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Legal Reporter for the National Sea Grant College Program

FWS Reaches Settlement Agreement on ESA Work Plan

Also,

Federal Court Upholds NMFS Decision Limiting Pesticide Use

Washington State Supreme Court Rules on Groundwater Use

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FWS Reaches Settlement Agreement on ESA Work Plan

Joanna B. Wymyslo, J.D., LL.M.[1]

Congress enacted the Endangered Species Act (ESA) in 1973 to identify species in danger of extinction, protect their ecosystems, and promote their recovery. The Supreme Court called the ESA "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[2] However, an imperiled species is not entitled to any ESA safeguards until it has been formally listed as threatened or endangered. This critical step has become logjammed, causing ever-expanding delays in protection for hundreds of species as they approach extinction. On September 9, 2011, a federal judge approved settlements between the U.S. Fish and Wildlife Service (FWS) and two environmental groups intended to address the needs of those imperiled species by strengthening the FWS's work plan for listing candidate species under the ESA.[3]

Background

The agencies responsible for implementation of the ESA are the FWS in the Department of the Interior and the National Marine Fisheries Service (NMFS or NOAA Fisheries) in the Department of Commerce. The FWS administers the listing of terrestrial and fresh water species under its jurisdiction.

Listing can be a time-consuming and expensive process. The FWS may list species on its own initiative, or citizens, groups, or government agencies can initiate a petition to the agency which serves as a formal request to list a species.[4] If practicable, within 90 days from the date the petition is submitted, the FWS must determine whether there is "substantial information" indicating that listing may be warranted. If the preliminary finding is positive, the agency will conduct a twelve-month review to determine whether listing the species is warranted. If the FWS determines listing is not warranted, the process ends. If the agency determines that the petition is warranted, the FWS must publish "a general notice and the complete text" of the proposed rule in the Federal Register where it is open to public comment prior to the final decision on whether to list the species. Finally, if data suggests listing is in order, but other species have a higher priority at the time, the listing proposal is termed "warranted but precluded" and the species is placed on a Candidate List for later review. The FWS must conduct an annual review of candidate species through the Candidate Notice of Review (CNOR).

The Candidate List was originally intended to allow the FWS to quickly make listing determinations regarding candidate species. However, the FWS's Listing Program has received numerous listing petitions – more than 1,230 species in the last four years – which, combined with related litigation, has substantially reduced the FWS's resources.[5] Unfortunately, as the FWS addresses these other listing-related issues, imperiled species continue to accumulate on the Candidate List.[6] The November 10, 2010 CNOR identified 251 candidate species, most of which have been on the Candidate List for at least 20 years, and none of which receive ESA legal safeguards until they are formally listed.[7] The backlog can be devastating for affected plants and animals, as at least 24 species have gone extinct while waiting for legal protection on the Candidate List.[8]

Settlement Agreement

Two environmental groups, WildEarth Guardians (Guardians) and the Center for Biological Diversity (CBD) filed multiple complaints alleging that the Secretary of the Interior, Kenneth Salazar, failed to

comply with statutory deadlines for making findings in several listing decisions. The cases were consolidated into two Multi-District Litigation cases in the U.S. District Court for the District of Columbia. The FWS filed a stipulated settlement agreement with the Guardians on May 10, 2011. The Guardians have initiated over 700 listing petitions and over 30 related lawsuits since 2007,[9] but under the negotiated terms of the settlement, the group agreed to submit petitions for listing no more than 10 species in any fiscal year during the term of the agreement. The Guardians also agreed not to file any lawsuit to enforce ESA deadlines for species under the FWS's jurisdiction prior to March 31, 2017 so the agency may allocate resources otherwise spent on litigation to focus on the needs of candidate species. The agreement contains a work plan under which the FWS will systematically review candidate species to determine whether a Proposed Rule or a "not warranted" decision is appropriate. The work plan in the agreement contains specific timetables for decisions regarding certain species' listing decisions and critical habitat designations, which are to be completed over the next six years. The work plan also requires the FWS to make initial findings for several species that have been petitioned for listing under the ESA but are not on the Candidate List.

The CBD initially opposed the settlement agreement between the FWS and the Guardians, arguing it was "too weak, unenforceable and missing key species in need of protection."[10] Specifically, the CBD was concerned about terms in the agreement which allow the FWS to unilaterally withdraw its commitment to list species, exclude some critically imperiled species (including the Pacific Walrus and American Wolverine), and limit protection of other imperiled species in the future. However, on July 12, 2011, the FWS and CBD filed a complementary settlement agreement in which CBD agreed to drop its opposition to the FWS-Guardians agreement in exchange for expedited review of 449 species in danger of extinction but not officially on the Candidate List.

The court approved both settlement agreements on September 9, 2011. In all, 757 imperiled species in all 50 states will be considered for ESA protection over the term of the agreements.[11] The environmental groups and the agency hope the terms of the settlement will lead to a less adversarial and more comprehensive and efficient listing process in order to better protect imperiled species.[12] Additionally, the FWS anticipates the agreements "will provide state wildlife agencies, stakeholders and the public with clarity and certainty about when listing determinations will be made."[13]


Photograph of coral reef courtesy of Jerry Reid/USFWS.

