



WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Gillnet Restrictions in the Gulf of Mexico

by William C. Harrison, 2L

Introduction

Since 1981, every state bordering the Gulf of Mexico has introduced some form of restriction on the use of gillnets in nearshore waters. Many recreational fishermen and conservationists have argued that gillnets severely deplete fish stocks and indiscriminately kill endangered species. Seeking to preserve natural resources, they have mounted campaigns aimed at restricting or banning the commercial use of gillnets.

In response, commercial fishermen claim that those arguments simply cloud the real issue, resource allocation. Commercial fishermen in the Gulf of Mexico maintain that fish stocks such as mullet, red drum, and seatrout are healthy, and that the nets are highly selective. They argue that the gillnet issue does not involve conservation, but rather an attempt to allocate more resources to recreational fishermen. They maintain that if fish stocks are in trouble, all forms of fishing should be restricted to protect the resource. If recreational fishermen simply take up the slack, they contend, net restrictions will not save the fish. Scientific evidence, arguably the best basis for natural resource decisions, proves inconclusive in this debate due to the inherent trouble in accurately measuring fish populations and attributing causes of declines.

This article examines the positions of the stakeholders involved in the controversy over gillnets in the Gulf of Mexico. Problems fueling the debate include reliability of scientific evidence and fishery data, economic perspectives, and political agendas. This analysis sets out the background of the debate, discusses environmental concerns in fisheries management, and summarizes the issue of resource allocation. In addition, this article examines gillnet regulations in each state adjacent to the Gulf of Mexico and the effects of each state's actions.

Background

In 1981, Texas banned gillnets as part of an effort to restore fish populations decimated from harsh winters and overfishing. Since then, every state bordering the Gulf of

Mexico has enacted some form of gillnet restriction, from license qualifications in three states to a state constitutional amendment in another.

The federal government imposes some restrictions on gillnet use in federal waters. However, since most commercial gillnet fishing occurs in state territorial waters, state law usually governs gillnet use. Alabama, Mississippi, and Louisiana's marine jurisdiction extend three miles from their shore, while Florida and Texas exercise jurisdiction nine miles into the gulf.

The controversy over the use of gillnets in the Gulf of Mexico began in Texas in the late 1970s when recreational fishermen and environmental groups raised concerns about declining red drum and sea trout populations. To alleviate the problem, Texas banned the use of gillnets to catch these two species in 1981. In 1988, the state banned most other types of commercial netting. The stocks eventually increased to healthy levels, but the net ban remained. Texas continued to allow recreational hook and line fishing, however, while restricting the commercial industry. This policy decision set the stage for future gillnet restrictions throughout the Gulf of Mexico.

In recent years, other gulf states have looked to the Texas example to support net restrictions in their state. In 1992, conservationists and recreational fishermen in Florida formed a coalition called Save Our Sealife. Reacting to the perceived inaction of the Florida

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legislature and state agencies, the group pushed for a constitutional amendment to ban commercial netting in Florida. Save Our Sealife successfully gathered public support, and the Florida constitutional amendment passed in 1994. Since then, the remaining gulf states have enacted various gillnet restrictions of their own. These restrictions typically came in response to a perceived threat of shifting commercial fishing activity from states with gillnet bans.

Are Gillnets the Problem?

Environmental groups and many recreational fishermen contend that gillnets threaten fish populations and the health of many other marine animals. Organizations such as the Florida Conservation Association and the Coastal Conservation Association argue that sea turtles, manatees, dolphins, and marine birds become entangled in the nets and die. Some opponents of gillnet use claim significant bycatch of non-target fish stocks constitutes unnecessary waste.

Gillnet opponents claim that these nets and other fishing gear may be outpacing the ability of the fish to reproduce. According to some, a "regulated inefficiency", imposed through prohibiting or restricting the use of highly efficient equipment, may be necessary to prevent the overharvest of marine finfish.¹

Commercial fishermen dispute these claims, insisting that fish stocks are healthy. Many scientists agree. Dr. Behzad Mahmoudi, a scientist with the Florida Marine Fisheries Commission, found that the mullet fisheries in Florida have not been overfished.² Similar scientific evidence throughout the Gulf of Mexico seems to indicate few problems with overfishing. James Warren, a marine biologist in Mississippi, commented that although the mullet population varies, there is no real downward trend.³ He stated that the annual catch is relatively stable, and the fish population is not at a dangerously low level in Mississippi waters.⁴ According to Jean Williams, a Mississippi commercial fisherman associated with Save America's Seafood Industry, the number of gillnet fishermen and their catch has remained steady for the past twenty years.⁵ In addition, some Louisiana marine officials state that there is no scientific evidence to support the need for gillnet restrictions.⁶ Bob Jones, the Executive Director of the Southeastern Fisheries Association, asked, "if the fisheries were in such bad trouble, how were they able to survive this long?"⁷

Prior to the enactment of the Florida gillnet ban, the Gulf States Marine Fisheries Commission, an independent



advisory body to the five gulf coast states, passed a resolution stating that the "proposed net ban referendum has not been evaluated on the basis of scientific information through the appropriate fishery management agencies."⁸ The Commission asserted that although there is some circumstantial evidence pointing to gillnets as harmful, the proof is inconclusive as to whether gillnets cause irreparable harm to saltwater finfish stocks.

