Volume 19, Number 1, 1999

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Alabama Determines Landowner Rights

Wehby v. Turpin,
710 So.2d 1243 (Ala. 1998).

Brad Rath, 2L

In February 1998, the Alabama Supreme Court decided an issue of first impression by limiting the rights of riparian landowners. It heard the appeal of landowners who owned land on a man-made lake and who assumed they could use the entire lake for recreation. The Court determined that because the lake was artificial and non-navigable, the landowners only held rights to the surface-waters.

The land in dispute was a piece of property bordering Chelsea Place Lake located southeast of Birmingham. The story of the property begins with Clarence Hatcher who, in 1979, sold part of the property to a church when the adjoining lake bed was dry. The church repaired a dam, restoring the man-made lake, and flooded parts of Hatcher's property. Hatcher acquired a license to use the entire lake for recreational purposes but, in 1985, when the Wehbys purchased Hatcher's property, they failed to secure such a license. In fact, their title insurance policy stated "riparian rights are neither guaranteed nor insured." As riparian landowners, the Wehbys anticipated using the lake and claimed the right to use it ran with the property.

In June 1991, SouthTrust Bank acquired the neighboring church property and sought a court ruling that Hatcher had no right, title, or interest in the property or the lake. Eventually, the property was transferred to the Turpins, the defendants.

Meanwhile, the Wehbys attempted to sell their property in 1995, but confusion over the lake rights prevented the sale. As a

see Landowner, pg. 13

In This Issue . . .

NMFS, Council Agree Gulf is Essential Habitat

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

In February, the National Marine Fisheries Service (NMFS) partially approved the Essential Fish Habitat Amendment drafted by the Gulf of Mexico Fisheries Management Council. Its approval marks the beginning of a new phase in the Essential Fish Habitat (EFH) process, a federally mandated procedure to increase attention to and reduce the threats to marine habitat because "one of the greatest long-term threats to the viability of commercial and recreational fisheries is the continuing loss of marine, estuarine, and other aquatic habitats."[1]

Essential Fish Habitat was added to fishery management vocabulary in 1996 when Congress passed the Sustainable Fisheries Act, amending the Magnuson-Stevens Fishery Conservation and Management Act to mandate improved habitat protection for federally managed fish species. The amendments, contained in the 1996 Sustainable Fisheries Act,[2] were not the first statutory recognition of

see Habitat, pg. 8

Disputed Submerged Lands in Alabama Belong to State

West Dauphin Limited Partnership v. Callon Offshore Production, 725 So.2d 944 (Ala. 1998).

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

The Alabama Supreme Court recently ruled[1] that a tract of submerged land off the coast of Dauphin Island belongs to the state rather than to a succession of private landowners who have paid taxes on the land since 1954. The state high court ruled that tax payments and other acts between the state and the private claimants did not constitute a conveyance of the state lands. In its opinion, the court also highlighted the uniqueness of the state's public trust lands and emphasized the policy of strictly limiting the conveyance of such lands to circumstances where the citizens of the state would realize significant benefits in return.

The dispute over the ownership of the submerged lands arose in 1994 after Callon Offshore Production ("Callon") began drilling operations on offshore tracts leased from the state of Alabama. Pursuant to the lease arrangements, royalties on the oil and gas obtained from the production sites were due and payable to the state. However, West Dauphin Limited Partnership ("West Dauphin") also claimed the right to the royalties, pursuant to their claim of ownership of the submerged lands.

Faced with the prospect of multiple claimants, Callon filed a complaint for a declaratory judgment in Montgomery Circuit Court regarding the legal ownership of the lease tracts. The company also established an interest-bearing escrow account with the court to hold royalty payments pending a final determination on the matter. The state and Callon filed cross-claims stating their ownership claims and Callon moved to have the court enter a summary judgment in favor of the state. The trial court did so and West Dauphin appealed. Upon review, the Alabama Supreme Court revisited the arguments of West Dauphin and the state regarding their respective claims of ownership.

West Dauphin's Claims

The West Dauphin group claimed ownership to the submerged lands at issue based on a series of events dating back over sixty years. In 1932, the state promulgated Act No. 147, a statute designed to "enable a private corporation to construct a bridge from the mainland of Mobile County to Dauphin Island."[2] The Act (later codified at Alabama Code Section 33-7-53) set out conditions which would allow for the conveyance of state submerged lands to private parties making improve-

see Submerged Lands, pg. 4

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, Lamar Law Center, University, MS, 38677, 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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Editor's Note: The Federal Legislative Update reported in Issue 18:4 inadvertently omitted the following Act passed in the 1998 legislative session.

Coast Guard Authorization Act of 1998
15 Pub. L. 383

Title III: Extends the definition of navigable waters for the purposes of the Ports and Waterways Safety Act (33 U.S.C. § 1222) to meet the territorial sea definition in Presidential Proclamation No. 5928, December 27, 1988.

Title IV: Clarifies liability of persons engaging in oil spill prevention and response activities

Title VI: Creates the Harmful Algal Bloom and Hypoxia Research and Control Act of 1998 which establishes a task force to assess harmful algal blooms and hypoxia by 5/30/99 and submit a plan for reducing, mitigating, and controlling hypoxia in the Gulf of Mexico by 3/30/00.

We Are Listening . . .

A sincere thanks to those who responded to the 1999 Reader Survey included in issue 18:4. As a result of the responses, we have a clearer picture of the coastal issues that face our subscribers. In this issue, we have attempted to address suggested topics such as fishing violations and coastal property use and development while maintaining reports on current events such as President Clinton's Executive Order on Nonindigenous Species and Gulf-related topics. We will strive to incorporate your suggestions as WATER LOG evolves.

The WATER LOG staff and I were also pleased to find out that WATER LOG keeps you informed of both Gulf of Mexico and national coastal developments and that some of you even keep back issues to review from time to time. Finally, we take this opportunity to extend a special "Dedicated Reader Award" to Surash N. Pathiki, Lecturer in Botany, who mailed his Reader Survey from Anantapur, India!

As always, we welcome your suggestions. If you did not get a chance to fill out the Reader Survey and wish to, you may access it on the web at www.olemiss.edu/pubs/waterlog to share your thoughts with us. We look forward to hearing from you and working with you in the future.

Sincerely,

Kristen Michele Fletcher
Editor

Fifth Circuit Upholds EPA Zero Discharge Mandate

Texas Oil & Gas Association v. EPA, 161 F.3d 923 (5th Cir. 1998).

Tammy L. Shaw, 2L

In December of 1998, the Fifth Circuit decided that the Environmental Protection Agency (EPA) properly set zero discharge limits for sand, water and drilling waste produced by coastal oil and gas producing operations across the nation. This ruling was the result of the consolidation of six separate actions, bringing together both major oil companies challenging the nationwide zero discharge limits and environmental groups challenging the more lenient limits granted to producers in Cook Inlet, Alaska.

EPA Sets New Guidelines

The EPA regulates discharge from oil and gas producers under authority of the Clean Water Act (CWA), enacted to gradually reduce allowable discharge by point source polluters.[1] To achieve this goal, the EPA requires point source facilities to obtain a permit and then promulgates Effluent Limitation Guidelines (Guidelines) for particular industries restricting the quantities of pollutants that may be discharged by point sources working in those industries.