Conclusion

The settlements illustrate an interesting paradox facing endangered species advocates. It is estimated that over 80 percent of species that scientists deem to be imperiled in the United States are not protected under the ESA.[14] The only way to provide federal safeguards to those species is through listing, and if the FWS does not initiate listing internally, the only option to protect those species under the ESA is to file a petition for listing. However, when those very petitions are exacerbating the devastating delays which could potentially lead to the extinction of the candidate species the environmental groups are trying to protect, the proper course of action becomes less clear. The agreements between the FWS and the environmental groups hopefully represent a positive step toward a solution as they provide at least a partial roadmap for navigating this paradox over the next six years.

The FWS will likely determine listing is warranted for most of the 251 candidate species, because the agency previously determined those species warranted protection under the ESA when it placed them on the waiting list behind species considered to be a higher priority. Thus, although the agreements do not mandate specific outcomes for the agency's upcoming review process, the settlement agreements constitute a significant commitment of the FWS's resources and a critical step toward legal protection for hundreds of imperiled plant and animal species.

Endnotes

1. Joanna Wymyslo holds a J.D. from Florida Coastal School of Law and a LL.M. in environmental and natural resources law from Lewis & Clark Law School. She currently practices law in Jacksonville, Florida.
2. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).
3. In re Endangered Species Act Section 4 Deadline Litigation, No. 1:10-mc-00377-EGS (D.D.C. May 10, 2011); In re Endangered Species Act Section 4 Deadline Litigation, No. 1:10-mc-00377-EGS (July 12, 2011).
4. The ESA listing process is outlined in 16 U.S.C. § 1533(a)-(b).
5. U.S. Fish and Wildlife Service, News Release, *Fish and Wildlife Service Announces Work Plan to Restore Biological Priorities and Certainty to Endangered Species Listing Process*, May 10, 2011.
6. *Id.*
7. Wild Earth Guardians, Press Release, *A Further Boost for Endangered Species Act Candidates*, July 12, 2011.
8. Kierán Suckling, *A Brighter Future for Hundreds of U.S. Species*, The Huffington Post, July 14, 2011.
9. WildEarth Guardians, http://www.wildearthguardians.org/site/PageServer?pagename=priorities_wildlife_ESA_listing_milestone.
10. Suckling, *supra* note 8.
11. *Id.*
12. WildEarth Guardians, *supra* note 9.
13. FWS, *supra* note 5.
14. WildEarth Guardians, *supra* note 9.

Litigation Update: U.S. Supreme Court Rules on Ownership of Montana Rivers

Ben Sloan, J.D. Candidate, Univ. of Mississippi School of Law, May 2014

On February 22, the U.S. Supreme Court ruled that the State of Montana could not seek compensation for a utility's use of riverbeds that were non-navigable at statehood. In PPL Montana, LLC v. Montana, 132 S.Ct. 1215 (2012), an unanimous court held that the navigability of a river is determined by a "segment by segment" analysis. The Montana Supreme Court had looked to the river as a whole, determining that long sections of the river could be considered navigable even if portages would have been required at places. The U.S. Supreme Court disagreed, finding that portages may defeat navigability for title purposes.

As a result, only those individual segments of the river that could be commercially traveled at the time of statehood should be considered navigable. In addition, the Supreme Court reiterated that the navigability for title purposes depends on whether it was "susceptible of being use" as a highway of commerce at statehood and faulted the Montana Supreme Court for its reliance upon the evidence of present day, primarily recreational use of the Madison River. The U.S. Supreme Court remanded the case to the Montana Supreme Court for further proceedings. For more information on this case, please see Terra Bowling, *U.S. Supreme Court Looks at Ownership of Montana Rivers*, 11:1 SandBar 10 (2012).

Federal Court Upholds NMFS Decision Limiting Pesticide

April Killcreas[1]

In upholding the National Marine Fisheries Service's Biological Opinion restricting the use of three potentially toxic pesticides, the District Court for the District of Maryland took a step forward in protecting threatened salmon and steelhead populations in the Pacific Northwest. The pesticides at issue in the NMFS's Biological Opinion threaten the habitat for almost thirty species of fish by impacting their food supply and hindering their ability to navigate back to their spawning areas. Through this ruling, these pesticides may have a reduced likelihood of adversely effecting these threatened fish populations.

Background

In 2001, various environmental groups sued the Environmental Protection Agency (EPA) for failing to formally consult with the National Marine Fisheries Service (NMFS) as to the impact that several organophosphate-based pesticides, including chlorpyrifos, diazinon, and malathion, have on twenty-eight protected species of salmon and steelhead and their habitat in the Pacific Northwest and California. Because such consultations are required under the Endangered Species Act (ESA), the court ordered EPA to initiate contact with NMFS with regard to these pesticides. NMFS was subsequently sued in 2007 for its failure to respond to any of the EPA's requests for consultation for these pesticides between 2002 and 2004. This litigation resulted in a court order requiring NMFS to complete the consultation requirement.

