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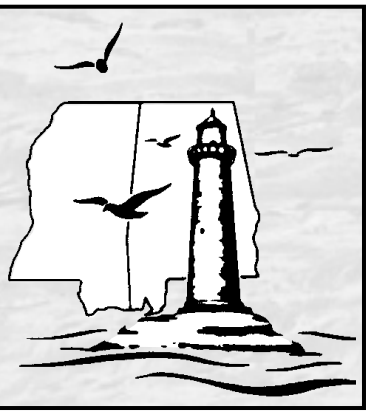
WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



Water for Endangered Silvery Minnow Considered a Beneficial Use

***Rio Grande Silvery Minnow, et al. v. Keys,* 333 F.3d 1109 (10th Cir. 2003).**

Sarah Elizabeth Gardner, J.D.

Defenders of Wildlife and other environmental groups sued the Bureau of Reclamation, Department of the Interior, Fish and Wildlife Service, and Army Corps of Engineers under the Endangered Species Act for water diversions and storage facilities believed to jeopardize the endangered Rio Grande silvery minnow (minnow). The Tenth Circuit Court of Appeals held that the Bureau of Reclamation (Bureau) has the discretion to reduce contract deliveries and restrict diversions to meet Endangered Species Act (ESA) duties.[1]

Background Litigation

Listed as endangered by the Fish and Wildlife Service (FWS) in 1994, the recovery of the silvery minnow has been hampered by a lack of water. As with many of the

See Silvery Minnow, page 6

Review of TMDLs Rests in District Court

***Friends of the Earth v. EPA*, 333 F.3d 184 (D.C. Cir. 2003).**

Kristen M. Fletcher, J.D., LL.M.

In the latest procedural decision regarding Total Maximum Daily Loads under the Clean Water Act, the Circuit Court for the District of Columbia rejected a petition to review limits set for the Anacostia River in Washington, DC. The environmental group Friends of the Earth requested the Circuit Court review the total maximum daily loads (TMDLs) for dissolved oxygen and turbidity for the river. Finding TMDLs to be outside the court of appeals' Clean Water Act (CWA) review jurisdiction, the court transferred the case to the district court.

See TMDL, page 8

In This Issue . . .

What You're Missing in Issue 2:1 of THE SANDBAR

- Docks Relocated in Michigan Isle Royale National Park
- $37 Million Awarded to Fishing Vessel Owner for a Temporary Taking
- Maine Agency Has Authority to Permit the Construction of Docks
- Ancient Forests Submerged in Lake Belong to State of Washington
- New Import Regulations for Patagonian Toothfish
- Highlights of the 55th Annual Meeting of International Whaling Commission


The SANDBAR
Vessel Owner Awarded Over $37 Million for Temporary Taking
NOAA Fisheries Strengthens Patagonian Toothfish Regulations

Articles and Subscription information available at: http://www.olemiss.edu/orgs/SGLC/reporter.html .

Agreements Reached in Regional Water Disputes

This summer, the parties of two regional water disputes reached agreements on allocation of water, a resource becoming more and more scarce in the U.S. and internationally. Environmental groups that planned to sue to restore water to protected fish species in the **Klamath Basin** have reached a settlement with the federal government. The U.S. Bureau of Reclamation agreed to include the Fish and Wildlife Service and the National Marine Fisheries Service in evaluations on the impacts of the 53-year-old Rogue Basin Project on endangered suckers and threatened coho salmon. The move represents at least a temporary abatement in the legal battles over sharing water between fish and farms in the Klamath River Basin, where there is not enough water to go around.

Locally, the governors of Alabama, Florida, and Georgia signed an MOU concerning allocation of the waters of the **Apalachicola-Chattahoochee-Flint (ACF)** river system among the three states. The MOU expresses the states' agreement to some terms of an allocation formula, including: an allowance for Georgia to increase withdrawals from the federal reservoir Lake Lanier, which supplies water to the Atlanta area, from 409 million gallons per day (mgd) to 705 mgd; a requirement that Georgia return as wastewater fifty-eight percent of the amount it withdraws from the Chattahoochee; and minimum stream flows to protect human and environmental interests in all three states.

Sea Grant

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

To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 262 Kinard Hall, Wing E, P. O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: **waterlog@olemiss.edu** . We welcome suggestions for topics you would like to see covered in WATER LOG.

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For information about the Legal Program's research, ocean and coastal law, and issues of WATER LOG, visit our homepage at
http://www.olemiss.edu/orgs/SGLC

News from the Program . . .

Legal Program Welcomes Research Counsel Josh Clemons

In June, Josh Clemons joined the Mississippi-Alabama Sea Grant Legal Program as Research Counsel. He is researching and writing on ocean, coastal, natural resource, and environmental law issues; providing assistance to government agencies in interpreting statutes, regulations, and case law; assisting in the publication of the *Water Log Legal Reporter*; and supervising law student research and writing projects. Since his arrival at Sea Grant, Josh has provided legal research to Sea Grant constituents, written and edited articles for *Water Log*, and attended a "Show and Tell" for the North Mississippi Watershed Forum in Columbus, Mississippi. He is currently researching the water quantity conflicts between Alabama, Georgia, and Florida and writing a book review for the ECOLOGICAL ECONOMICS JOURNAL.

Josh received his B.S. in geology from Florida State University in 1998 and his M.S. in hydrology from the University of Arizona in 2000. He earned his J.D. from Lewis & Clark Law School in Portland, Oregon, in 2003, with a Certificate in Environmental and Natural Resource Law. While in law school Josh clerked in the Bonneville Power Administration Office of General Counsel in Portland, where he gained experience in environmental and natural resource law. He is excited about putting his interest and experience in water law and environmental law to work for the Sea Grant Legal Program. You can reach Josh at jeclemon@olemiss.edu .

