Pace Environmental Law Review

Volume 26
Issue 2 *Summer 2009*
40 Years and Counting Relicensing the First Generation of Nuclear Power Plants

Article 16

June 2009

Best Brief: The United States of America

Gabrielle Janssens
University of California, Davis School of Law

Michael Minkler
University of California, Davis School of Law

Monica Bauman
University of California, Davis School of Law

TWENTY-FIRST ANNUAL PACE UNIVERSITY LAW SCHOOL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Best Brief*

THE UNITED STATES OF AMERICA

UNIVERSITY OF CALIFORNIA-DAVIS SCHOOL OF LAW
GABRIELLE JANSSENS, MICHAEL MINKLER, AND MONICA BAUMANN

Civ. App. No. 08-1001
IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

GALLEON ENTERPRISES INC.,
Plaintiff-Appellant,
v.
THE UNIDENTIFIED SHIPWRECKED VESSEL, if any, its apparel, appurtenances, and cargo located within a five-mile radius of the GOLD COAST NATIONAL MARINE SANCTUARY, coordinates provided to the Court under seal,
Defendant *in rem*,
and
THE KINGDOM OF SPAIN,
Claimant-Appellee,
and
UNITED STATES OF AMERICA,
Intervenor-Appellee.

Brief for The UNITED STATES OF AMERICA,
Intervenor-Appellee

---

* This brief has been reprinted in its original format. Please note that the Table of Authorities and the Table of Contents for this brief have been omitted.

JURISDICTIONAL STATEMENT

It is the position of the United States of America that the U.S. Court of Appeals has jurisdiction over all claims presented in this appeal. Galleon, Inc., properly initiated this action *in rem* for title or salvage rights to the Unidentified Shipwrecked Vessel under the federal court's admiralty jurisdiction. U.S. CONST. art. III, § 2. The United States intervened to make claims against Galleon under four federal statutes: the National Marine Sanctuary Act, 16 U.S.C. §§ 1431-1445(a) (2006); the Endangered Species Act, 16 U.S.C. §§ 1531–1599 (2006); the River and Harbors Act, 33 U.S.C. §§ 401-430 (2006); and the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006). Federal courts have jurisdiction over all cases arising from federal statutes. 28 U.S.C. § 1331 (2006).

STATEMENT OF THE ISSUES

I. Whether the SMCA applies to the sunken vessel referred to as *La Contesta*.

II. Whether the sunken vessel is subject to sovereign immunity and whether Spain's consent is necessary for salvage.

III. Whether a research/recovery permit authorized under NMSA is required for salvage of the sunken vessel and extends to the cargo outside of the GCNMS.

IV. Whether NOAA acted permissibly under the APA in denying Galleon's research/recovery permit for salvage within the GCNMS.

V. Whether the Secretary of Commerce acted permissibly under the APA in denying Galleon an ESA incidental take permit to drill through endangered deep sea coral.

VI. Whether COE and NPDES permits are required for Galleon's salvage activities.

STATEMENT OF THE CASE

Galleon Enterprises, Inc. ("Galleon") brought the original suit in the United States District Court for the District of New Union to gain title to, or in the alternative, a salvage award for, salvage activities conducted on an unidentified shipwreck off the coast of New Union. (R. at 3.) The Kingdom of Spain ("Spain") intervened, alleging that the shipwreck is the remains of a Spanish frigate called Nuestra Señora La Contesta de Aragon

("*La Contesta*"). (R. at 4.) Spain claims *La Contesta* is a warship listed on its official navy register and is the inalienable property of Spain. *Id*.

The United States also intervened with claims that Galleon violated the National Marine Sanctuary Act ("NMSA"), the Endangered Species Act ("ESA"), the River and Harbors Act ("RHA"), and the Clean Water Act ("CWA"). (R. at 4.) The U.S. claims that because the wreck lies within the Gulf Coast National Marine Sanctuary ("GCNMS"), Galleon was required to obtain permits from the National Oceanic and Atmospheric Administration ("NOAA") for research/recovery. *Id*. In addition, Galleon was required to obtain a permit from the Secretary of Commerce ("Secretary") for incidental take of deep sea coral. *Id.* It was also required to obtain permits from the U.S. Army Corp of Engineers ("COE") and the U.S. Environmental Protection Agency ("EPA") for the construction of a drilling platform and discharge of a pollutant from a point source within navigable waters.

This is an appeal from an order of the United States District Court for the District of New Union. Galleon appeals the District Court's ruling on the laws of find and salvage within the GCNMS boundaries. Galleon also appeals the COE and EPA permits, the Secretary's denial of an ESA take permit, and NOAA's authority under NMSA, or in the alternative the denial of a research/recovery permit. (R. at 1.) Spain appeals the District Court's ruling on the Sunken Military Craft Act ("SMCA") and the law of salvage regarding the artifacts in the wreck. (R. at 1-2.) The United States appeals the District Court's ruling regarding NOAA's authority to require a permit for the artifacts found outside the GCNMS and with the court's application of the SMCA. (R. at 2.)

STATEMENT OF RELEVANT FACTS

In April 2008, Galleon discovered several artifacts 600 feet underwater and 24 nautical miles from the coast of New Union. (R. at 1, 5.) The artifacts lie partially within the boundaries of the GCNMS. *Id.* Spain asserts that the shipwreck is *La Contesta*, a frigate that sailed as part of a fleet of military ships belonging to the Royal Spanish Navy. The historical record shows that the frigate escorted a fleet of twenty Spanish merchant galleons on their way to Peru. (R. at 5.) On the return journey, *La Contesta* was carrying mail, private passengers, and a consignment of merchant goods. *Id*. As the returning ships passed by the coast of present day New Union, a hurricane hit the fleet. *Id*. Almost half of the ships, including *La Contesta*, perished in this storm. *Id*.