"If the fisheries were in such bad trouble, how were they able to survive this long?"

Commercial fishermen claim that the nets are very selective and catch few endangered species. Ed Conklin, Director of Marine Resources for the Florida Department of Environmental Protection, stated that it is difficult to prove gillnets kill turtles.⁹ Unless they are found with net marks or actually entangled in the nets, their cause of death is difficult to ascertain. Even though there have been cases of marine animals dying in gillnets, there is little conclusive evidence of widespread harm caused by the nets. Through the use of new technology such as acoustic alarms and increased monitoring, fishermen can decrease endangered species mortality and bycatch waste.

One major problem in analyzing bycatch and endangered species harm is the lack of accurate data collection methods. Vessel observer programs are costly, and few commercial fishermen are likely to commit willful violations of fishing laws with an observer on board. States often require commercial fishermen to prepare log books detailing daily catch. However, many conservationists challenge the credibility of such records.

When a fishery declines, it is difficult to point to any one source of the problem. Harsh winters, natural predation, and other factors can cause a decrease in fish stocks. Proponents of net restrictions often use yearly landings statistics to support their claims by showing a decrease in current landings. However, older catch figures are often incompatible with current data. According to *Fisheries Management for Fishermen*, "[l]andings data . . . alone are not very useful. Landings can fluctuate up and down for a variety of reasons."¹⁰ Number of fishermen, shorter seasons, and varied technology can result in drastically different numbers.

It is also difficult to identify fish stocks on a state-by-state basis. Fish don't recognize boundaries. Fish in one state's waters can be in another state's waters minutes later. Although fisheries data and statistics are difficult

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to accurately measure, both sides of the debate use data favorable to their position.

Allocation Concerns

Scientific data alone does not seem to support gillnet restrictions. Instead, political and economic concerns also influenced the shift in policy. Many players in this debate will admit that gillnet restrictions are based on economics more than science. Ron Lukens, Assistant Director of the Gulf States Marine Fisheries Commission, stated that scientific evidence did not conclusively support either side of the issue.¹¹

Dan Dumont, a conservationist associated with the Alabama Wildlife Federation, raises the concern of displace fishermen moving from states with stricter laws to those with safer restrictions.¹² Ed Conklin notes that as the population increases, more people must divide finite natural resources.¹³ As a resource declines, all those depending on it for a living suffer. Many state officials share this concern. To combat this potential problem, several states enacted license restriction programs. These regulations provide for the issuance of gillnet licenses after satisfying certain requirements, such as residency or commercial fishing income criteria. This essentially puts a moratorium on the licensing of new entrants to the state fishery. The gillnet issue is one of allocation as well as conservation.

State Gillnet Restrictions

Texas

Reason

Texas was the first gulf state to enact a gillnet ban. According to the Texas Parks and Wildlife Department (TPWD), during the late 1970's the state's red drum and sea trout populations declined sharply due to harsh winters and overfishing.¹⁴

Legal Mechanism

To counter this trend, TPWD issued a proclamation prohibiting gillnet use and sale of these fish in 1981 over the objections of the commercial fishing industry.¹⁵ According to Richard Moore, a fishermen affiliated with the commercial fishing organization Pisces, their side was underfunded and in the minority.¹⁶ Recreational fishermen and their allies succeeded in gaining the anti-netting regulations. TPWD banned all other types of commercial netting for saltwater fish in 1988.¹⁷ The regulation prohibits the use of strike nets, gillnets, or

Red Drum



trammel nets to catch game fish. Texas also restricted the bag limits of recreational fishermen.

Result

According to the Texas Parks and Wildlife Department (TPWD), these actions to help the fish stocks have worked. Hal Osburne, TPWD Coastal Fisheries Policy Director, stated,

The overall impact of these fishery management measures has been the recovery of red drum and spotted seatrout populations as well as the reestablishment of premier sport fisheries for these species throughout the Texas coast. Because commercial nets targeted larger red drum, the removal of nets in Texas resulted in a dramatic upsurge in the number of large fish available.¹⁸

The net ban in Texas served as a precedent for other states in enacting their own gillnet restrictions. Many groups use the Texas example to show the need and potential success of a gillnet ban in their state. Since the Texas gillnet ban, all four remaining gulf coast states have enacted various measures to restrict gillnetting.

Florida

Reason

In Florida, groups advocating a net ban claimed the nets needlessly killed endangered species, depleted marine finfish stocks, and contributed to marine debris. Recreational fishermen and environmental groups argued for a complete ban on gillnets. A coalition of these groups, Save Our Sealife (SOS), launched a multi-million dollar media campaign to enact a constitutional amendment banning gillnets. SOS stated,

The nets . . . have been responsible for excessive and damaging harvesting of fish populations and are notorious for their unnecessary killing of other marine animals, such as turtles and dolphins. We have no choice but to take this issue directly to the people of Florida.¹⁹

Frank Sargeant of the Tampa Tribune accurately predicted that,

[t]he war is about to begin. . . [c]ommercial fishermen and recreational anglers are about to square off in a bitter battle, the object of which is the life of the state's marine fisheries--or the death of commercial fishing in Florida . . .²⁰

