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WATER LOG

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Texas Court Invalidates Gulf Red Snapper Plan

Fisheries Service Given Nine Months to Fix It

***Coastal Conservation Assn. v. Gutierrez*, Civ. Action No. H-05-1214 (S.D. Tex. Mar. 12, 2007)**

Josh Clemons

On March 12, 2007, U.S. District Judge Melinda Harmon of the U.S. District Court for the Southern District of Texas, Houston Division, ruled that the National Marine Fisheries Service (NMFS) violated the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) and the Administrative Procedure Act when it promulgated Amendment 22 to the Gulf of Mexico Reef Fishery Management Plan (management plan) because the plan did not have at least a fifty percent likelihood of rebuilding red snapper stocks within the mandated time period. The court gave NMFS nine months to approve a satisfactory plan.

The Magnuson Act

Congress passed the Magnuson Act[1] in 1976 to protect the nation's fishery stocks from overexploitation. Towards this end the Magnuson Act provides for Regional Fishery Management Councils (Councils), which produce fishery management plans for species in their jurisdictions. These plans are reviewed by NMFS before being promulgated through the formal administrative rulemaking process.

Congress established ten national standards to guide the management plans and their implementing regulations.[2] Four of these standards were relevant to this case. Standard one requires conservation and management measures to "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry."[3] Standard two requires measures to be based on the best available scientific information. Standard eight requires measures to utilize economic and social data to minimize adverse impacts on fishing communities. Standard nine requires measures to minimize bycatch and mortality from unavoidable bycatch.[4] These standards are put into effect by the management plans and NMFS regulations.

The Magnuson Act requires the Councils to generate a plan to end overfishing and rebuild the stock within one year of a stock being declared overfished. If a Council fails to complete an adequate plan on time, NMFS must create one within nine months. Overfished stocks are to be returned to full productivi-

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ty within ten years, or if that is not possible, within the shortest possible time that does not exceed "the rebuilding period calculated in the absence of fishing mortality, plus one mean generation time or equivalent period based on the species' life history characteristics."[5] For the Gulf of Mexico red snapper, this period has been calculated to be 31.6 years.

Federal Efforts to Protect Red Snapper

Red snapper stocks, with a current population level of approximately seven percent of historical levels, have been officially declared overfished since 1997. Human-induced red snapper mortality is caused by three activities: commercial red snapper fishing, recreational red snapper fishing, and shrimp fishing. Of these, the one that takes the greatest number of red snapper is, ironically, shrimp fishing; juvenile red snapper, which congregate near the ocean floor, are often taken as bycatch by shrimp trawls. It is generally acknowledged that the rebuilding of red snapper stocks will require reduction of this bycatch.

NMFS regulates the taking of red snapper under the Gulf of Mexico Reef Fishery Management Plan. In 1990 the management plan was to rebuild red snapper stocks by 2000. Since then the target date has been set farther and farther into the future. Amendment 22 to the management plan, adopted by NMFS in 2005, sets the date at 2032. (Interestingly, NMFS has increased the total allowable catch of red snapper from four million pounds in 1991 to over nine million pounds today.) Amendment 22 responds to NMFS' demand, in response to a proposed red snapper rebuilding plan that the Council submitted in 2001, that the Council "further explore alternative rebuilding plans based on more realistic expectations concerning bycatch in the shrimp fishery."[6]

Amendment 22 Controversy

The issue of bycatch in the shrimp fishery is at the center of the Amendment 22 controversy. In Amendment 22 the Council declared that the red snapper stocks could be rebuilt by 2032 without additional regulatory action with respect to shrimp fishery bycatch. To reach this conclusion, the Council relied on three assumptions: that ninety percent of red snapper mortality is caused by commercial shrimping; that bycatch reduction devices (BRDs) provide forty percent effectiveness in reducing that red snapper mortality; and that shrimping effort in the Gulf will be cut in half in every year of the red snapper rebuilding plan.

The Coastal Conservation Association (CCA), an advocacy group for recreational fishers, believed that Amendment 22 provided inadequate protection for red snapper because it failed to address shrimp trawl bycatch. In March 2005 the group filed with NMFS a "Petition for Emergency Action to Stop Overfishing in the Gulf of Mexico Red Snapper Fishery." The agency denied the petition on the grounds that "additional management measures to end overfishing of red snapper would better be addressed through a Gulf of Mexico Fishery Management Council (Council) regulatory amendment and development of a fishery management plan (FMP) amendment."[7] CCA then sued NMFS for approving Amendment 22 without mandating a reduction in bycatch, for violating the National Environmental Policy Act (NEPA), and for denying the petition for emergency rulemaking.

The Court's Opinion

When a court reviews the action of an administrative agency, it examines whether the agency has acted reasonably and rationally to carry out its statutory mandate from Congress. A court usually will be very deferential to agency expertise but will also require that the agency adequately explain its action. Judge Harmon, following the reasoning of the D.C. Circuit Court of Appeals,[8] declared that the stock rebuilding plan would have to have at least a fifty percent chance of succeeding to pass muster.

