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Supreme Court Rules EPA's Denial to Regulate Greenhouse Gases Arbitrary

Massachusetts v. EPA, 127 S.Ct. 1438 (2007).

Sarah Spigener, 3L, University of Mississippi School of Law

In an opinion by Justice Stevens, the United States Supreme Court held that the Environmental Protection Agency (EPA) has the statutory authority to regulate greenhouse gas emissions from new motor vehicles. The Court also ruled that Massachusetts had standing to challenge the EPA, given that the state would suffer direct harm from the further loss of its coastal land due to climate change.

Background

Based on research that a rise in global temperatures and climate changes have resulted from a significant increase of "greenhouse gases" in the atmosphere, private organizations petitioned the EPA to begin regulating the emissions of four such gases, including carbon dioxide, from new motor vehicles under § 202(a)(1) of the Clean Air Act. The organizations claimed that the EPA had authority to take this action, because the agency itself had already confirmed such authority in an earlier statement by the EPA's general counsel. The EPA rejected the petition and concluded that it did not have statutory authority to regulate greenhouse gas emissions from motor vehicles and that, even if it did, it would not currently exercise that authority.

The organizations, joined by twelve states, three cities, and an American territory, sought review of the EPA's decision in the United States Court of Appeals for the District of Columbia. First, the EPA contended that the petitioners lacked standing[1] to bring this case before the court. The plaintiffs, in response, claimed that they did have standing and presented numerous examples of future damage caused by global warming that would occur as a result of these emissions. The court of appeals did not address the standing issue.

Second, the plaintiffs challenged the EPA's decision not to exercise its authority to compose regulations "until more is understood about the causes, extent and significance of climate change and the potential options for addressing it."[2] The plaintiffs claimed that the EPA's decision rested solely on scientific uncertainty. The court of appeals disagreed and stated that the EPA also correctly based its decision on policy judgments. The court of appeals held that the EPA Administrator properly exercised his discretion under the Clean Air Act in denying the petition.

Standing

The plaintiffs appealed to the Supreme Court and contended that the EPA abdicated its responsibility under the Clean Air Act to regulate emissions of greenhouse gases and asked the Court to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether the EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and, if so, whether its stated reasons for refusing to do so are consistent with the statute. The EPA, now supported by ten states and six

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trade associations, repeated its contention that the plaintiffs lacked standing to bring these claims before the Supreme Court.

The Supreme Court stated that only one of the plaintiffs must have standing for the Court to consider a petition for review. To have standing, a plaintiff must meet three elements: the plaintiff must have suffered a concrete and particularized injury that is either actual or imminent; the injury must be fairly traceable to the defendant; and, it must be likely that a favorable decision will redress that injury.

The Court held that the state of Massachusetts meets the standing requirements because Massachusetts owns a large portion of the territory that is to be affected by these alleged climate changes. The Court reasoned that the EPA's refusal to regulate these emissions presents a risk of harm to Massachusetts that is actual and imminent. The harm Massachusetts claimed is that its coastal land had already succumbed to increased sea levels as a result of global warming and that this process will continue if sea levels continue to rise. Though minimal, the EPA's refusal to regulate these emissions contributes to Massachusetts' injuries. The Court further recognized that even though regulating emissions would not reverse global warming, that did not mean that the Court could not consider whether or not EPA has a duty to act to slow or reduce it.

Statutory Authority to Regulate

The Supreme Court considered whether the Clean Air Act authorizes the EPA to regulate greenhouse gas emissions from new motor vehicles when the EPA determines that such emissions contribute to climate change. The Court concluded that it does. Section 202(a)(1) of the Clean Air Act states that the EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[3]

The EPA contended that carbon dioxide, one of the greenhouse gases contested in this case, was not an "air pollutant" as defined in the above provision. The Court disagreed and stated that the statute was unambiguous and that the definition of "air pollutant" includes any air pollutant, including carbon dioxide. The EPA also argued that Congress enacted other legislation that amounted to a congressional command to refrain from regulating greenhouse gas emissions. However, the Court pointed out that the EPA did not identify any specific congressional action in accordance with its contention.

The EPA finally argued that it could not regulate these emissions because doing so would require the EPA to tighten mileage standards, a duty within the scope of the Department of Transportation (DOT). The Court disregarded this argument and stated that though the two obligations might overlap, the two agencies could work together. Therefore, after considering the various arguments of the EPA, the Court concluded that the EPA does have authority to regulate the emission of such gases from new motor vehicles.

Photograph courtesy of ©Nova Development Corp.

Exercise of Authority

The EPA also contended that even if it did have the authority to regulate, it would be unwise to do so at this time. The Court analyzed the Clean Air Act and determined that the EPA could avoid taking further action on a petition only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. The Court invalidated the policy judgments that the EPA relied on to form its conclusion because policy had nothing to do with whether greenhouse gas emissions contribute to climate change. The Court further stated that the EPA cannot rely on uncertainty surrounding features of climate change to justify its actions. The Court concluded that there is no reasonable explanation for the EPA's refusal to decide the issue and that the EPA's action was arbitrary and capricious. The Court further mandated that, on remand, the EPA must base its reasons for action or inaction in the statute.

Conclusion

The Supreme Court disagreed with the EPA and held that the plaintiffs, particularly Massachusetts, did have standing to challenge the EPA's denial of their rulemaking petition. The Court determined that the EPA has the authority, given by Congress, to regulate greenhouse gas emissions from new motor vehicles. The Court further held that the EPA, on remand, must state its grounds for denying the petition.

Endnotes

1. Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Black's Law Dictionary* 661 (8th ed. 2004).
2. *Massachusetts v. EPA*, 415 F.3d 50, 57 (D.C. Cir. 2005).
3. 42 U.S.C.S. § 7521(a)(1).

District Courts May Take Quickest Path to Dismissal

Sinochem International Co. v. Malaysia International Shipping Corp., 127 S.Ct. 1184 (2007).

Allyson L. Vaughn, 3L, University of Mississippi School of Law

The United States Supreme Court has ruled that a district court does not have to consider a threshold objection, such as subject matter jurisdiction or personal jurisdiction, before responding to a defendant's *forum non conveniens* plea.

Background

Sinochem, a Chinese state-owned importer, entered into a contract with Triorient for the purchase of steel coils. Under the contract, Triorient would be paid under a letter of credit when Sinochem received a bill of lading certifying that the coils had been loaded for shipment to China on or before April 30, 2003. Triorient subcharted a vessel owned by Malaysia International to transport the coils to China. A bill of lading dated April 30, 2003 prompted payment; however, Sinochem believed that Malaysia International fraudulently backdated the bill of lading and petitioned a Chinese admiralty court for preservation of a maritime claim and arrest of the vessel. The Chinese court ordered the vessel detained.

Malaysia International filed the present action in United States district court, claiming that Sincohem's preservation petition contained misrepresentations and that they were entitled to compensation for losses incurred during the detainment of the vessel. Sinochem sought dismissal based on lack of subject-matter jurisdiction and personal jurisdiction and *forum non conveniens*.

Under the doctrine of *forum non conveniens,* a federal district court may dismiss an action if an alternative jurisdiction exists that would be more convenient and appropriate for adjudicating the dispute. Additionally, the court can dismiss based on *forum non conveniens* if the chosen forum is inappropriate based on the court's own administrative and legal problems. A dismissal on these grounds reflects the court's assessment of a "range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality."[1]

The district court agreed with Sinochem and found that the case should be adjudicated in Chinese courts and dismissed the case based on *forum non conveniens*. However, the appellate court did not agree with the lower court. The Third Circuit Court of Appeals held that the district court could not dismiss the case based on the doctrine of *forum non conveniens* until it determined that it had personal jurisdiction and subject matter jurisdiction over the defendant.

The Doctrine of *Forum Non Conveniens*

In a unanimous opinion authored by Justice Ginsburg, the Supreme Court recognized that there is no mandatory sequence in which those "nonmerit issues" must be resolved; therefore, if *forum non conveniens* qualified as one of the nonmerit issues, it could be decided before considering personal or subject matter jurisdiction. The Court noted that a federal court generally must establish its jurisdiction over the cause and the parties prior to ruling on the merits of the case. While an inquiry into a *forum non conveniens* determination may involve the examination of some factual elements of the controversy, Justice Ginsburg explained that the critical element rendering this doctrine a nonmerits issue is that to resolve such a motion the court does not have to exercise any substantive law-declaring power.

