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WATER LOG

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Florida Court Dismisses Vessel Monitoring System Suit

***Gulf Fishermen's Assn. v. Gutierrez*, No. 8:06 CV 2313 T 26TBM (M.D. Fla. Apr. 24, 2007)**

Josh Clemons

On April 24 the U.S. District Court for the Middle District of Florida in Tampa dismissed a suit by the Gulf Fishermen's Association, a fishing advocacy group, challenging a federal rule that requires certain commercial fishing vessels to be equipped with vessel monitoring systems.

Background

On August 9, 2006, the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS, also known as NOAA Fisheries) issued a Final Rule to implement Amendment 18A to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (Final Rule).[1] Among the Final Rule's mandates was a requirement that vessels, including charter vessels, with federal commercial permits for Gulf reef fish (which include snapper and grouper) must be equipped with NMFS-approved vessel monitoring systems, or VMS, beginning December 7, 2006.

VMS is a system by which a mobile transceiver on the VMS-equipped vessel sends the vessel's exact latitude and longitude hourly via satellite to NMFS' Office for Law Enforcement.[2] Under the Final Rule the unit must be on twenty-four hours a day, seven days a week. NMFS has sought to use VMS to help it ensure compliance with area-specific restrictions on reef fish that, for logistical reasons – the limited number of enforcement personnel, the sheer expanse of the restricted areas and their distance from shore - have been difficult to enforce in the past. The agency is obligated to keep the location information confidential, and will release it only to federal fishery management and enforcement agents, to the vessel owner, or pursuant to a court order. Vessel owners must purchase and install their own VMS, which cost between $3,500 and $3,800 for the unit, plus $480 to $660 in annual service fees.

On December 6 the agency extended the deadline to March 7, 2007, so that vessel owners would have more time to decide whether remaining in the reef fishing industry was worth the cost of compliance, and if they chose to comply, to purchase and install VMS.

The Lawsuit

On December 15 the Gulf Fishermen's Association (Association), a non-profit commercial fishing advocacy group headquartered in St. Petersburg, filed suit in

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federal court to challenge the Final Rule. The Association pressed four claims for relief.[3] Its first claim was that the Final Rule violated the Magnuson-Stevens Fishery Conservation and Management Act, which requires NMFS to "take into account the importance of the fishery resources to the fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities."[4] The Association argued that the cost of compliance with the Final Rule would have extremely detrimental effects and that NMFS did not give due consideration to these effects.

The Association's second claim was that the Final Rule was arbitrary, capricious, and an abuse of agency discretion in violation of the Administrative Procedures Act.[5] The agency's purpose in enacting the Final Rule was to crack down on illegal fishing in restricted areas; however, the Association asserted that the use of VMS would cast too wide a net, so to speak, because it would record the movement into restricted areas of *all* vessels, including those not breaking any laws.

The Association's third claim was that the Final Rule failed to satisfy the procedural requirements of the Regulatory Flexibility Act, which requires an agency to perform a regulatory flexibility analysis when it promulgates a rule that will have significant economic impact on a substantial number of small entities (such as the commercial fishers represented by the Association).[6] According to the Association, NMFS did not adequately explain how it would minimize the Final Rule's economic impacts on the fishers or why it chose to require VMS instead of a different option, and did not fulfill the Regulatory Flexibility Act's reporting and recordkeeping requirements.

Finally, the Association asserted that the Final Rule violated its members' right to privacy under the Fourth Amendment of the U.S. Constitution, because the VMS would enable law enforcement to monitor vessel movement at all times even in the absence of probable cause to believe that a crime is being committed. The Association asked the court to declare the Final Rule unlawful.

The Court's Decision

Unfortunately for the Association, time was not on its side. The Association filed suit four months after the Final Rule was published; however, as the court observed, legal challenges to rules passed under the Magnuson-Stevens Act must be filed within thirty days of publication. The fact that some of the Association's claims were pursuant to other statutes was not enough to rescue them. Neither did the court endorse the Association's argument that the amendments to the Final Rule, such as the December deadline extension, started a new thirty-day challenge period.

Conclusion

The court entered judgment in favor of NOAA and NMFS because the Association waited too long to file its lawsuit. The merits of the Association's arguments were not addressed. Although it was unsuccessful in court, the Association may still advocate for its members' interests by petitioning the agencies for new rulemaking on VMS.˅

Endnotes

1. 71 Fed. Reg. 45428 (Aug. 6, 2006).
2. This information on VMS comes from NMFS Southeast Regional Office's VMS Frequently Asked Questions, available at <http://sero.nmfs.noaa.gov/vms/vms.htm>.
3. Gulf Fishermen's Association's Complaint for Declaratory and Injunctive Relief (Oct. 23, 2006).
4. 16 U.S.C. § 1851(a)(8).
5. 5 U.S.C. § 706(2).
6. 5 U.S.C. §§ 601-12.

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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Appeals Court Remands in Florida Clean Water Act Case

***Sierra Club, Inc. v. Leavitt*, 2007 WL 1649987 (11th Cir. June 8, 2007)**

Sarah Spigener, 3L, University of Mississippi School of Law

Environmental groups appealed a holding by the U.S. District Court for the Northern District of Florida that the U.S. Environmental Protection Agency's decision to approve Florida's 2002 impaired waters list, submitted pursuant to the Clean Water Act, was not arbitrary, capricious, or not in accordance with the law.

Clean Water Act

Since the issues in the case center on the duties and responsibilities that the Clean Water Act (CWA)[1] imposes, the court found it necessary to explain some key provisions.

Congress passed the CWA to restore and maintain the integrity of our nation's waters. The Act mandates that the states and the federal government work together to combat water pollution. First, the CWA requires states to establish "water quality standards" for waterbodies within their boundaries. In order to do this, a state must first designate each waterbody's specific use(s), such as fishing or swimming. The state must then determine the water quality necessary to safely permit the designated use. This level of quality is the "water quality standard."