In 2008, due to the potential harm that could result from the unregulated use of these pesticides near sensitive habitats, the NMFS issued a Biological Opinion (BiOp) holding that products containing these pesticides could not be registered for use by the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) without certain restrictions. The limitations suggested by the NMFS included no-spray buffer zones and vegetated areas of land next to streams to prevent runoff contaminated by these pesticides from entering protected fish habitats.

In October 2011, a federal district court upheld the NMFS's 2008 decision restricting the use of the pesticides contaminating the habitats of salmon species located in Oregon, Washington, Idaho, and California. After the NMFS determined that the use of products containing these three pesticides should be restricted, several manufacturers holding registrations to sell the pesticides, including Dow AgroSciences, Makhteshim Agan of North America, and Cheminova, Inc. U.S.A., challenged the BiOp issued by the agency. The plaintiffs argued that the agency's decision to restrict the pesticides' use was not based on the best available scientific and commercial data as mandated under the ESA and, therefore, the decision was arbitrary and capricious under the Administrative Procedures Act and should be invalidated. However, the district court rejected the manufacturers' claim, holding that the plaintiffs failed to provide sufficient evidence to support their argument that the agency's decision to restrict the pesticides' use was not adequately supported by the record.

Endangered Species Act

The ESA requires all federal agencies to ensure that actions they conduct, fund, or authorize will not jeopardize the existence of endangered or threatened species or their habitats.[2] When an agency determines that its actions may impact a protected species or its habitat, the agency must formally consult with the U.S. Fish and Wildlife Service or NMFS (depending on the species in question). Following consultation, the FWS or NMFS prepares a BiOp which discusses the impact of the agency's action on species of concern. For instance, the EPA's decision to authorize the use of the three pesticides at issue could harm salmon and steelhead fish, reducing their populations, and thereby jeopardizing their existence. Therefore, the potential harm that these pesticides could cause to these protected species triggered NMFS's duty to consult with the EPA and develop a BiOp.

When considering whether the EPA's authorization of the pesticides would cause jeopardy to the fish and their habitat, the NMFS must "use the best scientific and commercial data available."[3] In order to adequately consider the potential threat posed by these pesticides, the NMFS solicited and received written comments, scientific data, and expert opinions explaining that data. The manufacturers of the three pesticides at issue participated in the public comment process and unsuccessfully attempted to persuade the agency that the pesticide use would have no obvious impact on the salmon habitats.

After the NMFS made its determination that such authorization would result in jeopardy to the salmon and steelhead fish, the ESA required the agency to suggest reasonable alternatives to the EPA that would mitigate the harm caused by the pesticides. Based upon this requirement, the NMFS issued its BiOp along with six reasonable and prudent alternatives (RPAs), including the buffer zone and no-spray requirements, to be incorporated into the EPA's procedures within one year.

THE APA MANDATES THAT AGENCIES MUST NOT ACT IN A MANNER THAT IS "ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH THE LAW."

Administrative Procedure Act

Biological Opinions that have been prepared under the ESA are considered final agency actions that are reviewable under the Administrative Procedure Act. The APA mandates that agencies must not act in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[4] On review, the court cannot substitute its judgment for that of the agency and may only determine whether the agency adequately considered relevant information before taking final action. If the agency failed to consider relevant factors, neglected to consider important aspects of the problem, or provided explanations for its decision that are contrary to the evidence presented to the agency, then the agency's action may be deemed arbitrary and capricious and, thus, invalid.

To rule on the plaintiffs' challenges to the agency's BiOp, the reviewing court must conduct a thorough examination of the administrative record and may not consider any additional information presented to the court for the first time on appeal.[5] If NMFS did not provide a specific explanation for its decision that can be effectively reviewed on appeal, the U.S. Supreme Court has held that the agency may provide affidavits or testimony to sufficiently explain the reasons behind the agency's decision, as long as these declarations explain the original agency record rather than providing entirely new justification for the agency's actions in the form of post-hoc rationalization.[6]

Motions to Strike Affidavits

In their challenge to the NMFS's BiOp, the plaintiffs moved to strike two declarations offering additional explanations for the agency's decision that were not specifically part of the administrative record.[7] The court determined that one of these declarations, an affidavit from Ed Whitelaw, was irrelevant to the issues on appeal and discusses financial impacts outside the scope of the ESA; accordingly, the court granted the plaintiffs' motion to strike Whitelaw's statement from the record. However, the court declined to strike an additional statement made by Anthony Hawkes discussing the agency's consideration of various studies and data submitted by the plaintiffs.

To explain the NMFS's decision to restrict pesticide use in protected salmon habitats, the agency provided Hawkes' affidavit to the reviewing court; however, Dow Agrosciences argued that this statement constituted an inadmissible post-hoc rationalization of the agency's action. In his affidavit, Hawkes explained that the agency chose to ignore studies and data submitted by the plaintiffs during the public comment period because the study failed to provide additional useful information outside of that already discussed in the BiOp. This explanation as to why the agency failed to incorporate the data presented by the plaintiffs during the public comment period was not originally included in the administrative record; however, the record did reflect that the agency conducted a thorough and ongoing review of the studies and data submitted by all of the parties, and the record additionally includes general information as to why the NMFS disregarded certain information provided to the agency by the plaintiffs. The court ultimately held that Hawkes' affidavit was an admissible explanation of the agency's administrative record.

