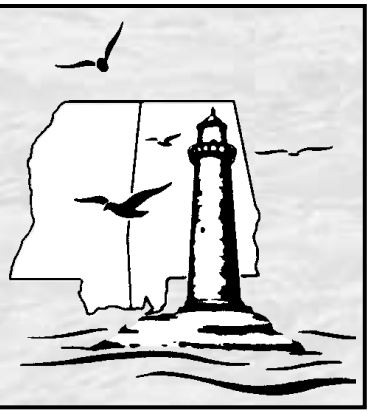
Volume 21, Number 4, 2001

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



$5 Billion Punitive Damages Against Exxon Deemed Excessive

In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001).

Jason Dare, 2L

Following the guidance of recent Supreme Court cases, the Ninth Circuit has ruled that $5 billion in punitive damages levied against Exxon for the 1989 *Valdez* oil spill was unconstitutionally excessive. The court noted that while punitive damages were deemed appropriate, due to the company's reckless conduct in giving command of an oil tanker to a known alcoholic, the $5 billion amount awarded was unjust. The court explained that it was not a fair apportionment of Exxon's reprehensible conduct, was excessively greater than the compensatory damages awarded by the jury, and was excessively greater than other fines for similar misconduct.

Background

During the evening of March 24, 1989, an inebriated Captain Joseph Hazelwood boarded the 900-foot oil tanker *Exxon Valdez* and embarked on a now infamous journey into Prince William Sound. The tanker headed out of port, toward a difficult turn at Busby Island, and Hazelwood instructed a third mate to turn the ship west once the Island's navigation light was visible. Two minutes before the turn commenced, Hazelwood, the only person aboard the vessel with a special license required to navigate that part of Prince William Sound, exited the bridge and went to his cabin in order to do paperwork. Moments later, the *Valdez*'s hull was ripped open by Bligh Reef and 11 million gallons of oil were deposited into Prince William Sound.

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Status of Endangered Salmon Challenged in Northwest

Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or. 2001).

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

In September of 2001, Judge Michael Hogan of the U.S. District Court of Oregon, issued a controversial decision in *Alsea Valley Alliance v. Evans* declaring the National Marine Fisheries Service's (NMFS) listing of coho salmon as arbitrary and capricious. According to Hogan, the NMFS violated federal law when the agency counted hatchery-born fish for the purpose of designating populations of salmon that needed protection but failed to extend federal protection to those hatchery fish. While the ruling has been stayed by the Ninth Circuit until an appeal can be heard, the decision has potentially wide-ranging application and complicates a struggle between improving the condition of wild salmon stocks and providing hatchery-bred fish for severely depleted salmon runs.

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Alabama Supreme Court Upholds Storm Water Act

Densmore v. Jefferson County, 2001 Ala. LEXIS 365 (Sept. 21, 2001).

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

Last September, the Alabama Supreme Court upheld the constitutionality of the state's Storm Water Act, the statute created to supplement the authority of counties and municipalities to enable them to implement storm water laws.[1] In upholding the Act, the court found that it is a validly-created law and provides for a valid funding mechanism through its fee system.

Background

Storm water discharges result from runoff caused by rainfall which flows over land and is not absorbed into the soil. Uncontrolled storm water discharges can severely impact water quality, especially in the early part of a runoff event when pollutant concentrations are high. Subsequent to the 1972 enactment of the Clean Water Act, the Environmental Protection Agency (EPA) resisted applying permitting requirements to storm water discharges because the application of the program would potentially require the issuance of millions of additional permits.[2] Congress resolved the issue in the 1987 amendments to the Clean Water Act which confirmed that "storm water" discharges are encompassed by the federal permitting program. However, because of the challenges posed by including such discharges, Congress and the EPA embarked on a phased approach to allow the agency and the states to first focus their attention on the most serious storm water discharges.[3]

In an effort to comply with this federal process, the Alabama legislature adopted the Storm Water Act "to assist the state in its implementation of the storm water laws, and to supplement the authority of the governing bodies of all the counties and municipalities in the state to enable them to implement the storm water laws."[4] The statute also authorized certain governing bodies to establish procedures to carry out the storm water laws and to determine how to fund the operations of the program. In 1997, Jefferson County took action. The county joined twenty-three municipalities located with the county to form the Storm Water Management Authority and, within a few months, the County Commission approved an ordinance authorizing fees ranging from $5 to $15 to pay for the program.[5] The next year, this class action suit was filed challenging the constitutionality of the Storm Water Act and the fee imposed by the ordinance.

Constitutional Challenge

The plaintiffs, primarily property owners, argued that the Storm Water Act had not been properly adopted by the Alabama legislature, claiming that the statute was a "local law" instead of a "general law." Under Alabama law, a general law is one which "in its terms and effect, applies either to the whole state or to one or more municipalities of the state less than the whole in a class."[6] A local law is one which is not general in its scope and does not apply to an individual, association or corporation. The significance of claiming that the Storm Water Act is general law lies in the requirements for passing a local law: to adopt a local law, the governing body must provide public notice which was not provided for the Storm Water Act.

The court ultimately deferred to the justification of the trail court that any constitutional infirmities in the adoption of the Act were cured by its codification as part of the Code of Alabama. Because the legislature adopted the Act as part of the state code, the court refused to define the Act as either a local or general law and, instead, held it constitutionally valid.

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.

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City's Riparian Rights Stem From Public Street

City of Orange Beach v. Benjamin, 2001 Ala. LEXIS 409 (Ala. Nov. 9, 2001).

Jason Dare, 2L

According to the Supreme Court of Alabama, the City of Orange Beach lawfully obtained a fee simple property interest in the land adjacent to Terry Cove in order to build a street, thereby giving the city riparian rights in the navigable waterway. Pursuant to its riparian rights, the city was allowed to prevent a couple from using a pier they built on the cove, despite the fact the couple received permission from the city to build it.

City of Orange Beach v. Benjamin prevents riparian landowners from building piers such as this one if a city street lies between their property and the water.

Background

Gulf Drive is a street located between William and Margaret Benjamin's property and Terry Cove, a navigable waterway off the coast of Orange Beach, Alabama. Gulf Drive was dedicated in fee simple to the City of Orange beach according to statute and runs parallel to and along the water's edge.[1] In 1994, believing that they maintained riparian rights even though a street separated their property from the water, the Benjamins sought, and received, a permit to construct a pier. The building inspector, believing that Orange Beach merely had jurisdiction over Gulf Drive and not the water of the cove, issued the permit. Accordingly, the Benjamins constructed the pier.

Orange Beach filed a complaint with the Baldwin Circuit Court seeking a permanent injunction prohibiting the Benjamins from accessing the pier, pursuant to the city's alleged riparian rights over the water. The lower court ruled in favor of the Benjamins, and the city appealed to the Supreme Court of Alabama.

