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Ninth Circuit Denies Standing to World's Whales and Dolphins

Cetacean Community v. Bush, 386 F.3d 1169 (9th Cir. 2004).

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The Ninth Circuit Court of Appeals recently confirmed that marine mammals do not have standing to sue in their own name.

Background

The Cetacean Community (Cetaceans), the name given to the world's whales, dolphins and porpoises by their self-appointed attorney, filed suit against President Bush and the Secretary of Defense over the Navy's use of SURTASS LFA sonar. The Navy developed this sonar system to assist in the detection of quiet submarines at long range. The SURTASS LFA sonar consists of an active component that emits a loud sonar pulse and a passive listening component. The Cetaceans contend that the Navy's use of the sonar harms them by disrupting biologically important behaviors, including feeding and mating, and causing tissue damage.

There is a permanent injunction restricting the Navy's routine peacetime use of SURTASS LFA sonar "in areas that are particularly rich in marine life" because of the well-recognized negative effects of underwater noise on marine mammals.[1] The Cetaceans did not challenge the current restrictions, but sought an order compelling the Secretary of Defense to consult with NOAA Fisheries under the Endangered Species Act (ESA), apply for a letter of

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Dam Operator Not Liable for Downstream Flooding

Shamnoski v. PG Energy, 858 A.2d 589 (Pa. 2004).

Stephanie Showalter

In 1985, flooding caused by storms associated with Hurricane Gloria severely damaged property in Luzerne County, Pennsylvania. Three homeowners affected by the flooding filed suit against PG Energy, the owner and operator of water supply dams in the watershed, seeking compensation for damages they claimed were caused by negligent dam design, maintenance, and operation. The Pennsylvania Supreme Court determined that PG Energy was not negligent.

Background

In one day in September 1985, Hurricane Gloria deposited more than six inches of rain over the Springbrook Creek watershed, a steep mountain waterway in Luzerne County near Scranton, Pennsylvania. The plaintiffs lived in close proximity to Springbrook Creek, approximately one-half to three-quarters of a mile downstream and their homes were destroyed by floodwaters from the creek.

PG Energy owned and operated four water supply dams upstream from the plaintiffs' property. These dams, built between 1893 and 1925, were designed to create water supply reservoirs for the collection of drinking water, not to control flooding. During Hurricane Gloria, the reservoirs filled to capacity and overflowed. The dams themselves, however, did not fail.

Plaintiffs filed suit against PG Energy claiming dams must "be designed, maintained and operated so as to cabin and safely pass on the rain and floodwaters

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Alaskan Fishery Commission Followed Proper Procedure to Limit Entry

Simpson v. Alaska, 2004 Alas. LEXIS 138 (Alaska Nov. 19, 2004).

Stephanie Showalter

Following a challenge by a disgruntled fisherman, the Alaska Supreme Court recently held that the Alaska Commercial Fisheries Entry Commission (CFEC) followed proper procedures when it established the maximum number of permits for the Northern Southeast Inside sablefish longline fishery at seventy-three.

Background

Although Article VIII, Section 15 of the Alaskan Constitution declares "no exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State," the state may limit entry into a particular fishery for conservation purposes or to prevent economic distress to those dependent on the fishery. If the CFEC finds that a particular fishery has reached levels of participation which require the limitation of entry in order "to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing,"[1] the CFEC is required to establish a maximum number of entry permits for that fishery.[2] Permits are distributed pursuant to a ranking system developed by CFEC which is unique to each fishery.

Concerned that the health of the sablefish (lingcod) fishery was suffering due to overfishing, the CFEC limited participation in 1985. The maximum number of permits was set at seventy-three, despite the recommendation of the Alaska Department of Fish and Game that the maximum be set around thirty or forty. A point system was developed to rank applicants based on past participation in the fishery and economic dependence.

Steven Simpson applied for a limited entry permit for the sablefish fishery in 1987. In his applica-

tion he claimed a total of 65 points out of 100 for participation as a skipper in 1983 and 1984, income dependence, and vessel investment. After an initial finding of 32 points, which Simpson challenged through administrative channels, the CFEC determined that he was entitled to 50 points - seventeen points for past participation as skipper in 1983, three for past participation as crew member in 1984, and fifteen points each for vessel investment and income dependence. Simpson was denied a permit, however, because applicants with 50 or fewer points did not rank high enough to qualify. Simpson appealed the permit denial to the Alaska Superior Court in 1999. The Superior Court affirmed the findings of the CFEC and Simpson appealed.

Photograph of longline fishing was provided by NOAA.

Number of Permits

On appeal, Simpson argued that the CFEC set the maximum number of permits for the sablefish fishery too low, claiming the number was inconsistent with the Limited Entry Act's requirement that limiting entry must be accomplished without unjust discrimination. While the Alaska Limited Entry Act of 1973 states that the maximum number for distressed fisheries "shall be the highest number of units of gear fished in that fishery during any one of the four years immediately preceding January 1, 1973,"[3] the Act does not provide guidelines for setting the maximum number of permits for non-distressed fisheries such as the sablefish fishery. In *Johns v. CFEC*, however, the Alaska Supreme Court found that because the legislature intended the number of permits initially issued to reflect present use, the CFEC could not establish a maximum number lower than the highest number of vessels participating in the fishery in the four years preceding the limitation date.[4] In the present case, the Supreme Court reaffirmed its ruling in *Johns*, "expressly hold[ing] that for a non-distressed fishery CFEC must set the maximum number at a level that is no lower than the highest number of units of gear fished in any one year of the four years prior to the limitation of the particular fishery."[5] The CFEC therefore did not err by establishing the number of permits for the sablefish longline fishery at seventy-three, the highest number during the preceding four years.

Optimum Number

After the CFEC determines the maximum number of permits for the fishery, it must then determine the optimum number of permits "based upon a reasonable balance of the following general standards: (1) the number of entry permits sufficient to maintain an economically healthy fishery . . . (2) the number of entry permits necessary to harvest the allowable commercial take . . . [and] (3) the number of entry permits sufficient to avoid serious economic hardship to those currently engaged in the fishery."[6] The optimum number may be higher or lower than the maximum number. If the optimum number and maximum number are different, the state must take action to bring the two numbers in line by either issuing or buying back permits.

The CFEC established the optimum number at seventy-three. Simpson claimed that based on the above factors, the optimum number should be set at

See Alaska, page 14

Sausalito Has Standing to Sue to Stop Redevelopment of National Recreation Area

City of Sausalito v. O'Neill, 386 F.3d 1186 (9th Cir. 2004).

Jason Savarese, J.D.

On October 20, 2004, the Ninth Circuit Court of Appeals determined that the City of Sausalito, California, had standing to sue for an injunction against the National Park Service (NPS) and its planned redevelopment of a decommissioned military base near the city.

Background

Fort Baker is a former U.S. military base near Sausalito, California, built in the 19th century, and currently managed by the NPS. Fort Baker is located in one of the last remaining habitats for the endangered Mission Blue Butterfly. In 1980, the NPS developed the Golden Gate National Recreation Area General Management Plan (GMP), which included Fort Baker's transformation into a conference center. An Environmental Impact Statement (EIS) was completed in 1999, which included the NPS's preferred alternative for a retreat and conference center. Forty-two acres of habitat, including twenty-three acres specifically for the Mission Blue Butterfly, were to be preserved, improved, or repaired.

The City of Sausalito sued the NPS in 2001 to enjoin the implementation of the NPS Fort Baker Plan. Sausalito claimed that NPS violated numerous conservation and environmental laws in developing the Plan's EIS. Sausalito also claimed that the Plan's EIS was deficient. The trial court granted the defendants' motion for summary judgment, citing Sausalito's lack of standing to assert its claims and lack of merit.

Standing

Sausalito appealed to the Ninth Circuit Court of Appeals. To have standing, Sausalito had to show it meet the requirements of Article III of the U.S. Constitution, which requires that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[1] The court found that Sausalito had established an Article III "injury in fact" to its proprietary interests because the Fort Baker redevelopment project could attract an estimated 2,700 Fort visitors a day, which would impact traffic, aesthetic appeal, and revenue in Sausalito.

Beyond showing it had Article III standing, the City also had to have statutory standing under the particular statutes involved in its case. The court found that Sausalito had such standing under the Coastal Zone Management Act (CZMA), the Marine Mammal Protection Act (MMPA), and the Migratory Bird Treaty Act (MBTA). The district court had denied Sausalito standing on the ground that "the CZMA's 'zone of interest' extends only to 'a state's protection of their [sic] coastal zones.'"[2] Although it is the states that make CZMA consistency determinations, the court held that Sausalito had standing to sue under the CZMA because the City could be injured by an incorrect consistency finding.

The court also said Sausalito had standing under the MMPA, since the NPS had not secured a MMPA permit and the Plan's construction and resulting swell in traffic would likely "take" marine mammals, thus violating the MMPA and harming Sausalito's aesthetic characteristics, recreational activities, and revenue. Sausalito also argued that the redevelopment would result in the deaths of migratory birds in violation of the MBTA. Though a criminal statute on its face, cases from various circuits have held that animal welfare and environmental groups can use the MBTA in civil lawsuits to obtain injunctions. Thus, the court held that the City had standing to sue the NPS for alleged violations of the MBTA, such as the removal of trees at Fort Baker.

