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Cover photograph of a John D. MacArthur Beach State Park at Riviera Beach, Florida, courtesy of Doug Kerr.

Contents photograph of John D. MacArthur Beach State Park at Riviera Beach, Florida, courtesy of Doug Kerr.

Is a Houseboat a Vessel?
U.S. Supreme Court Applies New Test for Floating Homes

Anna Outzen[1]

Photograph of a double-deck houseboat, courtesy of Miheco Photography.

On January 15, 2013, the U.S. Supreme Court heard a case that began as a simple dispute between a city-owned marina and a boat owner about unpaid dockage fees and rule violations.[2] After over six years of legal disputes between the marina resident and the city, the ultimate issue faced by the Supreme Court became whether or not a "floating home" should be legally treated as a "vessel." If the Court found that this "floating home" was in fact legally a "vessel," it would subject these types of boats and their owners to a special branch of law specific to maritime issues. Many were concerned with the case's potential impact on the maritime industry as a whole, wondering if, for example, floating homes would be subject to the Coast Guard's licensing and registration procedures. Recognizing this case's importance, the Supreme Court took a new approach to determining whether or not floating homes were maritime vessels.

Background

In 2002, Fane Lozman bought a floating home to live in as his primary residence. Lozman's boat resembled a home in that it was made of plywood and had a sitting room, bedroom, closet, bathroom, and kitchen, as well as a stairway leading to an office space, and French doors on three of its sides. Furthermore, the boat had no steering mechanism, an unraked hull, and no way to generate or store electricity unless connected to the marina. The boat could not propel itself like most houseboats, but could only travel if being towed.

After Hurricane Wilma destroyed the marina where Lozman was docked, he had his boat towed to a marina operated by the City of Riviera Beach, Florida (City) in March of 2006, where he planned to permanently dock his floating home. Conflict between Lozman and the City quickly arose

when Lozman challenged the City's massive redevelopment plan for the marina. The plan was halted and the City tried to evict Lozman based on claims that Lozman failed to muzzle his dangerous dog and used unlicensed repairmen to service his boat.[3] After an unsuccessful attempt to evict Lozman, the City revised its dockage agreements and marina rules in June of 2007. The City claims to have sent various informative letters to the marina residents, but Lozman contends that he never received a letter until March of 2009, when he received a notice that he had to bring his boat into compliance with the new rules by April 1st or his dockage agreement would be terminated. Lozman attempted to pay the fees by check, but the City returned his payment, claiming he was too late to renew his dockage agreement. The City then brought suit in order to recover the unpaid fees from Lozman and for trespass since he was no longer allowed to dock at the marina.

The City brought its lawsuit directly against the floating home – an action that is only allowed in admiralty court. In this special branch of law, businesses that provide necessary goods and services to vessels can file lawsuits against vessels themselves and seize them to ensure that businesses will be paid. Consequently, federal admiralty courts only have authority to hear such cases if a boat qualifies as a "vessel" in the legal sense. The lower courts, finding that the boat was a "vessel" and the case was properly brought in admiralty court, sided with the City and ordered the boat to be sold at public auction in order to pay the City what was owed.[4] The City, however, outbid others at this public auction. The City purchased the boat and had it destroyed. After Lozman's appeal, the Supreme Court had to decide whether or not these admiralty courts should have heard this case from the start.

What is a Vessel?

The term vessel is legally defined as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[5] The lower court found that Lozman's home fit within the terms of this definition because it could float and could be towed over water.[6] On appeal however, the Supreme Court rejected the lower court's "anything that floats" approach to determining vessel status because it too broadly interpreted the term capable. The Court reiterated that "[n]ot *every* floating structure is a 'vessel,'" listing obvious examples such as "a wooden washtub, a plastic dishpan, [and] a swimming platform," and then stated that for vessel status, floating structures must be *practically* "capable of being used…*as a means of transportation on water*."[7] Consequently, the Supreme Court provided a new test for determining when floating structures have "vessel" status: "In our view, a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."[8]

City's Arguments

The City claimed that a test focused on a boat's purpose was too subjective and would be easily manipulated. Instead, the test should be as simple as possible since a court's jurisdiction could depend on a boat's vessel status. But the Court assured the City that under this new approach, it was only considering objective elements of purpose, such as physical characteristics and usage history. The Court also explained that this test would not always be determinative of "vessel" status, much less a court's jurisdiction, by characterizing this new test as guidance for borderline cases similarly dealing with a structure's capability of transportation. The Court assured that this test was in fact "workable" for those cases, much more so than an "anything that floats" test. The City also argued that even under the Court's new test, Lozman's boat was practically capable of transportation because it was in fact used for transportation. The Court, however, found that "actual use" was not proven because Lozman's floating home only moved over water while being towed and only moved significant distances twice in seven years with no passengers or cargo aboard.

Houseboat or Vessel?