Summary Judgment

Dow Agrosciences and the other manufacturing plaintiffs additionally argued that the agency failed to 1) base its recommendations on the best available scientific and commercial data as required by the ESA, 2) adequately justify the relationship between the facts found by the

agency and the recommendations contained in the BiOp, and 3) sufficiently respond to the comments received by the EPA, various state agencies, and the manufacturers opposing the NMFS' conclusions.[8] The plaintiffs specifically contended that the agency relied on outdated toxicity data for the three pesticides affected by its BiOp, disregarded the restrictions on the pesticides' use that had already been implemented, and relied on inaccurate models in assessing the effects of the pesticides on salmon populations. In response to these arguments, the NMFS argued that its conclusion that the use of these pesticides would jeopardize protected salmon species and their habitats was based on the best available scientific and commercial data.

The plaintiffs argued that the agency placed too much emphasis on obsolete water quality data that overestimated the amount of these pesticides actually reaching salmon habitats. According to the plaintiffs, this data failed to consider mitigation efforts already imposed by the EPA when registering the use of these pesticides, and these efforts substantially limited the use and the harm caused by each of the chemicals at issue. By failing to consider more recent scientific and environmental data concerning the use of the pesticides, the plaintiffs maintain that NMFS failed to consider the best available data in formulating the conclusions outlined in the BiOp. However, the agency explained its use of the earlier studies by noting that the new studies were not as comprehensive in scope as the older studies and that the new information did not take into account the water quality data from peak exposure.

The plaintiffs additionally maintained that NMFS relied too heavily on unrealistic modeling data to predict the amount of pesticides actually reaching salmon habitats; however, in the BiOp, the agency specifically addressed the shortcomings involved in its use of the model, and an examination of the data revealed that, regardless of the concentration of each pesticide used in the model, the conclusion that each pesticide's use would have toxic ramifications would be unchanged.

Additionally, the plaintiffs argued that the agency's reasonably prudent alternative mandating the implementation of no-use buffer zones was unsupported by the data in the record. This alternative measure requires the EPA to prohibit the use of each of these pesticides within 500 feet by ground application and by 1000 feet by aerial application. The plaintiffs specifically maintain that the buffer zones were far too large and should vary based on the channel's dimensions and the presence or absence of salmon populations; however, the court noted that uniformity in buffer zones are standard within the industry and declined to hold the agency to consider the plaintiffs' recommendation. The plaintiffs also indicated that the NMFS failed to consider the economic and technological feasibility of implementing the buffer zones; however, neither ESA regulations nor the guidelines on issuing reasonably prudent alternative actions mandate a consideration of the financial considerations of impacted industries.

After reviewing the administrative record, the court determined that a rational connection existed between the facts considered by the agency and the decisions articulated in the agency's final BiOp. The court noted that, even though the plaintiffs made persuasive arguments as to why the agency should have considered different studies and additional data to reach an alternative conclusion, the plaintiffs failed to demonstrate that the agency actually disregarded the best scientific and commercial data available. Accordingly, the court held that the NMFS's BiOp was not arbitrary and capricious and did not violate the requirements of the ESA and the APA.

Conclusion

While lengthy, the ESA consultation process evaluating these three pesticides resulted in additional protections, such as buffer zones, for twenty-eight protected salmon and steelhead populations in the Pacific Northwest and California. The District Court, by upholding the agency's Biological Opinion, affirmed the protective measures outlined by NMFS and reduced the likelihood that these pesticides will continue contaminating food supplies and spawning areas essential to the survival of these species.

Endnotes

1. J.D. Candidate, Univ. of Mississippi School of Law, May 2012.
2. 16 U.S.C. § 1536(a)(2).
3. *Id.*
4. 5 U.S.C. § 706(2)(A).
5. Camp v. Pitts, 411 U.S. 138, 142 (1973).
6. *Id.* at 142-43
7. Memorandum Opinion at 8, Dow Agrosciences v. Nat'l Marine Fisheries Serv., 2011 U.S. Dist. LEXIS 125404 (D. Md. Oct. 31, 2011).
8. *Id.* at 14.

Washington State Supreme Court Rules on Groundwater Use

Mary C. Olive[1]

Franklin County contains some of the driest lands in the state of Washington, and is home to Five Corners Family Farmers, a group of dryland wheat farmers whose families have been in business since the 1900s. According to these farmers, their operations are threatened by Easterday Ranches' plans to operate a massive industrial feedlot with 30,000 cattle. The industrial feedlot would pump 600,000 gallons of water per day (gpd) from the county's limited supply of groundwater. Five Corners, joined by the Sierra Club and the Center for Environmental Law and Policy, filed suit claiming that Easterday could not withdraw groundwater without a permit. On December 22, 2011, the Washington Supreme Court ruled in *Five Corners Family Farmers et al., v. The State of Washington* on whether Easterday's planned withdrawals met the stock-watering exemption to the state's ground water permit statute.