A district court may disregard questions of subject-matter and personal jurisdiction and dismiss based on *forum non conveniens* when

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Pennsylvania Trial Court Preserves Public Access

Pennsylvania v. Espy, No. 03-781 (Pa. Ct. Common Pleas filed Jan. 29, 2007).

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

A pristine river stocked with trout is silent on a beautiful summer morning. One fisherman stands in the middle of the river about to cast his first line. His guide his only company. No cars, no music, just the sounds of nature. Every fly fisherman's dream, right? A few fishermen have been living that dream in Pennsylvania as members of the exclusive fishing club, the Spring Ridge Club (Club). The controversial Club owns or leases almost ten miles along some of the best trout streams in Pennsylvania for the exclusive use of its members. The dream comes with a hefty price tag, however. It currently costs $95,000 to join the club and members are required to pay annual dues (approximately $4,500) and incur fees for staying or eating at the Club's lodges. But for some wealthy fly fishermen, the cost is worth it for the benefit of an empty stream.

Although local fly fishermen grumbled about the Club's existence and what such operations mean for the future of the sport, the wrath of state regulatory agencies was not raised until 2003 when the Club installed two cables, spaced 1.3 miles apart, across the Little Juniata River and posted them with "No Trespassing" and "Private Property" signs. The Little Juniata River, a branch of the Juniata River, flows through Huntingdon County in central Pennsylvania. The Club's intent to limit public access was undeniably clear. The fact that the trout its members were catching are stocked annually by the Pennsylvania Fish and Boat Commission made little difference to the Club. The Club's position was that their lease of .60 acres of land along the River included the streambed and they had a right to restrict access.

The Pennsylvania Department of Environmental Protection, Department of Conservation and Natural Resources, and the Fish and Boat Commission (Commonwealth) disagreed. In 2006, the Commonwealth sued the Club and its owner, Donald Beaver, alleging interference with the public's right to access the 1.3 mile section of the Little Juniata River. The Commonwealth claimed ownership based "on historical evidence of navigation and trade on the Little Juniata River dating from the 1700s, and statutory designations of the river as a public highway dating to 1794, 1808 and 1822."[1]

Historic watercolor courtesy of University of Pennsylvania Library.

Public's Right to Fish and Navigability

"Navigable waterways located in Pennsylvania are owned by the Commonwealth and are held in trust for public use, while the beds of non-navigable waterways are owned by the property owners of the land along the waterways."[2] Riparian owners of land along the banks of navigable rivers "do not have the exclusive right to fish in those rivers; that right is vested in the Commonwealth and open to the public."[3]

During the early years of the Commonwealth, extremely poor road conditions and the bulky nature of most goods produced by rural communities (grain, flour, lumber) made over-

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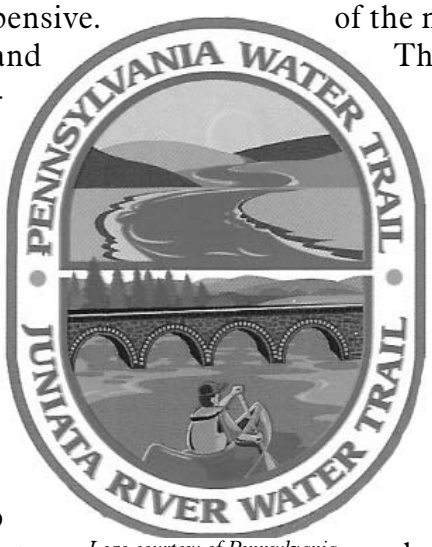
land transport difficult and expensive. Pennsylvania's abundant rivers and streams provided an alternative transportation network. Many waterways, including the Little Juniata, were used by inland communities to transport goods to the larger cities of Philadelphia and Pittsburgh. Since many of the streams were shallow, arks were often the vessel of choice. Arks "could operate in water as shallow as twenty to twenty-four inches and were able to carry about fifty tons of goods."[4]



Logo courtesy of Pennsylvania Fish and Boat Commission

Navigability is a loose term that varies depending on which state the waterway is located in and which level of government is called upon to make the determination. There is no single published listing of all navigable waterways in Pennsylvania. Except for a few "principal rivers," such as the Susquehanna, most navigability determinations are made on a case-by-case basis by the Pennsylvania courts. The test for navigability in Pennsylvania is whether a river is navigable in fact.[5]

Navigability of the Little Juniata River

The primary issue facing the trial court was ownership of the streambed along the disputed section of the Little Juniata River. If the river was non-navigable, title to the streambed was held by the riparian owner. If the river was currently navigable, or had been in the past, the Commonwealth holds the title and the waterway is open to all.

The court determined that the Commonwealth submitted sufficient evidence to support the conclusion that the Little Juniata River was once a highway of commerce for surplus goods. Furthermore, the Pennsylvania Legislature declared the Little Juniata River a public highway in 1974.[6]

The Spring Ridge Club argued that its lease, which was based on the riparian owner's deed, granted title to the streambed regardless of the navigability of the Little Juniata. The court disagreed. At the time that the Little Juniata was declared a public highway, the Commonwealth held title to the tract of land in question. The land passed into private hands in 1803 through a series of deeds from the Commonwealth. The court held that the Commonwealth's original grant of land, coming nine years after the public highway designation, was subject to public highway declaration. Therefore, the property "extends only to the low watermark and not the middle of the stream."[7]

Conclusion

In January, Pennsylvania won a significant battle in the war to preserve public access to the state's waterways. There are many more battles to fight, however. Donald Beaver is expected to appeal the court's ruling to the Pennsylvania Superior Court and the popularity of private fishing clubs is growing. Public acquisition of land may be the only alternative to lengthy court battles and unsatisfactory settlements.

Endnotes

1. *Public's Right of Access to Little Juniata River wins Critical Protection*, January 31, 2007 available at http://www.fish.state.pa.us/news-releases/2007/out_dep_littlej.htm .
2. *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 719 (Pa. Super. Ct. July 26, 1999).
3. *Id.*
4. *Pennsylvania v. Espy*, No. 03-781, slip op. at 21 (Pa. Ct. Common Pleas filed Jan. 29, 2007).
5. See *Pennsylvania Power & Light co. v. Maritime Management, Inc.*, 693 A.2d 592 (Pa. Super. Ct. 1997).
6. *Espy*, slip op. at 23.
7. *Id.* at 55.

"Dolphin Safe" Tuna Retains Its Meaning

Earth Island Inst. v. Hogarth, 2007 U.S. App. LEXIS 9572 (9th Cir. Apr. 27, 2007).

Terra Bowling, J.D.

The Ninth Circuit has ruled that the National Marine Fisheries Service's (NMFS) conclusion that the yellowfin tuna fishery has no adverse impact on a dolphin population was based on inconclusive evidence and is therefore arbitrary and capricious. The court also held that, absent a Congressional mandate, the "dolphin safe" label would continue to signify that the tuna was not harvested with purse-seine nets and that no dolphins were killed or seriously injured when the tuna were caught.

Background

Off the west coast of South America, yellowfin tuna, a prized commercial fish, are often found congregating beneath pods of dolphins. In the 1950s, fishermen began catching the tuna by encircling the dolphins with purse-seine nets to capture the tuna below. As a result, three species of dolphin stocks were rapidly depleted. Congress responded by passing the Dolphin Protection Consumer Information Act (DPCIA), which prohibits manufacturers from labeling tuna as "dolphin safe" if the tuna was caught using the purse-seine method.

As a result of the DPCIA, several commercial fishing groups were forced out of the market when they could not comply with the new standards and consumers exceedingly chose "dolphin safe" products. Those groups pushed Congress to relax the "dolphin safe" labeling requirements.

Seeking to determine whether the standards should be relaxed, Congress amended the Marine Mammal Protection Act (MMPA) and passed the International Dolphin Conservation Program Act (IDCPA). The MMPA now required NOAA to conduct three studies to determine whether the tuna fishery was, in fact, harming the dolphin populations. The IDCPA required the Secretary of Commerce, acting through NOAA, and essentially NMFS, to make an Initial Finding on the effects of the method by March 31, 1999 and a Final Finding by December 31, 2002.

