer, alleging that the developer dumped fill on wetlands of a Virginia island without having obtained a §404 permit. The Government sought both injunctive relief and a civil penalty in the amount of $22,890,000, the maximum allowed under the Act. As most of the property in question had since been sold to third parties, injunctive relief was impractical as to most of the property.

The developer admitted discharging the fill without a permit, but asserted that the property was not "wetlands." " Wetlands" is defined by regulation as "swamps, marshes, bogs and similar areas." 33 CFR §323.2(c) (1986). The developer's demand for a jury trial was denied by the district court. After hearing evidence from both sides, the court imposed civil fines and granted injunctive relief. *United States v. Tull*, 615 F. Supp. 610 (E.D.Va. 1983) The Fourth Circuit Court of Appeals affirmed the lower court's decision in holding he was not entitled to a jury trial under the Seventh Amendment. *Tull v. United States,* 769 F.2d 182 (4th Cir. 1985) The United States Supreme Court reversed.

Analysis

The Supreme Court of the United States held, in this case, that the Seventh Amendment of the Constitution guarantees a jury trial whan determining liability for injunction and civil penalties under the Clean Water Act. However, the Court did not recognize this right as to the assessment of the amount of the civil penalty. The Seventh Amendment states in part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . ."

In finding a right to a jury trial, the Court first compared the action to the 18th century English action on debt. Prior to adoption of the Seventh Amendment, courts in the United States followed the custom of the English courts when there was a question regarding trial by jury. The English courts distinguished law and equity, traditionally requiring juries in law courts, but not in equity courts. The action in debt was within the jurisdiction of the English law courts. In the United States, when the Seventh Amendment was adopted, the courts chose to treat the civil penalty suit as an action in debt, and therefore an action allowing trial by jury.

The Government asserted, however, that this action is really more analogous to the action to abate a public nuisance. Abatement of nuisance is equitable in nature and therefore would not require a jury trial. The Court noted that both analogies are proper, but it was not necessary to find the "closest 18th century analogue" because the Seventh Amendment "requires trial by jury in actions unheard of at common law."

The Court reasoned further that the civil penalty at common law was enforceable only in a court of law. Its purpose is to punish an individual who has done something wrong, while conversely, equitable relief seeks to "restore the status quo." Because the penalty in *Tull* does nothing to compensate for damages, the Court reasoned, it is a penalty, and therefore legal in nature.

The Government next argued that even if the civil penalty were legal in nature, a court of equity could impose monetary damages where they are incidental to injunctive relief. The Court rejected this argument on three grounds. First, a court of equity may award monetary damages but may not enforce civil penalties. Second, the Government knew that injunctive relief was impractical in this case and that the civil penalty would be the primary relief. Finally, the Government here was not limited to the legal action. Equitable relief is available in addition to the legal remedy.

As to the issue of trial by jury on the assessment of the penalty, the Court held that this was not guaranteed under the Seventh Amendment. This holding was based on two theories. First, the assessment of civil penalties is not one of the fundamental elements of trial by jury. Also, the Court found that Congress has the authority to fix a penalty by statute. This authority extends to the ability to allow the trial judge to do the same. In addition, the assessment of penalties is not foreign to the usual duties of a trial judge.

Justice Scalia concurred as to the right to trial by jury to determine liability. However, he dissented on the issue of trial by jury to assess the civil penalty. He suggested that the right to jury trial as to whether a civil penalty should be assessed involves the right to jury trial as to the amount. He found unpersuasive the idea that simply because the legislature did not fix a specific penalty that was within their power to fix, that a judge, and not a jury, was the only competent entity to fix the penalty.

Conclusion

At this time it appears that the determination of liability for civil penalty under the Clean Water Act is properly an issue for jury trial. However, unless Justice Scalia's dissent persuades the rest of the Court in the future, the assessment of that penalty will be left to the trial judge.

P. Colleen Coffield

CALIFORNIA COASTAL COMMISSION v. GRANITE ROCK CO.