Sausalito also raised claims under the Concessions Management Improvement Act (CMIA) and the Omnibus Parks and Public Lands Management Act (Omnibus Act). Sausalito claimed that the proposed conference center and its corresponding concessions would harm the City's proprietary interests and Fort Baker's natural resources due to increased traffic. Even though the City would not have concessions at Fort Baker, the court said that Sausalito had standing to sue, due to the potential injury from such concessions to its proprietary inter-

ests. The Omnibus Act prohibits the use of lands for employee housing if that housing would "impact primary resource values of the area." Sausalito claimed that concession employee housing at Fort Baker and the traffic it would generate would damage the area's "scenic beauty and natural character" and "primary resource values." The court again found Sausalito had standing.

NEPA

Federal agencies must prepare environmental impact statements for "major federal actions significantly affecting the quality of the human environment."[3] Sausalito challenged the EIS for the Fort Baker Plan on several grounds including failure to consider reasonable alternatives and the impacts of the Plan on traffic. The Ninth Circuit concluded that the NPS took the requisite "hard look" as the EIS thoroughly discusses four development alternatives, contains a detailed analysis of traffic concerns, and examines the impact of the proposed alternatives on wildlife in the area.

ESA/MMPA/MBTA

The ESA prohibits the taking of an endangered or threatened species and requires federal agencies to consult with either the FWS or NMFS if proposed federal activities might result in a taking. The NPS consulted with both the FWS and NMFS during the development of the Fort Baker plan. The NPS had incorporated mitigation measures recommended by NMFS for salmonids and by the FWS for the Mission Blue Butterfly into the final EIS. The Ninth Circuit held that the NPS consultations were adequate and complied with the ESA.

The MMPA prohibits the taking of marine mammals without the proper permits. Sausalito argued that the NPS failed to secure the proper permits for takings that will result from construction activities. Because the parties had not fully briefed this issue in district court, the Ninth Circuit remanded this claim for an initial ruling on the merits.

Under the MBTA, it is unlawful to hunt, kill, capture, etc. a migratory bird. Habitat destruction, however, does not effect a taking under the MBTA. The Ninth Circuit stated that the NPS was not required to seek MBTA authorization because the birds will only be disturbed through habitat modification.

CZMA

California has a federally-approved coastal management program for San Francisco Bay which allows limited commercial recreational facilities within waterfront parks if they are incidental to park use and do not restrict public access to the Bay. Under the CZMA, federal action must be consistent with approved state coastal management plans. The Bay Commission found the Fort Baker Plan to be consistent with the Bay Plan. Sausalito claimed this consistency determination does not satisfy the CZMA. The court agreed with Sausalito, holding that the NPS's consistency determination was based on an improper ground - a general claim of insufficient funding. In seeking the Bay Commission's approval, the NPS "relied on the need to generate funds for the Fort Baker complex, even though lack of funds is explicitly forbidden as a criterion for finding consistency under 15 C.F.R § 930.32(a)(3)."[4] The court remanded this claim back to the district court for further proceedings.

Conclusion

The court rejected Sausalito's remaining claims under the NPS Organic Act, the CMIA, and the Omnibus Act. The Ninth Circuit found Sausalito had standing under a variety of statutes to challenge the validity of the Fort Baker Plan. While many of Sausalito's claims were dismissed, the court remanded Sausalito's CZMA and MMPA claims to the district court for further proceedings.

Endnotes

1. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).
2. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1201 (9th Cir. 2004).
3. 42 U.S.C. § 4332(2)(C).
4. *Sausalito,* 386 F.3d at 1223.

Photograph of Fort Baker courtesy of the National Park Service.

Lobsterman Unable to Recover Lost Profits from Catastrophic Oil Spill

Hall v. Eklof Marine Corp., 339 F. Supp. 2d 369 (D. R.I. 2004).

Lance M. Young, 2L, Roger Williams School of Law

On January 19, 1996 the tugboat *Scandia* and barge *North Cape* grounded and caught fire off a Rhode Island beach, resulting in the largest oil spill in Rhode Island's history and devastating losses of marine life and migratory birds in the Rhode Island and Block Island Sounds. A lobsterman who traps lobster approximately seventeen miles north of the spill filed suit in 2002 against those responsible for what is called the *North Cape* oil spill. The lobsterman's catch in 2000 was less than half of his catch in 1996. The district court dismissed the claims on summary judgment because it found no actual and proximate cause between the oil spill in 1996 and the lobsterman's depleted catch.

The *North Cape* Oil Spill

The weather forecast on January 18, 1996 predicted severe winter storms and high winds over Rhode Island on the day of the *North Cape* oil spill. Despite the storm warnings, the captain and crew of the *Scandia* set out for Rhode Island from New Jersey with four million gallons of home heating oil in tow. Failing to heed weather conditions, however, was not the *Scandia*'s only mistake. The *North Cape* was being towed without its anchor windlass, which was essential for raising and lowering the barge's 6,000-pound anchor. Because the windlass was broken, the crew left it behind and depended on a wire and rope rigging to hold the anchor. The crew was instructed to use the makeshift replacement only in an emergency because its use was very difficult.

Emergency ensued as the *Scandia* ventured into the North Atlantic winter storm and the crew was unable to lower the *North Cape*'s 6,000-pound anchor because of the storm's severity. The *Scandia*'s voyage ended when it and the barge grounded off a Rhode Island beach and caught fire, releasing 828,000 gallons of oil into the water and covering nine miles of Rhode Island shoreline. The vast area of affected waters was closed to fishing for several months. The spill had devastating effects on both marine life and migratory birds in the affected areas: authorities reported removing almost three million dead lobsters from Rhode Island beaches. The oil spill killed approximately nine million lobsters in Rhode Island and Block Island Sounds. A joint task force of federal and state agencies implemented a restoration plan for the oil spill in September of 1996 leading to the placement of 1.5 million lobsters in 2000 as part of the restoration plan.

The Lobsterman's Claims

Thomas Hall operates a lobster boat in Narragansett Bay approximately seventeen miles north of the *North Cape* oil spill location. Narragansett Bay was not closed off to fishing after the oil spill, nor was it declared an affected area by federal or state authorities. Lobsters, however, migrate and Hall contended that had lobsters not been killed as a result of the *North Cape* oil spill, they would have migrated north into Narragansett Bay where he set traps. His annual catch in 2000 was 20,845 pounds compared to 45,743 pounds in 1996.

Hall filed five separate claims in Rhode Island state court against companies that were affiliated with the *Scandia* and *North Cape*, the director in charge of the *Scandia*'s maintenance, and her captain. Under the Rhode Island Environmental Injury Compensation Act (Rhode Island Act), he filed both a strict liability and negligence claim.[1] Kathleen Castro, Director of the Sea Grant Fisheries Extension Program at the University of Rhode Island, was Hall's exclusive expert witness. Castro was keenly familiar with the *North Cape* oil spill and was an expert on lobster migration in Rhode Island. Castro's affidavit supported Hall's migration assertions and stated that the oil spill probably affected lobster catches in Narragansett Bay; in fact, lobster were placed in Narragansett Bay as part of the restoration plan. She also noted that lobster catches were down in the entire region, and that low lobster landings in Narragansett Bay could also be attributed to other environmental factors and over-fishing.

Hall also planned to present other scientific studies that revealed lobster migration patterns in Rhode Island and the negative impacts that the *North Cape* oil spill has had and will have on the state's lobster fishery. Authors of those reports were planning to testify at trial, but were only offered as lay witnesses.

Lay witnesses, as opposed to expert witnesses, may only testify to observations based on their own perceptions. While the court opinion does not specify why these witnesses were offered as lay witnesses, Hall more than likely failed to introduce them as expert witnesses within the required discovery period. Castro was only introduced a day before the discovery period came to a close.

Court's Analysis

Before the case reached trial, defendants moved for a summary judgment on each claim. If the plaintiff in a case is unable to provide any pre-trial evidence showing a genuine issue of material fact, the court may grant a motion for summary judgment and the moving party is entitled to a judgment as a matter of law.[2] The court's task was to determine whether Hall had any evidence for which a jury could return a verdict in his favor. In the court's view, Hall had to show that his fishing spot was affected by the oil spill and the effects of the oil spill must be distinguished from other factors that might have affected the lobster in Narragansett Bay.

