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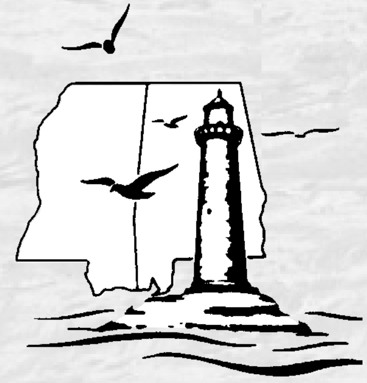
WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



Water-Sharing Compact Dissolves

States Fail to Agree Before August 31 Deadline

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

The states of Alabama, Florida, and Georgia, which had compacted to develop an allocation formula for the waters of the Apalachicola-Chattahoochee-Flint (ACF) river basin, failed to arrive at a mutually acceptable allocation formula by the August 31, 2003 deadline. The missed deadline terminated the compact. The states' likely next step is litigation before the U.S. Supreme Court for an equitable allocation of the disputed waters.

Background

States generally have almost total sovereign control over waters entirely within their borders. When a water resource is shared with other states, however, the situation can get tricky. Battles over interstate water have long been common in the dry West, and are likely to grow increasingly familiar to Easterners as populations grow. The biggest fights will probably involve the biggest and fastest-growing cities – cities like Atlanta, which gets much of its drinking water from the Chattahoochee River.

The ACF basin serves a variety of human and non-human needs in Alabama, Florida, and Georgia. The Chattahoochee River, impounded behind Buford Dam in Lake Lanier, provides much of Atlanta's municipal and industrial water supply. A series of dams and reservoirs downstream on the Chattahoochee enables navigation, flood control, and hydropower generation, and supplies municipal water for other communities. The Flint River provides irrigation water for southwest Georgia farmers. The Apalachicola River provides the fresh water needed by Apalachicola Bay oysters, which support a $70 million industry.

Georgia officials in the early 1970s knew that Atlanta would need more water if it were to grow at the rate they predicted. Responding to their concern, in 1972 Congress authorized the U.S. Army Corps of Engineers (Corps) to study alternatives to supply that water. In 1988 the Corps made its recommendation: reallocate storage water in Lake Lanier from hydropower to water supply. The Corps formally reported this recommendation in 1989, and the tri-state "water wars" began. Alabama, afraid that the recommended action would raise hydropower costs, harm water quality, and prevent further economic development, sued the Corps in 1990 for favoring Georgia and for failure to comply with the National Environmental Policy Act. Florida intervened to protect the Apalachicola Bay oyster industry, and Georgia intervened to protect its sovereign power over water with-

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Sixth Circuit Interprets *SWANCC*

U.S. v. John A. Rapanos, 339 F. 3d 447 (6th Cir. 2003).

Luke Miller, 2L

In August, the Sixth Circuit further defined what "waters" fall under the control and purview of the Clean Water Act (CWA). Wetlands previously had been determined to be under the CWA's dominion if adjacent to actual navigable water. The court extended this prior rule to wetlands that have a hydrological connection to drainage, such as a ditch or man-made drain, resulting in possible effects on navigable-in-fact waters.

SWANCC Background

The decision out of the Sixth Circuit was based on further application of a seminal Supreme Court holding coming from *Solid Waste Agency of Northern Cook County v. United States*, or *SWANCC*.[1] The Solid Waste Agency was a consortium of suburban Chicago municipalities looking for land to utilize for non-hazardous solid waste disposal. What this consortium found was an old abandoned gravel pit isolated and overgrown with vegetation, along with several ponds that had formed out of previous trenches. To develop the site the consortium would have to drain several of the ponds, which might be subject to regulation or permit. Upon contacting several agencies, one of which was the Army Corps of Engineers (Corps), the consortium received approval to begin its project. However, soon thereafter the Illinois Nature Preserves Commission informed the Corps that migratory bird species had been seen on the land. According to the Corps this finding brought the land under CWA jurisdiction, through the application of the Migratory Bird Rule.[2] Using the Migratory Bird Rule the Corps denied SWANCC's permit to proceed draining the ponds. After the declaration of jurisdiction and denial by the Corps, SWANCC filed suit challenging the authority the Corps had used in interpreting the CWA as covering non-navigable, isolated, intrastate waters based on the presence of migratory birds. SWANCC also claimed that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction; this claim was circumvented by the Supreme Court's determination that the claim would raise unnecessary constitutional questions.

The Supreme Court's analysis set forth the language in the CWA regulations that led to the confusion of jurisdictional interpretation. Under § 404(a) of the CWA, the Corps can regulate the discharge of fill materials into "navigable waters," and these waters have been identified as "waters of the United States, including the territorial seas."[3] The Corps interpreted this definition as allowing jurisdiction over the ponds of the gravel pit in accordance with the application of the Migratory Bird Rule. Previous rulings by the Supreme Court have given some effect to this broad reach of CWA jurisdiction, and have noted Congress intimated some intent to allow regulation over waters that would not be deemed navigable under the classic understanding of that term.[4] The Supreme Court stressed that this determination was based on the understanding that Congress acquiesced to and approved of the Corps' interpretation of the CWA covering wetlands adjacent to navigable waters, and found there was a "significant nexus" between wetlands and navigable water, which allowed CWA jurisdiction over those adjacent wetlands.[5]

The Corps in *SWANCC* was trying to utilize reasoning similar to what the Supreme Court had alluded to in an earlier opinion, in order to allow Corps jurisdiction over isolated, non-traditional bodies of water. In 1977 the Corps formally adopted regulations that expanded its jurisdiction to "isolated wetlands and lakes, intermittent streams… and other waters that are not part of a tributary system to interstate waters or navigable waters of the

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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.

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Regulation Not A "Taking" of Tank Vessels

Maritrans, Inc. v. U.S., 342 F.3d 1344 (Fed. Cir. 2003).

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

Maritrans, Inc., sued the U.S. government, alleging that the Oil Pollution Act of 1990 was a compensable Fifth Amendment taking of thirty-seven of its single-hulled tank vessels. The Court of Federal Claims held that, for the eight vessels for which the claim was ripe for adjudication, there was neither a categorical nor regulatory taking. The U.S. Court of Appeals for the Federal Circuit affirmed the lower court's holding on the takings issue.