107 S. Ct. 1419 (1987)

Introduction

In a recent decision the United States Supreme Court upheld state authority to regulate use of federal land under the Coastal Zone Management Act of 1972 (CZMA). 16 U.S.C.A. §§1451 *et seq.* (West 1985). The Court ruled that the California Coastal Commission, pursuant to the California Coastal Act, might impose its permit requirement on a private mining company that holds a claim to use national forest lands for the purpose of extracting limestone.

The case arose out of Granite Rock's desire to mine on federally owned lands in the Big Sur region of Los Padres National Forest. The company held a claim under the Mining Act of 1872, 30 U.S.C.A. §§22 *et seq.* (West 1986). After conducting a mineral analysis, Granite Rock, in accordance with federal regulations under the Mining Act, submitted to the Forest Service a five-year plan of operation, which was approved with modifications in 1981. The company began its mining, but later received a letter from the Coastal Commission instructing it to apply for a coastal development permit.

Granite Rock filed suit in United States District Court for the Northern District of California, seeking relief from the permit requirement. After motion for summary judgment was denied, Granite Rock appealed to the Ninth Circuit Court of Appeals. The Court of Appeals reversed the lower court's denial of summary judgment, finding that the permit requirement was pre-empted by federal law. The California Coastal Commission appealed to the United States Supreme Court.

Analysis

The Supreme Court first addressed the issue of whether in instances like this state permit requirements are automatically pre-empted, even in the absence of clear conflict with federal law. Granite Rock contended that the property clause of the United States Constitution by itself exempts federal lands from state regulation. The Court disposed of the argument by relying on its language in *Kleppe v. New Mexico,* 426 U.S. 529, 543 (1976), in which it wrote that "the state is free to enforce its criminal and civil laws" on federal land where no conflict is present.

The Court then reached three alternative arguments advanced by Granite Rock: (1) the federal government's environmental regulation of unpatented mining claims in national forests demonstrates an intent to pre-empt state legislation; (2) when other forms of state land-use planning over unpatented mining claims in national forests are pre-empted, it should lead to the conclusion that the Coastal Commission's permit requirement is pre-empted as well; and (3) the CZMA, by excluding federal lands from its definition of the coastal zone, declared a legislative intent that federal lands be excluded from all state coastal zone regulation.

On the first contention the Court examined the Department of Agriculture's Forest Service regulations, which provide that "use of the surface of the National Forest System Lands should be conducted so as to minimize adverse environmental impacts on National Forest Service surface resources." 36 C.F.R. §228.3(d) (1986). The Court found no express federal intent in the Forest Service regulations that a company authorized to mine in a national forest would be exempt from compliance with state environmental regulations. Rather it found some indication that the regulations assumed that those submitting operational plans would comply with state laws. In addition, the Los Padres National Forest Environmental Assessment of the company's plan expressly stated that Granite Rock was responsible for obtaining permits required by the California Coastal Commission.

In response to Granite Rock's second argument, the Court drew a distinction between environmental regulation and land-use planning. It examined two federal statutes: (1) the Federal Land Policy and Management Act (FLPMA), which makes the Department of Interior's Bureau of Land Management responsible for management of surface impacts of mining on federal forest lands. The Court reasoned that FLPMA and NFMA, read together, pre-empt state regulation of land-use planning in the national forests. But it found no legislative intent that the area of environmental regulation should be similarly pre-empted.

The Court found further that Congress had distinguished between land-use planning and environmental regulation by delegating land-use and environmental regulatory authority to different agencies. Because the Court found no legislative intent to pre-empt state law in the environmental regulation of national forest land, it ruled that Granite Rock's challenge to the permit requirement must fail.

The Court concluded its analysis by addressing the company's final argument that the CZMA was intended to exclude federal land from its coverage. After examining the statute and its legislative history, the Court found that Congress had specifically disclaimed any intent to override pre-existing state authority. It therefore found no automatic pre-emption of state regulation of activities on federal lands, even when Congress had excluded such lands by definition from the coastal zone.