NMFS Faces Opposition

In an Initial Finding released in 1999, the Secretary determined that the fishery was not having an adverse impact on the dolphin populations. Several environmental groups brought suit against NMFS, and the district court granted the groups summary judgment and vacated the Initial Finding. On appeal, the Ninth Circuit affirmed the district court's decision, holding that the agency was required to reach a definitive answer, not a "default finding" based on the lack of evidence. The agency proceeded to perform additional studies and released a Final Finding in 2002 that concluded that the fishery was not a threat to the dolphin populations. Several groups, including Earth Island, again filed suit against the agency.

The district court granted summary judgment in favor of Earth Island, concluding that the Final Finding was arbitrary and capricious. The district court based its finding on three legal grounds: 1) the agency did not conduct the studies required by the MMPA and its finding was therefore arbitrary and capricious; 2) in light of the best available evidence, the agency's no adverse impact finding was implausible; and 3) the court found a "compelling portrait of

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political meddling," indicating that the agency considered factors outside of those mandated by Congress. The government appealed the district court's decision to the Ninth Circuit.

The Ninth Circuit Weighs In

The Ninth Circuit reviewed the three legal grounds on which the district court based its decision. First, the court looked at whether the agency failed to conduct the appropriate studies. The court found that two of the studies required by the MMPA were inadequate. For instance, the first study required a review of relevant stress-related research and a 3-year series of necropsy samples from dolphins obtained by commercial vessels. NOAA concluded that it would need a minimum sample size of 600 dolphins to sufficiently perform the necropsy study; however, the agency only studied 56 dolphins. The next study in question required an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement (the CHESS study). The court found that the sample size in the CHESS study was also too small to support an adequate finding.

Due to the inadequacies of the studies, the court determined that the agency did not obtain the scientifically meaningful results necessary to make a decision of whether the fishery affects the dolphin population. The agency contended that it had completed both of those studies and that the district court erred in its failure to defer to the agency's expertise in the methodology it uses to conduct its studies. The Ninth Circuit rejected that argument and upheld the district court's ruling, finding that "no deference to agency discretion as to methodology is appropriate when the agency ignores its own statistical methodology."[1]

Next, the court examined whether the agency used the best available evidence in making its decision. The court recognized that although usually it would defer to the agency's analysis, it would not do so in this instance "because there [was] no rational connection between the Secretary's Final Finding and the evidence outlined in the Final Science Report …"[2] For example, in its final report, the agency concluded that it did not have enough evidence to support a finding of the indirect effects on the dolphins, such as the effect of the mother-calf separation during a high-speed chase and encirclement, yet the agency concluded that the data supported a finding of no adverse impact.

Finally, the court determined that the agency's finding was improperly influenced by political concerns. The court held that it was Congress' intent that the agency should base its decision on science alone; however, the evidence showed that the agency weighed international political concerns in making its decision. The court cited internal memos that highlighted the foreign policy considerations at stake in the findings.

Conclusion

The final issue facing the court was whether it should remand the decision to the agency for further studies or vacate the Final Finding. The court ruled that this was one of the "rare circumstances" in which it would not remand the case but would vacate the Final Finding, citing the agency's failure to conduct two of the three studies mandated under MMPA.

Furthermore, the court noted that the labeling requirements could only be changed if the studies had found that the fishery was not affecting the dolphin population. Because the agency had not obtained the data to support that conclusion, the labeling requirements could not be changed. The district court had gone a step beyond vacating the Final Finding by ordering NOAA and its agencies to take enforcement measures against those participating in impermissible labeling. Although the Ninth Circuit affirmed the district court's ruling, it instructed the district court to limit its mandate to directing the Secretary to vacate NMFS' Final Finding.

Endnotes

1. *Earth Island Inst. v. Hogarth*, 2007 U.S. App. LEXIS 9572 at *12 (9th Cir. Apr. 27, 2007).
2. *Id*. at *19.

Ninth Circuit Rules for Environmental Groups in Salmon Case

National Wildlife Federation v. National Marine Fisheries Service, 481 F.3d 1224 (9th Cir. 2007).

Josh Clemons, M.S., J.D., MS-AL Sea Grant Legal Program

On April 9, 2007, the U.S. Court of Appeals for the Ninth Circuit issued another opinion in the seemingly endless litigation over salmon and the Federal Columbia River Power System (FCRPS). This chapter of the saga finds the federal government on the losing end, as the appeals court upheld the Oregon district court's rejection of the 2004 Biological Opinion for the operation of the FCRPS.

Background

The Columbia River and its tributaries, including the Snake and the Willamette, provide Pacific salmon with vital access to their spawning grounds in the Columbia Basin. These majestic fish, in addition to their financial and symbolic value to the people of the region, are protected by the Endangered Species Act (ESA) because of their declining numbers.

A major cause of that decline is the FCRPS, which, ironically, is also of enormous financial and symbolic value to Pacific Northwesterners. The mighty dams of the Columbia and Snake rivers, immortalized in song by Woody Guthrie, provide the region with irrigation water, flood control, and cheap, clean, renewable energy, as they are required to do by their authorizing statutes. Unfortunately they are difficult for migrating salmon to bypass, even when the dams are equipped with fish ladders and other structural measures.

The conflicting imperatives that Congress has issued – operate the FCRPS to "assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply"[1] and simultaneously ensure the survival and recovery of endangered fish that are inevitably harmed by that operation – form the crux of this litigation.

The ESA obligates any federal agency that is taking an action that may affect ESA-listed salmon to consult with the National Marine Fisheries Service (NMFS, also known as NOAA Fisheries) to ensure that the action is not likely to jeopardize the species or its critical habitat. Because operation of the FCRPS is such an action, the agencies who operate it (the U.S. Army Corps of Engineers and the Bureau of Reclamation, known as the "action agencies") must consult with NMFS on their proposed operating plan. After consultation NMFS issues a Biological Opinion, or BiOp, on whether the species and habitat in question will be jeopardized by the action. A "jeopardy" opinion means the proposed action must be modified to avoid jeopardy.

The 2004 BiOp

The 2004 BiOp was NMFS' third attempt at addressing the FCRPS' effects on certain species of salmon. The first two, in 1993 and 2000, failed to pass legal muster because they relied on unexplained assumptions and uncertain mitigation actions, respectively.

To circumvent the previous BiOps' difficulties NMFS took three creative approaches to its jeopardy analysis in the 2004 version. First, the agency deemed much of the operation of the FCRPS to be non-discretionary because of statutory directives for irrigation, flood control, and power generation, and thus excluded from the jeopardy analysis, which addresses only discretionary actions. Second, NMFS used a "segregated" jeopardy analysis, in which the environmental baseline, cumulative effects, and current species status were considered separately rather than in the aggregate, as is normally done.

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Third, the 2004 BiOp did not contain analysis of the impact on the species' chances of recovery (as opposed to mere survival), as earlier BiOps had.

A coalition of environmental groups led by the National Wildlife Federation sued NMFS and the action agencies on the grounds that these creative approaches, as well as NMFS' allegedly inadequate consideration of effects on critical habitat, violated the ESA. The district court in Oregon ruled for the plaintiffs, and the federal agencies appealed the decision to the Ninth Circuit.

The Ninth Circuit Opinion

The appeals court agreed with the district court's conclusion that the 2004 BiOp did not satisfy the ESA's requirements. The court rejected NMFS' "cramped view" of discretionary actions, observing that no federal agency - NMFS included - had ever interpreted "discretionary" so narrowly, and that NMFS' interpretation did not accord with regulations or case law.[2] In reality, the court opined, "aspects of FCRPS operations…are within the agencies' discretion."[3] The competing mandates imposed by Congress simply require the agencies to balance their obligations.

The court also rejected NMFS' segregated jeopardy analysis because it failed to place the salmon's endangered status within a realistic context. Under NMFS' scheme, too many potentially jeopardizing factors were being pushed below the environmental baseline, which could allow the species to "be gradually destroyed, so long as each step on the path to destruction is sufficiently modest."[4] This, the court reasoned, was incompatible with the ESA.

The ESA regulations forbid agencies to take actions that would "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild."[5] NMFS interpreted the conjunctive "and" extremely literally, such that an action that threatened a species' recovery would be permissible if it did not also threaten the species' survival. The court did not find this interpretation persuasive because it would essentially remove the word "recovery" from the regulation. Furthermore, this interpretation was contrary to NMFS' own prior interpretations, which entailed a joint analysis of survival *and* recovery impacts.

