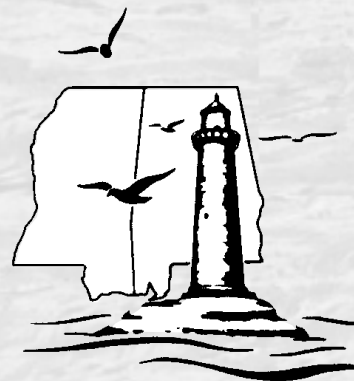


WATER LOG

A Legal Reporter of the Mississippi-Alabama
Sea Grant Consortium



Park Service Determines Stiltsville's Fate

National Parks Conservation Association v. Norton, 324 F.3d 1229 (11th Cir. 2003).

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

The Eleventh Circuit Court of Appeals recently reviewed the National Park Service's actions toward Stiltsville, a collection of structures constructed on stilts located within the boundaries of Biscayne National Park off the southern coast of Key Biscayne, Florida. Though the court directed the National Park Service (Service) to determine a plan of action for Stiltsville by mid-May of this year, it found that the claims against the Service were without merit at this time.

Stiltsville Joins a National Park

The unique history of the stilted buildings off Key Biscayne begins in 1930 with the construction of buildings as weekend homes, restaurants, and nightclubs reaching 27 structures by the 1960s and being dubbed "Stiltsville." Over the years, many structures were destroyed by hurricanes but seven remain. During the 1960s, Florida issued renewable year to year leases to private individuals but replaced these leases with exclusive "Campsite Leases" in 1976, for \$700 per year, that would expire on July 1, 1999. At the expiration of the campsite lease, the structures were to be removed by the lessor.

During this time, the federal government was also taking action in the area to preserve the natural

See Stiltsville, page 13

Position Shift by Foreign Government Does Not Affect Convictions

United States v. McNab, et. al., 324 F.3d 1266 (11th Cir. 2003).

Joseph M. Long, 2L
Stephanie Showalter, J.D., M.S.E.L.

The Eleventh Circuit recently decided an issue of first impression, whether federal courts are bound by a foreign government's post-conviction representations regarding the validity of its laws. This question arose as a result of an *amicus* brief filed by the Honduran Embassy, which contained representations about Honduran law directly conflicting with the Honduran government's original pre-trial representations.

See Honduras, page 11

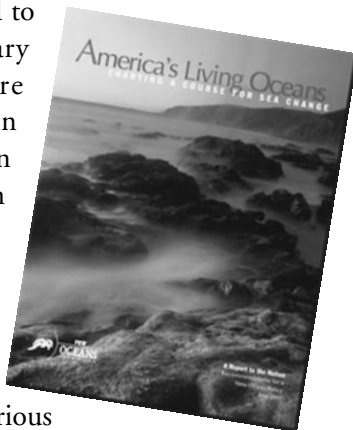
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Pew Oceans Commission Issues Final Report

On June 4, 2003, the Pew Oceans Commission announced the release of "America's Living Oceans: Charting a Course for Sea Change." The independent Commission was formed to identify policies necessary to protect and restore marine living resources in U.S. waters and the ocean and coastal habitats upon which those resources depend. The Report concludes that overfishing, overdevelopment along U.S. coasts, and pollution are the most serious threats to U.S. oceans. Among the many recommendations of the Commission are an immediate overhaul of the U.S. management system to protect ocean ecosystems and restore wildlife, a doubling of the budget for federal ocean research, and a moratorium on the expansion of finfish aquaculture until the promulgation of national standards.

The report may be viewed or downloaded at: www.pewoceans.org.



NOAA & NMFS Plan for Ecosystems & Fisheries

Request for Comments

The National Oceanic and Atmospheric Administration's National Ocean Service (NOS) Draft Strategic Plan is now available for public review and comment. The plan details the five-year strategy of the NOS for the preservation and enhancement of ocean and coastal ecosystems. The plan is available on-line at <http://www.osp.noaa.gov>. The comment period is open until June 21, 2003. Comments can be submitted through the Office of Strategic Planning website or via email at strategic.planning@noaa.gov.

Notice of Public Meetings

The National Marine Fisheries Service recently scheduled eight regional constituent meetings to obtain public input regarding the effectiveness of the agency and its management of living marine resources. The meetings began in early June and will continue through September. The Gulf of Mexico Regional Meeting will be held at the Naples Beach Hotel & Golf Club in Naples, Florida, on July 15, 2003 from 2 - 5 p.m. and 6 - 8 p.m. For those members of the public unable to attend any of the regional meetings, the NMFS is piloting an e-comment program. The agency is soliciting comments in the following areas: (1) the key issues facing fisheries management, (2) who should have conservation or management responsibility, (3) how could the federal management process be improved, (4) performance measures, and (5) information dissemination. Comments may be submitted through the NMFS website at <http://seahorse.nmfs.noaa.gov/emeeting-ssi/index.shtml>.



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

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


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For information about the Legal Program's research, ocean and coastal law, and issues of WATER LOG, visit our homepage at

 <http://www.olemiss.edu/orgs/SGLC>

Upcoming Conferences

The eight Regional Fishery Management Councils and the National Marine Fisheries Service are co-sponsoring the first-ever fisheries management conference, Managing Our Nation's Marine Fisheries - Past, Present, and Future. The conference will be held in Washington, D.C., November 13-15, 2003 at the Omni-Shoreham Hotel and Conference Center. More information may be obtained from the Council's website: <http://www.gulfcouncil.org>. ♡

Supreme Court Precedent Serves as Road Map in Environmental Cases

In 1995, the U.S. Supreme court issued its decision in *U.S. v. Lopez* analyzing the Congressional authority to regulate activities under the Commerce Clause of the Constitution. Two cases covered in this issue of WATER LOG (below and on page 6) turn on the *Lopez* decision in regards to Congressional authority under the Endangered Species Act.

In *Lopez*, the Supreme Court ruled that the Gun-Free School Zone Act of 1990 was unconstitutional because it exceeded Congress's power under the Commerce Clause. The Court's ruling in this case has since served as the foundation for numerous constitutional challenges to environmental statutes. Article 1 of the Constitution gives Congress the authority "to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes." Congress's power to regulate interstate commerce, however, is not unlimited. In *Lopez*, the Supreme Court established the outer limits of Congress's Commerce Clause power. In general, Congress may regulate three broad categories of activities:

1. The use of the channels of interstate commerce, such as roads, bridges, and rivers;
2. The instrumentalities of interstate commerce, such as trucks used in interstate commerce; and
3. Intrastate activities which substantially affect interstate commerce.

Courts must consider the following elements when faced with a Commerce Clause challenge to Congressional regulation:

1. Does the regulated activity have any connection to "commerce" or an economic enterprise;
2. Does the statute in question contain an "express jurisdictional element" such as language limiting the authority of the agency to activities "in or affecting commerce";
3. Are there "express congressional findings" or legislative history "regarding the effects upon interstate commerce" of the regulated activity; and
4. Is the relationship between the regulated activity and interstate commerce too attenuated to be considered substantial?