The historical record shows that the current day resting site of *La Contesta* is within the GCNMS. (R. at 5.) The Secretary created the GCNMS pursuant to the NMSA. The NMSA authorizes the U.S. Department of Commerce to develop a management plan for submerged lands and resources and to designate such locations as national marine sanctuaries. *Id.* GCNMS includes marine waters surrounding the coast of New Union out to twenty-four nautical miles from shore. *Id.* The sanctuary was specifically created to protect natural and historical resources. *Id.*

After discovering the location of the shipwreck, Galleon applied for a permit from NOAA to excavate the vessel and its cargo. (R. at 6.) NOAA denied the research/recovery permit. *Id.* NOAA concluded from the information it received from Galleon that the artifacts Galleon discovered were the remains of *La Contesta* and that Galleon needed permission from Spain to conduct salvage activities. *Id.* Spain refused Galleon's request to salvage. *Id.*

Galleon began salvage operations despite the permit denial. (R. at 6.) In the process, it built a drilling platform without a permit from COE and discharged pollutants through the mailbox technique without a CWA permit. *Id.* During the salvage operations, Galleon harmed or destroyed Johnson seagrass and deep sea coral, which are threatened and endangered species under the ESA, respectively. (R. at 13.) On June 25, 2008, the District Court issued a warrant for the arrest of the sunken frigate and its cargo. (R. at 6.)

SUMMARY OF THE ARGUMENT

The SMCA applies to the shipwreck in question, thus the law of finds and salvage is not applicable. The shipwreck is also subject to sovereign immunity. A research/recovery permit is required for the entire shipwreck, both within and outside of the GCNMS, and NOAA acted reasonably in denying Galleon's request for a research/recovery permit within the GCNMS. ESA, RHA, and CWA permits were all mandatory for Galleon's salvage activities, and NOAA acted permissibly in denying Galleon an ESA incidental take permit.

1. Sunken Military Craft Act: The SMCA applies in this case because the Spanish vessel *La Contesta* sank in modern day U.S. waters while on military noncommercial service for Spain. Under the SMCA, the shipwreck should not be disturbed without the appropriate permit. Sunken Military Craft Act, Pub. L. No. 108-375, title XIV, § 1402, 118

Stat. 1811. The lower court erred in holding that *La Contesta* was a commercial vessel at the time it sank. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 609 (1992). *La Contesta* falls under the definition of a "warship," therefore, the SMCA applies. United Nations Convention of the Law of the Sea art. 29, Dec. 10, 1982, 1833 U.N.T.S. 397.

2. Sovereign Immunity: Under the Foreign Sovereign Immunities Act ("FSIA"), this shipwreck is subject to sovereign immunity. 28 U.S.C. § 1604 (2006). Based on the evidence, Spain has met the burden of establishing ownership over the shipwreck in question. *California v. Deep Sea Research*, 523 U.S. 491, 500 (1998). Under salvage law, it is the right of the owner of the vessel to refuse salvage services; therefore Galleon cannot proceed without the consent of Spain. *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000).

3. National Marine Sanctuary Act: A research and recovery permit is required prior to conducting salvage activities on a sunken shipwreck in the GCNMS. 15 C.F.R. § 922.166(c) (2007). NOAA has regulatory authority over the resources of the GCNMS. The Property Clause of the U.S. Constitution grants NOAA the authority to protect the resources of the GCNMS. U.S. CONST. art. IV, § 3, cl. 2. This authority extends to the entire shipwreck and its cargo, within and outside of the GCNMS, because these resources are threatened by Galleon's activity. *United States. v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979). In addition, NOAA acted reasonably in interpreting the NMSA to require permission from a foreign sovereign for salvage of a shipwreck subject to sovereign immunity. *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32-33 (1981). Finally, NOAA's decision to deny the research/recovery permit was reasonable based on Galleon's failure to obtain the consent of Spain. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

4. Endangered Species Act: The denial of the ESA permit was not arbitrary, capricious, or contrary to law under the Administrative Procedures Act ("APA"). 5 U.S.C. § 706 (2006). This Court should give full deference to denial of the permit because the Secretary may deny an incidental take permit based on the harm to the species. 50 C.F.R. § 17.22 (2007). The Secretary may deny the permit if she finds that the take is not incidental. 50 C.F.R. § 17.22(b)(2)(A) (2007). Additionally, the Secretary may deny the permit if she finds the harm to the species will reduce its likelihood to survive and recover in the wild.

50 C.F.R. § 17.22(b)(2)(D) (2007). In this case the take was not incidental, and the species' ability to survive in the wild would be reduced, therefore the Secretary acted reasonably in denying the permit. *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 175, 184 & n. 29 (1978).

5. The Rivers and Harbors Act: Under the RHA, COE permit is necessary for construction of any structure within the rivers, the harbors, or the contiguous zone of the United States. 33 U.S.C. § 403 (2006). Congress clearly intended the COE to have broad regulatory authority over all types of structures on the outer continental shelf, regardless of the purpose or the type of the structure. *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 105, 110 (1st Cir. 2005). Galleon failed to obtain an RHA permit before constructing a drilling platform within the contiguous zone of the U.S. (R. at 11.) The District Court ruling that an RHA permit was required should be affirmed and an injunction should issue ordering Galleon to remove the structure.

6. The Clean Water Act: A National Pollution Discharge Elimination System ("NPDES") permit is required for the discharge of any pollutant from a point source to the waters of the United States. 33 U.S.C. § 1342(a) (2006). The definition of "discharge" includes "addition" of a pollutant. 40 C.F.R. § 122.2(a) (2007). The word "addition" "may reasonably be understood to include 'redeposit.'" *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (4th Cir. 1983). As the lower court held, the mailbox technique employed by Galleon redeposits pollutants on the sea floor and is therefore a the discharge of a pollutant into the waters of the United States without an NPDES permit. Galleon should be enjoined from continuing this activity.

ARGUMENT

I. THE SUNKEN MILITARY CRAFT ACT APPLIES TO THE WRECK REFERRED TO AS *LA CONTESTA* BECAUSE IT IS A MILITARY VESSEL

The District Court erred in holding that the wreck referred to as *La Contesta* is not a military vessel, and thus not subject to the SMCA. The SMCA applies to the military vessels of both the United States and foreign sovereigns. The facts in the record indicate that *La Contesta* is a military vessel and thus this Court should find that the SMCA applies to the sunken frigate in question. Therefore, the laws of find and salvage do not apply.

The SMCA prohibits any activity that disturbs, removes, injures, or attempts to disturb, remove, or injure any sunken military vessel. Pub. L. No. 108-375, title XIV, § 1402, 118 Stat 1811. Such activities may be authorized by issuance of a permit under the SMCA. *Id.* In its attempted salvage activities, Galleon disturbed, removed, or injured *La Contesta* without a permit in violation of the SMCA. (R. at 6.)