Dear Water Log Readers,

After working at the Sea Grant Legal Program and *Water Log* for six years, I will resign as Director of the Legal Program and Sea Grant Law Center this September. Writing for and serving as editor of *Water Log* has been one of the most rewarding parts of working with the Program but it cannot surpass the enjoyment of working with colleagues such as you in Sea Grant and the greater ocean and coastal community.

It is a bittersweet departure as I relocate to Rhode Island this fall to work in ocean law and outreach with Roger Williams University Law School, the University of Rhode Island School of Marine Affairs, and Rhode Island Sea Grant. I look forward to following the work of Staff Attorneys Josh Clemons and Stephanie Showalter and the incoming Director as the Legal Program and Law Center continue to grow and provide ocean and coastal research and outreach.

It has been an honor to work with and for you.

Sincerely,

Kristen M. Fletcher

Court Upholds Stricter Arsenic Rule

***State of Nebraska, et al. v. Environmental Protection Agency,* 331 F.3d 995 (D.C. Cir. 2003).**

Leah Huffstatler, 2L

The United States Court of Appeals for the District of Columbia recently upheld the Environmental Protection Agency's (EPA) new rule setting the maximum contaminant level for arsenic in public water systems. Challenging both the arsenic rule and the Safe Drinking Water Act, under which the rule was promulgated, the State of Nebraska claimed constitutional violations of the Commerce Clause and the Tenth Amendment, but the court determined no such violations were present and that the rule could stand.

Background

The Safe Drinking Water Act (Act) directs the EPA to promulgate national primary drinking water guidelines. These guidelines include enforceable standards, or maximum contaminant levels, which limit the amount of certain contaminants — including arsenic — allowed in public drinking water systems. Released into public water systems both naturally and by human activities, arsenic has been linked to various health problems including cancer of the skin, liver, and lungs and neurological and cardiovascular disorders.

Prior to the new rule, the EPA's maximum contaminant level for arsenic was .05 mg/L, set in 1975 and based on a public health standard originally issued in 1942. Authorized by Congress in 1996 through amendments to the Act that set the standard at a level that "maximizes health risk reduction benefits at a cost that is justified by the benefits,"[1] the EPA initiated a rulemaking proceeding that resulted in a new regulation reducing the maximum contaminant level to .01 mg/L that was finalized in 2001. The rule will not be effective until 2006 and will apply to all public water systems in the nation. "Public water system" is defined as "a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals."[2]

The arsenic standard should "maximize health risk reduction benefits at a cost that is justified by the benefits . . ."

Challenges to the Safe Drinking Water Act

In March 2001, the State of Nebraska, along with the City of Alliance, Nebraska, challenged the new arsenic standard through an attack on the constitutionality of the Act. Nebraska first claimed that the Act violated the Commerce Clause of the Constitution which authorizes Congress to "regulate Commerce. . .among the several states."[3] The regulation of public drinking water systems, the state contended, is a regulation of the intrastate distribution and sale of water and does not fall within the scope of the Commerce Clause grant of authority.

The second issue raised by the state was whether the Act comports with the Constitution's Tenth Amendment which states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[4] Nebraska argued that under this restriction of federal regulation of the states, imposing the new arsenic rule on the state is a constitutionally impermissible activity.

Court Upholds Standard

The court first considered whether the Safe Water Drinking Act and Congress' regulation of public drinking water systems within Nebraska violated the Commerce Clause. In order to succeed on this claim, the state had to show that the Act would be constitutional under "no set of circumstances."[5] The court upheld the regulation and determined that Nebraska "fall[s] well short" of satisfying its burden.[6] Noting that Congress may use its power under the Commerce Clause to regulate both "persons and things in interstate commerce," the court considered data collected by the EPA which shows public water utilities often engage in the sale and distribution of water across state lines. Because these interstate transactions all qualify as circumstances in

which the Act would be unquestionably valid, the state failed in its first claim.[7]

The second challenge was whether the Act was constitutional under the Tenth Amendment. By first upholding the Act's constitutionality and authority under the Commerce Clause, the court narrowed the second question to whether or not the Act regulated the states in a permissible manner.[8] The court ruled that the Act neither forced the states to pass legislation regarding acceptable arsenic levels nor enforce the federal arsenic standards and, thus, distinguished these activities from the permissible regulation of the states solely in their role as public water system owners.[9] Thus, the Safe Drinking Water Act and the new arsenic rule are constitutionally proper exercises of the federal government's authority under the Commerce Clause and Tenth Amendment.

ENDNOTES

1. Pub. L. No. 104-182, §104(a)(6)(A) (1996).
2. 42 U.S.C. § 300f(4)(A) (1996).
3. U.S. CONST. art. I, §8, cl. 3.
4. U.S. CONST. amend. X.
5. *State of Nebraska, et al. v. Environmental Protection Agency,* 331 F.3d 995, 998 (D.C. Cir. 2003).
6. *Id.*
7. *Id.*
8. *Id.* at 999.
9. *Id.*

Coast Guard Solicits Comments on Ballast Water Management Rulemaking

The Coast Guard's proposed rulemaking would revise subpart D of 33 C.F.R. part 151. The current voluntary ballast water management (BWM) program would become mandatory for all vessels equipped with ballast water tanks entering U.S. waters. The proposed rule would not alter the BWM requirement for vessels entering the Great Lakes and the Hudson River from outside the U.S. Exclusive Economic Zone (EEZ). All vessels operating beyond the EEZ would be required to use one of the following ballast water management practices:

1. Complete ballast water exchange in an area no less than 200 nautical miles from any shore;
2. Retain ballast water onboard the vessel;
3. Use an alternative environmentally sound method of BWM approved by the Coast Guard; or
4. Discharge ballast water to an approved reception facility.