Second, each state must compile a list of waterbodies that do not meet its water quality standards or that are not safe enough for their designated uses. This is the state's "impaired waters list." Each individual waterbody on this list is a "water quality limited segment" (WQLS). The CWA mandates that states target these WQLSs for pollution control. In order to do this, the states must establish a "total maximum daily load" (TMDL) for pollutants in each WQLS. The TMDL specifies the maximum amount of a particular pollutant that can pass through a waterbody each day without a violation of water quality standards.

Lastly, each state is required to establish a priority ranking for WQLSs. States are required to submit all this information, including the impaired waters list, TMDLs, and priority ranking, to the U.S. Environmental Protection Agency (EPA) every two years. The EPA has the duty to approve or disapprove the lists. If a list or item on a list is disapproved, the EPA must issue its own determination.

Background

This case focuses on Florida's 2002 update to its impaired waters list. In this update, the Florida Department of Environmental Protection (FDEP) reexamined roughly twenty percent of the state's waterbodies in accordance with its water quality standards and new Impaired Waters Rule (IWR)[2] and submitted the list to the EPA. The EPA for the most part approved the list, but disapproved Florida's failure to list certain waterbodies and removal of other waterbodies that were on the previous list. As a result, the EPA added eighty WQLSs to Florida's 2002 list.

SIERRA CLUB FOUNDED 1892 *vs.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

The Sierra Club and two other environmental organizations (collectively, Sierra Club) brought suit alleging that EPA's approval of the list was arbitrary, capricious, and not in accordance with the law. First, Sierra Club challenged the EPA's approval of Florida's decision not to rely on fish consumption advisories or data older than 7.5 years to list waterbodies. Second, Sierra Club

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challenged the EPA's approval of Florida's priority ranking of waterbodies, arguing that Florida did not consider statutory standards in creating the ranking. Lastly, Sierra Club challenged the EPA's approval of Florida's delisting of waterbodies that violated the water quality standards at least once in the last 7.5 years because the violations were due to natural conditions.

Intervention

The first issue that the appeals court considered was whether the district court had correctly ruled that the FDEP could not intervene in the case. In order to intervene, four requirements must be met: (1) the application to intervene must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may impede or impair his ability to protect that interest; and (4) the applicant's interest must not be represented adequately by the existing parties. The court agreed with the district court that the FDEP did not prove the fourth requirement because the agency's objective in the case was the same as the EPA's objective: to defend Florida's 2002 list and prevent the addition of waterbodies to that list. Therefore, FDEP was denied intervention.

Standard of Review

The remaining issues on appeal concerned the district court's grant of summary judgment on some issues. Summary judgment is proper when, viewing the evidence in the light most favorable to the party not asking for summary judgment, there is no genuine factual issue to be tried and the asking party is entitled to a judgment at that time.

Since the summary judgments were based on the EPA's decisions, the court also explained the standard of review applicable to federal agencies. Under the Administrative Procedure Act (APA), a court must set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[3] When an agency interprets a statute that the agency is responsible for administering, courts must give that interpretation deference if: (1) Congress has delegated interpretative authority to the agency; (2) the statute is silent or ambiguous with respect to the issue at hand; and (3) the agency's interpretation of the statute is reasonable.[4] Courts must also give deference to an agency's reasonable interpretation of its own regulations.

Issues on Appeal

Sierra Club initially raised a very general argument that the entire 2002 list should be invalidated because it was adopted under the IWR, portions of which were later invalidated. This argument was not presented at the original trial. An appellate court cannot review a legal issue not presented to the trial court unless it is a pure question of law. The court concluded that this was not a pure question of law and declined to address it.

In Sierra Club's first specific claim, it alleged that the EPA's decision to approve Florida's 2002 list was arbitrary and capricious because the list was missing waterbodies for which data indicated dangerous levels of mercury. In this argument, Sierra Club referred to fish consumption advisories issued for the state of Florida and a provision of the IWR that prohibited the use of data more than 7.5 years old. The district court concluded that the EPA's decision to approve Florida's methodology was rational.

The appeals court disagreed. Concerning the IWR provision, the court reasoned that even though a state has the right to decide not to use certain data, it still must evaluate all available data. By not evaluating data more than 7.5 years old, Florida failed to meet the requirement. The appeals court overturned the summary judgment and remanded this issue to the district court.

Concerning the use of fish consumption advisories, the court gave deference to the EPA; however, it was a lesser degree of deference than the agency wanted. The EPA had previously issued a guidance letter stating that only information relating to specific waterbodies should be considered in developing a state's impaired waters list. The court determined that Florida had reasonably relied upon this guidance letter. Since the majority of these advisories contained information from combined waterbodies, Florida's decision not to rely on them was reasonable. However, Sierra Club insisted that some of the advisories contained information only concerning specific waterbodies. Since this was a disputed issue, the court also remanded it to the trial court for an evaluation of the EPA's approval of Florida's decision not to use these advisories.

Sierra Club alleged that the EPA violated the CWA when it added eleven waterbodies to Florida's list that had been delisted from Florida's previous list. Sierra Club argued that when the EPA disapproves a list, it should create a completely separate list of its own. The court stated that nothing in the CWA prevented the

EPA from adding to the list or required the EPA to make its own list. The court rejected that claim.

Sierra Club also alleged that the EPA's approval of Florida's priority ranking of WQLSs for TMDL development was arbitrary and capricious. Florida ranked waterbodies by listing them as high, medium, or low priority, and designated as low priority "all water segments that are listed before 2010 due to fish consumption advisories for mercury (due to the current insufficient understanding of mercury cycling in the environment)."[5] Therefore, Sierra Club contended that Florida did not consider specific statutory factors in establishing the ranking. The EPA concluded that Florida did consider these standards. The court vacated the summary judgment and remanded the issue for a factual determination of this claim based upon the EPA's administrative records.

