

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CLIFTON B. CRAFT
JACK DEAN FERGUSON
DONALD L. JERNIGAN
MICHAEL PATRICK KING
THOMAS D. STOCKS and
WILLIAM LEE WILSON,**

Plaintiffs/Appellants,

- vs. -

No. 93-55140

**THE NATIONAL PARK SERVICE,
THE NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION,
THE NATIONAL MARINE FISHERIES SERVICE and
THE UNITED STATES OF AMERICA,**

Defendant/Appellees.

**On Appeal of a Final Judgment from the
United States District Court for the Central District of California
The Hon. Stephen V. Wilson
C.A. No. CV 92-1769-SVW**

APPELLANT'S OPENING BRIEF

July 2, 1993

Submitted by:

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I. STATEMENT OF SUBJECT MATTER JURISDICTION

This case was brought before the United States District Court for the Central District of California pursuant to the Administrative Procedures Act, 5 U.C.S. §701 *et seq.*, (hereinafter, "APA"), which provides for the review of final agency actions by the United States District Court. The acts from which this appeal arise occurred in the waters of the Channel Islands National Marine Sanctuary (hereinafter, "CINMS"), which is located in Santa Barbara and Ventura Counties, each of which are within the jurisdiction of the U.S. District Court for the Central District of California.

II. STATEMENT OF APPELLATE JURISDICTION

The Ninth Circuit Court of Appeals has jurisdiction over the instant appeal pursuant to 28 U.S.C. §1291, as this case was disposed of by a final order of the United States District Court for the Central District of California, entered by the Clerk of the Court on November 18, 1992. That District Court's judgment, per the Honorable Stephen V. Wilson, dismissed the action with prejudice, thereby disposing of all claims with respect to all parties. The Appellants' Notice of Appeal was timely filed with the Clerk of the Central District of California on January 7, 1993.

III. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

**WHETHER THE CINMS REGULATION PROSCRIBING
"ALTERING THE SEABED" IS, WHEN APPLIED
TO THE APPELLANT DIVERS' CONDUCT,
UNCONSTITUTIONALLY VAGUE
AND OVERBROAD.**

IV. STATEMENT OF THE CASE

This case arises out of an elaborate, federally-orchestrated "sting" operation which targeted a group of recreational scuba divers who had, for decades, been freely and openly recovering artifacts from the shipwrecks located beneath the waters surrounding Southern California's Channel Islands. On September 22, 1980, pursuant to the Marine Protection, Research and Sanctuaries Act ("MPRSA"), 16 U.S.C. §1401 *et seq.*, these waters--including the shipwrecks found there--were designated the CINMS.

On October 2, 1987, the *Vision*, a scuba diving charter vessel owned and operated by Truth Aquatics, Inc. of Santa Barbara, brought a boat load of recreational scuba divers, including the Appellant divers, to the CINMS. The record shows that the CINMS was not the divers' original destination, for only after boarding their chartered vessel did they learn that their previously-scheduled charter to the so-called Honda shipwrecks near Vanderberg Air Force Base had been, under suspicious circumstances, cancelled at the last minute. Unbeknownst to the other divers on the *Vision*, two undercover National Park Service Rangers, Yvette Menard and Mark Senning, were on board the dive boat, hoping to catch the divers violating the CINMS regulations.

The *Vision* anchored over two shipwrecks within the CINMS, the *Winfield Scott*, which is located in the waters of Ventura County and the *Goldenhorn*, in Santa Barbara County waters. Several of the divers were allegedly observed while underwater "altering the seabed" or removing historical and cultural resources, in violation of the CINMS regulations.

In spite of these problems, each and every underwater identification alleged by the Rangers were accepted as accurate by Department of Commerce Administrative Law Judge Hugh J. Dolan, only because

These Respondents [Plaintiffs herein] by their conduct individually and as a group have demonstrated that they deserve no consideration as credible persons....In the investigation they lied. In this proceeding they continued to prevaricate. No utterance from their mouths, individually or collectively, deserves consideration as to credibility... In the Matter of Clifton Craft, et al., supra., slip op. at pp. 4-5.