To determine the Guidelines for coastal oil and gas producers, the EPA conducted a study of producers to determine the type of technology being used to reduce the discharge of pollutants. As a result of this study, the EPA set a zero discharge limit on produced water and drilling waste for all coastal oil and gas facilities. Produced water is a highly saline water brought up by the drilling process and drilling waste includes fluids and cuttings that are generated during the drilling process. When it set these zero discharge limits, it exempted the coastal facilities of Cook Inlet, Alaska, due to cost and location factors.

The EPA also set a zero discharge limit on produced sand, made up of small particles from fractured sub-strata, for all costal facilities, including Cook Inlet facilities. Coastal oil and gas producers were required to reinject these by-products or provide on-site storage facilities.

see Zero Discharge, pg. 12

Submerged Lands, from pg. 2

ments to such lands which would benefit the state.[3] Under the terms of the Act, riparian owners would be able to seek title to adjacent submerged lands in return for not only building bridges or causeways, but also for making other improvements.[4]

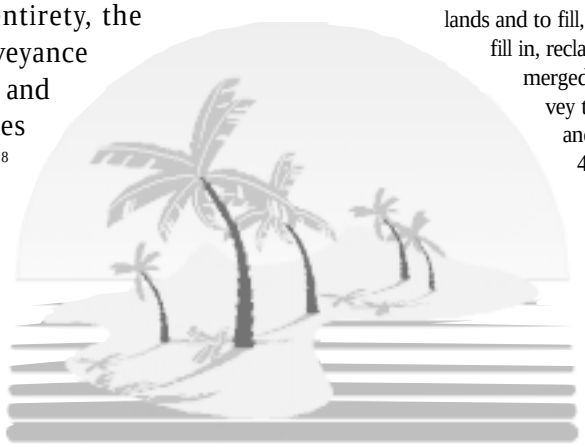
West Dauphin outlined the extent to which their predecessors in title had dealt with state and local authorities in their move to acquire the adjacent submerged lands. In 1934, the property owners published a notification regarding their application for the right to fill and reclaim submerged lands adjacent to their properties. In 1938, they secured a Certificate of Approval from the State Docks Commission which noted that the owners' intent to reclaim and make improvements to land "is in the public interest." [5]

The Certificate of Approval granted authority to the owners "to fill in, reclaim, or otherwise improve all tide lands and submerged lands, abutting or in front of their respective riparian holdings."[6] The West Dauphin group contended that the certificate of approval in conjunction with subsequent dedication of private property by the owners to the Mobile County Chamber of Commerce constituted a *quid pro quo* (this for that) that supported the conveyance of the submerged lands to the group.

While the facts indicate that the improvements proposed to be made to the submerged lands never came to fruition, West Dauphin quoted paragraph 4 of 33-7-53 as supporting their position, arguing that the very act of "proposing such improvements" warranted conveyance of state submerged lands.[7] Finally, West Dauphin argued that the state ought to be estopped from raising its claim of ownership in light of the fact that it had accepted tax payments from the group for more than fifty years.

The State of Alabama's Response

In response to West Dauphin's contentions, the state argued that when read in its entirety, the statute does not allow for conveyance of state submerged lands unless and until a claimant "actually makes the intended improvements."[8] They noted that the first paragraph of the statute is controlling and, as such, the phrase in paragraph 4 upon which West Dauphin relied, cannot be read as a distinct means of acquiring state public trust lands.[9]



Regarding West Dauphin's claim that a transfer or dedication of private lands in the 1950s constituted the consideration for an exchange of lands, the state responded that any dedication of private lands by West Dauphin was compensated for by a $1 million cash payment from the Mobile Chamber of Commerce.[10]

The State Supreme Court's Analysis

In assessing the claimants arguments, the Supreme Court agreed with the state that the statute at issue governing conveyances of state tidelands and submerged lands must be read in its entirety. In doing so, West Dauphin's contention that a mere proposal to reclaim and improve submerged lands in exchange for title to them must fail. The court also refused to accept West Dauphin's argument regarding an exchange of lands because the group failed to show that any such exchange was memorialized by a transfer of deeds. Finally, the court addressed the fact that West Dauphin had been paying *ad valorem* taxes on the land. The justices noted that while in certain rare circumstances the state might be estopped from raising a legal claim of right, no such circumstances existed in the case at hand, particularly in light of the state's claim of title to unique and valuable tidelands. As a result, the state supreme court affirmed the trial court's summary judgment in favor of the state.

ENDNOTES

1. A motion for rehearing was denied on December 4, 1998 and the Alabama Supreme Court issued a certificate of judgment on the case on December 22, 1998.
2. *West Dauphin Limited Partnership* at 947, (quoting Letter from Gessner T. McCorvey to John H. Peach, legal advisor to the Governor, October 20, 1932).
3. ALA. CODE § 33-7-53 (1998). The statute states that "[i]n order to encourage the building of bridges, causeways and other development work and relief work, the owner of any lands in the State of Alabama abutting on tidelands, the title to which or control of which may now or hereafter be vested in the State of Alabama . . . shall be authorized to acquire such tidelands and to fill, reclaim or otherwise improve same and to fill in, reclaim or otherwise improve the abutting submerged land and to own, use, mortgage and convey the lands so reclaimed, filled or improved, and any improvements thereon . . . ."
4. *Id.* at para. 1.
5. *West Dauphin Limited Partnership* at 949 (quoting State Docks Commission, Certificate of Approval (October 15, 1938)).
6. *Id.* at 946.
7. *See* ALA. CODE § 33-7-53(4) (1975).
8. *West Dauphin Limited Partnership* at 951.
9. *Id.*
10. *Id.* at 954.

Casino Permit Issued Pending Reconsideration Does Not Amount to 'final agency action'

Bay St. Louis Community Association v. Commission on Marine Resources, No. 97-CC-00101-SCT, 1998 LEXIS 334 (Miss. 1998).

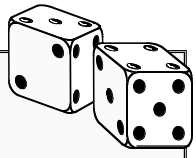
John A. Duff, J.D., LL.M., M.A.

In July, the Mississippi Supreme Court ruled that a Commission on Marine Resources (CMR) permit allowing for a casino site - but still subject to a reconsideration hearing - was not a final agency action. As a result, an appeal of the permit issuance decision was deemed to have been timely filed even after the expiration of thirty days from the date of issuance. Opponents of the permit had filed an appeal within thirty days of the decision of the reconsideration hearing and also claimed the CMR failed to provide adequate notice.

In 1996, Casino World and Hancock County Port and Harbor Commission applied to the Mississippi Commission on Marine Resources to issue a permit for a casino resort. On July 16, 1996, CMR indicated that it would issue the permit. The Bay St. Louis Community Association and other parties requested that CMR reconsider the issue and CMR agreed to review petitions for reconsideration at an August 20, 1996 meeting. In the meantime, the Department of Marine Resources issued the permit to Casino World on August 13, 1996, indicating that it was still subject to reconsideration. At the August 20, 1996 CMR meeting, the Commission voted against reconsideration. On September 18, 1996, the opponents of the permit appealed the Commission's decision. The Hancock County Chancery Court dismissed the appeal noting that appellants had failed to appeal within thirty days of the August 13 permit issuance. On appeal to the state supreme court, appellants argued that CMR had breached its duty to notify them of the permit issuance. They further argued that the thirty day appeals clock did not start running until a reconsideration decision was made by the Commission.