To determine whether Lozman's houseboat was a vessel, the Court turned to the physical attributes and usage history of the floating home. The boat's physical attributes – rooms similar to living quarters and French doors as opposed to watertight portholes – did not convince the Court that this boat was designed for maritime transport. Similarly, the boat's inability to be steered or independently produce electricity, coupled with the fact that it could only travel if being towed and had only done that a few times, led the Court to find that the boat was not used for transportation. In short, the Supreme Court found that no characteristics of Lozman's boat, other than its floating ability, suggested that it was designed to a practical degree for transporting people or things over water.[9] Therefore, in a 7-2 vote, the Supreme Court reversed the lower courts' judgments in holding that Lozman's floating home was not legally a vessel under admiralty law, and the City therefore improperly seized Lozman's floating home in the first place.

Dissent

The two dissenting justices agreed that determining whether Lozman's home was a vessel depended on whether it had a maritime transportation purpose or function, but disagreed that the test for establishing this purpose was whether a "reasonable observer" would find a maritime purpose based on the craft's physical characteristics and activities. The dissent argued that although it seems an objective inquiry, this "reasonable observer" standard introduces a subjective "I know it when I see it" component into the analysis. For example, the dissent disagreed with the majority's consideration of Lozman's boat's style of rooms and windows which have no relation to maritime transport. Secondly, the dissent found the majority's analysis of the craft's usage history to be "strange" and "confusing" for acknowledging that the craft traveled far distances carrying "people and things," but then concluding that a reasonable observer would not find that the craft was designed to any practical degree to engage in such transportation. The dissenters also believed that more facts were needed about Lozman's boat in order to make a proper vessel inquiry. The majority, however, found that the dissenters did not propose a more workable test and that although they believed more facts were needed, neither Lozman nor the City made such a request, so the majority opinion would stand.

Conclusion

The opinion is silent as to what Lozman and the City should do now, but the Court did mention that the lower courts required the City to post a $25,000 bond that Lozman could recover if he won. Reports have been made that Lozman does plan to return to court, this time seeking compensation for the value of his now destroyed floating home, which he believes is more than $25,000, as well as reimbursement for over $300,000 in legal fees that have accumulated since the fight started nearly seven years ago.[10] But Lozman's potential plans do not stop there. He has also reported that he is seriously considering returning to the Riviera City Beach marina and docking his new floating home there as well.[11]

Endnotes

1. 2013 J.D. Candidate, Univ. of Miss. School of Law.
2. Lozman v. City of Riviera Beach, No. 11626, 2013 WL 149633 (U.S. Jan. 15, 2013).
3. *Id.*
4. City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approx. Fifty-Seven Feet in Length, No. 09-80594-CIV, 2009 WL 8575966 (S.D. Fla. Nov. 19, 2009).
5. 1 U.S.C. § 3 (2011).
6. *Lozman,* 2013 WL 149633, at *4.
7. *Id.* at *4.
8. *Id.*
9. *Id.* at *5.
10. Jane Musgrave, *Fane Lozman, winner in Supreme Court case against Riviera Beach, calls it 'an amazing day'*, Palm Beach Post, Jan. 15, 2013, http://www.palmbeachpost.com/news/news/crime-law/court-rules-lozmans-floating-home-not-covered-unde/nTxKy/.
11. Nina Totenberg, *Supreme Court: Floating Home Still A Man's Castle*, NPR (Jan. 15, 2013) *available at* http://www.npr.org/2013/01/15/169452244/supreme-court-rules-that-houseboats-are-houses-not-boats.

Court Revokes Wetlands Fill Permit in Turkey Creek Watershed

Evan Parrott[1]

In November, the U.S. District Court for the Southern District of Mississippi found that the U.S. Army Corps of Engineers (Corps) acted improperly when it issued a wetlands permit to the Mississippi Department of Transportation (MDOT) for the construction of a road connecting I-10 and the state port.[2] The MDOT was attempting to secure the permit under § 404 of the Clean Water Act (CWA) in order fill more than 160 acres of wetlands. The court found the Corps acted arbitrarily by relying on outdated and incomplete information in issuing the permit. As a result, the court revoked the permit and set out a list of conditions that must be satisfied in order for the Corps to properly issue the permit.

NEPA

In an effort to decrease environmental damage, the National Environmental Policy Act of 1969 (NEPA) implemented a series of procedural requirements on federal agencies attempting to take actions that significantly affect the environment. NEPA requires federal agencies to compile an Environmental Impact Statement (EIS) whenever an agency proposes a project that is a federal major action and that will significantly affect the quality of the human environment. If that qualification is not met, a less-detailed Environmental Assessment (EA) is required. When only an EA is necessary, a Finding of No Significant Impact (FONSI), a report briefly describing why the proposed activity will not significantly affect the environment, must accompany the EA.