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Most of the citizens in the state knew little about gillnet use and the environmental concerns. The primary sources of information about the proposed ban were pamphlets and radio and television ads. The stakeholders used hyperbole to argue for their side, detracting

"We have no choice but to take this issue directly to the people of Florida"

from an objective debate on the validity of gillnet restrictions. The Organized Fishermen of Florida (OFF), a commercial fishing interest group, filed a suit against sixteen television stations claiming that the stations ran misleading ads supporting the statewide net ban.²¹ The ads depicted harm to fish and sea turtles on what appeared to be a commercial fishing vessel. According to Bob Jones of the commercial fishermen's group, Southeastern Fisheries Association,

[t]he net ban proponents had one basic ad showing a shrimp boat dumping a net full of fish and an upside down turtle on the deck of the shrimp boat with a booming voice urging the voters to stop this wasteful practice. . . . [It] was actually a film of a turtle excluder device (TED) study conducted in Cape Canaveral in the 1970's.²²

Florida citizens voted for the ban, however, despite the fact that scientific evidence did not conclusively show danger of overfishing.

Legal Mechanism

Florida enacted both a constitutional amendment and a statute governing gillnet use. The amendment provides "[n]o gill nets or other entangling nets shall be used in Florida waters."²³ The statute provides in part, "[n]o person may take food fish within or without the waters of this state with a purse seine, purse gill net, or other net."²⁴

Result

A Florida judge denied a request for an emergency injunction on the ban sought by the Organized Fishermen of Florida (OFF).²⁵ The group now seeks a declaratory judgment to have the net ban amendment declared illegal.²⁶ The suit seeks to prove ballot summary deficiency, improper constitutional subject matter, and due process violations. According to some commentators, this claim is unlikely to succeed.²⁷

Alabama

Reason

Alabama has the distinction of being the only gulf state where the commercial and recreational fishermen sat down together and worked out a compromise rather than attacking each other. Although overfishing of red drum and spotted seatrout was an issue in Alabama, the main concern was the influx of Florida fishermen, ousted by their state's new gillnet ban.

Legal Mechanism

The Alabama statute prohibits gillnets over 2,400 feet in length.²⁸ In addition, the law imposes license restrictions. An applicant must have purchased a license for two years between 1989 and 1993. The applicant must also have reported at least 50 percent of his gross income reported on an Alabama tax return, came from the capture and sale of seafood two of the five years between 1989 and 1993. The law requires higher fees for commercial gillnet permits from non-residents. Further, the statute declares spotted seatrout and red drum gamefish, thereby prohibiting their commercial catch and sale.

Result

The impact of restrictions in Alabama is difficult to determine. Although commercial fishermen still have the right to use gillnets, the new laws restrict their activity. Anti-netting groups still seek stronger restrictions, therefore the issue is still alive in Alabama.

Louisiana

Reason

In Louisiana, the Coastal Conservation Association argued for gillnet restrictions to protect against overfishing of marine stocks such as speckled seatrout and mullet. The Louisiana legislature enacted gillnet restrictions as a result.

Legal Mechanism

The Louisiana act consists of many different facets. The main part of the law is the Louisiana Marine Resources Conservation Act of 1995 (LMRCA).²⁹ The LMRCA establishes a qualification system to determine which commercial fishermen may receive a license to use gill nets. To qualify for a license, an applicant must "provide positive proof that they held a valid commercial gear license for gill nets during any two years of the years 1995, 1994, and 1993." In addition, an applicant must also show that they "derived more than 50 percent of their earned income from the capture and sale of seafood

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species in at least two of the three years, 1995, 1994, or 1993." The law also restricts the length of the nets. Furthermore, it establishes the Commercial Fisherman's Economic Assistance Fund, with money raised from saltwater license fees going to fishermen in need of financial assistance due to the impact of the LMRC.

Some officials argue the statutory gillnet restriction is confusing. According to a state official well versed in marine fisheries issues, the legislature hastily drafted the law on the Senate floor without formal hearings and with very little debate. As a result, the law is difficult to understand and even harder to enforce. A Louisiana court granted the Louisiana Seafood Management Council (LSMC), representing commercial interests, a temporary restraining order against enforcement of the gillnet restrictions until August 31, 1995.³⁰ The order was not renewed.

Result

The LSMC is currently appealing a judicial ruling against their petition seeking injunctive relief and a declaratory judgment on the constitutionality of the gillnet restriction law.³¹ They claim that the law violates the state's public trust doctrine by the unequal allocation of saltwater finfish resources between commercial and recreational fishing interests without a sound basis in conservation policy or scientific evidence. According to the scientists who support LSMC, the saltwater fish ostensibly protected by the gillnet restrictions are in healthy supply. The petition also claims a lack of due process and adequate compensation for the taking of property such as boats, equipment, and gear. Equipment and other investment in gillnet fishing are now essentially valueless, they argue. Although Louisiana has instituted a net buyback program, the LSMC claims that the compensation is a mere "pittance" and that there has been no money set aside by the state to fund the buyback. The petition also claims denial of equal protection by the inequitable allocation of saltwater finfish resources. The petition further claims a violation of the federal commerce clause by exacting a fee for use of gillnets in federal waters. According to the petition, no other state charges this fee.