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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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Eleventh Circuit Affirms Listing of Alabama Sturgeon as Endangered Species

Alabama-Tombigbee Rivers Coalition v. Kempthorne, **477 F.3d 1250 (11th Cir. 2007)**

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Since the Alabama sturgeon was first classified as a separate species from the more common shovelnose sturgeon in 1976, various business interests have been trying to prevent the Fish and Wildlife Service (FWS) and other federal agencies from adding this prehistoric fish to the endangered species list. In February of this year, the U.S. Court of Appeals for the Eleventh Circuit held that the FWS had properly identified the Alabama sturgeon as a separate species by using the best scientific methods available and correctly listed it.

Background

The Alabama sturgeon was once a plentiful species and fished for commercially. An estimated twenty thousand Alabama sturgeon were caught in the late 1800s but their numbers have decreased so drastically that the FWS, despite diligent efforts, had only eight confirmed catches during the 1990s. The only bodies of water in which the fish is now found are small portions of the Alabama River channel in south Alabama and farther downstream to the mouth of the Tombigbee River. The incredible decline in population has been attributed to several factors, among which are overfishing, construction and operation of hydroelectric dams, decline in habitat and water quality due to land management practices, and dredging and channeling to improve the navigability of the Mobile River Basin.

The FWS began studying the Alabama sturgeon in 1980. The agency's first attempt to list it as an endangered species under the Endangered Species Act (ESA) was in 1993. It was this proposed listing that first brought the FWS into court with the Alabama-Tombigbee Rivers Coalition (Coalition), a group of industries and associations brought together in opposition to the listing of the Alabama sturgeon as an endangered species.

In their first meeting, the Coalition sought and received a permanent injunction preventing the FWS from listing the Alabama sturgeon using information gained from a scientific report that was made in violation of the Federal Advisory Committee Act.[1] The FWS appealed the injunction, but the appeals court held that the injunction was valid. A few months later the FWS withdrew the listing proposal because it did not have enough evidence to prove the Alabama sturgeon still existed.

Luckily for the fish, after a few Alabama sturgeon were captured in 1999 the FWS once again proposed its listing. On May 5, 2000, the FWS published a final rule listing the Alabama sturgeon as an endangered species. According to the ESA, after a listing is made the FWS is responsible for designating the "critical habitat" of endangered creatures. The FWS did not do this at the time the Alabama sturgeon was listed and they have yet to do so.

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Photograph of Alabama sturgeon courtesy of the U.S. Fish and Wildlife Service.

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The Coalition brought a new suit alleging defects in the listing process under 16 U.S.C. § 1540(g)(1), a provision of the ESA that allows citizens to voice their concerns in court, and under 5 U.S.C. §§ 701-06, the judicial review provision of the Administrative Procedure Act. The case was originally dismissed because the district court found that the Coalition lacked standing in the case. The district court was later reversed and the suit was allowed to continue.[2] Once the district court heard the merits of the Coalition's case, it decided that the Coalition essentially *had* no case. The court did, however, order the FWS to issue a proposed and final rule designating the "critical habitat" by May 14, 2006 and November 14, 2006, respectively. The Eleventh Circuit reviewed the district court's ruling.

Coalition's Arguments

In its attempt to keep the Alabama sturgeon off the endangered species list the Coalition raised three different arguments before the Eleventh Circuit. The group's first argument was that the FWS failed to consider the relevant factors in reaching their listing decision. Next, the Coalition contended that the FWS violated § 4 of the ESA, which requires the agency to designate the "critical habitat" of an endangered species concurrently with putting the species on the endangered species list. Finally, the Coalition argued that the FWS ruling (Final Rule) should be dissolved because Congress's Commerce Clause powers could not be used for the protection of a fish that has no connection to interstate commerce.

Failure to Consider Relevant Factors

The Coalition contended that the FWS discounted genetic typing in favor of morphological taxonomy, failed to examine the best taxonomic data, and allegedly interfered with the research of a FWS scientist, Dr. Steven Fain.

These claims were discredited by a close reading of the Final Rule. The Coalition hand picked research that supported their contention that the shovelnose and Alabama are actually the same species of sturgeon, then claimed that the FWS did not give proper deference to this research. One issue was the genetic testing of the shovelnose and Alabama sturgeon's mitochondrial cytochrome B gene, which reveals that they are genetically very similar fish. The FWS explained this similarity by invoking the long-held theory that the two species branched away from one another about ten thousand years ago, which is a relatively short period in evolutionary terms.

The taxonomic data the FWS supposedly ignored was a paper written for a statistics-focused journal that concluded that the two fish are actually the same species. The FWS countered with another article, out of an ichthyologic journal, that concluded that the species are separate. The judge resolved this dilemma by quoting the U.S. Supreme Court: "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if…a court might find contrary views more persuasive."[3]

Finally, the Coalition asserted that because Dr. Fain, an FWS researcher, came to a different conclusion from the one he had shared with a Coalition researcher at the beginning of his study, the FWS must have interfered with the research. The court opined that findings typically change from the beginning to the end of a research project.

Violation of § 4 of the ESA

The Coalition next contended that even if the FWS had correctly interpreted the research, the listing was still invalid because the agency had failed to designate the critical habitat within the statutory two-year period. The Coalition argued that critical habitat needs to be determined at the time public hearings are held to present opposition to the listing so all parties influenced by the listing can make their opposition known. The Coalition further believed the district court's order that the FWS must finally make a designation of the critical habitat was an improper remedy to the agency's disobedience of the ESA's requirements. The Coalition believed that making the FWS start the listing process over would be the most effective remedy.