Challenge to Riparian Rights

A riparian property owner, one who possesses property adjoining an ocean or other saltwater body generally has the right to access navigable water in front of his or her property and has the right to wharf out into that water. [2] Therefore, if the court found the Benjamins were riparian owners, they would have the right to construct a pier into Terry Cove. The Supreme Court of Alabama, however, determined that because Gulf Drive had been lawfully dedicated in fee simple to Orange Beach and the waters of Terry Cove abutted Gulf Drive and not the Benjamins property, the City of Orange Beach was the proper riparian owner. As a result, the Court held that the Benjamins "were not entitled to build and should not be permitted to use or maintain a pier extending into those waters."[3]

The Benjamins contended, citing a 1913 Alabama Supreme Court case, that when streets are dedicated to the public, they are done so as an easement, leaving the "ultimate fee" with the abutting landowners.[4] If correct, this would change Orange Beach's property interest in the street and maintain the landowner's riparian rights. The Court rejected this argument because the unambiguous language of the statute that dedicated the land to Orange Beach clearly provided for "a conveyance in fee simple."[5] When the language of a statute, according to the Court, has a "commonly understood meaning," a court should not interpret the statute in any other way.[6]

Equitable Estoppel Argument

The Benjamins also alleged that because the city's building inspector informed them that Orange Beach had no jurisdiction over Terry Cove and issued a permit to build the pier, the doctrine of equitable estoppel should prevent the city from disclaiming the validity of the permit. Equitable estoppel is a legal doctrine that bars one party from inducing another into action through false information. The doctrine, however, will only apply to states in extreme situations and will not prevent "the correction . . . of a mistake of law."[7] Because the building inspector's assertion to the Benjamins was a "misstatement of law," the Supreme Court of Alabama held that Orange Beach should be able to cure the mistake. Therefore, the Court rejected the Benjamin's equitable estoppel argument.

Latest Challenge to NMFS Summer Flounder Quota Fails

North Carolina Fisheries Ass'n. v. Evans, 172 F. Supp. 2d 792 (E.D. Va. 2001).

Sarah Elizabeth Gardner, 2L

In the latest challenge to the National Marine Fisheries Service (NMFS) summer flounder quota, Virginia District Court Judge Doumar found that the challenges to the regulations implementing the fishery management plan (FMP) were untimely and that the agency did not violate the Magnuson Act when it set the quota specifications.

Background

The Magnuson Act created eight regional fishery management councils whose main responsibility includes developing an FMP, setting out the rules for each fishery to meet the national conservation and management standards imposed by the Act. The eastern seaboard states' governments, in response, established the Atlantic States Marine Fisheries Commission (Commission) to monitor fisheries in state controlled waters (from the coast line to three miles out). Congress then amended the act in 1996 with the Sustainable Fisheries Act (SFA) to address the problem of stock conservation, providing conservation efforts be allocated fairly and equitably between fishing sectors. The SFA gave the Secretary the responsibility of ensuring that the FMPs submitted by the councils complied with not only the previous standards imposed by the Magnuson Act but also with the new SFA equality provisions.

As revised by the Magnuson Act, the NMFS and the Commission developed and implemented an FMP for summer flounder. The NMFS then passed Amendment 2 to the FMP, establishing a rebuilding schedule for the stock. This amendment required decreases in the fishing mortality rate each year until the fishing mortality rate associated with the maximum yield per recruit was achieved. It also established annual coast wide quota procedures, designating the quota split between commercial and recreational fisheries to be 60/40, basing the allotments on historical percentages caught by the two sectors. Amendment 2 required an overage determination on a state-by-state basis, maintaining that the following year's quota for that state be reduced by the previous year's overage.

On January 29, 2001, the Secretary of Commerce issued an emergency rule setting the 2001 summer flounder quotas and on March 23, 2001, the Secretar issued his final rule. On April 20, 2001, both North Carolina commercial fisherman and the North Carolina Fisheries Association filed suit against the Secretary, challenging the summer flounder quota specifications set by the NMFS. The District Court ruled that the challenges against the summer flounder FMP were untimely and the annual quota specification was not in violation of the Magnuson Act.

Time-Barred Challenges

The plaintiffs first claimed the NMFS did not publish the quotas within a reasonable time, keeping them from being able to determine how to operate their businesses and allocate their fishing efforts for the 2001 season. The District Court quickly disposed of this issue, ruling that the quota for 2001 had been published in a reasonable time and therefore did not need to be addressed.

The plaintiffs also claimed that the system used by the NMFS for determining overages was unfair, penalizing the commercial fishermen twice and only penalizing the recreational fishermen once. The plaintiffs explained that if the NMFS finds an overage, caused by either commercial or recreational fishermen, the overall quota for the next year is reduced, penalizing both sectors alike. However, any overage found to be caused directly by a commercial fisherman reduces his total allowable landings, requiring a "pay back" by reducing his allotment for the following year. Recreational fishermen are not individually penalized in this way. The NMFS countered that the challenges to these regulations were time-barred because the Magnuson Act requires that such claims be brought within thirty days of promulgation in the Federal Register.[1] The regulations related to overages stem from Amendment 2, promulgated on August 6, 1992. The Court found the plaintiffs' challenge was not predicated on the quota decisions made in 2001 but was a challenge to the 1992 implementing regulations. Therefore, any challenges to the regulations were "barred by the 30-day statute of limitations."[2]

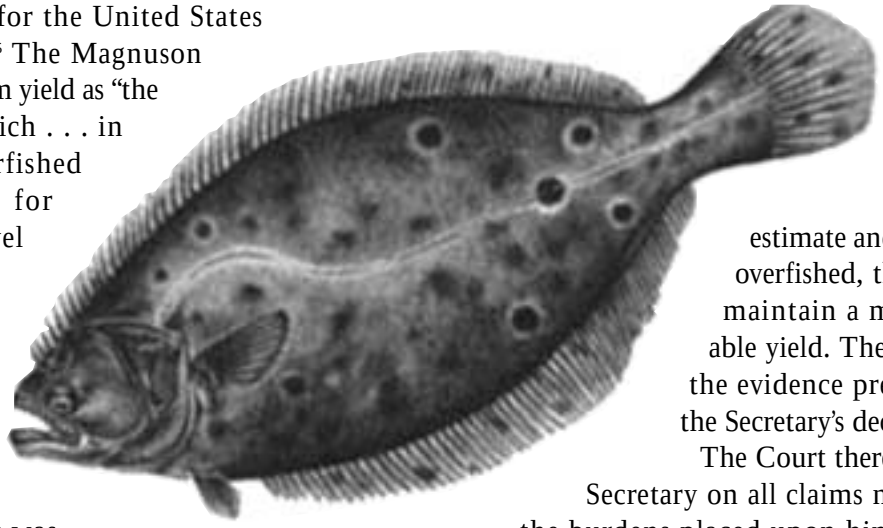
The plaintiffs next claimed the monitoring measures employed by the NMFS were inequitable and unfair.[3] The Court found that neither the Secretary's emergency rule nor his final rule altered the Amendment 2 procedures with respect to the monitoring and overage measures used for both fisheries. Therefore, the Court concluded the challenges were also time-barred because

they were not filed pursuant to the 30-day statute of limitations.[4]