The SMCA defines the term "sunken military craft" as "any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank." Pub. L. No. 108-375, § S1408(3)(A). To determine whether *La Contesta* is a sunken military vessel, the court must (1) determine whether it is a warship and (2) whether it was on noncommercial service when it sank. The SMCA does not provide definitions for all of the terms used. It does, however, state in section 1406(b) that the SMCA "shall be applied in accordance with generally recognized principles of international law and in accordance with the treaties, conventions, and other agreements to which the United States is a party." Accordingly, since the SMCA does not provide definitions for warship or commercial service, it is appropriate to turn to consistent authority in other statutes and treaties. *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1377 (Fed. Cir. 2002).

The definition of "warship" in the United Nations Convention of the Law of the Sea supports the finding that *La Contesta* is a military vessel. The Convention defines a "warship" as:

> [A] ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list . . . and manned by a crew which is under regular armed forces discipline.

United Nations Convention of the Law of the Sea art. 29, Dec. 10, 1982, 1833 U.N.T.S. 397. *La Contesta* was under the command of the Spanish government and was listed in the registry of the Royal Spanish Navy when it sank. (R. at 4.) Spain also believes *La Contesta* is the gravesite of military men, meaning the frigate was manned by a crew under armed forces discipline. *Id.* Under this definition, *La Contesta* is a warship.

This Court should turn to the FSIA as persuasive authority because the SMCA does not provide a definition for commercial activity. *See* 28 U.S.C. §§ 1602-1611 (2006). The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d) (2006). This determination is

made through "reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* The Supreme Court found that when determining whether an activity is commercial, "the issue is whether the government's particular actions . . . are the *type* of actions by which a private party engages in commerce." *Weltover*, 504 U.S. at 607 (emphasis in original).

Applying this definition to the facts here, this Court should find that *La Contesta* was not engaged in the "types" of actions which a private person would do in commerce. Under common understanding and natural language, commercial ships do not carry military personnel or weapons. *La Contesta* began its journey by serving as a military escort to a commercial ship. (R. at 5.) Spain asserts that there were military personnel on the return voyage. (R. at 4.) Furthermore, *La Contesta* is listed on the Royal Spanish Navy registry, indicating it was a military vessel. *Id*.

Even though *La Contesta* carried private persons and cargo, it was still on its military mission when it embarked on its return voyage to Spain. The Supreme Court in *Weltover* emphasized it was the "nature," not the "purpose" that mattered in determining whether an activity is commercial. *Weltover*, 504 U.S. at 607. The *nature* of *La Contesta*'s voyage was military. *La Contesta* was a frigate on assignment to protect a commercial fleet. (R. at 5.) The *purpose* of its trip from Peru to Spain was to return home and transport mail, private persons, and personal cargo. *Id*. The nature of *La Contesta*'s return voyage was therefore still inherently military.

Under the FSIA definition, *La Contesta* was not engaged in a commercial activity when it sank. It is thus a sunken military craft and falls under the SMCA. This Court should find that the nature of its trip was military because *La Contesta* was a frigate on the homeward bound leg of a military journey. Since the SMCA applies, the law of finds and the law of salvage are not applicable to *La Contesta*. Pub. L. No. 108-375, §§ 1406(c)-(d).

When ruling on the SMCA issue, this court should consider the impacts to the United States' international policy implication. It is important to respect amicable diplomatic relations between sovereign nations. In 2004, the President issued a public notice stating the policy of the United States on sunken government vessels of both the United States and foreign nations. Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property, 69 Fed. Reg. 5,647 (Feb. 5, 2004). "The United States will use its authority to protect and preserve sunken craft of the United States and other nations." *Id*. In this public notice,

Spain stated it did not abandon or relinquish ownership over sunken military vessels or their contents. *Id*. Spain also "present[ed] its compliments" to the Department of State for honoring Spanish laws and policy regarding the remains of their sunken ships. *Id*. It is in the United States' interest to maintain this amicable relationship with Spain to ensure the United States receives reciprocal treatment of its sunken vessels in foreign waters.

This court should apply the SMCA to *La Contesta.* Under the definitions of commercial and warship, *La Contesta* is a military vessel that sank while on a noncommercial voyage. Since the SMCA applies, *La Contesta* is not subject to the laws of find and salvage.

II. SPAIN HAS ESTABLISHED OWNERSHIP OVER THE SUNKEN VESSEL, THEREFORE SOVEREIGN IMMUNITY APPLIES AND SALVAGE ACTIVITIES REQUIRE SPAIN'S CONSENT

If the shipwreck in question is *La Contesta*, then the SMCA applies as established in the preceding section of this brief. However, if the court finds that the shipwreck is not *La Contesta*, but instead is a commercial Spanish vessel, then the question becomes whether or not Spain is entitled to claim sovereign immunity, and if so, whether Galleon must obtain Spain's consent before conducting salvage operations. Spain has presented sufficient evidence to establish that the sunken shipwreck is a Spanish vessel. It is the position of the United States that Spain is entitled to sovereign immunity, whether or not this shipwreck is *La Contesta*, and consent is required prior to conducting salvage activities.

The facts of the present case are similar to the facts of *Sea Hunt*. 221 F.3d 634. In *Sea Hunt*, a salvage company discovered two sunken Spanish military ships off the coast of Virginia. *Id.* at 638. The State of Virginia asserted ownership over the ships under the Abandoned Shipwreck Act, which gives states title to shipwrecks abandoned and embedded in the submerged lands of the state. *Id*. Spain intervened in Sea Hunt's *in rem* admiralty action, asserting that the ships were not abandoned and Spain was still the owner. *Id.* The Fourth circuit agreed with Spain, finding that Spain was the owner of the shipwrecks. *Id*. at 646. The court also held that under the law of salvage, it is the right of the owner of any vessel to refuse unwanted salvage. *Id*. at 648 n. 2. In *Sea Hunt*, the court properly held that Spain had not abandoned the vessels, that title remained with the sovereign, and that consent was required prior to salvage operations.