The court acknowledged that Hall's lobster migration evidence could establish a genuine issue of material fact but failed to find any causal connection between the oil spill and Hall's depleted lobster catch. Causation was an essential element of Hall's strict liability claim, statutory negligence claim, and common law negligence claim. Under Rhode Island law, causation is shown when a plaintiff can show his/her injury would not have occurred "but for" the defendant's negligence.[3]

Hall relied almost exclusively on the expert testimony of Castro. While Castro's testimony supported Hall's claims in many ways, her affidavit also suggested that a number of factors other than the oil spill probably contributed to depleted lobster catches in the Narragansett Bay. She provided testimony that lobster production decreased from Massachusetts to Long Island Sound at the same time Hall's lobster catch declined. Although Castro's testimony does not discount the *North Cape* oil spill as a cause, it affirms that the oil spill is not separate and distinct from other causes of declining lobster populations. The court concluded that the evidence supplied "speaks in terms of 'possibilities' and not 'probabilities,' and does not state with sufficient degree of positiveness that Plaintiff's injuries are the result of the Oil Spill."[4] Because the punitive damage claims were dependent on the success of the other three, the court ruled in favor of defendants on all five claims.

Conclusion

Despite the court's ruling against Hall, it seemed to concede that had the oil spill never occurred, the lobster population in Narragansett Bay would be more plentiful today. The Rhode Island Act was enacted to help individuals injured in situations like this one. The oil spill most likely contributed to Hall's disappointing lobster landings, but in this case, there had to be other evidence that could convince a jury that the oil spill distinctly and separately had an identifiable effect on the lobster population. Castro's affidavit confirmed that the oil spill was not the "but for" cause of Hall's injuries; instead, it asserted that injury would have occurred despite the oil spill.

Hall's lay witnesses, if presented as expert witnesses, might have helped his case go to trial. One of them could have testified, with real percentages, that the death of 9 million lobsters could affect the future lobster population in Narragansett Bay. Another witness could have testified that lobsters do migrate from Rhode Island and Block Island Sounds to Narragansett Bay. The testimony of these two witnesses, taken together, might have enabled the jury to find that the oil spill actually and directly depleted lobster in Narragansett Bay. While this case on the surface appears to be a hurdle for victims of environmental destruction, the outcome probably has more to do with the plaintiff's pre-trial mistakes.

Endnotes

1. R.I. GEN. LAWS § 46-12.3-4 (2003).
2. Federal Rules of Civil Procedure 56(c).
3. *Evans v. Liguori*, 374 A.2d 774, 777 (R.I. 1977).
4. *Hall v. Eklof Marine Corp.*, 339 F. Supp. 2d 369, 380 (D. R.I. 2004).

Photograph of lobster on lobster pot was provided by NOAA.

Piping Plover Critical Habitat Designation Remanded to FWS

The Cape Hatteras Access Preservation Alliance v. U.S. Department of the Interior, 344 F. Supp. 2d 108 (D.D.C. 2004).

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On November 1, 2004, the District Court for the District of Columbia upheld several challenges to the designation of specific coastal areas in North Carolina as critical habitat for the wintering piping plover. The court found that a baseline approach to economic analysis when designating critical habitat is proper, although the economic impacts of designation were not adequately evaluated in this case. Furthermore, the court held that the requirements of NEPA must be followed when designating critical habitat.

Background

The Endangered Species Act (ESA) was enacted in 1973 to conserve endangered species and threatened ecosystems, and to provide a program for the conservation of endangered and threatened species. The Fish and Wildlife Service (FWS) is authorized under the ESA to protect species by listing them as either threatened or endangered and designating critical habitat. In 1985, the FWS listed the piping plover as endangered in the Great Lakes watershed and threatened in the remainder of its range, but declined to designate any critical habitat. After a 1996 lawsuit compelled the FWS to designate critical habitat for the Great Lakes and Northern Great Plains populations of piping plovers, the FWS decided to designate critical habitat for all wintering piping plover populations collectively. The FWS designated critical habitat for the wintering piping plover in coastal areas from North Carolina to Texas in 2001. Eighteen areas in North Carolina (approximately 6,800 acres and 126 linear miles of shoreline) were at issue in this case.

Compliance with the ESA

There are several key issues that must be addressed when designating critical habitat for any species. First, it must be determined whether or not the listed species occupies a particular area. Both occupied and unoccupied areas can become critical habitat, but in unoccupied places the whole area must be essential to the species' survival, not just certain physical features. The ESA does not define "occupied." During the plover designation, the FWS looked to consistent use and defined the plover's occupied habitat as those areas "where observations over more than one wintering season demonstrated [the] plovers' presence."[1]

Although the FWS's definition of "occupied" was valid, problems existed with the FWS's designation of certain areas that are not currently "occupied" by the piping plover. While it is acceptable for the FWS to include within its critical habitat designation unoccupied areas, it can only be done when the designation of occupied lands is insufficient. The FWS failed to make any findings regarding the necessity of including unoccupied lands within the designated critical habitat, and as such those pertinent areas cannot be designated as critical habitat.

After determining which areas are occupied, the FWS must then determine that "those physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection" are found on specific parcels in the area.[2] These features are known as Primary Constituent Elements (PCEs) and for the wintering piping plover included intertidal beaches and associated dunes. The court found that the FWS was overreaching when it designated certain areas as critical habitat where PCEs were not known to exist, so it remanded the case for an affirmative showing that PCEs are present in the areas designated as critical habitat. The court further held that the FWS failed to meet its statutory mandate to directly show that the PCEs require special management consideration or protection and ordered the FWS to address in the revised designation "how each identified PCE would need management or protection."[3]

Critical Habitat Boundaries

The plaintiffs also challenged the FWS's boundary designations for the critical habitat areas. In delimiting the critical habitat boundaries, the FWS used mean lower low water (MLLW) and vegetation lines. Critical habitat is defined "by specific limits using reference points and lines as found on standard topographic maps of the area . . . Ephemeral reference points (e.g. trees, sand bars) shall not be used in defining critical habitat."[4] This is the first time a court

reviewed this particular regulation. Although there is some ambiguity in the regulation as to whether or not the boundaries have to be fixed, the court found it was reasonable for the FWS to use movable, but long-lasting, lines such as MLLW and vegetation lines. Such lines are not ephemeral; they will not disappear over time, even though they may shift.

Economic Analysis

Economic and other impacts play an important role in designating critical habitat. The FWS is permitted to "exclude any area from critical habitat if [they] determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat unless . . . the failure to designate such area as critical habitat will result in the extinction of the species concerned."[5] A split currently exists in the Circuits regarding the FWS's economic analysis requirements. The Fifth and Ninth Circuits have rejected the functional equivalence analysis often used by the FWS in critical habitat designations. "Functional equivalence is the theory that the designation of critical habitat serves a minimal additional function separate from the listing of a species - that the effects of designation are mainly a subset of the effects of listing."[6] The Tenth Circuit, on the other hand, has rejected the FWS's baseline analysis which compares the economic situation without the designation and with it.

Photograph of piping plover was provided by the USFWS.

The D.C. District Court found that the baseline approach was proper as "tak[ing] into account economic costs already incurred as a result of listing would violate the ESA."[7] However, the court determined that the FWS appeared to have minimized the economic impact of the regulation by improperly evaluating the designation of the critical habitat versus the costs of the listing itself. The court remanded the designation to the FWS for clarification or modification of its position regarding the economic impact of the designation for the wintering piping plover and establishment of baseline costs. The FWS must also connect the facts and its conclusory findings that certain beach access modifications will not have an economic effect.

Application of NEPA

NEPA requires federal agencies to prepare an environmental impact statement for major federal actions which will significantly affect the quality of the human environment. The FWS maintained a policy of not preparing NEPA impact statements in addition to the analysis of economic and other impacts it conducts under the ESA. The court found this policy argument unconvincing and held that the FWS must undertake NEPA assessment when designating critical habitat.

Conclusion

The D.C. District Court dealt with several distinct issues in this case, and went through extensive reasoning and analysis - particularly when dealing with conflicting Circuit Court opinions. While the plaintiffs, who opposed the designation of the critical habitat, won most of their motions for summary judgment, the court will allow the FWS to clarify and modify its findings on remand. The wintering piping plover's critical habitat will be further refined, but hopefully the original designation of 137 coastal areas from North Carolina to Texas will not be limited too extensively.

Endnotes

1. *The Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior*, 344 F. Supp. 2d 108, 120 (D.D.C. 2004).
2. *Id.* at 120.
3. *Id.* at 124.
4. 50 C.F.R. § 424.12(c).
5. *CHAPA,* 344 F. Supp. 2d at 127.
6. *Id.*
7. *Id*. at 130.

Convictions for Entering Navy "Danger Zone" Vacated

U.S. v. Zenon-Encarnacion, 387 F.3d 60 (1st Cir. 2004).

Ronni Stuckey, 2L, the University of Mississippi School of Law

In October, the First Circuit vacated the convictions of three individuals charged with illegally entering a Navy-designated "danger zone" around Vieques, Puerto Rico. The court found that the district court erred by denying the defendants' request for an evidentiary hearing to determine whether the danger zone regulation complies with a food fishing proviso.