Statutory Interpretation

Washington has a statute in place that regulates public groundwater use.[2] According to this statute, as of June 6, 1945, no one is permitted to withdraw groundwater in the state without a permit from the Department of Ecology. However, the statute provides a list of exceptions; that is, groundwater uses that do not require a permit. The statute specifically states that all withdrawals require a permit "except, however, that any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden…or for single or group domestic uses in an amount not exceeding five thousand gallons a day…or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt."[3]

The debate in this case boils down to two different interpretations of the statute. Easterday read the statute as having four categories of exemptions for any withdrawal of public groundwaters:

1. Stock-watering purposes, or
2. Watering of a lawn or of a noncommercial garden, or
3. Single or group domestic uses in an amount not exceeding 5,000 gpd, or
4. Industrial purpose in an amount not exceeding 5,000 gpd.[4]

Therefore, according to Easterday, because they would be using the groundwater for stock-watering, the first exemption applies, and no permit is required.

Five Corners reads the statute differently, separating it into only two categories. Any withdrawal of public groundwaters for:

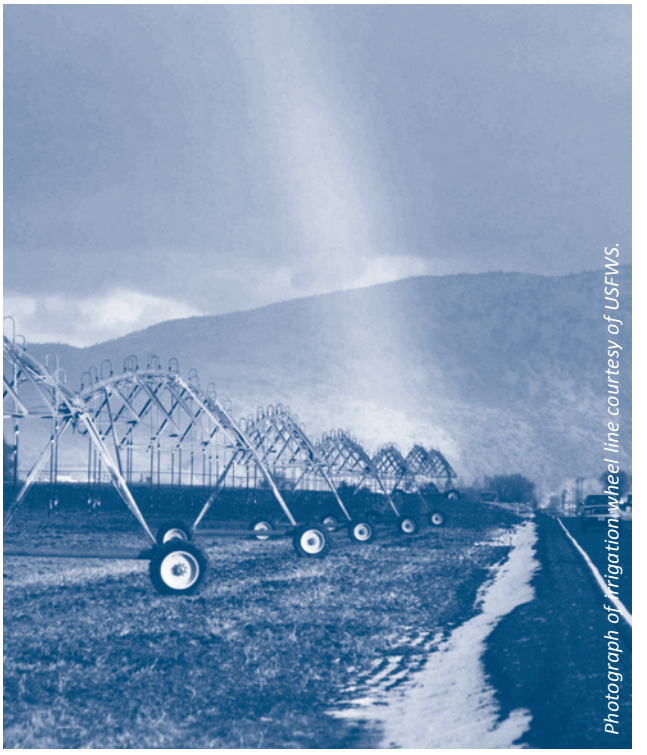
1. Stock-watering purposes, or for the watering of a lawn or of a noncommercial garden…or for single or group domestic uses in an amount not 5,000 gpd, or
2. An industrial purpose in an amount not exceeding 5,000 gpd.[5]

Under this interpretation, there is a 5,000 gpd maximum on all exempted groundwater uses; therefore, Easterday must reduce its groundwater withdrawal to 5,000 gpd or apply for a permit.

After considering the two options, the Washington Supreme Court concluded that Easterday's view is the only reasonable one. In reaching its conclusion, the court reasoned that if the legislature intended to bundle the first three uses, as Five Corners suggested, the first "or" in the statute would be rendered meaningless. The statute would, instead, read "Any withdrawal of public groundwaters for stock-watering purposes, __ for the watering of a lawn or of a noncommercial garden, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or for an industrial purpose in an amount not exceeding five thousand gallons a day."

However, because the statute contains the first "or," the uses were clearly not intended to be bundled, and thus Five Corners' interpretation is unreasonable. To the dismay of Five Corners and all residential farmers in the area, the court ultimately held that groundwater withdrawals for stock-watering purposes do not require a permit, and are not limited to any amount.

The main criticism the court's ruling will face may be that the interpretation adopted by the court does not take in to account the fact that the statute divides residential and industrial uses into two separate categories, a fact that supports Five Corners' view. The statute begins by listing different residential uses (stock-watering, watering of a lawn or garden, and single or group domestic uses) and specifies that these uses may not exceed 5,000 gpd if they are to be exempt from a permit. The statute then exempts industrial uses, so long as they do not exceed 5,000 gpd. It seems arbitrary for the legislature to use a 5,000 gpd limit to qualify only two of the listed uses, which is true under Easterday's interpretation (the 5,000 gpd would apply only to single or group domestic uses and industrial uses). The more likely intent of the legislature was to limit both residential and industrial uses to 5,000 gpd.



Photograph of irrigation wheel line courtesy of USFWS.