The Permit Negotiations

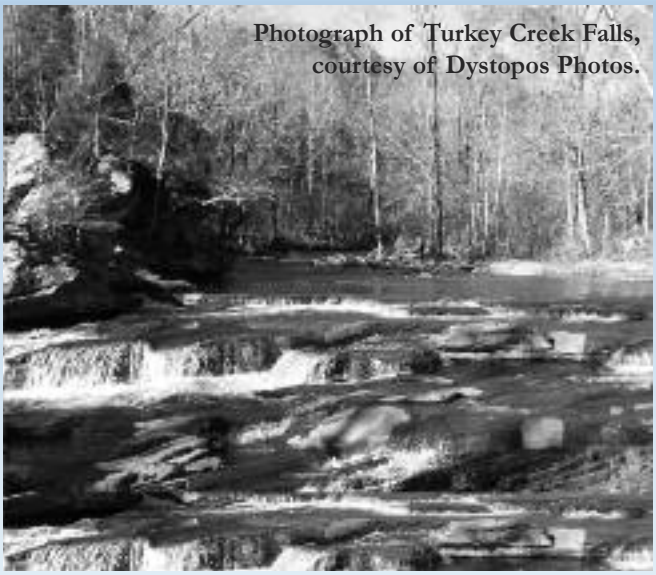
In June 2007, MDOT applied to the Corps for a § 404 permit under the Clean Water Act to construct a road connecting U.S. Highway 90 at the Port of Gulfport and Interstate 10 near Canal Road. The project would involve 20 separate wetland sites comprising approximately 162 acres. MDOT proposed to mitigate the wetland loss with 393.92 wetland credits from two wetlands mitigation banks outside the watershed. MDOT's application included an EA and FONSI prepared in 2003 that was submitted by it and the U.S. Department of Transportation Federal Highway Administration (FHWA).

In response to the application, the Corps received comments from the Mississippi Department of Environmental Quality (MDEQ) and the Environmental Protection Agency (EPA) expressing concerns about the project. Before the Corps can issue the § 404 permit, MDEQ must first issue a § 401 water quality certification. MDEQ had concerns about certifying the project.

In addition, EPA felt that the project did not take into consideration alternatives that would have lesser impacts on the wetlands and that project impacts resulting from subsequent construction were not sufficiently taken into consideration. EPA recommended that MDOT mitigate the wetland impacts by protecting other lands within the Turkey Creek Watershed.

In December 2007, agency officials met to discuss EPA's concerns and agreed MDOT would submit a formal update of its EA and FONSI. MDOT submitted a re-evaluation but continued to rely on mitigation outside the watershed, citing difficulties obtaining wetland credits within the Turkey Creek Watershed. Unsatisfied, EPA requested more information on MDOT's inability to secure wetlands within the Turkey Creek watershed. In response, MDOT issued a new re-evaluation, which increased the mitigation ratio to 3:1 but continued to rely on mitigation credits outside the watershed.

Meanwhile, MDEQ issued the required water quality certification. The Corps considered MDOT's new mitigation plan to adequately address EPA's concerns and moved forward with permit issuance. The Corps determined that an Environmental Impact



Photograph of Turkey Creek Falls, courtesy of Dystopos Photos.

Statement (EIS) was not necessary and instead issued the less-detailed EA/FONSI. Again, EPA objected to the Corps' decision and set out alternatives that included mitigation within the Turkey Creek Watershed through the use of state eminent domain proceedings. In response, a negotiated-solution was reached that involved a new wetlands mitigation proposal to purchase approximately 1,659.1 acres within the Turkey Creek Watershed. Thereafter, the Corps issued the draft permit and included the 2008 EA/FONSI, having deemed an EIS was not necessary.

In January 2010, Ward Properties, a company that owns property in the path of the proposed connector road, as well as over 1,300 acres of the proposed mitigation property within the Turkey Creek Watershed, challenged the permit in court alleging that its issuance violated NEPA and the CWA. In September 2010, the City of Gulfport joined the lawsuit, alleging similar violations.

The Permit's Revocation

Ward Properties' main contention was the Corps violated NEPA because the Corps had insufficient information to evaluate the merits of MDOT's mitigation plan. Specifically, Ward Properties argued that the Corps should have required an EIS instead of relying on the 2008 EA/FONSI. As the court noted, proposed mitigation plans do not need to be laid out to the finest detail but agencies must develop a sufficient record to enable them to adequately evaluate proposed actions and their environmental impacts.

In this case, not only did the Corps require an EA instead of an EIS, but it also relied on the 2008 EA that involved a significantly different mitigation plan - purchasing wetland credits from outside the watershed. However, the final permit required mitigation involving 1,600-plus acres within the Turkey Creek Watershed. Therefore, while the permit issued by the Corps sets out certain mitigation measures (the ones eventually agreed upon the parties in April 2009), the underlying EA the permit relies upon describes the outdated mitigation plan originally proposed by MDOT and fails to consider later agency comments and revisions. In addition, the administrative record lacked any information regarding whether the property marked for mitigation actually constitutes wetlands. Therefore, it is impossible for the court to determine the character or even the existence of any wetlands that are actually being preserved through the mitigation plan set out in the permit.

