

Roger Williams University

DOCS@RWU

Sea Grant Law Fellow Publications

Marine Affairs Institute

2004

Forest Service Must Reevaluate Spotted Owl Decision

Terry Boardman

Roger Williams University School of Law

Follow this and additional works at: https://docs.rwu.edu/law_ma_seagrant



Part of the [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

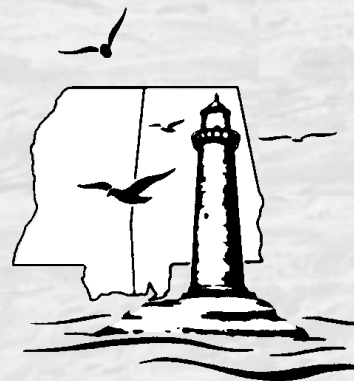
Boardman, Terry, "Forest Service Must Reevaluate Spotted Owl Decision" (2004). *Sea Grant Law Fellow Publications*. 52.

https://docs.rwu.edu/law_ma_seagrant/52

This Article is brought to you for free and open access by the Marine Affairs Institute at DOCS@RWU. It has been accepted for inclusion in Sea Grant Law Fellow Publications by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

WATER LOG

A Legal Reporter of the Mississippi-Alabama
Sea Grant Consortium



Circuits Splitting Over Reach of Clean Water Act

Supreme Court Decision Looms

U.S. v. Needham, No. 02-30217, 2003 WL 22953383
(5th Cir. Dec. 16, 2003)

Luke Miller, 2L

In December of 2003, just before the Christmas season arrived, the Fifth Circuit raked the coals of controversy when it released a decision interpreting the reach of the Clean Water Act (CWA). Not following a decision by the Sixth Circuit only four months prior, and a decision by the Fourth Circuit only six months prior, the Fifth Circuit decided that tributaries not navigable, nor truly adjacent to navigable water, do not fall under the jurisdiction of the federal government.

How the Split Interpretations Arose

The most prominent and recent Supreme Court case interpreting the coverage of the CWA is *Solid Waste Agency of Northern Cook County v. United States*, or *SWANCC*.¹ In that case the Supreme Court limited CWA jurisdiction from reaching isolated, non-navigable waters. Instead, waters that were either navigable (which has several definitions) or adjacent to navigable waters were appropriately regulated by federal agencies. To decide if waters were adjacent to navigable water a “significant nexus” test was to be used. Having this significant nexus is what allowed wetlands, previously not considered actually navigable waters, to be regulated.

In recent months the interpretation of CWA jurisdiction has focused as much on determining if a body of

See Clean Water Act, page 8

Legal Path Clear for Longhorn Pipeline

Fifth Circuit Upholds “Mitigated FONSI”

Spiller v. White, 352 F.3d 235 (5th Cir. 2003)

Josh Clemons, M.S., J.D.

On December 12, 2003, the U.S. Court of Appeals for the Fifth Circuit upheld a lower court’s decision that federal agencies adequately complied with the law in determining that operation of the Longhorn gasoline pipeline would not significantly affect the quality of the human environment. Longhorn may therefore proceed with pipeline development and operation.

See Pipeline, page 9

In This Issue . . .

Circuits Splitting Over Reach of Clean Water Act . . .	1
Legal Path Clear for Longhorn Pipeline	1
Court Strikes Down Endangered Species Act Rules	2
Industry Group Has Standing to Challenge Sturgeon Listing	3
Coastal Landowners Suffer Setback in Florida Court Decision	4
Ninth Circuit Affirms Water Use Restriction to Protect Fish	6
Forest Service Must Reevaluate Spotted Owl Decision	7
2003 Federal Legislative Update	14
Lagniappe	15
Upcoming Conferences	16

Court Strikes Down Endangered Species Act Rules

Spirit of the Sage Council, et al. v. Norton, 2003 WL 22927492 (D.C. Cir. 2003)

Leah Huffstatler, 2L

Citing a failure of agency compliance with public notice-and-comment requirements, the District Court for the District of Columbia recently struck down two rules promulgated under the Endangered Species Act. The No Surprises and Permit Revocation rules were challenged by several Native American groups and conservation organizations as violations of the Act's purpose and procedurally invalid.

