IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-55140

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

Appellants,

v.

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

Appellees.

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court's unreported opinion, Craft v. United States Park Service, No. CV 92-1769 (C.D. Cal. Oct 26, 1993), is reproduced in the Appellants' Appendix (App.) at pages 8-15.

ISSUE PRESENTED FOR REVIEW

Whether the regulation of the Channel Islands National Marine Sanctuary providing that "within 2 nautical miles of any Island, no person shall . . . dredge or otherwise alter the seabed in any way," 15 C.F.R. § 935.7(a)(2)(iii), is unconstitutionally vague or overbroad.

JURISDICTION

1. Jurisdiction of the District Court.

The district court's jurisdiction to review civil penalties assessed under authority of the Marine Protection, Research, and Sanctuaries Act (MPRSA) rested on 28 U.S.C. § 1331, with review provided under the MPRSA, 16 U.S.C. § 1437(c)(4), and under the Administrative Procedure Act, 5 U.S.C. § 702.

2. Jurisdiction of the Court of Appeals.

Appellants filed a timely notice of appeal under Federal Rule of Appellate Procedure 4(a)(1) on January 7, 1993, from the November 18, 1992, final order of the United States District Court for the Central District of California, which granted the motion by the United States for summary judgment and thereby disposed of all claims with respect to all parties. That order is appealable under 28 U.S.C. § 1291.

STATEMENT OF THE FACTS

This appeal arises from the district court's review of an assessment of civil penalties by the National Oceanic and Atmospheric Administration (NOAA) under the MPRSA. 16 U.S.C. § 1437(c)(1). NOAA assessed these penalties following a four-week administrative trial in which Clifton Craft, Jack Dean Ferguson, Donald Jernigan, Michael King, Thomas Stocks, William Lee Wilson, and others were found to have violated NOAA regulations protecting both seabed and historic resources of the Channel Islands National Marine Sanctuary (CINMS), in the course

of the their underwater excavation of a number of protected CINMS sites containing natural or historic resources.

I. Statutory background.

A. The MPRSA.

Congress enacted the MPRSA in response to "growing concern about the increasing degradation of marine habitats." S. Rep. No. 100-595, 2d Sess. (Oct. 7, 1988) 1, reprinted in 1988 U.S. Code Cong. & Admin. News 4387 (Sen. Report). The MPRSA provides:

> for the protection of important and sensitive marine areas and resources of national significance through the establishment of marine sanctuaries. The purpose of such sanctuaries is to preserve or restore such areas for their conservation, recreational, ecological, or aesthetic value.

Id.; see also 16 U.S.C. § 1431.

The MPRSA confers authority for the designation and management of marine sanctuaries, and for MPRSA enforcement, on the Secretary of Commerce, 16 U.S.C. §§ 1433, 1434, who has delegated these responsibilities to NOAA. NOAA determines whether an area of the marine environment should be designated as a sanctuary according to statutory criteria compelling the agency to appraise whether the area presents natural, historical, cultural, or archaeological resources of national significance, as well as to consider the area's opportunities for recreational activities, research, and education. 16 U.S.C. § 1433(b)(1). NOAA implements sanctuary designations in regulations for specific National Marine Sanctuaries that are set forth at 15 C.F.R. Part 922.

NOAA's regulatory powers in the MPRSA are coupled with comprehensive civil enforcement authorities in marine sanctuaries. As amended in 1988, MPRSA title III imposes civil liability generally on "any person who destroys, causes the loss of, or injures any sanctuary resource...." 16 U.S.C. § 1443. The statute defines "sanctuary resource" broadly to "mean[] any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8). The statute further establishes authority for NOAA to promulgate regulations providing specific resource protection for each sanctuary. 16 U.S.C. §§ 1433, 1434. At the time of the acts giving rise to this appeal, the MPRSA provided that any person who violates these regulations "shall be liable to the United States for a civil penalty of not more than $50,000 for each violation, to be assessed by [NOAA]." 16 U.S.C. § 1437(c)(1)(1990). Congress subsequently has increased the maximum civil penalty for each violation to $100,000. 16 U.S.C. § 1437(c)(1) (Supp. 1993)(as amended by the Oceans Act of 1992, Pub. L. No. 102-587, 106 Stat. 5039 (Nov. 4, 1992)).