Background

In 1990, spurred into action by the disastrous *Exxon Valdez* oil spill in Alaska, Congress passed the Oil Pollution Act (Act). Section 4115 of the Act requires vessels that carry oil or oil residue as cargo on waters under U.S. jurisdiction to be constructed with double hulls.[1] Double-hulled tankers present a lower risk of oil spills than single-hulled because the second, inner hull acts as reinforcement to minimize the effects of punctures or other damage to the outer hull. The Act applied not only to newly constructed vessels but also to existing single-hulled vessels, which had to be retrofitted to the new standard or else retired according to a phased retirement schedule beginning in 1995.[2]

Maritrans, Inc., is a marine petroleum transport company with a fleet of tank vessels in which it transports oil for oil companies and distributors on U.S. waters. Most of Maritrans' vessels failed to meet the double hull standard, and without retrofitting would have been illegal to operate as oil transports on U.S. waters after their statutory retirement date. Eight of these vessels were the subjects of the takings analysis in this case (the question whether the remaining vessels were taken was found not to be ripe for judicial review). Of the eight, two had been retrofitted to double hull standards for $14 million apiece, five had been sold for prices ranging from $2.2 to $3.4 million apiece, and one had been lost in a 1996 collision for which Maritrans collected insurance proceeds.

Maritrans' Takings Claim

Maritrans alleged that the government took its property by enacting the double hull requirement which, accord-

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Court Upholds Process Service Aboard Cruise Ship

Andras Pota, et al., v. Kenneth Holtz, M.D., 852 So. 2d 379 (Fla. 3rd DCA 2003).

Leah Huffstatler, 2L

After a cruise ship physician's attorney accepted process service on his client's behalf aboard a ship docked in the Port of Miami and later contended the process was insufficient to confer personal jurisdiction, a Florida appeals court held that the service was proper and the ship was subject to the law governing the port where it was docked.

Facts

Hungarian residents Andras and Marianne Pota were passengers on a Royal Caribbean cruise from Miami when Marianne, who was twenty-six weeks pregnant, began complaining of stomach cramps. She consulted the ship's physician, Dr. Kenneth Holtz, and was diagnosed with a bladder infection and prescribed an antibiotic. A few hours after seeing Holtz, Marianne began bleeding and having contractions. She was examined by Holtz, who determined that her cervix was closed. After Royal Caribbean denied the Potas' request to be airlifted to the nearest hospital, Holtz reassured the couple that everything would be fine and that Marianne would be able to go to a medical facility in Cozumel after the ship docked there. The next morning, Marianne went into labor and the ship docked in Cozumel during the birthing process. She was transported by ambulance to a clinic where she gave birth to a son who died within hours.

The Disputed Process Service

The Potas then filed suit against Royal Caribbean and Holtz for wrongful death, medical malpractice, personal injury, and negligent and intentional infliction of emotional distress. After unsuccessfully attempting to serve Holtz several times, an arrangement was agreed upon whereby Royal Caribbean's counsel – who was also serv-

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USFS Must Consider Potential Wild & Scenic Rivers

Ctr. for Biological Diversity v. Veneman, 335 F. 3d 849 (9th Cir. 2003).

Joseph M. Long, 3L

The Center for Biological Diversity brought suit against the United States Forest Service (USFS) for violations of the Administrative Procedure Act, claiming that the USFS did not adhere to the Wild and Scenic Rivers Act (WSRA) requirement to consider designated river segments and streams within Arizona for protection under the Wild and Scenic Rivers System (WSRS). The District Court for Arizona dismissed the case based on a lack of subject matter jurisdiction. The Center for Biological Diversity appealed that decision to the Ninth Circuit Court of Appeals, which ruled in the Center's favor.

Background

In 1993, the Arizona legislature requested that the USFS prepare a report identifying any river segment or stream that meets the statutory requirements of the WSRA for inclusion in the WSRS. The USFS reported that fifty-seven river segments and streams within Arizona were potential additions and included in its report information in support of that conclusion. The Ninth Circuit stated that "the 1993 Report thus provided all of the necessary information to determine which Arizona stream or river segments met the WSRA's criteria for designation."[1] The suit is based on the Center's claim that, since the completion of the 1993 Report, the USFS violated a mandatory statutory requirement directing the agency to consider the designated potential additions for WSRS inclusion when planning for development or use of federal land.

The Wild and Scenic Rivers Act

The WSRA was enacted in 1968 in response to the massive expansion of electrical capacity within the United States following the passage of the Federal Power Act of 1920, which elevated electrical facility development throughout the country to a position of higher importance than almost everything else, including environmental concerns. The WSRA counters the Power Act by recognizing the importance of natural river habitats and requiring federal agencies to preserve and protect river segments and streams that could otherwise be developed under the Power Act.[2]

A river segment or stream is eligible for WSRA protection if it flows freely and possesses an "outstandingly remarkable value" (ORV).[3] An ORV can be based upon scenic, recreational, geological, fish and wildlife, historic, cultural, or other similar qualities.[4] If a river meets these two requirements, § 1276 of the WSRA imposes upon federal agencies the duty to consider eligible river segments and streams "in all planning for use and development of water and related land resources" and to submit those rivers to Congress for its consideration and discussion.[5] Congress may then act to include the river segment or stream in the WSRS, or governors may apply for inclusion if acting on behalf of their own legislature.[6]

The WSRA does not, however, contain a cause of action provision for parties wishing to challenge agency action under the WSRA. Therefore, such challenges must be brought under the Administrative Procedure Act (APA).

The Administrative Procedure Act

Under the APA, a court may review a government agency's decision only if that decision is either a "final agency action" or when an agency action is "unlawfully withheld or unreasonably delayed."[7] To be a final agency action the action must evidence a "consummation" of the agency's decision-making process where rights and obligations have been determined or from which legal consequences will flow.[8] Determining whether an agency action has been unreasonably delayed or unlawfully withheld involves a two-part test.

First, there must be a statutory provision requiring an agency to take action. For example, under the WSRA, a government agency is statutorily required to consider all river segments and streams designated as free flowing and possessing at least one ORV in all land use planning and development. This is a clear statutory provision requiring agency action.

Second, under the unreasonably delayed or unlawfully withheld action test, a challenging party must show that the agency has genuinely failed to pursue the statutory mandate. This failure may be shown through evidence that the agency did not go beyond merely acknowledging the legislation by its action.