Background

On April 9, 2002, the U.S. Navy was conducting a training exercise in Vieques. South Salinas Bay, by virtue of its designation as a danger zone, was closed to the public during such training exercises. During the exercise, the defendants entered the bay in two small boats. The naval exercise was halted and the defendants instructed to leave the area. The defendants refused and were charged with criminal trespass in violation of 18 U.S.C. § 1382. The defendants were found guilty and sentenced by a magistrate judge in November 2002. One defendant received one year probation and forty-five days of incarceration and two received one year probation and four months of incarceration. The defendants appealed the conviction and the district court affirmed. They then appealed to the U.S. Court of Appeals for the First Circuit.

"Danger Zone" Designation

18 U.S.C. §1382 makes it illegal to enter "any military, naval, or Coast Guard reservation, post, fort, . . . or installation for any purpose prohibited by law or lawful regulation." South Salinas Bay is "open to navigation at all times except when firing is being conducted."[1] When firing is underway, people and surface vessels, except for those on patrol, are prohibited from entering or remaining in the danger area. The defendants violated §1382 by entering South Salinas Bay during firing.

The defendants challenged their convictions on several grounds. First, they argued that the Navy lacked the authority to designate the area as a danger zone because the Navy was operating under an expired National Pollutant Discharge Elimination System (NPDES) permit at the time. The Navy's permit expired in 1989, at which time it applied to the EPA for a new permit. At the time of the arrests the EPA had deemed the permit application complete, but had not issued a new permit. Under 40 C.F.R. §122.6(a), however, the EPA's failure to act simply resulted in the permit remaining in force despite its expiration.

The defendants contended that even if the permit had not expired, the Clean Water Act required state

Aerial photograph of Vieques was provided by the USFWS.

certification that the Navy's actions would meet state water quality standards. Puerto Rico denied the Navy's application for a water quality certificate (WQC) in February 2000. As a result, appellants claimed, the Navy's NPDES permit was no longer in force because the EPA could not issue a NPDES permit without a WQC. The First Circuit disagreed. At the time of the arrests, the EPA had yet to revoke or terminate the permit nor had it denied the Navy's application. On April 9, 2002, the Navy's permit was administratively still in force.

Trial Before a Magistrate Judge

The defendants also urged the court to vacate their convictions because their trial was held before a magistrate judge, even though the case involved misdemeanors for which they received imprisonment as opposed to petty offenses. Under 28 U.S.C. § 636(a)(4), magistrate judges have the authority to enter sentences for petty offenses. A person charged with a misdemeanor, other than a petty offense, however, may elect to be tried in district court.[2] The defendants claimed they were not charged with petty offenses and that their consent was required before they could be tried by a magistrate for a misdemeanor. A petty offense is defined in 18 U.S.C. §19 as "a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum" penalty is no greater than $5,000 or 6 months imprisonment. The defendants were charged with violating §1382 which provides for a fine and a maximum prison sentence of six months. Their crime therefore fell within the definition of a petty offense and their consent was not required to be tried or sentenced by a magistrate judge.

Food Fishing Proviso Defense

Finally, the defendants claimed the illegal entry into a danger zone may only be prosecuted under 33 U.S.C. § 3, the statutory authority for the designation of danger zones. In the present case, the government prosecuted the defendants under 18 U.S.C. § 1382. The court readily dismissed the defendants' argument as § 1382 clearly applies to individuals who violate the law by trespassing onto a naval installation. The court held that the Navy's designation of South Salinas Bay as a danger zone prohibited the defendants' entry into the bay during firing and subjected them to § 1382 liability.

The defendants also argued that the government's prosecution under § 1382 prevented them from asserting a valid jurisdictional defense under 33 U.S.C. § 3. They claimed that § 3 entitled them to an evidentiary hearing on whether the Navy's creation of a "danger zone" causes unreasonable interference or restriction of the food fishing industry.[3] The court agreed with the defendants that they were entitled to an evidentiary hearing, but not because the government brought charges under § 1382. The First Circuit held that the food fishing proviso applies to charges brought under either § 3 or § 1382. The court found that the district court had improperly denied the defendants an evidentiary hearing due to its reliance on *U.S. v. Zenon-Rodriguez.* In *Zenon-Rodriguez*, the First Circuit held that an evidentiary hearing was not required in a § 1382 case for the violation of a danger zone regulation promulgated under 33 U.S.C. § 1. Section 1, unlike § 3, lacked a food fishing proviso.

Conclusion

The court remanded the case for an evidentiary hearing and instructed that the convictions should stand if the district court finds the Navy's danger zone regulation in compliance with the food fishing proviso. As a final note, two concurring justices questioned the soundness of the majority's decision. If the defendants thought the danger zone unreasonably impacted commercial fishing in the area they could have directly challenged the validity of the regulation in district court under established judicial precedent. Instead, the defendants offer the invalidity of the regulation as a defense against prosecution. Justices Boudin and Lynch "question whether [given the opportunity for a direct challenge] either a fishermen or a protester should be allowed to sail deliberately into a known restricted military zone and then challenge the regulation by way of defense in a criminal case"[4] and suggest that the direct remedy should be an exclusive means of relief in such situations.

Endnotes

1. 33 C.F.R. § 334.1470(b)(1).
2. 18 U.S.C. § 3401.
3. The powers of the Department of the Army to restrict the use and navigation of navigable waters during target practice "shall be so exercised as not unreasonably to interfere with or restrict the food fishing industry." 33 U.S.C. § 3.
4. *U.S. v. Zenon-Encarnacion*, 387 F.3d 60, 67 (1st Cir. 2004).

Corps Doing All It Can to Meet State Temperature Standards

National Wildlife Federation v. U.S. Army Corps of Engineers, 384 F.3d 1163 (9th Cir. 2004).

Lauren Cozzolino, 3L, University of Connecticut School of Law
Stephanie Showalter

The National Wildlife Federation, along with several other environmental groups challenged the issuance of a Record of Decision (ROD) in 2001 regarding the Army Corps of Engineers' (Corps) operation of four dams on the lower Snake River in the State of Washington. The lawsuit alleged that the Corps had not properly addressed their obligations to comply with the State of Washington's water quality standards for temperature. On appeal, the Ninth Circuit concluded that the 2001 ROD was not arbitrary or capricious or contrary to law and granted summary judgment to the Corps.

Background

The Corps operates four dams on the lower Snake River in Washington State as part of the Federal Columbia River Power System (FCRPS), a hydroelectric power project that provides about seventy-five percent of the electric power used in the Pacific Northwest. The Clean Water Act (CWA) requires federal agencies to comply with state water quality standards. The State of Washington designated the lower Snake River suitable for aquatic life and promulgated a temperature standard which specifies that the temperature of the lower Snake River shall not exceed 20^0 C (68^0 F) due to human activities on any given day.[1] Water temperature can affect the viability of salmon and steelhead as well as the biological productivity of streams and fish migration.

Water temperatures on the lower Snake River regularly exceed twenty degrees Celsius. In 1995, NOAA Fisheries, also known as the National Marine Fisheries Service, issued a biological opinion calling for operational modifications of the FCRPS to ensure the long-term survival of salmon stocks. The Corps adopted NOAA Fisheries' recommendations in 1995 and 1998 RODs. The NWF challenged these RODs in 1999, claiming the Corps did not adequately address its obligation to comply with state temperature standards. The district court agreed and remanded the case to the Corps. The remand resulted in a 2001 ROD in which the Corps concluded that "the operation of the mainstem Corps dams . . . on the Snake and Columbia Rivers has no significant impact on water temperatures." The NWF was still not satisfied and challenged the ROD in August 2001. The district court held that the 2001 ROD was not arbitrary or capricious as the Corps had implemented the recommendations in the biological opinion and evaluated its obligations under the CWA. The NWF appealed to the Ninth Circuit.

Standard of Review

Under the Administrative Procedure Act, a court may set aside agency action only if the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Due to the highly scientific nature of this issue and the unique expertise of the Corps, the court was obliged to give substantial deference to the Corps's judgment in deciding this case.[2]

2001 ROD

In the 2001 ROD, the Corps concluded that "there are no operational changes that we can undertake to significantly decrease river water temperatures" and "that the Corps' operation of the four dams on the lower Snake River did not cause temperature exceedences."[3] The NWF claimed both of these conclusions were arbitrary, capricious, and contrary to law.

In support of its claim, the NWF first drew attention to a 1995 Environmental Impact Statement (EIS) prepared by the Bureau of Reclamation, the Corps, and the Bonneville Power Administration for the Columbia River System Operational Review. The agencies involved determined that the "natural river operation" of the dams on the System would cause the least amount of temperature exceedences. The NWF argued that this finding showed that the Corps could have taken action to reduce temperature exceedences by adopting the natural river operation method. The court disagreed. First, the natural river operation method is not a silver bullet that will slay the temperature demon. Even with operational modifications, the EIS concluded that none of the alternatives "would completely control water temperature" and the natural river method was likely to cause other

problems due to increased sedimentation and dissolved gas saturations levels. In addition, the natural river method would require that the dams undergo significant structural and operational modifications, some of which the court found would be inconsistent with Congress' intent in authorizing the dams to store water and generate power. The Ninth Circuit held that the Corps was not arbitrary and capricious for failing to adopt the "natural river operation" in the 2001 ROD and concluding that there was nothing else it could do to reduce water temperatures.