B. The Channel Islands National Marine Sanctuary

NOAA designated the Channel Islands National Marine Sanctuary in 1980. 45 Fed. Reg. 65198 (Oct. 2, 1980). The Sanctuary consists of marine waters surrounding Anacapa Island, Santa Cruz Island, Santa Rosa Island, San Miguel Island, Santa Barbara Island, Richardson Rock and Castle Rock, out to a

distance of 6 nautical miles. 15 C.F.R. § 935.3. The islands themselves form the Channel Islands National Park, and National Park Service rangers are authorized to enforce sanctuary regulations there pursuant to an interagency agreement with NOAA. See 16 U.S.C. § 410ff.

NOAA designated the sanctuary "to protect and preserve the extraordinary ecosystem[,] including marine mammals and other natural resources of the waters surrounding the northern Channel Islands and Santa Barbara Island[,] and ensure the continued availability of the area as a research and recreational resource." 15 C.F.R. § 935.2 In designating the sanctuary, NOAA particularly noted that:

> [t]his area supports a particularly rich and diverse marine biota, partially because it is located in a transition zone between northern and southern waters and partially because it is one of very few areas off the Southern California coast that has been relatively unaltered by human use.

Id.

The CINMS regulations protect sanctuary resources through the regulation or prohibition of a number of activities that might adversely affect sanctuary resources, including hydrocarbon operations, discharge or deposit of any substance, commercial vessel traffic, disturbance of marine mammals or seabirds by overflights, and removal or damage of cultural or historical resources. 15 C.F.R. §§ 935.6, 935.7. All activities not specifically prohibited are allowed and recreational use of the sanctuary is encouraged. § 935.5. In addition, the Secretary may issue permits for an activity otherwise prohibited where such

activity: (1) is research related to the sanctuary resources; (2) furthers the educational value of the sanctuary; or (3) involves salvage or recovery operations for recent marine casualties. 15 C.F.R. § 935.9.

As pertinent in this case, the CINMS regulations include two prohibitions on activities that threaten sanctuary resources in close proximity to the islands of the CINMS: prohibitions on altering the seabed and prohibitions on removing or damaging cultural or historic resources. 15 C.F.R. § 935.7. Unless specifically authorized by permit, "the following activities are prohibited in the sanctuary," 15 C.F.R. § 935.7(a):

> (2) Alteration of, or construction on, the seabed: Except in connection with the laying of any pipeline as allowed by § 935.6, within 2 nautical miles of any Island, no person shall:
>
> (i) Construct any structure, other than a navigation aid, or
>
> (ii) Drill through the seabed, or
>
> (iii) 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.
>
> ....
>
> (5) Removing or damaging historical or cultural resources. No person shall remove or damage any historical or cultural resource.

Id. (emphasis supplied).

At the time of the conduct at issue in this appeal, violations of these CINMS regulations were subject to civil penalties of up to $50,000 for each violation. 16 U.S.C. § 1437(c)(1) (1990). There are no criminal penalties, sanctions or liabilities under Title III. See 16 U.S.C. § 1437 (Supp. 1993).

II. Appellants' activities in the CINMS.

The appellants are members of a southern California diving club who participated in a charter trip aboard the boat VISION to the CINMS on October 3 and 4, 1987, to dive on four shipwrecks located in the sanctuary. App. 17-19. Also on board the VISION were two National Park Service rangers who participated as part of an undercover investigation. These park rangers participated in the dives, witnessed numerous violations of the CINMS regulations by the various appellants, and ultimately provided testimony in a four-week administrative trial of those violations that formed the basis for the civil penalty assessment upheld by the district court.