Relief for the plaintiff depends upon the extent to which the USFS can be shown to have failed to consider the "adverse planning decision" on the eligible resource.[9] This duty to consider is limited only to requiring the

The court states that the "consideration requirement is neither a statement of policy, nor a generalized instruction to the federal agencies that may be overlooked."[12] This consideration requirement holds the agency responsible for studying, considering and discussing an action that may affect the designated segments and streams before it takes that action. The court found that the USFS was aware of the legislative mandate to consider the segments and streams and that being aware only, without action, does not satisfy the legislative requirements under § 706(1) of the APA. "An intention to consider the river cannot satisfy a requirement that the agency *actually have considered* the rivers."[13]

infracting agency to study and discuss the full effect of its decision upon the affected area.[10]

The Court's Reasoning

The court first dismissed the Center's claim that the 1993 Report itself was a final agency action that can be reviewed under the APA. The court reasoned that the report was only an initial step in the full designation process into the WSRS and concluded that inventory of a region is not an act that "marks the consummation" of the decision-making process, signaling that the agency action was, indeed, final.

As an alternative, the Center argued that the USFS is statutorily required to consider the eligible rivers in its planning and, by not doing so, unlawfully withheld or unreasonably delayed the performance of this mandatory responsibility. The court concluded that the list of fifty-seven eligible river segments and streams was an inventory that could potentially be included in the WSRS because the intended purpose of the 1993 Report and its criteria for inclusion in the study "conform to the dictates of the WSRA."[11]

Once the 1993 Report was found to be an inventory under the WSRA, the court found that § 1276(d)(1) does impose upon the USFS a mandatory duty, not to act, but to consider the eligible segments and streams in its land planning activities within that area. Further, although there may not exist a statutory duty, upon inventory, to protect the eligible segments and streams, there does exist a mandate in the legislative language to consider them during land planning and development.

Conclusion

The court concluded that considering the fifty-seven eligible rivers in the 1993 Report while planning land use or development on federal land was a mandatory duty for the USFS under § 1276(d)(1) of the WSRA. By not fulfilling this requirement, the USFS subjected itself to review under the APA because the USFS unlawfully withheld a mandatory responsibility. The decision of the district court was reversed and remanded. In more general terms, the court concluded that any report commissioned by or for a government agency that meets the criteria for inclusion in the WSRS must be considered if planning for use or development of federal lands.

ENDNOTES

1. *Ctr. for Biological Diversity v. Veneman*, 225 F.3d 849, 852 (9th Cir. 2003).
2. 16 U.S.C. §§ 1271-1287 (2003).
3. 16 U.S.C. § 1273(b) (2003).
4. The ORV list is found at 16 U.S.C. § 1271 (2003).
5. 16 U.S.C. § 1276(d)(1) (2003).
6. 16 U.S.C. § 1273(a) (2003).
7. 5 U.S.C. § 706(1)-(2) (2003).
8. *Alaska Dep't of Envtl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001).
9. *Ctr. for Biological Diversity* at 856.
10. *Id.*
11. *Id.* at 855.
12. *Id.* at 856.
13. *Id.* at 857.

Endangered Species Trump Navigation

American Rivers v. U.S. Army Corps of Engineers, 271 F. Supp. 2d 230 (D.D.C. 2003).

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

American Rivers and other national and local environmental groups sued to enjoin the U.S. Army Corps of Engineers from operating the Missouri River dam and reservoir system inconsistently with a 2000 U.S. Fish and Wildlife Service Biological Opinion that mandated low summer flows to prevent jeopardy to three species listed under the Endangered Species Act. The U.S. District Court for the District of Columbia ruled for the environmental groups and ordered the injunction. After additional legal wrangling, the Corps complied.

Background

Man and animal alike depend on the bounty of the mighty Missouri River. Humans use the river for a variety of purposes including commercial navigation, hydropower generation, recreation, and water supply. The least tern and Great Plains piping plover, respectively endangered and threatened under the Endangered Species Act (ESA), nest on the sandbars that are exposed during low summertime flows. The endangered pallid sturgeon lives most of its life in the river, relying as a juvenile on shallow, slow-flowing water during the summer and fall.

The U.S. Army Corps of Engineers (Corps), under the authority of the Flood Control Act (FCA) and other statutes, operates six dams and reservoirs on the Missouri River to provide or enhance flood control, navigation, irrigation, water supply and quality, hydropower, recreation, fish, and wildlife. Because the Corps' operation of the river system is a federal action that could adversely affect the tern, plover, and sturgeon, § 7 of the ESA[1] requires the Corps to consult with the U.S. Fish and Wildlife Service (FWS) to ensure that it does not jeopardize the continued existence of those listed species. In 2000 the FWS issued a § 7 Biological Opinion (BO) on the Corps' operation of the system. The 2000 BO said that system operation was likely to jeopardize the tern, plover, and sturgeon unless the Corps implemented several measures, including operating the system for low summer flows to protect the species and their habitat. The 2000 BO gave the Corps until 2003 to implement the low summer flows. However, the Corps' 2003 Annual Operating Plan did not provide for low summer flows; rather, it featured two alternative high-flow regimes to protect downstream navigation. Plaintiffs then sued the Corps in January 2003 for failure to comply with the 2000 BO.

After the suit was filed, the Corps consulted further with FWS. In April 2003 FWS produced a supplemental BO that said, in direct contradiction to the 2000 BO, that the birds and fish could survive the summer of 2003 without low flow. FWS based this assertion on new information about tern and plover fledge ratios and habitat restoration, and its assumption that the Corps' future river management would comply with the 2000 BO. In May the plaintiffs moved to enjoin the Corps from implementing the 2003 operating plan until the merits of the case filed in January could be decided.

The Corps' Conflicting Obligations

A month later, in other litigation between Nebraska and the Corps over the operating plan, the Eighth Circuit Court of Appeals upheld a Nebraska District Court injunction ordering the Corps to operate the system according to its Master Manual in *South Dakota v. Ubbelohde*.[2] The court held that the Corps was bound by the Master Manual, which it had properly promulgated under the FCA for the purpose of guiding reservoir operations, and which prioritizes navigation above fish and wildlife. The annual operating plan is required by the Master Manual; thus, operating according to the Master Manual means operating according to the annual operating plan - which called for high flows for navigation. The Eighth Circuit case did not mention the ESA.