Lastly, the court found fault with NMFS' failure to ensure that FCRPS operations would not adversely affect the salmon's critical habitat. The agency gave inadequate weight to short-term adverse effects and relied too heavily on future mitigation measures that, in the court's opinion, were not sufficiently likely to occur. NMFS also made decisions in the absence of adequate information about the in-river survival levels necessary to support recovery of the endangered fish.

Conclusion

Because of these significant flaws in the 2004 BiOp, the Ninth Circuit upheld the district court's remand of the document to NMFS so that the agency could produce a BiOp that satisfies the requirements of the ESA.

Endnotes

1. Northwest Power Act, 16 U.S.C. § 839(2).
2. *National Wildlife Federation v. National Marine Fisheries Service*, 481 F.3d 1224, 1234 (9th Cir. 2007).
3. *Id*.
4. *Id*. at 1235.
5. 50 C.F.R. § 402.02.

Photograph of Boulder Dam courtesy of the National Archives, photographer, Ansel Adams.

Ninth Circuit Finalizes Punitive Damages in *Exxon Valdez* Spill

In re the Exxon Valdez, 2007 WL 1490455 (9th Cir. May 23, 2007).

Sarah Spigener, 3L, University of Mississippi School of Law

In the latest appeal of the punitive damages award for the *Exxon Valdez* oil spill, the Ninth Circuit has reduced the district court's award from $4.5 billion to $2.5 billion.

Background

In 1989, the *Exxon Valdez* ran aground in the Prince William Sound causing a massive oil spill in Alaskan waters. The district court found that the sole cause of the accident was Exxon's placement of a relapsed alcoholic as captain of the supertanker *Exxon Valdez*.

The district court initially found the defendant, Exxon, liable for a $287 million verdict in compensatory damages, and the jury additionally assessed $5 billion in punitive damages. Exxon appealed. While the appeal was pending, the Supreme Court issued two relevant opinions that instructed the lower courts to consider, through a due process analysis, the ratio of punitive damages to compensatory harm when deciding if the award was excessive.[1] Pursuant to this new analysis, the Court of Appeals held that the $5 billion punitive damages award was grossly excessive and remanded the case to the district court for a further analysis consistent with the due process analysis handed down by the Supreme Court.

Upon remand, the district court concluded that the compensatory harm was just over $500 million (this amount included prior settlements between Exxon and other plaintiffs). The court further concluded that a ratio of 10 to 1 of punitive damages to harm was warranted by the circumstances of this case; nonetheless, the court reduced the award from $5 billion to $4 billion. Exxon again appealed. The Supreme Court issued another opinion, *State Farm v. Campbell*, while this appeal was pending.[2] In *State Farm*, the Supreme Court indicated that "ratios in excess of single-digits would raise serious constitutional questions and that single-digit ratios were more likely to comport with due process."[3] As a result, the Ninth Circuit again remanded the case to the district court to reevaluate the punitive damages award consistent with *State Farm*.

On its third remand, the district court calculated the harm at $513.1 million. Holding that Exxon's conduct was highly reprehensible, the district court increased the award from $4 billion to $4.5 billion at a 9 to 1 ratio. Not surprisingly, Exxon appealed.

Reprehensibility of Conduct

The Court of Appeals decided this case based upon the Supreme Court cases that shaped the initial appeals: *State Farm* and *BMW v. Gore*.[4] *BMW v. Gore* provided three guideposts for reviewing punitive damages: 1) the reprehensibility of the defendant's misconduct; 2) the ratio of punitive damages to harm; and 3) comparable statutory penalties.

State Farm stressed that of those factors, the most important is the reprehensibility of the conduct. This is because fair notice of the possible legal consequences of one's misconduct is required by due process. To evaluate the reprehensibility of the harm, *State Farm* gave five sub-factors: 1) the type of harm; 2) whether there was reckless disregard for the health and safety of others; 3) whether there were financially vulnerable targets; 4) whether there was repeated misconduct; and 5) whether it involved intentional malice, trickery, or deceit, rather than mere accident. Mitigating factors must also be considered.

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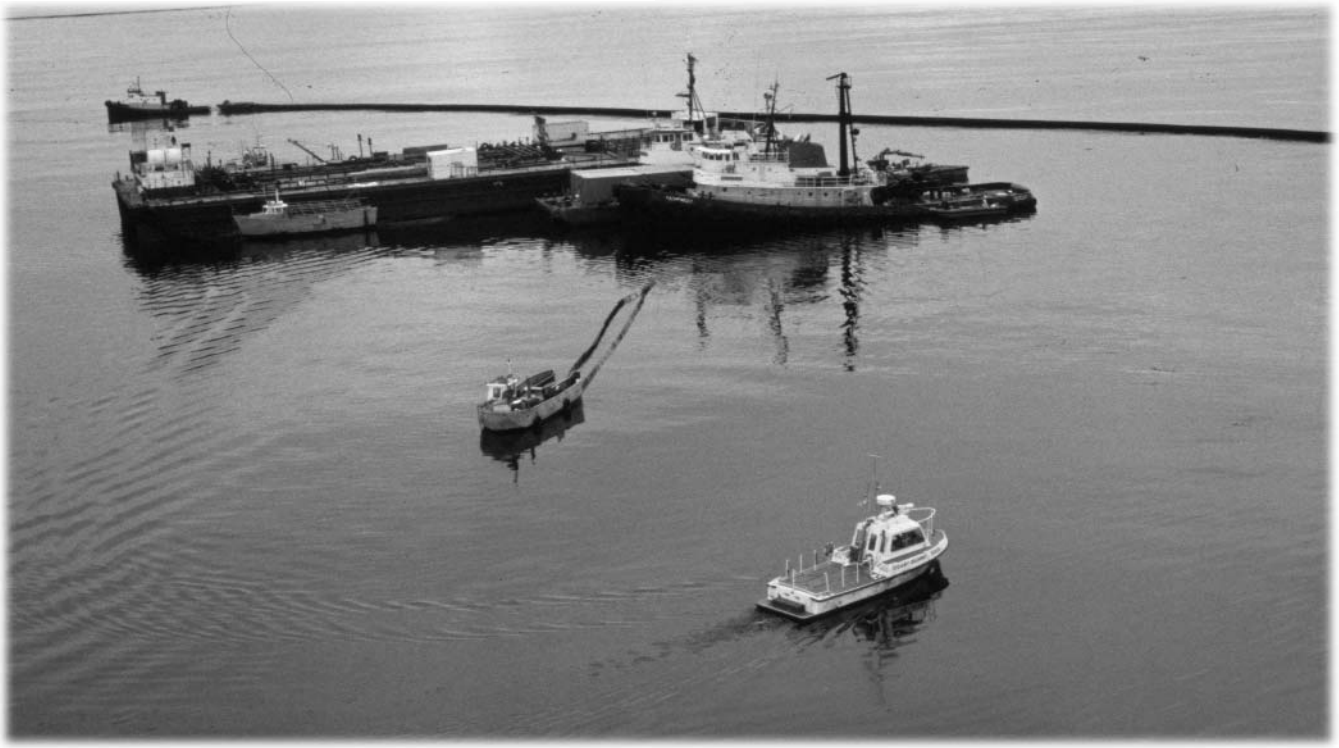
In evaluating the sub-factors, the court held that Exxon's misconduct fell in the middle of a continuum between accidental and intentional conduct. The first factor required the court to evaluate the type of harm, particularly whether the harm was economic or physical, noting that physical harm would result in a higher level of reprehensibility. Though the court found no actual physical harm to people, the combined economic and emotional harm was severe. Examining the second factor, the court determined that Exxon entrusted an incompetent captain to command the *Exxon Valdez* and that the potential harm of placing all people and businesses in the vicinity of the Prince William Sound in harm's way was entirely predictable. Therefore, this factor indicated high reprehensibility because Exxon had shown reckless disregard for the health and safety of others. In examining the third factor, the court found that though Exxon's conduct harmed financially vulnerable subsistence fishermen—arguably financially vulnerable targets—this conduct was not intentional and did not affect its assessment of reprehensibility. The court noted the fourth factor—whether there was repeated misconduct—pointed to higher reprehensibility, since for three years, the defendant allowed the incompetent captain onboard the *Exxon Valdez*. In examining the final factor, the court decided that Exxon's misconduct was no mere accident, but neither was it intentional malice. The court stated that Exxon's misconduct was highly reprehensible, but not in the highest realm. Here, Exxon's response to the catastrophe, including its immediate cleanup and compensatory payments, was significant to mitigate the harm. Since Exxon's efforts to mitigate the harm were significant, the court concluded that the reprehensibility should be mid-range.