Justices Powell and Stevens, in a partial dissent, criticized the Court's analysis of the distinction between land-use planning and environmental regulation. Justice Powell argued that Congress did not intend to place exclusive authority in the Secretary of the Interior to manage mineral resources. Rather, in the national forests, Congress gave it to the Department of Agriculture, through its delegate the Forest Service. Justice Powell also objected on the ground that the decision gave a state agency the right to prohibit the exercise of rights granted by a federal agency. The resulting duplication of federal and state permit requirements would lead, he contended, to important decision-making conflicts. Furthermore, Justice Powell believed that a proper reading of the property clause of the United

States Constitution, as well as common sense , lead to the conclusion that federal authority must take precedence in matters concerning federal land.

In a separate dissenting opinion, Justice Scalia, joined by Justice White, found the exercise of state power to be an attempt to control land use rather than environmental regulation. Since a state's ability to control use of federal lands is foreclosed by federal pre-emption of state law, Justice Scalia concluded that California's permit requirement must be invalid.

Conclusion

In summary, the majority's reading of controlling federal statutes allowed it to draw a distinction between land use and environmental regulation. They found Congressional intent to pre-empt state law in federal land-use questions, but found no comparable intent in the area of environmental regulation. Without such intention, state law may result needlessly in a duplication of permit requirements. Also, the distinction between land-use and environmental regulation, while tempting in this case, is surely arbitrary, and may lead to trouble in future cases. Although the majority failed to find a pre-emption problem in this case, it illustrates the degree to which serious jurisdictional problems may arise when overlapping federal and state laws effect duplication of a legal process.

Greg Grisham
Daniel Conner

CHAMPION INTERNATIONAL CORP. v. EPA

648 F. Supp. 1390, *aff'd*, 652 F. Supp. 1398 (W.D.N.C. 1986)

Introduction

The issue of what recourse a downstream state has against a corporation or municipality in an adjacent state discharging pollutants into common waters is troublesome. Congress has attempted to deal with this problem through the Federal Water Pollution Control Act (FWPCA) (also known as the Clean Water Act). The United States Supreme Court has construed this Act as abolishing the federal common law of nuisance as a remedy in interstate water pollution cases. *Illinois v. Milwaukee*, 451 U.S. 304 (1981). Six years later, the FWPCA was again interpreted by the United States Supreme Court in *Ouellette*. The Court held that when pollution-related injury is caused by a violation of a discharge permit, the law of the source state must be applied. [See *International Paper Co. v. Ouellette*, 7 WATER LOG no. I p. 15 (Jan.-Mar. 1987).]

The U.S. Supreme Court recently remanded a decision to the Tennessee Supreme Court, to be re-evaluated in light of the *Ouellette* holding. In *State v. Champion International Corp.*, 709 S.W.2d 569 (Tenn. 1986), Champion's North Carolina plant was discharging pollutants into a waterway that was only a matter of miles from the Tennessee border. Because the Champion plant was conforming to its permit lawfully authorized by North Carolina under the FWPCA, the Tennessee court stated, Tennessee had no recourse for damages or an injuncton under the Act. This was so even though Tennessee had set much higher standards than North Carolina. It is likely that the same result will occur after remand.

Analysis

Champion International Corp. v. EPA is the next stage in the dispute between Tennessee and Champion International. The State of Tennessee was unable, in the first action, to affect the issuance of the discharge permit. As an alternate remedy, Tennessee requested the Environmental Protection Agency (EPA) to review North Carolina's pollution discharge permit to Champion. This was done pursuant to the FWPCA. 33 U.S.C.A. §1342(d) (2) (West 1985). When a state makes such an application to the EPA, the administrator has the authority to disapprove a permit if he finds that "the discharges will have an undue impact on interstate waters." The discharge in question affected the entire length of the river as it runs through Tennessee. The EPA found that approximately an 80 percent reduction in the color levels would be required in order to meet Tennessee standards at the state line. Therefore the permit, which did not require this reduction, needed to be modified.