In *American Rivers v. U.S. Army Corps of Engineers*,[3] the Corps cited *Ubbelohde* in support of its argument to the D.C. District Court that it did not have discretion to operate the river system in accordance with the ESA because it was bound by the FCA and the Master Manual, which gives higher priority to navigation than to fish and wildlife.

The D.C. District Court's Analysis

Before deciding whether to order the injunction, the court faced the threshold question of whether the Corps had the statutory discretion to operate the system for low

summer flows. The court began by noting that "[u]nder the ESA, government agencies are obligated to protect endangered and threatened species to the extent that their governing statutes provide them the discretion to do so."[4] The court interpreted this standard as requiring an agency to comply with the ESA if it has "*any* statutory discretion over the action in question."[5] Because the FCA authorizes the Corps to allocate storage water in the Missouri River reservoirs for various purposes, the court held that the Corps had sufficient discretion to manage the river in accordance with the ESA. This reasoning was buttressed by the U.S. Supreme Court's language in the seminal snail darter case, wherein the Court concluded that the ESA reflected Congress' intent that endangered species protection should have "priority over the 'primary missions' of federal agencies."[6] The Corps argued that, in light of *Ubbelohde*, it was bound by the Master Manual. The court did not disagree; rather, it told the Corps that "the Master Manual itself affords the Corps discretion in management of the Missouri River."[7]

Having determined that the Corps had discretion to manage the river for low summer flows, the court employed a conservative, four-part test to determine whether to order the injunction sought by American Rivers. By this traditional test the plaintiff must demonstrate "(1) a substantial likelihood of success on the merits, (2) that [plaintiff] would suffer irreparable injury if the injunction is not granted, (3) that any injunction would not substantially injure other interested parties, and (4) that the public interest would be served by the injunction."[8] The plaintiffs successfully carried this burden. The court found that they were likely to succeed on the merits of their claim that the Corps and FWS violated the ESA for several reasons: first, the 2003 supplemental BO based "no jeopardy" on a condition (the Corps complying with the 2000 BO in future years) not adequately likely to occur; second, it improperly segmented ESA consultation by considering the effects of high flows on listed species for only one year but not for future years; third, FWS did not adequately explain why it departed so radically from the 2000 BO; and fourth, the Corps violated ESA § 7 by not ensuring that listed species would not be harmed, and violated § 9 because the 2003 operating plan made a take of terns and plovers imminent. The court also found that the long-term effects of the imminent takes would be irreparable injury, that the damage barge companies and others would suffer from low flows were outweighed by the threat to listed species posed by high flows, and that the public interest favored operation of the river system according to the 2000 BO. It therefore ordered the injunction.

The Aftermath

The Corps, however, failed to reduce flows, maintaining that it was bound by *Ubbelohde*. The court found the Corps in contempt of court and ordered it to comply or pay a fine of $500,000 for each day of non-compliance.[9] This order was quickly stayed by another federal judge, and the various Missouri River cases were consolidated and transferred to the U.S. District Court for the District of Minnesota. On August 5, the Corps announced that it would reduce flows to comply with the injunction.

Conclusion

In *American Rivers* the D.C. District Court enjoined the Corps from operating the Missouri River dam and reservoir system in a way that favored navigation over ESA-listed species protection. This case illustrates the tension the ESA can create when the general obligation of all federal agencies to protect listed species conflicts with an agency's specific statutory functions, as well as the ongoing vitality of the *TVA v. Hill* reasoning that Congress intended endangered species to have priority over other agency considerations.

ENDNOTES

1. 16 U.S.C. § 1536 (2003).
2. 330 F.3d 1014 (8th Cir. 2003).
3. 271 F. Supp.2d 230 (D.D.C. 2003).
4. *Id.* at 251.
5. *Id.* (emphasis added).
6. *Id.* at 252 (quoting *TVA v. Hill*, 437 U.S. 153, 185 (1978)).
7. *Id* at 253.
8. *Id.* at 248.
9. *American Rivers v. U.S. Army Corps of Engineers*, 274 F. Supp.2d 62 (D.D.C. 2003).

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ing to Maritrans, prematurely and completely terminated the tank vessels' useful economic lives as of their retirement dates. Maritrans argued that the vessels would have no economically viable use after the retirement dates because they could no longer carry oil, and that the vessels had negligible scrap value. Maritrans urged the court to find a categorical taking, which is a taking of all the property's economic value. Alternatively, Maritrans alleged a regulatory taking, which may leave some economic value. (These two types of takings are sometimes called "total" and "partial" takings, respectively.) The remedy for a taking is compensation.

The Court's Takings Analysis

The Fifth Amendment of the U.S. Constitution forbids the federal government to take "private property…for public use, without just compensation." The threshold question in any takings analysis is whether there is a legally cognizable property interest at stake. Maritrans characterized the property interest as its single-hulled vessels' "expected useful lives and associated revenue streams."[3] The court, noting that Maritrans had the right to possess, sell, transport, and/or retrofit the vessels, agreed that Maritrans' interest was one subject to Fifth Amendment protection.

Having established that Maritrans had a valid property right for Fifth Amendment purposes, the court turned to the question of whether the government's 1990 statutory requirement worked a taking of that interest. Maritrans had argued a categorical taking, which required it to show that it "was called upon to sacrifice all economically beneficial uses of its single hull tank barges."[4] Because it had been able to retrofit two vessels, sell five, and collect insurance on one, Maritrans could hardly argue that the vessels had no economic value after the Act. Instead, it asked the court to consider the vessels' pre-retirement and post-retirement lifetimes separately. After their statutory retirement dates, the vessels would have no economic value; thus, Maritrans argued, there was a categorical taking of the value they would have had after those dates if there were no double hull requirement. The court rejected this argument. The proper analysis, it said, is of the course of the regulatory action as a whole, not as a collection of discrete, individually protected periods. In this case there was no categorical taking.

Maritrans' back-up argument was for a regulatory taking, which does not require the loss of all economic value. The standard analysis for a regulatory taking was announced by the Supreme Court in *Penn Cent. Transp. Co. v. New York City*: the court should consider (1) the character of the government action at issue, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation has interfered with reasonable, distinct, investment-backed expectations.[5] Here, the government was seeking to protect the environment from oil spills by regulating the precise vessels that cause them, with the cost being borne by the entities that profit from marine oil transportation. The court reasoned that this government action did not place the type of "wholly disproportionate" burden on Maritrans that gives rise to a taking, but was more akin to the "adjusting [of] the benefits and burdens of economic life to promote the common good" that requires no compensation.[6]

For the second *Penn Central* factor the court compared the relative values of Maritrans' vessels before and after the regulation. The trial court had found a loss of 13.1 percent, despite the plaintiff's claim for a total loss. By the court of appeals' judgment, the fact that Maritrans could recover much of the value of its property weighed against its takings claim.