When the *Vision* returned to the dock at the end of its weekend charter, it was met by enforcement officers from the National Marine Fisheries Service, the National Park Service and the Santa Barbara County Sheriff's Office. Twenty of the divers were interviewed and subsequently were charged with violations of State criminal laws in either Santa Barbara and Ventura Counties. While the criminal prosecutions were pending, NOAA charged the twenty divers with the violations of CINMS regulations, for which civil penalties were sought.

In light of ALJ's Dolan's opinion of the divers' veracity, it should not surprise this Court to learn that the Plaintiffs herein were found guilty of each and every charge lodged against them by NOAA. The ALJ's "Initial Decision" was adopted by the agency and NOAA's final agency action for purposes of appeal, a denial of discretionary review, was made on February 21, 1992. On March 20, 1992, the divers appealed to the United States District Court, which, on cross motions for summary judgment, affirmed the agency decision and dismissed the divers' appeal with prejudice on November 18, 1992. The instant appeal has ensued.

V. STATEMENT OF THE STANDARD OF REVIEW

This case, arising under the Administrative Procedures Act, *supra.*, was before the district court on the Appellant divers' Motion for Summary Judgment pursuant to FRCP 56. The facts of the case were established in a 1988 administrative law hearing of several weeks' duration; the issues before the district court, were, as with this Court purely legal in nature.

When reviewing final agency action under the APA, the scope of review is ordinarily an arbitrary and capricious/abuse of discretion standard. 5 U.S.C. §706 (2)(A) authorizes a reviewing court to set aside agency findings which are not in accordance with law, or unsupported by substantial evidence. Good Samaritan Hospital v. Mathews 609 F. 2d 949 (9th Cir. 1979). While the agency is given deference in the interpretation of its own regulations, the reviewing court has a duty to see to it that the agency's actions are consonant with the Congressional intent in enacting the underlying legislation. *Id.* at 956; Barlow v. Collins 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed. 192 (1970).

**VI. AS APPLIED TO THE DIVERS' ACTIVITIES,
THE CINMS REGULATION PROSCRIBING "ALTERATION OF THE
SEABED" IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD**

Appellant divers Craft, Ferguson and Wilson were convicted of violating 15 CFR §935.7 (a)(2)(iii), which proscribes the "alteration" of the seabed. The district court found that the actions of the Plaintiffs which gave rise to their convictions constituted the hand fanning of the bottom sediments and/or the striking of rocks with a hand held geologist's hammer. A-9. The court below went on to conclude that the language of the regulation, prohibiting "alteration ... in any way" was sufficiently clear so as to pass constitutional vagueness muster. As the regulation set forth two exceptions, or permissible forms of alteration for which no CINMS permit was required, and the divers' conduct fell within neither of these exceptions, then they were guilty of having unlawfully "altered" the seabed. A-10.

But the district court failed to address the divers' key contention: the term "alteration of the seabed" *had* been defined by NOAA, the agency which drafted and was charged with enforcement of the regulation. NOAA's quite specific definition--set forth in several prominent places in the administrative record of the CINMS--in no way contemplated proscribing as unlawful "alteration" such innocuous activities as hand-fanning the sand on the bottom of the CINMS. It is not that the regulation as written is incapable of interpretation through a reading of its plain language, as the district court construed the term "alteration". Rather, the divers contend that the agency set forth a very precise definition of the term and the district court simply rejected the agency's own interpretation thereof in upholding the administrative law convictions obtained below.

Yet even reading the plain language of the entire regulation demonstrates that the term "alteration of, or construction on, the seabed" is meant to proscribe industrial and/or commercial uses or impacts which have a significant environmental effect upon the seabed within the CINMS. 15 CFR §935.7 (a) provides that:

[2] *Alteration of, or construction on, the seabed.* Except in connection with the laying of any pipeline No person shall:
(i) Construct any structure other than a navigation aid, or
(ii) **Dredge or otherwise alter the seabed in any way, other than**
[A] to anchor vessels, or
[B] to bottom trawl from a commercial fishing vessel. [Boldface supplied]

This Court may take judicial notice of the fact that the *permitted* activities under the regulation--namely anchoring a vessel and bottom trawling--each have an infinitely greater environmental impact upon the seabed than does the hand fanning or manual hammering upon a rock by an individual diver. The Sindia Expedition, Inc. v. The Sindia 895 F. 2d 116, 117 n.1 (3d Cir. 1990). By examining the administrative history of the CINMS, it becomes manifest that the intent of the regulatory prohibition is to govern the impacts upon the seabed brought about by major industrial and/or commercial uses of the CINMS.