Despite only being provided outdated and incomplete information, the Corps still issued the permit. For this reason, the court found that the Corps acted arbitrarily and capriciously and abused its discretion. The court also vacated the permit and held that the Corps cannot issue another permit until it determines whether a new EA, FONSI, EIS or other appropriate disposition is required.

Conclusion

With the court's decision in *Ward Gulfport Properties v. U.S. Army Corps of Engineers*, the construction of the road connecting Interstate 10 and the state port has been delayed. This delay could affect the transportation of goods to and from the coast as well as the economic growth and expansion of the port. Fortunately, the appropriate agencies worked together and have already developed a mitigation plan that satisfies each agency's concerns and the NEPA requirements. Once an updated EA/FONSI or EIS is executed, the Corps and the MDOT can recommence their collaborative efforts to streamline transportation to the Mississippi State Port.

Endnotes

1. 2013 J.D. Candidate, Univ. of Miss. School of Law.
2. Ward Gulfport Properties v. U.S. Army Corps of Engineers, No. 1:10CV8-HSO-JMR, slip op. (S.D. Miss. Nov. 21, 2012).

Environmental Group Says Fine Imposed on Developer Is Too Low

Bailey Smith[1]

Construction can frequently cause environmental issues for nearby bodies of water. A residential developer has been fined by the Alabama Department of Environmental Management (ADEM) for the discharge of sediment into a tributary of Cottondale Creek. Cottondale Creek flows into several other water bodies that are popular for recreational activities. The parties bringing suit use these bodies of water for various activities and challenge the fine imposed on the developer as too low to actually deter future illegal discharges. This is the latest of multiple fines that has been imposed on the developer for causing turgid water conditions downstream. However, the Court of Civil Appeals denied standing—the ability to bring suit—because the parties were not injured by the decision of ADEM.[2]

Background

The environmental group, Friends of Hurricane Creek, and a concerned individual, John Wathen (collectively FOHC), took issue with the low fine imposed on a residential developer. The developer was fined by ADEM for violating permitting requirements by dumping sediment into a tributary. FOHC requested administrative review of ADEM's decision. After losing on appeal at the lower levels, FOHC brought their complaint to the Alabama Court of Civil Appeals. At issue here is whether or not FOHC meet the requirements for standing to be able to successfully bring suit against ADEM.

Challenging the Fine

FOHC claimed that the penalty imposed by the Department against the developer was so low that it was arbitrary and illogical--an abuse of discretion. They alleged that the fine will not be significant enough to deter future violations, and it does not fix the damage caused by the previous violation. Among the injuries alleged by FOHC was that their recreational use and aesthetic enjoyment of the water body had been and will continue to be diminished. These are the grounds upon which FOHC claimed that they are aggrieved parties entitled to standing for an appeal of the Department's decision.

Among the injuries alleged by FOHC was that their recreational use and aesthetic enjoyment of the water body had been and will continue to be diminished.

Before the court could consider the merits of FOHC's claims, the court had to first consider whether they had the legal right to bring these claims. Procedural issues such as standing can be a crucial, yet an often overlooked step in bringing forth an appeal against administrative actions. Standing is the legal term for having a legitimate claim to base a lawsuit on. In the case of environmental issues, agency decisions require specific steps in order to have the decision reviewed. First, regulatory agencies have discretion in the orders they give. These orders must be appealed to another agency vested with the authority to review administrative actions rather than directly to the court. Standing for this review is only granted to parties "aggrieved by…administrative action[s]."[3] An aggrieved party must meet three criteria. First, there must be a concrete injury. Second, there must be a

Photograph of an aqua levee created to control creek discharge, courtesy of the USACE.

causal connection between the injury and the action complained of. Third, it must be likely that a favorable decision by the court will redress the injury. There may be judicial review only in the case that the appeal decision also creates an aggrieved party.[4]

The developer argued that only the injury may exist—not causation and redressability. When challenging a government action, there is a higher bar for proving causation and redressability. The challenging party must prove through facts that the party being sued, ADEM, is the cause of the grievance. In this case, the developer is the cause. Also, it must be proven that a favorable court decision would fix the problem caused by ADEM's decision. FOHC were not able to prove that ADEM caused the issue or that any damage could be redressed by the court. At most, FOHC would only achieve the satisfaction of punishing a wrongdoer. However, precedent states that this type of relief does not establish the redressability element of standing.[5]

Conclusion

While FOHC was not able to establish the required elements of standing in this particular case, justice was still served. The fine, though argued as inadequate, was still imposed upon the developer. Since imposition of the fine, the developer has also divested itself of much of the residential construction it had once been engaged in.[6]

Endnotes

1. 2014 J.D. Candidate, The Univ. of Miss. School of Law.
2. Dana Beyerle, Hurricane Creek Appeal Dismissed, TUSCALOOSANEWS.COM (Dec. 15, 2012), http://www.tuscaloosanews.com/article/20121215/news/121219870?p=2&tc=pg.
3. Ala. Dept. of Envtl. Mgmt. v. Friends of Hurricane Creek, 2012 WL 6554412 at 3 (Ala.Civ.App. Dec. 14, 2012).
4. *Id.* at 1.
5. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107.
6. *Friends of Hurricane Creek,* 2012 WL 6554412 at 6.