Maritrans fared better on the third factor, for which it had to show that it acquired its property interest in reliance on a state of affairs that did not include the double hull requirement. Evidence included the fact that the Coast Guard had rejected a similar requirement in 1982. The court said that this factor was in Maritrans' favor, but, on balance with the other factors, there was no regulatory taking.

Conclusion

Congress enacted an environmental protection statute that required Maritrans to retrofit its single-hulled oil transport vessels to a new standard or retire them. Although this regulation imposed an economic burden on Maritrans, the court concluded that it did not rise to the level of a compensable taking because Maritrans' property retained substantial economic value and the statute was a fair exercise of the government's power to legislate for the public good.

ENDNOTES

1. 46 U.S.C. § 3703a (2003).
2. *Id.*
3. *Maritrans, Inc. v. U.S.*, 342 F.3d 1344, 1352 (Fed. Cir. 2003).
4. *Id.* at 1354.
5. 438 U.S. 104, 124 (1978).
6. *Maritrans* at 1356-57 (quoting *U.S. v. Locke*, 471 U.S. 84, 107 n. 15 (1985), and *Penn Cent.*, 438 U.S. at 124).

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ing as Holtz's counsel at the time – would facilitate service on Holtz. The process server met Royal Caribbean's attorney in Miami at the gangway to the ship on which Holtz was currently working. In the meantime, Holtz had retained his own counsel, Mr. Hamilton, and had arranged for Hamilton to be present at the gangway meeting. Hamilton informed the process server that he was authorized to accept service on Holtz's behalf, but would only do so aboard the ship. He was then served in that manner and it was noted on the summons that Holtz did not waive objections to service of process, sufficiency of service or personal jurisdiction.

Afterwards, the Potas – concerned the service would later be challenged – requested a ruling from the trial court on the adequacy of the service. The court held that the service was proper and no challenge would be entertained, but vacated its ruling a month later pending a ruling on Holtz's motion to dismiss for lack of personal jurisdiction.

Before ruling on this motion, the trial court admonished Hamilton for acting in bad faith by previously assuring the court that there would be no problem with service. However, the court granted the motion to dismiss based on the notion that Holtz had been personally served, but that personal jurisdiction was not effectuated because the Potas had not fulfilled Florida's long-arm statute (which provides for jurisdiction over a non-resident defendant who has had contacts with the state).

Appeals Court Ruling

The Florida Third District Court of Appeals reversed the trial court's order to dismiss. The court first noted that the case the trial court based its order on is controlling only in circumstances of substituted rather than personal service.[1] Thus, since Holtz authorized Hamilton to accept personal service and the attorney acknowledged that he had been personally served, this was sufficient to confer personal jurisdiction. Accordingly, the issue of failure to comply with the state's long-arm statute requirements was rendered moot.

Holtz went on to argue, however, that since service occurred aboard a ship registered in Liberia, Liberian process requirements must be followed. The court easily dismissed this position by citing federal case law, which states that vessels subject themselves to the law that governs the ports they visit.[2] The court just as easily rejected Holtz's argument that he was not served within Florida's jurisdiction because service occurred aboard a foreign-flagged vessel. The court clarified Holtz's position by saying that he "would have us impart the sovereignty of a foreign embassy to a foreign vessel docked in Miami."[3] Refusing to do this, the court again turned to state law and held that a ship docked in Miami is within the state of Florida, not Liberia.[4]

Conclusion

Personal service is properly effectuated when it is expressly accepted by an authorized third party, and a vessel on which service is processed is within the jurisdiction of Florida law when it is docked at a local port. Thus, Holtz's personal service through his attorney was proper and the Miami-docked ship on which the process service occurred was within the jurisdiction of Florida law.

ENDNOTES

1. *Andras Pota, et al., v. Kenneth Holtz, M.D.,* 852 So. 2d 379, 381 (Fla. 3rd DCA 2003).
2. *Id.*
3. *Id.*
4. *Id.* at 382.

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United States…"[6] Congress was aware of this expansion and a House bill surfaced with language to limit this expansion, which failed to pass. The Corps argued this failed attempt demonstrates Congress' acquiescence to and acceptance of this new definition of "navigable waters." The Supreme Court dismissed this assertion, reasoning that a bill can be proposed for any number of reasons and likely dismissed for any number as well. Therefore, the Corps did not provide enough evidence to indicate to the Court the bill in question was proposed in response to CWA expanded jurisdiction, or that the bill's denial would be indicative of acquiescence by Congress.

Rapanos Extending *SWANCC* Interpretation

In a case of similar circumstances the Sixth Circuit was called upon to determine the reach of CWA jurisdiction when a body of water is not directly adjacent to navigable water. Mr. Rapanos owned 175 acres of land, forty-nine to fifty-nine acres of which were considered wetlands that he was interested in selling off for development. To make the land more attractive he made plans to clear the trees and eradicate the wetlands. After contacting the Department of Natural Resources, Rapanos was informed that he would have to receive a permit to proceed with his plans of filling and destroying wetlands. Ignoring the permit requirements, Rapanos began destroying the wetlands. The EPA became aware of Rapanos' actions and made attempts to bring him into compliance with the CWA; however, Rapanos lied about his actions and the EPA filed charges for knowingly discharging pollutants into the waters of the United States. Rapanos did not deny that wetlands had been destroyed on his property; instead, he focused on arguing for a lack of federal jurisdiction, claiming the CWA did not apply to the land in question. Rapanos was convicted and his conviction affirmed by the Appeals Court. Rapanos appealed to the Supreme Court and was granted certiorari.