After the EPA determined that the permit should be modified, Champion brought suit in federal court against the EPA, alleging that the EPA's assumption of permitting authority was arbitrary and capricious. The lower

court held that the actions of the EPA were not arbitrary and capricious on three grounds. First, the Clean Water Act required that a National Pollutant Discharge Elimination System (NPDES) permit must contain conditions adequate to achieve state water quality standards. The North Carolina permit failed to include such conditions to be considered in judging compliance with the permit. North Carolina was notified of this deficiency by the EPA. When the deficiency was not corrected, the EPA correctly assumed permitting authority.

Second, the permit failed to require unequivocal compliance with any color standard. The permit required only that Champion "make all reasonable efforts to remove at least 75 percent of the mill effluent color, subject to technical feasibility."

Finally, the permit failed to require compliance with Tennessee's proposed color standard and North Carolina did not adequately explain this failure. When one state rejects the recommendations of another state, §402(b) (5) of the Clean Water Act requires that the state be notified. North Carolina rejected Tennessee's proposal but did not notify Tennessee. In addition, North Carolina failed to provide the EPA with an opportunity to comment on the permit, as required by federal regulation.

Two weeks after the *Ouellette* decision, Champion moved for withdrawal of the *Champion* holding, claiming that the *Ouellette* opinion limits the review role of the EPA under the FWPCA. The North Carolina court disagreed on the grounds that *Ouellette* was a common law nuisance action, while *Champion* involved an action brought pursuant to statute.

The court also emphasized that although Tennessee's color standard was considered in reviewing Champion's permit, it was not mandating that states would be required to comply with water quality standards of every downstream state. The EPA is simply given the discretion to modify discharge permits when the pollutants would have an "undue impact" on interstate waters.

Conclusion

The reasoning of the North Carolina court here seems to offer relief not found in a suit to enjoin the issuance of a discharge permit. If Champion's argument had prevailed, as long as a source state complied with the minimum standards set by the FWPCA, any downstream state with higher standards could have fallen victim to these minimum standards. Allowing states to enlist the EPA in such a matter increases uniformity in the pollution discharge standards of the various states. The consideration of the affected state's color standards protects that state without burdening the source state with a higher duty, absent a showing of undue impact.

P. Colleen Coffield

WATER QUALITY ACT OF 1987

101 Stat. 7 (Feb. 4, 1987)

Introduction

In an effort "to restore and maintain the chemical, physical and biological integrity of the nation's waters," Congress passed the Clean Water Act Amendments in 1977. 33 U.S.C.A. §§1251-1376 (West 1985). Federal water quality control legislation has evolved significantly since its inception in 1948. On February 4, 1987, over President Reagan's veto, the House and Senate passed legislation to once more renew and amend the Act. This article discusses these amendments.

Stormwater Discharges

In the recent past, a substantial portion of funds appropriated under the Clean Water Act have gone to municipalities for construction of modern sewage treatment facilities. This expenditure has been controversial and was the main reason for President Reagan's veto of the current amendments. The House and Senate, however, unanimously agreed on an 18 billion dollar reauthorization that will terminate the Clean Water Act grants program for municipal sewage treatment plant construction in nine years. Under this reauthorization, sewage treatment plant construction grants will be phased out by 1990. However, funding will be provided to help capitalize state revolving loan funds to replace the grants. The authorization levels are as follows: two years of grants (1987 & 1988) at $2.4 billion per year and two years of grants (1989 & 1990) at $1.2 billion per year. Beginning in 1989 and ending in 1994, state loan funds will receive capital ranging from $2.4 billion to $600 million. After the second year the funds received will decline.

In addition, states may use portions of construction grant allotments to help capitalize revolving loan fund. States may use up to 50 percent of the allotment in 1987, 75 percent in 1988 and 100 percent thereafter. Provided that a state has financed all treatment works necessary to comply with the Clean Water Act by July I, 1988, the loan funds may be used for broader purposes than before, e.g., for combination or separate sewage system construction, or plant rehabilitation.