National Standard Challenges

The plaintiffs further claimed that the Secretary violated National Standard One of the Magnuson Act on two grounds: (1) the NMFS reduced the optimum yield for both commercial and recreational fisheries by not imposing consequences on recreational fisherman for quota violations and (2) the NMFS set quota levels below the overfishing threshold established in the FMP. National Standard One requires that "conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States Fishing Industry."[5] The Magnuson Act defines optimum yield as "the amount of fish which . . . in the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery."[6] The Court noted that the first argument was identical to the issue in *North Carolina Fisheries Ass'n. Inc. v. Daley*, which was rejected by the District Court in 1997.[7] In that case, Judge Doumar explained that the determination of the optimum yield was an ongoing process. Therefore, this Court found that "overages in a particular segment of the fishery from year to year do not preclude attainment of optimum yield."[8] The Court further found that the NMFS target for 2001 established a quota lower than the one established by the FMP. However, the Court found that the significantly decreased target biomass was temporary and in response to the District of Columbia Circuit's ruling in *Natural Resources Defense Council v. Daley*.[9] The *Daley* court required the NMFS to set the 2001 quota at such a level as to achieve the target biomass that would have been reached had the 1999 and 2000 targets been met. Therefore, the Court found this lower fishing mortality rate did not violate National Standard One.

The plaintiffs' last contention was that the March 23, 2001 final rule did not comply with National Standard Two which requires the best scientific evidence available be used in the establishment of conservation and management measures. They claimed that the lower mortality rate and the NMFS conclusion that the fishery was overfished was not supported by scientific evidence. The Secretary responded that he based his decisions upon the information he had at the time of the FMP preparation and regulation's implementation, in accordance with the agency's national standard guidelines.[10] The evidence showed that the NMFS used the proper calculation to indicate the threshold below which the stock is deemed to be overfished. According to the January 1, 2000 estimate of biomass, the NMFS found the stock remained overfished. The evidence also showed that even if the NMFS erred in its estimate and the stock was not overfished, the stock could not maintain a maximum sustainable yield. The Court found that the evidence presented supported the Secretary's decisions.[11]



The Court therefore found for the Secretary on all claims noting that he met the burdens placed upon him under the Magnuson Act and its implementing regulations. The Court also noted that they could not say that the Secretary's decisions "were unreasonable or devoid of justification."[12]

ENDNOTES

1. 16 U.S.C. § 1802(28) (2001).
2. *North Carolina Fisheries Ass'n Inc. v. Evans*, 172 F. Supp. 2d 792, 798-99 (E.D. Va. 2001).
3. 16 U.S.C. §§ 303-304 (2001).
4. *Id.* at § 1855(f).
5. *Id.* at § 1851(a)(1).
6. *Id.* at § 1802(28).
7. *North Carolina Fisheries Ass'n. Inc. v. Daley*, 16 F. Supp. 2d 647 (E.D. Va. 1997).
8. *Evans*, 172 F. Supp. 2d at 800.
9. *Natural Resources Defense Council v. Daley*, 209 F.3d 747 (D.C. Cir. 2000).
10. 50 C.F.R. § 305.315(b)(2) (2000).
11. *Evans.* at 803.
12. *Id.*

Exxon, from page 1

Following the wreck, Exxon spent an estimated $2.1 billion removing oil from the water and surrounding shorelines. It was fined $125 million for environmental crimes and was ordered to pay $900 million by the State of Alaska and the U.S. for restoration of the natural environment, pursuant to the Clean Water Act. Furthermore, Exxon paid $300 million in out-of-court settlements to entities whose economic interests were damaged by the spill. Added to the approximately $46 million value of the vessel and cargo lost in the wreck, Exxon spent over $3.8 billion on the spill before the commencement of this case. However, the prior settlements and environmental damage awards failed to compensate the area's commercial fishing industry for damages it sustained, leading commercial fishermen to file this suit.

The action was brought before the U.S. District Court for the District of Alaska, which created a multi-class action suit consisting of a compensatory damages class, who could receive actual damages for proven injury or loss, and a punitive damages class, whose damages were awarded to deter the defendant's reckless conduct. The district court noted that the punitive damages class was mandatory in order to avoid future punitive damage litigations by commercial fishermen and to allow the jury to include all punitive damages it considered proper. In order to simplify the case for the jury, the court tried it in three phases. During phase one, Hazelwood's actions were deemed reckless, a requirement for punitive damages, because he commanded the vessel while "so drunk that a non-alcoholic would have passed out,"[1] increased the ship's speed, by engaging its autopilot, while traveling towards a known reef, and left a third mate with the tricky task of maneuvering the vessel away from the reef. Furthermore, the jury viewed Exxon's actions as reckless in phase one because of evidence that the company knew Hazelwood dropped out of meetings for alcoholism and drank before taking command of its vessel. Phase two of the trial consisted of the jury awarding $287 million in compensatory damages to the commercial fishermen. Previous settlements and other payments by Exxon prior to this case were deducted from the jury total by the district court, thus allowing for $19.6 million in compensatory damages. Finally, jury rulings from phase three provided that Hazelwood owed $5,000 in punitive damages and Exxon owed $5 billion in punitive damages, which "at the time . . . was the largest punitive damages award in American history."[2]

. . . even though maritime law typically forbids punitive damages, defendants such as Exxon may be subject to them because their conduct was found to be willful and wanton.

Proper Review of Punitive Damages

Exxon appealed to the Ninth Circuit and claimed that punitive damages were not appropriate in this case and that, even if the punitive damages were appropriate, the amount awarded was unconstitutionally excessive.[3] In its claim that punitive damages were not appropriate, Exxon contended that maritime law traditionally prohibits punitive damages in general, the legal doctrine of *res judicata* bars punitive damages in this case, and the jury lacked sufficient evidence to award punitive damages.

First, the Ninth Circuit noted that even though maritime law typically forbids punitive damages, defendants such as Exxon may be subject to them because their conduct was found to be willful and wanton. Although the State of Alaska and the U.S. previously sued Exxon for damage to the environment, *res judicata*, the legal doctrine that provides that parties cannot litigate a particular issue twice, did not prevent the claimants' present suit. According to the Ninth Circuit, this suit differed from the previous litigation because it involved commercial fishing, rather than environmental, damages. Finally, the court decided that substantial evidence existed to support the jury findings in this case, affirming that punitive damages were available to the commercial fishermen and were not barred by other laws or legal doctrines.