Supreme Court Decision

Rapanos' strongest support for his contention came from the remand by the Supreme Court ordering a review of his original conviction under the *SWANCC* decision. The District Court, citing the new *SWANCC* rule, overturned the conviction. The United States appealed, bringing the proceedings to the present decision. One of the key arguments Rapanos relied on through *SWANCC* was the frequent reference by the Supreme Court to wetlands directly adjacent to navigable water. The Appeals Court found reliance upon that phrase somewhat limiting and not conclusive to mean that only wetlands directly adjacent to navigable water will be under CWA jurisdiction, especially in light of similar decisions by the Supreme Court indicating a much broader scope to the CWA.[7]

In a case with facts similar to those in *Rapanos*, the Fourth Circuit interpreted *SWANCC* as suggesting the CWA is based on Congress' power over navigable waters; thus any non-navigable waters have to have some connection to navigable-in-fact waters.[8] This interpretation is based on the Supreme Court's use of the "significant nexus" language given in *SWANCC*. Applying the nexus test to the facts of this case the Sixth Circuit found that the land in question was connected to the Labozinski Drain, which flows into Hoppler Creek, which flows into the Kawkawlin River, which is a navigable body of water. These several connections formed an appropriate nexus between the wetland and the navigable water, thus falling under the CWA's purview.

Conclusion

The decision by the Sixth Circuit rested on the court's understanding that the CWA was created to protect and keep pollutants out of the waters of the United States. Policing only the navigable-in-fact waters clearly would not suffice, due to the necessity of controlling pollution at other point sources upstream in non-navigable waters. This type of upstream control would be required for the success of the CWA. Congress expressed this sentiment when it created the CWA and noted that a common sense approach in application should be followed.[9]

ENDNOTES

1. *Solid Waste Agency of N. Cook County v. U.S.*, 531 U.S. 159 (2001).
2. The Corps issued the Migratory Bird Rule in an attempt to "clarify" the reach of its jurisdiction through the CWA. It stated in part that § 404(a) of the CWA extends jurisdiction to intrastate waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." 33 C.F.R. § 328.3(a)(3) (1999).
3. 33 U.S.C. §§ 1344(a), 1362(7) (2002).
4. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).
5. The "significant nexus" language used by the Supreme Court described what it saw as wetlands inseparably bound up with waters of the United States. *SWANCC*, 531 U.S. at 167.
6. 33 C.F.R. § 323.2(a)(5) (1978).
7. *See Riverside Bayview*, 474 U.S. at 121.
8. *U.S. v. Deaton*, 332 F.3d 698, 709 (4th Cir. 2003).
9. S. Rep. No. 92-414, at 77 (1972).

Water-Sharing, from page 1

in its borders. The litigation was stayed, however, when the states agreed to attempt a settlement.

The ACF Compact

The settlement negotiations resulted in the Apalachicola-Chattahoochee-Flint River Basin Compact.[1] Signed into federal law in November 1997, the compact was in essence an agreement to agree on an allocation formula for the basin's water. The compact created the ACF Basin Commission, comprised of the states' governors and one non-voting federal member, with the primary purpose of developing an allocation formula.

Unfortunately, the ACF compact featured a structural flaw that effectively ensured its demise. The compact required unanimous agreement by the states on an allocation formula, but provided no way to break an impasse. By its terms the compact would terminate on December 31, 1998, if the states failed to reach agreement and did not extend the deadline. The deadline was extended several times as the states proposed various draft allocation formulas, and in July 2003 the states agreed to several key principles to be embodied in a final allocation formula.

Despite that encouraging development, however, the states could not come to agreement. Florida refused to accept the possibility that receiving "minimum flows" might become the norm rather than the exception. Georgia took offense at Florida's suggestions that it limit irrigated farm acreage and control reservoir levels. There seemed to be no point in further discussion. After more than six years of compact negotiations, and thirteen years after the lawsuit that started it all, the compact terminated on August 31, 2003.

The Next Step: Equitable Apportionment by the Supreme Court

The compact has expired, but the problem of sharing the ACF waters remains. There are three ways interstate water resources are allocated among the states that share them. The first is by interstate compact. The compact mechanism offers states great flexibility in developing solutions to interstate problems, but as the ACF case shows, it can be difficult for states to agree on compromises.

The second method of allocating interstate water among states is apportionment by Congress, under its constitutional authority to regulate interstate commerce.[2] For political reasons, Congress rarely exercises this option. That leaves the ACF states with only the third method to resolve their dispute: equitable apportionment by the U.S. Supreme Court.

The Supreme Court has original jurisdiction over conflicts between states,[3] which it exercises only if the dispute is so serious that it would lead to war if the states were sovereign nations. Interstate water conflicts easily satisfy that requirement, and the Court has presided over several such cases. The seminal case is *Kansas v. Colorado*,[4] in which the two named states tussled over the flow of the Arkansas River. *Kansas v. Colorado* established several important principles. First, the internal water rights doctrines (riparianism, prior appropriation, or hybrid) of the disputing states do not control the rights of the states as to each other. Second, in the absence of federal statute, the law to be applied is federal common law, which consists of "Federal law, state law, and international law, as the exigencies of the particular case may demand."[5] Third, the guiding principle is "equality of right" among the states, and the goal is a balance of benefits among them. These principles, bearing the gloss of nearly a century's worth of subsequent decisions, still guide the Court today.

The Court will consider "all…relevant facts" when deciding on an equitable apportionment.[6] In the past, relevant factors have included physical conditions, existing economic uses, the states' internal water rights doctrines, and existing or potential conservation efforts. The ACF states can lay claim to a variety of important economic uses including drinking water for Atlanta and other cities in Alabama and Georgia, vital fresh water for Florida's Apalachicola Bay, commercial navigation, agricultural irrigation, and hydropower generation.

Conclusion

Having failed to reach agreement among themselves on the allocation of the waters of the ACF, Alabama, Florida and Georgia are likely to entrust this monumental task to the nine impartial justices of the U.S. Supreme Court. The Court will attempt to apportion the water in a way that is fair to all – which probably means that no state will get all that it wants, but each state will get at least some of what it wants. Because the Court will consider "all relevant facts," the states will be able to present a wide range of evidence supporting their claims to the ACF. The ultimate decision depends on how thoroughly and convincingly they make their cases.

ENDNOTES

1. Pub. L. No. 105-104, 111 Stat. 2219 (1997).
2. U.S. CONST. art. I, § 8, cl. 3.
3. U.S. CONST. art. III, § 2, cl. 2.
4. 206 U.S. 46 (1907).
5. *Id.* at 96-97.
6. *Colorado v. New Mexico*, 459 U.S. 176, 184 (1982).

2003 Mississippi 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 Mississippi Legislature during the 2003 session. Sections referred to are Mississippi Code of 1972 unless otherwise noted.