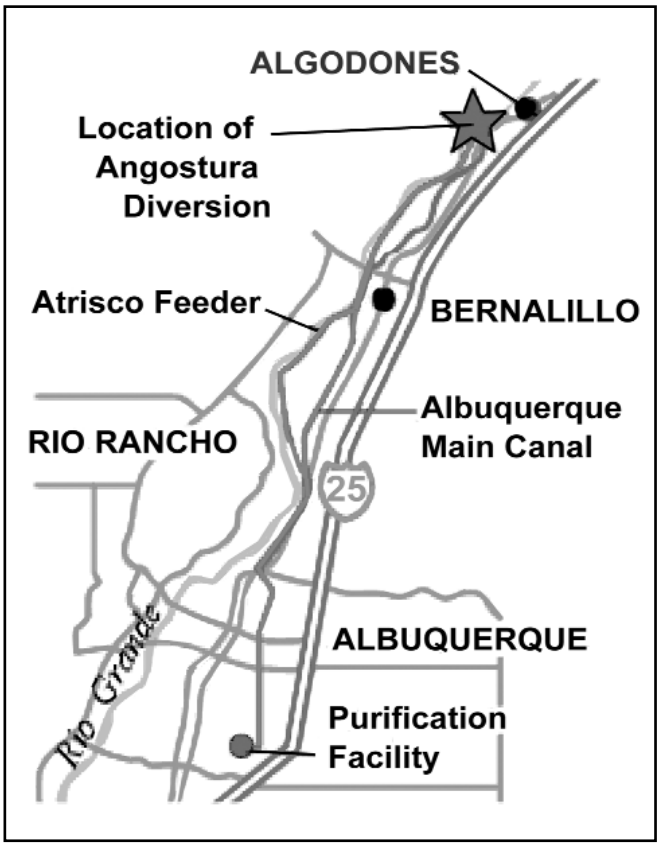
If safety is a concern or a vessel's voyage does not take it into waters 200 nautical miles from shore for a significant period of time, the vessel would be allowed to discharge, except in the Great Lakes or the Hudson River, that amount of ballast water which is operationally necessary. Penalties would be imposed for the failure to use one of the above practices, maintain a BWM plan onboard the vessel, or make the required reports available.

The Coast Guard is also specifically requesting comments on a proposed revision to the criteria for mid-ocean exchanges, which would remove the constraint of exchanging ballast water in waters more than 2000 meters deep. Comments on this proposed rulemaking must be received by the Department of Transportation **on or before October 28, 2003**. Comments can be submitted via mail, fax, or electronically through the web at http://dms.dot.gov. Anyone wishing to submit comments should review the detailed instructions in the notice of proposed rulemaking: Mandatory Ballast Water Management Program for U.S. Waters, 68 Federal Register 44691 (July 30, 2003).

Silvery Minnow, from page 1

Western rivers, the Rio Grande is fully appropriated, with farmers, cities, and species in competition for the valuable resource. The main conflict coalesces around the flow and allocation of the Rio Grande. How much water must be retained in the Rio Grande to protect the silvery minnow? Which sector should be required to "give up" its water to save the minnow? Should existing water contracts yield to new ESA requirements?

In 1999, the Secretary of the Interior designated 163 miles of the main stem of the Rio Grande as critical habitat for the minnow. Litigation immediately ensued and the federal agencies involved have struggled ever since to balance the existing water obligations in the region with the mandates of the ESA. Two major water projects operate in the region. In June 1963, the Secretary of the Interior entered into a contract with the City of Albuquerque to furnish and supplement its water supply for municipal, domestic, and industrial uses. A subsection of the contract provided for the furnishing of water for fish and wildlife benefits. The second project, the Middle Rio Grande Project (Project), was approved and operated for flood control and reclamation purposes in the 1920s - 1940s. The project flopped, but the U.S. agreed to rescue the project in the late 1940s and acquired all the Project's obligations in exchange for all its property rights, water rights, and necessary easements, including an obligation to provide water for fish and wildlife.



Two biological opinions have been prepared relating to the effect of water quantity on the minnow and the Bureau and the Corps have been repeatedly chastised by the court for failing to properly consult with the FWS. The plaintiffs instituted the present lawsuit to challenge the Bureau's activities with regard to both water projects and ensure that the required amount of water is delivered to those portions of the Rio Grande designated as critical habitat for the minnow.

Bureau's Discretion to Allocate Water

The Bureau claimed that the existing water contracts defined its obligations under the ESA, and because the contracts failed to expressly permit a delivery reduction below the fixed amounts, it did not have the authority to reduce payments under its negotiated water contracts. The City of Albuquerque, who intervened in the lawsuit on behalf of the Bureau, claimed that the fixed repayment contracts cannot be made subservient to ESA compliance because they gave the City a "perpetual right" to use the project water. The State of New Mexico, an additional intervener, argued that the delivery of water for fish and wildlife purposes is not a beneficial use and that the loss of water to protect the silvery minnow resulted in irreparable harm to its citizens.

The Tenth Circuit looked to the contractual language to decide whether the contracts reserved discretion for the Bureau to comply with the ESA. Reading the contracts as a whole, the court held that the contracts established a repayment schedule, provided that in years of scarcity non-federal parties would share the available water, and expressly stated that the provision of water for fish and wildlife is a beneficial use of the water resources. The court determined that in the contract, the Bureau retained the discretion to determine the "available water" from which allocations would be made and the allotments that would be altered for "other causes," which could include the prevention of jeopardy to an endangered species.[2] Therefore, the Bureau had the discretion, for the purpose of preventing the extinction of the silvery minnow, to reduce contractual deliveries of available water.