Courts Continue to Deal with Deepwater Horizon Aftermath

Cullen Manning[1]

After the Deepwater Horizon oil spill, parties filed a slew of lawsuits against BP and other parties in 2010 that are now beginning to show results. Perhaps the biggest step forward in litigation is the United States District Court in the Eastern District of Louisiana's approval of a settlement between the U.S. Department of Justice and BP. As part of the settlement, BP agreed to plead guilty to 14 criminal charges and to pay $4 billion in penalties.[2]

Now that the dust is starting to settle on BP's criminal case, the civil settlements with many parties along the Gulf Region continue to develop. A class action lawsuit filed on behalf of private citizens affected by the disaster suffered a blow when the district court dismissed a portion of the plaintiffs' claims. The court dismissed three types of citizens from the suit: property owners that claimed damages but were not physically touched by the oil spill, BP dealers, and those suing for losses relating to recreation.[3]

Property owners claimed that BP's intentional, criminal acts resulted in the oil spill that decreased the value of their property and, therefore, entitled them to relief. The court disagreed with the owners' claim, stating that they failed to make clear that BP's actions were intentional and, as a result, physical damage from the spill was required for relief. Private BP dealers also failed to state a claim because of their alleged damages. Dealers claiming that they lost business because of the stigma associated with the BP name did not receive relief because the court reasoned that the businesses could not recover simply because customers decided not to shop in BP gas stations anymore. Similarly, the court dismissed citizens suing for the loss of recreational activities like fishing because loss of enjoyment was not a damage citizens could sue for under the Oil Pollution Act.

This past December, the court approved the remaining settlement for those private individuals claiming economic loss and property damage. The potential claim for property and economic damage exceeds $30 billion.[4] Included in the settlement is the ability to assign a portion of the claims to Transocean and Halliburton. Transocean has agreed to a settlement for $1.4 billion in civil and criminal penalties already.[5]

Despite litigation moving forward, the "Sword of Damocles" still swings over BP's head. BP now needs to worry about the amount of pollution fines they will incur under the Clean Water Act. On February 25, 2013, trial began between BP and federal and state prosecutors after BP rejected last minute settlement offers. BP could face up to $21 billion in potential civil fines brought under the Clean Water Act. These fines could be even higher if the company is found to be grossly negligent. The Restore Act provides the Gulf states with 80% of the fines BP pays.[6] While the trial continues, rumors suggest behind the scenes settlement agreements are also underway.

Endnotes

1. 2014 J.D. Candidate, Univ. of Miss. School of Law.
2. Clifford Kraus, *Judge Accepts BP's $4 Billion Criminal Settlement Over Gulf Oil Spill*, N.Y. Times (Jan. 29, 2013), www.nytimes.com.
3. In re Oil Spill by Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010, MDL 2179, 2012 WL 4610381 (E.D. La. Oct. 1, 2012).
4. Clifford Krauss, *Judge Accepts Transocean Guilty Plea in Gulf Oil Spill*, N.Y. Times (Feb. 14, 2013), www.nytimes.com.
5. *Id.*
6. Clifford Krauss, *BP Will Plead Guilty and Pay Over $4 Billion*, N.Y. Times (Nov. 15, 2012).

Supreme Court Ruling Maintains Water Transfer Rule

Benjamin Sloan[1]

In early January, the U.S. Supreme Court considered a case that could have made it more difficult for municipalities across the country to meet the requirements of the Clean Water Act (CWA) while operating their storm water management systems.[2] The Court considered whether or not polluted water flowing from a concrete drainage canal into a river should be considered a discharge of a pollutant under the CWA. The Ninth Circuit had previously held that a discharge occurred, but the Supreme Court reversed, holding that there must be an addition of a pollutant and not merely a transfer of a pollutant before a violation can occur.[3]

Photograph of a Los Angeles drainage ditch, courtesy of Jim McDougall.

Background

The Los Angeles County Flood Control District (District) oversees a large storm water management system (MS4) comprised of concreted canals that drain into surrounding rivers. This water can become heavily polluted requiring the District to acquire National Pollutant Discharge Elimination System (NPDES) permits to discharge it pursuant to the CWA. The CWA defines discharge as "any addition of any pollutant to navigable waters from any point source."[4] The key word here is *addition*. To aid compliance, there are pollution monitoring stations in the MS4 and in the adjacent rivers.