Many commercial fishing groups argue that any harm to Louisiana's marine finfish resources is coming from recreational fishermen. They "claim that recreational fishermen land four times as many speckled trout every year. Besides, they say, the number of commercial fishermen has plummeted, while each year the state sells record numbers of sport licenses."³² Manny Fernandez, a New Orleans attorney representing the commercial

"This is not about conservation. It's about politics and greed."

fishermen, said in the same article, "[t]his is not about conservation. It's about politics and greed."



Mississippi

Reason

Mississippi, the middle state on the Gulf of Mexico coastline, was the last gulf state to address commercial gillnet restrictions. On August 15, 1995, The Mississippi Commission on Marine Resources (MCMR) passed an "emergency" regulation restricting the issuance of gillnet licenses. Fear of increased commercial fishing activity from non-resident fishermen likely prompted the MCMR to pass the regulation.

Legal Mechanism

The new restriction provides for issuance of gillnet licenses only to "individuals, firms or corporations that purchased Mississippi gill and trammel net licenses during any license year between May 1, 1990 and April 30, 1995."³³

Result

Some conservationist groups, most notably the Coastal Conservation Association of Mississippi (CCAM), insist that stocks are overfished and that the state should enact tighter regulations. According to CCAM, their group unsuccessfully tried to work out a gillnet restriction compromise with commercial fishermen. The proposed compromise, tailoring Alabama and Louisiana laws to fit gillnet use in Mississippi, consisted of: 1) limited entry system requiring proof that the commercial fisherman "made at least 51 percent of their income from commercial fishing; 2) declaring redfish a gamefish and eliminating speckled trout netting after July 1997; 3) restrictions on the season, gear, and location for mullet fishing; 4) increasing penalties for violations; and, 5) other reporting requirements.³⁴

The gillnet issue in Mississippi may be addressed in the 1996 term of the legislature. Pending legislation includes a total net ban and limited licensing schemes. A net ban initiative similar to that passed Florida could arise in Mississippi if the legislature and MCMR do not act.

Conclusion

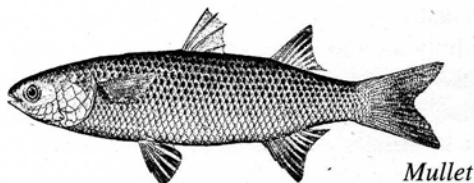
The gillnet issue boils down to a question of allocation. According to Ron Lukens of the Gulf States Marine

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Fisheries Commission (GSMFC), the issue is not purely one of science. It also involves the question of who gets the fish. The parties in this debate have all used the facts and data to their advantage, and it is often hard to tell which arguments are credible. Dealing with a mobile resource such as fish makes it even more difficult. Politics and economics have played a significant role in the gillnet debate.

Conservation should play an important role in dealing with natural resources. Commercial fishermen should not decimate fish stocks for short term profit. They ought to also address harm to endangered species and wasteful bycatch. Fisheries management policies should ensure sustainable stocks. If fish stocks are truly in danger, they need protection from all forms of harvest, from gillnets to hook and line fishing. Whether adopting a licensing scheme or tighter regulations, states should look at reasonable restrictions to manage fisheries. Total bans on net use are not always justified and may lead to unnecessary economic losses to commercial fishermen.

It is better for policymakers to work towards protecting fisheries for both sport and commercial use. Fish are a common property resource. Whether it is through angling for seatrout or sitting down to a dinner of commercially-caught blackened red drum, people should have the opportunity to enjoy this valuable resource. Through carefully planned regulation and equitable allocation, the fruits of the sea can be prudently used and shared for generations to come. □



Endnotes

¹Colin Nickerson, A "Regulated Inefficiency" May be the Solution, BOSTON GLOBE, April 19, 1994, at B1.

²Robert P. Jones, Florida's Net Ban--A Study of the Causes and Effects, p. 9 (1995), unpublished manuscript (on file with author).

³Telephone Interview with James Warren, Scientist, Miss. Dep't. of Marine Resources (Oct. 25, 1995).

⁴*Id.*

⁵Telephone Interview with Jean Williams, Director, Save America's Seafood Indus. (Oct. 23, 1995).

⁶Telephone Interview with Dep't. Official, La. Dep't. of Wildlife, Fisheries and Parks (Oct. 17, 1995).

⁷Telephone Interview with Bob Jones, Executive Director, Southeastern Fisheries Ass'n. (Nov. 30, 1995).

⁸Resolution on the Florida Net Ban Referendum, Gulf States Marine Fisheries Commission, October 20, 1994.

⁹Telephone Interview with Ed Conklin, Director, Fla. Dep't. of Env'tl. Protection, Marine Resources Division (Nov. 20, 1995).

¹⁰Richard K. Wallace et. al., FISHERIES MANAGEMENT FOR FISHERMEN: A MANUAL FOR HELPING FISHERMEN UNDERSTAND THE FEDERAL MANAGEMENT PROCESS, pp. 5-6 (1994).