Turning to the ratio of harm to punitive damages, the court held that the proper numerator is the harm likely to result from the defendant's conduct. The district court set this as $513.1 million, but the court decreased this amount by $9 million as a result of an overpayment by a liability fund, to $504.1 million. The court noted that in cases with significant economic damages and more egregious behavior, a single-digit ratio higher than 4 to 1 might be

See ExxonValdez, *page 18*

Photograph of tanker Exxon Valdez *and response vessels, courtesy of NOAA's Office of Response and Restoration.*



Texas Court Invalidates Gulf Red Snapper Plan

Fisheries Service Given Nine Months to Fix It

Coastal Conservation Assn. v. Gutierrez, Civ. Action No. H-05-1214 (S.D. Tex. Mar. 12, 2007).

Josh Clemons, M.S., J.D., MS-AL Sea Grant Legal Program

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On March 12, 2007, U.S. District Judge Melinda Harmon of the U.S. District Court for the Southern District of Texas, Houston Division, ruled that the National Marine Fisheries Service (NMFS) violated the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) and the Administrative Procedure Act when it promulgated Amendment 22 to the Gulf of Mexico Reef Fishery Management Plan (management plan) because the plan did not have at least a fifty percent likelihood of rebuilding red snapper stocks within the mandated time period. The court gave NMFS nine months to approve a satisfactory plan.

The Magnuson Act

Congress passed the Magnuson Act[1] in 1976 to protect the nation's fishery stocks from overexploitation. Towards this end the Magnuson Act provides for Regional Fishery Management Councils (Councils), which produce fishery management plans for species in their jurisdictions. These plans are reviewed by NMFS before being promulgated through the formal administrative rulemaking process.

Congress established ten national standards to guide the management plans and their implementing regulations.[2] Four of these standards were relevant to this case. Standard one requires conservation and management measures to "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."[3] Standard two requires measures to be based on the best available scientific information. Standard eight requires measures to utilize economic and social data to minimize adverse impacts on fishing communities. Standard nine requires measures to minimize bycatch and mortality from unavoidable bycatch.[4] These standards are put into effect by the management plans and NMFS regulations.

The Magnuson Act requires the Councils to generate a plan to end overfishing and rebuild the stock within one year of a stock being declared overfished. If a Council fails to complete an adequate plan on time, NMFS must create one within nine months. Overfished stocks are to be returned to full productivity within ten years, or if that is not possible, within the shortest possible time that does not exceed "the rebuilding period calculated in the absence of fishing mortality, plus one mean generation time or equivalent period based on the species' life history characteristics."[5] For the Gulf of Mexico red snapper, this period has been calculated to be 31.6 years.

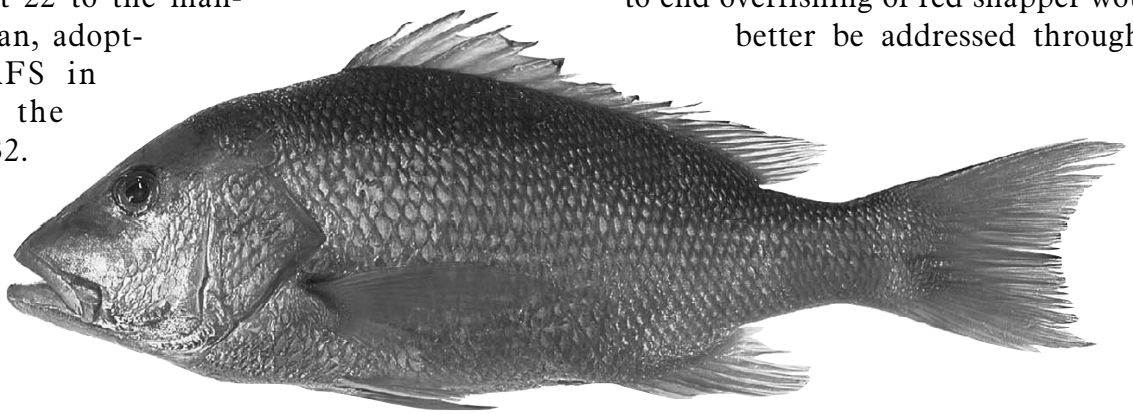
Federal Efforts to Protect Red Snapper

Red snapper stocks, with a current population level of approximately seven percent of historical levels, have been officially declared overfished since 1997. Human-induced red snapper mortality is caused by three activities: commercial red snapper fishing, recreational red snapper fishing, and shrimp fishing. Of these, the one that takes the greatest number of red snapper is, ironically, shrimp fishing; juvenile red snapper, which congregate near the ocean floor,

See Red Snapper, page 14

are often taken as bycatch by shrimp trawls. It is generally acknowledged that the rebuilding of red snapper stocks will require reduction of this bycatch.

NMFS regulates the taking of red snapper under the Gulf of Mexico Reef Fishery Management Plan. In 1990 the management plan was to rebuild red snapper stocks by 2000. Since then the target date has been set farther and farther into the future. Amendment 22 to the management plan, adopted by NMFS in 2005, sets the date at 2032. (Interestingly, NMFS has increased the total allowable catch of red snapper from four million pounds in 1991 to over nine million pounds today.) Amendment 22 responds to NMFS' demand, in response to a proposed red snapper rebuilding plan that the Council submitted in 2001, that the Council "further explore alternative rebuilding plans based on more realistic expectations concerning bycatch in the shrimp fishery."[6]



Photograph of red snapper courtesy of the USFDA.

The Coastal Conservation Association (CCA), an advocacy group for recreational fishers, believed that Amendment 22 provided inadequate protection for red snapper because it failed to address shrimp trawl bycatch. In March 2005 the group filed with NMFS a "Petition for Emergency Action to Stop Overfishing in the Gulf of Mexico Red Snapper Fishery." The agency denied the petition on the grounds that "additional management measures to end overfishing of red snapper would better be addressed through a Gulf of Mexico Fishery Management Council (Council) regulatory amendment and development of a fishery management plan (FMP) amendment."[7] CCA then sued NMFS for approving Amendment 22 without mandating a reduction in bycatch, for violating the National Environmental Policy Act (NEPA), and for denying the petition for emergency rulemaking.

Amendment 22 Controversy

The issue of bycatch in the shrimp fishery is at the center of the Amendment 22 controversy. In Amendment 22 the Council declared that the red snapper stocks could be rebuilt by 2032 without additional regulatory action with respect to shrimp fishery bycatch. To reach this conclusion, the Council relied on three assumptions: that ninety percent of red snapper mortality is caused by commercial shrimping; that bycatch reduction devices (BRDs) provide forty percent effectiveness in reducing that red snapper mortality; and that shrimping effort in the Gulf will be cut in half in every year of the red snapper rebuilding plan.

The Court's Opinion

When a court reviews the action of an administrative agency, it examines whether the agency has acted reasonably and rationally to carry out its statutory mandate from Congress. A court usually will be very deferential to agency expertise but will also require that the agency adequately explain its action. Judge Harmon, following the reasoning of the D.C. Circuit Court of Appeals,[8] declared that the stock rebuilding plan would have to have at least a fifty percent chance of succeeding to pass muster.