Exxon next argued that, even if punitive damages were appropriate, the $5 billion amount calculated by the jury was unconstitutionally excessive. Ordinarily, appellate courts show great deference toward jury decisions concerning damages. The Supreme Court, however, recently decided that appellate review of punitive damages constitutionally requires stricter scrutiny. In *BMW v. Gore*, the Supreme Court handed down three factors courts should consider when analyzing punitive damages. The three "guideposts" are: "(1) the degree of reprehensibility of the person's conduct; (2) the disparity between

the harm . . . suffered by the victim and his punitive damages award; and (3) the difference between the punitive damage award and the civil penalties . . . imposed in comparable cases."[4] In *Cooper Industries v. Leatherman Tool Group*, the Supreme Court further explained that "courts of appeal should apply a de novo standard," literally meaning to try the case anew, when reviewing a district court's punitive damages determination.[5] Because the *BMW* and the *Leatherman Tool* cases were decided after the district court's decision in the present action, the district court was not able to apply the appropriate review standards. Therefore, for the following reasons, the Ninth Circuit vacated the $5 billion punitive damages award against Exxon, and remanded the case "so that the district court could set a lower amount in light of [these] standards."[6]

Reprehensible Conduct

Reprehensibility, according to the Supreme Court, is analogous to criminal cases in that "nonviolent crimes are less serious than crimes marked by violence."[7] The Ninth Circuit agreed with the plaintiff's assertion that Exxon exhibited reprehensible conduct by instructing an oil tanker to navigate the dangerous waters of Prince William Sound and by giving control over the navigational tasks to an alcoholic. However, the Ninth Circuit noted that Exxon had not intentionally deposited 11 million gallons of oil into Prince William Sound and had not tried to fraudulently conceal the accident. The court distinguished the damages to the fisheries from damage to the environment, finding that the majority of damages sustained were to the environment. In addition, inequality between Hazelwood's $5,000 in punitive damages and Exxon's $5 billion in punitive damages, despite Hazelwood being the direct cause of the accident, made the court suspicious as to whether the jury correctly evaluated reprehensibility. Finally, the court noted that reprehensibility should be discounted when the defendant promptly attempts to mitigate the harm.

Relation to Compensatory Damages

The next step in evaluating a punitive damage award is to determine whether the punitive damages are "reasonably related" to compensatory damages.[8] The court pointed to a Supreme Court case that a 4 to 1 punitive damages to compensatory damages ratio was "close to the line" of excessiveness.[9] In the present case, the jury awarded $5 billion in punitive damages and $287 million in compensatory damages, a ratio of 17 to 1. The district court established that compensatory damages could have been as high as $418 million, giving a ratio of approximately 12 to 1.

Workers transporting captured, oiled wildlife to a rehabilitation center for cleaning after the Valdez *spill.* *--Photo courtesy of NOAA*

Either way, the two ratios greatly surpassed the borderline 4 to 1 ratio cited by the Supreme Court. Moreover, in calculating the harm done to the plaintiff, the Ninth Circuit refused to add Exxon's cleanup costs to the compensatory damages award. Even though those costs were indicative of the harm suffered by the plaintiff, the court found that adding the figures would discourage defendant's voluntary cleanup efforts and would overly deter the harmful action.

Relation to Fines for Similar Conduct

The final step in appellate review of punitive damages is to compare the punitive damages awarded to penalties or fines for similar actions. For this step, the Ninth Circuit listed various comparable penalties that could be levied against Exxon. First, in some cases, federal law provides that fines of not more than twice the pecuniary loss of victims of the misconduct should be awarded.[10] The district court determined the plaintiffs in question suffered up to $516.7 million in pecuniary loss, which doubled equals $1.03 billion, or 1/5 of the punitive damages. Second, the Trans-Alaska Pipeline Act holds a defendant strictly liable for any discharge of oil that has traveled through the trans-Alaskan pipeline, and fines the individual no more than $100 million per incident, or 1/50 of the punitive damages.[11] Finally, the Oil Pollution Act, enacted in response to the *Exxon Valdez* spill, calls for a fine not in excess of $3,000 per barrel of oil discharged.[12] The *Exxon Valdez* spilled the equivalent of 261,905 barrels of oil, resulting in a necessary fine of $786 million, or 1/6 of the punitive damages. Hence, the fines and penalties from the District of Alaska were far from an optimal one-to-one ratio to punitive damages for oil spills mentioned by the Ninth Circuit.

Following its review of the $5 billion punitive damage award by using the 3-prong test laid out by the

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The NMFS Listing & Policies

When the Endangered Species Act (ESA) was adopted in 1973, it provided a program for the conservation of endangered and threatened species, recognizing that conservation of listed species may be facilitated by artificial means such as hatchery-spawned or hatchery-raised fish.[1] When Congress amended the ESA in 1978, it redefined "species" as "any subspecies of fish . . . and any distinct population segment of any species . . . which interbreeds when mature."[2] Because Congress did not define distinct population segment (DPS), the NMFS introduced the term "evolutionary significant unit" (ESU) to interpret DPS under the statute. The agency guidance, issued in 1991, explained that "a stock of pacific salmon will be considered a distinct population, and hence a 'species' under the ESA, if it represents an Evolutionary Significant Unit of the biological species."[3] For a stock to be considered an ESU, it must (1) be substantially reproductively isolated from other conspecific population units; and (2) represent an important component in the evolutionary legacy of the species.[4]

Two years after the ESU policy, the agency issued its "Hatchery Policy" stating that the ESA requires the agency to focus its recovery efforts on "natural populations" and that "although hatchery populations may be included as part of a listed species, [the] NMFS policy is that it should be done sparingly because artificial propagation could pose risks to natural populations."[5] The NMFS includes hatchery fish in the listed species if they are "essential for recovery."[6]

Though the agency initially decided to list six ESUs of coho salmon as threatened, it rescinded this decision based upon conservation measures proposed in the Oregon Coastal Salmon Restoration Initiative, a state sponsored plan based on coordinated federal and state agency programs, community-based action and monitoring. An environmental group, the Oregon Natural Resources Council, challenged the failure to list and the agency ultimately listed the Oregon Coast coho ESU as threatened pursuant to court order.[7] Within this ESU, the NMFS listed all "naturally spawned" coho inhabiting streams between Cape Blanco and the Columbia River. Even though nine Oregon hatchery populations were part of this ESU as natural populations, the NMFS did not include the hatchery coho because they were not deemed "essential to recovery."[8]