An answer of no to one of the above questions is not necessarily fatal. Rather, courts will examine all four elements to determine whether there is enough of a connection between the regulated activity and commerce to justify Congressional involvement in the field.

Aggregation Saves Texas Cave Species

GDF Realty Investments, Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003).

Sarah Elizabeth Gardner, J.D.

The Fifth Circuit Court of Appeals held that the Endangered Species Act's (ESA's) take provision as applied to six species of subterranean invertebrate (Cave Species) found only in two Texas counties did not exceed Congress' authority under the Commerce Clause. The Court found that while the proposed takings themselves did not substantially affect interstate commerce, takings of the endangered cave species, when aggregated with other endangered species takes, did affect interstate commerce, giving Congress the constitutional hook it needed to regulate such activity.

Background and Procedural History

In 1983, two brothers (the Purcells) purchased a tract of cave land near a developing area of Austin, Texas with the hopes of commercially developing the property and even installed water and wastewater gravity lines, force mains,

lift stations, and other utilities. Five years later, the United States Fish and Wildlife Service (FWS) issued a rule listing five of the Cave Species as endangered under section 4 of the ESA. A sixth species was added to that list in 1993. In 1989, the FWS informed the Purcells that their development plans might constitute an ESA take, defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" under the statute.¹

In 1990, in hopes of alleviating the problem, the Purcells deeded a portion of their land that contained several caves and sinkholes which served as the Cave Species' habitat to a non-profit environmental organization. After the FWS informed one of the Purcell brothers that he was under federal investigation for possible ESA takes for removing brush from the property, the Purcells and other area landowners (Plaintiffs) filed for a declaratory judgment that the development of the area would not constitute a take under the ESA. The District Court stated that the FWS would have to first determine whether a take occurred and ordered the agency to conduct an environmental review of the land at issue.² The FWS conducted

See Cave Species, page 4

Cave Species, from page 3

the review but did not determine whether a take had occurred and the district court dismissed the action.

In 1997, the Purcells attempted to obtain incidental take permits under section 10(a) of the ESA, which allows for incidental takes under some circumstances. The Purcells first applied to the Balcones Canyonlands Conservation Plan (Plan), a regional body from which landowners obtain § 10(a) permits to develop protected land by paying "mitigation fees" but the Plan refused their application because the land was entirely within a protected area. They next applied to the FWS but the FWS determined that because they planned to develop a shopping center (including a Wal-Mart), a residential subdivision, and office buildings, the deeded preserves were inadequate to protect the Cave Species. However, the FWS would not issue a formal denial of the permit, effectively preventing the Purcells from challenging FWS' action, forcing the Purcells to again file suit, this time seeking a declaration that the permits were denied de facto. The district court found the permits had been denied, therefore allowing the Purcells to challenge the FWS' action.³

In 1999, the Plaintiffs brought the present action against the Secretary of the Interior and Director of the FWS alleging that the land use restrictions on their property, based on the application of the ESA, exceeded Congress' authority under the Commerce Clause. There were no disputes as to facts therefore, cross summary judgment motions were filed. In 2001, the United States District Court for the Western District of Texas granted summary judgment for the government, holding the take provision in the ESA constitutional under the Commerce Clause power.⁴ The landowners appealed.

Ruling

Central to the Fifth Circuit's ruling was whether in demonstrating a substantial effect on interstate commerce, Cave Species takes could be aggregated with other endangered species takes to obtain a sum which might be substantial in relation to interstate commerce. The U.S. Supreme Court has allowed aggregation of an activity's effects with those of other similar activities where a wheat grower avoided market regulation by producing wheat to meet his own needs. The Court found that his own contribution to the demand for wheat was trivial by itself but was not enough to remove him from the scope of federal regulation where his contribution, taken together with that of many others similarly situated, was far from trivial.⁵ In its decision in the present case, the court noted that under its Commerce Clause Power, Congress has the authority to regulate, among other things, those activities

having a substantial relation to interstate commerce. The court pointed out that because the Cave Species are only found in Texas, the ESA takes concerned intrastate, not interstate activity.

The U.S. Supreme Court has held that there are four factors to determine whether purely intrastate activity substantially affects interstate commerce.⁶ These factors include: (1) the economic nature of the intrastate activity, (2) the presence of a jurisdictional element in the statute which limits its application to instances affecting interstate commerce, (3) legislative history concerning the effect the regulated activity has on interstate commerce, and (4) the attenuation of the link between the intrastate activity and its affect on interstate commerce.⁷ There are two ways in which intrastate activity might substantially affect interstate commerce: either alone or in some circumstances as aggregated with other similar activities.⁸ The Fifth Circuit pointed out that in light of Supreme Court precedent, the key question for purposes of aggregation is whether the regulated activity is economic; which could occur where the intrastate activity is part of a larger economic regulatory scheme that could be undercut unless the activity had a particular intrastate regulation.⁹

On the first factor—the economic nature of the regulated activity—the plaintiffs asserted that for evaluating substantial effect, only the expressly regulated activity, Cave Species takes, should be examined. The FWS however argued that the plaintiff's planned commercial development should be considered also. The district court agreed with the FWS and looked at the plaintiff's planned development of the subject property noting that the activity alone would substantially affect interstate commerce. The Fifth Circuit proceeded with a lengthy discussion of several cases that were decided in light of both *Lopez* and *Morrison* and held that the district court erred by looking primarily to the plaintiff's proposed commercial developments because it primarily looked at the plaintiffs' *motivations* underlying the takes instead of whether the expressly regulated activity, either alone or by aggregation, substantially affects interstate commerce.¹⁰

On whether aggregation should be used in this case, the FWS argued first that the Cave Species takes alone warrant a substantial affect on interstate commerce, citing two significant effects: the substantial scientific interest generated by the Cave Species, pointing out that scientists had traveled to Texas to study the Cave Species; the cave species had been transported to and from museums in five states; articles about the species had been published in several scientific journals; and there were possible future commercial benefits of the species.¹¹ The Fifth

Circuit dismissed the FWS's first argument that the scientific interest created a substantial impact on interstate commerce by stating that any effect that the connection between the takes in Texas and scientific travel or publication had on interstate commerce was negligible. The court, addressing the FWS's second argument that future commercial benefits which might be derived from the Cave Species or Cave Species products would be enough to show a commerce connection because research concerning certain endangered species has been used in the treatment of diseases, said it was purely conjecture and "the possibility of future substantial affects of the Cave Species on interstate Commerce through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass muster."¹² Finally, the FWS argued that the Cave Species takes must be aggregated with those of all other endangered species. The Plaintiffs had already conceded that if aggregation was used, the substantial effects test would be met.