The court's only justification on this issue is that the legislature did not intend to divide water uses into two categories: 1) uses of 5,000 gpd or less, which are exempt from permits and 2) uses of more than 5,000 gpd, which are not exempt from permits. The court says this was not the legislature's intent because not all uses of 5,000 gpd or less are exempt from permit requirements. However, Five Corners did not argue that the legislature intended to divide water uses based on the amount of water they use. Instead, Five Corners claims the legislature intended to divide water uses into residential and industrial uses. If a use falls into one of the categories listed in the statute, it is exempt from a permit only if it uses less than 5,000 gpd. However, the court failed to see the logic behind this reasoning, and instead ruled in favor of Easterday.

Conclusion

So what are the practical implications of this holding? For the residents of Franklin County, it means that Easterday can pump nearly unlimited amounts of groundwater, while new permit seekers may be denied any water rights at all. Users who already have permits, such as Five Corners, and users who are exempt from permits cannot formally be denied a water right; however, it is a real fear that their wells, which serve as the source of drinking and household water, will be threatened by the new, massive, and unregulated use by Easterday Ranches.

This decision may have potentially opened the floodgates to other large stock-watering operations like Easterday. With the knowledge that these industries are exempt from groundwater permits, Franklin County is now an exceedingly attractive location for these businesses to open shop. While the people of Franklin County may already view Easterday as an unexpected and inconceivable threat to their water supply, they may be forced to brace themselves for an influx of more, and possibly larger, industrial feedlots.

Endnotes

1. 2013 J.D./M.E.L.P. Candidate, Vermont Law School.
2. WASH. REV. COD ANN. § 90.44.050.
3. *Id.*
4. Five Corners Family Farmers et al., v. The State of Washington et al., No. 8462-4, 2011 Wash. LEXIS 955, 1, 12 (Wash. Dec. 22, 2011).
5. *Id.*

No Takings Claims Allowed: Revisiting Permit Exactions

Barton Norfleet[1]

On November 3rd, the Florida Supreme Court answered the much debated question of whether offsite mitigation conditions attached to a zoning permit could result in a takings under the Fifth Amendment.[2] More specifically, the court analyzed whether or not these conditions, also known as exactions, could give rise to a takings claim even if they were never actually imposed. The answer is no, according to the court's recent ruling. The court stated that this type of condition cannot be considered a taking if no action is ever taken to implement it.

Background

In 1994, developer Coy Koontz, in an effort to create a commercial property development, requested a permit from St. Johns River Management District (St. Johns). Koontz wanted to dredge a larger portion of wetlands on his property than the existing environmental regulations allowed. Koontz owns 15 acres in Orange County, Florida, approximately 1.4 of which is located in a Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrological Basin. St. Johns agreed to grant Koontz his permit if he restricted the remaining part of his property for conservation purposes and performed several offsite mitigation projects. St. Johns was seeking to impose an exaction, which is "a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted."[3]

St. Johns' proposed offsite mitigation projects involved either repairing culverts or plugging holes in drainage canals located on nearby property. In the alternative, St. Johns presented Koontz with the option of reducing his development down to only an acre and designating the remaining acreage as a conservation area. Koontz agreed to deed restrict the portion of his land not needed for the development, but he refused both the offsite mitigation and the one-acre size limit. As a result, St. Johns refused to give Koontz a permit claiming his development would adversely affect the RHPZ fish and wildlife and that without any mitigation there would be no way to offset the adverse impacts of Koontz's development. The trial court concluded that denying Koontz a permit based on his refusal of the proposed offsite mitigation constituted a taking of his property.

St. Johns agreed to grant Koontz his permit if he restricted the remaining part of his property for conservation purposes and performed several offsite mitigation projects.

The *Nollan* and *Dolan* Decisions

The trial court used the decisions of the phonetically pleasing *Nollan* and *Dolan* cases to reach its conclusion. In *Nollan v. California Coastal Commission*, the U.S. Supreme Court held that a government entity may attach a condition to a permit as long as the condition "serves the same governmental purpose as the developmental ban."[4] In *Dolan v. City of Tigard*, the U.S. Supreme Court added to the "essential nexus" test, requiring that there must also be a "rough proportionality" between the attached condition and the impact the development might potentially have.[5] The trial court asserted that by ordering Koontz to restrict the remaining portion of his property for conservation purposes, St. Johns effectively offset the environmental impacts the development might have caused. Therefore, the requirement of offsite mitigation failed the *Nollan/Dolan* test because it "had no essential nexus to the development restrictions already in place on the Koontz property and was not roughly proportional to the relief requested by Mr. Koontz."[6]

The Appeal

St. Johns appealed the ruling, arguing that requiring an exaction of money or labor to improve some of St. Johns' other land is a valid mitigation offer to help offset the damage caused by Koontz's development. The Florida appellate court rejected this argument, recounting that the Supreme Court of California had implicitly decided against this type of exaction in the case of *Ehrlich v. City of Culver City*. In *Ehrlich*, the California Supreme Court vacated a lower court's decision which approved a permit with an exaction clause contingent upon the building of tennis courts and buying of artwork.[7] The Fifth District Court of Appeal affirmed the trial court judgment awarding compensation to Mr. Koontz. St Johns filed a motion, which was granted by the court, to certify the following question to the Florida Supreme Court:

> Do the Fifth Amendment to the United States Constitution and Article X, Section 6(a) of the Florida Constitution recognize an exactions taking under the holdings of [*Nollan* and *Dolan*], where there is no compelled dedication of any interest in real property to public use and the alleged exaction is a non land–use monetary condition for permit approval which never occurs and no permit is ever issued?