Conclusion

The court ended its opinion by quoting the U.S. Supreme Court in its seminal case *TVA v. Hill* regarding the broad legislation enacted by Congress to pro-

Photo of Angostura Dam provided courtesy of the City of Albuquerque Water Resources Department

tect endangered species which provide "keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask."[3] The court recognized that the minnow "provides a measure of the vitality of the Rio Grande ecosystem, a community that can thrive only when all of its myriad components – living and nonliving – are in balance."[4] The court then affirmed the district court's decision that the Bureau has discretion to reduce deliveries of water under its contracts to comply with the ESA.

ENDNOTES

1. *Rio Grande Silvery Minnow, et al. v. Keys*, 333 F.3d 1109, 1114-1115 (10th Cir. 2003).
2. *Id.* at 1129.
3. *Id*. at 1138 (*citing Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 177 (1978)).
4. *Id*.

Refugium Creates Habitat Conditions for Silvery Minnow

In the fall of 2001, construction began on a "Rio Grande Silvery Minnow Rearing and Breeding Facility" at the Albuquerque Biological Park. New Mexico Governor Bill Richardson joined City of Albuquerque Mayor Martin Chavez on June 27, 2003 for the ribbon cutting on the state-of-the-art refuge for the endangered silvery minnow.

The facility consists of a 50,000 gallon naturalized "refugium" along with a 3,500 square foot building with aquariums where the minnows will be artificially spawned and raised to supplement the refugium population. The refugium reconstructs the habitat thought to best foster minnows, consisting of a donut-shaped outdoor pond varying in depth from about 1 inch to 2 feet with pumps that control the current to mimic the natural flows of the Rio Grande. The bottom surface consists of sand, gravel, and silt. The area surrounding the pond includes boulders and cottonwood boughs which create natural cover and eddies.

The Refugium is funded by the New Mexico Interstate Stream Commission and managed by the City of Albuquerque in cooperation with the US Fish and Wildlife Service, New Mexico Game and Fish, the Interstate Stream Commission, and the Bureau of Reclamation.

Photo courtesy of Albuquerque Biological Park

TMDL, from page 1

Anacostia River's Water Quality

Under the CWA, pollutants discharged by a pollution source are regulated by technology based standards[1] but recognizing that technology-based effluent limitations "could not achieve the Act's objectives alone. . . the CWA also employs a water-quality-based approach to controlling water pollution, requiring states to adopt water quality standards sufficient to 'to protect the public health or welfare.'"[2] If the required effluent limitations are not stringent enough to implement the water quality standards, the CWA requires the state to establish a priority ranking for such waters and to establish the total maximum daily load for pollutants at a level necessary to meet the applicable water quality standards. The TMDL represents the maximum amount of pollutant "loadings" that a waterbody may take in without violating the water quality standards set for it.[3]

In accordance with water quality provisions under the CWA, the Anacostia River in the District of Columbia is classified for the following beneficial uses: primary contact recreation; secondary contact recreation and aesthetic enjoyment; protection and propagation of fish, shellfish, and wildlife; protection of human health related to consumption of fish and shellfish; and navigation.[4] Because it violates several of these standards, the river was identified for TMDL development.

After the TMDLs were assigned, Friends of the Earth claimed that two water quality standards were inadequate: the dissolved oxygen standard and the turbidity standard. Dissolved oxygen is a basic requirement for aquatic life and violations of dissolved oxygen standards can be traced to biochemical oxygen demand (known as BOD), a measure of pollutants that, when they decompose, deplete the oxygen necessary to support aquatic life.[5] "Turbidity" is defined as "an optical property of very small particles that scatter light and reduce clarity in waterbodies"[6] and violations of turbidity standards can be traced to particles of organic and inorganic matter suspended or floating in the water.

After the EPA established the two TMDLs, Friends of the Earth (Friends) petitioned for review by the D.C. Circuit Court. The EPA moved to dismiss the petition, claiming that the Circuit Court did not have jurisdiction over the claim; rather, EPA argued that the suit should be brought in the Federal District Court for the District of Columbia.

Jurisdiction Under the CWA

In order to determine whether the Circuit Court had original jurisdiction over Friends' claim, the court examined the statutory construction of the CWA. Section 1369 of the statute provides for direct review in

Relevant Provisions of the Clean Water Act

§ 1369 - Administrative procedure and judicial review
Review of the [EPA] action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title. . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business . . . " § 1369(b)(1)(E)

§ 1311 - Technology-based effluent limitations
". . . the discharge of any pollutant by any person shall be unlawful." § 1311(a)

§ 1312 - Water Quality related effluent limitations
". . . [limitations] shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality." § 1312(a)

§ 1316 - National Standards of Performance
The EPA shall issue "regulations establishing Federal standards of performance for new sources. . ." § 1316(b)(1)(B)

§ 1345 - Disposal or use of sewage sludge
The EPA shall issue regulations governing the issuance of permits for the disposal of sewage sludge. . ." § 1345(b)

§ 1313 - Water Quality standards and implementation plans
States adopt water quality standards "to protect the public health or welfare, enhance the quality of water. . ." § 1313(c)(2)(A)

a court of appeals (like the D.C. Circuit Court) of an EPA action "in approving or promulgating any effluent limitation or another limitation under section 1311, 1312, 1316, or 1345. . ."[7] Friends claims that although EPA's authority to approve and establish TMDLs is provided under section 1313, which is not included among those to which a court of appeals' jurisdiction attaches, the language of the CWA considers TMDLs as effluent limitations like those under section 1311. The EPA responded that because section 1313 is not included in section 1369's list of sections granting original jurisdiction, the court cannot read section 1313 into it. The court agreed with the EPA, noting that other circuits had found that the specificity of section 1369 precluded finding original jurisdiction in sections other than those listed.

Furthermore, the court distinguished the effluent limitation provisions under section 1311 and 1312 of the CWA which provide for technology-based and water quality based limitations for point sources from the TMDL limitations under section 1313. In fact, the Circuit Court noted that Congress has distinguished the effluent limitations under sections 1311, 1312, and 1313 throughout the CWA, bolstering the EPA's position. Friends attempted to use Supreme Court precedent and legislative history to show original jurisdiction over the TMDLs but the court rejected their rationale finding that their reliance on the precedent was out of context and the legislative history had been adopted five years after the relevant section.