The *Sea Hunt* case pre-dates the SMCA, otherwise it is likely that the SMCA would apply in that scenario, as it should apply to the present case.

Additionally, Spain did not assert a claim of sovereign immunity in *Sea Hunt*. However, the court relied on express agreements between Spain and the United States requiring "that in our territorial waters, Spanish ships are to be accorded the same immunity as United States ships." *Sea Hunt*, 221 F.3d at 643. This Court should respect this treaty obligation and afford Spanish ships broad protection under the doctrine of sovereign immunity.

Spain contends that because this is a Spanish shipwreck, and they have not abandoned it, sovereign immunity applies and Galleon needs Spain's consent before conducting any salvage operations. The line between cases where sovereign immunity applies and cases where it does not is not clear. Historically, courts often deferred to the political branches of government for expressions of whether or not sovereign immunity should apply. *See Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). While the State Department generally adopted a restrictive approach to sovereign immunity, the process was subject to political pressure instead of the rule of law. "The situation whereby courts would defer to executive determinations of sovereign immunity claims frequently led to results which were inconsistent with the restrictive theory of sovereign immunity." *Jet Line Serv., Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1169 (D. Md. 1978).

Congress acted to take politics out of the sovereign immunity doctrine when it passed the FSIA in 1976. 28 U.S.C. §§ 1602-1611. The FSIA takes the reliance on the political branches of government out of the determination of sovereign immunity by granting a blanket immunity subject only to specific exceptions. 28 U.S.C. § 1604. The specific exceptions are enumerated in the act, however none are relevant to the present case. 28 U.S.C. §§ 1605-1607 (2006). Therefore, if Spain is the owner of the shipwreck discovered by Galleon, then it is entitled to sovereign immunity.

Spain must also establish that it is the owner of the vessel. NOAA agreed with Spain that this is a Spanish shipwreck when it denied Galleon's research and recovery permit on the grounds that Spain's consent was required before Galleon could continue its salvage operations. (R. at 6.) The Supreme Court has not determined what standard of proof a sovereign must meet in order to establish ownership. However, the Supreme Court noted disagreement between several circuit courts. *Deep Sea Research*, 523 U.S. at 500. The Ninth Circuit adopted a preponderance of the evidence test, while two other circuits, the Seventh and the First, have held that a sovereign need only make a bare assertion to ownership. *Id.* (*citing Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665, 670 (7th Cir. 1992)); *Maritime Underwater Surveys, Inc. v. Unidentified Wrecked and*

Abandoned Sailing Vessel, 717 F.2d 6, 8 (1st Cir. 1983). Even if this court were to adopt the Ninth Circuit's higher standard of proof, Spain has still established ownership of the shipwreck.

The record shows that all of the historic evidence and all of the artifacts that have been recovered support Spain's claim that this is a Spanish shipwreck. R. at 12. Furthermore, even the evidence that Galleon presented to NOAA "strongly suggests that the only ships that sank within the GCNMS within historic times were Spanish vessels that sailed in the mid 1730's from Peru to Spain." *Id*. Based on this evidence, the United States concludes that this is a Spanish shipwreck subject to sovereign immunity. As such, Galleon must have consent from Spain before it can proceed with salvage operations. Spain has established that the unidentified shipwreck in this case is a Spanish vessel; that sovereign immunity applies, and that Galleon must have Spain's consent prior to conducting salvage operations.

III. GALLEON'S ACTIVITIES REQUIRE A RESEARCH / RECOVERY PERMIT, AND NOAA ACTED IN ACCORDANCE WITH LAW BY DENYING THE PERMIT

Galleon's method of salvaging the sunken frigate caused harm to the historic and archaeological value of the shipwreck and violated GCNMS regulations. A research/recovery permit was therefore necessary for the salvage of any portion of the wreck. In addition, NOAA acted permissibly in denying the permit because Galleon needed Spain's permission to salvage the frigate. This Court should therefore reverse the District Court's ruling that NOAA's jurisdiction does not extend to the entire wreck. This court should affirm the District Court's ruling on jurisdiction within the GCNMS and NOAA's decision in denying the permit.

A. Galleon's excavation methods violated GCNMS regulations and therefore required authorization through a permit

The NMSA authorizes conservation and regulation of marine sanctuaries. 16 U.S.C. §§ 1431-1445(a). Congress found that some areas of the marine environment posses historical, cultural, archaeological, and environmental qualities which "give them special national, and in some cases international, significance." 16 U.S.C. § 1431(a)(1) (2006). The Secretary of Commerce is authorized to issue regulations in order to carry out the Act. 16 U.S.C. § 1439 (2006).

Under the NMSA, a number of activities are prohibited within marine sanctuaries. The Act states that it is unlawful to "destroy, cause the loss of, or injure any sanctuary resource." 16 U.S.C. § 1436(1) (2006). A "sanctuary resource" is any living or nonliving resource that contributes to the ecological, historical, educational, cultural, or archeological value of the sanctuary." 16 U.S.C. § 1432(8) (2006). The Secretary is also authorized to promulgate regulations which specify the sanctuary resources for each different sanctuary. 16 U.S.C. §§ 1434, 1439 (2006).

The Secretary established the GCNMS pursuant to the NMSA off the coast of New Union. (R. at 5.) The GCNMS is governed by the regulations and management plan for the Florida Keys National Marine Sanctuary ("FKNMS"). The purpose of the sanctuary is to protect natural and cultural resources such as seagrasses, corals, and shipwrecks. (R. at 5.) The sunken frigate therefore falls within the definition of a sanctuary resource. *See* 16 U.S.C. § 1432(8).

The Secretary may issue permits which authorize activities that are otherwise prohibited. 16 U.S.C. § 1441 (2006). Specifically, the Secretary may issue a Research/Recovery of Sanctuary Historic Resources permit. 15 C.F.R. § 922.166(c). Research and recovery permits must meet all of the conditions of General Permits, as well as requirements specific to research and recovery activities associated with historic resources. 15 C.F.R. § 922.166 (2007).