In determining what circumstances must be present to justify aggregation, the court first noted that the Cave Species have no present economic value and that future value is speculative. The court found that there is no historic trade in Cave Species, nor do tourists come to Texas to view them.¹³ In addition, the larger regulation must be directed at activity that is economic in nature. Under this factor, the Fifth Circuit noted that the ESA states that endangered species are of "esthetic, ecological, educational, historical and scientific value. . . ."¹⁴ The court also noted that relevant to this determination is the ESA legislative history, concluding that in this light, the ESA's protection of endangered species is economic in nature because of the importance of preventing species loss.

In addition, in order to aggregate the regulated activity it must be an "essential" part of the economic regulatory scheme."¹⁵ Here the FWS argued that "[a]llowing a particular take to escape regulation because, viewed alone, it does not substantially affect interstate commerce, would undercut the ESA scheme and lead to piece-meal extinctions" arguing further that "takes of any species threaten the interdependent web of all species" and that Congress has recognized the "essential purpose" of the ESA is protecting the ecosystems upon without which we cannot live.¹⁶

Conclusion

The Fifth Circuit concluded that the ESA's take provision is in fact economic in nature and found that even though there is no expressed jurisdictional limit in the ESA, the analysis of the interdependence of species shows that reg-

ulated takes under the ESA do affect interstate commerce. The court further concluded that the ESA's take provision is restricted to circumstances which have a specific relationship with or effect on interstate commerce but that the link between species loss and a substantial commercial effect is not diminished. In closing, the court found the regulation of Cave Species takes an essential part of the ESA and therefore, such takes may be aggregated with all other ESA takes and is a constitutional exercise of the commerce clause power. ▼

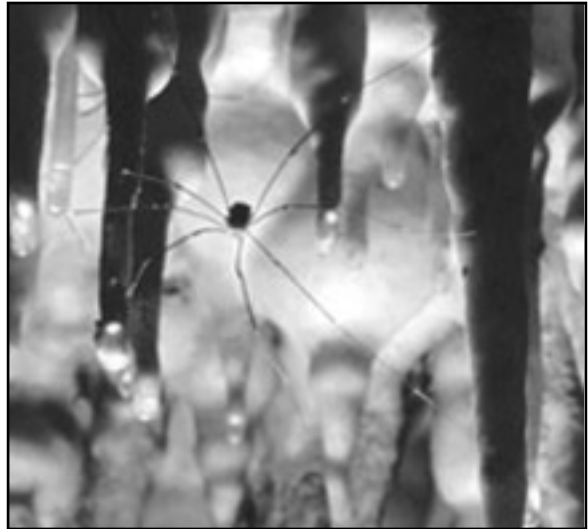


Photo courtesy of the Smithsonian Institute

ENDNOTES

1. 16 U.S.C. § 1532 (19) (2003).
2. *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 626 (5th Cir. 2003) (citing *Four Points Utility Joint Venture v. United States*, No. 93-CA-655 (W.D.Tex. 1993)).
3. *Id.* (citing *GDF Realty, Ltd. v. United States*, No. 98-CV-772 (W.D.Tex. 1998)).
4. *See GDF Realty Investments, Ltd. v. Norton*, 169 F.Supp.2d 648 (W.D.Tex. 2001).
5. *See Wickard v. Filburn*, 317 U.S. 111 (1942).
6. *See U.S. v. Lopez*, 514 U.S. 549 (1995). *U.S. v. Morrison*, 529 U.S. 598 (2000).
7. *GDF Realty Investments*, 326 F.3d at 628.
8. *See U.S. v. Ho*, 311 F.3d 589 (5th Cir. 2002).
9. *GDF Realty Investments*, 326 F.3d at 630.
10. *Id.* at 636.
11. *Id.* at 637.
12. *Id.*
13. *See Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000).
14. *See* 16 U.S.C. § 1531 (a)(3).
15. *GDF Realty Investments*, 326 F.3d at 639.
16. *See* H.R. Rep. No. 93-412, at 6 and 10.

Endangered Toads Cause Construction Woes

Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C.Cir. 2003).

Sarah Elizabeth Gardner, J.D.

The United States Court of Appeals for the District of Columbia upheld a lower court's dismissal of a developer's challenge of the application of the Endangered Species Act to a building plan and construction site, finding that the present case was governed by its prior decision in *National Association of Home Builders v. Babbitt (NAHB)*.¹

Background and Procedural History

In 1994, the Secretary of the Interior listed the arroyo southwestern toad as an endangered species. The toad, which lives in scattered populations ranging from Monterey County, California to Baja California, Mexico, breeds in shallow, sandy or gravelly areas along streams and then spends its adult life in upland habitats.

Rancho Viejo, a real estate development company, planned to build a 208-home residential development on a 202 acre site, bordered on the south by Keys Creek. To conduct its construction plans, Rancho Viejo was going to use 52 acres of upland area for residential sites and 77 acres of upland area and portions of the Keys Creek streambed to provide six feet of fill for the 52 acre building project. Surveys of Keys Creek revealed the presence of arroyo toads on and neighboring the proposed building site.

Due to the fact that its construction plan involves the discharge of fill into waters of the U.S., Rancho Viejo was required to obtain a permit under § 404 of the Clean Water Act from the Army Corps of Engineers (Corps). In its assessment of the project, the Corps determined the project "may affect" the resident arroyo toad population and instituted a formal consultation with the Fish and Wildlife Service (FWS) pursuant to § 7 of the Endangered Species Act (ESA).²

Rancho Viejo, in May 2000, dug a trench and erected a fence parallel to Keys Creek. Since arroyo toads were seen on the upland side of the fence, the FWS determined that the fence served and would continue to serve as an impediment to the toads to move between their upland habitat and their breeding habitat in the creek and informed Rancho Viejo that "construction of the fence 'has resulted in the illegal take and will result

in the future illegal take of federally endangered' arroyo toads 'in violation of the [ESA].'"³

The FWS issued a Biological Opinion in August, in which it concluded the use of the 77 acres as fill material would result in violations of both § 7 and § 9 of the ESA.⁴ The FWS proposed an alternative plan which would not result in putting the arroyo toads in jeopardy by allowing Rancho Viejo to obtain the needed fill material from an off-site location. Rancho Viejo refused to remove the fence or adopt the proposed alternative and instead filed suit against the government in the U.S. District Court for the District of Columbia alleging that both the listing of the arroyo toad as an endangered species and then the application of the ESA to Rancho Viejo's construction plans exceeded the government's Commerce Clause Power. Both parties filed motions for summary judgment. The district court found that the facts in Rancho Viejo's suit were indistinguishable from those found in *NAHB* and that there were no subsequent Supreme Court opinions which would cast any doubts on that decision. Therefore, the district court granted the government's summary judgment motion.