What is a Discharge?

Initially, the district court heard four claims brought by the National Resource Defense Council and Santa Monica Baykeeper (environmental groups) relating to pollution exceedances in four separate rivers receiving water from the District's sewer system.[5][6] The district court ruled against the environmental groups because it did not find the

Photograph of the Miccosuke Tribe hosted Comprehensive Everglades Restoration Plan sites tour in Florida, courtesy of the USACE Jacksonville District.

evidence showing that the District actually had control over the pollution found in the municipal sewer system to be strong enough to hold the district liable for it.[7]

However, the Ninth Circuit disagreed, writing that the detected violations at selected monitoring sites along two of the rivers were sufficiently under the control of the District to create liability for pollution in this water because the waters in the sewer system had not yet come into contact with the unimproved sections of the river, giving sole control of the waters in this system to the District.[8] Next, the court wrote that because the stormwater system was sufficiently distinct from the unimproved sections of the river, there was in fact a discharge of pollutants triggering a violation of the District's NPDES permit.[9]

Following this decision, the District appealed to the Supreme Court on the sole question of whether a discharge of a pollutant had occurred when water drained from an improved section of the sewer system into an unimproved sections of nearby rivers. The Ninth Circuit defined the stormwater management system as a point source of pollution under the Clean Water Act, triggering the need for a NPDES permit. However, the Supreme Court reversed, citing South Fla. Water Management Dist. v. Miccosukee Tribe, in which the Court held that a discharge is not created when an entity simply transfers water from one part of a body of water back into the same body of water – known as the Water Transfer Rule.[10] Therefore, the District did not violate its permit because there was no discharge. It did not add any pollutant to the waters. It simply transferred the pollution from one part of these two rivers into another part of these rivers.

Conclusion

While both sides agreed that the water leaving the District's stormwater management system was heavily polluted beyond levels allowed by its NPDES permit, the Court did not want to upset precedent. The Court very narrowly defined its ruling based on the facts of the case and maintained its previously ruling on the Water Transfer Rule.

Endnotes

1. J.D. Candidate 2014, Univ. of Miss. School of Law.
2. Los Angeles County Flood Control Dist. v. Natural Res. Def. Council, 133 S. Ct. 710 (2013).
3. *Id.* at 713.
4. 33 U.S.C.A. § 1362(12).
5. 33 U.S.C. § 1342(p).
6. Natural Res. Def. Council, Inc. v. County of Los Angeles, 636 F.3d 1235, 1244 (9th Cir. 2011).
7. *Los Angeles*, 133 S. Ct. at 712 (2013).
8. Natural Res. Def. Council, Inc. v. County of Los Angeles, 673 F.3d 880, 889 (9th Cir. 2011).
9. *Id.* at 890.
10. S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004).

Koontz and Decker: A Supreme Court Preview

Catherine M. Janasie[1]

The U.S. Supreme Court will hear several environmental cases during its current term. While the Court has already issued decisions on some of these cases, it has yet to issue its opinions in *Koontz v. St. Johns River Water Management District* and *Decker v. Northwest Environmental Defense Center*.