Galleon's salvage activities are prohibited by sanctuary regulations, therefore Galleon was required to obtain a permit to excavate the frigate. The sanctuary regulations prohibit moving, removing, or possessing sanctuary historical resources. 15 C.F.R. § 922.163(a)(9) (2007). Excavation of the frigate's cargo is therefore prohibited. (*See* R. at 5.) The sanctuary regulations also prohibit any injury to coral and operating a vessel in a way that injures seagrass. 15 C.F.R. §§ 922.163(a)(2) & (5) (2007). The mailbox and drilling methods of excavation are therefore prohibited. (*See* R. at 5.) Finally, the regulations prohibit altering the seabed, including drilling and prop dredging. 15 C.F.R. § 922.163(a)(3) (2007). Again, this prohibits the mailbox and drilling methods of excavation. (*See* R. at 5.) This Court should therefore affirm the District Court's ruling that a research/recovery permit was necessary for excavation of the sunken frigate because the sanctuary regulations prohibit several of Galleon's salvage activities.

B. A research/recovery permit is necessary for any portion of the sunken frigate because NOAA has authority to protect federal property from harm under the Property Clause

This Court should find that a research/recovery permit is necessary for excavation of the frigate and its cargo, regardless of whether the individual pieces of the wreck are found in or out of the sanctuary. The District Court found that NOAA did not have jurisdiction over the wreck outside of the GCNMS because it imposed too great of a burden on Galleon. (R. at 12-13.) The District Court erred by failing to consider the harm to the historical and archaeological value of the shipwreck. Partial excavation of the frigate would harm it as a sanctuary resource, and therefore NOAA has jurisdiction to extend its permitting power outside of GCNMS under the Property Clause of the U.S. Constitution. U.S. CONST. art. IV, § 3, cl. 2.

NOAA has jurisdiction over the portions of the sunken frigate outside of the GCNMS because the Property Clause grants Congress broad power to regulate in order to protect federal property and navigable waters. *Lindsey*, 595 F.2d at 6. The Constitution grants Congress the power to "make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. The Supreme Court held that under the Property Clause, federal power is broad enough "to reach beyond the territorial limits of its property." *Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976). This grant of power extends to conduct on or off public land. *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981). The issue is not where the activity occurs, rather if there is a nexus between the regulation and protection of federal property. *United States v. Alford*, 274 U.S. 264, 267 (1926); *Grand Lake Estates Homeowners Ass'n v. Veneman*, 340 F. Supp. 2d 1162, 1167-68 (D. Colo. 2004).

In *Grand Lake Estates*, the court held that the U.S. Forest Service could require special use permits for a marina and boat dock built on private land connected to a reservoir located within the Arapahaoe National Recreation Area. *Id.* at 1167-68, 1169. The court found that the Forest Service had the regulatory authority under the Property Clause to require the permit because the Forest Service is authorized by Congress to protect National Forest System lands. *Id.* at 1166. In addition, the court found that there was a connection between the offsite activity the Forest Service sought to permit and harm to federal property. *Id.* at 1168. The Forest Service found that the marina and docks would endanger the water quality of the reservoir on federal property. *Id.* The special use permits therefore

directly addressed the needs of the reservoir and were reasonably related to protecting the federal land. *Id.* at 1167-68.

Here, Congress delegated the authority of the Property Clause to NOAA. The NMSA grants NOAA the statutory authority to protect the GCNMS and its sanctuary resources. 16 U.S.C. §§ 1431-1445(a). Specifically, the GCNMS was established to protect shipwrecks and other sanctuary resources. R. at 6; 16 U.S.C. § 1436(1). NOAA therefore has the statutory and regulatory authority to extend the research/recovery permit to the portions of the sunken frigate and its cargo outside of the GCNMS. *See Grand Lake Estates*, 340 F. Supp. 2d at 1167-68.

In addition, there is a sufficient nexus between the regulation and the protection of federal resources to extend the research/recovery permit to the entire sunken frigate. The GCNMS regulations protect the historical, cultural and archaeological value of the site of the sunken frigate. 15 C.F.R. § 922.166. The value of the wreck cannot be maintained, however, if the site as a whole is not protected. Contextual information received from the items found in a shipwreck allows archaeologists to make inferences about the past. *United States v. Fisher*, 977 F. Supp. 1193, 1198 (S.D. Fla. 1997). Partial excavation of the sunken frigate will damage contextual information, which is the relationship between a site and the artifacts. *Id*. It will therefore lead to the loss of important information about the wreck and will therefore harm the sanctuary resource. This Court should therefore reverse the District Court's decision and extend the protection of the research/recovery permit to the entire sunken frigate.

C. This Court should find that NOAA interpreted the NMSA permissibly and denied Galleon's application for a permit based on the relevant factors

The NMSA is ambiguous as to which factors NOAA should consider when judging any kind of special use permit, including research/recovery permits. Therefore, NOAA therefore interpreted the NMSA to require that before NOAA grants a research/recovery permit for the excavation of a sunken ship, the applicant must show it has title to the ship or a right to salvage. NOAA denied Galleon's application for a permit because Galleon was unable to obtain Spain's approval for this salvage. It was reasonable for NOAA to require Spain's permission because all of the information Galleon provided to NOAA indicated the ship was subject to sovereign immunity. This Court should therefore uphold the District Court's ruling that NOAA acted permissibly in denying Galleon a research/recovery permit.

1. NOAA acted within its statutory authority in interpreting ambiguities in the NMSA to require salvors to obtain the permission of foreign sovereigns before excavation of shipwrecks

The decision to deny Galleon's application for a research/recovery permit was proper because NOAA reasonably interpreted its own authority to require denial of a permit to salvage ships subject to sovereign immunity. Judicial review of an agency's interpretation of a statute it administers is two-pronged. *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984). The reviewing court first asks if Congress has directly spoken to the precise issue at hand. *Id.* If Congress's intent is clear, then the court and the agency are both required to follow that intent. *Id.* If Congress has not directly addressed the issue, then the inquiry is whether the agencies' interpretation of the statute is permissible. *Id.* The court will give the agency's regulations controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id*. at 844.