¹¹Telephone Interview with Ron Lukens, Director, Gulf States Marine Fisheries Comm'n. (Oct. 16, 1995).

¹²Telephone Interview with Dan Dumont, Director, Ala. Wildlife Fed'n. (Nov. 3, 1995).

¹³Telephone Interview with Ed Conklin, *supra* note 9.

¹⁴Letter from Hal Osburn, Coastal Fisheries Policy Director, Texas Parks and Wildlife Dep't., to William C. Harrison (Oct. 25, 1995) (on file with author).

¹⁵*Id.*

¹⁶Telephone Interview with Richard Moore, Member, Pisces Organization (Dec. 8, 1995).

¹⁷Letter from Hal Osburn to William C. Harrison, *supra* note 14.

¹⁸*Id.*

¹⁹Save Our Sealife, Press Release by John Sowinski, November 10, 1992.

²⁰Frank Sargeant, *State Fisheries Campaign May End Netting Industry*, Tampa Tribune, February 23, 1992.

²¹Jones, *supra* note 2 (manuscript at p. 12).

²²*Id.*

²³Fla. Const. Art. 10 Sec. 16 (b)(1).

²⁴Fla. St. Ann. § 370.08(3) (West 1995).

²⁵Order Denying Motion for Temporary Injunction, *Lane v. Childs*, 2d Judicial Cir. of Leon Co, Fla., June 29, 1995.

²⁶Dee Rivers, *Florida Net Ban Goes Into Effect*, NATIONAL FISHERMAN, Sep. 1995, at 13, 72.

²⁷Alexandra M. Renard, *Will Florida's New Net Ban Sink or Swim?: Exploring the Constitutional Challenges to State Marine Fisheries Restrictions*, 10 J. LAND USE & ENVTL. L. 273.

²⁸1995 Ala. Acts 287.

²⁹1995 La. Acts 1316. La. Rev. Stat. Ann. Section 305 (West 1995).

³⁰Dee Rivers, *Louisiana Net Ban on Hold*, NATIONAL FISHERMAN, Oct. 1995, at 42.

³¹Notice of Appeal, La. Seafood Mgmt. Council v. La. Wildlife and Fisheries Comm'n., 19th Judicial Dist. Ct., Parish of E. Baton Rouge, La., Filed Dec. 18, 1995.

³²Sam Walker, *Bayou Battle Pits Gill Netters Against Rod-and-Reel Crowd*, CHRISTIAN SCIENCE MONITOR, May 19, 1995, at 1.

³³Adoption of Emergency Regulations Governing the Sale and Transfer of Gill and Trammel Net Licenses, Mississippi Commission on Marine Resources, August 15, 1995.

³⁴Press Release, Coastal Conservation Association, Mississippi (on file with author).

ESA Turtle Protection Applies to All Shrimp Exports to U.S.

Earth Island Institute v. Christopher, ___ F. Supp. ___, (CIT 1995), slip op. 95-208.

by John A. Duff, J.D., LL.M.

Overview

The United States Court of International Trade recently directed the U.S. Departments of State, Commerce and Treasury ("federal defendants") to apply sea turtle protection measures to all nations exporting shrimp to the United States. Several species of sea turtle are endangered and large numbers of them drown in shrimp nets. Under a 1989 amendment to the Endangered Species Act (ESA), the U.S. must ban shrimp imports from countries that fail to reduce sea turtle fatalities in shrimping operations. However, since the sea turtle amendment was enacted, it has only been applied to those nations catching shrimp in the Gulf of Mexico and wider Caribbean region.

Environmental organizations, led by Earth Island Institute, argued that the federal defendants erroneously limited application of the law to the wider Caribbean. In its December 29, 1995 ruling, the court cited the plain language of the Endangered Species Act as applicable to all nations exporting shrimp to the U.S. The court directed the federal departments and agencies to "prohibit not later than May 1, 1996 the importation of shrimp . . . wherever harvested in the wild with commercial fishing technology" unless the exporting state adopts sea turtle conservation measures.

At the outset of its opinion, the court noted,

Science and government have apparently come to agree that the turtles which

have navigated Earth's oceans for millions of years may not survive human habits (and appetites) without the intervention of law.¹

Background

The ESA and Turtles

The Endangered Species Act directs all federal departments and agencies to use their authority to conserve endangered and threatened species.² Pursuant to the ESA listing process, four species of sea turtle are designated as endangered and one is considered threatened. In 1989, Congress amended the ESA, adopting measures to reduce sea turtle mortalities related to shrimp harvesting.

Most U.S. commercial shrimping activity takes place in the Gulf of Mexico and wider Caribbean region including the western Atlantic. In the United States, commercial shrimping vessels operating in sea turtle areas are required to use Turtle Excluder Devices (TEDs) on their nets to allow turtles to escape. Since the introduction of TEDs, the turtle mortality rate from U.S. shrimping interactions has decreased dramatically.