Koontz v. St. Johns River Water Management District

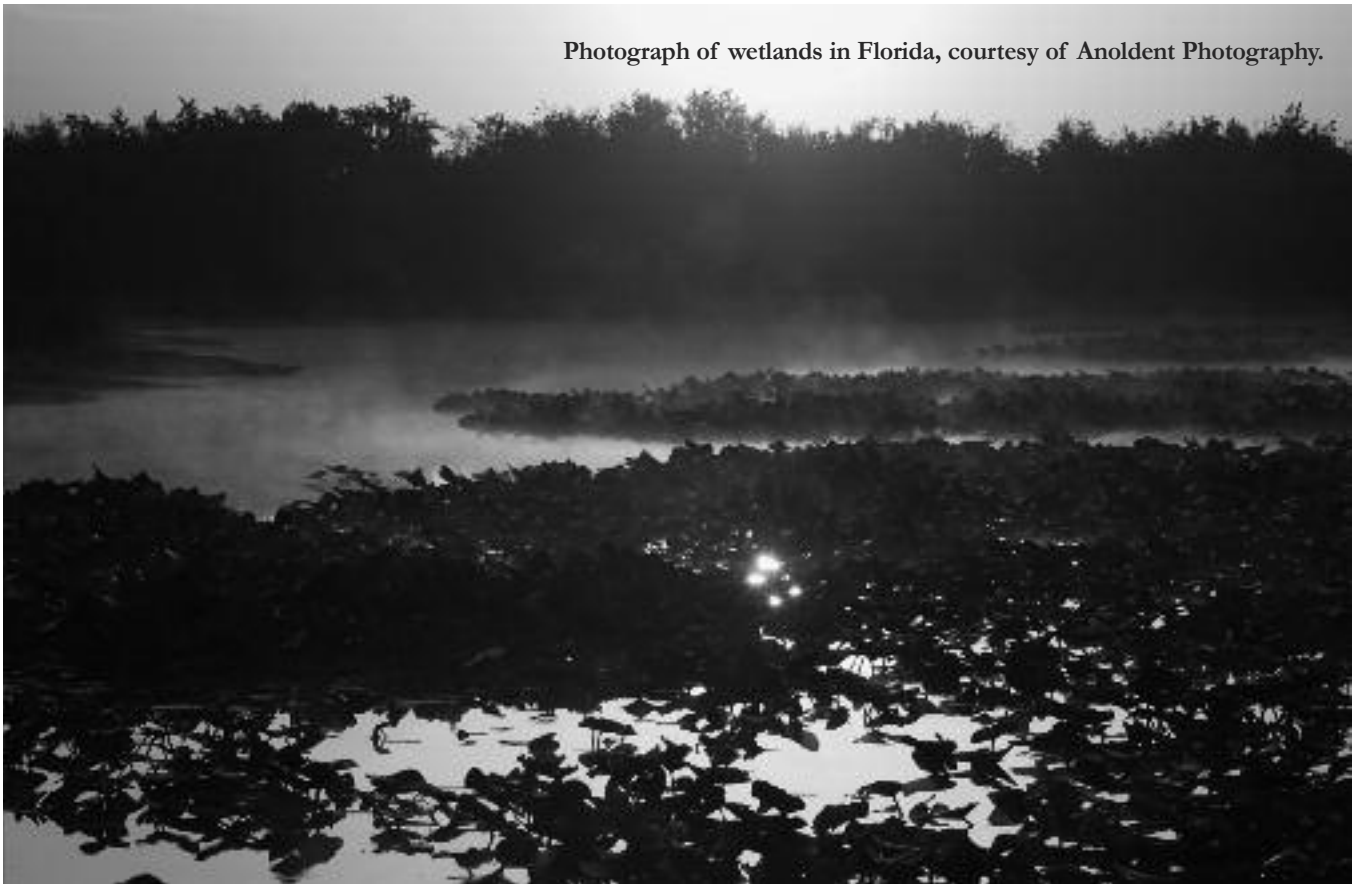
In *Koontz v. St. Johns River Water Management District*, the Court will decide the extent of its previous rulings in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, which provide tests for whether an exaction amounts to a taking under the Fifth Amendment of the U.S. Constitution.[2] Both *Nollan* and *Dolan* involved landowners who brought takings claims based on the government requiring a condition or exaction, specifically the dedication of or over real property, in a building permit. In *Nollan*, the Court created what is known as the "essential nexus" test, which states that in order for a government entity to place a condition in a permit, the condition must serve "the same governmental purpose as the development ban." Otherwise, the condition is a taking. In *Dolan*, the Court added to the "essential nexus" test by requiring a "rough proportionality" between the proposed development's impact and the condition.

Since the Court decided these cases, lower courts have been uncertain whether to apply *Nollan* and *Dolan* to situations outside the facts of those cases. The Supreme Court of the United States granted certiorari in *Koontz* to decide: (1) whether *Nollan* and *Dolan* apply to a permit denial, when the denial is based on a landowner not accepting permit conditions; and (2) whether *Nollan* and *Dolan* are limited to dedications of or over real property or apply to dedications of money or other personal property as well.[3]

In this case, Koontz owned a 14.2-acre vacant parcel of land in a commercial zone, but the parcel was also located in a habitat protection zone under the jurisdiction of the St. Johns River Water Management District (District). Koontz wished to develop 3.7 acres of the land, of which 3.4 acres were wetlands and 0.3 acres were uplands. When Koontz applied for a permit from the District to dredge and fill 3.25 acres of the wetlands, the District replied that it would grant the permit if Koontz dedicated the remaining 11 acres of his property into a conservation area and performed offsite mitigation, or if Koontz would reduce the size of his development to one acre and dedicate the remaining portion of the land. Koontz agreed to dedicate 11 acres, but refused to pay for and perform the off-site mitigation or reduce the size of his development. In response, the District denied the permit, claiming that the development would adversely impact the habitat protection zone and it had required mitigation to offset that impact.

Koontz subsequently sued the District for inverse condemnation in the Florida trial court, claiming that the District's offsite mitigation requirement was a taking. The trial court applied *Nollan* and *Dolan* and found that a taking had occurred. On appeal, the Fifth District Court of Appeal concluded that *Nollan/Dolan* apply both when a permit is denied because the landowner refused to fulfill a permit condition and when the condition involves the expenditure of money instead of the dedication of land.