Applicability of *Lopez* and *NAHB*

The court began its opinion by discussing the facts of *NAHB* to which the court applied *Lopez*.⁵ In *NAHB*, the plaintiffs challenged the application of the ESA to the construction of a hospital and power plant and extension of a highway intersection in an area that serves as habitat for the endangered Delhi Sands Flower-Loving Fly. In *NAHB*, this court found § 9 of the ESA and its application to the construction site were both legitimate exercises of Congress' Commerce Power. In reaching this decision, the court pointed out that the application of the ESA in the case fell within the third category of *Lopez*, finding that "(1) 'the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce' and (2) 'the Department's protection of the flies regulates and substantially affects commercial development activity which is plainly interstate.'"⁶

The court then continued with an in-depth analysis of the four *Lopez* factors and how they applied to *NAHB* in relation to the present case. The first factor addresses the question of whether the activity, here the construction plan, has anything "to do with commerce or any sort of economic enterprise" Rancho Viejo argued

that whether the activity is “economic” is not just a factor but outcome definitive. Because the arroyo toad itself is not the subject of any commercial or economic activity, it fails the first factor. However, in *NAHB* the court regulated the conditions under which commercial activity could take place and the court found that the regulated activity of Rancho Viejo was the same and therefore, the same conclusion must be reached.

The court next followed *Lopez* in opining that the absence of an expressed jurisdictional limit for the application of the ESA does not render it unconstitutional but instead requires the courts to independently determine that the statute is being used to regulate activities that arise out of or are connected with a commercial transaction. Such determination then leads to the viewpoint that the activity does substantially affect interstate commerce.

The third *Lopez* factor requires the court to determine if the statute’s congressional findings and legislative history contain anything regarding the regulated activity’s effects upon interstate commerce. Rancho Viejo suggested that the ESA has a noneconomic purpose and therefore, the protection of the arroyo toads are without commercial or economic value. However, the court in *Lopez* recognized that Congress is not required to make such findings but that “such evidence merely ‘enables the court to evaluate the legislative judgement that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.’”⁸

Rancho Viejo argued that the effect that protecting endangered species has on interstate commerce is too vague to satisfy the fourth factor; however, Rancho Viejo did not claim such a tenuous connection between interstate commerce and its commercial construction project.⁹ The court agreed with the *NAHB* court’s opinion that the regulation of commercial land developments directly impacted interstate commerce and since Rancho Viejo’s 202 acre project was located near an interstate highway that it would presumably bring not only materials but also laborers and purchasers to the

development from out of the state. The court concluded that Rancho Viejo’s failure to demonstrate or even argue its construction plan would not have a substantial effect on interstate commerce was “fatal” and the fact the arroyo toad was found solely in California had no impact on the court’s decision.

Inapplicability of Subsequent Supreme Court Cases

Rancho Viejo also contended that two subsequent Supreme Court decisions rendered the *NAHB* decision “no longer good law.”¹⁰ The court briefly explained that in one the Supreme Court used the four factor test

from *Lopez* in deciding the case and stated that the test provided the proper analysis for determining valid Commerce Clause authority. Then the court discussed how the Court in the other declined to decide whether Congress had acted within its Commerce Clause authority but stated that if it was going to, it would have to evaluate the precise activity that substantially affects interstate commerce. The present court then noted that the “precise activity” analysis would

only strengthen its conclusion that the ESA can be applied constitutionally to Rancho Viejo’s construction project.¹¹

National v. Local

Rancho Viejo next argued that according to Supreme Court precedent, it is Constitutionally required that a distinction be made between what is “truly national and what is truly local” and that the application of the ESA to their construction project is an “unlawful assertion of congressional power over local land use decisions.”¹² The court pointed out that the ESA does not regulate general land use but instead is a Congressional response to a specific problem of national concern, species conservation.

Conclusion

Using primarily the four factors found in *Lopez*, the court upheld the district court’s grant of summary judgment to the government. ✓



Photo of *Bufo californicus* courtesy of B.D. Hollingsworth, SDNHM

Toads, from page 7

ENDNOTES

1. *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C.Cir. 1997).
2. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1665 (D.C.Cir. 2003).
3. *Id.*
4. ESA § 7 prohibits any federal agency's activity or granting of permits to jeopardize the existence or "destruction or adverse modification of habitat" of any endangered species. 16 U.S.C. § 1536. ESA § 9 makes it unlawful to take any listed species without a permit. To take includes to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1538.
5. See *U.S. v. Lopez*, 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000).
6. *Rancho Viejo*, 323 F.3d at 1067.
7. *Lopez*, 115 S.Ct. at 1630-1631.
8. *Id.* at 1069.
9. *Id.* (citing *Lopez*). The fourth factor is "whether the relationship between the regulated activity and interstate commerce is not too attenuated to be regarded as substantial."
10. See *U.S. v. Morrison*, 529 U.S. 598 (2000). See also *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
11. *Rancho Viejo*, 323 F.3d at 1071.
12. *Id.* at 1078-1079 (citing *Morrison*).

Update on Wetlands Law: Green Collar Criminals Face Uncertainty

Kristen M. Fletcher, J.D., LL.M.
S. Beth Windham, J.D.

The jurisdiction of the Army Corps of Engineers over wetlands has been under fire over the last decade, leading to judicial decisions and agency responses that have left more questions than answers over what waters the agency has regulatory authority.¹ This situation clouds the implementation of § 404 of the Clean Water Act (CWA), the section prohibiting the discharge of dredged or fill material into waters of the United States without a permit.²

Some legal analysts consider the CWA to fall within the scope of the "public welfare doctrine." Under the doctrine, certain regulatory crimes require no showing of the traditional mens rea, or "guilty mind," as a predicate to criminal liability. The doctrine has been used to relax intent requirements in criminal statutes when the public welfare is at stake and is predicated upon the fact that the defendant had notice that the dangerous activity is regulated. A majority of courts place the criminal provisions of the CWA within the public welfare doctrine. In theory, therefore, prosecutors need not prove that a defendant acted with the requisite intent with respect to each element of the underlying statutory offense in order to convict.

The complexity of environmental statutes and the potential consequences of violating these laws have led criminal defense attorneys to argue that the government should be required to prove that a defendant was aware of the illegality of his conduct. Such green-collar criminals would, in essence, claim ignorance of the law as a

defense, an option generally denied persons accused of non-regulatory crimes. Courts are currently struggling with whether environmental criminal defendants should be segregated from other criminal defendants in such a manner. The existing confusion in wetlands law and agency jurisdiction poses questions about application of criminal provisions of the CWA.

Current State of Wetlands Law

Beginning in 1985, adjacent wetlands are included as waters of the United States under the CWA.³ Since then, the Corps has extended § 404 to waters that provide habitat for migratory birds, a rule that was adopted without public notice and eventually challenged. After a split in the federal circuits over the validity of the rule, the Supreme Court reviewed the Corps' jurisdiction over isolated wetlands in Illinois in *South Waste Agency of Northern Cook County v. Corps of Engineers* (SWANCC) and found that the CWA does not give the Corps jurisdiction over intrastate, non-navigable, isolated waters if the sole basis for jurisdiction was migratory bird habitat.⁴ Since the SWANCC decision, Corps jurisdiction became dependent on the waters' connection to interstate commerce.