As for the Corps' conclusion that the operation of the dams does not cause the temperature exceedences, the court again deferred to the agency. For a 1999 EIS, the EPA prepared a temperature model which indicated that the presence of the dams "played a significant role in increasing the magnitude and duration of water temperature exceedences in the Snake River."[4] The EPA model also concluded that breaching the dams would decrease the number of exceedences. It is important to note, however, that the same model revealed that exceedences would occur even under a natural river scenario. The NWF argued that the results of the EPA modeling established that the Corps' operation of the dams causes the temperature violations. The court disagreed mainly because the EPA model compared water temperatures in a system with the dams and without the dams and did not model the differences in temperature among the various types of operational methods. In fact, the Ninth Circuit found that the EPA study supported the Corps' claim that the mere existence of the dams causes temperature exceedences.

Operation vs. Existence

The NWF also argued that the Corps' distinction between the existence of the dams and the operation of the dams on the Snake River was arbitrary and capricious. According to NWF, no distinction should be made because the Corps must comply with the CWA regardless of whether it is the operation or the existence of the dams which causes the temperature increases. The Ninth Circuit rejected this argument, holding that the CWA directive requiring federal agencies to comply with state water quality standards must be read in light of other Congressional mandates, such as the statutes authorizing the construction of the dams on the Snake River. "If state regulatory exceedences occur as the result of water impoundment required for operation of the federal dams, despite good-faith and diligent efforts of the Corps to do all that is feasible to avoid such exceedences, then we do not believe such an exceedence can be construed as a violation of the CWA."[5]

Dissenting Judge McKeown challenged the logic of the majority which framed the issue as a choice between compliance with the CWA and destruction of the dams. Judge McKeown questioned whether the administrative record supported the Corps' conclusion that the existence of the dams is the *sole* cause of the temperature exceedences. The judge noted that although the existence of the dams may adversely affect water temperatures, the operation of the dams may also contribute.

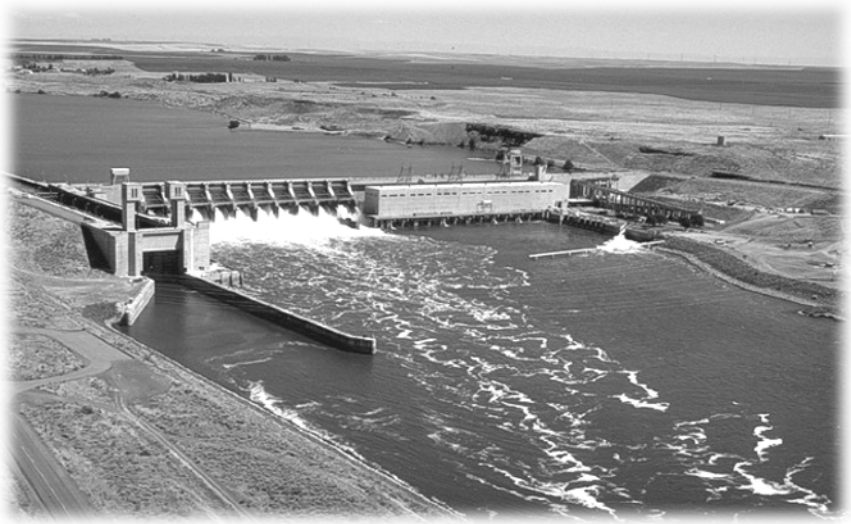
Conclusion

The Corps' conclusion that its operation of the dams on the lower Snake River did not contribute to temperature exceedences was not arbitrary and capricious because it was supported by the administrative record. The Ninth Circuit affirmed the district court's decision.

Endnotes

1. WASH. ADMIN. CODE § 173-201A-602.
2. *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).
3. *National Wildlife Federation v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1172 (9th Cir. 2004).
4. *Id.* at 1176.
5. *Id.* at 1179.

Photograph of the Ice Harbor Dam on the Snake River was provided by the USGS.



Alaska, from page 3

109. The court disagreed because the Department of Fish and Game presented evidence to the CFEC that indicated the fishery was in trouble and that even seventy-three permits would be too many to maintain a sustainable catch. The CFEC's decision to set the number at seventy-three and not higher was therefore reasonable and consistent with the Limited Entry Act.

Skipper Participation Points

Simpson also claimed that the CFEC erred in denying him skipper participation points for 1984. To receive points for past participation as a skipper, an individual must have harvested the resources as a skipper, defined as "a gear operator who . . . was licensed according to the following: (i) for the years 1978-1984 had, at the time the skipper participation occurred, a valid sablefish interim-use permit for the fishery for which the applicant is applying."[7] Simpson admitted in his affidavit that he had failed to secure an interim-use permit in 1985. Apparently, he had forgotten to get the required permits until the day before the opening and was forced to sell the fish under a crew member's license. The court found that CFEC's decision not to award Simpson past participation points for 1984 was neither erroneous nor contrary to the law.

Conclusion

The Supreme Court affirmed the decision of the lower court. The CFEC was not arbitrary or capricious when it set the maximum and optimum number of permits for the sablefish longline fishery at seventy-three or when it denied Simpson skipper participation points for the 1984 season.

Endnotes

1. ALASKA STAT. § 16.43.010.
2. *Id.* § 16.43.240(b).
3. *Id.* § 16.43.240(a).
4. 758 P.2d 1256, 1261-62 (Alaska 1988).
5. *Simpson v. Alaska*, 2004 Alas. LEXIS 138 at *14 (Alaska Nov. 19, 2004).
6. ALASKA STAT. § 16.43.290.
7. ALASKA ADMIN. CODE, tit. 20, §§ 05.705 and 05.713(9).

Congress Amends Migratory Bird Treaty Act

On December 8, 2004, Congress quietly amended the Migratory Bird Treaty Act (MBTA) to exclude non-native birds from its protections. The MBTA prohibits the taking, killing, or possessing of migratory birds and the possession of eggs, nests, and any product derived from a migratory bird. Spurred by a controversy in Maryland to cull mute swans in the Chesapeake Bay, the amendment limits the application of the MBTA to "migratory bird species that are native to the United States or its territories." Last year, a federal judge enjoined a Maryland state plan to reduce the swan population in the Chesapeake Bay. Officials and environmental groups such as the National Audubon Society and the Nature Conservancy claim the swan population must be reduced because the swans, which were imported by a private citizen in the 1950s to decorate his estate, are contributing to the decline of the Bay by overharvesting critical vegetation. The Fund for Animals, the Humane Society, and other groups decry the plan and the new amendment insisting that the swans are simply the scapegoat for the Bay's many problems and that the amendment is an act of political subterfuge. The head of Maryland's invasive species program anticipates that the state will begin culling swans this spring by shooting or euthanizing adults and shaking and coating eggs to prevent hatching. Under the new law, migratory bird species occurring in the U.S. because of intentional or unintentional human-assisted introduction can be considered native for the purposes of the act if (1) it was native in the U.S. in 1918 or (2) it was extirpated after 1918 and reintroduced through a federal program. The Secretary of the Interior has 90 days to publish a list of all nonnative, human-introduced bird species to which the MBTA no longer applies.

Mid-Atlantic, from page 1

which accompany a storm of the magnitude of Hurricane Gloria,"[1] regardless of the dam's purpose. PG Energy argued that a dam operator's duty was limited to ensuring that its dam does not fail as a structural matter. Both the trial court and the Superior Court concluded that although PG Energy's dams did not fail, PG Energy "violated a duty to construct, maintain and operate them in a fashion that would have protected the downstream homeowners from these floodwaters, and that the homeowners' losses were the proximate result of that breach of duty."[2]

Photograph of flooded homes was provided by the USGS.

PG Energy appealed. The Supreme Court accepted the case to examine "what legal duty a water supply reservoir/dam owner has to undertake with respect to its dams in order to protect downstream property owners against floodwaters caused in the aftermath of a storm of the magnitude of Hurricane Gloria."[3]

Negligence *Per Se*

On appeal to the Superior Court, PG Energy was found liable for damages resulting from the overflow of the dam because it failed to warn downstream communities of the dangers posed by the hurricane. The court relied on negligence *per se* to reach this conclusion. Negligence *per se* is a form of negligence that results from the violation of a statute.[4] The Superior Court ruled that PG Energy violated the Pennsylvania Dam Safety Act which imposes a legal duty on dam owners to "monitor, operate and maintain the facility in a safe condition" and notify appropriate authorities in downstream communities "of any condition which threatens the safety of the facility, and take all necessary actions to protect life and property . . ."[5] In the opinion of the Superior Court judges, the term "safety" referred to the security of downstream communities and therefore operators have a duty to warn even if the dam is structurally sound. PG Energy was therefore negligent because it violated the Dam Safety Act by failing to warn.