The appeals court looked to the intent of Congress when it created the ESA to make its decision. The judges determined that Congress wanted the listing of an endangered species and the determination of critical habitat to be separate processes so that the economics of potentially affected habitat would not interfere with the FWS' decision on listing the species.

As for the Coalition's idea to make the FWS start the listing process over, the judge, bothered as he was by the FWS' inefficiency in designating critical habitat, said that delisting only benefited the Coalition's goals.

The Commerce Clause

Congress used its broad constitutional power over interstate commerce, granted in the Commerce Clause,[4] to enact the ESA. Administrative agencies that

See Alabama Sturgeon, page 14

Court Rules Corps Did Not Follow NEPA in Issuing Wetlands Permit

***O'Reilly v. U.S. Army Corps of Engrs.*, 477 F.3d 225 (5th Cir. 2007)**

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Background

The Planche family owns land in St. Tammany Parish, near Covington, Louisiana that it wishes to develop into a residential subdivision. The family land includes wooded wetlands bordering the Timber Creek, which connects to Timber Branch, a tributary of the Tchefunte River. In order to construct the subdivision, some of the wetlands will need to be dredged and filled and materials will need to be discharged into public waters. In order for a developer to do this, the Clean Water Act requires that he or she obtain a § 404 permit[1] from the U.S. Army Corps of Engineers (Corps). The Corps must comply with the procedural requirements of the National Environmental Policy Act (NEPA) in approving the permit.

In 1999 the Planche family filed for a permit for a three-phase project on their land, which encompasses wetlands. Because of public objections the family withdrew this application. In 2000 the family submitted a revised permit application for only the first part of the project, which covers less wetlands. The Corps began to comply with the NEPA requirements, and in 2003 issued a "mitigated FONSI," or Finding of No Significant Impact, concluding that the project's adverse impacts on the environment would be reduced to a less-than-significant level by means of mitigation conditions attached to the permit. Consequently, the Corps issued the Planche family a § 404 permit that allows the dredging and filling of 39.54 acres of wetlands, conditioned on certain mitigation measures.

Local residents who live, work, and recreate near the proposed development sued to block the permit. They alleged that the Corps did not comply with NEPA's requirements because it (1) did not prepare an Environmental Impact Statement (EIS); (2) prepared an inadequate Environmental Assessment (EA); and (3) failed to consider the project's direct, indirect, and cumulative effects.

The District Court for the Eastern District of Louisiana concluded that the Corps' EA and FONSI were not sufficient under NEPA's requirements and agreed with the plaintiffs that the Corps had failed to consider the project's direct, indirect, and cumulative effects. The trial court also determined that the Corps should have assessed the entire project, not just the first part. Accordingly, the court enjoined issuance of the permit until the Corps prepared a full EIS.

The Corps and the Planche family representative appealed. The Planche family representative contended that the Corps' EA, FONSI, and permit should be affirmed, but the Corps asked only that the case be returned to the agency for further proceedings that may, if necessary, lead to a new EA and mitigated FONSI. The family and the Corps agreed that the injunction left the Corps with no other option than issuing a full EIS before it could decide whether to approve the developer's permit.

See Wetlands Permit, page 6

Wooded wetlands photograph courtesy of ©Nova Development Corp.

Wetlands Permit, from page 5

Assessing NEPA's Requirements

A court may overrule the Corps' decision not to prepare an EIS only when the plaintiff establishes that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[2] The district court based its finding that the Corps should have prepared an EIS on three grounds: (1) the Corps' failure to demonstrate the feasibility of the mitigation measures it imposed; (2) the Corps' failure to consider the cumulative effects of the project, other permits, and area urbanization; and (3) the Corps' improper segmentation of the first part of the project.

The Fifth Circuit Court of Appeals stated that reliance on mitigation measures may reduce a project's adverse impacts below the level of significance; however, in order to fulfill NEPA's requirements, an EIS involving mitigation must include a thorough evaluation of mitigation options. The Corps' EA predicted that the project would have substantial long-term adverse effects on site soils; could cause long-term, adverse impacts from increased pollution; would cause significant adverse impacts on wildlife habitat and wildlife; would result in a complete loss of wetland functions on the site, which would affect nearby wetlands; and would result in adverse and long-term impacts on traffic and transportation which could lead to safety concerns. Evaluating the Corps' proposed mitigation measures of these impacts, the appeals court agreed with the trial court that the Corps' EA failed to effectively demonstrate how these measures would remediate the adverse impacts so that they would not significantly affect the environment. Consequently, the court held that the Corps arbitrarily relied upon the EA to support its mitigated FONSI.

To determine whether the Corps failed to consider the cumulative effects, the court stated that the Corps must consider "proposed or reasonably foreseeable actions that are related by timing or geography."[3] The court found that the Corps had issued seventy-two other permits within a three-mile radius of this proposed development, which includes 400.9 acres of wetlands. The Corps acknowledged that the cumulative effects of the Planche project could become major. The court again agreed with the trial court that the Corps failed to explain why the permit mitigation requirements rendered the cumulative effects of this project less-than-significant.

To assess whether the project was improperly segmented, the court had to determine whether "proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects."[4] "Projects," under NEPA, include proposals where action is imminent. The court disagreed with the trial court and found that this project was not improperly segmented because the other phases of the project were still in the planning stages and not imminent.