The United States imports billions of dollars worth of shrimp annually from over seventy nations. An estimated 124,000 sea turtles drown each year due to shrimping practices by non-U.S. fleets. To address this threat to the survival of the species, the ESA sea turtle provisions (known as "section 609") direct the Secretary of State, in consultation with the Secretary of Commerce, to:

- develop agreements with other nations for the protection and conservation of sea turtles;
- initiate negotiations with foreign nations engaged in commercial shrimping practices which might adversely affect these species;
- encourage the protection of specific ocean and land regions vital to the species survival; and,
- provide Congress with a list of nations which conduct commercial shrimping operations within the range of those sea turtles and indicate which nation's operation may adversely affect them.³

Section 609 also includes enforcement measures to reduce the threat to sea turtles. Specifically, it requires that "[t]he importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles *shall be prohibited*," unless the government of the harvesting nation can prove that it has adopted a regulatory program to reduce sea turtle deaths comparable to United States.⁴ (emphasis added)

Application of Section 609

Concerned that application of section 609 to all nations might adversely affect trade, the State Department directed its efforts toward those nations which operate in the Gulf of Mexico and wider Caribbean region. This region hosts most of the U.S. shrimping industry

and is considered an important sea turtle habitat. In construing Section 609 in this manner, the State Department applied the sea turtle protection measures to only 14 of the more than 70 countries that export shrimp to the United States.

Environmental Concerns

Earth Island Institute and other environmental organizations read section 609 to apply to all harvesting nations that export shrimp to the United States. They point to commercial shrimp fishing operations as a "major factor in the mortality and decimation of these species."⁵ Earth Island considered the State Department's limiting interpretation to, "render [section 609] inoperative and meaningless."⁶

In its original complaint, Earth Island sought a declaratory judgment, a writ of mandamus directed at the Departments of State and Commerce to perform the duties set out in the ESA, and injunctive relief. Both the Federal District Court for Northern California and the Court of Appeals for the Ninth Circuit declined to hear the case on its merits, ruling that the action must be heard, if at all, in the U.S. Court of International Trade.

Lawsuit in U.S. Trade Court

Standing

The federal defendants argued that the plaintiff environmental organizations did not have a sufficient interest in the issue to constitute legal standing. They relied on the Supreme Court ruling in *Lujan v. Defenders of Wildlife*,⁷ where the Court reiterated the requisite elements of standing. A party invoking federal jurisdiction must establish "that it has suffered injury in fact, that there is a causal connection between that injury and the

conduct complained of, and that the injury is likely to be redressed by a favorable decision."⁸ In that case, the Court held that an environmental organization did not satisfy the "injury in fact" element when it made a general argument that government interpretation of the ESA might result "in an increase in the rate of extinction of endangered and threatened species."⁹

The Court of International Trade distinguished the instant case from the facts in *Defenders*, pointing out that Earth Island had supported its claim of injury in fact with sufficient specificity and credibility. The Trade Court noted that the type of injury in fact that Earth Island charged had been foreseen and deemed sufficient by the Supreme Court in *Defenders*. "The desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."¹⁰ The Trade Court also ruled that Earth Island had established the additional standing elements.

Interpreting Legislation

The main issue of the case at hand was whether the federal agencies had properly applied Section 609 in limiting its application to nations that were conducting commercial shrimping operations in the Caribbean region.

Federal Agency Construction

The State Department interpreted section 609,

to be limited to an effort by the Congress to extend the protection given to threatened and endangered sea turtles protected by U.S. regulations only to those turtles throughout their range across the Gulf of

Mexico, Caribbean, and western central Atlantic (or, more simply, the wider Caribbean)¹¹

In construing Section 609 in this manner, the federal defendants applied the ESA requirements to the fleets of those nations operating in the wider Caribbean region and exporting shrimp to the U.S. They argued that since Section 609(b) is silent regarding geographic scope of implementation, they had reasonably delimited the scope to the wider Caribbean.

Arguing in the alternative, the federal defendants contended that even if section 609 had originally been enacted to cover all sea turtle/shrimping interactions, Congress had acquiesced to the federal agencies' interpretation of the statute by remaining silent regarding its application.

Court's Analysis of 609

The court noted that, "[t]he starting point in every case involving construction of a statute is the language itself ... [and i]f the statute is silent or ambiguous with respect to the specific issue, the question of the court is whether the agency's answer is based on a permissible construction of the statute."¹² The federal defendants argued that they had interpreted section 609 in a permissible manner. The court disagreed, pointing out that no ambiguity existed which might support their interpretation. The court indicated that the statute contained no terms of geographic restriction. Nor did the court accept the argument that the statute was silent on the matter, since the statute was global in its express terms, referring to "all foreign governments which are engaged in or which have persons or companies

engaged in, commercial fishing operations, which ... may affect adversely [endangered or threatened] species of sea turtles."¹³ (emphasis added)

Congressional Acquiescence Argument

The court also found invalid the federal defendants' argument that Congress had effectively acquiesced to the limited geographic scope interpretation. The court noted that judicial determination of Congressional acquiescence is limited to cases in which there has been extended, meaningful interaction between the executive and legislative branches and where the Congress has revisited the statute and left the practice untouched.¹⁴ In the case at hand, the executive agencies' interpretation had been for a short period of time and Congress had not revisited Section 609 or even been asked to do so by the executive branch since its enactment.