The Supreme Court disagreed and held that the Superior Court improperly invoked negligence *per se*. Generally, negligence *per se* is appropriate only when the statute at issue is sufficiently specific to leave little doubt that a person violating it deviates from a reasonable person standard. For example, motor vehicle statutes establishing maximum speed limits can be the basis for negligence *per se* because they impose strict standards. Statutes, however, requiring drivers to maintain reasonable speeds cannot support a finding of negligence *per se* because the "reasonableness" of a driver's actions will depend on the circumstances.

The court stated that the Dam Safety Act does not mandate particular actions for dam owners and therefore lacks the required specificity. The act simply requires operators to maintain the dam in a "safe condition" and take "necessary actions." The Supreme Court ruled that § 693.13 does not support a finding of negligence *per se* as it "sets forth a general standard of conduct . . . express[ing] the familiar and flexible reasonable man standard."[6]

Traditional Negligence

In order for PG Energy to be liable for the damage to plaintiffs' property, the company must have breached a recognized legal duty of care owed to the plaintiffs and its breach of that duty must have

See Mid-Atlantic, page 16

Mid-Atlantic, from page 15

caused the plaintiffs' injuries. The Supreme Court held that § 693.13 does not impose a general duty of flood control for the protection of downstream homeowners, but rather imposes a duty on owners "to monitor, operate, and maintain the *facility* in a safe condition."[7] "The Act may fairly be said to impose a duty upon dam owners to protect the public from foreseeable harms that would result from the failure of the facility - irrespective of what might occasion the danger of failure."[8] PG Energy's dams did not fail. In fact, the dams provided a modicum of protection to downstream homeowners during the storm because the reservoirs were not filled to capacity prior to the storm, and therefore actually provided some flood control.

Conclusion

Despite the tragedy suffered by the plaintiffs due to the hurricane, the court refused to hold PG Energy responsible for the plaintiffs' damages because its dams remained structurally sound during the storm. The lower court judgments in favor of the plaintiffs were reversed and a judgment in favor of PG Energy was entered.

Endnotes

1. *Shamnoski v. PG Energy*, 858 A.2d 589, 592 (Pa. 2004).
2. *Id*. at 593.
3. *Id.* at 591.
4. Black's Law Dictionary, 1035 (6th Ed. 1990).
5. 32 PA. CONS. STAT. § 693.13.
6. *Shamnoski*, 858 A.2d at 602.
7. *Id.* at 603 (emphasis in original).
8. *Id.* at 604.

Hawaii, from page 1

Photograph of dolphin was provided by NOAA.

authorization under the Marine Mammal Protection Act (MMPA), and prepare an environmental impact statement under the National Environmental Policy Act (NEPA) for its use during wartime. The Cetaceans claimed they had standing to sue in their own name because of a Ninth Circuit decision in which the court stated the Hawaiian Palila bird, "has legal status and wings its way into federal court as a plaintiff in its own right."[2]

The defendants moved to dismiss the suit for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The district court granted the motion to dismiss, holding that the Cetaceans lacked standing under the ESA, the MMPA, NEPA and the Administrative Procedure Act (APA). The Cetaceans appealed.

Article III Standing

To bring suit in federal court, a plaintiff must have both Article III (constitutional) standing and statutory standing. Under Article III, a plaintiff "must show that (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[3] If the plaintiff has Article III standing, then the court must determine whether the plaintiff has standing under the specific statute under which the plaintiff brings suit. If a plaintiff has Article III standing but lacks statutory standing, the plaintiff cannot state a claim upon which relief can be granted and the claim should be dismissed.

Although animals have many legally protected rights, animals unfortunately, like artificial persons

such as corporations and ships and judicially incompetent persons such as infants, cannot speak for themselves or function as a plaintiff in the same manner as a judicially competent person. However, "nothing in the text of Article III of the U.S. Constitution explicitly limits the ability to bring a claim in federal court to humans."[4] The Ninth Circuit held that Congress could authorize a suit in the name of an animal if it wanted to. The main question for the court, therefore, was whether Congress granted animals statutory standing in any of the four statutes under which the Cetaceans brought suit. The court found that it had not.

Statutory Standing

Neither the Administrative Procedure Act, the ESA, the MMPA, nor NEPA authorizes animals to bring suit in their own names. The APA provides that a person "suffering legal wrong" because of a federal administrative action is entitled to judicial review. "Person" is defined as "an individual, partnership, corporation, association, or public or private organization other than an agency.[5] With regards to the MMPA, affected "persons," as defined by the APA, can file suit to compel parties to seek permits or letters of authorization. Suits regarding NEPA violations must be brought under the APA and therefore are similarly limited to the above definition of persons. The ESA, which authorizes citizen suits for alleged violations of the act, defines "person" as an individual, corporation, partnership, trust, association, or other private entity. Animals are not included in the APA or ESA definitions of "person" and consequently they lack standing to sue in their own names.

Conclusion

The Ninth Circuit reaffirmed that Congress has yet to grant statutory standing to animals. The court dismissed the Cetaceans' argument that *Palila* granted them standing holding that the reference to the Palila bird having standing in its own right was non-binding dicta. It is important to note, that nothing in the court's opinion limits the ability of groups to challenge the Navy's use of sonar or other government actions impacting animals. The suits must simply be brought by a judicially competent person or group on the animals' behalf.

Endnotes

1. *Nat. Res. Def. Council, Inc. v. Evans,* 279 F. Supp. 2d 1129, 1191 (N.D. Cal. 2003).
2. *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106, 1107 (9th Cir. 1988).
3. *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).
4. *Id.* at 1175.
5. 5 U.S.C. § 551(2).

Photograph of humpback whale fluke was provided by the USFWS, and the photographer was Gary Stoltz.

Ohio Contemplates Elimination of Submerged Lands Leases

Stephanie Showalter, J.D., M.S.E.L.

In November, at what appeared to be the tail end of an incredible controversy regarding the Ohio Coastal Management Program's submerged lands leasing program, the Ohio Department of Natural Resources (ODNR) issued proposed rules to eliminate a portion of the program. According to ODNR's website, the new rules would:

- Eliminate the Submerged Lands Lease requirement for private residential structures, creating a new, simplified permit system. Submerged Lands Leases would still be required for commercial properties and would be available to residential owners on request.
- Remove provisions requiring landowners to secure liability insurance covering the State of Ohio against damages related to coastal structures covered by the new permits.
- Allow permits to be easily renewed after a residential property is bought or sold.[1]

If the rule change is approved, homeowners with existing leases will be offered an opportunity to switch their leases for permits. New permits would be issued at a one-time, $50.00 rate. The Ohio Legislature's Joint Committee on Agency Rule Review is currently reviewing the proposed rules.

A public hearing was held on January 4, 2005. According to the *Toledo Blade*, no one spoke in favor of the rule change at the hearing.[2] The Ohio Lakefront Group (OLG), a vocal opponent of ODNR and the state's current coastal management program, urged the Committee to reject the proposed rules, at least until the group's court case is resolved. On May 28, 2004, OLG filed suit alleging "ONDR has unconstitutionally and unlawfully asserted ownership and possession of the private property of Ohio citizens abutting Lake Erie."[3] Over the years, the ODNR has claimed state ownership of all land lakeward of the high water mark. The OLG wants the court to declare that landowners along Lake Erie have fee title to the land between the high water mark and the legal boundaries of their property as established by their deeds, which might be the low water mark, the water's edge, or something else entirely.

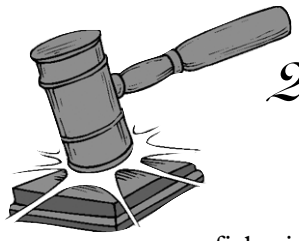
Legislation attempting to address this boundary issue died in a Senate committee last year. The original sponsor of H.B. 218, newly-elected state Senator Tim Grendell, is also opposing the rule change claiming the ODNR's proposal "is merely another effort to continue to aggrandize their own authority, misrepresent Ohio law, and continue to shape policy inconsistent with the revised [Ohio] code and common law."[4] Representative Grendell intends to introduce a new version of H.B. 218 in the next legislative session.[5]

The Committee has 90 days to rule on the proposed rules and its decision is expected by the end of February. In the meantime, the OLG's lawsuit continues to move forward; the Court of Common Pleas recently denied the State's motion to dismiss. It is unclear how the lawsuit will turn out for the lakefront property owners and the state or whether Representative Grendell can get his bill passed this time around, but one thing is for certain, Ohio's coastal managers are living in interesting times.

Endnotes

1. Ohio Coastal Management Program's Proposed Rules website at http://www.dnr.state.oh.us/coastal/proposed rules1204.htm .
2. Steve Murphy, *Lakeshore Owners Oppose Rule Change*, TOLEDO BLADE, Jan. 5, 2005.
3. Complaint for Declaratory Judgment, Mandamus, and Other Relief at 2, *State of Ohio ex rel. Robert Merill, Trustee, et. al. v. Ohio Department of Natural Resources* (No. 04CV001080) (Court of Common Pleas 2004).
4. State Representative Tim Grendell, Press Release, Grendell Opposes DNR Rule Filing, 12/2/2004.
5. *Id.*

Photograph of Lake Erie was obtained from the USEPA Great Lakes Collection.