On the basis of the park rangers' testimony and other evidence, NOAA assessed civil penalties against various divers aboard the VISION. A number of those charged later contested NOAA's charges in the administrative trial. After hearing the rangers' testimony, as well as evidence and testimony adduced by the divers, an administrative law judge (ALJ) concluded that three divers -- Craft, Ferguson, and Wilson -- had violated the CINMS regulation prohibiting any person from "[d]redg[ing] or otherwise alter[ing] the seabed in any way." 15 C.F.R. § 935.7(a)(2)(iii). The ALJ found that six of the divers -- Stocks, King, Jernigan, Parrott, Ferguson, and Wilson -- had violated the CINMS regulation prohibiting "remov[ing] or damag[ing] any historical resource." 15 C.F.R. § 935.7(a)(5). App. 27-49. The ALJ recommended the assessment of the penalties

sought by NOAA's counsel, but increased the penalty assessed against Appellant Ferguson to $100,000, which reflected the $50,000 maximum penalty for each of the two separate counts of the violation. 16 U.S.C. § 1437(c)(1) (1990). These assessments were upheld on administrative review and therefore became the decision of the NOAA Administrator.

The ALJ found that the appellants "knew and reminded themselves that the very conduct they engaged in was prohibited and that those charged with protecting the sanctuary were on the lookout for predators. Nevertheless, individually, they proceeded to do the very acts they knew were prohibited." App. 22. The ALJ based these conclusions on evidence that numerous times during the course of the dive trip, Appellant Ferguson announced to the group over the public address system that the wreck sites were located within a federal reserve and thus protected, App. 18, 23, 40; Ferguson further advised the group that removing anything from the sites would be illegal. Id. The ALJ found that Ferguson even set up a warning system to avoid detection by sanctuary enforcement officials, assuring the other appellants that the dive boat was equipped with an underwater alarm that would alert the group in the event that a National Park Service patrol approached. App. 18.

The testimony of the park rangers before the ALJ established that, while at the various wreck sites, Ferguson and the other appellants removed artifacts from the shipwrecks and excavated the seabed with their salvage tools. App. 17-19, 23-24. As the

ALJ concluded, the appellants "set out with their picks[,] hammers, chisels, booty bags, and other wreck raiding paraphernalia, fully intending to remove these wrecks in the closed areas within the Sanctuary, and that is what they did." App. 47. Based on this evidence, along with evidence of repeated instances in which the appellants actually removed artifacts from the sanctuary, the ALJ concluded that the appellants had removed historical or cultural resources from the sanctuary in violation of 15 C.F.R. § 935.7(a)(5). App. 22-27, 36-37, 39-48.

The evidence before the ALJ also established that the use of sledge hammers, chisels, hacksaws, rock picks, and other tools by Appellants Craft, Ferguson, Wilson, and others to retrieve artifacts from the CINMS had led to significant alteration of the seabed. The ALJ made extensive findings concerning the specific actions by Craft, Ferguson, and Wilson that had "alter[ed] the seabed" within the meaning of the CINMS regulation. 15 C.F.R. § 935.7(a)(2)(iii). The ALJ found that these appellants had "excavated" the site of wrecks in the sanctuary, and that rangers could locate the site of the excavations days after the divers had worked at the site. App. 26. The ALJ also made specific findings concerning the conduct of each appellant. The ALJ found that Appellant Craft had been "repeatedly hammering at an area" of the seabed in the protected area, "causing rocks to crumble" and stirring "a sediment cloud in the water." App. 36. The ALJ found that Appellant Ferguson himself had admitted that one of the protected sites "was beginning to look like a 'minefield'

because of the divers' activities." App. 40. The ALJ found that Appellant Wilson also had used a "hammer to hit repeatedly at objects" within the protected area of the sanctuary, and had excavated to the point that he had "stirred up a large cloud of debris." App. 44. Wilson, the ALJ said, "threw rocks approximately up to the size of a softball away from the area he was working," and "used a hammer and chisel to excavate the area." App. 46. Based on this evidence, the ALJ found that all three of these appellants had unlawfully altered the seabed in violation of 15 C.F.R. § 935.7(a)(2)(iii), damaging sanctuary resources protected by the regulation.

The ALJ imposed the same penalties that had been assessed by the agency counsel with regard to all the appellants except one, Jack Dean Ferguson. He found Ferguson, the divemaster, to be a "special case":

> As the divemaster he bore a special responsibility. By his personal conduct in diving and his announcements to the cruise participants, he mocked the law and by actions and words encouraged all of the violations committed. . . . My conclusion is that he is reaping the harvest of his own misconduct, which was gross.