NOAA's Final Environmental Impact Statement ("FEIS") for the CINMS provides irrefutable proof that the regulation at issue was intended to govern the alteration of the seabed through the impact of major industrial and/or commercial uses of the CINMS. By its own definition, NOAA's regulation was never meant to proscribe or regulate the *de minimus* "altering" of the seabed caused by the manual acts of individuals. Thus, when §935.7 (a)(2)(iii) is applied so as to proscribe the acts of Plaintiffs Craft, Ferguson and Wilson, the regulation is clearly, and impermissibly, vague and overbroad.

When first mentioned at A- 54 (p. C-21 of the FEIS), §935.7 (a)(2)(iii) is discussed exclusively in the context of dredging:

The impacts of prohibiting seabed alteration and construction are expected to be minor since all current dredging occurs outside the sanctuary.

Again, at A-62-63, (pp. F-118-9 of the FEIS), the regulation proscribing the "alteration" of the seabed is discussed **exclusively** in terms of dredging or dredge disposal activity:

"[T]his regulation will enhance resource protection by prohibiting the presence of large, and often noisy, dredging machinery..."

According to the FEIS, the purpose of the prohibition is the protection of benthic communities and pelagic fish resources that might be smothered or otherwise damaged if dredging were to take place near the shoreline. Thus, the regulation is wholly unrelated to its purported application below against the divers, as a regulatory vehicle for the protection of archaeological and historical resources within the CINMS. A-66 (FEIS at p.F-143).

If NOAA's interpretation of its own regulation in its FEIS were not compelling enough, subsequently the agency's Designation Document for the CINMS--the so-called "constitution" of the Sanctuary--sets forth the purpose of the regulatory proscription. In 15 CFR Part 935, 45 Fed Reg 65198 (October 2, 1980), the prohibition against unlawfully "altering the seabed" is described:

"... the primary purpose of managing the area and of these implementing regulations is to protect and to preserve the marine birds and mammals, their habitats and other natural resources from those activities which pose significant threats." 45 Fed Reg 65199.

It should be obvious to even the casual observer that a diver's hand-fanning or hammering on a submerged rock is not an activity that poses a significant threat to the natural resources of the CINMS.

The District Court has committed plain error in refusing to give deference to the agency's own interpretation of its regulation. The Supreme Court addressed this issue in Chevron, Inc. v. Natural Res. Defense Council, 467 U.S. 837 (1983), holding that a reviewing court may not merely substitute its own construction of a regulation for that of a reasonable interpretation of an administrative agency "[T]he question for the court is whether the agency's answer is based upon a permissible construction of the statute." *Id.* at 843.

Yet the situation facing the prosecuted CINMS divers goes well beyond a statutory construction question. In the instant case, the agency has previously interpreted its regulation on several occasions during the administrative process of creating the Sanctuary. It is NOAA itself which rejects its own unambiguous construction of the regulation, adopting a novel interpretation of seabed "alteration" which sweeps so broadly as to ensnare what appeared to the divers to be wholly innocuous behavior.

While it is obvious from its administrative history that NOAA never intended §935.7 (a)(2)(ii) to have the broad reach that the prosecution below has given it, to determine if the regulation is unconstitutionally vague, the "altering the seabed" prohibition must be viewed from the Plaintiffs' perspective--that is, from that of one whose conduct must conform with it.

It is well settled that procedural due process requires that a criminal statute give fair warning of the acts or omissions which it declares to be prohibited and punishable. Clingenpeel v. Municipal Court of Antelope App., 166 Cal. Rptr. 573, 575; 108 Cal. App. 3d 394, 397 (1980). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." U.S. v. National Dairy Products Corp. 372 U.S. 29, 31 (1963); Bowland v. Municipal Court 18 Cal. 3d 479, 492 (1976).