The Florida Supreme Court's Analysis

The answer to that question, according to the Florida Supreme Court, is no. The court distinguished the *Nollan/Dolan* test from the case at hand. Both *Nollan* and *Dolan* involved exactions that required the property owner to dedicate real property in exchange for approval of a permit. Subsequent U.S. Supreme Court cases had limited the scope of *Nollan* and *Dolan* to exactions which involved the dedication of real property for a public use.[8] The Florida Supreme Court refused to broaden the scope of the *Nollan/Dolan* test beyond situations where the exaction involves a dedication of real property in exchange for permit approval. Furthermore, the court held that the *Nollan/Dolan* rule is applicable "only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed."[9]

Under this interpretation, the lower court erred by applying the *Nollan/Dolan* exaction test to St Johns' proposed offsite mitigation because "St Johns did not condition approval of the permits on Mr. Koontz dedicating any portion of his interest in real property in any way to public use."[10] Application of the *Nollan/Dolan* test was also improper because Koontz's complaint ultimately arises from the denial of the development permit, not the imposition of the permit conditions.

Conclusion

In summary, the court held that the *Nollan/Dolan* test's "essential nexus" and "rough proportionality" standards only apply to instances in which a governmental entity requires a property owner to dedicate real property to public use. The test should not be applied if: 1) there is no dedication of an interest involving real property; 2) if the exaction is never imposed; or 3) if the permit is denied. The Florida Supreme Court remanded the case back to the lower court for further proceedings, as there may be grounds to claim that the denial of the development permit itself resulted in a takings.

The court justified its decision of narrowly interpreting the *Nollan/Dolan* test to apply only to real property by pointing out that government entities must have the ability to evaluate and negotiate permit applications without a constant onslaught of takings claims. The court reasoned that if government zoning entities are not given this ability, regulation of land use would most likely become "prohibitively expensive," and agencies might begin to deny permits outright for fear of liability in takings claims.[11]

Endnotes

1. 2012 J.D. Candidate, Univ. of Mississippi School of Law.
2. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So.3d 1220 (Fla. Nov. 3, 2011).
3. *Id.* at 1223
4. 483 U.S. 825, 837 (1987)
5. 512 U.S. 374 (1994).
6. St. Johns River Water Mgmt. Dist. v. Koontz, 2009 Fla. App. LEXIS 91 at 6 (Fla. Dist. Ct. App. 5th Dist. Jan. 9, 2009).
7. See Ehrlich v. City of Culver City, 512 U.S. 1231 (1994).
8. *St. Johns River Water Mgmt. Dist*, 77 So.3d at 1230; *see also* Lingle v. Chevron U.S.A., 544 U.S. 528, 546-47 (2005); City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 702-03 (1999).
9. *St. Johns River Water Mgmt. Dist.*, 77 So.3d at 1230.
10. *Id.* at 1231.
11. *Id.*

Third Circuit Grapples With Rapanos

Christopher Motta-Wurst[1]

The Third Circuit Court of Appeals recently ruled that both tests set forth in the U.S. Supreme Court decision *Rapanos v. United States* may be used when determining what constitutes a wetland subject to the Clean Water Act (CWA).[2] The circuit courts have disagreed on how to interpret the ruling in *Rapanos* since there was no clear majority. The Third Circuit sided with the First and Eighth Circuits and found that the U.S. Army Corps of Engineers (Corps) has jurisdiction under the CWA whenever either of two tests set forth in the *Rapanos* decision are met.

Background

David Donovan has owned a four-acre piece of land in Delaware since 1982. In August 1987, the Corps inspected Donovan's property and identified wetlands subject to the CWA. During the inspection, the Corps noticed that Donovan had filled approximately 3/4 of an acre and warned him that if he continued to fill his property, he would need to obtain a permit. Upon further inspection in 1993, the Corps found that Donovan had placed additional fill on his land without a permit. Consequently, the Corps ordered Donovan to remove 0.771 acres of fill material from his property, but Donovan ignored the order because he believed that the Corps had no right to regulate the use of his land.

In 1996, Donovan's continued defiance of the Corps led the United States to sue him for violating the CWA. Ten years later, the United States District Court for the District of Delaware entered a final judgment against Donovan that required him to remove 0.771 acres of fill from his land and pay a $250,000 fine.[3] Donovan appealed, claiming that the Corps did not have jurisdiction over his land. On appeal, the government requested that the case be remanded to the district court so it could develop a record on the issue of the Corps' jurisdiction over Donovan's land.[4]

On remand, the government provided two expert reports confirming that the land was indeed a wetland. Donovan did not provide any expert reports on his behalf. Instead, he relied on his own personal knowledge of the region that he had lived in for almost fifty years. Donovan claimed that, with the exception of when it rains, the channels on his property are dry, and that Supreme Court decisions prior to Rapanos would have supported a finding that the property was not a wetland subject to the Corps' jurisdiction. The district court ruled in favor of the government, finding that Donovan's claims were unpersuasive and there was "no genuine issue of material fact as to whether the wetlands are subject to CWA jurisdiction."[5]

Photograph of wetlands courtesy of Bill Butcher/USFWS.