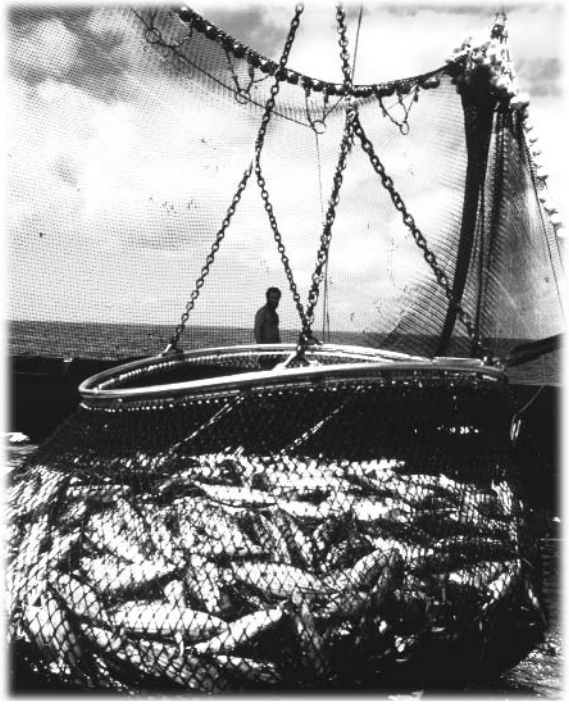
NMFS faced a difficult challenge in defending its action here. In formulating the rebuilding plan the Council had considered economic

studies that showed a reduction in shrimping effort of only thirty-four percent, culminating in 2012. Yet in the plan the Council adhered to the assumption of a fifty percent reduction in effort beginning in 1999 and continuing through 2032.

The court found that NMFS was not engaging in reasonable decision-making when it persisted in relying on an assumption that was contradicted by the evidence the agency considered. Judge Harmon observed that the Council's own graphs showed that red snapper stocks would not be rebuilt within the mandatory time period. It would have been difficult for the court to conclude that the agency had acted reasonably, in light of this evidence to the contrary.

Judge Harmon also found that NMFS violated the plain meaning of the Magnuson Act by not taking steps to minimize bycatch and mortality from unavoidable bycatch in the fishery management plan. The agency had attempted to defend itself by claiming that it would include bycatch reduction at a later date in the Shrimp Fishery Management Plan. Unfortunately for the agency, the Magnuson Act explicitly requires fishery management plans to include measures that, to the extent practicable, minimize bycatch and mortality from unavoidable bycatch.

Photograph of gillnet catch courtesy of NOAA.



The court thus sided with CCA on its substantive claim that NMFS, in approving Amendment 22, violated the Magnuson Act and the APA. It was less receptive to CCA's other two claims. Judge Harmon found that CCA did not raise a valid NEPA question, and that NMFS did not act inappropriately when it denied the group's petition for emergency rulemaking.

Conclusion

Judge Harmon ordered NMFS to approve a red snapper stock rebuilding plan that includes measures to reduce shrimp fishery bycatch within nine months of her decision. Rather than vacating the entire plan, however, Judge Harmon allowed for the status quo to be maintained until the new plan is finalized.

On April 2 NMFS issued interim measures to address red snapper overfishing while the Council prepares a new plan. The interim measures, which include a reduction in the bag limit and the total allowable catch, became effective on May 2. The interim measures may be viewed at the Council's website, www.gulfcouncil.org .

Endnotes

1. 16 U.S.C. §§ 1801-83.
2. *Id*. § 1851(a).
3. *Id.* § 1851(a)(1).
4. The Magnuson Act defines "bycatch" as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program." *Id*. § 1802(2). Of most pertinence here are red snapper caught by accident in shrimp trawls.
5. 50 C.F.R. 600.310(e)(4)(ii)(B).
6. *Coastal Conservation Assn. v. Gutierrez*, Civ. Action No. H-05-1214, at 5 (S.D. Tex. March 12, 2007) (quoting Amendment 22).
7. 70 Fed. Reg. 53142 (Sept. 7, 2005).
8. *National Resources Defense Council v. Daley*, 209 F.3d 747 (D.C. Cir. 2000).

Accidental Bomb Leads to Legal Malpractice Suit

ITT Federal Services Corp. v. Montano, 2007 U.S. App. LEXIS 1742 (1st Cir. Jan. 26, 2007).

Terra Bowling, J.D.

The First Circuit Court of Appeals has ruled that a company and its insurer did not have a statutory right to recover legal malpractice damages from an injured employee's attorneys. ITT Federal Services (ITT) and its insurer had filed the claim seeking relief under the Longshore and Harbor Workers' Compensation Act (LHWCA).

Background

The claim originated when a Navy pilot accidentally dropped two bombs near the control tower where Edgar Colon, an employee of ITT, was working. As a result of his injuries, Colon filed an administrative claim seeking benefits under the LHWCA from ITT and its insurance carrier, Pacific Employers Insurance Company (PEI). ITT and PEI settled the claim with Colon for $305,000.

While the administrative claim was pending, Colon's attorneys brought suit against ITT and the Navy in federal district court under the Federal Tort Claims Act (FTCA). The court dismissed the suit against the Navy, noting that the United States may be sued under the FTCA, but individual military departments may not. The district court also dismissed the suit against ITT, citing the fact that the LHWCA provided Colon with an exclusive remedy.

Colon's lawyers never refiled the federal suit or appealed the district court's decision. After two years, the statute of limitations on the FTCA claim ran, and the district court's judgment became final. ITT and the insurance carrier then brought suit against Colon's attorneys, claiming that they could have recovered payments made to Colon under the LHWCA if the attorneys had refiled the lawsuit naming the United States as a defendant.[1] The U.S. District

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Photograph of Tomcat bomber courtesy of the U.S. Navy.

Court Upholds Tax Deduction for Lake Michigan Conservation Easement

Glass v. Commissioner, 471 F.3d 698 (6th Cir. 2006).

Terra Bowling, J.D.

The Sixth Circuit has concluded that a couple properly claimed a tax deduction for a conservation easement, despite claims from the Internal Revenue Service (IRS) that the conservation easements were not qualified deductions.

Background

In 1988, Charles and Susan Glass purchased a ten-acre parcel of land on the shores of Lake Michigan, which included a home and a guest cottage on a bluff. The heavily forested property was home to several threatened species, such as bald eagles, piping plovers, Lake Huron tansy, and pitcher's thistle.

In an effort to preserve the natural features of the property, the couple granted three conservation easements to the Lake Traverse Conservancy (LTC), a Michigan nonprofit agency that facilitates the creation of conservation easements. As part of one of the easements, the couple retained a limited right to conduct certain activities within the easement, such as maintaining foot paths to the shore and the right to add to or replace an existing cottage. In another easement, the couple retained the right to replace or add to an existing guest cottage, so long as the cottage did not exceed a certain size.

When the couple claimed charitable deductions on their federal taxes for the conservation easements, the Commissioner of the Internal Revenue Service (IRS) issued a notice of deficiency for two of the easements. The couple challenged the decision in the United States Tax Court, which concluded that the conservation easements were qualified deductions. The IRS appealed the decision.

Qualified Contributions?

The United States Court of Appeals for the Sixth Circuit first examined whether the conservation easements were qualified conservation contributions under I.R.C. § 170(h)(1). Section 170 requires the taxpayer to show that three requirements have been met: "1) the real property interest is a 'real property interest;' 2) the donee is a 'qualified organization;' and 3) the contribution is exclusively for 'conservation purposes.'" The IRS claimed that the couple's conservation easement did not meet the third requirement.

In order to show that a contribution is exclusively for conservation purposes, the conservation must provide "… protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystems."[1] The treasury regulation implementing this definition required that the easement protect a significant habitat.

The Sixth Circuit agreed with the tax court's determination that the easements were a significant habitat for threatened species such as bald eagles, Lake Huron tansy, and pitcher's thistle. The IRS attempted to argue that even if there were protected species on the property, the terms of the conservation easements "undermine their state purpose because the encumbered property is too small, [t]axpayers' reserved rights are too great, and there is no limit on building on neighboring properties."[2] The court rejected these assertions.

The court held that the IRS did not prove that the preserved property was too small for the protected species to exist. Furthermore, the easements had been carefully drawn to prohibit any activity or use of the encumbered property that would undermine their stated conservation purposes. For instance, the couple could prune vegetation to preserve the scenic view or for safety purposes, but clear cutting was clearly prohibited. The court found that LTC

See Lake Michigan, page 19

Sinochem, from page 4

"considerations of convenience, fairness and judicial economy so warrant."[2] Justice Ginsburg found this to be a "textbook case for immediate *forum non conveniens* dismissal."[3] For instance, establishing personal jurisdiction would burden Sinochem with great expense and delay during discovery and would inevitably end with the district court dismissing for *forum non conveniens*. The Supreme Court found that the gravamen of Malaysia International's complaint is an issue best left for resolution by the Chinese court.