2004 Federal Legislative Update

Luke Miller, 3L, University of Mississippi School of Law

The following is a summary of federal legislation related to coastal, fisheries, water, and natural resources enacted during 2004 by the 108th Congress.

108 Public Law 219 - To Provide for the Conveyance of a NOAA Ship, and for other purposes (H.R. 2584)
Amends the Fishermen's Protective Act of 1967 to extend through FY 2008 the requirement that the Secretary of State enter into agreements to reimburse owners of commercial fishing vessels seized and detained by a foreign country for actual costs, market value of confiscated or spoiled fish, and half of lost gross income.

108 Public Law 264 - Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004 (S. 2238)
Amends the National Flood Insurance Act of 1968 to extend the national flood insurance program through September 30, 2008 and establishes a pilot program authorizing FEMA to provide financial assistance to communities taking action to reduce losses to properties for which repetitive flood insurance claim payments have been made.

108 Public Law 266 - Marine Turtle Conservation Act of 2004 (H.R. 3378)
Directs the Secretary of the Interior to finance projects for the conservation of marine turtles and their nesting habitats in foreign countries through the Multinational Species Conservation Fund.

108 Public Law 361 - Water Supply, Reliability, and Environmental Improvement Act (H.R. 2828)
Establishes an Office of the Federal Water Resources Coordinator within the Office of the Secretary of the Interior to coordinate federal activities addressing water desalination, impaired ground water, brine removal, and water reuse projects and activities authorized under the act.

108 Public Law 384 - Brown Tree Snake Control and Eradication Act of 2004 (H.R. 3479)
Directs the Secretaries of Interior and Agriculture to fund brown tree snake control, interdiction, research, and eradication efforts of federal agencies, state and local governments, and private entities. Designates the brown tree snake as non-mailable matter.

108 Public Law 399 - To Amend the Federal Water Pollution Control Act (H.R. 4731)
Amends the Federal Water Pollution Control Act to reauthorize appropriations for the National Estuary Program through FY 2010.

108 Public Law 412 - Noxious Weed Control Act of 2004 (S.144)
Requires the Secretary of Agriculture to establish a program to provide assistance to eligible weed management entities to control or eradicate noxious weeds on public and private land.

108 Public Law 447 - Foreign Operations, Export Financing, and Related Programs Appropriations Act (H.R. 4818)
Contains the Oceans and Humans Health Act (Title IX) which establishes the interagency ocean and human health research program and the NOAA Ocean and Human Health Initiative. Requires the implementation of a public information and outreach program in cooperation with the National Sea Grant Program.

108 Public Law 456 - Harmful Algal Bloom and Hypoxia Amendments Act of 2004 (S. 3014)
Reauthorizes the Harmful Algal Bloom and Hypoxia Research and Control Act of 1998, requires the President to submit a prediction and response report, and provides for local and regional scientific assessments.

Book Review . . .

Stephanie Showalter

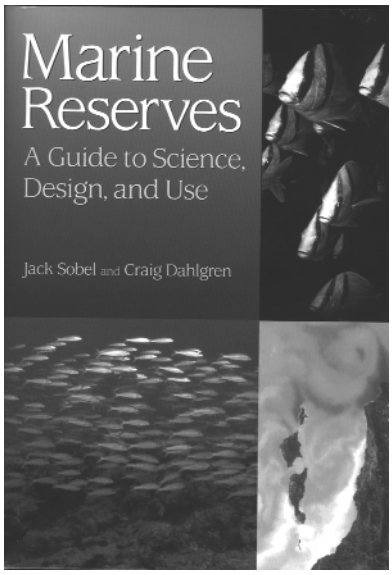
Marine Reserves: A Guide to Science, Design, and Use

Jack Sobel and Craig Dahlgren (Island Press 2004)

"Marine 'no-take' reserves, areas closed to fishing and all other extractive activities, are among the most essential tools required to protect and restore the health of our oceans from multiple stressors." In their review of marine reserves from around the globe, *Marine Reserves: A Guide to Science, Design, and Use*, Sobel and Dahlgren present overwhelming evidence in support of the above claim. Using case studies from the United States to Chile, Australia to Kenya, the Philippines to the Mediterranean, Sobel and Dahlgren reveal time and time again that the establishment of no-take marine reserves can protect biodiversity, increase fish biomass, enhance opportunities for non-consumptive uses, and improve scientific knowledge of the marine environment.

Marine Reserves should be required reading for anyone involved in the development of marine reserves. While not intended to be an exhaustive review as the primary scientific literature in this area is extensive, the book highlights key issues, research needs, and lessons learned and is an excellent starting point for further exploration. *Marine Reserves* contains a wealth of information on the current state of key marine ecosystems and fisheries, the impact of fishing on fish populations and marine habitats, and the types of benefits marine reserves can achieve when designed and implemented properly. *Marine Reserves* contains detailed case studies of the Channel Islands Marine Reserve Network, the Exuma Cays Land and Sea Park in the Bahamas, and Belize's marine protected area network, one of the most advanced systems in the world. Additional case studies highlight the global marine reserve experience.

An entire chapter is dedicated to the often overlooked social dimensions of marine reserves. Social factors can play a significant role in the success or failure of a particular marine reserve. Reserves established with the support of local communities and fishermen in particular are more likely to succeed than those without. The four principal socioeconomic elements of marine reserve design: decision-making arrangements, resources use rules, monitoring and enforcement, and conflict resolution mechanisms are discussed as well as how the design of a marine reserve can influence human behavior and vice versa.



Despite the fact that *Marine Reserves* is a review of the scientific literature related to marine reserve design, use, and benefits, it is written for a general audience and easily accessible by anyone. For example, the difference between single-species management and ecosystem management is compared to the difference between automobile and airplane maintenance. Airplanes, unlike automobiles which are serviced when a problem occurs, are maintained to prevent the failure of important components. Ecosystem management similarly seeks to prevent the failure of key components and systems. Although most readers will no doubt already have a handle on the concept of ecosystem management, such comparisons are refreshing.

No-take marine reserves are not a panacea, but they are powerful management tools that in concert with fisheries regulations, water quality controls, and other national environmental policies can relieve at least some of the pressure on the world's oceans. At a time when our oceans are under incredible strain from human activities, Sobel and Dahlgren's contribution to the field is not only an important educational text, but a springboard for future discussions on the use of marine reserves to protect marine ecosystems and resources. *Marine Reserve* is an invaluable guide for policy-makers and managers ready to embrace innovative ideas and members of the public ready to become involved in local, state, or federal marine reserve initiatives. The dissemination of this valuable scientific information can only improve the debate.

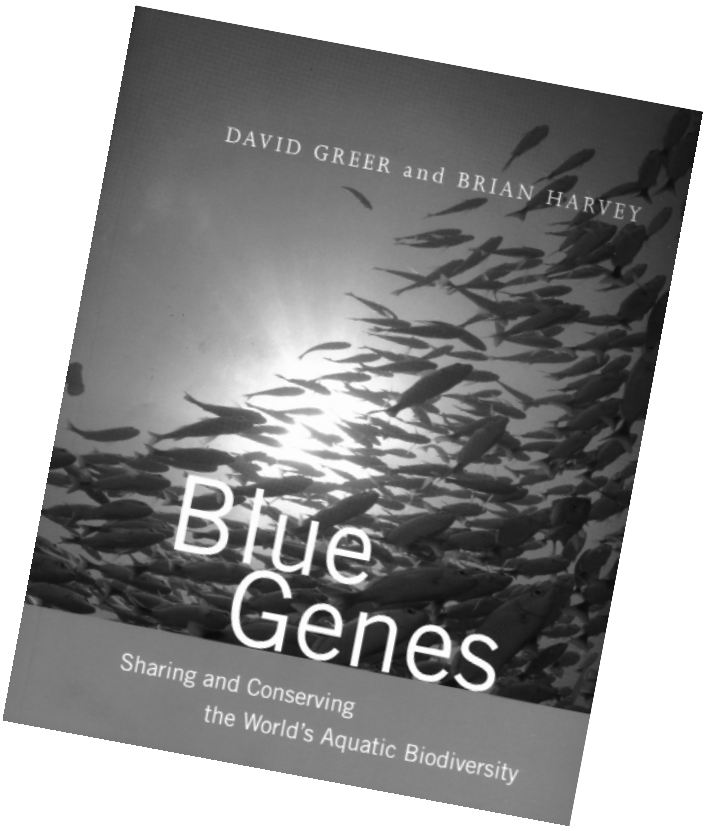
Jack Sobel is Director of Strategic Conservation Science and Policy for The Ocean Conservancy. Craig Dahlgren is the Science Director for the Perry Institute for Marine Science's Caribbean Marine Research Center.

Book Review . . .