Photograph of Little River Springs, FL, courtesy of the US EPA.

Sierra Club challenged the EPA's approval of Florida's delisting of forty-five waterbody/pollutant combinations that were on Florida's previous list. According to Sierra Club, several of the waterbodies had exceeded their water quality standards at least once in the past 7.5 years and some of them were delisted because their violations were deemed to be the result of natural conditions. Both sides agreed that a state may remove a waterbody from the list if the waterbody is meeting its water quality standards, is expected to meet those standards within a certain timeframe, or if the original basis for its listing was inaccurate; however, neither party agreed whether the delisted combinations fell under any of those categories. In approving the delisting, the EPA used a totality approach to review whether a waterbody was impaired. Under this approach, the EPA determined that Florida's delisting was reasonable. Both courts found the EPA's approach reasonable and affirmed the delisting. Concerning the delisting as a result of natural conditions, Sierra Club argued that there was no exception in the CWA for pollution as a result of natural conditions. The court held that waterbodies not meeting water quality standards solely because of natural conditions did not need to be placed on Florida's impaired waters list because it contradicted the purpose of the CWA.

Conclusion

The 11th Circuit affirmed the denial of FDEP's motion to intervene and the entry of summary judgment on Sierra Club's claim that the EPA's approval of Florida's decision to delist certain waterbodies was arbitrary and capricious. The court vacated and remanded the remaining claims - that EPA wrongfully approved Florida's decision to discern which data to use and evaluate, and whether information in EPA's administrative records supported the contention that Florida did in fact use all statutory standards to compose Florida's priority ranking - to the district court for further factual determinations.˅

Endnotes

1. 33 U.S.C. §§ 1251 *et seq*.
2. Fla. Admin. Code Ann. r. 62-303.
3. 5 U.S.C. § 706(2)(A).
4. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843 (1984).
5. *Sierra Club, Inc. v. Leavitt*, 2007 WL 1649987 at *9 (11th Cir. June 8, 2007).

Fifth Circuit Rules for Drilling Company in Contract Dispute

***Thibodeaux v. Vamos Oil & Gas Co.*, 487 F.3d 288 (5th Cir. 2007)**

Josh Clemons

While working as roustabouts on an inland drilling vessel, the *Freedom*, Roy Thibodeaux and Gabino Silva allegedly suffered injuries in the course of their employment. They sued the drilling company under the Jones Act, which gives seamen a cause of action for money damages for personal injuries they suffer on the job.[1]

The drilling company, Axxis Drilling, filed a claim for indemnity and defense against Maxum Services, Inc., the contract labor provider that employed the ill-starred seamen. The two companies had a Master Service Agreement (MSA) under which Maxum provided workers for Axxis' drilling business. The MSA provided that Maxum would "protect, defend, indemnify, and hold harmless [Axxis]…from and against all claims, demands, causes of action, cost, expenses, or losses…arising in connection herewith in favor of Maxum's employees" and also that the MSA would be interpreted under U.S. maritime law.[2] If successful, Axxis' claim would make Maxum liable for the costs associated with the lawsuit, including the damages to Thibodeaux and Silva.

Maxum responded that it did not consent to be subject to the Jones Act because it was not aware that Thibodeaux and Silva would be used in maritime work; and that Louisiana law, under which the indemnity clause is invalid, should be used to interpret the MSA. The Louisiana district court was not persuaded and granted summary judgment in Axxis' favor. Maxum appealed to the U.S. Court of Appeals for the Fifth Circuit.

The Court of Appeals' Decision

The court faced a threshold jurisdictional issue regarding Thibodeaux' claim. Silva's claim had been settled, making indemnity and defense a "live" issue. The merits of Thibodeaux's claim, on the other hand, were still being litigated in the lower court. Because Axxis' liability to Thibodeaux was still in question, the court declared that it would be premature for it to consider the indemnity and defense dispute with respect to his claim. It proceeded to address the issue with respect to Silva's claim.

The court first observed that the MSA's language was crystal clear: Maxum agreed to indemnify Axxis against claims brought by Maxum's employees. Nonetheless, the court was obligated to weigh Maxum's two arguments for why the MSA should not apply.

Maxum's first argument was that it did not know that it would potentially be liable under the Jones Act, because it was unaware that Thibodeaux and Silva would be involved in maritime labor, and therefore did not truly consent to the contract. While a mistake that has certain characteristics can render a contract unenforceable, the court found that this was not such a mistake. The MSA clearly stated that maritime law would apply. The court held that Maxum was simply careless and was not entitled to relief on this ground.

. . . Maxum had nothing more to offer than "a conclusory statement that there are insufficient facts to find that maritime law applies."

Maxum's second argument was that Louisiana law, and not federal maritime law, should apply because Louisiana law would strike the indemnity clause. Again the court was dismissive, observing that personnel contracts for drilling barges are usually considered maritime contracts and Maxum had nothing more to offer than "a conclusory statement that there are insufficient facts to find that maritime law applies."[3] This argument failed too, and the court upheld the lower court's decision that Maxum owes indemnity and defense to Axxis.

Endnotes

1. 46 U.S.C. App. § 688.
2. *Thibodeaux v. Vamos Oil & Gas Co.*, 487 F.3d 288, 291-92 (5th Cir. 2007).
3. *Id.* at 294-95.

Injured Seaman Must Seek Arbitration

***Lobo v. Celebrity Cruises, Inc.*, 2007 U.S. App. LEXIS 13141 (11th Cir. June 7, 2007)**

Terra Bowling, J.D.