The Court ruled that appellants had not proven that they were of a class legally obligated to notice of the CMR permit issuance. The relevant statutes indicate that notice of permit issuance is due only to certain government officials and certain qualified adjacent landowner claimants. While the statute requires that notice be given to these two groups, failure to do so would not affect the validity of any permit granted thereafter. This determination prompts the question: Is the notification provision a mandate or does it fall into some category of discretionary activity? With no sanction or repercussions connected to a failure to notify, the statute may appear as little more than rhetoric.

However, the Court did rule in favor of appellants regarding the issue of a "final agency action" which would start the appeals clock. The Court characterized the Commission's permit issuance pending a reconsideration decision as "the heart of the error" in the dispute. Based on the fact that the permit had been issued pending a reconsideration decision, the Court deemed the action interlocutory rather than final. The Court concluded that the "final agency action" did not take place until August 20 when the Commission denied the reconsideration petition. As a result, appellants' September 18 appeal was timely filed.



Mayor, Federal Agencies Bet Against Expanded Casino

Destination Broadwater, the President Casino's proposed expansion, would set a dangerous new precedent of manufacturing land in the interest of casino development, according to Biloxi Major A.J. Holloway. Citing concern that the proposal would alter the beach, increase traffic, and fill 54 acres of the Mississippi Sound, Holloway vetoed a recent Biloxi City Council resolution to support it.

Destination Broadwater would add 6,250 new motel rooms, a six-casino mall, entertainment center, convention center, golf course, retail stores and amusement park to Biloxi, boosting annual state casino tax revenue by $154 million. The Environmental Assessment for the resort explains that even with 54 acres of fill in the Mississippi Sound, relocation of marsh, dredging of water bottoms, and excavation of wetlands, an Environmental Impact Statement is unnecessary because the project is "in the public interest."

In a presentation about the proposed project to the Gulf of Mexico Fisheries Management Council, National Marine Fisheries Service Representative Mark Thompson explained that "filling [54] acres of Mississippi Sound and associated subtidal habitat is one of the most significant impacts that can occur to an estuary [because it] results in a permanent loss of habitat." The National Marine Fisheries Service, Fish and Wildlife Service, and Environmental Protection Agency have submitted objections to the project. The Army Corps of Engineers is determining if an Environmental Impact Statement is necessary.

Executive Order Attacks Exotics

President William J. Clinton, Executive Order 13112, 64 Fed. Reg. 6183 (1999).

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

The Federal government waged war on aliens in February, documented by President Clinton's Executive Order promising Federal efforts to combat the quiet influx of exotic species. Exotics, or non-indigenous species, are defined as any species, including its seeds, eggs, spores, or other biological material capable of propagating the species, that is not native to an ecosystem. Exotics are generally those occurring outside their native ranges in a given place as a result of actions by humans. This allows distinction between changes to natural resources caused by natural processes, such as natural range expansions and contractions, and those changes caused by humans.

Exotic species, sometimes referred to as "smart pollution," are not healed by time like other kinds of environmental degradation. Rather, established exotics continue to entrench themselves and spread. As they spread, they erode necessary ecosystem boundaries, destroying natural ecosystem integrity which allows different living things to evolve in different places. This process destroys parts of the earth's natural resources base and becomes a social menace.

The management of exotic species must combine scientific expertise and developments with the authority to halt introductions. The science differs from species to species because the avenue of introduction, method of establishing a colony, and the ultimate impact on the ecosystem vary. But, certain common factors are crucial to the understanding of exotics. A "bioinvasion" occurs when a plant or animal is released into a new environment and finds conditions to its liking.[1] According to exotics researcher Chris Bright, if the exotic encounters no effective competitors, predators or diseases in its new range, it may undergo a population explosion. In the process, it may out-compete native species for some essential resource. If it's a microbe, it may infect them; if it's a predator, it simply may eat them.[2]

Scientists and policy-makers alike recognize that invasion is actually a natural, ancient process. But, the human factor has increased the transport and exchange of exotic species at an exponential rate. In today's world, this includes the purposeful introduction of a species in order to manage another and the inadvertent spread of a species. Whether purposeful or not, it has become evident that the integration of the global economy is spreading creatures around the globe in ship ballast water, in containers, and in commodities themselves. With these warning signs, a coherent policy designed for the long-haul is necessary but difficult to accomplish.

The Executive Order attempts to do this by supplementing Federal activities authorized under the 1990 Nonindigenous Aquatic Nuisance Prevention and Control Act and the 1996 National Invasive Species Act which, among other efforts, called for the prevention of the introduction and spread of exotic species into U.S. waters through the ballast waters of commercial vessels. The Order establishes an Invasive Species Council with members representing the Departments of Commerce, Interior, Agriculture, Defense, State, Treasury, and Transportation. The Council will take the lead in overseeing implementation of the Order and "seeing that the Federal agency activities concerning invasive species are coordinated, complementary, cost-efficient, and effective . . . ."[3] These duties include developing guidance for the prevention and control of invasive species and the establishment of an Internet-based information sharing system to disseminate invasive characteristics, economic, environmental, and human health impacts, and management, research, and public education techniques. Finally, the Council has 18 months to issue the National Invasive Species Management Plan to recommend goals and specific measures for Federal Agency efforts concerning invasive species. The Order sets out the goals for the Management Plan:

- Review existing and prospective approaches and authorities for preventing the introduction and spread of invasive species;
- Identify pathways by which invasive species are introduced and methods to minimize the risk of introduction;
- Provide a science-based process to evaluate risks associated with introduction and spread of species; and
- Provide for a coordinated and systematic risk-based process to identify, monitor, and inhibit such pathways.[4]

Due in August of 2000, policy makers hope that the coordinated efforts of Federal agencies will advance methods to prevent the introduction and spread of exotics in order to minimize the impacts of invasive species.

For the text of the Executive Order and internet links to exotic species websites, visit the Legal Program website at www.olemiss.edu/pubs/waterlog .

ENDNOTES

1. Worldwatch Institute Press Release, Chris Bright, *Global Economy Spreading Destructive Species: The Invisible Threat of Bioinvasion*, on file with author (1998).

2. *Id.* at 2, *citing* Chris Bright.

3. President William J. Clinton, Executive Order 13112 § 4(a), 64 Fed. Reg. 6183 (1999).

4. *Id.* at § 5(b).

Meet the Aquatic Exotics

The oceans, like the mountains and deserts, once served as natural boundaries, isolating one ecosystem from another. But, trade, travel and other human activities are moving organisms from one ocean to another allowing a species to take hold in the estuaries, tidelands, and wetlands of separate continents, touching off more and more invasions. Aquatic invaders can be the most difficult to halt because it is challenging to plug aquatic pathways that allow the species to spread.

One aquatic exotic, the Nile perch (introduced into Lake Victoria, Africa, as a commercial catch), is responsible for the disappearance of some 200 species from the lake resulting in one of the greatest single incidents of extinction ever recorded. Other aquatic exotics are described below.

ZEBRA MUSSEL

Originally from the Caspian and Ural Seas, the zebra mussel probably hitched a ride in ballast water to the Great Lakes where they colonized quickly and mercilessly, attaching to pipes, engines, fishing gear and dock pilings. Without a natural predator, the zebra mussel threatens to spread throughout the U.S. evidenced by a discovery in Florida in 1998.

GRASS CARP

This slender Asian minnow is a voracious aquatic plant eater which can eat two or three times its weight each day, growing to nearly three feet long and up to 100 pounds.