Stephanie Showalter

Blue Genes: Sharing and Conserving the World's Aquatic Biodiversity

David Greer and Brian Harvey (Earthscan 2004)



Biotechnology and genetic engineering are rapidly changing the world we live in. No longer are researchers limited to traditional breeding and hybridization techniques with their unpredictable results which take years to achieve. Today, researchers can extract DNA from one species and insert it directly into the cell of another. Genetically Modified Organisms (GMO) may be more resistant to disease or freezing, contain additional vitamins, or grow faster. The rapid growth of aquaculture and the ornamental fish trade and the expansion of pharmaceutical "bioprospecting" from land to sea has greatly increased the demand for aquatic genetic resources - genetic material of actual or potential value. Resource managers and policy makers around the globe are struggling to develop access regimes for these resources.

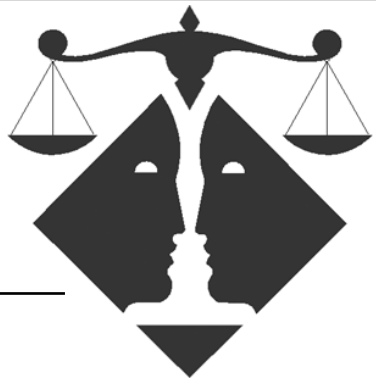
In *Blue Genes*, David Greer and Brian Harvey examine the myriad of issues surrounding the ownership, governance, and trade in aquatic genetic resources. Who owns and has control over aquatic genetic resources, when unlike agriculture crops, aquatic life largely inhabits public territory? What happens when community knowledge is not required to use genetic resources to develop a new drug or transgenic fish - a rarity in the plant world? How can the rights of indigenous peoples be protected in situations where local communities do not have rights regarding aquatic genetic resources? Are royalties the best benefit-sharing method?

Blue Genes is an excellent entry point for anyone interested in or involved with the collection of aquatic genetic resources for research or commercial purposes. Key issues in the management of aquatic genetic resources, such as unintended consequences, denial of access due to lack of policies, and "research chill," are illustrated through six case studies from four continents.

Greer and Harvey do not claim to have the answers to these difficult questions. Their work is nevertheless groundbreaking because it asks the questions and challenges policy makers to fill the policy gaps surrounding aquatic genetic resources and thereby achieve the objectives of the 1992 Convention on Biological Diversity (CBD). The CBD calls on signatory nations to conserve biological diversity, ensure the sustainable use of its components, and provide for the fair and equitable sharing of benefits derived from the use of genetic resources. Achieving these objectives will be a struggle, but according to Greer and Harvey "what matters most is the determination to do so, recognizing that biology trumps politics and nature bats last."

David Greer is an independent legal consultant specializing in natural resources and biodiversity management policy and Brian Harvey is a fisheries biologist and the President of World Fisheries Trust. *Blue Genes*, published by Earthscan, is distributed in the U.S. by Stylus Publishing.

International Law Update



Jason Savarese, J.D.

Below is a summary of the coastal- and marine-related international law developments in 2004.

International Convention for the Control and Management of Ships' Ballast Water and Sediments **February 2004**

The International Maritime Organization (IMO) adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments at its London meeting. The Convention is designed to prevent the spread of harmful aquatic organisms via ballast water and requires ships to implement a ballast water and sediments management plan. The Convention will enter into force one year after ratification by thirty states representing 35 percent of the world's merchant shipping tonnage.

Guiding Principles for Alien Species Amended **February 2004**

Members of the Convention on Biological Diversity amended the Guiding Principles for the Prevention, Introduction, and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats, or Species.

Listing Changes in CITES **October 2004**

Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) agreed to add the great white shark, humphead wrasse, and five species of Asian turtles and tortoises to the Convention's "ark" of protected animals. The Irrawaddy dolphin was given Appendix I status, while Nile crocodiles in Namibia, and American crocodiles in Cuba, were moved down from Appendix I to Appendix II.

MARPOL Annexes I and II Revised **October 2004**

The International Maritime Organization (IMO) adopted revised regulations for ships that carry chemicals or oil, including new requirements for pump room bottom protection and accidental oil outflow performance. The revised Annex II regulations for noxious liquid substances include a new four-category categorization system. The revisions are expected to enter into force on January 1, 2007.

International Shark Finning Ban Adopted **November 2004**

Sixty-three members of the International Commission for the Conservation of Atlantic Tunas (ICCAT) banned the finning of Atlantic shark during its 2004 annual meeting. The U.S., which banned shark finning in 1993, urged ICCAT to adopt these protective measures necessary to ensure the survival of the sharks.

ACCOBAMS Resolution On High Intensity Sonar **November 2004**

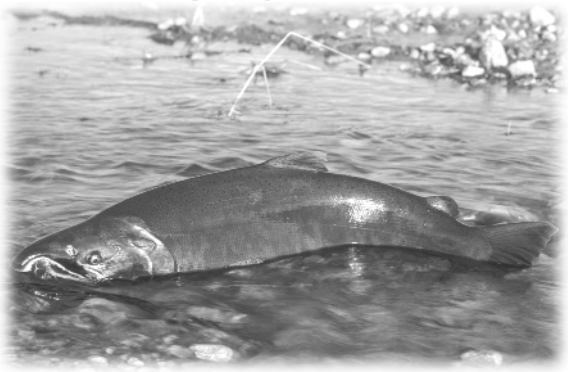
The sixteen member states of the Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea, and Contiguous Atlantic Area (ACCOBAMS) approved a resolution calling for "extreme caution" with regards to ocean activities producing intense underwater noise, such as military sonar operations. The resolution states that such activities would ideally only be undertaken after the development of environmental guidelines.

Coast to Coast
And Everything In-Between

An historic declaration laying the foundation for regional collaboration in the Great Lakes was signed on December 3, 2004. Dozens of officials from federal, state, tribal, and local agencies and organizations pledged their "support for the development of a widely understood and broadly supported strategy including actions to further protect and restore the Great Lakes ecosystem through the Great Lakes Regional Collaboration process." The Great Lakes Regional Collaboration is the result of a May 18, 2004 Executive Order. A regional plan is due by June 2005 and a final strategy by the end of the year. While the signing of the Declaration is a significant step towards coordination in the region, its implementation could be hindered due to lack of funding. No funds have yet been earmarked to support the Collaboration, a situation which may very well spell its doom.

On December 17, President Bush signed Executive Order 13366 establishing the Committee on Ocean Policy. As part of the Council on Environmental Quality, the Committee will provide advice on the establishment and implementation of ocean policies, obtain and disseminate information on ocean-related matters, review and provide advice on policies proposed by federal agencies, facilitate implementation of common principles and goals, and ensure the coordinated implementation of the ocean component of the Global Earth Observation System. The President's Ocean Action Plan was released at the same time. For more information or to download the Plan, please visit the President's Interagency Ocean Policy Group's website at http://ocean.ceq.gov/ .

Photograph of sockeye salmon was provided by the USFWS, and Dave Menke was the photographer.



In September, a federal appeals court ruled that the Navy need not consider the impact an accidental missile explosion might have on protected salmon in Hood Canal in Washington State. A coalition of environmental and anti-war groups argued that, prior to updating its fleet of Trident nuclear submarines, the National Environmental Policy Act (NEPA) and the Endangered Species Act required the Navy to determine the possible impacts of an explosion which could cause the release of radioactive material into the environment. A district court dismissed the groups' claims in 2002. The Ninth Circuit Court of Appeals affirmed the district court ruling finding that the upgrade had been ordered by President Clinton and was not subject to NEPA. Furthermore, the court stated that federal agencies do not have to prepare environmental assessments for unlikely occurrences.

Around the Globe

On December 18, 2004, the International Tribunal for the Law of the Sea ordered the prompt release of the *Juno Trader*. Guinea-Bissau claimed the *Juno Trader*, which flies the flag of Saint Vincent and the Grenadines, had been illegally fishing in the Guinea-Bissau EEZ approximately 40 miles from the coast. After a bit of a chase and some gunfire, officials from Guinea-Bissau boarded the vessel and detained its master and crew. Despite the fact that the owners of the *Juno Trader* paid Guinea-Bissau EUR 50,000 for the return of the vessel and the crew in November 2004, the Fisheries Commission of Guinea-Bissau claimed the ownership of the vessel had reverted to the state for failure to pay the fine imposed on October 19, 2004. Saint Vincent and the Grenadines claimed the conditions set by Guinea-Bissau for the release of the *Juno Trader* and its crew violated Article 73 of the Convention. The Tribunal ordered the prompt release of the *Juno Trader* and its crew upon the posting of a EUR 300,000 bond because, among other reasons, Guinea-Bissau had not asked for a bond or informed Saint Vincent and the Grenadines that the bond it did post was insufficient.

THE SANDBAR is a quarterly publication reporting on legal issues affecting the U.S. oceans and coasts. Its goal is to increase awareness and understanding of coastal problems and issues. To subscribe to *THE SANDBAR*, contact: the Sea Grant Law Center, Kinard Hall, Wing E, Room 262, P.O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: sealaw@olemiss.edu . We welcome suggestions for topics you would like to see covered in *THE SANDBAR*.

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