Conclusion

The D.C. Circuit Court concluded with language from a sister circuit noting that "[i]t would be too much to say that we construe this confusing statute with confidence. But construe it we must, consoled by the knowledge that if our interpretation of the intent of Congress is incorrect, Congress can easily correct it."[8]

ENDNOTES

1. 33 U.S.C. § 1311 (2003).
2. 333 F.3d 184, 2003 U.S. App. LEXIS 12720 at *3 (D.C. Cir. 2003), *quoting* 33 U.S.C. § 1313(c)(2)(A) (2003).
3. 33 U.S.C. § 1313(d)(2) (2003).
4. D.C. MUN. REGS. tit. 21, § 1101.1-2 (classes A through E, respectively).
5. 333 F.3d 184, 2003 U.S. App. LEXIS 12720 at *7, *citing Am. Meat Inst. v. EPA*, 526 F.2d 442, 447 (7th Cir. 1975).
6. EPA, NATIONAL WATER QUALITY INVENTORY: 1998 REPORT TO CONGRESS 21 (Aug. 1998).
7. 33 U.S.C. § 1369(b)(1)(E) (2003).
8. 333 F.3d 184, 2003 U.S. App. LEXIS 12720 at *25, *quoting Bethlehem Steel v. EPA*, 538 F.2d 513, 518 (2d Cir. 1976).

Supreme Court Denies Review of TMDL Decision

***Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2573 (U.S. June 16, 2003).**

The U.S. Supreme Court denied a petition for review of the Ninth Circuit Court of Appeal's decision in *Pronsolino v. Nastri*, a case deciding that a waterway polluted only by nonpoint source pollution was covered under the Clean Water Act's Total Maximum Daily Load (TMDL) provisions. The Pronsolinos, timber landowners and ranchers, challenged the EPA's authority to list the Garcia River as an impaired waterway and to adopt a TMDL for the river under the Clean Water Act after the State of California failed to act. The landowners claimed that because the Garcia was impacted solely by pollution from nonpoint sources, such as logging, the EPA did not have the authority to adopt a TMDL.

A number of other organizations joined as parties including the American Forest & Paper Association and the California Forestry Association supporting the landowners and the Association of Metropolitan Sewerage Agencies supporting the EPA's position. Meanwhile, the TMDL schedule for waterbodies including the Garcia River is proceeding and the North Coast TMDLs are scheduled to be issued by the end of 2005.

For more information on the Ninth Circuit decision, *see* Fletcher, *Rivers Polluted by Nonpoint Source Pollution Subject to TMDLs*, 1:1 THE SANDBAR 4 (2002) (available online at www.olemiss.edu/orgs/SGLC/SandBar/1.1tmdl.htm).

Public Benefit Inadequate for Attorney Fees Award

***Legal Envtl. Assistance Found., Inc. v. Alabama Dept. of Envtl. Mgt.,* 2003 WL 21361783 (Ala. Civ. App. June 13, 2003).**

Josh Clemons, M.S., J.D.

The Legal Environmental Assistance Foundation, Inc. (LEAF) sued the Alabama Department of Environmental Management (ADEM) for failing to fulfill rulemaking requirements when issuing implementation procedures for the state's federally-mandated water quality antidegradation policy. LEAF prevailed on the merits, and ADEM ultimately issued substantially unchanged procedures after going through the proper rulemaking process. The trial court decided not to award attorney fees to LEAF, however, because the litigation did not confer an adequate benefit upon the public to justify such an award. In June, the Alabama Court of Civil Appeals affirmed this decision.

The Litigation

The purpose of the Clean Water Act (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[1] through two approaches. The first focuses on sources of pollution and sets permissible pollutant levels based on the degree of cleanup technologically achievable by a source or category of sources. The second focuses on the quality of the water itself and includes the antidegradation policy at issue in this case. The antidegradation policy is intended to maintain minimum standards of water quality while higher quality is pursued.

Section 303(c) of the Act charges the states with developing water quality standards.[2] The Environmental Protection Agency (EPA) has interpreted this section as requiring an antidegradation standard to prevent water quality from falling below existing levels and has incorporated that requirement into its regulations. The regulations require states to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy."[3]

The underlying legal action in this case arose in 1991, when ADEM issued a revised antidegradation policy. ADEM's policy did not include methods or procedures for the policy's implementation, and the agency failed to adopt any. This failure engendered LEAF's first complaint letter to the EPA in 1995. In 1997, the EPA told ADEM that the lack of implementation procedures constituted noncompliance with the CWA and that ADEM must bring its policy into compliance or risk having the EPA promulgate federal regulations to replace the defective state policy. States generally would rather write their own regulations because allowing the federal government to do so necessarily involves some relinquishment of state control. Accordingly, ADEM responded with implementation procedures, which the EPA approved, that allowed the maximum pollution permissible under the federal standards.

When writing and promulgating environmental rules and regulations, such as these procedures, Alabama state agencies are subject to procedural requirements under the Alabama Administrative Procedure Act and the Alabama Environmental Management Act.[4] The core requirement is that the general public be notified of proposed rules and given a chance to comment on them. However, because ADEM did not consider the implementation procedures to be "rules" by the statutory definition, the agency neither published notice of nor heard public comment on the proposed procedures.[5]

LEAF filed a civil action to enforce the notice and comment requirements.[6] After losing at trial and on its first appeal, LEAF prevailed before the Alabama Supreme Court, which held that the implementation procedures were indeed "rules" requiring notice and comment. On remand, the trial court declared the implementation procedures invalid, enjoined their use until they complied with the notice and comment requirements, enjoined ADEM from issuing pollution

discharge permits until valid implementation procedures were in place, and gave LEAF permission to seek attorney fees. Ultimately ADEM issued substantially identical implementation procedures in accordance with the state's rulemaking procedures, including notice and comment.