The plaintiff property rights group, Alsea Valley Alliance, challenged this action as illegal because the ESA does not permit listing distinctions below that of species, subspecies or a distinct population segment of a species. While acknowledging that the agency was entitled to deference, the court found that the NMFS acted arbitrarily because "the NMFS decision defines the ESU and thus DPS, but then takes an additional step, beyond its definition of an ESU, to eliminate hatchery coho from its listing decision."[9] The court upheld the agency's authority to create the ESU concept and establish the factors used to define it (geography and genetics) but held that "once [the] NMFS determined that hatchery-spawned coho and naturally-spawned coho were part of the same [ESU], the listing decision should have been made without further distinctions between members of the same ESU."[10] The court seemed uneasy that the NMFS listing decision would create the situation of two genetically identical coho salmon swimming side by side in the same stream, but only one receiving ESA protection[11] and found that "genetics cannot, by itself, justify a listing distinction that runs contrary to the definition of a distinct population segment."[12]

Statute of Limitations Challenge

The agency also lost on its claim that the plaintiff's challenges were time barred by federal law which requires

Salmon

November 20, 1991
NMFS issues "Policy on Applying the Definition of Species Under the ESA to Pacific Salmon," introducing the term Evolutionary Significant Unit.

April 5, 1993
NMFS issues "Interim Policy on Artificial Propagation of Pacific Salmon Under the Endangered Species Act," known as the "Hatchery Policy," stating that hatchery populations may be included as part of a listed species, but sparingly because it could pose risks to natural populations.

August 10, 1998
NMFS lists the Oregon Coast ESU coho salmon as threatened under the ESA.

September 10, 2001
Judge Hogan decides *Alsea Valley Alliance v. Evans*, determining that NMFS improperly excluded hatchery salmon from its listing decision.

cases to be filed within six years after the right of action exists.[13] The NMFS claimed that the challenges are to the ESU policy, adopted in 1991, and the Hatchery Policy, adopted in April 1993, and therefore time barred by the six year statute of limitations. The court responded that the challenges were to the more recent listing decision, not the earlier 1991 and 1993 policies, because the earlier policies did not provide a final agency decision regarding specific salmon in specific geographic regions.[14]

Response to the Hogan Decision

As one commentator noted, Judge Hogan's ruling "complicates an already-complex issue."[15] The potential ramifications of the case are to change a popular federal policy of protecting wild fish while allowing harvest of hatchery fish. Because the majority of adult coho that return to Oregon coastal rivers spawn in hatcheries (a situation mirrored by most of the twelve threatened and endangered runs in the Columbia basin), counting hatchery fish could also compel the government to delist twenty of twenty-six endangered West Coast salmon species, even though the wild population may be on the brink of extinction. Government biologists worry that the biological differences between wild and hatchery fish, such as reproductive success, the likelihood of returning as a spawning adult, ability to avoid predation, and ability to deal with environmental changes, of which wild fish are better adapted, will threaten the long-term survival of West Coast salmon.

A few weeks after the decision, the NMFS received its first petition to remove salmon and steelhead populations from the endangered and threatened species lists. In the following months, land use practices, previously unauthorized or postponed because of ESA listings, were resumed. The agency was urged to appeal the decision but the agency and Bush administration declined. Instead, the agency began a review of its policy of including hatchery-bred salmon as part of listing populations and a review of the status of 25 ESUs currently listed as threatened or endangered.[16]

Environmental and fishing groups took up where the NMFS left off and filed an appeal with the Ninth Circuit Court of Appeals.[17] The Ninth Circuit stayed the decision, effectively replacing the listings and land use protections, until it can hear the case this winter. *WATER LOG* will report on the decision in an upcoming issue.

ENDNOTES

1. 16 U.S.C. § 1531 (b) (2002).
2. 16 U.S.C. § 1532 (16) (2002).
3. 56 Fed. Reg. 58,613, at 58,618 (Nov. 20, 1991).
4. *Id.*
5. 58 Fed. Reg. 17,573, at 17, 575 (Apr. 5, 1993).
6. The NMFS does not define "essential to recovery" but gives examples of what is essential including a natural population facing a "high, short-term risk of extinction, or [a] hatchery population [that] is believed to contain a substantial proportion of the genetic diversity remaining in the species." *Id.*
7. 63 Fed. Reg. 42,587 (Aug. 10, 1998).
8. 63 Fed. Reg. at 42,589.
9. 161 F. Supp. 2d at 1161.
10. *Id.* at 1162.
11. *Id.* at 1163.
12. *Id.*
13. 28 U.S.C. § 2401 (a) (2002) (providing that "every civil action against the U.S. shall be barred unless the complaint is filed within six years after the right of action first accrues").
14. 161 F. Supp. 2d at 1161.
15. Erik Robinson, *Ruling on Hatchery Fish Classification Draws Strong Reactions*, THE COLUMBIAN, Oct. 4, 2001, at A1.
16. 67 Fed. Reg. 6,215 (Feb. 11, 2002).
17. These groups include the Oregon Natural Resources Council, Pacific Rivers Council, Pacific Coast Federation of Fishermen's Ass'n, Audubon Society of Portland, Coast Range Ass'n, Institute for Fisheries Resources and the Sierra Club. Visit http://www.earthjustice.org/urgent/display.html?ID=87 .

Timeline

September 28, 2001
NMFS receives its first post-Hogan petition to remove seven populations of Columbia Basin salmon and steelhead from endangered and threatened species lists.

September/October/November 2001
After the Hogan decision, actions previously postponed due to coho's protected status resume such as federal timber sales, road-building, and culvert repairs, without having to consider effects on salmon. However, state protections in Oregon remain in place.

November 9, 2001
NMFS announces that it will not appeal Hogan's decision but will undertake a 10-month review of its policy of including hatchery-bred salmon as part of listed populations.

December 14, 2001
Ninth Circuit stays decision pending appeal by fisheries and environmental groups, effectively reapplying federal land use protections.

WTO Appellate Body Upholds U.S. Ban on Shrimp Imports

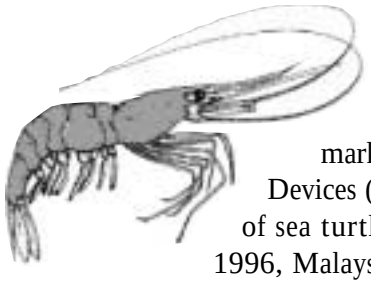
Appellate Body Report, U.S. – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, GATT Doc. WT/DS58/AB/RW (Oct. 22, 2001).

Yoshiyuki Takamatsu, 3L

In October, the World Trade Organization (WTO) held that the U.S. has brought its import prohibition of certain shrimp and shrimp products, aimed at protecting sea turtles worldwide, into conformity with WTO rules. In affirming the findings of a WTO dispute settlement panel (panel), the WTO Appellate Body (AB) turned down a Malaysian complaint challenging that the U.S. failed to comply with the recommendations and rulings of the earlier AB decisions requiring the U.S. to alter its shrimp import requirements.