Conclusion

The Court held that when a lengthy discovery process is required to determine subject-matter or personal jurisdiction and *forum non conveniens* considerations favor dismissal, the court may follow the least burdensome path and dismiss based on *forum non conveniens.*

Endnotes

1. *Sinochem International Co. v. Malaysia International Shipping Corp.*, 127 S.Ct. 1184, 1190 (2007).
2. *Id*. at 1192.
3. *Id.* at 1194.

Exxon Valdez*, from page 12*

constitutional. The court recognized that this case falls into that category, but because only the most egregious forms of intentional misconduct, such as threats of violence and intentional racial discrimination, merit the highest ratios, the court set the ratio at 5 to 1.

Finally, the last factor to consider was comparable penalties. This factor's significance has been greatly diminished by *State Farm* and other Ninth Circuit cases. However, the fact that this particular factual situation–spilling oil in navigable waters–has been taken very seriously by Congress and the state legislature, further justified the court's conclusion that a substantial punitive damage award should be assessed.

Photograph of cargo ship courtesy of NOAA.

Conclusion

The appellate court concluded that Exxon's reckless conduct in placing an incompetent captain in command of the *Exxon Valdez* warranted severe sanctions; however, the most severe sanctions were not necessary in light of Exxon's mitigating efforts and considering that this misconduct was not intentional. Because the district court's punitive damages award of $4.5 billion was not consistent with the Supreme Court's *State Farm* decision, the Ninth Circuit reduced the award to $2.5 billion consistent with a 5 to 1 ratio.

Endnotes

1. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1993); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).
2. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
3. *Id.* at 14.
4. *B.M.W. of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

Bomb, from page 16

Court for the District of Puerto Rico dismissed the claims and the companies appealed.

Subrogation

Section 933 of the LHWCA provides that an employee may bring suit against third parties that have injured him or her. When an injured employee is compensated by third parties in such a suit, § 933 of the LHWCA gives the employer a limited right of subrogation for payments made to the employee by a third party. This means that if Colon had recovered money from the United States, ITT could have recovered the benefits it had paid Colon in the settlement. Furthermore, the LHWCA provides that if the employee does not bring suit against a third party within six months, the right to bring an action reverts to the employer—or to the insurer if it has paid the compensation under the LHWCA—for 90 days. After the 90 day time period, the right reverts back to the employee.

On appeal, ITT and PEI argued that Colon had suffered an injury when his lawyers did not refile the claim against the United States and therefore they were entitled to a subrogation lien in a legal malpractice suit against Colon's attorneys under § 933. The First Circuit noted that although § 933(b) does provide a limited subrogation right for an employer when a third party is liable for injury, "injury" is defined as "accidental injury … arising out of and in the course of employment …" The court concluded that the subrogation right was only available for the injury that Colon sustained during the course of his employment, which would have included the injury sustained as a result of the accidental bombing but precluded the malpractice claim. Furthermore, the court acknowledged that legal malpractice is not the type of injury that entitles an employee to compensation under the LHWCA. The court affirmed the district court's judgment, observing that both ITT and PEI could have pursued claims against the United States under the LHWCA.

Section 933 of the LHWCA provides that an employee may bring suit against third parties that have injured him or her.

Endnotes

1. The companies also argued that the lawyers breached their duty of care to the companies; however, the district court held that the lawyers only owe a duty of care to clients and non-clients if the lawyers reasonably foresee that the non-client will rely on his services.

Lake Michigan, from page 17

appeared to be willing to monitor and enforce compliance and there was no evidence to the contrary. The Sixth Circuit noted that the couple, in granting the easements, was not required to consider the neighbors' building rights. The appellate court found that the couple met all of the statutory requirements for contributing a conservation easement and affirmed the Tax Court's decision.

Endnotes

1. I.R.C. § 170 (H)(4)(A)(ii).
2. *Glass v. Commissioner*, 471 F.3d 698, 709 (6th Cir. 2006).

Photograph of Lake Michigan shoreline courtesy of NOAA's Great Lakes Environmental Research Laboratory.

Project Jeopardizes South Carolina Wetlands

April S. Williams

April is a third-year law student at the Florida Coastal School of Law. The views expressed herein are those of the author and do not necessarily reflect the views of the Sea Grant Law Center, NOAA, or any of its sub agencies.

The United States is home to over 100 million acres of wetlands, 4.6 million of which are isolated wetlands of South Carolina. Congress has proposed a new interstate to run from Michigan to Myrtle Beach, South Carolina. The South Carolina Department of Transportation's (DOT) chosen route will affect a minimum of 384 acres of wetlands scattered up and down the preferred alternative. Protection for these wetlands that serve so many important functions is insufficient, and it is time to enact real protections.

Since the recent *Rapanos v. United States* decision, and the further erosion of wetlands regulations, section 404(b) of the Clean Water Act (CWA) is not adequate with respect to protection of isolated wetlands. Congress needs to enact a statute specifically tailored to protect such wetlands, South Carolina needs to immediately enact an isolated wetlands protection statute, and the U.S. Army Corps of Engineers (Corps) needs to work on a case by case basis, and, along with the EPA, promulgate new definitions and regulations to protect wetlands.

South Carolina's Wetlands

Wetlands have been shown to slow water momentum, reduce flood heights, and allow for ground water recharge. This is especially important in hurricane-prone South Carolina, given the ability of wetlands to store floodwaters and reduce property damage and loss of life. One acre of wetland can store up to 1.5 million gallons of floodwater. One reason floods have become more costly is that over half of the wetlands in the U.S. have been drained or filled.

Wetlands also serve as water filtration systems by removing nutrients and pollutants from water before it leaves the wetland. Storm water and wastewater treatment facilities are sometimes designed from wetlands due to the ability of wetlands to filter water. Wetlands also serve as fisheries and wildlife habitats, and provide recreation. Having such an important role in the environment, wetlands need protection against those who want to build on and destroy them, specifically the isolated wetlands in the path of 1-73.

South Carolina's most comprehensive wetlands statute to date is the "Coastal Tidelands and Wetlands Act."[1] However, this statute only protects "critical areas," and leaves out many acres of South Carolina wetlands. It defines "critical areas" as coastal waters, tidelands, beaches, or beach/dune systems. It also states that South Carolina may issue permits for "erosion and water drainage structure . . . as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare . . . " This permit system leaves a loophole for the state to grant permits when advantageous to the public welfare. Also there is no protection for isolated wetlands or basically any inland wetlands. The Pollution Control Act indirectly protects South Carolina wetlands. It gives the Department of Health and Environmental Control (DHEC) the power to regulate pollution and maintain water quality, but just refers to "waters," not "wetlands," "implying they are not covered by the act."[2]

I-73 Project

Interstate 73 is a proposed road that will provide a direct route for the northern states to the coast of South Carolina. The primary goals of this project are system linkage and economic development. The DOT wants to provide a connection between Interstate 95 and the Myrtle Beach region, and "enhance economic opportunities and tourism in South Carolina."[3] The DOT is currently sending out engineers and scientists to determine what wetlands could be

filled, and which should be preserved. The DOT is not sure yet which wetlands will be bridged and which will be filled, but, if filled, they will have to obtain a permit first. A final Environmental Impact Study is to be released in the summer of 2007.

In the meantime, the South Carolina wetlands that are at stake on the proposed path for Interstate 73 must be protected. The momentum favors constructing this interstate rather than new legislation to protect wetlands. Therefore, the citizens of South Carolina need to oppose this new road's interference with wetlands. Citizens need to demand that a more extensive EIS be done, and that bridges take precedence over filling regardless of the additional cost. Also a possible citizen suit under the CWA might be viable, and perhaps result in an injunction, at least until further legislative action is taken.

South Carolina needs to enact a real isolated wetlands protection statute. It needs to work with the federal government in enacting real wetlands legislation by expanding the protections to any water or wetland not covered by federal law. The new statute should allow construction only in the direst circumstances, mandating judicial approval for any such permit.

Federal Protection

In a culmination of wetlands jurisdictional cases, in 2006 the Supreme Court heard *Rapanos v. U.S. Army Corps of Engineers*.[4] The issue was whether the Corps had jurisdiction over non-navigable waters. The Corps' jurisdiction rested on whether the waters were considered adjacent to navigable waters and what kind of hydrological connection must be present for a water to be considered adjacent. The case resulted in a plurality opinion that left many questioning how to apply the ruling. Many circuit courts have chosen to follow Justice Kennedy's concurrence.