Injunction

The trial court enjoined the issuance of the permit to the Planche developer until the Corps issued an EIS. The appeals court observed that a court that has determined that an agency has acted arbitrarily (as the trial court did) is permitted to set aside the agency's action. When the agency's decision is not sustainable on the basis of the evidentiary record, then the matter should be remanded to the agency for further consideration.

Because the trial court's findings relied on flaws in the Corps' methodology that rendered its decision unreliable, the appeals court agreed with the Corps and concluded that this case should be sent back to the agency. The court accordingly amended the injunction to enjoin the issuance of the permit pending remand of the case to the Corps for future proceedings.

Conclusion

The court of appeals affirmed the trial court's conclusion that the Corps acted arbitrarily in issuing a FONSI based on an inadequate EA because it did not meet NEPA requirements. Also, because the EA was inadequate, the court held that the EA could not form the basis of the Corps' FONSI. Furthermore, the court agreed with the trial court that the Corps should be enjoined from issuing the permit at this time, but disagreed with the trial court's reasoning. The court stated that this case should be remanded to the Corps so that the agency may correct its mistakes, but that this did not necessarily mean the Corps is required to prepare a full EIS. Therefore, the injunction was amended accordingly.˅

Endnotes

1. Permit applicants must design their projects to avoid adverse wetlands impacts where "practicable" and to minimize those impacts to an extent "appropriate and practicable."
2. Administrative Procedure Act, 5 U.S.C. § 706(2)(A).
3. *Vieux Carre Prop. Owners, Residents, & Assocs., Inc. v. Pierce*, 719 F.2d 1272, 1277 (5th Cir. 1983).
4. *Fritiofson v. Alexander*, 772 F.2d 1225, 1241 (5th Cir. 1985).

Fifth Circuit Rules Against Re-Injured Seaman

***Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271 (5th Cir. 2007)**

Adam DeVrient, 2L, University of Mississippi School of Law

On January 26, 2007 the U.S. Court of Appeals for the Fifth Circuit held that an agreement to arbitrate made after a seaman was injured was governed by the Federal Arbitration Act (FAA). Furthermore, the court determined that the FAA's definition of a corporation's residence would determine the venue for the suit. Finally, the court held that the scope of the arbitration agreement was broad enough to apply to the seaman's re-injury.

Background

In November of 2000, while the tugboat *Maryland* (owned by K-Sea Transportation Corp., or K-Sea) was in Connecticut, crew member Dextel Terrebonne suffered a hernia while lifting a pump onboard the tug. Terrebonne underwent surgery for the hernia the following month and returned to work on January 26, 2001. Two months later he signed an arbitration agreement settling claims that arose from his injury.

The arbitration agreement specifically settled all claims that Terrebonne had incurred from the date of his injury to the date of the agreement. While Terrebonne reserved the right to recover for any damages that he might later suffer as a result of the injury, those claims would be subject to arbitration.

Towards the end of April 2001 Terrebonne's hernia afflicted him again. Nonetheless, he continued to work onboard the tug until May 25, 2001, when he alerted his employers to his re-developed hernia. Shortly thereafter he underwent surgery for his re-injury.

District Court's Decision

Because Terrebonne's re-injury occurred after the arbitration agreement he brought a Jones Act[1] claim for maintenance and cure, as well as a claim under general maritime law for unseaworthiness. In his complaint Terrebonne neglected to tell the court of the existence of the arbitration agreement.

K-Sea asked the trial court to stay the proceedings pending arbitration. Terrebonne objected, claiming that the agreement was unenforceable under the FAA because it was subsumed by his employment contract. The trial court granted K-Sea's motion to compel arbitration and denied a motion for rehearing made by Terrebonne. Terrebonne filed suit in state court in Louisiana, but shortly thereafter dismissed it and agreed to proceed with arbitration.

In his complaint Terrebonne neglected to tell the court of the existence of the arbitration agreement.

The arbitrators awarded compensation to Terrebonne following their examination of the re-injury. K-Sea asked the district court to confirm the arbitration award and Terrebonne asked for the award to be set aside. The trial court refused to set aside the award and Terrebonne appealed to the Fifth Circuit on the matter.

The Appeal

Terrebonne appealed the district court's confirmation of the arbitration award and subsequent dismissal of his suit. Terrebonne's appeal was based on two separate arguments: that the arbitration agreement he signed was unenforceable, and that even if the agreement was enforceable the redevelopment of his hernia fell outside the scope of the agreement.

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Terrebonne, from page 7

Was the agreement enforceable?

Terrebonne argued that the agreement was unenforceable under either the FAA, the scope of which excludes seamen's employment contracts, or § 5 of the Federal Employer's Liability Act (FELA), which prohibits a common carrier from contractually limiting its liability. FELA applies by way of the Jones Act, which grants injured seamen the right to bring a cause of action for damages at law and the right to trial by jury.

Terrebonne attacked the arbitration agreement by pointing out that § 1 of the FAA states that "nothing herein shall apply to contracts of employment of seamen…" However, the court rejected this argument because it believed that the arbitration agreement was for Terrebonne's damages and not his employment.