Nutria

Every gulf state has its share of the 10 million nutria living in the coastal marshes, the large South American rodent that resembles a cross between a beaver and a rat. Originally introduced for a commercial trade in fur, it has developed a healthy appetite for the gulf states' aquatic plants.

HYDRILLA

The submerged aquatic plant can grow as much as 2 - 6 inches each day. It cleverly edges out other plants by fanning out its stems like a mushroom cloud when it reaches the surface, creating a dense mat that shades out other plants.

WATER HYACINTH

The hyacinth is a floating aquatic plant with colorful lavender flowers that also shades out other plants and makes navigation nearly impossible. Its final gift to the ecosystem it invades is that when a large amount of the plant dies at one time, the decomposing material can use all of the oxygen in the surrounding water, killing whatever animal life is present.

CHINESE TALLOW

A visitor from China, the Chinese tallow has grown quickly and, while it can provide shade from the hot gulf sun, it can also change an ecosystem, turning coastal tall grass prairie into tallow forest.

SEA LAMPREY

The lamprey is a predacious, eel-like fish that attaches to a host fish until satiated or until the host dies. Native to the coastal regions of both sides of the Atlantic Ocean, it entered the Great Lakes in 1921 and contributed to the decline of whitefish and lake trout until efforts to establish a sea lamprey control program were successful.

ASIAN SWAMP EEL

This eel is one of the few species known to invade natural wetlands. Discovered in Florida in 1997, the eel has become firmly established there and has the capability of invading freshwater ecosystems through the Southeast, including the Everglades.

Habitat, from pg. 1

the importance of fish habitat. When Congress reauthorized the Magnuson Act in 1986, it called for the inclusion of "readily available information regarding the significance of habitat to the fishery and assessment as to the effects which changes to that habitat may have upon the fishery" into fishery management plans (FMPs).[3]

A decade later, Congress determined it was necessary to "expand existing Federal authority to identify and protect essential fish habitat."[4] To do so, Congress built on the habitat provisions present in the Magnuson Act and added an identification, assessment and consultation scheme similar to provisions of the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA). Councils must now include provisions in the FMPs to describe and identify EFH, minimize adverse effects on EFH caused by fishing, and identify other actions to encourage the conservation and enhancement of EFH. These have taken form as individual EFH amendments for specific fisheries or a generic EFH amendment for all managed fisheries in a particular region. For example, the Gulf Council decided that "a single, generic amendment was the only practical means of meeting the requirement to amend all seven FMPs by the October 1998 deadline."[5]

Identifying EFH

Once the EFH provisions were passed, the NMFS and the regional Councils began the arduous process of identifying EFH. EFH is defined as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity,"[6] but, for purposes of identification, EFH may actually include migratory routes, open waters, wetlands, estuarine habitats, artificial reefs, shipwrecks, mangroves, mussel beds and coral reefs.[7] To determine if these areas were "essential," Councils had to synthesize information from available environmental and fisheries data sources relevant to each life stage of each managed species. This information was used to map the location of EFH in each region.

The Gulf Council was especially challenged because it manages over 450 species under its FMPs. Its generic amendment applies to the following FMPs: shrimp, red drum, reef fish, mackerels, stone crab, spiny lobster, and coral and coral reefs. Because many species rely on estuarine waters for early life stages and marine waters once mature, the Gulf Council identified EFH for both estuarine and marine waters. It determined that "[g]iven the broad definition of EFH, the extensive estuarine distribution of the managed species, and NMFS guidance to be risk averse in [the] face of uncertainty, all of the estuarine systems of the Gulf of Mexico are considered essential habitat."[8] Similarly, EFH for marine waters is virtually all marine waters and substrates from the shoreline to the seaward limit of the United States Exclusive Economic Zone.[9]

Once EFH is identified, the Council then must identify adverse impacts on the habitat and the actions that should be considered to ensure its conservation and enhancement and include it in the EFH amendment. Such activities in the Gulf include nonpoint source pollution, coastal development, introduction of exotic species as well as bottom trawling, traps, bottom longlines, and harvesting of live rock coral.[10] The Council recommends project-specific conservation measures such as avoiding development, aligning docks to avoid oyster reefs or marsh grasses, and avoiding impoundment of wetlands that does not accommodate use by fish and invertebrates. The NMFS partially approved the Gulf Council Generic EFH amendment in February. Although the Council must complete additional studies for other species, the EFH amendment is in effect in the Gulf of Mexico.

Commenting and Review

Now that the Amendment is in effect, Congress' mandate reaches beyond the NMFS and Gulf Council to all Federal agencies. A Federal agency that authorizes, funds, undertakes or proposes to undertake an action that may adversely affect any EFH identified in the Amendment must consult with the NMFS.[11] This consultation provision is similar to that found in NEPA, i.e., it is intended to compel Federal agencies to review the potential and likely impacts of its action. The EFH consultation may be general, abbreviated, or expanded, depending on the degree of impact.[12] The NMFS then makes recommendations to conserve the habitat and the Councils may also make recommendations.[13] The receipt of these comments by the authorizing agency begins a 30-day period in which the agency must respond including a description of measures to mitigate effects and an explanation if the action chosen does not follow the NMFS recommendation.[14]

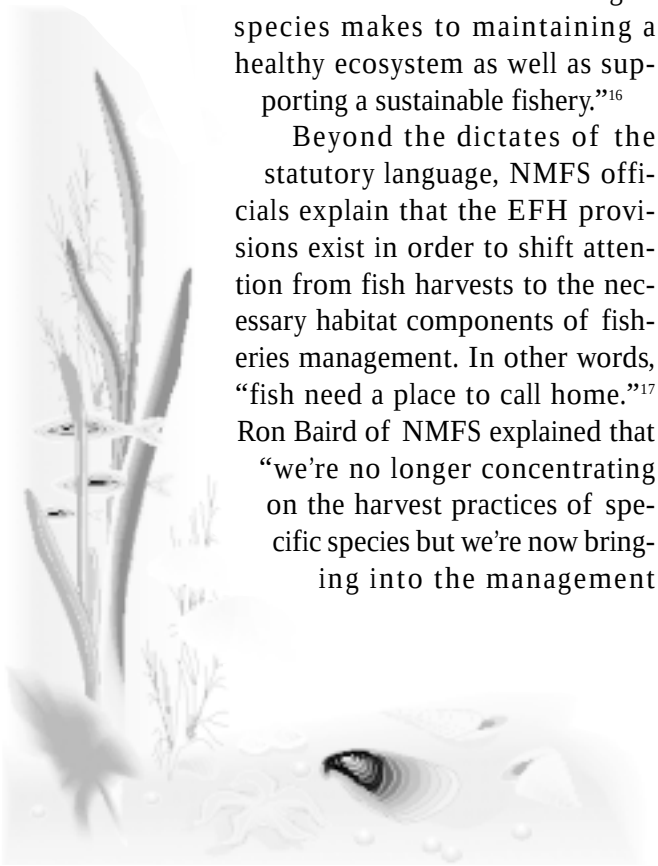
Just the Essentials

In the midst of the deadlines and extensions, regulations and guidelines, lies the underlying question of whether or not the EFH provisions will work. In other words, how effective can these efforts be when couched in terms of "should" and "may" and when notice of some activities that *shall* adversely impact habitat is completely

voluntary, leaving commenting and recommendations out of the Council's control. Effectiveness depends on the efforts of the Councils and initiative of Federal agencies but may be limited by the lack of teeth in the statutory provisions.