Here, the NMSA is ambiguous on what factors NOAA should consider in judging an application for a research/recovery permit. The statute authorizing the Secretary to issue "special use permits" requires activities under the permit to be conducted in a manner that is consistent with sanctuary purposes and does not harm sanctuary resources. 16 U.S.C. § 1441(c) (2006). The Secretary may issue permits that authorize conduct otherwise prohibited within the sanctuary in order to regulate that conduct or to promote public use and education. 16 U.S.C. § 1441(a) (2006). The NMSA is ambiguous regarding what kind of conduct is prohibited within sanctuaries or what constitutes a sanctuary resource. 16 U.S.C. § 1434 (2006). Congress left these determinations, which inform special use permits, to be made on a case by case basis by NOAA. *Id.* Furthermore, each designated sanctuary must have a management plan to inform special use permit determinations. 16 U.S.C. § 1434(e) (2006). In order to administer congressionally authorized programs, agencies must necessarily formulate policy and rules to fill any gaps left by Congress. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). This is the kind of delegation of authority contemplated in *Chevron*. 467 U.S. at 843.

This Court should find NOAA's interpretation of its permitting authority to be permissible because it was a reasonable construction of a congressional mandate and it was permissible under the statute. In determining whether an agency's construction of a statute is permissible,

the court asks if it was reasonable. *Chevron*, 467 U.S. at 845. This is a deferential standard, even when courts disagree with the agency interpretation. *Fed. Election Comm'n*, 454 U.S. at 37. The agency's construction need not be the best one available, but will be judged on whether its reasoning was thorough, valid, and consistent. *Id.* at 37-39. In *Federal Election*, the Court held that the Federal Election Commission provided enough of a reasoned and consistent explanation for its prohibition against some kinds of election finance. *Id.* at 36. The Court found that the FEC had published consistent reports and sufficiently linked its interpretation to the purposes of its governing act. *Id.* at 36-38.

NOAA's regulations regarding permits in the GCNMS are reasonable because they are consistent and reflect the purposes of the NMSA. The overarching congressional intent of the NMSA is to protect marine resources of special historical, cultural, or environmental value. 16 U.S.C. §§ 1431(a)(2), 1431(b)(1), 1432(8), 1433(a)(2)(A) (2006). The NMSA also requires that regulations promulgated under the Act accord with treaties, conventions, agreements to which the United States is a party, and generally recognized principles of international law. 16 U.S.C. § 1435(a) (2006). The purpose of the GCNMS in particular is to protect natural and cultural resources such as shipwrecks. (R. at 5.) The sanctuary is governed by the regulations and management plan for the FKNMS.

NOAA's decision to deny permits where sovereign immunity applies reflects these goals. The sanctuary regulations prohibit moving, removing, or possessing sanctuary historical resources. 15 C.F.R. § 922.163(a)(9) (2007). This is consistent with the NMSA's concern for the protection of these historical resources. 16 U.S.C. § 1431(a)(2) (2006). As discussed above, the Secretary may issue special use permits that allow activities otherwise prohibited. 16 U.S.C. § 1441. Specifically, the Secretary may issue a Research/Recovery of Sanctuary Historic Resources permit. 15 C.F.R. § 922.166(c). Research and recovery permits must conform with the Sunken Cultural Resources (SCR) Agreement. 15 C.F.R. § 922.166(c)(2)(ii) (2006). The SCR Agreement bars access to a sunken vessel subject to sovereign immunity without the permission of the foreign sovereign. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, PROGRAMMATIC AGREEMENT AMONG THE NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND THE STATE OF FLORIDA FOR HISTORICAL RESOURCE MANAGEMENT IN THE FLORIDA KEYS NATIONAL MARINE SANCTUARY (1998).

The decision to require permission of a sovereign is based on thorough, valid, and consistent reasoning. First, the NMSA seeks to honor

international law. The laws of sovereign immunity, salvage and find would fall under this category. If NOAA did not seek to ensure a salvager has title or permission to salvage a sunken vessel or its cargo, it would fail to consistently follow the NMSA. Second, one of the purposes of the GCNMS is the protection of shipwrecks. Granting permits for research / recovery of sunken cargo without clearing legal property issues would leave this sanctuary resource more vulnerable to harm. NOAA's interpretation of its permitting authority is therefore reasonable and deserves full discretion from this Court.

2. NOAA considered the relevant factors in denying Galleon's research/recovery permit and its decision should therefore receive full deference

NOAA properly applied the facts in the present case to the relevant factors in the NMSA in denying Galleon a research/recovery permit. Judicial review of agency action does not end after the court finds the agency permissibly interpreted its statutory authority. 5 U.S.C. § 706 (2)(A). The reviewing court must also find that the application of facts to law was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* The test is whether the agency considered the relevant factors and avoided a clear error of judgment. *Overton Park*, 401 U.S. at 416. While the reviewing court must make a searching and careful inquiry into the facts, this is ultimately a narrow standard of review. The court may not "substitute its judgment for that of the agency." *Id.*

Before beginning its subsequent salvage activities, Galleon applied to NOAA for a research and recovery permit for activity within the GCNMS. Based on the information provided by Galleon, NOAA determined that the vessel Galleon had discovered was a Spanish frigate. (R. at 12.) This information included the location of discovery and historical evidence. (R. at 5.) Galleon did not provide any documentation that other types of vessels sank near that location or that the discovered artifacts were from another country's vessel. (R. at 12.) Therefore, all of the information in the record indicated that the ship was a Spanish frigate.

NOAA's decision to deny the permit is permissible under the standard set by the Court in *Overton Park*. Based on the fact that Galleon failed to produce any information tending to show that the sunken frigate is not subject to sovereign immunity, NOAA acted reasonably in denying the permit. *Overton Park*, 401 U.S. at 416. The decision is based on the relevant factors because NOAA reasonably interpreted the NMSA to require permission of a foreign sovereign in order to salvage a vessel

subject to sovereign immunity. *Id.* An agency must base its decision on the facts before it, and in this case all of the facts establish that Galleon needed Spain's permission to salvage the sunken vessel. This Court should affirm the District Court's ruling that NOAA acted reasonably in denying Galleon the research/recovery permit.