In an attempt to skirt this rejection of his argument, Terrebonne asserted that the agreement dealt with a seaman's maintenance and cure, which is an inseparable aspect of a seaman's employment. After noting that Terrebonne brought this issue to the attention of the lower court, the appellate court dismissed Terrebonne's argument. The court said that maintenance and cure is indeed a crucial aspect of a seaman's relationship with his employer, but it is still separate from the employment contract. Citing the U.S. Supreme Court, the court observed that "[t]he right to maintenance cannot be abrogated, but it can be modified and defined by contract."[2] The court determined that the arbitration agreement did not eliminate Terrebonne's right to maintenance and cure and thus was valid.

Did the agreement violate FELA?

When Congress enacted the Jones Act it did not list the rights of seamen in the act itself. Instead, Congress

Photograph of a tug courtesy of ©Nova Development Corp.

extended to them those rights which existed under FELA. FELA § 5 voids "any contract…the purpose of which [is] to enable any common carrier to exempt itself from any liability…"[3] Terrebonne contended that the arbitration agreement violated this statute and was therefore unenforceable. This argument rested in large part upon the U.S. Supreme Court case of *Boyd v. Grand Trunk Western R. Co.*[4] In *Boyd* an injured FELA employee was injured and agreed to compensation from his employer in exchange for being able to bring suit in only one venue. The Supreme Court held that FELA § 5 rendered this agreement invalid. The appeals court was not persuaded by this argument, reasoning that *Boyd* was not controlling in this instance. The court said the Jones Act itself contains a venue provision for cases brought under it.

The court also stated that it was enforcing the arbitration agreement because doing so protected expectation interests and contractual rights of both the parties.

Terrebonne next argued that the Jones Act should apply a broader definition of a corporation's "residence" for venue purposes; specifically, he asserted that the definition found in 28 U.S.C. § 1391(c), which describes the general venue requirements of district courts, is the applicable one. The court agreed that this venue provision is to be read into the Jones Act; however, the court stated that the trial court correctly applied this venue provision in denying Terrebonne's motion to have the case transferred.

The court also reasoned that *Boyd* was inapplicable because it did not involve the FAA. And, according to the court, the judiciary has a policy of favoring arbitration. Therefore, the court was obliged to regard Terrebonne's argument(s) in a light that favors arbitration.

Terrebonne relied upon *Boutte v. Cenac Towing Inc.*, in which an arbitration agreement was held to be invalid.[5] The court distinguished that case from Terrebonne's by showing that in *Boutte* the arbitration agreement was contained in the actual employment contract, which was not the case with Terrebonne. Terrebonne attempted to avoid that distinction by citing *Wilko v. Swan*, in which the plaintiff was able to avoid arbitration because it would have violated § 14 of the Securities Act.[6] The court was not swayed for two reasons: (1) *Wilko* had been overruled, and (2) the *Wilko* holding was made at a time when there was judicial hostility towards arbitration.

The court appeared to have no reservations about compelling Terrebonne to enter arbitration. The court assured him that he would not have to give up any of his substantive rights under the Jones Act; his dispute would merely be resolved in a different forum.

Was there a violation of public policy?

Terrebonne argued that requiring him to arbitrate his case was a violation of public policy. The court responded that, to succeed with that contention, Terrebonne needed to show how it violates public policy or goes against the intent of Congress, which he was unable to do. The court also stated that it was enforcing the arbitration agreement because doing so protected expectation interests and contractual rights of both the parties.

Was the agreement broad enough for the second injury?

Terrebonne finally argued that, should the agreement be held to be enforceable, his re-injury was a separate incident and therefore not governed by the arbitration agreement. The court looked to the language of the agreement and found that it did indeed govern any claims that were related to Terrebonne's original injury. The court also stated that Terrebonne had failed to show how his re-injury was separate. Therefore, the agreement governed Terrebonne's re-injury.

Endnotes

1. 46 U.S.C. App. § 688.
2. *Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271, 280 (5th Cir. 2007) (internal citations omitted).
3. 45 U.S.C. § 55.
4. 338 U.S. 263 (1949).
5. 346 F.Supp.2d 922 (S.D.Tex. 2004).
6. 346 U.S. 427 (1953).

Court Rejects Expert Testimony in Benzene Cancer Claim

***Knight v. Kirby Inland Marine, Inc.*, 2007 WL 795676 (5th Cir. 2007)**

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This case involves a toxic tort suit brought by two tankermen who developed cancer after being exposed to benzene and other toxic chemicals while employed by the defendant. The U.S. District Court for the Northern District of Mississippi ruled for the defendants and denied the testimony of the plaintiff's expert witness. The plaintiff appealed this decision to the U.S. Court of Appeals for the Fifth Circuit.

Plaintiff's Exposure to Benzene

Benzene is a colorless and flammable liquid used primarily as an industrial solvent. Long-term exposure to benzene can damage bone marrow, lead to anemia, and cause leukemia.

Heath Knight worked as a tankerman for Kirby Inland Marine (Kirby) from 1993 until 1994. In 1998 he was diagnosed with Hodgkin's lymphoma. He underwent chemotherapy and made a full recovery. Thomas Ingerman began working for Hollywood Marine, Kirby's predecessor-in-interest, in 1987. From 1987 until 1995 Ingerman was employed as a tankerman and was exposed to benzene in addition to other hazardous chemicals. During this period, Ingerman underwent numerous benzene physicals, none of which ever indicated an increased level or buildup of benzene. In 1999, Ingerman was diagnosed with bladder cancer.