Background

The U.S. battle against shrimp exporting countries that do not require specific protection for sea turtles has a long history. To protect endangered sea turtles, in 1989, the U.S. first restricted the import of shrimp that was harvested with fishing technology that adversely affected sea turtles.[1] The U.S. had required shrimp exporting countries wishing to sell in U.S. market to use Turtle Excluder Devices (TEDs) to reduce deaths of sea turtles in shrimp trawls. In 1996, Malaysia, India, Thailand and Pakistan challenged the U.S. requirements under the WTO rules resulting in a 1998 AB ruling that the U.S. violated the rules and subsequent U.S. agreement to comply. In 2000, Malaysia requested the WTO to examine the U.S. compliance. When a WTO panel found, in June 2001, that the U.S. implementation was fully consistent with WTO rules and complied with the earlier rulings of the AB, Malaysia appealed to the AB.



Findings of Appellate Body

The WTO recognizes the importance of sustainable development and environmental protection[2] and allows members to take trade-related measures to conserve exhaustible natural resources as long as the measures do not constitute arbitrary or unjustifiable discrimination.[3] In the 1998 decision, the AB found that the U.S. unjustifiably discriminated against WTO members by negotiating a multilateral agreement in one region (the Inter-American Convention) while imposing a unilateral import ban on the rest. To comply with the ruling, the U.S. launched a negotiation process in the Indian Ocean and the South-East Asia region, actively participating in and financially supporting the negotiations. In this 2001 appeal, the AB held that in light of the serious, good faith efforts of the U.S. to negotiate the multilateral agreement, the U.S. was no longer discriminating against the WTO members.

In 1998, the AB found that the U.S. had violated the WTO rule by requiring exporting countries a single, rigid and unbending requirement to adopt essentially the same policies and enforcement practices as those applied to domestic shrimp trawlers. In implementing the ruling, the U.S. amended its certification process so that exporting countries that implement and enforce a comparatively effective regulatory program to protect sea turtles without the use of TEDs may still be certified. In this appeal, the AB found that, by changing the requirements, the U.S. gave sufficient latitude to the exporting countries to adopt a regulatory program that is suitable to the specific conditions prevailing in their territory. Accordingly, the AB held that the new, flexible requirements do not constitute arbitrary or unjustifiable discrimination. In finding the U.S. measure consistent with the WTO rules, the decision is being heralded by conservation organizations for highlighting the importance of sustainable development and conserving marine resources.

ENDNOTES

1. 16 U.S.C. § 1537 (2001), amended by Pub. L. No. 101-162, § 609 (1989).
2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments–Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125, 1144 (1994).
3. General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A- 11, T.I.A.S. 1700, 55 U.N.T.S. 194 (incorporated into at General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments–Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125, 1154 (1994)).

International Court Dismisses Latest Tuna Challenge

Defenders of Wildlife v. Hogarth, 177 F. Supp. 2d 1336 (Ct. Int'l Trade 2001).

Yoshiyuki Takamatsu, 3L

In December 2001, the U.S. Court of International Trade dismissed challenges to the latest actions of the U.S. government in its long effort to protect dolphins endangered as a result of tuna-fishing practices in the Eastern Tropical Pacific Ocean (ETP), stretching from southern California to Peru. After the discovery that yellowfin tuna swim under dolphins in the ETP, the predominant tuna fishing method was to encircle schools of dolphins with a net to capture the tuna below resulting in high dolphin mortality.

In 1990, under the Marine Mammal Protection Act, the U.S. imposed an embargo of tuna on Mexico for failure to meet the U.S. tuna harvesting standards.[1] In the 1990s, the U.S. entered into two international agreements to reduce dolphin mortalities in the ETP: the La Jolla Agreement,[2] a non-binding agreement establishing a schedule to reduce dolphin takes; and the Panama Declaration,[3] a formalization of part of the La Jolla Agreement. In 1997, Congress enacted the International Dolphin Conservation Program Act (IDCPA)[4] to implement these international agreements, and in 2000, the U.S. Department of Commerce implemented the IDCPA by issuing an interim final rule.[5] In April 2000, the U.S. lifted its embargo against Mexico and allowed the import of tuna harvested in the ETP. The Defenders of Wildlife and various other environmental groups sought to invalidate these governmental actions concerning the dolphin conservation program in the ETP. First, the plaintiffs alleged the interim final rule was inadequate to implement, and inconsistent with, the IDCPA. However, the court found the plaintiffs failed to show that the rule contravened the IDCPA. Deferring to the government's greater familiarity with the circumstances surrounding the subjects, the court found the government's interim final rule legal.

The plaintiffs also challenged the rule under the National Environmental Policy Act (NEPA) which requires federal agencies to consider the environmental impact of any major federal action.[6] They contended that the government's application of the NEPA to the interim final rule and related actions was illegal because its environmental assessment was defective, and it failed to complete a required environmental impact statement. The court found that the plaintiffs failed to show the government committed a clear error in complying with the NEPA and dismissed the claims.

Under the IDCPA, the government lifts a tuna embargo if it makes specific positive findings that the country conforms to the U.S. standards.[7] The plaintiffs claimed the government's affirmative findings for Mexico were flawed because Mexico did not meet its international obligations. After carefully reviewing each allegation, the court found many of them without merit and affirmed the government's findings.

ENDNOTES

1. 16 U.S.C. § 1361 (2001).
2. Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean (EPO), June 1992, 1 U.S.T. 230, 33 I.L.M. 936 (1994).
3. Declaration of Panama, Oct. 4, 1995, *reprinted in* 143 Cong. Rec. S379-01 (1997).
4. Pub. L. No. 105-42, 111 Stat. 1122 (1997).
5. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP), 65 Fed. Reg. 30 (Jan. 3, 2000).
6. *See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983).
7. 16 U.S.C. § 1371 (2001).

Fisheries Service Issues Final EFH Rule

In January, the National Marine Fisheries Service (NOAA Fisheries), the federal agency charged with managing the nation's marine fisheries resources, issued its final rule on Essential Fish Habitat (EFH). Congress added the EFH provisions to the Magnuson-Stevens Act in 1996, directing the regional fishery management councils to identify EFH and evaluate adverse effects on it. The final rule replaces an interim final rule that has been in effect since January 1998. The final rule clarifies the standards for use in identifying EFH and implementing the EFH review and consultation procedures, specifically summarizing the five approaches for conducting EFH consultation. The rule can be found at 67 Federal Register 2,343 (January 17, 2002) or on-line at http://www.nmfs.noaa.gov/habitat/habitatprotection/efhfinalrule.pdf .