Inacio Lobo worked aboard Celebrity Cruises as a stateroom attendant. As part of his duties, Lobo was assigned to clean passenger cabins with the help of an assistant. Cruise passengers tipped Lobo for his services; however, the cruise company required Lobo to pay his assistant $1.20 per passenger per day out of the gratuities that he received. Alleging that the requirement violated the terms of his employment, as well as the Seaman's Wage Act and a prior U.S. Supreme Court decision, *U.S. Bulk Carriers, Inc. v. Arguelles*,[1] Lobo filed suit.

Arbitration Clause

The terms of Lobo's employment were governed by a collective bargaining agreement, which specified that disputes arising on the vessel or in connection with the agreement must be sent to arbitration. Lobo argued that the Seaman's Wage Act and *Arguelles* rendered the arbitration clause invalid.

The Seaman's Wage Act gives seamen the right to resolve wage disputes in federal courts. In *Arguelles*, a seaman successfully argued that the Seaman's Wage Act was not displaced by the Labor Management Relations Act (LMRA), which "provides a federal remedy to enforce grievance and arbitration provisions of collective-bargaining agreements."[2] Lobos claimed that the *Arguelles* decision permitted him to sue in federal court in lieu of arbitration.

The federal district court dismissed his claim, finding that an international treaty adopted by the U.S., the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), requires states to recognize and enforce international arbitration agreements and superseded the Seaman's Wage Act. Furthermore, the court concluded that *Arguelles* did not apply to Lobos' claim, because *Arguelles* was heard before the Convention was implemented. The court, therefore, held that Lobo was required to resolve his claim through arbitration.

Exempt?

On appeal to the Eleventh Circuit, Lobos again contended that the *Arguelles* decision effectively exempted seamen's arbitration agreements from the Convention. The Eleventh Circuit disagreed. The court noted that the Supreme Court in *Arguelles* did not consider the effect of the Convention, because the Convention was implemented only a few days after the briefing and oral argument. The appellate court also recognized that there is nothing in the language or the legislative history of the LMRA to indicate that it would supersede the right to sue in federal court. On the other hand, the Convention compels federal courts to direct qualifying disputes to arbitration. The court reasoned that invalidating the arbitration provision in Lobos' terms of employment would not conform to Congress' intent in enacting the Convention. The court affirmed the district court's ruling, leaving Lobo to seek relief through arbitration.˅

Endnotes

1. 400 U.S. 351 (1971).
2. *Id*. at 352.

Photograph of a cruise ship courtesy of the ©Nova Development Corp.

Florida Court Upholds Issuance of Dock Permit on Loxahatchee River

***Board of Commrs. of Jupiter Inlet Dist. v. Thibadeau*, 2007 WL 1427461 (Fla. App. May 16, 2007)**

Sarah Spigener, 3L, University of Mississippi School of Law

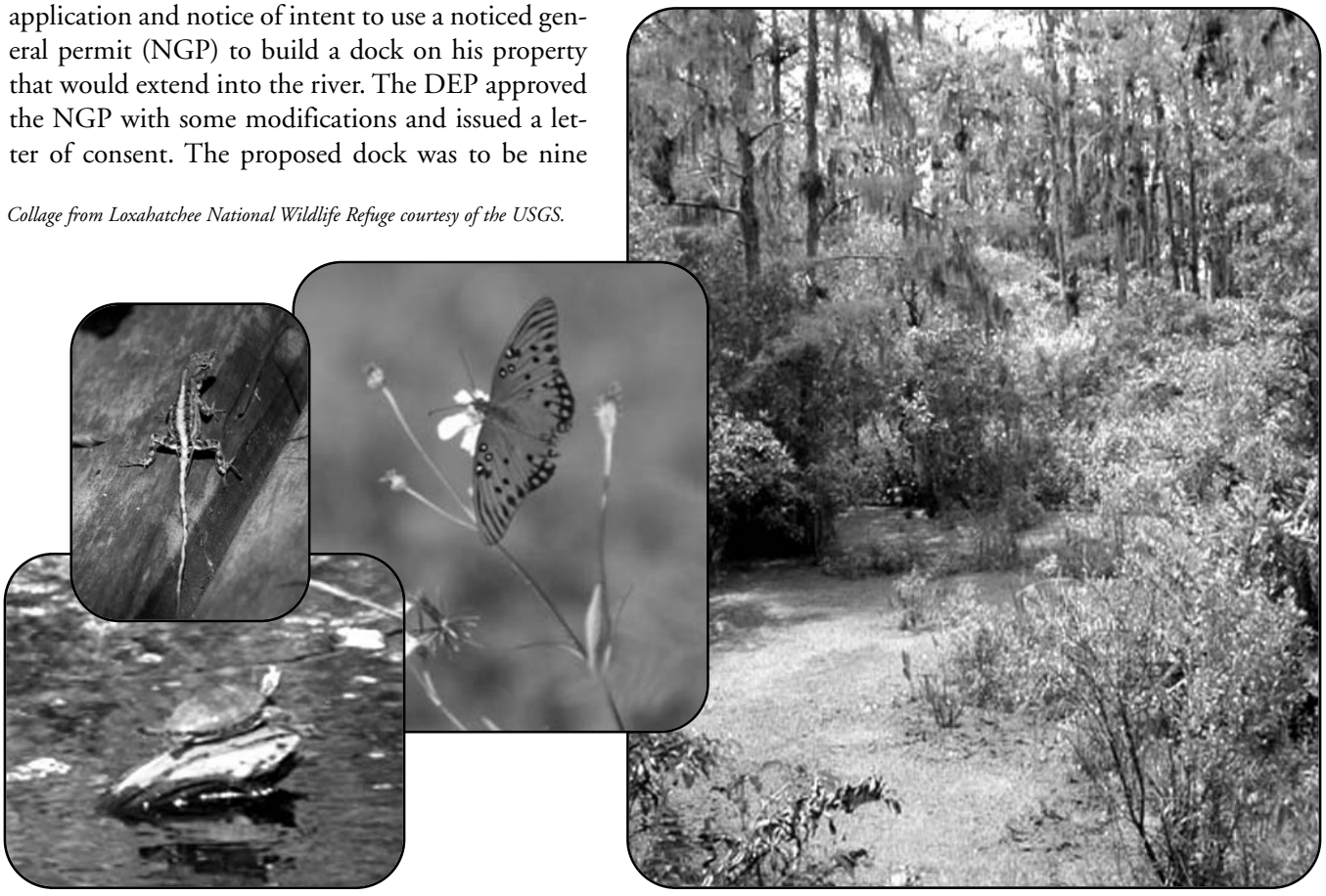
Florida's Department of Environmental Protection (DEP) authorized the issuance of a dock permit to Jupiter resident Paul Thibadeau. An administrative proceeding was held and ended in Thibadeau's favor, prompting the Jupiter Inlet District and two property owners to appeal and challenge the authorization and issuance of the dock permit.