Since their birth, EFH provisions have been compared to those in the Endangered Species Act for both purpose and process. Although the EFH consultation process is modeled on the ESA section 7 procedure of halting Federal activities that jeopardize the survival of a species, the Magnuson-Stevens Act imposes no substantive obligations on the action agency, only procedural. Thus, there is no *obligation* to avoid adverse effects. As a result, the EFH provisions mirror the NEPA procedural analysis, but while NEPA has been an effective statute to encourage and maintain public participation and public enforcement, EFH provisions do not provide for this same level of public influence.

The NMFS rule advances the statutory ideals by recognizing "management of fishing practices and habitat protection are both necessary to ensure long-term productivity of our Nation's fisheries."[15] In order to fulfill this ideal, it deems that the regional councils "should protect, conserve, and enhance adequate quantities of EFH to support a fish population that is capable of fulfilling all of those other contributions that the managed species makes to maintaining a healthy ecosystem as well as supporting a sustainable fishery."[16]



Beyond the dictates of the statutory language, NMFS officials explain that the EFH provisions exist in order to shift attention from fish harvests to the necessary habitat components of fisheries management. In other words, "fish need a place to call home."[17] Ron Baird of NMFS explained that "we're no longer concentrating on the harvest practices of specific species but we're now bringing into the management equation the whole structured function of biological systems."[18]

Whether this shift of attention will make a difference depends upon the will of agencies authorizing particular projects. Tom Bigford, a NMFS habitat specialist, explains that fisheries managers can use this information compiled by the Councils to advise agencies about what government projects might damage areas important to habitat. Recognizing that the agencies are not required to follow the advice, he explains that

> Congress and a lot of outside groups are going to be watching and all of that is going to adding just a little bit more pressure for people to take this whole process seriously and make sure that fish and fish habitat perhaps get a little bit more weight in decisions than they have in the past.[19]

Even though considering habitat is a breakthrough in fisheries management, the statute still maintains a voluntary and generally unenforceable stance. As Bigford explained, "outside groups" may put additional pressure to adapt a particular project, but have few options to take such objections to a higher level to force better protections.

ENDNOTES

1. 16 U.S.C. § 1801(a)(9) (1998) (Pub. Law 104-297).
2. Sustainable Fisheries Act of 1996, Pub. L. No. 104-297 (October 11, 1996).
3. 16 U.S.C. § 1853(a)(7) (1986).
4. Senate Report No. 276, 104th Cong., 2d Sess. 1, 6, 24-25 (May 23, 1996).
5. Gulf of Mexico Fishery Management Council, *Generic Amendment for Addressing Essential Fish Habitat Requirements [for] Fishery Management Plans in the Gulf of Mexico*, at 24 (1998).
6. 16 U.S.C. § 1802 (10) (1998).
7. National Marine Fisheries Service, Technical Guidance to Implement the Essential Fish Habitat Requirements for the Magnuson-Stevens Act, at 1 (1998) (available at http://www.nmfs.gov/habitat/efh).
8. *Generic Amendment* at 29.
9. *Id.* at 53.
10. *Id.* at 115-172.
11. 16 U.S.C. § 1855(b)(2) (1998).
12. The level of consultation is determined by NMFS.
13. *See* 16 U.S.C. § 1855(b)(3)-(4) (1998). A Council may comment on an activity that may affect EFH and *shall* comment on an activity that is likely to substantially affect the habitat of an anadromous fishery. *Id.* at (3)(B).
14. 16 U.S.C. § 1855(b)(4)(B) (1998).
15. Magnuson-Stevens Act Provisions, Essential Fish Habitat, 62 Fed. Reg. 66,531 (1997) (codified at 50 C.F.R. pt. 600).
16. *Id.*
17. Earthwatch Radio, Available at ENN Media (http://www.enn.com).
18. Ron Baird, Presentation to American Fisheries Society, Annual Meeting of American Fisheries Society, July 1998.
19. Tom Bigford, Earthwatch Radio, Available at ENN Media (http://www.enn.com).

Fish Compete with Communities for Survival

North Carolina Fisheries Ass'n v. Daley, 27 F. Supp.2d 650 (E.D. Va. 1998). Southern Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411 (M.D. Fla. 1998).

Kristen M. Fletcher, J.D., LL.M. and Elizabeth B. Speaker, 3L

Under two federal statutes, the Secretary of Commerce must now satisfy procedural safeguards that balance his obligation to conserve fishery resources with the potential adverse impacts his actions may have on fishing communities. The two statutes, the Magnuson-Stevens Fishery Conservation and Management Act[1] (Magnuson Act) and the Regulatory Flexibility Act[2] (RFA), were amended in 1996 to include Economic Analysis safeguards. Recent lawsuits have brought these statutes to the attention of courts and have resulted in the clarification of the Secretary's fisheries management duties and, in some cases, the setting aside of fishing quotas in order to balance the needs of coastal communities.

The premiere case reviewing the Secretary's compliance with each statute resulted from a successful challenge by North Carolina commercial fishermen to the Secretary's 1997 summer flounder fishery quota. Since the adoption of a Fishery Management Plan for commercial summer flounder in 1988, numerous amendments were passed creating rebuilding schedules and season quotas. After 1995 when the National Marine Fisheries Service (NMFS) reported that North Carolina fishermen had overfished by close to 600,000 pounds, the quota underwent a series of calculations and changes culminating in the 1997 quota challenged by the fishermen for not considering effects on the coastal communities.

The commercial fishers sued and in *North Carolina Fisheries Association v. Daley*, the U.S. District Court for the Eastern District of Virginia found that the Secretary had not fulfilled his responsibility and ordered him to conduct a level of Economic Analysis consistent with both the RFA and the Magnuson Act.[3] Upon producing the economic analysis, the North Carolina Fisheries Association challenged it as insufficient and a violation of both the Magnuson Act and the RFA. The court determined that the "Secretary has produced a so-called economic report that obviously is designed to justify a prior determination and sanctioned the Secretary under both the Magnuson Act and the RFA."[4]

Economic Analysis under the Magnuson Act

With the passage of the Sustainable Fisheries Act in 1996, Congress added National Standard 8 to the Magnuson Act, mandating the Secretary of Commerce to consider and minimize the economic impacts of conservation and management measures on fishing communities.[5] The Secretary must "take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities and (B) to the extent practicable, minimize adverse economic impacts on such communities."[6]

The Secretary claimed that the Economic Analysis completed for the 1997 summer flounder quota fulfilled the responsibility under National Standard 8 and that the quota regulations posed no threat to the sustained participation of North Carolina's fishing communities. The court, however, issued a strong rebuke finding that the Secretary "completely abdicated his responsibilities under the Magnuson Act."[7]

The court's reasoning was threefold. First, it faulted the narrow methodology of the Secretary's Economic Analysis finding that the lack of detailed analysis foreclosed any meaningful examination of economic impacts and reasonable compliance with National Standard 8. Specifically, the Analysis failed to consider the population size of communities, the significance of the fishing industry on local economies, or what constitutes a North Carolina fishing community. The court dismissed the Secretary's argument that such detail would place an undue burden on agency resources by citing the Internet as a method to collect data in an efficient manner.[8]