App. 48. Accordingly, the ALJ determined that Ferguson's conduct warranted the maximum civil penalty authorized by law at that time: $50,000 for the violation of 15 C.F.R. § 935.7(a)(2)(iii) and $50,000 for the violation of 15 C.F.R. § 935.7(a)(5), for a total of $100,000. App. 41, 48. NOAA then adopted the ALJ's recommendation.

III. Proceedings in district court.

Following NOAA's adoption of the ALJ's recommendation, the appellants filed an action in the district court presenting a series of legal challenges to NOAA's authority to impose civil penalties, without disputing the facts as found by the ALJ. Specifically, the appellants contended that the regulation prohibiting alteration of the seabed within two miles of the Channel Islands is overbroad or void for vagueness; that they have a pre-existing right to engage in salvage activities; and that the CINMS regulations impermissibly restrict their rights under principles of admiralty law to engage in these activities.

The district court rejected all of these claims. App. 8-15. Addressing the contention that the CINMS regulation against altering the seabed is void for vagueness, the district court concluded that:

> Because the regulation lists two exceptions, it seems clear to the Court that if a party's actions do not fall within those explicit exceptions, then the general prohibition on 'altering the seabed in any way' would apply. The language prohibiting plaintiffs' conduct is clear as applied to any alteration, including the alteration committed by plaintiffs.

App. 10.

The district court also rejected the contention that the appellants had a pre-existing or "fundamental" right to engage in salvage activities, concluding that the MPRSA specifically provides that NOAA may regulate pre-existing rights for the protection of sanctuary resources, App. 10, and that recognition of an absolute or "fundamental right" to salvage would render the

MPRSA "meaningless," because "[t]he Secretary would be prohibited from preventing any activity, no matter how destructive, as long as the person engaging in the conduct had done so before the designation of the Sanctuary." App. 11.

Finally, the district court found that the ALJ acted within the bounds of his discretion in assessing civil penalties, specifically concluding that the increased penalty assessed against Appellant Ferguson was supported by the findings that Ferguson had acted in "'mocking derision' of the law." App. 14 (citation omitted).

This appeal followed.

ARGUMENT

THE CINMS PROHIBITION AGAINST ALTERATION OF THE SEABED IS NOT OVERBROAD OR VOID FOR VAGUENESS

A. Summary

Appellants do not contest the overwhelming evidence supporting the ALJ's conclusion that Craft, Ferguson, and Wilson repeatedly excavated the sanctuary seabed using hammers, chisels, and other implements in search of historic and protected artifacts, hammering away and stirring up clouds of debris amidst the very resources protected by the CINMS regulations. Instead, these appellants broadly challenge one of the two sanctuary regulations on which NOAA based its assessment on civil

penalties,1/ namely, the regulation prohibiting alteration of the seabed in any way. Appellants assert that constitutional doctrines proscribing overbreadth and vagueness render these regulations unconstitutional. However, these doctrines apply with force, and require strict scrutiny of regulations, only where the government restricts fundamental or constitutional rights or imposes criminal sanctions. This Circuit has made clear that these doctrines have only limited application to civil or administrative regulations such as those designed to protect natural resources. Thus, there is no basis for strict scrutiny of the CINMS regulation challenged in this case.

The regulation prohibiting "alter[ation] of the seabed in any way," 15 C.F.R. § 935.7(a)(2)(iii), is sufficiently clear to pass any relevant standards of constitutional notice required by the void-for-vagueness doctrine. Moreover, this Circuit has made clear that the void-for-vagueness doctrine is only relevant where a regulatory prohibition is vague as applied to the particular persons invoking the constitutional claim. Here, the ALJ's findings that these appellants engaged in intentional and repeated excavation of the seabed, wielded hammers and other

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1/ Appellants do not challenge the regulation prohibiting "removal or damage of any historical or cultural resource," 15 C.F.R. § 935.7(a)(5), which was the only basis for the penalties assessed against King, Jernigan, Stocks, and Parrott. The ALJ found that Appellants Ferguson and Wilson were liable for penalties for violating this regulation as well as the challenged regulation. See App. 39 (counts against Ferguson), 26 (counts against Wilson). Appellant Craft is the only individual before this Court whose penalty was based exclusively on the challenged regulation. App. 21. See Section E, below.

crude implements that generated clouds of debris and significantly affected protected sanctuary resources, and did so with full knowledge of the prohibitions in the sanctuary, reveals the absurdity of any claim that the CINMS regulations were too vague to provide these particular parties with notice of the prohibitions that were in effect in the highly regulated domain of the CINMS.