Confusion also reigns over what exactly constitutes a discharge of dredged or fill material. Initially, Corps regulations considered a discharge "any addition of dredged materials into the waters of the United States,"⁵ eventually requiring permits for redeposits of large amounts of dredged material using mechanical equipment. An exemption still existed, however, for incidental soil movement occurring during normal dredging opera-

tions, known as the incidental fallback exception. Environmentalists successfully attacked the exception leading to the Tulloch Rule, which required permits for fallback and spill during excavation of wetlands. After a 1998 challenge to the Tulloch Rule, the D.C. Circuit found that the Corps had overextended its jurisdiction and invalidated the rule, holding that the Corps can regulate only certain types of redeposit.

Today, the agencies' definition of waters of the U.S. and discharge of dredged material continue to undergo changes. In 2001, the EPA and Corps defined discharge of dredged material to mean "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States."⁶ Furthermore, in January of this year, the agencies published an advance notice of proposed rulemaking on the regulatory definition in the CWA of waters of the United States to obtain comment on the scope of waters that are subject to the CWA, in light of SWANCC. The comment period for the rulemaking closed on April 16; at that time, the EPA had received approximately 133,000 comments, including both individual letters and form letters.⁷

Enter the Public Welfare Doctrine

This confusion regarding when a permit is required is one of the many arguments against application of public welfare principles to the Clean Water Act. Public welfare principles require the activity be so inherently destructive that the actor is automatically put on notice there is regulation of the activity. The activity must be so obviously dangerous or hazardous that any person engaging in it would realize it must be regulated. If the courts are confused over the scope of Corps' jurisdiction, the argument goes, it would be ridiculous to expect individuals to understand the dangerous nature of their conduct. Conversely, while a court may not be sure of the Corps' jurisdiction, the action does not appear any less dangerous. The confusion over wetland jurisdiction is related to the limits imposed on federal agencies by Congress and the Constitution, not the nature of the activity. An actor could still recognize that his action is regulated, even if it is regulated by the state rather than a federal agency.

The applicability of the public welfare doctrine to the criminal provisions of the CWA has not been clearly established by the courts; consensus has yet to emerge in the circuits over the knowledge required to sustain a conviction. The Second and Ninth Circuits, however, view the CWA as a public welfare statute and only require the defendant to have knowledge of the nature of her conduct.

The Ninth Circuit held accountable the manager and assistant manager of a sewage treatment plant who told employees to dump plant waste directly into the ocean and failed to report the excess waste.⁸ With evidence of 436,000 tons of pollutant solid dumped into the ocean on 40 different occasions, the court reasoned that the parties "knowingly violated" a provision of the act; in this case, the discharge of pollutants into navigable waters without a permit. The court noted that the CWA legislative history referred to a person "causing" a violation and inferred that Congress meant to criminalize the actions of a person who knowingly committed the prohibited conduct, regardless of her knowledge of the law or the permit. After reviewing public welfare doctrine, the Court announced that the CWA is a public welfare statute, designed to protect the public from water pollution which clearly fell within the category of public welfare offenses. Therefore, the government was not required to prove the defendants knew their acts were unlawful or in violation of their permit.

The Second Circuit has also construed the Clean Water Act as a public welfare statute, holding accountable the vice-president of a metal manufacturer who tampered with the plant's wastewater testing resulting in toxic materials expunged into the Five Mile River in Connecticut.⁹ The V.P. was convicted of violating the conditions of the discharge permit, knowingly falsifying or tampering with the discharge sampling methods, and conspiring to commit those offenses. On appeal, the defendant contended that he could only be found guilty if the jury found that he knew he was violating his permit.

As the statute did not specifically state whether "knowingly" meant the defendant knew he was violating the Act or the permit, the Second Circuit looked to the intent of Congress. The court noted the legislature's change of the intent requirements for violations of the CWA from "willfully" to "knowingly" in 1987. It also pointed to the Congressional goal that the 1987 amendments strengthen the criminal provisions of the Act. One method utilized by Congress to strengthen the provisions was the reduction of the mens rea, which the transition from "willfully" to "knowingly" apparently had done. Relying on the Ninth Circuit's interpretation, the Second Circuit adopted the interpretation that the CWA required proof that the defendant knew the nature of his acts, and performed them intentionally, not that the defendant had any knowledge they violated the CWA or the regulatory permit.

Deepwater Port Act Amendments Yield Offshore Applicants

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As reported in the 2002 Federal Legislative Update, Water Log 22:3, Congress amended the Deepwater Port Act last fall, providing for offshore ports for natural gas. Guest author Doug Burnett of Holland & Knight describes the changes and the resulting applications for future deepwater port facilities.

The Deepwater Port Act of 1974 ("DWPA") provides for offshore deepwater ports for petroleum products. Only a single DWPA petroleum terminal, the "LOOP" facility, about 16 nautical miles off of Louisiana's coast, was completed; this terminal has been operational since 1981. The DWPA was amended on November 25, 2002 to provide for offshore ports for natural gas.¹ These innovative amendments have been well received by the energy industry, yielding deepwater gas port license applications for Liquid Natural Gas filed by ChevronTexaco on November 25, 2002 for two gravity feed structures about 37 nautical miles off of the Louisiana Coast² and on December 23, 2002³ for a seabed based submersible buoy system structure about 116 miles off the Louisiana coast. If approved, both facilities are planned to enter service in 2004. The U.S. Coast Guard has determined that both applications appear substantially complete and license proceedings are progressing in accordance with the unique features of the natural gas amendments to DWPA.

To qualify for a license as a natural gas terminal under the DWPA, the offshore terminal, which can be any non-vessel facility, must be built beyond the nautical mile territorial sea of a coastal state and within the limit of the US Outer Continental Shelf or the 200 nautical mile Exclusive Economic Zone (EEZ). The license, however, covers the actual terminal and all shore connections seaward of the high water mark. The criteria for granting a license to a financially qualified applicant are a) national energy and security policies, b) no unreasonable inter-

ference with navigation under international law and treaties, c) use of the best technology to minimize environmental impact, d) no negative report from the Environmental Protection Agency (EPA), e) consultation with relevant federal agencies, and f) deemed approval by the adjacent state governor(s). Several features make the DWPA distinctive.

First under the DWPA only a single national federal license is required which is issued by the Department of Transportation (DOT). Within DOT, the U.S. Coast Guard is the lead agency which will carryout the license review, assisted where appropriate by the Maritime Administration (MARAD). All other federal agencies, EPA, NOAA, Department of Defense, the Corps of Engineers, Department of State, and Department of



Photo courtesy of Bill Daughdrill, Ecology & Environment, Inc.