2001 Federal Legislative Update

Kristen M. Fletcher, J.D., LL.M.
Roy A. Nowell, Jr.

The following is a summary of federal legislation related to coastal, fisheries, water, and natural resources enacted during the first session of the 107th Congress.

107 Public Law 13 - Act to Authorize Funds for Endangered Species Act Consultation (H.R. 581)

Authorizes the Secretaries of the Interior and Agriculture to use wildland fire management funds (appropriated in the Department of the Interior and Related Agencies Appropriations Act, 2001) to reimburse the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for the costs of their compliance with Endangered Species Act consultation requirements.

107 Public Law 20 - 2001 Supplemental Appropriations Act (H.R. 2216)

Title I - National Security Matters

Chapter 2: Makes supplemental appropriations for the Department of Energy for defense-related environmental restoration and waste management.

Title II - Other Supplemental Appropriations

Chapter 1: Appropriates for the (1) enforcement and enhancement of activities under the Animal Welfare Act; (2) the Animal and Plant Health Inspection Service; and (3) Natural Resources Conservation Service, to repair damages to waterways and watersheds resulting from natural disasters. Rescinds specified funds appropriated to the Farm Service Agency for the Agricultural Conservation Program.

§§ 2104, 2107: Provide amounts for water conservation assistance to producers in the Klamath Basin (Oregon) and in the Yakima Basin (Washington).

Chapter 2: Amends a prior appropriation for the construction of a research center at the ACE Basin National Estuarine Research Reserve, making $3 million available for construction and $5 million for land acquisition.

§ 2201: Revises the date for the adoption of final regulations concerning permits under the fishing capacity reduction program from May 1, 2001, to as soon as practicable and provides that interim Bering Sea crab fishery certificates issued after December 1, 2000 shall remain valid until the Secretary implements final regulations.

§ 2202: Amends the American Fisheries Act's requirements for commercial lenders, mortgage trustees, and fisheries endorsements, including the revision of methods by which commercial fishing vessel lenders demonstrate citizenship status.

Chapter 11: Authorizes the EPA to award grants for work on New York watersheds.

107 Public Law 26 - Act to Reauthorize the Tropical Forest Conservation Act of 1998 (H.R. 2131)

Amends the Tropical Forest Conservation Act to authorize appropriations through FY 2004 for the reduction of debt owed by a developing country with a tropical forest, if the debt was a result of loans made or credits extended by the U.S. The act also revises language to require "investment reforms" by the country to be eligible for the debt reduction.

107 Public Law 63 - Department of the Interior and Related Agencies Appropriations Act, 2002 (H.R. 2217)

Provides funds for the following activities.

- Landowner Incentive Program - Provides for private conservation efforts funded through the Land and Water Conservation Fund for the protection and management of habitat to benefit federally listed, proposed, or candidate species, or other at-risk species on private lands;
- Offshore Oil and Gas Leasing - Allows activities only within the area of Sale 181 in the eastern Gulf of Mexico;
- Glacier Bay National Park Vessels - Directs the National Park Service to complete (by January 1, 2004) an EIS to identify and analyze the possible effects of the 1996 increases in the number of vessel entries issued for Glacier Bay National Park, providing that the number of vessel entries into the Park shall be the same as that in effect during the 2000 calendar year until the Secretary sets levels consistent with the EIS.

107 Public Law 66 - Energy and Water Development Appropriations Act, 2002 (H.R. 2311)

Section 502 Instructs the Secretary of the Army to study and report to Congress on the known and potential environmental effects of oil and gas drilling activity in the Great Lakes, including effects of drilling upon the shorelines and water and prohibits any state or federal permit or lease issuance for new oil and gas slant, directional, or offshore drilling in or under any of the Great Lakes.

107 Public Law 69 - Act to Amend the Reclamation Recreation Management Act of 1992 (H.R. 2925)

Directs the Secretary of the Interior to issue regulations in order to provide for the security of dams, facilities, and resources under the jurisdiction of the Bureau of Reclamation.

107 Public Law 73 - Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002 (H.R. 2620)

Funds the Environmental Protection Agency for fiscal year 2002; in its conference report, it provides $10 million for coastal states to test and monitor the water at local beaches and to notify the public if the water quality is deemed unsafe for swimming, as required by the BEACH Act of 2000.

107 Public Law 91 - Detroit River International Wildlife Refuge Establishment Act (H.R. 1230)

Establishes the nation's first international Wildlife Refuge to protect the remaining high-quality fish and wildlife habitats of the Detroit River and to restore and enhance degraded wildlife habitats associated with the Detroit River. The act calls for assistance with international efforts to conserve, enhance, and restore the native aquatic and terrestrial community characteristics of the Detroit River in the U.S. and Canada, and for partnerships among the U.S. Fish and Wildlife Service, Canadian national and provincial authorities, State and local governments, communities, and conservation organizations. The refuge consists of the lands and waters managed by the Secretary in Michigan within the area extending from the point in Michigan directly across the river from northernmost point of Ojibway Shores to the southern boundary of the Sterling State Park, including the Wyandotte National Wildlife Refuge.

107 Public Law 107 - National Defense Authorization Act for Fiscal Year 2002 (H.R. 1438)

Creates a pilot program for emission reduction incentives by authorizing the Secretary of Defense to prepare a report on the sale of economic incentives for the reduction of emission of air pollutants attributable to military facilities. In addition, the following should be well detailed in the report: number and type of pollutants involved, extent of loss to U.S., extent to which retention of the proceeds of sales provided incentives, and the environmental impact of the program.

Storm Water, from page 2

Storm Water Fees

The Act gave Jefferson County the authority to determine its financial needs to fund the program, including the powers to tax and to pay for such programs. The county, through its ordinance, levied a fee upon each parcel of real property ranging from $5 to $15 per parcel of land. The plaintiffs argued that the storm water fee was an illegal tax because its primary purpose was to raise revenue and the assessment of the tax lacked any relationship between the amount of the storm water fee and the benefit each property owner received from the Storm Water Management Authority.[7] The county countered that the fees collected were a result of complying with the Clean Water Act and that the fees collected were used "exclusively to fund the storm water program mandated by state and federal law."[8]

While Alabama law distinguishes between taxes that are purely revenue measures and fees or charges that are principally regulatory in purpose and effect, the court determined that Jefferson County properly established the fee structure based on requirements from the EPA that the Storm Water Management Authority have a stable funding source, "to make sure that the storm water program would operate without interruption."[9] Furthermore, the court found that Alabama law does not require that fees precisely comport with the benefits provided to property owners. Rather, the court need only find a "substantial indirect benefit" to a property owner to uphold the validity of a fee such as the storm water fee. Relying on its own precedent that found a fee valid when it provided a benefit to the public by reducing pollution, the Alabama Supreme Court upheld the fee structure because it was "based upon the indirect benefit or a public benefit to the persons assessed the fee."[10]