Second, the court noted that the Secretary departs from the empirical findings and "then justifies that departure with remarks that are an affront to one's native intelligence."[9] It found that the Secretary could not justify why it had ignored the mounting statistical evidence that over half of North Carolina's vessels are impacted by 5% or more, that 43% of the vessels would suffer revenue reductions of more than 25%, and that at least one-third of North Carolina vessels were projected to suffer a loss of revenue of 50% or more.[10] Third, the court faults the Secretary for claiming that his own regulations that conform to the goals of the Magnuson Act to rebuild overfished fisheries override his statutory duty under National Standard 8 to minimize adverse economic impacts on communities because "the purposes of National Standard 8 do not concern fishery conservation in isolation."[11]

Economic Analysis under the RFA

The court also found the Economic Analysis lacking in light of the RFA provisions. Amended in 1996, the RFA requires a level of economic analysis to consider whether a regulation has a "significant impact" on small entities in North Carolina.The Secretary may comply by completing a Final Regulatory Flexibility Analysis to state the objectives of a final rule, a description and estimate of the number of small entities to which the rule will apply, the projected workload for small entities, and the steps taken to minimize the significant economic impact on small entities.[12] In the alternative, the Secretary may provide a certification that the final rule will not have a significant impact on small entities.[13]

Upon order by the court, the Secretary proceeded with the Economic Analysis under the RFA and, like the analysis under the Magnuson Act, found that there would be no significant impact on a substantial number of small businesses arising from the 1997 summer flounder quota. The court disagreed and faulted the Secretary's methodology reproaching the agency for omitting known information, considering the entire state of North Carolina as a single fishing community, and claiming that present economic losses are alleviated by past revenues earned by overfishing. Finally, the court admonished the Secretary that there would be "no economic effect when every commercial fisherman in the state is in bankruptcy."[14] Ultimately, the court set aside the 1997 summer flounder quota by over 399,000 pounds and forbid the Secretary to consider these as overfishing in setting a quota for subsequent years.

The U.S. District Court for the Middle District of Florida conducted a similar analysis for commercial harvest quotas set for Atlantic sharks in *Southern Offshore Fishing Association v. Daley*. The National Marine Fisheries Service certified that the 1997 Atlantic shark quota reduction would not affect small entities because "shark fishermen are nimble and adaptive in their fishing operations . . . and that the shark fishing season was historically too brief to permit a prudent fisherman to rely exclusively on annual revenue from shark fishing."[15] Finding that the Fisheries Service "inconsistently characterizes the universe of shark fishermen in the record" and fails to contain adequate explanation of gross revenue figures, the court found the Economic Analysis inadequate stating that "one can no more readily change a bass boat to a flats boat than change directed shark fishing paraphernalia to equipment for profitable tuna fishing"[16] The court remanded the agency's determinations with instructions to undertake a rational consideration of the economic effects and potential alternatives to the 1997 quotas.

Interestingly, these cases focused more on the impacts on fishing communities than impacts on the fisheries. In the 1997 case *Associated Fisheries of Maine v. Daley*,[17] the First Circuit Court of Appeals noted that the intent of the RFA is not to limit regulations having adverse economic impacts on small entities but to have the agency focus special attention on possible impacts. In this case, the Court was confronted with challenges to amendments that sought to eliminate overfishing of cod, haddock, and yellowtail flounder stocks by reducing permissible fishing over a 5 -7 year period. At the time of the amendments, haddock and yellowtail stocks had collapsed and cod stocks were near collapse.[18] In finding that the Secretary had fulfilled the RFA obligation, the court recognized the Secretary's consideration of other alternatives and their impacts on small entities, response to comments submitted by affected fishermen, and elimination of a provision to ease concerns of smaller vessels.[19] The court upheld the balance struck by the Secretary through the amendments and noted that "it is evident that rapidly deteriorating conditions required the Secretary to fish in troubled waters."[20]

The Future of Economic Analysis

As a result of these rulings, the bar for economic analyses has risen. This reveals a renewed tension between those actions that strike a balance between competing conservation and economic concerns and those that are "a buzzsaw to mow down whole fishing communities in order to save some fish."[21]

ENDNOTES

1. 16 U.S.C. §§ 1801 - 1882 (1999).
2. 5 U.S.C. §§ 601 - 612 (1999).
3. *North Carolina Fisheries Ass'n., Inc. v. Daley*, 16 F. Supp.2d 647 (E.D. Va. 1997).
4. *North Carolina Fisheries Ass'n, Inc. v. Daley,* 27 F. Supp.2d 650, 652 (E.D. Va. 1998).
5. 16 U.S.C. § 1851(a)(8) (1999).
6. *Id.*
7. 27 F. Supp.2d at 662.
8. *Id.* at 664.
9. *Id.* at 662.
10. *Id.* at 665.
11. *Id.* at 666.
12. As amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 104 Pub. L. 121 (1996).
13. 5 U.S.C. § 605(b) (1999).
14. 27 F. Supp.2d at 661.
15. *Southern Offshore Fishing Ass'n, Inc. v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998).
16. *Id.* at 1436.
17. 127 F.3d 104 (1st Cir. 1997).
18. *Id.* at 108.
19. *Id.* at 116. It is important to note that the Court analyzed the Secretary's compliance with the RFA prior to the passage of the 1996 amendments which altered some requirements to the RFA analysis of § 604(a).
20. *Id.* at 118.
21. 27 F. Supp.2d at 667.

Zero Discharge, from pg. 3

Effluent Limitation Guidelines Challenged

The Guidelines were challenged by three different groups of plaintiffs. The Texas Oil and Gas Association, the Texas Railroad Commission and other members of the coastal oil and gas industry (Texas petitioners) challenged the EPA study as inadequate on several levels. First, the Texas petitioners contended the EPA failed to consider the economic effects the zero discharge standard would have on older wells because its study failed to review pre-1980 wells.

The court responded that although this exclusion "may have had some effect on the precision of the EPA's analysis of the age factor . . . an agency's choice to proceed on the basis of 'imperfect' information" does not meet the level of arbitrary and capricious,and cannot be overturned.[2]

Next, the Texas petitioners argued that the EPA study was not sufficiently representative of the facilities impacted by the Guidelines and did not address the cost-benefit ratio associated with achieving zero discharge limits. In reality, the EPA data showed a high percentage of coastal oil and gas facilities already practicing zero discharge by 1992 and that 80% of coastal facilities in Louisiana and Texas would be required to practice zero discharge by 1997 due to new state water quality regulations.

Having recognized that the Texas petitioners "face an especially difficult challenge in this case, given the proportion of dischargers already practicing zero discharge at the time of rule-making," the court rejected this argument and found that the agency determination was a rational one.[3]

The second group of plaintiffs, the Cook Inlet producers, also challenged the EPA application of zero discharge for produced sand. They argued that the EPA did not adequately consider an alternative to zero discharge, a method of pollution control by washing the produced sand and allowing a minimal discharge, that would cost less for the producers. The court rejected this argument, finding that the EPA did consider the alternative, but found it inconsistent in eliminating residual pollutants from produced sand. The court also noted undisputed evidence that all of the coastal facilities, minus one, were already practicing zero discharge at the time of the new Guidelines.