Long-term exposure to benzene can damage bone marrow, lead to anemia, and cause leukemia.

The Lawsuit in District Court

Pursuant to the Jones Act, Knight and Ingerman filed a lawsuit in federal district court in Mississippi. The plaintiffs hired Dr. Barry Levy, an epidemiologist and physician, to testify as their expert witness. The court then conducted a "*Daubert* hearing" to determine whether or not Dr. Levy's testimony was admissible on the issue of causation.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* the U.S. Supreme Court set forth a list of factors to assist courts in determining the admissibility of an expert's testimony.[1] The Court suggested that a trial judge should consider, among other criteria: (1) whether the theory or technique employed by the expert is generally accepted, (2) whether the theory has been subject to peer review and is published, (3) whether the theory can be tested, (4) whether the known or potential rate of error is acceptable, and (5) whether there are controlling standards for the operation of the technique.

The district court found Dr. Levy's testimony inadmissible based on Federal Rule of Evidence 702. The court based this finding on discrepancies in the scientific studies Dr. Levy relied upon to testify that the benzene the plaintiffs were exposed to at work was the cause of the cancer they later developed.

The second issue in the case involved Federal Rule of Civil Procedure 26(b)(4)(C), which provides that "if a court allows the deposition of an expert who will testify at trail, the court must order the discovering party to compensate the expert for his time, unless 'manifest injustice would result.'"[2] The court also has the authority to order the party seeking discovery to pay the other party a "fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert."[3] The district court reduced Dr. Levy's billing rate by one hundred dollars, limited the billed preparation time to twelve hours, and subtracted lunch and recess time from Dr. Levy's billed deposition time. The plaintiffs appealed the outcome of these two issues to the Fifth Circuit.

The Fifth Circuit Court of Appeals Decision

The appeals court determined that the lower court did not abuse its discretion in either issue on appeal and affirmed its holding. The issues in this case revolved around the question of whether benzene caused injury to the general population or to the plaintiffs.

The district court must find both general and specific causation. General causation analysis examines the effect of a substance on the general population, while specific causation analysis questions whether the substance caused the alleged injury to a particular individual. In toxic tort cases, the court applies a two-step process in which it first determines whether there is general causation evidence and then determines whether there is admissible specific causation evidence. While Dr. Levy was hired to testify on both issues, the district court found that his testimony regarding general causation lacked the necessary foundation to satisfy *Daubert* scrutiny, thus making an examination of his testimony on specific causation unnecessary.

The Fifth Circuit agreed with the lower court that the testimony was inadmissible because the case-control studies Dr. Levy relied upon failed to reliably establish a link between benzene and cancer not only in the general public but also in tankermen. The district court did not abuse its discretion in finding the analytical gap between the studies and his conclusions too wide and Dr. Levy's testimony unreliable. The court went further to hold that the testimony failed to satisfy vital *Daubert* criteria: Dr. Levy's methodology is not generally accepted, and has not been published or subjected to peer review or tested. Therefore, Dr. Levy's expert testimony on causation was inadmissible.

On the issue of discovery costs the appellate court again held that the lower court did not abuse its discretion in making deductions to the amount of reimbursed costs. The court affirmed the denial of the plaintiff's request for Kirby to pay the expenses incurred during the *Daubert* hearing. The court held that a *Daubert* hearing is not a discovery hearing but is actually an evidentiary hearing designed to screen expert testimony. The Fifth Circuit refused to extend Federal Rule of Civil Procedure 26 to any other hearing outside the discovery context.

Endnotes

1. 509 U.S. 579, 593 (1993).
2. *Knight v. Kirby Inland Marine, Inc.*, 2007 WL 795676 at *7 (5th Cir. 2007) (*citing* Fed. R. Civ. P. 26(b)(4)(C)).
3. *Id.*

Photograph of tanker courtesy of ©Nova Development Corp.

Florida Court Limits Right to Enjoy Bayside Easement

Neighbors Must Watch Sunset Elsewhere

***Brannon v. Boldt*, 2007 Fla. App. LEXIS 644 (Fla. Dist. App. Jan. 24, 2007)**

Kathryn L. Burgess, 2L, University of Mississippi School of Law

Background

A group of neighbors who live near the Boca Ciega Bay in St. Petersburg's Bay Park Gardens neighborhood wanted the legal right to sit and stand on land subject to an easement to fish in the bay, watch fireworks and the sunset, and enjoy the view of the bay. Title to the land in dispute is owned by the plaintiffs, the Brannons.

The controversy here arose over the interpretation of the easement that runs with the land. The Brannons saw the other neighbors as trespassers on their property when they were on the easement for longer periods of time than the Brannons felt was reasonably necessary to access the bay. The neighbors felt that they have the right to be on the easement as long as is necessary to enjoy their riparian rights.

Sunset on the bay, photograph courtesy of ©Nova Development Corp.