Dissent & the Act's Future

The Supreme Court Chief Justice Moore dissented to the court's decision, possibly paving the way for future challenges to the Storm Water Act. He found that the Act was "clearly and unambiguously a local act, and calling it a 'general act' does not make it one"[11] and raised an issue that had not been raised by the parties to the case. Moore claimed that the Act contains an inherent defect that limits its scope to only Alabama counties containing Class 1 municipalities. Alabama law defines a Class 1 municipality as one with a population of 300,000 inhabitants or more. According to the 1990 and 2000 Federal Censuses, the city of Birmingham had under 300,000 inhabitants. Thus, Moore found that the law currently applies to no county in Alabama. While the majority opinion declined to respond to this issue because the Supreme Court cannot reverse a trial court's judgment on a claim raised for the first time on appeal, the dissent may be forecasting a future challenge to the Act's validity.

ENDNOTES

1. ALA. CODE § 11-89C-1 (2001).
2. *See Hughey v. JMS Dev. Corp.*, 28 F.3d 1523 (11th Cir. 1996).
3. National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, at 47,997 (1990).
4. ALA. CODE § 11-89C-1 (b) (2001).
5. Jefferson County Ordinance No. 97-783 (1997).
6. ALA. CONST. Am. 397.
7. *Densmore v. Jefferson County*, 2001 Ala. LEXIS 365 at *21.
8. *Id.* at *23.
9. *Id.*
10. *Id.* at *28.
11. *Id.* at *31.

Orange Beach, from page 3

Conclusion

A city may attain riparian rights pursuant to a fee simple dedication of a street. Once vested, these rights allow a city to prevent non-riparian owners from taking certain actions in that waterway, such as building a pier. Furthermore, a statement from a city official that the city does not possess these rights will not bar the city from asserting them in the future. For the foregoing reasons, the Supreme Court of Alabama reversed the lower court's ruling that the Benjamins could continue using a pier they built in Terry Cove, and remanded the case for an order consistent with the ruling.

ENDNOTES

1. ALA. CODE § 35-2-51 (2001). The statute states that "the acknowledgment and recording of such plat or map shall be held to be a conveyance in fee simple . . . and the premises intended for any street . . . shall be held in trust for the uses and purposes intended or set forth in such plat or map."
2. *See Dorroh v. McCarthy*, 462 S.E.2d 708, 709-11 (Ga. 1995).
3. *City of Orange Beach v. Benjamin*, 2001 Ala. LEXIS 409, at *4 (Ala. Nov. 9, 2001).
4. *Cloverdale Homes v. Town of Cloverdale*, 62 So. 712, 716 (Ala. 1913).
5. ALA. CODE § 35-2-51 (2001).
6. *Orange Beach*, 2001 Ala. LEXIS 409, at *5.
7. *Id.* at *6 (quoting *First Nat'l Bank v. U.S.*, 176 F. Supp. 768, 772 (M.D. Ala 1959)).

Lagniappe *(a little something extra)*

Around the Gulf . . .

Two significant efforts to improve the state of water quality in the city of Baton Rouge occurred this winter. The Baton Rouge-based tugboat company McKinney Towing, Inc., was charged a $400,000 fine for illegally pumping bilge water into the Mississippi River several times a week from 1995 to 2000, and the company's president received six months of home confinement. In addition, the city settled with the Louisiana and U.S. governments over years of sewage overflows, requiring improvements to municipal sewage treatment and collection systems.

Two of Florida's National Estuarine Research Reserves (NERR) were expanded last fall, adding 90,000 acres of upland and submerged lands to the 20,000 acre Rookery Bay NERR in southwest Florida near Naples and 53,427 acres of uplands to the 247,185 acre Apalachicola NERR in the Florida panhandle.

Two new species were added to the Endangered Species List this December. The Fish and Wildlife Service listed the vermilion darter, a small, bright colored fish only found in Alabama and the Mississippi gopher frog, the nation's rarest amphibian found only at a single site in DeSoto National Forest in Harrison County, Mississippi.

Around the Nation . . .

The Coast Guard issued a final rule on November 2 (which became effective December 3, 2001) to conform regulations governing the operational discharges of oil, garbage record-keeping requirements, and other activities to international maritime pollution standards. The final rule can be viewed at 66 Federal Register 55,566.

In November, the EPA announced its decision to adopt the Arsenic Rule developed during the Clinton Administration, requiring a 10 parts per billion (ppb) standard to be effective in 2006. It is estimated that the EPA received tens of thousands of public comments regarding the standard, many calling for an even lower standard, such as the 5 ppb recommended by the World Health Organization.

The UNESCO World Heritage Committee has inscribed new natural sites and expanded others on the World Heritage List including the naming of the Brazilian Atlantic Islands, which provide breeding and feeding areas for tuna, sharks, sea turtles, and the largest concentration of tropical seabirds in the Western Atlantic Ocean and the expansion of the Galapagos Islands site to include the Galapagos Marine Reserve covering more than 5,000 additional miles.

Australia has listed the whale shark, the world's largest fish, as nationally threatened under its Environment Protection and Biodiversity and Conservation Act. Globally rare, the whale shark grows up to 58 feet long and more than 20 metric tons, and has been proposed to be included in the Convention on International Trade in Endangered Species which would provide monitoring of trade in the sharks and their parts.

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. Graphics by ©Corel Gallery, © Nova Development Corp., and NOAA.

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Exxon, from page 7

Supreme Court, the Ninth Circuit determined that the award was "too high" and "must be reduced" by the district court.[13] Therefore, it vacated the decision and remanded the case back to the district court in order for the award to be lowered in light of these considerations.

ENDNOTES

1. *In re* Exxon Valdez, 270 F.3d 1215, 1236 (9th Cir. 2001).
2. *Id.* at 1238.
3. The punitive damage class also appealed alleging that claims by those who suffered purely economic injury was allowable. Even though economic recovery is typically unavailable in admiralty cases minus a showing of physical harm, the court held that Alaska's statute concerning hazardous substance spills was not pre-empted by maritime law and remanded the case for these claims.
4. 270 F.3d at 1240-41.
5. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1685-86 (2001).
6. 270 F.3d at 1246-47.
7. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996) (quoting *Solem v. Helm*, 463 U.S. 277, 292-93 (1983)).
8. 517 U.S. at 580.
9. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991).
10. 18 U.S.C. § 3571(d) (2001).
11. 43 U.S.C. § 1653(c)(3) (2001).
12. 33 U.S.C. § 1321(b)(7) (2001).
13. 270 F.3d at 1246.

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