A major change brought about by the 1987 Amendments is the permit program for stormwater runoff for municipalities and industry. Prior to these amendments, confusion existed concerning the application of National Pollutant Discharge Elimination System (NPDES) permits to stormwater runoff. Oil and gas exploration, production, processing or treatment operations, or transmission facilities are now exempt under §401 from stormwater requirements.

Sections 402(p)(1) and (2) provide that the EPA cannot require permits before October 1, 1992, for discharges entirely from stormwater. Enumerated exceptions to this include (1) discharges that have already received permits, (2) discharges caused by industrial activity, (3) municipal storm sewers serving

populations of 100,000 or more, and (4) discharges that EPA determines contribute to a violation of water quality standards or are significant contributors of pollutants.

The EPA is given approximately four years to write permits on sewer systems that serve 250,000 or more. After that time the agency must begin permitting sewer systems that serve 100,000 or more. The EPA is required to complete regulations for stormwater permits within two years of enactment (February, 1989). Municipalities must apply for a permit by February, 1990, and the permit must be issued or denied by February, 1991. The permit must require compliance as soon as is feasible, but not more than three years after the permit is issued. These permits will not be subject to the 1989 deadline for Best Available Technology (BAT), Best Conventional Technology (BCT) or revised Best Practicable Technology (BPT) limits.

While the portion of the amendments describing the municipalities that must apply for a permit is clear, the portion describing which industries must apply needs clarification. It should be noted that during floor debate industrial activities were described as those that "directly relate to manufacturing, processing or raw materials storage areas at a plant." This would not include parking lots or administration and employee building.

Water Quality Requirements

Amended §304(1) requires that states inform the EPA which water bodies will not attain (or maintain) state water quality standards due to point source discharges of toxic pollutants, even after implementation of technology-based limitations. The state must identify the errant point source and submit a control strategy to the EPA. Water quality standards should be attained as soon as possible, but must be attained within three years of implementation of the control strategy. The EPA must approve or disapprove the control strategy within 120 days of the exporation of the two years given to develop the strategy. To aid states in identifying problem water bodies, the EPA plans to publish guidelines by November, 1987.

Sections 308(c) and (d) provide that the EPA must, by February, 1989, publish information detailing methods for establishing and measuring water quality criteria for toxic pollutants.

Enforcement of the Act

Traditionally, violators of the Act were subject to federal and state, civil and criminal suits. The Amendments now provide for administrative penalties. Section 309 details a two-tiered penalty scheme. The EPA may choose either tier, regardless of the violation. The difference in the Class I and Class II schemes rests with the assessment of the penalty. Under Class I, the penalty is not to exceed $10,000 per violation or $25,000 total. This scheme allows an informal hearing. Under Class II, the penalty cannot exceed $10,000 per day for each day the violation continues, up to a $125,000 maximum. A formal hearing is required in keeping with the Administrative Procedures Act, 5 U.S.C.A. §§554 *et seq.* (West 1977).

While the penalty provided under Class II is greater than that for Class I, Class I will probably be the most frequently because of the administrative convenience of an informal hearing.

Conclusion

The Amendments to the Act seem to clarify existing programs as well as create new ones. The emphasis appears to shift from technology-based standards to water-quality standards, as well as place greater reliance on existing state programs.

P. Colleen Coffield

MMS PROPOSES PROSPECTINGS RULES

The Minerals Management Service (MMS) of the Department of the Interior (DOI) has proposed rules to allow prelease prospecting activities for marine mining in the Exclusive Economic Zone (EEZ). 52 Fed. Reg. 9758 (1987). MMS cites the Outer Continental Shelf Lands Act as authority for issuing the regulations. It perceives offshore mining to be a means of reducing the United States' near total dependence on foreign imports of strategic minerals. Marine mining is defined as recovery of minerals other than oil, gas, and sulphur within the 200 mile Outer Continental Shelf (OCS) of the United States. Through the rules, MMS proposes to regulate mining activity and gain access to the resulting data.