Finally the third group of plaintiffs, the Alaska petitioners, including the Natural Resources Defense Council and other environmental groups, contended the EPA did not have the authority to single out one group of producers and set a different effluent standard. Specifically, the Alaska petitioners challenged the more lenient standards set for produced water and drilling wastes for Cook Inlet producers. They argued that the Cook Inlet producers were part of the same subcategory as the Louisiana and Texas producers and that the CWA requires the EPA to impose uniform guidelines for all the producers in this subcategory. The EPA countered that the Cook Inlet facilities were granted a more lenient discharge for cost and location reasons. The facilities were located in relatively deep water, with a scarcity of land disposal facilities for by-products and geologic conditions that make reinjection unsuitable. In addition, the cost of compliance with a zero discharge standard would be substantially higher for these facilities.

The court found that the CWA does allow the EPA to promulgate different rules for some polluters within a category or subcategory. It analyzed the structure and language of the CWA and determined that while the EPA must promulgate rules for classes of polluters rather than individual polluters, the agency is not required to treat all polluters in a class identically.

Conclusion

This Fifth Circuit decision is significant for coastal oil and gas producers in the Gulf of Mexico because it affirms the EPA decision to set zero discharge limits for drilling and production by-products and supports the agency's finding that the effluent limitation guidelines are economically achievable within the industry. The decision has a national impact on industries and environmental groups by allowing the EPA to set a more lenient limit for a category of oil and gas producers that are geographically diverse, affecting producers from the Gulf of Mexico to Cook Inlet, Alaska. The Court's decision also supports the EPA's authority to single out a polluter within a category or subcategory with different standards or requirements, without defeating the objectives of the Clean Water Act.

ENDNOTES

1. The goal of the Clean Water Act was to reduce discharge from point source polluters or "end of the pipeline" type polluters, those in which a source of discharge is identifiable and clearly linked to a particular source, by the year 1985. Clean Water Act, 33 U.S.C. § 1251 (1998).
2. 161 F.3d at 935.
3. *Id.* at 934.

Attention Alabama Boaters

Boat operators in Alabama are reminded by the Alabama Marine Police they will be required to have an operator's license by April 28, 1999, to operate a motor boat on any of the state's waterways. This includes personal watercraft. The minimum fine for operating without a license is $100.

Landowner, from pg. 1

result, the Wehbys sued the Turpins for the right to use the entire lake for recreational purposes. They claimed that the lake was "public" and open to their use. The Turpins countered that because the lake was private, the Wehbys' interest was limited to the portion of the lake overlying their property. The parties also disputed the existence of an easement. The trial court granted the Turpins summary judgment and the Wehbys appealed.

Fighting for Riparian Rights

On appeal, the Wehbys argued that because their land is partially flooded and contiguous to the lake, they had littoral or riparian rights in the entire surface waters above the lake bed.[1] However, the question of control over the surface waters of a private, non-navigable lake is one of first impression in Alabama. As a result, the Alabama Supreme Court looked to the law of other jurisdictions "to gain a better understanding of the origins and evolution of littoral or riparian rights."[2]

Courts resolve this issue using two distinct rules. A majority of jurisdictions follow the common law rule which states that owners of land underlying the surface waters of a man-made, non-navigable lake are entitled to control of only that portion of the lake lying over the land they own. The civil law rule states that an owner of land abutting or extending into portions of a lake, navigable or not, is entitled to the reasonable use and enjoyment of the entire lake.

The Wehbys urged the court to follow the civil law rule. Even though the court acknowledged that the common law rule may "frustrate the beneficial use and enjoyment of an important recreational resource," it explained that Alabama is a common law state and is bound by the common law rule.[3] By adopting the common law rule, the court limited the rights of owners of land beneath man-made, non-navigable lakes to surface water rights in the waters above their land. Thus, without a covenant, agreement or statute to the contrary, the landowners had no right to use that portion of the lake beyond their boundaries.

The Wehbys then argued that even if Alabama follows the common law rule, it should not apply to Chelsea Place Lake because it is a public water. The Wehbys relied on the Alabama law that states "any water impounded by the construction of any lock or dam . . . placed across the channel of a navigable stream is declared a public water."[4] The Wehbys claim that the stream that feeds Chelsea Place Lake, the Yellowleaf Creek, is navigable. The damming of the creek created a public water, giving all landowners the right to recreate on its surface waters.

In order to determine if Yellowleaf Creek is a navigable waterway, the court turned to the federal and state tests for navigability. First, the court reviewed the standard the U.S. Supreme Court established in the 1870 case, *The Daniel Ball*, which requires a public navigable river to be "navigable in fact." A waterway is navigable in fact when it may be used "in [its] ordinary condition, as highways for commerce, over which trade and travel" may be conducted on water.[5] The court also relied on the Eleventh Circuit rule that "the fact that a waterway is on occasion susceptible to navigability during brief periods of flood or high water" does not mean it is navigable.[6] Finally, under Alabama law, a stream is navigable if it "has an aptitude for beneficial public servitude, capable of being traversed for a considerable part of the year."[7]

The Wehbys offered for evidence of navigability that Yellowleaf Creek is capable of being traversed by fishing boats and canoes during some parts of the year. The court rejected this evidence requiring that navigability exist for a *considerable* part of the year. Therefore, the creek was held to be non-navigable and the lake was deemed private under the Alabama Code, limiting the Wehbys use to only those waters over their land or to those lands for which they held an easement.

Court Encourages Use of Easements

Even though the court limited riparian rights along man-made, non-navigable waterways, it encouraged riparian landowners to acquire an easement for use of the entire lake.

The Wehbys argued that even though their other arguments failed, they possessed an easement, either express or implied, to use the entire lake for recreation. The court quickly found that the Wehbys held neither.

The previous owner, Hatcher, failed to obtain an express easement from the church; rather, he merely obtained permission in the form of a license which was not renewed at the time of the Wehbys' purchase. An implied easement exists if there is "original unity of ownership . . . and that use [is] open, visible, continuous and reasonably necessary."[8] Because Hatcher lacked a legal interest in the lake bed and had no authority to transfer any personal right, the Wehbys did not ensure an easement by virtue of purchasing the land and could not claim surface water rights.

Conclusion

Alabama joins the majority of jurisdictions holding that owners of land extending beneath an artificial, non-navigable lake possess only surface-water rights in the waters above their land. This decision serves as a caution to riparian landowners to establish an easement to ensure their use of lakes such as Chelsea Place Lake.

ENDNOTES

1. Littoral rights are rights of the owners of land abutting surface waters of a lake or sea. Riparian rights are rights of owners of land abutting a stream. However, the term "riparian" commonly refers to water rights in either context. *See* 78 Am.Jur.2d Waters § 260; *Defining Littoral Rights*, 17:2 WATER LOG 3 (1997).
2. *Wehby* at 1246 - 47.
3. *Id.* at 1248 - 49.
4. ALA. CODE § 9-11-80(a) (1998).
5. *The Daniel Ball*, 77 U.S. 557, 563 (1870).
6. *U.S. v. Harrell*, 926 F.2d 1036, 1040 (11th Cir. 1991).
7. *Rhodes v. Otis*, 33 Ala. 578, 597-8 (1859).
8. *Wehby* at 1250.

False Statements Exact High Price

United States v. Royal Caribbean Cruises Ltd., 11 F. Supp.2d 1358 (S.D. Fla. 1998).

United States v. Tomeny, 144 F.3d 749 (11th Cir. 1998).