Determining CWA Jurisdiction

The issue in this case was whether Donovan's land was a wetland and, therefore, subject to Corps jurisdiction under the CWA. The CWA prohibits "the discharge of any pollutant by any person," and the "discharge of any pollutant" includes "any addition of any pollutant to navigable waters from any point source."[6] The term "navigable waters" has been defined as the "waters of the United States."[7] The most recent U.S. Supreme Court case determining

what constitutes the "waters of the United States" was *Rapanos v. United States*.

In *Rapanos*, the Court had a 4-1-4 plurality opinion rather than a majority decision. Five of the justices ruled that the Corps had a more limited jurisdiction, but they did not agree on the same test to determine that limited jurisdiction. The four-Justice plurality defined the phrase "waters of the United States" used in the CWA as "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as streams, oceans, rivers and lakes."[8] Additionally, the plurality ruled that wetlands only fall within the CWA if they have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands."[9]

> ***"THE CWA IS APPLICABLE TO WETLANDS THAT MEET EITHER THE TEST LAID OUT IN THE PLURALITY OR BY JUSTICE KENNEDY IN RAPANOS."***

The other test in *Rapanos* was created in Justice Kennedy's concurring opinion. In his concurrence, Justice Kennedy said that wetlands are subject to the CWA if there is a "significant nexus" with "waters of the United States." A wetland has a significant nexus to waters of the United States if the wetland exists "either alone or in combination with similarly situated lands in the region, and significantly affects the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[10] The existence of two different tests and no majority has presented a problem for some courts in determining which test they should apply.

Donovan argued that since there was no majority ruling in *Rapanos*, there is no governing standard, and earlier decisions should govern whether his land is subject to the CWA.[11] The Third Circuit rejected this claim and said that even though circuits have disagreed on how to interpret *Rapanos*, none have adopted his position.[12] The Third Circuit also stated that any confusion among the circuits should not exist because Justice Stevens and the other three Justices said what jurisdiction test should be applied in their dissent in Rapanos. Justice Stevens, in his dissent, plainly stated that "in all other cases in which either the plurality's or Justice Kennedy's test is satisfied-on remand each of the judgements should be reinstated if either of those tests is met."[13] Justice Stevens' guidance to lower courts in his dissent helped the Third Circuit conclude that "the CWA is applicable to wetlands that meet either the test laid out in the plurality or by Justice Kennedy in Rapanos."[14]

Conclusion

The Third Circuit found that the government presented sufficient evidence that Donovan's land was subject to jurisdiction under either *Rapanos* test to met its initial burden on a motion for summary judgment. Because Donovan failed to offer any evidence raising sufficient doubt about the credibility of the government's evidence, the District Court properly entered summary judgment in favor of the government.

Endnotes

1. 2012 J.D. Candidate, Univ. of Mississippi School of Law.
2. U.S. v. Donovan, 661 F. 3d 174 (3rd Cir. 2011).
3. *Id.* at 176.
4. *Id.* at 177.
5. *Id.* at 178.
6. *Id. See* also 33 U.S.C. § 1362(12).
7. *Donovan*, 661 F. 3d at 178.
8. *Id.* at 179.
9. *Id.*
10. *Id.* at 180.
11. *Id.*
12. *Id.* at 183.
13. *Id.* at 184.

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Littoral Events

2012 Land Grant and Sea Grant National Water Conference

Portland, Oregon
May 20-24, 2012

The conference provides opportunities for water scientists, engineers, educators, and managers to share knowledge and ideas, to identify and update emerging issues, and to network with leading researchers, educators, and innovators from academia, government, and the private sector. The conference is hosted by a team of educators from Land Grant and Sea Grant Institutions around the nation in cooperation with national program leaders from USDA and NOAA. Please visit http://www.usawaterquality.org/conferences/2012/default.html for more information.

Global Conference for Oceans, Climate, and Security

Boston
May 21-23, 2012

The conference will focus on the intersection between climate change adaptation, human and national security, and oceans management. It will address the current state and future direction of science and policy that is guiding international, national, and local responses to these issues. To register, visit http://gcocs.org/register.html.

The Coastal Society's 23rd International Conference

Miami, Florida
June 3-6, 2012

The Coastal Society conferences provide a forum for interdisciplinary education and discussion on coastal issues. During concurrent sessions, ocean and coastal professionals share their latest research and strategies, sparking new ideas. The TCS conference is the place to listen, discuss, ask questions, and think about the application of knowledge for the future of our coasts. To register, visit http://www.thecoastalsociety.org/conference/tcs23/registration.html.