The proposed regulations represent the first step toward a three-tier program. The prelease, or initial step of information gathering, will be followed by the lease and post-lease phases. Operations under the prelease procedure will be similar to those conducted by mineral explorationists and may include gathering data such as measurements of gravity, density, magnetism, and radioactivity.

An application for prelease prospect mining must be submitted to the MMS at least 60 days prior to the planned initiation of prospecting activities. The name, address, and nationality of the person or group involved must be indicated. A description of the location to be covered, together with charts of the area, must be included in the application. The applicant should indicate the period of time desired to conduct the activities, not to exceed two years. A simple description of the prospecting to be conducted, such as mapping, drilling or surveying, completes the application requirements.

Prospecting permits will be granted for stated periods of up to two years. Extensions may be granted by the Director of MMS upon a showing of good cause. No bond requirement is proposed. Under the regulations, persons eligible to obtain permits would not be limited to United States nationals. Leasing, however, would most likely be limited to U.S. nationals. In the event of a national emergency, the United States would have the right to cancel agreements or buy all production from any lease.

In addition to the general informational requirements of the application, it is proposed that a more detailed prospecting plan be submitted. The prospecting plan must indicate the mineral(s) of primary interest and include a narrative description of activities to be conducted. Scheduled beginning and completion dates, as well as maps of the location and registration of vessels should be included. MMS provides for environmental concerns by requiring that permittees include in the prospecting plan a notation of anticipated environmental consequences for each activity to be conducted. MMS asserts that by applying specific guidelines on a case-by-case basis, prospecting can be carried out without harm to the environment.

It is proposed that an environmental assessment (EA) must be submitted to the MMS before the permittee may use explosives, trenching, and other

disruptive methods of data gathering. Proposed activities which may be conducted without providing an EA include, but are not limited to, water sampling, photography and measurements, minerals assays and acoustic profiling. Unless harmful environmental impacts are foreseen, an EA would not be required for monitoring methods such as water samples and surveys until later stages of development and production.

Under these proposals, cancellation of the permit is optional at any time, provided that the Director of MMS gives thirty days' notice and provides the reason for such action. Suspension may result when it is determined that a permittee is creating a hazard, polluting, or harming aquatic life. The threat of serious danger to life, property, minerals, or national security, or to the marine, coastal, or human environment will result in an immediate suspension of a permit.

Under the proposed regulations, quarterly reports of activities must be filed. In addition, a final report should be submitted to the MMS upon completion of the project. Proprietary information gathered by permittees would be released after 20 years. The proposals state that data with respect to a site which is leased will be released six months after the issuance of the lease. MMS proposes to notify adjacent states of each application for a prospecting permit. Proprietary data will be available to the Governor of adjacent states on request, provided he agrees to maintain confidentiality.

In an effort to provide this new program with regulatory certainty, MMS has defined numerous criteria they feel are critical to a successful program. Special attention has been given to the application process, reporting requirements, monitoring access, specificity of activities allowed under the permit, notice and confidentiality needs, and provisions for the duration and cancellation of permits. MMS hopes that by providing definite guidelines for these and other areas it will provide a sound base on which the program can be built.

The proposed regulations establish the initial framework for a comprehensive leasing and regulatory program for marine minerals. If adopted, they would be the first in a series of DOI actions designed to implement a leasing and regulatory program for OCS mining of minerals other than oil, gas, and sulphur. Marine mining activities have potential for profound impacts on other groups dependent or interested in marine ecosystems. Considering its express policy of decreasing domestic dependency on foreign suppliers of strategic minerals, DOI hopes the regulations will help prevent conflicts at this initial stage of exploitation of marine minerals.

Emily Shelton

BOOK REVIEWS

THE FUTURE OF THE OCEANS: A REPORT TO THE CLUB OF ROME by Elisabeth Mann Borgese. Montreal, Harvest House, 1986, 144 pp.

NEPTUNE'S REVENGE: THE OCEAN OF TOMORROW by Anne W. Simon. New York, Bantam Books, 1985, 188 pp.