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Most fishers are aware that the main U.S. fisheries statute, the Magnuson Act, prohibits obtaining licenses or permits through false reporting. Similarly, most mariners know that the U.S. Act to Prevent Pollution from Ships (APPS) also prohibits false representations.[1] Prosecutors, however, are using a broader statute, the False Statements Act (FSA), to charge violators with lying. The FSA criminalizes false statements made to the government, either directly or through a third party, and in 1998, two Federal courts found that this statute is properly used against fishers and vessel operators.[2]

In *United States v. Tomeny*, the defendants had obtained an endorsement to participate in the red snapper fishery by falsely stating that their vessel met certain threshold requirements.[3] The National Marine Fisheries Service determined that Theodore Tomeny and Steve Tomeny, of Tomeny and Tomeny, Inc., had submitted false information to obtain the endorsement. The Tomeny's were convicted of felony misrepresentation under the FSA.

On appeal, the defendants claimed that prosecution under the FSA was improper; the statute under which to prosecute is the Magnuson Act which states "[i]t is unlawful for any person to knowingly and willfully submit . . . false information" regarding a fisheries issue that a Council may consider, including the issuance of endorsements.[4] The Magnuson Act punishes a false statement as a misdemeanor with fines of $100,000 and six months imprisonment.[5] By contrast, the False Statements Act is a general fraud statute, enacted more than 100 years ago, that includes false statements as felonies with higher fines and possible imprisonment of five years.[6]

Seeking to classify their actions as misdemeanors rather than felonies, the Tomenys argue that because it applies specifically to supplying false information in the fisheries context, the Magnuson Act preempts the FSA. The Eleventh Circuit denied their claim for several reasons. The court found that "when an act violates more than one criminal statute, the Government may prosecute under either" so long as there is no legislative intent to repeal a statute and replace it with a new one.[7] Even though the Magnuson Act is more specific, it does not specifically repeal the FSA, nor does its legislative history indicate such an intent.

A Florida District Court made similar findings in *United States v. Royal Caribbean Cruises* finding the cruise liner guilty under the False Statements Act. In 1993, a Coast Guard officer observed the *Nordic Empress* discharging oil in Bahamian waters while en route to Miami. Under an international treaty, the cruise liner had to maintain an Oil Record Book listing all oil discharges. Once the *Nordic Empress* arrived in Miami, the United States Coast Guard boarded the vessel, conducted a document and safety inspection and found that there was not an entry of the oil discharge. Rather than prosecute under the more specific Act to Prevent Pollution from Ships, the United States charged Royal Caribbean with a violation of the FSA for presenting a false record to the Coast Guard official in Miami.

As with the Eleventh Circuit in *Tomeny*, the *Royal Caribbean* court found that that prosecution under the more general FSA was appropriate because Congress intended to have the Act to Prevent Pollution from Ships supplement existing laws rather than amend them.[8]

ENDNOTES

1. 33 U.S.C. § 1908 (1998).
2. 18 U.S.C. § 1001 (1998).
3. To obtain an endorsement, a vessel must have landed ≥5,000 pounds of red snapper in at least two of the three years of 1990, 1991, and 1992. *See* Emergency Interim Rule of Reef Fish Fishery of the Gulf of Mexico, 57 Fed. Reg. 62, 237 (1992), codified at 50 C.F.R. § 64 1.4 (m) and (n). The Tomeny's claimed their vessel met the threshold in 1990 and 1992 even though it, in fact, had not reached that level in 1990.
4. 16 U.S.C. § 1857 (1)(I) (1998).
5. 16 U.S.C. § 1859 (b) (1998).
6. 18 U.S.C. § 1001 (1998).
7. *See United States v. Batchelder*, 442 U.S. 114, 123-24 (1979).
8. Royal Caribbean also argued lack of jurisdiction because the dumping occurred in international waters and was preempted by MARPOL provisions (Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, codified at 33 U.S.C. § 1901 *et seq.*).

Royal Caribbean Admits Guilt

On March 22, Royal Caribbean pled guilty to criminal charges of making false statements to Coast Guard inspectors in an effort to conceal illegal discharges from the Nordic Prince, a cruise liner that sailed regularly from Mexico to Los Angeles and Alaska. These charges are in addition to those covered above and penalties could reach $1.5 million or higher.

Lagniappe (a little something extra)

Around the Gulf . . .

NOAA recently announced the installation of state-of-the-art navigational aids in the **Florida Keys National Marine Sanctuary** to help ships avoid grounding on coral reefs. The new beacons were purchased as part of a damage assessment and restoration agreement.

A **giant manta ray** weighing at least 300 pounds dragged two Florida boaters by its anchor line for almost two hours towing it over a mile offshore in February. The 16-foot vessel with its 90-horsepower engine was no match for the 18-foot wide ray that eventually freed itself of the anchor line after Coast Guard assistance.

In November, the Mississippi Commission on Marine Resources authorized a feasibility study for creating **seagrass preserves** in the Mississippi Sound. One commissioner suggested building the preserves with funds that casinos must pay to mitigate the environmental effects of construction.

In January, Texas environmentalists sued to remove the State's authority to run a **federal water pollution program.** Delegated by the EPA, the program authorized the Texas Natural Resource Conservation Commission to run the Federal program with minimal EPA oversight. The lawsuit claims Texas lacks the proper funds to run the program.

Around the Nation and the World . . .

At the **U.N.'s Food and Agriculture Organization's Committee on Fisheries** annual meeting in Rome in February, the United States urged the world's fishing nations to finalize agreements to review excess fishing fleet capacity and improve international conservation and management of sharks and seabirds.

In November, the National Marine Fisheries Service issued a final rule to revise the rules of conduct for **Fisheries Management Council members** prohibiting them from voting on matters that would have a significant and predictable effect on a financial interest. The rule can be found in the Federal Register at 64,182, November 19, 1998.

The U.S. Coast Guard recently sent a delegation to London to participate in an international forum addressing **Y2K** computer readiness in the global marine transportation industry and to produce checklists and model contingency plans for ships and ports.

Arguments continue regarding rights to the underwater remains of the **R.M.S. Titanic** as tourists have signed up to dive to the site. The right to dive is being challenged by RMS Titanic, Inc. who owns the salvage rights.

In January, the Italian government blocked a plan to build revolutionary flood barriers to save Venice from **rapidly rising tides**, saying it would ruin the lagoon, even though the rising tides waterlog the city every one in four days.

The United States recently reached an agreement with Thailand, Malaysia, India and Pakistan to comply with World Trade Organization recommendations regarding **U.S. shrimp import policy.** The U.S. is committed to drafting and implementing new regulations regarding shrimp imports by the end of 1999.

WATER LOG (ISSN 1097-0649) is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, under Grant Number NA86RG0039, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. The views expressed herein are those of the authors and do not necessarily reflect the views of NOAA or any of its sub-agencies.

MASGP-99-004-01

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Upcoming Conferences

Coastal Zone 99: The People, the Coast, the Ocean: Vision 2020
July 24-30 • San Diego, California
For registration, call (617) 287-5570 or visit
http://omega.cc.umb.edu/~cz99/main.html

National Marine Educator's Conference
Aug. 6-11 • Charleston, South Carolina
For registration, call (843) 953-5812 or visit
http://www.coastal.edu/science/scmea/NMEA99.html

International Conference on Coastal and Ocean Space Utilization
June 6-11 • The Hague, Netherlands
For registration, call (+31) 70-3114364 or
e-mail p.c.beukenkamp@rikz.rws.minvenw.nl

Humanity and the World Ocean
June 23-25 • Moscow, Russia
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