LEAF filed a motion in the trial court for attorney fees of $111,450 on the ground that the litigation it initiated resulted in a benefit to the general public. The trial court denied the motion without opinion, and LEAF appealed. The Court of Civil Appeals of Alabama affirmed the denial of attorney fees, holding that the benefit to the public, if any, was inadequate to justify an award of attorney fees under the common benefit doctrine.

A court "is not compelled to award an attorney fee under the common-benefit doctrine merely because some benefit might be argued to have accrued to the public."

The Common Benefit Doctrine

The common benefit doctrine is an exception to the so-called "American rule" of attorney fees. Under the American rule, which Alabama follows, parties to a lawsuit are responsible for their own attorney fees unless otherwise authorized by statute, provided in contract, or warranted by equity.[7] LEAF sought attorney fees not under statute or contract, but under the equitable common benefit doctrine. Under the common benefit doctrine, a prevailing plaintiff may, at the court's discretion, be reimbursed by the defendant for litigation costs if the plaintiff's attorney's efforts "render a public service or result in a benefit to the general public in addition to serving the interests of the plaintiff."[8] The underlying theory is that those who share the benefits of the successful litigation but do not share proportionately in its costs are unjustly enriched at the expense of the plaintiff, who has taken the risk of litigating.[9] The common benefit doctrine helps to level the playing field for individual citizens or citizen groups who take on government agencies or large corporations. If attorney fees were not recoverable, moderately-funded plaintiffs could be discouraged from initiating potentially vital public interest litigation.

Arguably LEAF conferred a benefit on the citizens of Alabama by protecting their right to be notified and heard before the state issues administrative rules; however, the court averred that it "is not compelled to award an attorney fee under the common-benefit doctrine merely because some benefit might be argued to have accrued to the public."[10] The court cited Alabama precedent to the effect that litigation must stop an "improper practice" being perpetrated against the public to qualify for the common benefit exception.[11] The court also noted that, in the cases in which fees were awarded under the common benefit doctrine, the defendants acted in bad faith and did not have valid arguments to support their litigation positions.[12] ADEM, on the contrary, could legitimately argue that the implementation procedures were not "rules."[13] Finally, the court opined that ordering ADEM to pay LEAF's attorney fees would decrease agency resources for pollution regulation - a result that would, presumably, harm rather than benefit the public.[14]

Conclusion

Although the citizens of Alabama may have benefitted from LEAF's litigation, LEAF was not entitled to attorney fees under the common benefit doctrine because ADEM did not act in bad faith and was not engaged in an "improper practice" when it issued CWA antidegradation policy implementation procedures without following rulemaking procedures.

ENDNOTES

1. 33 U.S.C. § 1251(a) (2003).
2. *Id.* § 1313(c).
3. 40 C.F.R. § 131.12 (2003).
4. Ala. Code §§ 41-22-1 to -27 (1981) and §§ 22-22A-1 to -16 (1982), respectively.
5. The lengthy definition of "rule" is located in Ala. Code § 41-22-3(9).
6. *Id.* §§ 41-22-4, -5, and -23; §§ 22-22A-8(a) and (b).
7. *LEAF v. ADEM*, 2003 WL 21361783 at *3.
8. *Id.* at *3.
9. *Hall v. Cole*, 412 U.S. 1, 6-7 (1973).
10. *LEAF v. ADEM*, 2003 WL 21361783 at *4.
11. *Id.* at *5.
12. *Id.* at *7.
13. *Id.*
14. *Id.* at *6, *8.

2003

Alabama Legislative Update

Josh Clemons, M.S., J.D.

The following is a summary of coastal, marine, environmental, and water resources related legislation enacted by the Alabama Legislature during the 2003 session.

2003 Alabama Laws 58. **(H.B. 92)**
Approved April 24, 2003. *Effective April 24, 2003.*
Under the Alabama Sunset Law, the existence and functioning of the Alabama Onsite Wastewater Board with certain modifications is continued; the Code of Alabama Sections 34-21A-2 and 34-21A-3 is amended to delete the act of pumping from the definition of the term servicing and specify that members of the board serve four-year terms in office.

2003 Alabama Laws 276. **(H.B. 335)**
Approved June 12, 2003. *Effective June 12, 2003.*
Enacts the Alabama Homeland Security Act of 2003 which specifies that the Director of Homeland Security has the power and duty to engage in the exchange of information with the federal government relating to immigration and efforts to improve the security of the borders, territorial waters, and ports of the U.S.

2003 Alabama Laws 388. **(H.B. 329)**
Approved June 16, 2003. *Effective September 1, 2003.*
Amends Code Section 11-40-10 relating to the police jurisdiction of municipalities, to provide that the police jurisdiction of a municipality which extends to include part of an island adjacent to the boundary of Florida would, upon approval of the council of the municipality, extend to include all of the island including certain adjacent waters.

2003 Alabama Laws 397. **(H.B. 434)**
Approved June 11, 2003. *Effective June 11, 2003.*
Amends Code Sections 22-22A-5 and 22-22A-7 regarding enforcement actions by the Department of Environmental Management, to provide public notice and an opportunity to comment on a proposed administrative order assessing a civil penalty; to provide for hearings before an order is finalized; to provide notice of the issuance of a final order to persons who submitted written comments on the proposed order; to increase the period for appeal of the order to the Environmental Management Commission; to allow parties who submitted written comments on a proposed administrative order assessing a civil penalty to obtain a hearing before the Commission; and, to allow persons who participated as parties in the hearing before the Commission to seek judicial review of the action of the Commission.