Justice Scalia held that the term navigable waters included "only relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water," and that adjacent waters are only those in which "a continuous surface connection exists between it and navigable water."[5] He narrowed the definition of "navigable waters" to waters that are in fact navigable. Congress defined "navigable waters" as "waters of the U.S." so that actual navigability would not be an issue.[6] According to the legislative history, the phrase "waters of the U.S." was to be given "the broadest possible constitutional interpretation."[7] Ultimately, Justice Scalia set out a two-prong test to determine whether adjacent water is covered by the CWA. First, the adjacent channel must contain waters of the United States (i.e., relatively permanent body of water connected to traditional interstate navigable waters); and second, the wetland must have a continuous surface connection with that water. This is a very strict test.

Justice Kennedy's concurrence advocated for a "significant nexus" test, which would be less narrow than the idea promoted by Justice Scalia. He held that the Corps should develop guidelines to determine what kind of proximity would satisfy the "significant nexus" test. This is the same interpretation most of the appellate courts follow. Justice Kennedy would defer to the Corps regulations, and rejected Justice Scalia's claim that only "permanent, standing or flowing waters are federally protected." He also wrote the wetland in question need not have a "continuous surface connection" to navigable water, because they can still have "significant effects" on water quality, and the ecosystem, regardless of how strong or tenuous their connection.[8] Justice Kennedy wrote that wetlands are areas that are inundated or saturated with water at a "frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[9]

His opinion went on to attack the two limitations that the plurality opinion put on the CWA. First, he said that the "continuous flow" requirement does not make sense in a statute "concerned with downstream water quality," because small continuous trickle would be cov-

See Federal, page 22

Federal, from page 21

ered, but "torrents thundering at irregular intervals" would not. According to Justice Kennedy the second limitation Justice Scalia imposed is the "exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters."[10] Justice Kennedy wrote that Justice Scalia's opinion is "inconsistent with the [CWA's] text, structure, and purpose."[11]

Solutions

Congress needs to enact real wetlands protection legislation immediately. It needs to steer away from this permit system under the CWA, and rather than creating legislation that allows destruction, create something that prevents such. The permit system is not effective. The Corps approves more than 90 percent of all applications for permits.

A place to look for guidance would be the international treaty, Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention.)[12] The treaty attempts to "stem the progressive encroachment on and loss of wetlands now and in the future." The treaty states that the contracting parties should implement planning to promote conservation, and wise use of the wetlands is included on the list. New federal legislation should take this a step further by adding specific tools for promoting conservation and wise use, such as a no-build, no-fill designation for all wetlands. The treaty requires "wise use" of any wetland a country lists, but does not describe what "wise use" means, or entails. A federal statute should include this type of provision, but give a precise definition of wise use that would not allow any building or filling that would damage a wetland.

In addition to federal legislation, states need to enact their own wetlands protection statutes. At the outset, there are several problems with state legislation. First, states do not have the same incentive to protect wetlands as does the federal government. In fact, states are more inclined not to have wetlands protection laws. When a neighboring state has provisions in place that the other does not, the other state has a crucial business advantage. States can use this to attract a business to their state. A federal statute would put each state on equal footing in attracting business.

Second, even if a state enacts legislation, the legislation will not be the same across the board. If every state enacts legislation, it is quite possible that there would be 50 different regimes. (even though it is unlikely all 50 states would enact the legislation). Some wetlands will be more protected than others, when they all warrant protection. Leaving this matter to state legislation suggests that the matter could be left without legislation if the state finds that is in its best interest. This should not be an option.

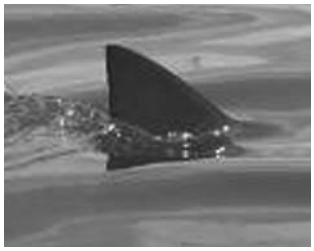
The CWA is not sufficient to curtail the erosion of America's wetlands. Congress needs to step in and enact real wetlands protections, states need to enact wetlands protection statutes, and the Corps needs to work with the EPA to create new regulations that will best provide protection for the wetlands.

Endnotes

1. S.C. Code Ann. § 48-39-10 – 48-39-360 (2005).
2. Ross B. Plyer, *Protecting South Carolina's Isolated Wetlands in the Wake of Solid Waste Agency*, 53 S.C. L. REV. 757, 768 (2002).
3. Welcome to the I-73 project: http://www.i73inS.C.com/ (last visited Feb 12, 2006) .
4. 126 S. Ct. 2208 (2006).
5. *Id.* at 2212-2213.
6. Robert Meltz and Claudia Copeland, Congressional Research Service, *The Wetlands Coverage of the CWA is revisited by the Supreme Court:* Rapanos and Carabell, Report RL 33263 (Feb. 2, 2006).
7. *Id*.
8. *Rapanos,* 126 S. Ct. 2208 (2006).
9 *Id*. at 2237.
10. *Id*. at 2244.
11. *Id*. at 2246.
12. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Dec. 21, 1975, T.I.A.S. No. 11084, 996 U.N.T.S. 243.

Coast to Coast
And Everything In-Between

A colonial-era shipwreck has netted 17 tons of colonial-era gold and silver coins valued at an estimated half million dollars, which could make it the biggest find in shipwreck treasure history. Odyssey Marine Exploration, the company that excavated the treasure, has not released details about the identity of the ship, but reported that the ship was located in a well-used sea lane in the Atlantic Ocean.

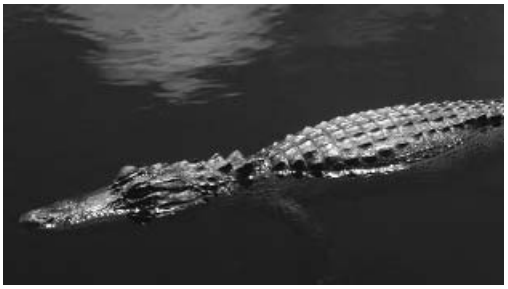


Photograph of shark fin courtesy of USF College of Marine Science.

A research group has reported that China's demand for shark fins may contribute to the threat of extinction of several shark species in European waters. The Lenfest Ocean Program, author of the report, claims that the growing middle class's demand for the luxury item may be driving the demand. When sharks are captured for their fins, fishermen catch the sharks, remove their fins, and toss the remains back into the ocean. The practice prevents researchers from getting an exact measure of how many sharks are being killed.

Two dogs displaced after Hurricane Katrina have returned to their original owners in Louisiana. The dogs, a St. Bernard and a shepherd mix, were dropped off by the Louisiana couple, Steve and Doreen Couture, at a temporary shelter before the storm hit. The couple did not immediately return for the dogs, and the pets were sent to a shelter in Pinellas County, Fla., where they were adopted by two different owners. After the Louisiana couple located their pets, the new owners originally refused to return the dogs and the Coutures brought suit. Although a trial date was set for July, the new owners decided to return the dogs and the suit has been dropped.

A 6½-foot alligator named Reggie escaped authorities in Los Angeles for over two years before being caught recently. Before his capture, Reggie provided an attraction for local residents who would watch for him to appear around the lake. The alligator was captured while he was sunning on the banks of Lake Machado and was taken to the L.A. zoo where he will be quarantined before joining other alligators. Authorities believe that Reggie was an illegal pet released into the lake.



Photograph of alligator courtesy of ©Nova Development Corp.

Photograph of coelacanth courtesy of NOAA's Alaska Fisheries Science Center.

An ancient fish has been caught off the coast of Indonesia. The captured fish, a coelacanth, was at one time thought to have gone extinct 80 million years ago. The Indonesian fisherman that caught the fish first took it to his house, and then put it in quarantine pool. The coelacanth only survived 17 hours in the quarantine pool, because the fish can not survive for very long outside of its natural habitat, which is 200 feet below the sea.

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*.

Editor: Terra Bowling, J.D.

Publication Design: Waurene Roberson

Research Associates:
Sarah Spigener
Allyson L. Vaughn
April Williams

Contributors:
Josh Clemons
Stephanie Showalter

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Sea Grant Law Center
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848

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