B. Vagueness doctrines require only minimal scrutiny of economic or natural resource regulation.

The appellants' argument that the CINMS regulation prohibiting the alteration of the seabed, 15 C.F.R. § 935.7(a)(2)(iii), is unconstitutionally overbroad and vague proceeds from a fundamental misunderstanding of the requirements of the relevant doctrines. The overbreadth doctrine requires at a minimum that "'the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail.'" United States v. Austin, 902 F.2d 743, 744 (9th Cir.)(collecting authority and quoting Schwartzmiller v. Gardner, 752 F.2d 1341, 1346 (9th Cir. 1984)), cert. denied 498 U.S. 874 (1990). Similarly, the void-for-vagueness doctrine provides for strict scrutiny of regulations that affect a constitutional or fundamental right, such as freedom of expression protected by the first amendment. See, e.g., Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 2732 (1991)(speech). The vagueness doctrine also requires strict scrutiny of criminal statutes, which must define offenses with sufficient clarity that ordinary people can understand what

conduct is prohibited and that arbitrary and discriminatory enforcement is discouraged. Kolender v. Lawson, 461 U.S. 352, 357 (1983); Colautti v. Franklin, 439 U.S. 379, 390 (1979); see also United States v. Sandsness, 988 F.2d 970, 971 (9th Cir. 1993)(vagueness claim requires that "no standard of conduct is specified at all").

By contrast, the Supreme Court has "expressed 'greater tolerance' of enactments with civil rather than criminal penalties," United States v. 594,464 Pounds of Salmon, 871 F.2d 824 (9th Cir. 1989)(quoting Village of Hoffman Estates v. The Flipside, 455 U.S. 489 (1982)). This Circuit has reasoned that under this standard, civil or administrative regulation is subject to a far less strict vagueness test because its subject matter is often more narrow and because the affected parties can be expected to consult relevant legislation or clarify the meaning of a regulation through administrative inquiry in advance of action. See United States v. Doremus, 888 F.2d 630, 634-35 (9th Cir. 1989), cert. denied 498 U.S. 1046 (1990).

All of these factors weigh against the overbreadth and vagueness claims asserted by the appellants in this case. First, appellants identify no constitutional or other fundamental right that plausibly could be the basis for invoking the overbreadth doctrine.2/ Accordingly, their overbreadth claim must fail.

2/ The appellants' assertion below that they have a constitutional or fundamental right to engage in salvage activities was properly rejected by the district court, App. 11-13, and has not been renewed on appeal.

Village of Hoffman Estates, 455 U.S. at 494-95. Second, and consequently, there is no constitutional or fundamental right to support strict scrutiny under the vagueness doctrine. Third, the penalties at issue in this case are indisputably civil in nature, as the MPRSA explicitly provides only for civil penalties for violations of sanctuary regulations. 16 U.S.C. 1437. This removes the only other basis for strict scrutiny of the CINMS regulations under the void-for-vagueness doctrine, despite the appellants' appropriation of criminal law jargon in arguing this appeal, (e.g. Brief for the Appellants (July 2, 1993)(App. Br.) 7 ("appellant divers Craft, Ferguson, and Wilson were convicted"); id. 5 (assertion that "appellants' were found guilty").

Therefore, appellants may prevail in their vagueness claim only if the regulation fails to satisfy the basic standards of fair notice that this Court requires of civil or administrative regulations. This Court has been particularly unreceptive to claims of vagueness in this context, however, even where statutes or regulations are drawn in quite general terms. See Doremus, 888 F.2d. at 635 (rejecting vagueness challenge to prohibition regulation against "damaging any natural feature"); United States v. Lee, 937 F.2d 1388 (9th Cir. 1991)(upholding against vagueness challenge a prohibition on fish taken in violation of any foreign law), cert. denied 112 S. Ct. 977 (1992); United States v. 594,464 Pounds of Salmon, 871 F.2d 824 (9th Cir. 1989)(same). Moreover, the regulations of the CINMS present a typical regulatory context in which those affected may seek

administrative clarification of any ambiguity concerning prohibited conduct. Doremus, 888 F.2d at 634-45.