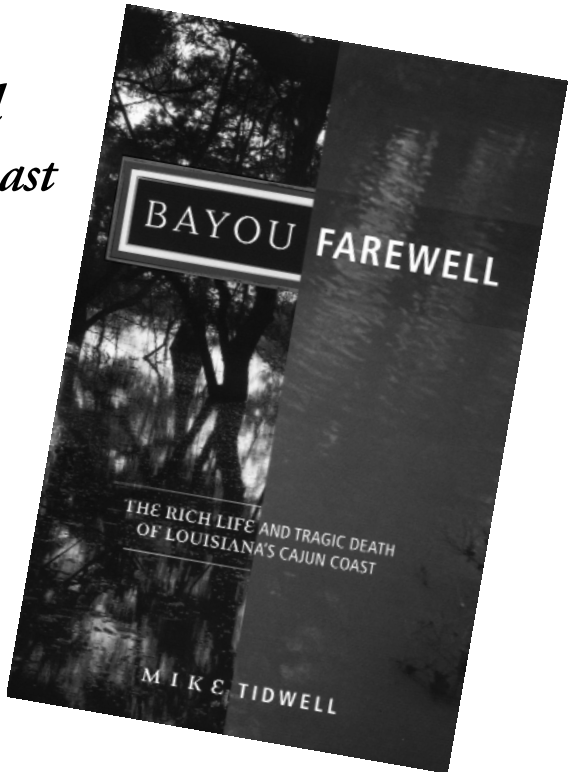
2003 Alabama Laws 398. **(H.B. 115)**
Approved June 16, 2003. *Effective September 1, 2003.*
Defines the legal methods for the disposal of animal by-products produced in commercial establishments (a class that includes fish processing facilities) consistent with methods approved by the appropriate agency; specifies that a violation would constitute grounds for denial, suspension, or revocation of permits; provides that the illegal disposal of animal by-products is a Class B misdemeanor; and, requires the new or increased expenditure of local funds within the meaning of Amendment 621 of the Alabama Constitution.

2003 Alabama Laws 403. **(H.B. 629)**
Approved June 16, 2003. *Effective September 1, 2003.*
Provides for the creation and operation of a revolving loan program to encourage and assist the voluntary remediation and redevelopment of contaminated property in rural and urban areas of the state; adds Chapter 30F to Code Title 22 creating the Alabama Land Recycling Finance Authority, to be administered by the Department of Environmental Management.

BOOK REVIEW

Bayou Farewell: The Rich Life and Tragic Death of Louisiana's Cajun Coast

Mike Tidwell (Pantheon Books, 2003)



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

Louisiana is sinking? Sounds crazy, right? But it is true, as revealed in poignant detail by Mike Tidwell in his book *Bayou Farewell: The Rich Life and Tragic Death of Louisiana's Cajun Coast*. The massive levees built to prevent flooding along the Mississippi River in the early part of the 20th Century have robbed the Louisiana coast of sediments that used to compensate for the settling of the land underneath the state's bayous. While on assignment for *The Washington Post*, Tidwell, an award-winning travel journalist, hitchhiked through the bayous of Louisiana on Cajun fishing boats and discovered that Louisiana was sinking. Approximately fifty acres of wetlands are lost every day. Tidwell returned in April 2000, "to carefully document as much of this world as I could before it departs."

What ensues is the road trip, or more accurately, the boat trip of a lifetime. Tidwell meets Cajun shrimpers and Vietnamese crabbers, goes shrimping in "the battlefield" during May, spends a day shadowing one of the last French-speaking Native American *traiteurs*, a traditional healer, and travels to the offshore oil platforms in the Gulf of Mexico. Rich in history and colorful characters, the account vividly presents the Cajun culture and a dying way of life. Descriptions of the Cajun traditional celebrations, food, homes, and towns abound. Tidwell adds additional flavor to the narrative by writing the dialogue to reflect the unique dialect of the Cajuns, choosing to include the altered grammatical style of Cajun speakers and omit the *th* sound. The word "this" is written as "dis," the Cajun pronunciation. Personal stories reveal details beyond the generic historical, political, and cultural information. A father struggles to come to terms with a son's choice to abandon fishing for a steady on-shore job; a town grieves for fishermen killed during a storm; the new arrivals to the coast, the Vietnamese, have trouble fitting in; and the fifteen thousand members of the Houma Nation, the largest Indian tribe in Louisiana, living in poverty and isolation, maintain and pass on their Indian heritage.

Bayou Farewell, however, is more than a travel log. It is also an account of the environmental devastation wrought by human attempts to harness a mighty river and the canals built to facilitate the delivery of oil and gas from offshore platforms. New Orleans now lies below the level of the Mississippi River, dangerously vulnerable to the next powerful hurricane. In addition, there are over ten thousand miles of canals throughout the Louisiana coast, causing massive erosion and serving as conduits for saltwater to enter freshwater and brackish ecosystems, destroying cypress swamps and driving species, such as oysters and alligators, further inland. But, not all hope is lost. Interwoven with the stories of vanishing land and habitat destruction, Tidwell gives equal time to Louisianians working hard to restore the damage. Through his discussions of plans for a Third Delta Conveyance Channel, a $2 billion construction project which would deliver much-needed sediment from the Mississippi River to the Louisiana coast, and projects to induce sedimentations by building Christmas tree walls in the bayous and planting marsh grass, Tidwell highlights the human capacity to fight and maintain hope against incredible odds. Compassionate and respectful, *Bayou Farewell* is a beautiful eulogy for the Cajun coast. May time prove it was delivered too soon.