Holding and Relief Granted

Upon reviewing the issues and facts, the Court of International Trade held that, "[t]he purview of Section 609 is clear on its face and not susceptible to differing interpretations; it is devoid of words or terms of geographical limitation."¹⁵ In so holding, the court granted the plaintiffs' request for a judicial declaration that, "the defendants are not properly enforcing the above quoted section 609(b) by restricting its mandate to the Gulf of Mexico - Caribbean Sea - western Atlantic Ocean."¹⁶

In providing interim relief, the court directed that the Commerce Department must, by May 1, 1996, ban shrimp imports from all nations that fail to implement measures to prevent shrimp interaction sea turtle deaths. The Commerce Department must then report the results of its actions to the court by May 31, at which time a final judgment will be determined.

Endnotes

¹ __ F. Supp. __ (CIT 1995), slip op. 95-208, at 1-2.

² Endangered Species Act, 16 U.S.C. 1531 (c).

³ Pub. L. 101-162, Title VI, § 609(a), Nov. 21, 1989, 103 Stat. 1037 (codified at 16 U.S.C. § 1537 note).

⁴ *Id.* at 609(b).

⁵ *Environmental Group Sues Government Over Failure to Ban Certain Shrimp Imports*, Int'l Trade Rep. (BNA) p. 394 (Mar. 4, 1992).

⁶ __ F. Supp. __ (CIT 1995), slip op. 95-208, at n. 36 and accompanying text.

⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L.Ed. 2d 351, 112 S. Ct. 2130 (1992).

⁸ *Id.* at 560.

⁹ *Id.* at 562.

¹⁰ __ F. Supp. __ (CIT 1995), slip op. 95-208, at 20 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 562-563).

¹¹ __ F. Supp. __ (CIT 1995), slip op. 95-208, at n. 33.

¹² *Id.* at 47-48.

¹³ *Id.* at 48-50.

¹⁴ *Id.* at 57-58.

¹⁵ *Id.* at 59.

¹⁶ __ F. Supp. __ (CIT 1995), slip op. 95-208, at 66.

Fear of Contaminated Fish Verdict Overturned

Leaf River Forest Products v. Ferguson, 662 So.2d 648 (Miss. 1995)

by John A. Duff, J.D., LL.M.

Overview

The Mississippi Supreme Court recently overturned jury awards for emotional distress based on a fear of eating contaminated fish. The court held that, "emotional distress based on a fear of a future illness must await the manifestation of that illness or be supported by substantial exposure to the danger, and be supported by medical or scientific evidence so that there is a basis for the emotional fear."

Facts

In 1984, the Leaf River paper mill began operating a paper pulp manufacturing facility on the Leaf River in Perry County, Mississippi. The Leaf River combines with the Chickasawhay River to form the Pascagoula River. The toxic substance dioxin was found in the waste water and sludge of the Leaf River Mill and subsequent testing on fish in the area led the Mississippi Department of Wildlife and Fisheries (MDWF) to close the area to commercial fishing from October 1990 to January 1991. MDWF also issued consumption advisories for

fish caught in the area.

Thomas and Jane Ferguson lived on the Pascagoula River approximately 125 miles downriver of the mill. They claimed that they noticed a change in the river's color starting in 1985. The Fergusons stated that they had eaten large amounts of fish caught in the Pascagoula before knowing about the dioxin problem. Thomas Ferguson stated that he could no longer swim or fish in the river and he had developed a fear of cancer. He testified that he would have made "different arrangements with [his] lifestyle" had he known of the

dioxin discharge. He also stated that recent flooding of his property exacerbated his fear of dioxin contamination. Mr. Ferguson did not have his property or well water tested for dioxin, nor did he try to sell his property. He did not have his blood tested for dioxin levels.

Jane Ferguson claimed that she suffered from a sense of loss due to the possible decline in property value. She also claimed that like her husband, she had developed a fear of cancer. She declined Leaf River's offer to pay for a blood test.

The Fergusons alleged that Leaf River's actions constituted a nuisance and that their fear of cancer also constituted actionable emotional distress. Numerous witnesses testified for each side regarding, *inter alia*, regulation of dioxin discharges, aquatic ecology and biology, public health, land and water aesthetics, real estate valuation, and psychiatric testing.

In Jackson County Circuit Court, a jury awarded the Fergusons \$10,000.00 each on their nuisance claim; \$90,000.00 each on their emotional distress claim; and, \$3,000,000.00 in punitive damages. Leaf River appealed.

Review of Jury Verdicts

The Mississippi Supreme Court, in reviewing the Circuit Court awards, analyzed whether the emotional distress and the nuisance verdicts must be overturned as a matter of law.

Emotional Distress Claim

The supreme court pointed out that while the state does recognize recovery for both negligently and intentionally inflicted emotional distress, it has never recognized such recovery based on a fear of contracting a disease or illness in the future. They noted further that any possible recovery for emotional distress must

be based on establishing, with proof, the legal elements upon which such a cause of action is based.

In reversing the emotional distress verdict, the court held that plaintiffs had not set forth the required legal proof, having failed to test themselves or their property for dioxin. The Court noted that while they presented evidence of the danger of dioxin, they failed to show dioxin to be present on their land or in their bodies. Further, they produced evidence of dioxin in the vicinity of the mill, but failed to show evidence of dioxin in the water near their home. Finally they failed to offer any proof of personal or physical injury. "They are afraid of what may happen in the future but have refused to take available steps that could alleviate or justify those fears," noted the court.