C. The CINMS regulation prohibiting seabed alteration provides fair warning of the conduct proscribed.

The plain language of NOAA's regulation in this case provides the requisite fair warning of the conduct that is prohibited and defeats any claim of vagueness. Lee, 937 F.2d at 1394. The regulation clearly and categorically states that, with the exception of those alterations created by vessel anchors and bottom trawls of commercial fishing vessels, "no person shall . . . [d]redge or otherwise alter the seabed in any way[.]" 15 C.F.R. § 935.7(a)(2)(iii). These prohibitions apply to a limited geographic area (within two nautical miles of the CINMS islands) that is readily ascertained from extant nautical charts, which conspicuously mark the sanctuary boundaries.

The explicit terms of the regulation, prohibiting alteration of the seabed "in any way," unambiguously announce the breadth of the prohibition that applies within this limited area. 15 C.F.R. § 935.7(a)(2)(iii). Any uncertainty concerning the nature of the activities thus proscribed is removed by the express exemption for impacts on the seabed caused by anchoring or commercial trawling. 15 C.F.R. § 935.7(a)(2)(iii)(A) & (B). The provision of an exception clearly implies that even minor impacts from such activities would be prohibited by the language of the statute but for the exception. The argument that the regulation is limited, as appellants would have it, to "major physical impacts on the

seabed" such as those from "laying of pipeline, construction, and dredging," App. Br. 12, is undermined by these exceptions.

The breadth of the prohibition, coupled with the narrowness of the exclusions for incidental and minor impacts that might result from anchoring or trawling, eliminates the possibility that affected parties must "speculate" about whether any given alteration of the seabed in the relevant areas of the CINMS "falls within the prohibition." United States v. Stenberg, 803 F.2d 422, 436 (9th Cir. 1986). Accordingly, this is not a case where undefined terms of uncommon usage result in different meanings to different people. Cf. United States v. Diaz, 499 F.2d 113, 114-115 (9th Cir. 1974) (penal prohibition on appropriation of antiquities, using terms outside the realm of common knowledge, is void for vagueness); but see United States v. Smyer, 596 F.2d 939 (10th Cir. 1979) (upholding same statute), cert. denied 444 U.S. 843 (1979). When measured by common understanding and the scope of the exceptions, the prohibition on altering the seabed "in any way" conveys a sufficiently definite warning as to the proscribed conduct, and thus cannot be deemed fatally vague. United States v. Petrillo, 332 U.S. 1, 8 (1947).

The regulation at issue here is also closely analogous to other resource and economic regulations that this Court has upheld against constitutional attack. In Doremus, for example, this Court rejected a similar vagueness challenge to a criminal conviction for violating a prohibition on "damaging any natural feature or other property of the United States" in a national

forest. 888 F.2d 630 (discussing 36 C.F.R. § 261.9(a)). The CINMS regulation prohibiting alteration of the seabed in a narrowly defined area is merely a marine, and indeed only civil, version of the same prohibition. Similarly, this Court in Austin concluded that a criminal statute providing that "[n]o person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands" could not be challenged on vagueness grounds. 902 F.2d at 743-45 (discussing 16 U.S.C. § 470ee). That regulation, too, is comparable in language and scope to the challenged CINMS regulation in that it generally prohibits "alter[ing]" existing resources; the CINMS regulation is therefore comparably lacking in constitutional defect. The CINMS regulation prohibiting any alteration of the seabed is framed in no less general terms, and is subject to less strict scrutiny, than were either of the criminal prohibitions at issue in Doremus or Austin.

