State Law Preempted

Coast Guard Final Rule Preempts the Massachusetts Oil Spill Prevention Act

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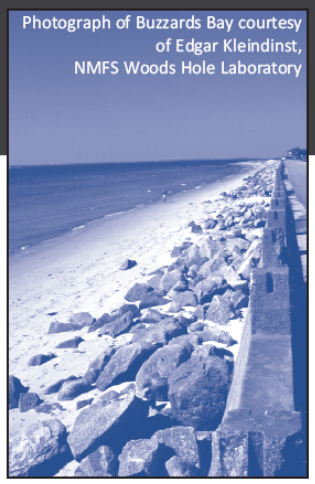

Photograph of Buzzards Bay courtesy of Edgar Kleindinst, NMFS Woods Hole Laboratory

After a long battle between the Commonwealth of Massachusetts, the U.S. federal government, and several shipping interests, the U.S. District Court for the District of Massachusetts has ruled that portions of the Massachusetts Oil Prevention Act (MOSPA) containing strict tug escort and manning requirements for tankers in Buzzards Bay, are preempted by the federal Ports and Waterways Safety Act (PWSA).[1] The court's ruling means that the Coast Guard's regulations promulgated under the PWSA, not MOSPA, will govern certain tank vessels and tug requirements in Buzzards Bay.

Background

Massachusetts enacted the MOSPA in response to a catastrophic oil spill in Buzzards Bay in 2003. In 2006, a federal district court ruled that Massachusetts was precluded from enforcing certain aspects of the MOSPA, due to preemption under PWSA.[2] Preemption is defined as "the principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation."[3]

On appeal, the U.S. Court of Appeals for the First Circuit reversed and remanded the case to the district court finding that the court needed "further development" of the reasoning for preemption.[4] Between the first ruling in 2006 and the First Circuit ruling in 2007, the Coast Guard issued final regulations under the PWSA that included manning and tug requirements in Buzzard's Bay. The Final Rule[5] called for complete preemption of the MOSPA by the PWSA.

Preemption by Regulation

The Coast Guard's Final Rule called for complete preemption of the MOSPA. In a Magistrate Judge's report and recommendation on the case, the judge found that the Final Rule[6] did in fact preempt the MOSPA completely.

Despite the likelihood that the court would find preemption of the state laws, Massachusetts asserted that the Coast Guard's implementation of the Final Rule violated the National Environmental Policy Act (NEPA), which requires all federal agencies to prepare an Environmental Assessment (EA) and an Environment Impact Statement (EIS) for "major federal actions significantly affecting the quality of the human environment." The Coast Guard stated that it did not file an EA or EIS because it believed the Final Rule met one of the exceptions to performing an EIS.

Although the court noted that it did not necessarily agree with how the Coast Guard handled the NEPA requirements, they found that "the procedural error of not following NEPA formalities was essentially harmless."[6] The court referenced the *Save Our Heritage, Inc. v. F.A.A.* case which held that if there is no harm done then, "[r]emanding for a differently named assessment [would be] a waste of time."[7]

The court agreed with the magistrate judge that MOSPA was preempted by the PWSA. The court cited *U.S. v. Locke*, which also dealt with preemption of federal law over state law.[8] In *Locke*, the court reasoned that, "The issue is not adequate regulation but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate. States, as well as environmental groups and local port authorities, will participate in the process."[9]

Conclusion

The navigation of oil tankers in Buzzards Bay has been a hot topic since the oil spill first occurred, and there have been many heated debates on whether the MOSPA or PWSA's regulations would provide for safer navigation. For example, Korrin Petersen, vice president of advocacy for the Coalition for Buzzard's Bay, stated, "We're not going to let the Coast Guard take a pass on doing an appropriate environmental review for

Buzzards Bay … Our water resources are far too valuable for the federal government to be so cavalier about their protection."[10] Despite the controversy, barges and tugs in Buzzards Bay are no longer subject to MOSPA, but must comply with the Coast Guard's Final Rule.

Endnotes

1. *United States v. Massachusetts*, 2010 U.S. Dist. Lexis 32417 (D. Mass., March 31, 2010).
2. United States v. Massachusetts, 440 F. Supp. 2d 24 (D. Mass. 2006).
3. *Black's Law Dictionary* 545 (2nd pocket ed. 2001).
4. United States v. Massachusetts, 493 F.3d 1 (1st Cir. Mass. 2007).
5. Regulated Navigation Area; Buzzards Bay, MA; Navigable Waterways within the First Coast Guard District, 33 C.F.R. Parts 161 and 165 (2007).
6. United States v. Massachusetts, 2010 U.S. Dist. LEXIS 32417 at *9.
7. *Id.*
8. *U.S. v. Locke*, 529 U.S. 89 (2000).
9. *Id.* at 117.
10. Patrick Cassidy, *State, Federal Officials War Over Tugs*, Cape Cod Times, May 28, 2010.

Renourishment, from p. 9

regarding the ability of a judicial decision to rise to the level of a judicial taking by overturning an established property right.

Endnotes

1. National Marine Fishery Service Office of International Affairs, Silver Spring, MD. The author attended the oral argument for this case on December 2, 2009.
2. The Beach and Shore Preservation Act is codified at Fla. Stat. §§ 161.011-161.45.
3. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. ___ (2010).
4. Reliction is the increase in land by the gradual and imperceptible withdrawal of a body of water. Accretion is the gradual and imperceptible accumulation of land along a shoreline. Erosion is the gradual and imperceptible loss of land from a shoreline. *See Walton County v. Stop the Beach Renourishment, Inc.*, No. SC06-1449 (Fla. S.Ct., Sept. 29, 2008) (citations omitted). For simplicity's sake, the U.S. Supreme Court in this case referred to accretions and relictions collectively as accretions, and this article does the same.
5. FLA. STAT. § 161.191.
6. *Stop the Beach Renourishment*, 560 U.S. ___, Opinion of Scalia, J. at 2.
7. *See* Melanie King, *Florida's Beach Renourishment Act Upheld,* 7:4 SANDBAR 6 (2009).
8. Justice Stevens did not participate in the decision of this case.
9. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. ___, Opinion of Scalia, J. at 3 (2010).
10. *Id.* at 3-4 (emphasis in original).
11. *Id.* at 27.
12. *Id.* at 10 (emphasis in original).
13. *Id.* at 8. The text of the Takings Clause is as follows: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amendment V.
14. *i.e. PruneYard Shopping Center v. Roberts,* 447 U.S. 74 (1980) (applying a takings law analysis to hold that a California Supreme Court decision that private property owners did not have to accord the freedoms of speech, the press, and to petition the government did not violate the Constitution) and *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155 (1980) (holding that a Florida Supreme Court decision that interest from an account for the satisfaction of claims is "public money" constituted a taking).
15. *See Stop the Beach Renourishment*, 560 U.S. ___, Opinion of Scalia, J. at 17.
16. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. ___, Opinion of Kennedy, J. at 1 (2010).
17. *Id.* at 3.
18. *Id.* at 10.
19. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560 U.S. ___, Opinion of Breyer, J. at 1 (2010).
20. *Id.* at 2.
21. *Rapanos v. United States,* 574 U.S. 715 (2006) (where, in the absence of a majority decision, Justice Kennedy's concurrence setting forth the "significant nexus" test for whether waters fall under the jurisdiction of the Clean Water Act controls). *See* Stephanie Showalter, *Supreme Court Fails to Clarify Limits of Corps' Wetland Jurisdiction*, 5:2 SANDBAR 1 (2006).