Background

Thibadeau owns residential property in Jupiter, Florida, next to the southern shore of a bay of the Loxahatchee River. The Loxahatchee River is classified as an "Outstanding Florida Water" and an "Aquatic Preserve" and is entitled to special protection because of its natural attributes. In August of 2002, Thibadeau filed an application and notice of intent to use a noticed general permit (NGP) to build a dock on his property that would extend into the river. The DEP approved the NGP with some modifications and issued a letter of consent. The proposed dock was to be nine hundred square feet with a three foot by two hundred and fifty foot walkway, a six foot by twenty-five foot terminal structure, one eight foot by thirty foot boat slip as a "wet slip," and another as a boatlift.

About a year later, the Jupiter Inlet District (JID) requested a formal administrative hearing concerning whether the dock qualified for a NGP. The JID argued that the dock, which was to be built over sovereign submerged lands in an area designated as an aquatic preserve, violated the legal limitations related to these areas. One such rule requires consideration of the cumulative impacts of a particular activity in the aquatic preserve, and another requires that all structures be set back a minimum of twenty five feet inside the applicant's riparian rights line. The JID also alleged that the dock created a navigational hazard and would interfere with the JID's maintenance obligations under an agreement with the Board of Trustees of the Internal Improvement Trust Fund (Board).

Another year later, two neighboring residential property owners along the Loxahatchee River intervened in the



Collage from Loxahatchee National Wildlife Refuge courtesy of the USGS.

proceedings. They claimed that the dock would interfere with navigation and recreational activities and that the dock did not qualify for an NGP; however, they were not involved in this appeal.

At the end of the hearing, the administrative law judge (ALJ) issued a recommended order that Thibadeau be permitted to construct his dock pursuant to the NGP and letter of consent with some added conditions. The ALJ found that Thibadeau's application qualified for an NGP and that the dock would not interfere with navigation or the riparian rights of nearby landowners. The ALJ also determined that the JID had standing to bring this suit because the JID has management responsibilities in the bay and their interests were substantially affected by the proposed dock.

The JID filed an exception challenging the ALJ's findings concerning the riparian rights requirement. The DEP denied the exception. The DEP stated that it was unclear whether the JID was a proper party to object to the ALJ's finding concerning riparian rights because the ALJ had only ruled that the JID had standing due to its bay responsibilities, not due to the riparian rights requirement. Regardless, the DEP reviewed the issue and upheld the ALJ's finding that the dock qualified for the NGP. The JID appealed to the courts.

Issues on Appeal

On appeal, the JID challenged the DEP and the ALJ's finding that it did not have standing regarding the riparian rights requirement. It also challenged whether the dock complied with all relevant rules and criteria. In response, Thibadeau argued that the JID lacked standing to challenge the dock's construction and to participate in the administrative hearing.

Court's Analysis

The Florida Fourth District Court of Appeal, without explaining its reasoning, affirmed the findings concerning the dock's compliance with all rules and criteria. The court then addressed the standing issues.

The court explained that standing to participate in the administrative hearing is granted to those who have a substantial interest that will be affected by the proposed agency action. The party must show first the degree of injury—that it will suffer an immediate actual injury that entitles it to a hearing. Second, the party must show the nature of the injury—that it is a substantial injury of a type or nature which the proceeding is designed to protect.

Thibadeau argued that since the JID is an independent special district, in order to challenge the dock it must have been delegated authority for the bay's safety and activities, which he argued that it did not have. Second, he argued that the JID failed the standing test because it did not demonstrate that its own rights were substantially affected, rather than the rights of the general citizenry.

The court disagreed. The JID entered into a management contract with the Board which authorized the JID to enhance recreational uses, improve the river's productivity, and preserve and enhance the river's natural resources. The court stated that this contract afforded JID the right to oppose any activity that would interfere with the very duties it was given. Thibadeau did not dispute this, but instead argued that the JID had contracted away its right to oppose a third party's use of the land. By reading the plain language of the contract, the court disagreed with Thibadeau. The court held that the JID's rights would be affected since the dock would impede on navigation, public recreation, and harm natural resources. As a result, the court rejected Thibadeau's arguments that the JID entirely lacked standing to object to the dock and participate in the administrative proceedings.

The court then addressed the JID's claims concerning the DEP's statement related to its standing to challenge the riparian rights requirement and the DEP's determination that the dock complied with this requirement. The court explained that standing to participate in judicial review is different from the standing needed to participate in administrative proceedings. Standing for judicial review is narrower and only for those who are adversely affected by a final agency action. The court held that the JID did not have standing to bring either of its claims because it could not demonstrate that it was adversely affected by either ruling. Because the DEP actually decided whether or not the dock complied with the riparian rights requirement, rather than deciding not to decide because the JID lacked standing, the JID could not be adversely affected by the DEP's standing concerns. Furthermore the court held that because the JID was not one of Thibadeau's neighboring landowners, it could not be adversely affected by the dock's compliance with the riparian rights requirement.