The original purpose of the easement was to create driveways and permit easy access to and from four different tracts of land, designated A-D. The easement also created a convenient way to reach the water from the landlocked tracts. The home in which the Brannons live, which is built on tracts A and B, was constructed so that the easement runs down the driveway, which is very close to the living room and kitchen, before it goes into the backyard. The judge noted that "anyone who owns the home on tracts A and B will always have a sense that neighbors are invading their personal space when the neighbors use the easement."[1] There was a seawall that was built on tracts C and D, which are the only two waterfront tracts. This seawall caused erosion of the public beach along the bay, so that the easement runs to a place that is of little to no value to neighbors who have only public rights to access the water.

This easement dispute was sparked when the Brannons installed two gates across the easement. A security gate was placed across their driveway at the front of the property, and another gate was placed closer to the water and closed off their entire backyard. These gates were locked, which made the easement inaccessible to the neighbors. The neighbors sued the Brannons and sought a declaration that all of the neighbors had an implied easement across that property, the right to use it to access the bay, and the associated riparian rights. The Henters, next-door neighbors to the Brannons, also claimed that they had the right to unobstructed access to their backyard through the easement, and said that the gate was an unreasonable obstruction.

After a hearing the trial court rejected the Brannons' defenses and held that an easement was created for the Henters to have access to their backyard. The court also held that the easement is for the benefit of all the neighbors to gain access to and from the bay and that it conveys the riparian rights associated with those lands. The court ordered the gate that the Brannons put up to be removed because it was an unreasonable obstruction to the Henters' right of passage and view. The Brannons appealed.

The Court of Appeals' Decision

The court of appeals affirmed the trial court's decision concerning the interference of the gates with the Henters' property. The only remaining issue was the

nature and the extent of the riparian rights the neighbors have by their easement by implication.

The court described the two categories of riparian rights, public and private. Public rights permit the use of navigable waters for navigation, commerce, fishing, bathing, and other easements allowed by law. These rights encompass the land below the high-water mark. Owners of riparian land share those rights with the public. Private riparian rights are possessed by those whose land extends to the high-water mark and include, among other things, the right to an unobstructed view of the water (in Florida, at least).

The court came to the realization that, in this case, there is little or no land that now exists below the high-water mark. The court's final conclusion was that the purpose of the easement by implication is to give the neighbors access to the water and the rights below the high-water mark. The neighbors have the right to cross the Brannons' property for a reasonable amount of time, but no right to remain on the easement for extended periods of time to view the water, fireworks, or the sunset.˅

Endnotes

1. *Brannon v. Boldt*, 2007 Fla. App. LEXIS 644 at *7 (Fla. Dist. App. Jan. 24, 2007).

CCA, from page 2

NMFS faced a difficult challenge in defending its action here. In formulating the rebuilding plan the Council had considered economic studies that showed a reduction in shrimping effort of only thirty-four percent, culminating in 2012. Yet in the plan the Council adhered to the assumption of a fifty percent reduction in effort beginning in 1999 and continuing through 2032.

The court found that NMFS was not engaging in reasonable decision-making when it persisted in relying on an assumption that was contradicted by the evidence the agency considered. Judge Harmon observed that the Council's own graphs showed that red snapper stocks would not be rebuilt within the mandatory time period. It would have been difficult for the court to conclude that the agency had acted reasonably, in light of this evidence to the contrary.

Judge Harmon also found that NMFS violated the plain meaning of the Magnuson Act by not taking steps to minimize bycatch and mortality from unavoidable bycatch in the fishery management plan. The agency had attempted to defend itself by claiming that it would include bycatch reduction at a later date in the Shrimp Fishery Management Plan. Unfortunately for the agency, the Magnuson Act explicitly requires fishery management plans to include measures that, to the extent practicable, minimize bycatch and mortality from unavoidable bycatch.

The court thus sided with CCA on its substantive claim that NMFS, in approving Amendment 22, violated the Magnuson Act and the APA. It was less receptive to CCA's other two claims. Judge Harmon found that CCA did not raise a valid NEPA question, and that NMFS did not act inappropriately when it denied the group's petition for emergency rulemaking.

Conclusion

Judge Harmon ordered NMFS to approve a red snapper stock rebuilding plan that includes measures to reduce shrimp fishery bycatch within nine months of her decision. Rather than vacating the entire plan, however, Judge Harmon allowed for the status quo to be maintained until the new plan is finalized.

On April 2 NMFS issued interim measures to address red snapper overfishing while the Council prepares a new plan. The interim measures, which include a reduction in the bag limit and the total allowable catch, became effective on May 2. The interim measures may be viewed at the Council's website, www.gulfcouncil.org.˅

Endnotes

1. 16 U.S.C. §§ 1801-83.
2. *Id.* § 1851(a).
3. *Id.* § 1851(a)(1).
4. The Magnuson Act defines "bycatch" as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards. Such term does not include fish released alive under a recreational catch and release fishery management program." *Id.* § 1802(2). Of most pertinence here are red snapper caught by accident in shrimp trawls.
5. 50 C.F.R. 600.310(e)(4)(ii)(B).
6. *Coastal Conservation Assn. v. Gutierrez*, Civ. Action No. H-05-1214, at 5 (S.D. Tex. Mar. 12, 2007) (quoting Amendment 22).
7. 70 Fed. Reg. 53142 (Sept. 7, 2005).
8. *National Resources Defense Council v. Daley*, 209 F.3d 747 (D.C. Cir. 2000).