Elisabeth Mann Borgese, daughter of the German novelist Thomas Mann, commands attention in her own right as a noted scholar of marine affairs and an expert on the Law of the Sea. She is Professor of Political Science at Dalhousie University in Nova Scotia and also chairwoman of the Planning Council of the International Ocean Institute there. Formerly associated with the Center for the Study of Democratic Institutions at Santa Barbara, Professor Borgese has also written *The Ocean Regime* (1968), *The Drama of the Oceans* (1976), *Seafarm: The Story of Aquaculture* (1980), and *The Mines of Neptune* (1985).

With qualifications like these, we reasonably expect a special degree of insight into the topics presented, and Professor Borgese does not disappoint. After a brief overview of recent advances in marine science and technology, she devotes a chapter to what she calls the "marine revolution" of the 1970s and 1980s. Here she describes new developments in aquaculture, ocean mining, and energy generation. In every section there is an abundance of lyrical and provocative statements, ideas you can sink your teeth into. For example: "From an anthropological perspective, the advent of aquaculture may turn out to be as important as the advent of agriculture ten thousand years ago." (p. 14) Or try this: Raising manganese nodules from the ocean floor is "a task comparable to that of having to harvest a field of potatoes on the plain of Lake Geneva from a plane flying high above Mont Blanc at night in a dense fog." (p. 31) Or this: "There can be no doubt...that sooner or later the petroleum age will end. It is likely...that we are moving into an area of far more diversified energy resources and far more decentralized energy systems. In these systems, ocean energy is bound to play a major role." (p. 42)

Professor Borgese believes that "the oceans are a great laboratory for establishing a new order." (p.44) An avowed internationalist, she argues that the Law of the Sea Convention, concluded in 1982 but not yet in force (and to which the United States is not a signatory), represents an early but important step in the direction of a new international system of economics "based on new concepts of value and of ownership and sovereignty, as different from traditional economics as Einstein's physics is from Newton's." (p. 68) In a chapter entitled "The Economics of the Common Heritage" she describes the work of an Italian economst, Orio Giarini, whose theories represent "a new discipline of welfare derived from the synthesis of economics and ecology." (p. 45)

Taking pains to explain how this new theory of welfare economics applies to the future of ocean use and the distribution of income therefrom, Professor Borgese concludes that "in legal and constitutional terms, the United Nations Convention on the Law of the Sea pushes developments far in the direction of Giarini's thinking. It is, in fact, ahead of him. The legal and institutional framework—no matter how imperfect in reality—is there...." (p. 54) From sentiments like these, it is clear that Professor Borgese views the Law of the Sea Treaty as a document reflecting an important advance in the human spirit, much like the Magna Charta or the United States Constitution.

The heart of Professor Borgese's book, however, lies in the final chapter, "The Philosophy of the Common Heritage." Here she writes that the Law of the Sea, incomplete though it is, "has gone further than any other existing law in institutionalizing a philosophy of nature." (p. 132) What is this philosophy she mentions? According to Professor Borgese:

> It is a philosophy of nonownership: the common heritage cannot be appropriated. It is a philosophy of nonconflict: the common heritage is reserved for exclusively peaceful purposes. It is a philosophy of participation and equity: the common heritage requires a system of management in which all users participate, and it requires sharing of benefits. It is a philosophy that respects the rights of future generations. And the common heritage concept postulates the conservation of resources for future generations. (p. 132)

You may not agree with Professor Borgese's outlook or conclusions, but if you are interested in current thinking on marine policy and on the future of resource use in the oceans, this book cannot fail to instruct you.

The inspirational qualities of *The Future of the Oceans* inclined this reviewer favorably to another book with a similar message, Ann Simon's *Neptune's Revenge*. It is a shame to have to review it critically.

Simply put, the author is articulate and passionate in her defense of the marine environment. Her book contains a wealth of marine lore, and it is evident that she has read widely and spoken with many authorities on the subjects she writes about.