Conclusion

The Fourth District Court of Appeal in Florida affirmed the ALJ's finding that the dock qualified for the NGP. The court rejected Thibadeau's arguments that the JID lacked standing to challenge the proposed dock's construction and to participate in the administrative hearing. However, the court determined that the JID did lack standing for judicial review of the DEP's findings concerning whether the JID had standing to object to the ALJ's findings and for judicial review of the riparian rights requirement.

Injured Airboaters Denied Claim for Loss of Consortium

***In re Everglades Island Boat Tours, LLC*, 2007 WL 1200961 (M.D. Fla. Apr. 23, 2007)**

Josh Clemons

On April 23 the U.S. District Court for the Middle District of Florida, Ft. Myers Division, ended the quest of Jonell and Robert Modys to recover for injuries allegedly sustained in an airboating accident by finding that the couple had no claim under federal maritime law.

Background

On December 19, 2005, Jonell Modys took a tour of the Everglades on a twenty-foot airboat owned by Everglades Island Boat Tours, LLC (Everglades Island) and piloted by William Anderson. Mr. Anderson and Ms. Modys were touring an area known to local airboat pilots as the "Big Bay" area. According to Ms. Modys, Mr. Anderson was operating the airboat at an excessively high speed and made an abrupt turn that caused her to be injured. Her injuries, she claimed, were substantial, permanent, and continuing in nature, and would not have occurred had Mr. Anderson been properly trained and/or supervised in the operation of the airboat.

Ms. Modys' husband Robert alleged that he was harmed by the accident as well, albeit indirectly. He claimed that Ms. Modys' injuries deprived him of the delightful intimacies that one expects from the marriage relationship – a deprivation described unromantically in law as "loss of consortium." He and his wife filed suit against Everglades Island for compensation for this loss.

The plaintiffs asserted that the waters on which the accident occurred are not "navigable" for the purposes of admiralty jurisdiction because they sometimes dry up during the dry season.

The Pivotal Question: Admiralty Jurisdiction?

The defendant argued that the court did not have jurisdiction to rule on this claim because the circumstances of the alleged accident invoked admiralty jurisdiction, which does not recognize the claim of loss of consortium. Admiralty jurisdiction over a tort claim requires the presence of two elements: (1) location of the incident on navigable waters (if the injury is suffered on land, it must have been caused by a vessel operating on navigable waters), and (2) connection with maritime activity.

The plaintiffs asserted that the waters on which the accident occurred are not "navigable" for the purposes of admiralty jurisdiction because they sometimes dry up during the dry season. In the court's estimation this fact was insufficient to render the waters non-navigable. The traditional standard for navigability was established by the U.S. Supreme Court in 1870: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[1] Without explicitly stating its reasoning the court declared that the Big Bay area meets this standard despite its periodic dryness.

The Modyses tried, but failed, to convince the court otherwise by citing two previous cases in which other courts had found wetlands to be non-navigable. In *In re Bridges Enterprises* the district court for the

Southern District of Florida found that certain wetlands were not "navigable" because they were landlocked and used only by airboats, and thus insufficiently suited for interstate commerce.[2] The court distinguished this case because the Big Bay area was connected via navigable channels to the Gulf of Mexico. In *In re Katrina Canal Breaches Consolidated Litigation* the district court for the Eastern District of Louisiana found certain wetlands not to be navigable for the purposes of establishing maritime jurisdiction.[3] The Modyses seem to have tried to stretch that holding too far, however, as the court noted that the mere fact that wetlands are present does not mean that maritime jurisdiction is improper.

Thus, the "location" element of admiralty jurisdiction was satisfied. There was no reason for the court to delve deeply into the "connection with maritime activity" element, as the commercial operation of an airboat for sightseeing purposes unquestionably fulfilled that requirement.

Despite this setback the Modyses had one more argument to make: that the airboat did not qualify as a "vessel" for purposes of admiralty jurisdiction. Unfortunately for their cause the statutory definition of "vessel" encompasses "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[4] The court found that an airboat easily fits within this very broad definition.

No Claim in Maritime Law

When admiralty jurisdiction exists, as the court found it did here, maritime law applies. Unlike the law in typical states, maritime law does not recognize a claim for loss of consortium in a personal injury case "except in exceptional circumstances" or when there is intentional wrongdoing, neither of which was the case here.[5]

Conclusion

Because the district court, sitting in admiralty, did not have jurisdiction over the claim for loss of consortium, it granted Everglades Island's motion to strike the claim.˅

Endnotes

1. *The Daniel Ball*, 77 U.S. 557 (1870).
2. No. 02-60270-CIV (S.D. Fla. Oct. 14, 2003).
3. No. 05-4182 (E.D. La. Mar. 9, 2007).
4. 1 U.S.C. § 3.
5. *In re Everglades Island Boat Tours, LLC*, 2007 WL 1200961 at *4 (M.D. Fla. Apr. 23, 2007).

Photograph of airboat courtesy of the USGS South Florida Information Access.

Environmental Group Denied Hearing on Pollution Order

***Alabama Dept. of Envtl. Mgmt. v. Legal Envtl. Assistance Found., Inc.*, 2007 WL 1378283 (Ala. Civ. App. May 11, 2007)**

Josh Clemons

In 2005 the Alabama Department of Environmental Management (ADEM) sought to assess civil penalties against Georgia Pacific for violating emissions standards. As required by the Alabama Environmental Management Act (Act),[1] the agency published notice of the proposed order and opened a thirty-day period for comments from interested parties. The Legal Environmental Assistance Foundation (LEAF), an environmental group, submitted comments asking ADEM to alter the proposed order. ADEM did not do so, and the order issued as proposed.