IV. THE SECRETARY OF COMMERCE ACTED PROPERLY IN DENYING GALLEON'S APPLICATION FOR AN INCIDENTAL TAKE PERMIT BECAUSE THE PROPOSED SALVAGE ACTIVITY WOULD CAUSE SUBSTANTIAL HARM TO ENDANGERED DEEP SEA CORAL

This Court should find that the Secretary acted permissibly in denying the incidental take permit because the decision was reasonable and based on the relevant factors. Section 706 of the APA governs review of the Secretary's actions because the ESA contains no internal standard of review. 5 U.S.C. § 706; *Vill. of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir.1984). Therefore, the standard of review is deferential to the point that the court must presume the agency action is valid. *Sierra Club v. Marsh*, 976 F.2d 763, 769 (1st Cir. Me. 1992). The court will only overrule an agency decision that is too unreasonable in the context of the record for the law to allow it to stand. *Id.*

The ESA has two main functions: (1) it authorizes the identification of species that are threatened or endangered and, (2) it prohibits certain actions towards these species, including take of wildlife. 16 U.S.C. §§ 1531(b), 1533, 1538(a)(1)(B) (2006). "Take" includes harm that actually kills or injures a species. *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 696-700 (1995); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 873-874 (D. Ariz. 2003) (degradation of habit is a take if it actually harms or injures a species). Limited exceptions are allowed to the prohibition against take. *See* 16 U.S.C. §§ 1536(a)(2), 1539 (2006). For example, the Secretary may issue an incidental take permit to a private party allowing limited take of a species if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B) (2006).

This Court should give full deference to denial of the permit because the Secretary may deny an incidental take permit based on the harm to the species. First, the Secretary may deny the permit if she finds that the take is not incidental. 50 C.F.R. § 17.22(b)(2)(A) (2007). Second, the Secretary may deny the permit if she finds that the applicant will not minimize and mitigate the impacts of the harm to the species. 50 C.F.R. § 17.22(b)(2)(B)

(2007). Third, the Secretary may deny the permit if she finds the harm to the species will reduce its likelihood to survive and recover in the wild. 50 C.F.R. § 17.22(b)(2)(D) (2007).

The decision to deny Galleon's permit request was based on the relevant factors, specifically the harm to the deep sea coral. *See Overton Park*, 401 U.S. at 416. Galleon's salvage technique involved drilling through the endangered species to access the sunken frigate. (R. at 6.) The drilling activity caused injury by cutting through the endangered deep sea coral. *Id.* Direct injury to an endangered species and degradation of its habitat that causes injury are both considered takes. *San Carlos Apache*, 272 F. Supp. 2d at 873-874.

The Secretary's decision to deny Galleon an incidental take permit was also reasonable with regard to the purpose of the ESA. Congress's intent in enacting the ESA was to "halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth.*, 437 U.S. at 175, 184 & n. 29. The balance to be struck between competing interests is in favor of giving endangered species the highest priority. *Id.* at 194. The Court in *Tennessee Valley* described Congress's approach to be an adoption of a policy of "institutionalized caution" towards endangered species. *Id.* The Secretary's decision not to issue a permit that by definition allows harm to endangered species reflects the kind of caution the Court recognized as Congress's intent in passing the ESA.

Finally, this Court should defer to the Secretary's decision even though the District Court partially erred in its reasoning in coming to the same conclusion. The District Court found that the injury to the seagrass was a permissible reason for upholding the Secretary's decision. (R. at 13.) This reasoning was incorrect on two fronts. First, the Johnson seagrass is not listed as endangered. Threatened Status for Johnson's Seagrass, 63 Fed. Reg. 49035 (Oct. 14, 1998). Second, the prohibition on take does not apply to threatened or endangered plant species. 16 U.S.C. § 1538(a)(2) (2006). The Secretary issues Section 10 incidental take permits as an exception to the take prohibition; if an activity is not actually prohibited, an exception is not necessary. *See* 16 U.S.C. § 1539 (2006).

Despite these deficiencies in the District Court's opinion, though, the Secretary's action should receive full deference. The pertinent issue is whether the Secretary acted in an arbitrary and capricious manner contrary to law, not whether the District Court's opinion was correct. Denial of the permit was based on the harm to the endangered species. The decision was therefore permissible and reasonable.

V. GALLEON VIOLATED THE RIVERS AND HARBORS ACT BY CONSTRUCTING A DRILLING PLATFORM IN THE CONTIGUOUS ZONE OF THE UNITED STATES WITHOUT A PROPER PERMIT FROM THE ARMY CORPS OF ENGINEERS

Galleon violated the RHA by constructing a drilling platform without the required permit. Section 10 of the RHA prohibits the creation of any obstruction to the navigable capacity of the waters of the United States without the affirmative authorization of Congress. 33 U.S.C. § 403. In order to prevent obstructions to navigable waterways, and to protect the environmental integrity of the waters of the United States, Galleon should be prohibited from resuming salvage activities until it obtains the proper permits.

Congress delegated regulatory authority to enforce section 10 of the RHA to the COE, which must authorize the construction of any structure in waters within the jurisdiction of the RHA. 33 U.S.C. § 403. The Outer Continental Shelf Lands Act ("OCSLA") extended the regulatory authority of the COE to include the contiguous zone of the United States. 43 U.S.C. § 1333(e) (2006); *see also Nantucket Sound*, 398 F. 3d at 108. Thus, any structure constructed in the rivers, harbors, or the contiguous zone of the United States must first obtain a permit from the COE. *Id*. Galleon's drilling platform is no exception.

In *Nantucket Sound*, the First Circuit affirmed a broad interpretation of COE's authority to regulate any structure on the outer continental shelf. In that case, environmental organizations challenged the authority of the COE to approve the construction of a data tower off the coast of Massachusetts. *Nantucket Sound*, 398 F.3d at 108. The environmental organizations argued that the RHA only applied to structures constructed for the purpose of mineral extraction. *Id.* The court, in finding for the COE, held that congress clearly intended the COE to have broad regulatory authority over all types of structures on the outer continental shelf, regardless of the purpose or the type of the structure. *Id.* at 110. The *Nantucket Sound* court relied upon a section of the statute which states that the RHA:

> prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States . . . is unlawful unless the work has been recommended by the chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit.

Id.; *see also* 33 C.F.R. § 320.2(b) (2007). The court found that this regulation is consistent with the clear intent of Congress in enacting the RHA and the OCSLA." *Nantucket Sound*, 398 F.3d at 108.

In the present case, Galleon discovered valuable items on the sea floor within the contiguous zone of the United States. R. at 8. Galleon proceeded to construct a drilling platform for the purpose of drilling through deep-sea coral. R. at 6. Galleon did not obtain a permit from the COE prior to constructing the platform. As the COE must authorize all types of structures on the outer continental shelf, Galleon was required to obtain a permit from the COE before constructing a drilling platform. 33 C.F.R. § 320.2(b) (2007).