Even so, the author lacks basic control of her facts. Thus, we run across gaffes like these within the space of a mere three pages: "There is a fish for every ocean niche . . ." (p. 14—not true, marine organisms tend to fill every available ecological niche, but not fish); "Caesar's legions discovered the [salmon] swarming in the rivers of Gaul and named it *Salmo salar* . . ." (p. 16—this name goes back only to the nineteenth century; Roman troops knew nothing of taxonomic classification names); or "No one yet knows the secret of [the salmon's] navigation. Some say it is by the stars . . ." (p. 17—it has been known that salmon navigate by smell since 1976).

Similarly, Simon's account of the events leading up to the final Law of the Sea Convention is riddled with inaccuracies, though she does manage to capture something of the drama of the time just before the Convention was

signed and the United States abruptly changed its position from support to opposition.

Simon is at her best when cataloguing the multitude of transgressions against the god Neptune that mankind has incurred. Her discussions of overfishing, chemical pollution, oil spills, ocean waste disposal, and the greenhouse effect are interesting and filled with telling anecdotes, if at times a bit overdrawn and not entirely accurate. She is overfond of alarmist language ("modern man's remarkable machines drill down into the rock in the ocean deep, crazed giant dentists urged onward by a fearful society"—p. 45) and strained metaphors ("The global Law of the Sea Convention is nationalism in a diving suit, creeping through the waves and along the sea bottom"—p. 92). Eventually this sort of thing pales, leaving the reader irritated and with an unfortunate resistance to her important message.

Better accounts of each topic she deals with are readily available. The value of *Neptune's Revenge*, however, is that it collects a wide variety of information into a unified account of mankind's abuse of marine resources. No comparable book exists. It fills a gap, and for that reason it can be recommended with caution.

Daniel Conner

LAGNIAPPE

A guide to the Coastal Zone Management Act (CZMA) and its use in protecting America's fragile coasts is available from the coast Alliance, a non-profit, national coalition of coastal activists. *And Two If By Sea: Fighting the Attack on America's Coasts*, made possible by a grant from the William H. Donner Foundation, examines the impacts on the coastal zone from residential and industrial development, ocean dumping of hazardous wastes, and energy development, and how CZMA can be used to protect the Atlantic, Gulf, Pacific and Great Lakes coasts. Copies of the manual are two dollars each and may be obtained by writing or telephoning: Beth Milleman, Coastal Projects Director, Coast Allinace, 218 D Street, S.E., Washington, D.C. 20003; (202) 466-5045.

Three new ordinances affecting saltwater commercial fisheries in Mississippi were published in late April by the Department of Wildlife Conservation Bureau of Marine Resources. The new regulations would allow for double rigging in state waters, prohibit retention of sponge crabs in state waters, and allow unlicensed boats to obtain permits for landing seafood legally caught outside of Mississippi territorial waters. For more information, contact the Bureau at 864-4602.

The Gulf of Mexico Fishery Management Council has submitted a final amendment to the Secretarial FMP for Red Drum to the Secretary of Commerce for review, approval, and implementation. A copy of the amendment may be obtained by calling the Council headquarters at (813) 228-2815. Public comment on the provisions is open until July 26, 1987.

EDITOR'S NOTE

As many of you know, this is the last issue of the WATER LOG for which I will be editor. Although I am looking forward to my move to Hawaii and the challenges that teaching will offer, I am leaving the Mississippi-Alabama Sea Grant Consortium family with sadness. The Coastal and Marine Law Research Program has provided me with the opportunity to research, write, and advise in the field I love most—coastal and marine law and policy.

Of all my responsibilities with the Program, editing the WATER LOG has brought me the most joy. I've been involved with the WATER LOG since its inception in 1981 where I began as a student writer for the first issue. I am proud to have been able to play a part in its development and hope that you the readers have learned more about some of the laws that govern our lives daily. Most of all I would like to thank Dr. James I. Jones, Director of the Mississippi-Alabama Sea Grant Consortium, for his initial support in taking a chance with publishing a legal newslettter and his continued support once it proved itself to be a worthwhile endeavor. I am confident that my successor will help the WATER LOG to grow and meet the information needs of the readers. Aloha!

Casey Jarman