Justice, etc. must coordinate their work with DOT through the U.S. Coast Guard. Only a single Environmental Assessment or Environmental Impact Statement, as the U.S. Coast Guard determines is most appropriate, is required of the applicant. This document will be used by all federal and state agencies for their review purposes. This provision avoids the need for multiple federal permits from diverse agencies without coordination and allows the applicant and the government to work from a common set of facts.

Second, there is no Coastal Zone Management Act consistency review by the adjacent state. The governor of

the adjacent state, however, can affirmatively veto the project after the U.S. Coast Guard has completed the 270 day evaluation period mandated by the statute. The governor can also ask that the license be conditioned based on the state's interests. If the governor is silent, approval is deemed given under the DWPA. The EPA is the only federal agency with similar power. This provision eliminates the frequent result in off-shore projects where the state CZMA process may delay the project until state stipulations are satisfied.

Third, the DWPA provides a fast track for approval which is fixed by statute as 356 days after filing. This includes an initial 21 day period for the U.S. Coast Guard and MARAD to evaluate the license application's completeness, a 270 day evaluation period during which all public hearings must be completed, an additional 45 day period to review comments by other federal agencies and adjacent states, and a final 45 day period before the DOT must issue its decision on the license. This provi-

sion greatly facilitates business planning and finance for DWPA projects because there is a firm statutory timeline for a decision which cannot be extended.

Finally, judicial review of DOT's license decisions is limited. Suit may only be filed directly in the U.S. Court of Appeals with jurisdiction over the adjacent state within 60 days of the decision granting a license and only by a plaintiff who (1) is adversely affected by the decision and (2) who participated in the USCG administrative proceeding. This provision adds to the timely certainty and reasonable finality of the license decision. ♡

ENDNOTES

1. 33 U.S.C. § 1501 (2002). *See Federal Legislative Update 2002*, 22:3 WATER LOG 12, for other legislation passed in 2002.
2. 67 Fed. Reg. 7935 (December 27, 2002).
3. 68 Fed. Reg. 3299 (January 23, 2003).

Honduras, from page 1

Background

In February 1999, NOAA Fisheries received an anonymous tip that a shipment arriving in Alabama contained undersized lobster tails in violation of Honduran law. After receiving official confirmation from Honduran officials that the ship had illegally harvested the lobsters, federal agents seized the ship and charged the defendants with violations of the Lacey Act. The Lacey Act prohibits the importation of "fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." The defendants were convicted in federal court under the Lacey Act for harvesting Caribbean spiny lobsters in violation of Honduran law. The defendants filed post-trial motions arguing that the foreign laws which served as the basis for the Lacey Act convictions were invalid. The district court dismissed the motions and sentenced McNab and two co-defendants to ninety-seven months imprisonment.

The defendants argued on appeal that the district court misinterpreted Honduran law, claiming that the Honduran laws were invalid and void at the time of the indictment and, therefore, could not serve as a basis for the application of the Lacey Act. Specifically, the defendants argued that: (1) the scope of the Lacey Act does not reach the Honduran regulations under which they were convicted because they are not statutes; and (2) the district court's interpretations of the law were erroneous.

The Lacey Act

The Eleventh Circuit first addressed whether the phrase "any foreign law" in the Lacey Act applies to foreign regulations and other legally binding provisions. The court determined that the language of the Act was ambiguous, as definitions of the word "law" range from "a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority" to "a statute."² When the plain language of a statute is ambiguous, a court looks to the legislative history to determine legislative intent.³

The Lacey Act was originally passed in 1900 to regulate interstate fish, wildlife, and plant trade, and amended in 1935 to include foreign law.⁴ It was amended again in 1981 to "expand its scope and enhance its deterrence effects."⁵ The court concluded that a narrow interpretation of the Act would "prevent the wildlife conservation laws of many countries from serving as the basis for the Lacey Act violations and would limit the Act's utility."⁶ Therefore, regulations promulgated by foreign governments are included within the scope of "any foreign law."

Honduran Laws

Three Honduran laws served as the basis for the Lacey Act prosecutions. Resolution 030-95 establishes a 5.5 inch size limit for lobsters, Regulation 0008-93 requires lobsters be inspected and processed in Honduras prior to exportation, and Article 70(3) of the Fishing Law pro-

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hibits the harvesting or destruction of lobster eggs. On appeal, the defendants raised the argument that, between the time the boat was seized and the subsequent conviction, Honduras repealed the regulations and laws under which the defendants were charged and sentenced. The defendants claimed that because the laws are no longer valid, the Lacey Act convictions were invalid.

Whether the defendants' convictions are sustainable depends on whether the Honduran laws relied on by the federal government were valid during the time period covered by the indictment. The fact that those laws may no longer be valid, does not affect the validity of the defendants' convictions. During the investigation, NOAA Fisheries made direct contact with Honduran officials charged with regulating and enforcing the fishing laws who provided evidence and verification that the laws were valid. During a pretrial hearing held in September 2000, Honduran government officials testified as to the validity of the laws and confirmed that they were in effect and legally binding during the time period in question. However, on appeal, the Honduran government maintained that the lobster regulations were invalid at the time of the shipments, clearly contradicting their position during the prosecution and trial.

The court noted that federal courts are not bound by declarations made by foreign embassies about their laws. Rather, the statements submitted to the court by the Honduran Embassy are simply evidence of what Honduran law is, which must be viewed in light of all the other evidence. The Eleventh Circuit held that the district court did not err in determining that the laws were valid and legally binding. "The district courts and the government of the United States . . . have the right to rely upon the Honduran government's original verifications of its laws."⁷

The Eleventh Circuit then reviewed the district court's findings regarding the validity of the three Honduran fishing regulations. With regard to Resolution 030-95, the defendants argued that it was never legally binding because it had not been issued in accordance with Honduran constitutional procedures, relying on an administrative law decision issued in May 2001. The administrative law court held that the regulation was not valid and was void. The Eleventh Circuit determined that although Resolution 030-95 is no longer valid, there is no evidence supporting the retroactive application of the administrative decision.

Regulation 0008-93 was promulgated in 1993 pursuant to Decree 40, which was repealed by the Honduran government in 1995. Regulation 0008-93

was repealed in December 1999. The defendants argue that the repeal of Decree 40 repealed all regulations promulgated under it and, therefore, Regulation 0008-93 was not in effect at the time of the shipments. The court disagreed, stating that there would have been no need for an accord repealing the regulation in 1999 if it had been repealed in 1995.

Finally, Article 70(3) of the Fishing law prohibits the harvesting or destruction of lobster eggs. The defendants argued that this regulation does not prohibit the destruction of lobster eggs for profit. The court quickly dismissed this argument, as there would appear to be no other way to interpret Article 70(3) except to prohibit the destruction of the eggs.