Federal Circuit Affirms Dismissal of Tuna Challenge

***Defenders of Wildlife v. Hogarth*, 330 F.3d 1358 (Fed. Cir. 2003).**

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

A recent decision by the Federal Circuit, affirming the Court of International Trade's dismissal of a challenge to a NOAA Fisheries Interim-Final Rule, is the latest development in a three year court battle to protect dolphins in the Eastern Tropical Pacific.[1] In 1999, without preparing an environmental impact statement (EIS), NOAA Fisheries published an Interim-Final Rule implementing the International Dolphin Conservation Program Act (IDCPA). Plaintiffs challenged the Rule's provision relating to the timeframe for commencement of backdown procedures[2] and the lack of an EIS.

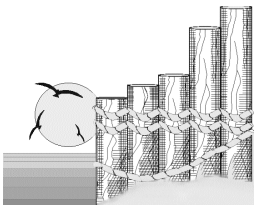
The Interim-Final Rule requires backdown procedures "be completed no later than one-half hour *after* sundown."[3] The IDCPA, however, requires the procedures to commence no later than thirty minutes *before* sundown.[4] The Federal Circuit held that even though the Interim-Final Rule directly conflicts with the IDCPA, NOAA Fisheries is authorized to alter the IDCPA requirements in certain circumstances. Because the International Agreement establishing the International Dolphin Conservation Program requires the procedures be completed no later than one-half hour after sundown, the agency had the authority to alter the IDCPA to comply with the International Agreement.

NOAA Fisheries did not prepare an EIS because the agency's Environmental Assessment resulted in a finding of no significant impact.[5] The plaintiffs claimed the environmental assessment was defective and that the agency's decision not to prepare an EIS was arbitrary and capricious. Both the Court of International Trade and the Federal Circuit disagreed and held that the agency adequately evaluated the dolphin mortality problem, the impacts of the Interim-Final Rule, and several alternatives on the dolphins and the environment. NOAA Fisheries, therefore, complied with the National Environmental Policy Act and did not act in an arbitrary or capricious manner in adopting its rule.

ENDNOTES

1. For a detailed analysis of the decision of the Court of International Trade, *see* Takamatsu, *International Court Dismisses Latest Tuna Challenge*, 21: 4 WATER LOG 11 (2001).
2. A "backdown" procedure is the process undertaken by a vessel at the conclusion of a "set" of a purse seine net on a school of tuna, in which the majority of the net is hauled back on board and the boat is put into reverse. This eases the tension in the net and lowers it below the water line, allowing any trapped dolphins to escape.
3. 50 C.F.R. § 216.24(c)(6)(iii) (2003) (emphasis added).
4. 16 U.S.C. § 1413 (2003).
5. An agency need not prepare an EIS, if it has made a FONSI (finding of no significant impact) determination and stated the reasons why the proposed action is insignificant. 40 C.F.R. § 1501.4 (2003).

Lagniappe *(a little something extra)*



Around the Gulf . . .

In late July, Mississippi named the **Mississippi Department of Environmental Quality** as the agency in charge of preparing a management plan to slow the spread of invasive species in area waters, marking Mississippi's first step towards catching up with the other Gulf states of Florida, Louisiana, and Texas in combating invasive species. The preparation of a state management plan is a prerequisite to obtaining federal dollars under the proposed Invasive Aquatic Species Act of 2003 which, if passed, will make up to $170 million available to fight the invaders including $30 million for state grants.

Federal District Court Judge U.W. Clemon recently approved a plan between the federal government, Solutia Inc., and Pharmacia Corp. that allows the parties to move forward with cleanup efforts in removing **PCB contamination in Anniston**, AL. Approximately 3,500 residents intervened to block the proposed federal settlement, alleging the EPA and Solutia had colluded against them. The residents also preferred the state courts oversee the cleanup. Judge Clemon in his ruling stated that the possibility of collusion had not yet escaped the court's decision and appointed a legal expert to monitor the progress of the investigation and cleanup.

Just two weeks after being indicted for illegally boarding a ship in Miami, **Greenpeace** once again finds itself in trouble with the law. An arrest warrant has been issued for a Greenpeace representative on August 4 after the environmental group and its attorney failed to appear in court on an indictment charging the illegal boarding of a cargo ship last year believed to be carrying illegal mahogany from Brazil. The group could face penalties of up to a $20,000 fine and probation.

This August, Federal officials announced the establishment of three new **manatee protection areas** in Florida. Watercraft will have to operate at reduced speeds along portions of the Caloosahatchee, Halifax, and St. Johns rivers within the new refuges. The fact that these three waterways are considered high danger areas for boating deaths and injuries to manatees has advocate groups, such as Save the Manatee, criticizing the new regulations as too weak.

Around the World . . .

The international controversy surrounding the capturing and transporting of more than two dozen dolphins from the Solomon Islands to the **Mexican aquatic park**, Parque Nizuc, heated up this summer. Animal activists warned that the dolphins would not survive the trip that took them halfway around the world. After Mexico was asked by the Australian government to block the dolphins' flight into Cancun, Mexican officials refused, claiming the park had met all requirements for importation and therefore they had no reason to deny their entrance into the country. Inspections revealed small holding tanks and several ill dolphins. Environmentalists also claimed that 30 dolphins were actually loaded onto the plane and that two were seen being pulled from the sea dead, shortly after arriving in Cancun.

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Upcoming Conferences

22nd Annual International Submerged Lands Management Conference

http://www.ffsl.utah.gov/slmc03/program.htm

September 22-26, 2003, Park City, Utah

Southern States Environmental Conference & Exhibition

http://www.fisheries.org/apa_symposium/homepage.htm

September 23-25, 2003, Biloxi, MS

International Sustainable Marine Fish Culture Conference and Workshop

http://www.hboi.edu/aqua/conference.html

October 9-10, 2003, Ft. Pierce, FL

Assessment and Management of New and Developed Fisheries in Data-Limited Situations

http://www.uaf.edu/seagrant/Conferences/dls-call.html

October 22-25, 2003, Anchorage, Alaska

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