The appellants seek to introduce ambiguity into the language of the regulation by reliance on statements in the environmental impact statement (EIS) for the sanctuary concerning the effect of the regulation, App. Br. 9, as well as on a canon of statutory construction. Id. 12. As an initial matter, these arguments are unavailing because mere ambiguity does not establish impermissible vagueness. See 594,464 Pounds of Salmon, 871 F.2d at 828-29 (reasoning that while statutory language "cannot be said to be unambiguous," it was not impermissibly vague). The asserted guides to interpretation, however, introduce neither

ambiguity nor vagueness but simply reinforce the rectitude of the decisions by the ALJ and the district court in this case.

The appellants rely on the EIS to argue that this Court must construe the statute narrowly because the EIS discusses the regulation "exclusively in the context of dredging," and states that "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 a shoreline." App. Br. 9. However, even if the EIS were an authoritative guide to construction of the regulation,3/ the ALJ's findings that these appellants excavated near-shore sites, repeatedly hammered at hard features of the seabed, and generated clouds of dust debris while they were working, make clear that the activities at issue in this case did in fact comprise a form of dredging, presenting the very risks of damage both to natural resources in the benthic community and other sanctuary resources that the regulations are intended to prevent.

Any uncertainty concerning this issue is removed by reference to the language of the regulation and of the MPRSA.

3/ An EIS is not prepared as an authoritative interpretation of the statute by NOAA or a list of all potentially affected activities, but only as a "concise statement" of the significant effects of the regulation "on the quality of the human environment." 42 U.S.C. § 4332(B). Accordingly, the EIS cannot be deemed an agency interpretation of the regulation to which NOAA is bound or to which the court must defer under the reasoning of Chevron U.S.A v. Natural Resources Defense Council, 467 U.S. 837 (1984). Accordingly, the omission of any reference in the EIS to activities identical to those that formed the basis for the appellants' liability is simply irrelevant to the scope of the regulation.

The appellants' suggestion that NOAA must prove "a significant threat to natural resources" to support a violation under 15 C.F.R. § 935.7(a)(2)(iii), App. Br. 10, defies the language of the regulation, which plainly extends to "alter[ation of] the seabed <u>in any way</u>" not covered by the narrow and specific exceptions. 15 C.F.R. § 935.7(a)(2)(iii)(emphasis supplied). The contention that this regulation could not have been intended "as a regulatory vehicle for the protection of archaeological and historical resources within the CINMS," App. Br. 9, is inconsistent with Congress' broad definition of "sanctuary resources" entitled to regulatory protection, which expressly includes not just natural resources but any "living or nonliving resource" with "historical, research, educational, or aesthetic value." 16 U.S.C. § 1432(8).

Appellants also err in relying on "well-settled principles of statutory construction" that "'general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words.'" App. Br. 12 (quoting Singer, 2a <u>Statutes and Statutory Construction</u> (Sands 4th ed. 1984 rev.)). Again, the undisputed findings of the ALJ -- that the appellants engaged in excavation at the dive sites that generated clouds of dust and debris -- make clear that the conduct that formed the basis for the penalties in this case was "similar in nature" to the specific activity described in the pertinent part of the regulation -- dredging. Moreover, as the district court correctly observed, the challenged CINMS regulation is not merely

a general prohibition preceded by specific illustrative terms. Instead, the regulation lists two specific exceptions to the prohibition on "alter[ing] the seabed in any way." As the district court reasoned, the regulation unequivocally provides that "if a party's actions do not fall within these explicit exceptions," then the general and categorical prohibition applies. App. 10. The cited canon therefore is irrelevant in construing the scope of the regulation.

D. The challenged CINMS regulation cannot be deemed vague as applied.

This Circuit recently reaffirmed the principle that one has "standing to raise a vagueness challenge only if the [regulation] is vague as applied to his or her specific conduct." United States v. Dischner, 974 F.2d 1502, 1510 (9th Cir. 1992), cert. denied 113 S. Ct. 1290 (1993). As an initial matter, both the prohibition on removal of historic artifacts, 15 C.F.R. § 935.7(a)(5), and the general liability provisions for damage or injury to sanctuary resources, 16 U.S.C. § 1443, provided appellants ample warning of the potential unlawfulness of their activities in the highly regulated realm of a national marine sanctuary. Cf. Lee, 937 F.2d at 1395 (awareness of violation mitigates vagueness concerns).