Alabama Sturgeon, from page 4

implement the ESA cannot exceed the reach of that power. The Coalition contended the FWS was powerless to regulate something located only within the boundaries of Alabama and having no connection to interstate commerce.

The court, in upholding the listing, relied on several recent cases that allowed Congress to grant the FWS authority under the ESA to list purely intrastate species as endangered. The judges went further, saying the reason the Alabama sturgeon is no longer part of interstate commerce and no longer has any reported commercial harvests is due to its near extinction. The court's final analysis on the issue, taken from the U.S. Supreme Court, was to look at all of the economic effects of an issue if it is an essential part of larger regulation. This means the FWS can regulate intrastate species because preventing them from doing so would undermine the entire ESA.

Conclusion

Despite the Coalition's best efforts, the judges of the Eleventh Circuit rejected its arguments and affirmed the district court's ruling. By doing so, the Eleventh Circuit gave the Alabama sturgeon, if nothing else, a chance at survival.˅

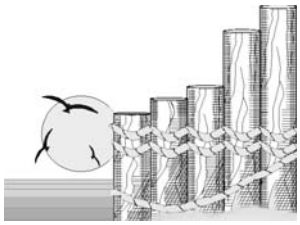
Endnotes

1. *Alabama-Tombigbee Rivers Coalition v. Dept. of Interior*, 26 F.3d 1103, 1104 (11th Cir. 1994).
2. *Alabama-Tombigbee Rivers Coalition v. Norton*, 338 F.3d 1244 (11th Cir. 2003).
3. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).
4. U.S. Const. Art. I, § 8, cl. 3.

Above, photograph of barges on the Tombigbee Waterway courtesy of U.S. Army Corps of Engineers.

Right, photograph of a peaceful Tombigbee River courtesy of the USGS.

Interesting Items



Around the Gulf…

The state of Alabama is considering a ban on gill nets in state waters. Gill nets, so called because they entangle fish by the gills, are used primarily to fish for Spanish mackerel and mullet. The nets can be up to half a mile long. At present their use is unrestricted, which scientists say is causing "localized depletion" of some species in Alabama waters. Commercial fishermen contend that the available data are insufficient to support that conclusion and are pressing the legislature to order further studies before taking action to ban the nets. Commercial fishermen generally oppose the ban, while recreational fishermen generally support it. Alabama is the only Gulf state that has not banned or severely restricted gill nets.

Mississippi governor Haley Barbour has signed an insurance wind-pool bill that legislators hope will expedite post-Katrina rebuilding by enticing private insurance companies to resume writing policies for coastal properties. Many private insurers had pulled out of the coast after the storm, leaving prospective builders with only the fiscally unsteady, and very expensive, wind pool option. In addition to beefing up the wind pool with new state money, the bill will allow private insurers to recoup their Katrina losses via a temporary monthly fee on all policyholders statewide, and will give tax breaks to insurance companies that voluntarily return to the coast.

The state of Louisiana has released its official Team Louisiana report on the levee failures following Hurricane Katrina. Team Louisiana, which is composed of engineers and scientists from Louisiana State University and the private sector, analyzed the decisions that set the stage for the post-Katrina catastrophe and laid the bulk of the blame on the U.S. Army Corps of Engineers. The team catalogued years of Corps missteps in research, engineering, construction, and maintenance of the levee system, and calls for further state and federal investigation into the failures so that the system can be improved. The report and associated documents can be downloaded at http://www.publichealth.hurricane.lsu.edu/TeamLA.htm.

Photograph of levee being sandbagged courtesy of USACE.

Over one thousand acres in Gulf Shores, Alabama, have been designated by the U.S. Fish and Wildlife Service as critical habitat for the endangered Alabama beach mouse. The designation protects the habitat, which encompasses some of Baldwin County's few remaining natural beaches, from development. As is often the case with critical habitat designations, the Service's action was hastened by litigation from environmental groups and opposed by developers.

Around the country…

The U.S. Fish and Wildlife Service has announced that twenty-eight states will share over $13 million in grants under the Clean Vessel Act. The grants may be used by state agencies to build and operate sewage disposal facilities for recreational boaters. Adequate disposal facilities help preserve water quality. The program is funded by taxes on fishing and boating gear, and boat fuels. Mississippi's Department of Marine Resources will receive $144,980 from the program, enough to finance nine disposal facilities.˅

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... Upcoming Conferences ...

•JUNE 2007 •

Applied Management of Conservation Lands in Florida
June 20-22, 2007, Orlando, FL
http://www.ces.fau.edu/amclif/

•JULY 2007 •

The Aquatic Plant Management Society, Inc. 47th Annual Meeting
July 15-18, 2007, Nashville, TN
http://www.apms.org/2007/2007.htm

Stream Restoration Principles Short Course
July 16-20, 2007, Logan, UT
http://uwrl.usu.edu/streamrestoration/

Coastal Zone 07: Brewing Local Solutions to Your Coastal Issues
July 22-26, 2007, Portland, OR
http://www.csc.noaa.gov/cz/

2007 National Marine Educators Association Conference
July 23-27, 2007, Portland, ME
http://www.seagrant.umaine.edu/education/06edunmea.htm

•AUGUST 2007 •

Managing Vertebrate Invasive Species
August 7-8, 2007, Fort Collins, CO
http://www.aphis.usda.gov/ws/nwrc/symposia/invasives/index.html

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