LEAF subsequently filed a request for a hearing with the Alabama Environmental Management Commission (AEMC), as provided for in the Act. This request ultimately gave rise to the controversy in this case by running afoul of an apparent conflict in the Act about who is entitled to a hearing.

Smokestack photograph courtesy of the U.S. EPA.

Ala. Code § 22-22A-5(18)a allows "persons who submitted written comments" to request a hearing, "in accordance with Section 22-22A-7." Sec. 22-22A-7 states that "any person *aggrieved* by" an ADEM action may request a hearing (emphasis added). The AEMC's administrative rules on hearings state that an "aggrieved person must either be subject to the order or have submitted timely written comments on the proposed order."[2] Elsewhere in the ADEM administrative rules "aggrieved" is defined as "having suffered a threatened or actual injury in fact."[3]

LEAF admitted in its request that is was not "aggrieved" but nonetheless deserved a hearing because it had submitted written comments about the order. ADEM countered that LEAF was not entitled to a hearing because it had not suffered threatened or actual harm from the order. An administrative law judge agreed with ADEM and dismissed LEAF's request. LEAF appealed that decision to the circuit court in Montgomery, which reversed and ordered AEMC to grant LEAF's request. ADEM appealed that decision to the Alabama Court of Civil Appeals.

The Appeals Court Decision

The appeals court reasoned that § 22-22A-5(18)a does not create a right to a hearing, but only the right to *request* a hearing. Sec. 22-22A-7 creates the right to a hearing, and it requires a person to be "aggrieved." This presented the question of what "aggrieved" means in the statute.

The court rejected LEAF's assertion that the language in § 22-22A-7 stating that an "aggrieved person must either be subject to the order or have submitted timely written comments on the proposed order" operates as a definition of the term "aggrieved." Rather, the court determined that the plain language of the statute, as well as previous court cases, indicated that the correct definition of "aggrieved" is "having suffered a threatened or actual injury in fact." Because LEAF was not "aggrieved," the group was not entitled to a hearing. The appeals court voided the circuit court's ruling and dismissed LEAF's request for a hearing.˅

Endnotes

1. Ala. Code § 22-22A-1 to -16.
2. Ala. Admin. Code r. 335-2-1-.04(2).
3. *Id.* r. 335-2-1-.02.

Court Denies Damages to Parents of Deceased Longshoreman

***American River Transp. Co. v. U.S. Maritime Svcs., Inc.*, 2007 WL 1760579 (5th Cir. June 19, 2007)**

Josh Clemons

In June the U.S. Court of Appeals for the Fifth Circuit affirmed the U.S. District Court for the Eastern District of Louisiana's decision that the non-dependent parents of a longshoreman who died while working on a barge were not entitled to damages from the barge owner for loss of society.

Background

The events giving rise to this case are tragic. Jacques Allemand and Darnell Page were work-release inmates providing labor on the barge ART 529, owned by American River Transportation Co. (ARTCO). On a February day in 2003 the pair were performing barge-cleaning tasks when Page was hit by a high-pressure stream of water, knocked unconscious, and fell into the Mississippi River. Allemand saw the accident and plunged into the river to save his colleague. Despite his best efforts, he was killed when two moored barges collided. Page died as well.

After the deaths ARTCO went to federal district court in Louisiana to initiate proceedings to limit its liability for the incident. Jacques Allemand's divorced parents, Lester and Edna Allemand, who had not been supported financially by their son, made an appearance in the court to claim survivors' damages as well as damages for loss of society based on their son's allegedly wrongful death.

ARTCO asked the district court for summary judgment on the ground that non-dependent parents are not entitled to damages for loss of society in a maritime wrongful death action. The court granted the request, reasoning that only dependents are entitled to recovery for loss of society in this situation. The Allemands appealed the decision to the Fifth Circuit.

The Fifth Circuit Decision

The appeals court began its discussion of the case with a primer on the history of the maritime wrongful death cause of action. The U.S. Supreme Court in 1886 held that there was no cause of action for wrongful death in maritime law.[1] Twenty-one years later the Court changed course and allowed that wrongful death actions could be brought in federal court when the death occurred in state territorial waters.[2] In 1920 Congress stepped in with the Jones Act, which provided for a wrongful death cause of action in negligence when a seaman is killed in the course of his employment, and the Death on the High Seas Act, which permits a wrongful death action in negligence or unseaworthiness for deaths on the high seas (whether or not in the course of employment). The statutes permitted only pecuniary damages.

This combination of cases and statutes created an irrational jumble of available causes of action . . .

This combination of cases and statutes created an irrational jumble of available causes of action, which depended in a seemingly arbitrary way on the legal status of the deceased and the waters in which he met his fate. Over the next seventy years the Supreme Court endeavored to create a more workable system in a series of decisions that established, among other things, that there is a general maritime cause of action for wrongful death in territorial waters, but that the Jones Act does not allow for recovery for loss of society in the wrongful death of a seaman.

This court framed the question before it thusly: "whether the *non-dependent* survivors of a deceased *longshoreman or harborworker* may recover for loss of society when the death *occurs in state waters*."[3] It then provided the rationale for why the answer is no.

The primary reason was precedent. The Fifth Circuit had held in two previous cases that the non-dependent survivors of seamen could not recover for loss of society in a maritime wrongful death action. The

See Longshoreman, page 14

Longshoreman, from page 13

court noted in those cases that the special concern that the law has for the survivors of seamen is motivated by the desire to ensure the survivors' continued financial support. With non-dependent survivors, this concern is absent. In addition, the goal of achieving uniformity in maritime law would be undermined by allowing non-dependents to recover.