The Supreme Court of Florida held that the District's permit denial was not an exaction, and thus, not a taking.[4] The lower court stated that the Supreme Court of the United States had not extended the *Nollan/Dolan* test to non-real property exactions.[5] Further, the Florida court held that the holdings of



Photograph of wetlands in Florida, courtesy of Anoldent Photography.

Nollan and *Dolan* apply only to dedications of or over real property and when a permit containing an exaction is actually issued. The court stated that even if *Nollan/Dolan* applied, Koontz's exactions challenge would fail since the District "did not issue permits, Mr. Koontz never expended any funds towards the performance of offsite mitigation, and *nothing was ever taken from Mr. Koontz*."

Decker v. Northwest Environmental Defense Center

In *Decker v. Northwest Environmental Defense Center*, the Supreme Court will look at two questions concerning the application of the Clean Water Act. First, the Court will consider whether a citizen can challenge a National Pollutant Discharge Elimination System (NPDES) permitting rule in a citizen suit under the Clean Water Act, or if the challenge should have been brought under the judicial review procedure of §509 of the Act. Second, the Court will decide whether discharges from logging roads are point source discharges that require a NPDES permit under the Act when the Environmental Protection Agency (EPA) has promulgated rules that it interprets as excluding these types of discharges from the NPDES permit program. In connection to this issue, the defendants in the case have also asked the Court to consider whether the Ninth Circuit should have deferred to EPA's position that these discharges do not require a NPDES permit.[7]

The Northwest Environmental Defense Center (NEDC) brought a suit against some timber companies and Oregon officials, claiming that they were violating the Clean Water Act by not having a NPDES permit for discharging stormwater into the waters of the United States from ditches besides logging roads. The Ninth Circuit ruled that the ditches on the side of the logging roads were point sources under § 502(14) of the Clean Water Act, emphasizing that EPA did not have the authority to exempt certain discharges from the NPDES permit program if the discharge was from a point source under the Act.[8] Defendants tried to argue that these discharges were exempt from the definition of point source under the Silvicultural Rule, which stated that silvicultural activity discharges from natural runoff were nonpoint

The Ninth Circuit held that if natural runoff from silvicultural activities was later "collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers," these were point source discharges under § 502(14).

source discharges, and thus, not point source discharges. The Ninth Circuit held that if natural runoff from silvicultural activities was later "collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers," these were point source discharges under § 502(14).

Defendants also tried to argue that the 1987 amendments to the Clean Water Act exempted the discharges from the definition of point source. First, the Ninth Circuit decided that there was no evidence that Congress knew of the Silvicultural Rule when it adopted the amendments, and therefore, could not be said to have accepted the rule when it passed the 1987 amendments. Further, the court reasoned that the discharges were covered by the 1987 stormwater amendments found in § 402(p) and the Phase I stormwater regulations adopted by EPA under that provision, which require permits for stormwater discharges "associated with industrial activity." Although the Ninth Circuit stated that it was undisputed that logging was an industrial activity, once again, EPA thought that the discharges were exempted because its rules stated that permits were not required for certain silvicultural activities. The court held that § 402(p) requires "that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels is a 'discharge associated with industrial activity,' and that such a discharge is subject to the NPDES permitting process."[9]

Also at issue in this case is whether NEDC could bring suit under the citizen suit provision of § 505(a) of the Clean Water Act, which allows any person to bring a suit against those who are illegally discharging pollutants into the waters of the United States without having a NPDES permit. However, § 509(b) limits the citizen suits that can be brought under § 505(a), as it requires that suits reviewing the actions of the EPA Administrator, such as the promulgation of the Silvicultural Rule, must be brought within 120 days, unless the reason for the suit came about after the 120 days have passed. If a person could have brought a suit under § 509(b), then the person cannot bring a citizen suit under § 505(a).

Here, the NEDC challenged the defendants' discharges without a NPDES permit, when the EPA believed a permit was not needed under the Silvicultural Rule, more than 120 days after EPA promulgated the rule. However, the Ninth Circuit found that NEDC was still able to bring a citizen suit because the basis for its suit arose after the 120 days. The court based this on the fact that the Silvicultural Rule was subject to more than one reading and EPA did not convey its reading of the rule, that defendants were exempted from getting a NPDES permit under the rule, until filing an amicus brief in this case.

Endnotes

1. Ocean and Coastal Law Fellow at the Mississippi-Alabama Sea Grant Legal Program at The University of Mississippi School of Law.
2. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).
3. Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 420 (2012).
4. *St. Johns River Mgmt. Dist. v. Koontz,* 77 So.3d 1220 (Fl. 2012).
5. *Id.* at 1231 (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) and Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005)).
6. *Id.* (emphasis in the original).
7. *Id.*
8. *See* Decker v. Northwest Envtl. Def. Ctr., 133 S.Ct. 22, 132 S.Ct. 865 (2012).
9. Northwest Envtl. Def. Ctr. v. Brown, 640 F.3d 1063 (9th Cir. 2011).
10. *Id.* at 1085.

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