Dissent

Justice Fay dissented from the majority arguing that the status of Resolution 030-95 was not settled within the Honduran legal system at the time the defendants were indicted. Justice Fay argued that the Honduran court's declaration of the Resolution as null and void should be controlling under the Lacey Act. The Honduran court declaration came after the district court's decision, but Justice Fay believes that it is vital to the appellate court's determination, because Resolution 030-95 did not follow "the legal code at the time it was issued," because it was not properly issued by the President of Honduras or authorized by the proper Secretary or Under Secretary of the State.⁸ Justice Fay reasoned that retroactive application of invalidated criminal laws to previous convictions is frequently practiced in the United States and should be applied in this situation.

Conclusion

Despite the dissenting arguments, the Court of Appeals for the Eleventh Circuit affirmed the district court's decision to convict the defendants, concluding that their actions fell within the scope of the Lacey Act and that the Honduran laws were valid and legally binding during the time period covered by the indictment. ✓

ENDNOTES

1. 16 U.S.C. § 3372(a)(2)(A) (2003).
2. *U.S. v. McNab*, 324 F.3d 1266, 1274 (11th Cir. 2003).
3. *Id.* at 1273.
4. *Id.* at 1275.
5. *U.S. v. 594,464 Pounds of Salmon*, 871 F.2d 824, 828 (9th Cir. 1989).
6. *McNab*, at 1276.
7. *Id.* at 1279.
8. *Id.* at 1286.

Stiltsville, from page 1

resources. Initially, Congress established the Biscayne National Monument to preserve “a rare combination of terrestrial, marine, and amphibious life in a tropical setting of great natural beauty.”¹ The Monument was converted into a National Park in 1980, expanding its territory by 71,000 acres, including the area in which Stiltsville is located. In accordance with the National Park Service Organic Act,² the Service developed the General Management Plan for the Biscayne National Park, stating that the leases for the Stiltsville structures would not be renewed and that the structures would be removed. When Florida deeded the submerged lands on which Stiltsville sits in 1985, the Service became the landlord for the Stiltsville leaseholders.

Exclusive Use is Challenged

As the 1999 lease expiration date drew near, the leaseholders and the federal Congress took actions to preserve their exclusive use of the buildings, including attempts to have the structures listed in the National Register of Historic Places (which were opposed by the Service) and the execution of an agreement providing for continued occupancy of the buildings through November, 2000. Bills were introduced in both the 106th and 107th Congresses to modify the borders of the Biscayne National Park to exclude Stiltsville. Though these attempts failed, a Congressional rider extended occupancy through March 31, 2001. Finally, leaseholders turned to the courts which resulted in an extension of occupancy through April, 2002.

The continued occupancy and seemingly endless extensions of the Stiltsville leases led the National Parks Conservation Association and Tropical Audubon Society to file suit claiming that the Service’s inaction was in violation of the Organic Act, the General Management Plan, and the National Environmental Policy Act. Furthermore, the plaintiffs argued that the rights of their members had been violated under the equal protection component of the Fifth Amendment Due Process Clause.

The District Court for the Southern District of Florida held for the Service on both challenges. First, the court rejected the plaintiffs’ argument that the Service’s repeated acquiescence in the lease extension agreements and failure to evict the Stiltsville leaseholders were “tantamount to the grant of an exclusive lease to the building’s occupants.”³ The court declined to review the Service’s actions, finding that none of the statutory provisions that the Service was accused of violating contained a standard that provided for meaning-

ful judicial review. Second, regarding the plaintiffs’ contention that they were denied equal protection, the court found they “lacked standing to vindicate the interest of all members of the public in fully enjoying Biscayne National Park.”⁴

Eleventh Circuit Weighs In

Final Agency Action. As a general rule, actions taken by administrative agencies such as the National Park Service are subject to judicial review. However, a court cannot review such an action if it is not “final” in nature, i.e., it marks the consummation of the agency’s decision-making process and it determines the rights or obligations from which legal consequences will flow. The Eleventh Circuit determined that the Service’s failure to discontinue the private occupancy of Stiltsville did not rise to the level of a “final agency action.” Noting that the delay was not solely on the part of the Service because of judicial order and legislative mandate, the court found that the Service is still in the decision-making stages regarding the fate of Stiltsville. Since inception of the lawsuit, the Service has taken steps toward a permanent management plan for Biscayne National Park, reviewing and accepting public comment on four alternatives for the future use and management of the Stiltsville structures, none of which provide for their continued private occupancy. The Eleventh Circuit reasoned that because the Service is still deciding among these four options, it has not reached a definitive position and cannot be said to have taken a final action.

Furthermore, the Service assured the court that it would take action by mid-May of this year. With this assurance, the court determined that the Service was not merely withholding or delaying final action in order to circumvent a judicial determination. Interestingly, the court noted that should a final management plan not be implemented by the start of June, then the plaintiffs can renew their claims.

Equal Protection Claim. The plaintiffs’ original claim that the Service failed to adequately protect the rights of non-leaseholders was denied by the district court based upon lack of standing. In order to show that they have standing to sue, they must show an injury in fact, a causal connection between the injury and the Service’s conduct, and the likelihood that their injury will be redressed by a favorable decision. The Eleventh Circuit found that the plaintiff groups *did* have standing as they provided affidavits of their members showing concrete harms as a result of the exclusive occupancy that would not be remedied without action by the Service.

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However, even with standing, the Circuit Court found that the Service properly treated Stiltsville occupants differently from non-Stiltsville occupants to further its goal of “protecting and maintaining the stilted structures” pending completion of the Services long-term planning process.⁵ Furthermore, the court found that the “temporary continuation of this arrangement is a minimally burdensome means of ensuring” that the continued caretaking of the structures continues pending the implementation of the Service’s management plan.⁶

Conclusion

The Eleventh Circuit decided this case in March 2003. This May, the National Park Service issued the General Management Plan Amendment and Final Environmental Impact Statement for Stiltsville. A Record of Decision on Stiltsville is expected to be signed

by the National Park Service Southeast Regional Director Bill Schenk on June 9, 2003. ♡

For more information on Stiltsville or to view the Plan or EIS, visit

<http://www.nps.gov/bisc/stiltsville/stiltsvillewelcome.htm> .

ENDNOTES

1. Pub. L. No. 90-606, § 1 (1968).
2. 16 U.S.C. § 1 (2003).
3. *National Parks Conservation Association v. Norton*, 324 F.3d 1229 (11th Cir. 2003), 2003 U.S. App. Lexis 5453, at *9-*10.
4. *Id.* at *12.
5. *Id.* at *47.
6. *Id.*

Green Collar, from page 9

At least in the Second and Ninth Circuits, the Clean Water Act is a public welfare statute under which prosecutors need not prove that a defendant knew he was violating the law or the conditions of a permit to convict defendants of CWA violations. For the wetlands in these circuits, the public welfare doctrine protects wetlands by giving prosecutors substantial leeway in proving mens rea. The remaining circuits have failed to agree on the CWA’s status as a public welfare statute.