RHA Section 406 calls for an injunction to issue ordering the removal of any structures erected in violation of the RHA. 33 U.S.C. § 406 (2006). In this case such an injunction is warranted. This court should affirm the District Court's holding that Galleon violated the RHA when it constructed a drilling platform without a permit.

VI. GALLEON VIOLATED THE CWA BY DISCHARGING A POLLUTANT INTO THE WATERS OF THE UNITED STATES WITHOUT THE PROPER PERMIT

Galleon's salvage method resulted in the discharge of a pollutant into the waters of the United States. Under the CWA a permit is required prior to discharging pollutants from a point source. Thus the District Court was correct in holding that Galleon violated the CWA during its salvage operations.

The CWA states that the "discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2006). Section 402, subdivision (a), of the CWA established NPDES as a broad exception to the prohibition in section 301. 33 U.S.C. § 1342(a) (2006). An NPDES permit is required before the discharge of any pollutant into the waters of the United States. *Id.* As the District Court held, Galleon's activities amounted to the discharge of a pollutant into the waters of the United States without an NPDES permit.

In accordance with congressional intent, the EPA interprets "discharge of a pollutant" broadly. 40 C.F.R. § 122.2 (2007). Discharge of a pollutant includes "any addition of any 'pollutant' or combination of pollutants to the 'waters of the United States' from any 'point source.'" 40 C.F.R. § 122.2(a) (2007). The definition of "pollutant" includes dredge spoil, heat, rock, and sand, *inter alia*, all of which are relevant in the present case. 33 U.S.C. § 1362(14) (2006). The definition of "point source" is "any discernible,

confined and discrete conveyance" and specifically includes "any pipe." 33 U.S.C. § 1362(12) (2006).

The mailbox technique employed by Galleon consists of attaching large pipes to the rear of a vessel to deflect the vessel's propeller wash downward. R. at 6. The force of the prop wash can clear the floor of sediments and plants within seconds. *Id.* In another case involving treasure salvors, the court described the mailbox technique and the resulting destruction to a wide area of Johnson seagrass. *Fisher*, 977 F. Supp. at, 1196. The court described "mailboxes" as "large angular pipes" that fit over the propellers of a vessel, then turn straight down to deflect the thrust of the propellers. *Id.* The court stated, "mailboxes are powerful devices that can displace five feet of hard-packed mud in thirty-five feet of water. They also can excavate up to twenty-five feet of sand from the ocean bottom. They can make a hole in the sand thirty feet across and three to four feet deep in 15 seconds." *Id.*

While the CWA was not at issue in *Fisher*, the description of the mailbox technique is instructive in determining that there was a discharge of a pollutant from a point source in the present case. Section 301 of the CWA requires the discharge to have come from a point source. Galleon's discharge came from a pipe that was attached to a vessel. As previously stated, a "pipe" is explicitly included in the CWA definition of "point source." 33 U.S.C § 1362(12). Therefore, when Galleon employed the mailbox technique it was discharging from a point source.

To find a violation of the CWA, we must also establish that Galleon discharged a pollutant from the point source. As the court in *Fisher* described, the mailbox technique can result in the displacement of dredge spoil, rock, and sand from the sea floor. 977 F. Supp. at 1196. Dredge spoil, rock and sand are all explicitly included in the CWA definition of pollutant. While "displacement" of a pollutant is technically not the same thing as "discharge", displacement has been found to satisfy the CWA's definition of discharge. Several courts have concluded that while the definition of "discharge" includes the "addition" of a pollutant, an "addition" "may reasonably be understood to include 'redeposit.'" *Avoyelles*, 715 F.2d at 923; *see also United States v. M.C.C of Fla.*, 772 F.2d 1501 (5th Cir. 1985) (*overrules on other grounds by Backlund v. Bd. of Comm'rs*, 481 U.S. 1034 (1987)). This definition of "discharge" was eventually affirmed. *M.C.C. of Fla.*, 848 F.2d at 1133. In *Avoyelles*, the Fifth Circuit held that "redeposit" satisfies the definition of "discharge" and that "this reading of the definition is consistent with both the purposes and the legislative history of the statute." 715 F.2d at 923.

Galleon may argue that their salvage activities occurred beyond the reach of the CWA, however in this case, the CWA applies to the contiguous zone of the U.S. The term navigable waters includes "waters of the United States including the territorial seas." 33 U.S.C. § 1362(7) (2006). The term "territorial seas" of the United States extends only three miles from low water line of the coast. 33 U.S.C. § 1362(8) (2006). However, the CWA also applies to "discharges from sources 'other than a vessel or other floating craft' in the 'contiguous zone' and the high seas." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11 n.18 (1981). As the mailbox technique results in the displacement of pollutants from a pipe, this is not a discharge from a vessel. Rather it is a discharge from a pipe displacing pollutants that do not come from a vessel. Therefore, an NPDES permit is required for use of the mailbox technique within the contiguous zone of the United States. As Galleon's activities took place within the contiguous zone, their failure to obtain an NPDES permit constituted a violation of the CWA.

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity" of waters of the United States. 33 U.S.C. § 1251 (2006). The mailbox technique has the destructive potential to displace pollutants and compromise the physical and biological integrity of U.S. waters. Furthermore, discharging a pollutant without the proper NPDES permit frustrates the intent of Congress to achieve the broad and ambitious objective of the CWA. Galleon, by employing the mailbox technique, has violated the CWA prohibition against discharge of a pollutant from a point source without a permit. This Court should find that an NPDES permit is required and enjoin Galleon from further use of the mailbox technique without a permit.

CONCLUSION

This court should find that the SMCA applies, thus the laws of find and salvage do not apply. This shipwreck is also subject to sovereign immunity therefore Galleon must obtain consent from Spain before conducting Salvage activities. NOAA has regulatory authority over the entire shipwreck and properly denied Galleon's request for a research/recovery permit. The Incidental Take Permit was also properly denied in this case. Lastly, Galleon violated both the RHA and the CWA and should be enjoined from continuing salvage operations without the proper permits.