In discussing the due process requirement of legislative specificity, the Supreme Court, per Justice Sutherland, in Connally v. General Const. Co. 269 U.S. 383, 391 (1926), 46 S.Ct. 126, 127, 70 L.Ed. 322, set forth what is considered to be the classic formulation of the test for constitutional vagueness:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

In U.S. v. Diaz, 499 F. 2d 113 (9th Cir. 1974), an otherwise valid federal statute prohibiting the appropriation of any "object of antiquity" situated on federal lands was found unconstitutionally vague when the statute was applied to 3-4 year old Apache ceremonial masks that the defendant had found in a cave on an Indian Reservation.

But a conviction under the same statute was affirmed where the defendants had made several visits to an ancient Indian burial ground in a National Forest and illegally excavated 800-900 year old artifacts. U.S. v. Smyer 596 F.2d 939 (10th Cir. 1979). Smyer and Diaz are not inconsistent: taken together, the cases demonstrate that a statute may be sufficiently clear standing alone to withstand constitutional scrutiny, yet when applied to conduct not clearly prohibited, the statute violate due process.

Thus, while §935.7 (a)(2)(iii) would be deemed to comply with procedural due process in a prosecution for illegal dredging within the CINMS, the regulation does not pass constitutional muster when the prosecution stretches an otherwise valid statute to encompass actions of individuals such as hand fanning the bottom or manually striking submerged rocks with a hammer--conduct which is clearly outside what one would reasonably believe to be the regulation's intended scope.

Well-settled principles of statutory construction mandate the same conclusion:

Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. Singer, 2A Statutes and Statutory Construction Sands 4th Ed., 1984 Revis.

Thus, to discern the meaning of the term "altering", one would look to its context and find reference to major physical impacts upon the seabed: laying of pipeline, construction and dredging. One would not conclude that the term "altering" was meant to encompass the *de minimus* impact on the seabed from manual tools or hand-fanning the sand. As the California Supreme Court observed,

The due process guarantee of fair notice is violated when an act is made punishable under a pre-existing statute ... by means of an unforeseeable judicial enlargement thereof. People v. Weidert (1985) 39 Cal. 3d 836, 850, 218 Cal. Rptr. 57.

The acts for which Plaintiffs Craft, Ferguson and Wilson were convicted do not constitute the conduct envisioned by NOAA in proscribing "altering the seabed". The Administrative history of the CINMS reveals that the regulation was meant to proscribe major industrial and/or commercial impacts upon the seabed: specifically the major environmental damage which could ensue from unregulated dredging operations.

A person of common intelligence could not possibly conclude that the regulation's reach might extend to the barely perceptible (if any) impact on the seabed which might be caused by a recreational scuba diver waving his hand across the sandy bottom or striking a rock with a hammer. As such, when applied to the Plaintiffs' actions, 15 CFR §935.7 (a)(2)(iii) is unconstitutionally vague and violative of due process. This Court should vacate the convictions obtained thereunder.

VII. CONCLUSION

For the foregoing reasons, this Court should vacate the convictions of the Appellant divers for having violated 15 CFR §935.7 (a)(2)(iii).

Respectfully submitted,

Dated: July 2, 1993



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Pursuant to Ninth Circuit Rule 28-2.6, the Appellants note on the final page of their Opening Brief that there are no related cases to the instant appeal.

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FOR THE NINTH CIRCUIT

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Plaintiffs/Appellants,

- vs. -

No. 93-55140

THE NATIONAL PARK SERVICE, et al.

Defendant/Appellees.

CERTIFICATE OF SERVICE

I hereby certify that the attached pleadings were sent by U.S. Mail on the date indicated below to the following Counsel of Record:

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Re: CV-92-1769-SW
CLIFTON CRAFT, ET AL.,
VS.
THE NATIONAL PARK SERVICE, ET AL.,

Dear PETER E. HESS

Pursuant to Rule 3(e) of the Federal Rules of the Appellate Procedures, as amended August 1, 1979, a \$5.00 filing fee and a \$ 100.00 docket fee is required to be paid to the Clerk, U.S. District Court.

Please remit a cashier's check or money order payable to "Clerk, U.S. District Court" in the amount of \$ ~~105.00~~ ^{\$} 5.00

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Very truly yours,

Clerk, U.S. District Court

Geneva Hunt

By GENEVA HUNT

Deputy Clerk

cc: Court of Appeals