The court acknowledged that Allemand and Page, the decedents in this case, were not "seamen" within the meaning of the Jones Act, but reasoned that this distinction did not weaken its logic. The Supreme Court had denied this kind of recovery for the survivors of seamen, the court noted, so it would be anomalous to extend it to the survivors of non-seamen. The court cited decisions in other circuits, including the Second, Sixth, and Eleventh, that accorded with this reasoning.

The Allemands cited contrary precedent from the Ninth Circuit in which that court allowed recovery by non-dependents on the ground that the statutes and Supreme Court cases do not explicitly require the dependent/non-dependent distinction to be made. This court was not persuaded by the Ninth Circuit's reasoning. Neither was it swayed by the Allemands' appeal for a more "humane" outcome; the Supreme Court, it said, has emphasized that uniformity in maritime law is a more important consideration than humanitarian outcomes.

The Allemands tried one more argument: that there is no reason to distinguish dependents from non-dependents when damages are not being sought to compensate for monetary loss. Unfortunately for them, the court had rejected that line of argument in a previous decision because it would do something courts are very hesitant to do without substantial justification: open up an extremely large class of potential plaintiffs. As the court noted here, allowing non-dependents to recover for loss of society would raise the specter of courtrooms filled with aunts, uncles, nieces, nephews, and even friends and lovers. Better, the court declared, to limit recovery to dependents, for whom the wrongful death action was originally created.

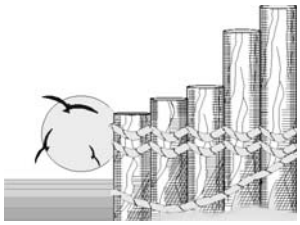
Conclusion

The court decided that its own precedent, the reasoning of other circuits, and the decisions of the U.S. Supreme Court compelled it not to allow recovery of damages for wrongful death by the non-dependent parents of a longshoreman who died in territorial waters. The court affirmed the district court's decision and dismissed the Allemands' claim.

Endnotes

1. *The Harrisburg*, 119 U.S. 199 (1886).
2. *The Hamilton*, 207 U.S. 398 (1907).
3. *American River Transp. Co. v. U.S. Maritime Svcs., Inc.*, 2007 WL 1760579 at *4 (5th Cir. June 19, 2007) (emphasis in original).

Interesting Items



Around the Gulf…

Get out the cocktail sauce! The Mississippi Department of Marine Resources reports that the state's shrimpers landed 2.4 million pounds of the delicious crustaceans in June. That's 1.1 million pounds over last June's catch, and even more impressive when one considers that 2006 was a record year. This year may be even better, according to experts. The upswing in catch over the past two years has been attributed to the busy 2005 hurricane season.

Speaking of Gulf shrimp, a study by researchers Russ Miget and Michael Haby at Texas A&M University suggests that farmed shrimp cannot match the unique flavor of wild-caught shrimp. The Gulf's popular pink, white, and brown shrimp contain chemicals called bromophenols, which help give them their special taste. Bromophenols are sometimes added to the feed given to farmed shrimp, but they have nonetheless been unable to duplicate the flavor of their wild-caught cousins. The title of the study is "Naturally-occurring Compounds which Create Unique Flavors in Wild-harvested Shrimp." For more information on the benefits of consuming wild-caught shrimp, visit the Wild American Shrimp, Inc., website at www.wildamericanshrimp.com.

Less encouraging is the recently discovered fact that parts of south Mississippi, like south Louisiana, are sinking. Over the last forty years or so, the coast of the Magnolia State has subsided approximately one foot, according to Kurt Shinkle of the National Geodetic Survey. While this is a slower rate of subsidence than that being experienced by Texas and Louisiana, it is still a problem for people who are relying on outdated elevation maps. The recently created FEMA maps, for example, use elevation data from 1969. Efforts to convince Congress to fund new data – which, at up to $2,000 per mile, is expensive – are underway.

In the Nation's Capital…

The Food and Drug Administration has blocked the sale of five types of farm-raised seafood from China because of repeated instances of contamination by unapproved additives. The banned species are shrimp, catfish, eel, basa (a catfish-type fish), and dace (a carp-like fish). The ban follows years of unheeded warnings to producers. Fortunately, seafood lovers can still freely partake of wild fish and shrimp from the Gulf of Mexico, and wholesome farm-raised catfish from our regional aquaculturists.

In the wake of the U.S. Supreme Court's supremely unsatisfying *Rapanos* decision, the Environmental Protection Agency and the Army Corps of Engineers have released new guidance for the filling of wetlands. Thanks to the Court's opinion, the new regime is less protective of wetlands than the one it replaces.

Photograph of bald eagle courtesy of US Fish sand Wildlife Service.

The bald eagle, proud symbol of the U.S. and one of the Endangered Species Act's great success stories, has been removed from the endangered species list. In 1963 there were 417 pairs; today, according to the U.S. Fish and Wildlife Service, there are 9,789. But don't start planning your bald eagle barbeque. Killing them remains illegal. They are protected by the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act.

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... Upcoming Conferences ...

• SEPTEMBER 2007 •

Clean Water Partnership Summit
September 5, 2007, Cincinnati, OH
http://www.htfwo.org/etprogram/summit07/

2007 Alabama Water Resources Conference
September 5-7, 2007, Orange Beach, AL
http://www.auei.auburn.edu/conference

• NOVEMBER 2007 •

2007 Estuarine Research Federation Conference
November 4-8, 2007, Providence, RI
http://www.erf.org/erf2007/

Water Management 2007: Improved Inflow Forecasts for Hydropower
November 15-16, 2007, Knoxville, TN
http://www.ceatech.ca/Meetings/WM2007/

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

•DECEMBER 2007 •

Understanding and Applying Environmental Flows
December 18-20 2007, Shepardstown, WV
http://www.nature.org/initiatives/freshwater/conservationtools/ - art21768.htm

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