As a result of recent Supreme Court and federal court rulings, substantial confusion surrounds the CWA permitting scheme. Citizens conducting actions in wetlands may interpret these recent legal decisions limiting the jurisdiction of federal agencies to mean that their actions do not require permits. If they conduct their activities without permits, those citizens may be subject to criminal penalties, potentially fighting the relaxed mens rea requirements under the public welfare doctrine.

The problem of the level of mens rea required to gain a conviction under the Clean Water Act could be solved if Congress amended the Act to reject the mens rea completely, define “knowledge” as knowledge of the conduct not the law, or define “knowledge” as knowledge of the conduct and the law. Until Congress amends the language of the statute, a safe interpretation for the federal courts would be to require only knowledge of the prohibited conduct. This would comport with the statute’s use of the term, “knowledge,” while not extending the knowledge requirement to every aspect of the offense as urged by many developers.

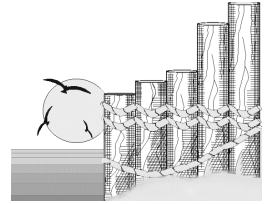
Unfortunately, until the Clean Water Act is amended to be more specific, developers and federal agencies will continue to fight in the courts to determine the exact boundaries of the Act. Courts must balance the ambiguity present in wetlands regulation and enforcement with the public welfare doctrine and the need to uphold criminal penalties for crimes that put the public health in jeopardy. ♡

ENDNOTES

1. For a recent analysis of Clean Water Act litigation, see James R. May, *Where the Water Hits the Road: Recent Developments in Clean Water Act Litigation*, 33 ENVIRONMENTAL LAW REPORTER 10369 (May 2003).
2. Specifically, the CWA prohibits the discharge of dredged and fill material into “waters of the United States” which, in general, includes wetlands. 33 U.S.C. § 1344 (2003).
3. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).
4. 531 U.S. 159 (2001).
5. 42 Fed. Reg. 37145 (July 19, 1977).
6. *See Further Revisions to the Clean Water Act Regulatory Definition of “Discharge of Dredged Material”*, 66 Fed. Reg. 4,550 (Jan. 17, 2001).
7. For the text of the advanced proposed rule making and other pertinent information, visit the EPA website at <http://www.epa.gov/owow/wetlands/swanccnav.html> (visited June 5, 2003).
8. *U.S. v. Weizenhoff*, 35 F.3d 1275 (9th Cir. 1993).
9. *U.S. v. Hopkins*, 53 F.3d 533 (2d Cir. 1995).

Lagniappe (a little something extra)

Around the Gulf . . .



In April, Florida received permission from the federal government to discharge over 500 million gallons of wastewater from an abandoned phosphate plant into the Gulf of Mexico. The **Environmental Protection Agency** approved the dumping due to concerns that inaction and heavy rainfall would lead to a spill, causing massive fish kills in Tampa Bay. This summer, the treated wastewater, still containing trace amounts of ammonia and nitrogen, will be slowly spread over 19,500 miles of the Gulf.

May 22 marked the conclusion of the largest wildlife undercover operation in Mississippi history, codename **Operation Delta**. Conservation officers from Mississippi, Arkansas, and the U.S. Fish and Wildlife Service spent over two years investigating the illegal harvest of wildlife. Fifty arrests were scheduled and over 300 state and federal wildlife charges have been filed. Fraud charges were also filed in Mississippi as a result of one interesting situation where beaver were legally harvested in Mississippi, where the tails are worth \$5, and sold in Arkansas as Arkansas beaver, which yield a bounty of \$10. Maybe the hunters can use the bonus beaver bounty to obtain legal representation.

The deep-sea coral reefs of the **Oculina Banks** off the Eastern coast of Florida have been reduced by 90% since the late 1970s, damaged by anchors and commercial trawling. Researchers from the Harbor Branch Oceanographic Institute and the National Undersea Research Center at U.N.C. at Wilmington, using undersea vehicles, which transmit video and digital images to a control room on board a research vessel, are charting the destruction and compiling data to support the extension of federal protection for the Oculina Banks beyond 2004, when the current protections expire. The expedition leaders hope this information will persuade NOAA to designate the Oculina Banks as a National Marine Sanctuary.

The **U.S. Geological Survey** recently reported that one-third of Louisiana's shoreline may erode by 2050. Approximately 1900 square miles of the state's coast disappeared between 1932 and 2000, with New Orleans experiencing 66% of the losses occurring since 1990. Louisiana has spent more than \$400 million for restoration projects in the last decade, and is currently seeking federal governmental support for a \$14 billion coastal engineering plan to save the Mississippi River Delta, which is a wintering ground for migrating songbirds and home to endangered species such as the Louisiana black bear and the American alligator.

On May 21, Florida Governor Jeb Bush signed into law a controversial **Everglades Bill**. The Bill, which critics say weakens water-quality standards and threatens federal funding for the \$8 million clean-up effort, was backed by the sugar industry. Governor Bush defended the Bill stating that it reinforces the state's commitment to restoring water quality by providing Florida with a strategic plan to achieve that goal.



Around the Nation



In April, the Environmental Law Institute announced the recipients of the **2003 National Wetlands Award**, which recognizes outstanding wetlands educators, activists, scientists, and conservationists. This year's winners are: John Beal (Washington), David Carter (Iowa), Bryce and Brad Evans (Missouri), Paul Scott Hausmann (Wisconsin), Maggy Hurchalla (Florida), Neil Johnston (Alabama), and Graeme Lockaby (Alabama). The recipients were honored at a ceremony on Capital Hill on May 20, 2003. ♡

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Upcoming Conferences

Comprehensive Resource Management Plan Meetings

10:00 a.m., Bolton Building auditorium

1141 Bayview Avenue, Biloxi, MS

August 21, October 16, and December 18, 2003

Advance in Coastal Habitat Restoration in the Northern Gulf States

 <http://www.gulfcrest.org>


July 1-2, 2003, Thibodaux, LA

Coastal Zone Management Through Time - 13th Biennial Conference

 <http://www.csc.noaa.gov/cz2003/>

July 13-17, 2003, Baltimore, MD

Taking Marine Education By Storm

 <http://www.marine-ed.org/nmea2003/>


July 20-24, 2003, Wilmington, NC

National Forum on Water Quality Trading

Lynda Wynn at lynda@epa.gov


July 22-23, 2003, Chicago, IL

2003 U.S. EPA Community Involvement Conference and Training

 <http://www.epancic.org/>

July 22-25, 2003, Philadelphia, PA

StormCon: the North American Surface Water Quality Conference & Exposition

 <http://www.forester.net/sc.html>

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