Nuisance Claims

Since the original claim of nuisance set forth by the Fergusons included elements of public and private nuisance and the Circuit Court proceedings did not specify the basis for the jury verdicts, the state Supreme Court addressed both as potential bases for recovery.

Private Nuisance

The Court first set forth the foundation for establishing a private nuisance claim: a showing by the plaintiff that defendant's conduct "is a legal cause of an invasion of [plaintiff's] use and enjoyment of land, and the invasion is either intentional and unreasonable, or ... otherwise actionable under the rules controlling liability."

The Court pointed to a lack of proof in ruling that the Fergusons failed to show legal causation. The Fergusons were concerned that dioxin might be on their property

and they claimed to have suffered damages as a result of the discoloration of water and riverbanks over the years. However, the Fergusons failed to show that dioxin had entered their property. And the court found legally insufficient, testimony regarding the discoloration of the river as inherently attributable to the Leaf River mill.

Public Nuisance

The court also dismissed any legal basis for a finding of a public nuisance, since the Fergusons failed to show that they suffered harm, if any, different in kind rather than degree than that suffered by the general public. The court noted that any changes in the waters of the river that might conceivably be attributable to the Leaf River Mill would result in a reduction of use or enjoyment by the public at large. Failing to establish causation and harm different in degree, any award must be reversed.

Conclusion

The Mississippi Supreme Court reversed the emotional distress verdicts, noting that the claim was deficient of legal proof and that any fear that the Fergusons may have had was not shown to be based on scientific or medical evidence. The court also reversed the nuisance verdicts, indicating again that the plaintiffs failed to present legal proof that their property had been adversely affected by Defendant's actions or that they suffered any damage different in kind from what the general public may have borne. □



Lagniappe *(a little something extra)*

Around the Gulf ...



The Mississippi Marine Trash Task Force reported that its 1995 participation in the 10th Annual International Coastal Cleanup netted 3,709 bags of trash from the state's coastline. The effort also garnered data on the types of trash removed. This information was used to prompt ratification of Annex V of the MARPOL Treaty which bans ocean dumping of plastic waste.

On October 21, 1995, Louisianans amended their state constitution regarding ownership determination of mineral rights on navigable waterbottoms that have been formed by the erosion of private property. Formerly, the state automatically took title to these lands and their mineral resources. The constitutional amendment allows the state to negotiate ownership of such mineral rights with owners of contiguous land. La. Acts 1332; La. Const. Amendment Act IX, Sec. 4 (A).

On Jan. 3, 1996, Florida officials reported that 201 manatees had died during 1995, for the second-worst death toll in two decades of study. Deaths attributable to human activity — primarily watercraft use and operation of floodgates and canal locks — declined slightly from 1994 figures. Increases were primarily in numbers of newborn manatees dying of natural causes and deaths from undetermined causes.

On Jan. 18, 1996, the Florida Supreme Court upheld a lower Circuit Court ruling that the Florida commercial net ban purpose was to limit but not to prohibit shrimp fishing, and thus modified shrimp trawls are permitted. See Department of Environmental Protection v. Millender, No. 85,880, Supreme Court of Florida, 1996 Fla. LEXIS 19; 21 Fla. Law W. S 27.



Around the Nation and the World ...



The Commerce Department's National Marine Fisheries Service, the nation's oldest conservation organization, celebrated 125 years of federal marine fisheries research, conservation, and management on Feb. 9, 1996. Founded as the U.S. Commission of Fish and Fisheries, the agency was established to investigate and curb the decline of food-fish stocks.

On Jan. 8, 1996, Brian Tobin announced his resignation as Canada's Minister of Fisheries to seek the premiership of Newfoundland. On Jan. 25, 1996, Newfoundland's Fred Mifflin was appointed to replace Brian Tobin as Minister of Fisheries.

On Dec. 11, 1995, Secretary of Commerce Brown certified Japan under the Pelly Amendment of the Fishermen's Protective Act, for expansion of its scientific whaling program in the North Pacific and the Antarctic. On Dec. 20, 1995, Japan's Fisheries Agency filed a letter of protest with the U.S. Dept. of Commerce concerning the Pelly Amendment certification. On Feb. 9, 1996, President Clinton reported to Congress that the U.S. would urge Japan to curb its whaling, but that trade sanctions would not be imposed.

In December, 1995, a UN commission on oceans began work on a three year project to review and make recommendations on measures to use and protect the world's maritime resources. The Independent World Commission on the Oceans (IWCO) will construct a report on ocean related issues to be submitted to the UN General Assembly in 1998. The Commission will, among other things, address the manner in which countries can best fulfill the provisions of the United Nations Convention on the Law of the Sea.

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

If you would like to receive future issues of **WATER LOG** free of charge, please send your name and address to: Mississippi-Alabama Sea Grant Legal Program, University of Mississippi Law Center, University, MS 38677, or contact us via e-mail: waterlog@sunset.backbone.olemiss.edu. We welcome suggestions for topics you would like to see covered in **WATER LOG**.

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