2003 Mississippi Laws 304. **(H.B. 651)**
Approved February 19, 2003. *Effective July 1, 2005 (except § 27, which is effective February 19, 2003).*
Repeals and replaces certain sections of Mississippi Administrative Procedures Law, which provides a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public.

2003 Mississippi Laws 350. **(S.B. 2492)**
Approved March 12, 2003. *Effective upon passage.*
Creates § 51-4-23.3 to designate a portion of Chunky Creek in Newton County, and the Chunky River in Newton, Lauderdale and Clarke Counties, as State Scenic Streams and to include them in the State Scenic Streams Stewardship Program.

2003 Mississippi Laws 356. **(S.B. 2568)**
Approved March 12, 2003. *Effective upon passage.*
Amends § 69-27-9 to conform membership of the State Soil and Water Conservation Commission to new congressional districts on a phased-in basis.

2003 Mississippi Laws 358. **(S.B. 2593)**
Approved March 13, 2003. *Effective June 30, 2003.*
Reenacts §§ 51-3-101 through 51-3-105, which create and empower the Mississippi Water Resources Advisory Council, and amends § 51-3-106 to extend repealer until July 1, 2007.

2003 Mississippi Laws 379. **(H.B. 937)**
Approved March 13, 2003. *Effective upon passage.*
Amends § 49-15-64.1 to change marine water boundary description to conform to new channel marker numbers established by the U.S. Coast Guard.

2003 Mississippi Laws 380. **(H.B. 938)**
Approved March 13, 2003. *Effective July 1, 2003.*
Amends § 49-15-63 to allow the Commission on Marine Resources to suspend the license of persons convicted of a marine violation and to suspend the license of vessels used in the violation.

2003 Mississippi Laws 389. **(H.B. 1171)**
Approved March 14, 2003. *Effective July 1, 2003.*
Amends § 49-15-29 to authorize the Commission on Marine Resources to establish a program to provide for the purchase of licenses, permits, registrations, and reservations issued by the Commission or the Department of Marine Resources.

2003 Mississippi Laws 398. **(S.B. 2666)**
Approved March 14, 2003. *Effective upon passage.*
Amends § 57-15-5 to provide that: the Marine Resources Council may contract with other governmental agencies and third parties for the acquisition and management of lands and properties for inclusion in the "Coastal Preserve System"; for purposes of those contracts and the expenditure of funds pursuant to the contracts, the "Coastal Preserve System" shall be deemed to be a part of the ecosystems of the Public Trust Tidelands; contracts authorized under § 57-15-5 may provide funds for the management of properties included in the "Coastal Preserve System."

2003 Mississippi Laws 401. **(S.B. 2793)**
Approved March 14, 2003. *Effective July 1, 2003.*
Amends § 69-25-1 to define noxious weeds as those plants declared by the Bureau of Plant Industry to be a public nuisance; amends §§ 69-25-7, 69-25-9, 69-25-15, 69-25-17, 69-25-19, 69-25-21, 69-25-23, 69-25-25 and 69-25-27 to allow noxious weeds to be regulated as pests; and amends § 69-25-47 to increase the penalties for violations of the Mississippi Plant Law.

2003 Mississippi Laws 402. **(S.B. 2802)**
Approved March 14, 2003. *Effective upon passage.*
Amends § 49-7-81 to revise the use of commercial fishing gear in streams and to revise penalties for untagged commercial fishing gear.

2003 Mississippi Laws 403. **(S.B. 2805)**
Approved March 14, 2003. *Effective July 1, 2003.*
Creates § 49-15-92 to provide penalties for the theft of crab traps, and repeals § 97-17-58, which establishes penalties for theft of crab pots.

2003 Mississippi Laws 404. **(S.B. 2825)**
Approved March 14, 2003. *Effective upon passage.*
Amends § 49-5-77 to authorize the Commission on Wildlife, Fisheries and Parks to obtain land for recreational purposes.

2003 Mississippi Laws 409. **(H.B. 637)**
Approved March 17, 2003. *Effective July 1, 2003.*
Amends § 97-37-25 to outlaw planting or placing any chemical, biological, or other weapon of mass destruction on any ship, vessel, boat, or gas or oil station or pipeline.

2003 Mississippi Laws 426. **(H.B. 880)**
Approved March 18, 2003. *Effective July 1, 2003.*
Amends § 49-15-313 to require captains of any water vessels to show proof of participation in a Department of Transportation-approved random drug testing program and proof of liability insurance as a charter boat captain as an additional requirement to obtain a charter license.

2003 Mississippi Laws 440. **(H.B. 1084)**
Approved March 18, 2003. *Effective upon passage.*
Provides immunity from liability to certain persons seeking to remediate property on sites that are on the U.S. Environmental Protection Agency's National Priorities List ("Superfund" sites), or that are proposed or eligible to be on the list.

2003 Mississippi Laws 453. **(H.B. 701)**
Approved March 23, 2003. *Effective January 1, 2003.*
Provides an income tax credit for donations of land that are priority conservation sites under the Mississippi Natural Heritage Program, or that are along streams nominated to the Mississippi Scenic Streams Stewardship Program.

2003 Mississippi Laws 480. **(H.B. 684)**
Approved March 28, 2003. *Effective July 1, 2003.*
Conforms the Organic Certification Law to the National Organic Program, and authorizes the Department of Agriculture and Commerce to develop an organic certification program for organic fish and seafood.

2003 Mississippi Laws 482. **(H.B. 81)**
Approved March 28, 2003. *Effective July 1, 2003.*
Amends § 51-1-4 to provide that any lake hydrologically connected to a natural flowing stream and listed as a public

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waterway under subsection (1) of § 51-1-4 on July 1, 2000, and subsequently removed from that list before July 1, 2001, by the Commission on Environmental Quality because the lake did not meet the requirements of subsection (1), is presumed to be a public waterway until a court of competent jurisdiction determines otherwise.

2003 Mississippi Laws 501. **(S.B. 2886)**
Approved April 10, 2003. *Effective upon passage.*
Authorizes bond issuance to fund capital improvements at the state-owned shipyard in Jackson County.

2003 Mississippi Laws 503. **(H.B. 1592)**
Approved April 15, 2003. *Effective upon passage.*
Authorizes bond issuance to provide matching funds for federal funds for the Water Pollution Control Revolving Fund; increases the amount of bonds that may be issued for the Local Governments and Rural Water Systems Improvements Revolving Loan Fund.