Any remaining argument that the prohibition is vague as applied to Craft, Ferguson, and Wilson must be rejected as disingenuous in light of the undisputed facts in this case. Appellants assert that this regulation failed to provide them fair notice that their conduct might be prohibited, but have not

challenged the uncontested finding that Ferguson and repeatedly reminded himself and warned the others of the risk of prosecution. App. 22. These findings make clear that, in fact, all on board the VISION had fair warning of the CINMS regulations. Indeed, Ferguson even promised to sound an alarm for the divers in the event the VISION was approached by sanctuary enforcement officials. App. 18. This is not a case in which those subject to a regulation were caught unawares, but one in which the appellants' entire course of conduct was calculated to evade enforcement of known regulations. In the words of the ALJ, the appellants "proceeded to do the very acts they knew were prohibited." App. 22. Under these circumstances, it is especially appropriate that "one who goes so perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952).

The appellants' assertion that the regulation is vague as applied to their conduct is not bolstered by their attempt to discount the significance of the impacts of their activities on the seabed, and supporting suggestion that the regulation should be construed to include a de minimis exception. App. Br. 12-13. As discussed previously, the language of the prohibition and the narrowness and specificity of its express provisions preclude such a construction.

Moreover, even if extremely minor impacts were beyond the scope of the regulation, this is not a case of minor impacts.

The appellants' suggestion that their activities yielded only "a barely perceptible (if any) impact" on the seabed is simply fanciful in light of the record in this case and their failure to challenge that record before the district court or on appeal. The ALJ found that the appellants had "excavated" the wreck sites in the sanctuary, such that rangers could identify the damaged sites days after the violations. App. 26. Appellant Craft was found to have "repeatedly hammer[ed] at an area at an area" of the seabed in the protected area, "causing rocks to crumble" and stirring "a sediment cloud in the water." App. 36. Appellant Ferguson was found to have declared that one protected site "was beginning to look like a 'minefield' because of the divers' activities." App. 40. Appellant Wilson also was found to have used a "hammer to hit repeatedly at objects" on the seabed, and was found to have excavated the seabed to the point that he had "stirred up a large cloud of debris," App. 44, and had "thr[own] rocks approximately up to the size of a softball away from the area he was working" to excavate the area. App. 46. Whatever threshold level of damage might be required to render the CINMS regulation imposing liability on those who "alter the seabed in any way," that level was reached and exceeded in this case.

E. The pending challenge to 15 C.F.R. § 935.7(a)(2)(iii) provides no basis for disturbing violations under other sections of the regulation.

This appeal is presented and captioned as one that challenges all of the violations that were before the district court. However, only appellants Craft, Ferguson, and Wilson

received civil penalty assessments based on 15 C.F.R. § 935.7(a)(2)(iii); other assessments were based on 15 C.F.R. § 935.7(a)(5), which has not been challenged before this Court. Accordingly, appellants have presented no basis on which disturb the ALJ's findings of violations and imposition of civil penalties based on 15 C.F.R. § 935.7(a)(5). See note 1, above.

In assessing a $100,000 penalty against Appellant Ferguson, moreover, the ALJ made clear that he was imposing the statutory maximum, which was then $50,000, for two separate violations of 15 C.F.R. § 935.7(a)(5) and 15 C.F.R. § 935.7(a)(2)(iii). Because this appeal is limited to a challenge to 15 C.F.R. § 935.7(a)(2)(iii), there is no basis on which to disturb the assessment of $50,000 in civil penalties attributable to Ferguson's violations of 15 C.F.R. § 935.7(a)(5), particularly in light of what the ALJ concluded was "gross" misconduct. App. 48.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

October 12, 1993

Respectfully submitted,

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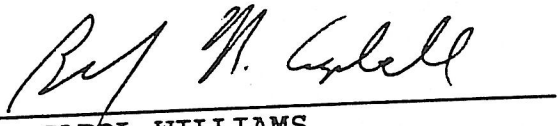
By: 

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CERTIFICATE OF SERVICE

I, Bradley M. Campbell, hereby certify that on this 7 th day of October, 1993, I caused a copy of the Brief for the United States to be served by first-class mail, postage prepaid, on the following:

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