2003 Mississippi Laws 505. **(H.B. 1596)**
Approved April 15, 2003. *Effective upon passage.*
Authorizes bond issuance to provide funds for the Mississippi Land, Water and Timber Resources fund.

2003 Mississippi Laws 512. **(S.B. 2270)**
Approved April 19, 2003. *Effective July 1, 2003.*
Authorizes the creation of public water authorities, provides for their management, identifies their powers, and establishes the procedures by which they may issue bonds.

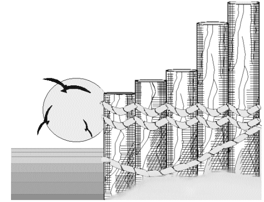
2003 Mississippi Laws 525. **(H.B. 845)**
Approved April 20, 2003. *Effective upon passage.*
Reenacts §§ 41-67-1 through 41-67-29, the Mississippi On-Site Wastewater Disposal System Law; amends reenacted § 41-67-4 to provide that if a developer requests a determination of feasibility of a community sewerage system, the Commission on Environmental Quality must make the determination within forty-five days or all sites within the subdivision are deemed approved; amends reenacted § 41-67-6 to provide that if a person requests approval of an individual on-site wastewater disposal system, the Department of Health must approve or disapprove the request within fifteen days or the request is deemed approved; amends § 41-67-31 to extend the repealer on the Mississippi Individual On-Site Wastewater Disposal System Law to July 1, 2005; and directs the On-Site Wastewater Disposal System Advisory Committee to study and recommend revisions to the Individual On-Site Wastewater Disposal System Law.

2003 Mississippi Laws 527. **(H.B. 861)**
Approved April 20, 2003. *Effective July 1, 2003.*
Establishes the Mississippi Coordinating Council for Remote Sensing and Geographic Information Systems; makes the Mississippi Department of Environmental Quality, Office of Geology and Energy Resources responsible for program management, procurement, development and maintenance of the Mississippi Digital Earth Model, a digital land base computer model of the State of Mississippi.

2003 Mississippi Laws 953. **(S.B. 2973)**
Approved April 19, 2003. *Effective upon passage.*
Authorizes the City of Vicksburg to widen the Yazoo Diversion Canal, and grants associated powers.

2003 Mississippi Laws 959. **(S.B. 3009)**
Approved April 21, 2003. *Effective upon passage.*
Authorizes the City of Meridian to contract for sale of treated effluent water from the city's wastewater treatment facilities.

Lagniappe *(a little something extra)*



Around the Gulf . . .

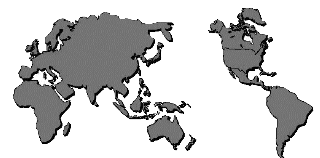
2003 has been a banner year for the Mississippi Department of Marine Resources' Derelict Vessel Removal Program. As of September 23 the program had **removed a record thirty-three derelict vessels** from coastal wetlands and associated navigable canals. The average removal rate over the preceding four years was twenty vessels per year. Abandoned vessels may be removed if they pose a hazard to navigation, public safety, or the environment. With the assistance of the Mississippi Gulf Fishing Banks, some derelict vessels pass on to a highly productive afterlife as artificial fishing reefs. Learn more about the Derelict Vessel Removal Program at http://www.dmr.state.ms.us/DMR/Derelict%20Vessels/derelict.htm.

Mississippi's Yazoo River Basin is the home of a half-mile project demonstrating **improved river bank stabilization and restoration techniques**. The U.S. Army Corps of Engineers and Trout Headwaters, Inc., are working together to identify ways to stabilize and restore streams with riverbank vegetation - "biostabilization" - instead of "hard armor" like rocks, concrete and riprap. Riparian areas, which help support eighty percent of fish and wildlife species, cannot maintain crucial vegetative cover when hard armor is used. Biodiversity and water quality suffer, and the lack of roots to hold soil in place increases erosion. The Yazoo River, with its history of stream channelization, has seen its share of these problems. The Corps plans to use the innovative methods in Mississippi and nationwide if biostabilization proves successful in the demonstration area.

University of Florida researchers are experimenting with **new technology for manatee protection**. The researchers have found that manatees at Homosassa Springs respond to recordings of manatee vocalizations with enthusiastic vocalizations of their own. When the live manatees respond, their locations can be pinpointed using computers and underwater microphones. The researchers hope to develop a system to alert boaters to the manatees' presence by way of blinking lights or radio signals. A record ninety-five manatees were killed in boat encounters in Florida last year.

Did you know that the design of your dock may determine whether the submerged land beneath it is a lushly vegetated fish paradise or merely a barren strip of mud? It's true. A dock's width, height, orientation, and total footprint, and the spacing between its boards and pilings, can affect the growth of submerged aquatic vegetation below. Healthy vegetation means more fish and other marine life. The National Marine Fisheries Service and the U.S. Army Corps of Engineers have developed guidelines to assist landowners in designing **ecologically friendly docks and piers**. Although originally developed for use in Florida, the guidelines can be adapted to other areas. The Dock and Pier Guidelines are published by the NMFS Southeast Regional Office and may be downloaded at http://caldera.sero.nmfs.gov/habitat/pnc/dockguid/dockhome.htm.

Around the World...



For the first time anywhere, **tidal power** is being fed into a commercial power grid. A windmill-like turbine bolted to the bed of the Kvalsund channel near Hammerfest, Norway, should produce about 700,000 kilowatt hours per year - enough for about thirty households. The prototype plant cost about $11 million. Although the price is high right now, proponents hope to show that renewable, dependable tidal power is a viable energy source.

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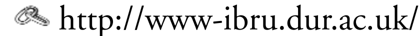
Upcoming Conferences

DECEMBER, 2003

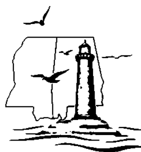
Preparing for Boundary Litigation/Arbitration
http://www-ibru.dur.ac.uk/
December 1-3, 2003, Paris, France



Deep Sea 2003
http://www.deepsea.govt.nz/
December 1-4, 2003, Queenstown, New Zealand

JANUARY, 2004

Water for a Sustainable and Secure Future
http://www.ncseonline.org/NCSEconference/2004conference/page.cfm?fid=3064
January 29-30, 2004, Washington, DC



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