Background

Described as the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation,"¹ the Endangered Species Act is designed to conserve threatened and endangered species and the ecosystems upon which these species depend. Under the Act, subject to some exceptions it is unlawful for any person to "take" any species listed as threatened or endangered. Generally, "take" means to harass, harm, hunt, wound, kill, trap or engage in a similar activity. Federal regulations further define taking to include significant habitat

modification or degradation that results in death or injury of protected wildlife.

In the early 1980s, Congress amended the Act to permit an otherwise prohibited taking when the taking is incidental to, and not the object of, an otherwise legal activity. The U.S. Fish and Wildlife Service and National Marine Fisheries Service — the agencies charged with enforcing the implementation of the Act — are allowed to issue incidental take permits (ITPs) to landowners and developers so long as permit holders enter into a mitigation plan known as a Habitat Conservation Plan (HCP). Each HCP must satisfy requirements under the Act and agency regulations, including the finding that the taking will not appreciably reduce the likelihood of the survival and recovery of the impacted species. Furthermore, ITP applications and their corresponding HCPs are subject to public comment prior to issuance of the permit.

The No Surprises rule challenged in this action was a policy whereby permit holders with approved conservation plans were assured the ITP would remain in effect without additional requirements even if circumstances changed so that the HCP would be inadequate to conserve the species. The goal of this policy was to insure regulatory certainty in exchange for conservation commitments. Various conservation organizations, Native

See Endangered Species, page 10



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


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

Editor: Josh Clemons, M.S., J.D.

Publication Design: Waurene Roberson

Contributors:

T. B. Boardman, Jr., 3L Luke Miller, 2L
Leah Huffstatler, 2L Lance M. Young, 1L
Stephanie Showalter, J.D., M.S.E.L.

For information about the Legal Program's research, ocean and coastal law, and issues of WATER LOG, visit our homepage at
 <http://www.olemiss.edu/orgs/SGLC>

Publication Announcement

Citizen's Guide to Conservation Easements in Alabama and Mississippi

The Mississippi-Alabama Sea Grant Legal Program is pleased to announce the recent publication of *A Citizen's Guide to Conservation Easements in Alabama & Mississippi*. Edited by Josh Clemons, Research Counsel for the Legal Program, the guide is intended to acquaint Alabama and Mississippi landowners with the law applicable to conservation easements in their states. Summaries of the relevant state and federal statutes and regulations are provided, along with the text of the statutes and regulations themselves. The guide is available on-line at <http://www.olemiss.edu/orgs/SGLC/citizen.pdf> and hard copies are available upon request.

Industry Group Has Standing to Challenge Sturgeon Listing

Alabama-Tombigbee Rivers Coalition v. Norton, 338 F.3d 1244 (11th Cir. 2003)

Josh Clemons, M.S., J.D.

On July 23, 2003, the U.S. Court of Appeals for the 11th Circuit held that the Alabama-Tombigbee Rivers Coalition has standing to challenge the U.S. Fish & Wildlife Service's listing of the Alabama sturgeon as an endangered species under the Endangered Species Act. The case was remanded to the U.S. District Court for the Northern District of Alabama for further proceedings on the merits.

Background – The Alabama Sturgeon

The Alabama sturgeon (*Scaphirhynchus suttkusi*) is a small (up to thirty-one inches and four pounds), freshwater sturgeon that is very closely related to the Mississippi shovelnose sturgeon.¹ The Alabama sturgeon was widespread historically in the Mobile River Basin of Alabama and Mississippi, and was bountiful enough to be fished commercially, but is presently known to exist only in “a short, free-flowing reach of the Alabama River below Millers Ferry and Claiborne Locks and Dams in Clarke, Monroe, and Wilcox Counties, Alabama.”² The U.S. Fish & Wildlife Service (FWS) attributes the sturgeon's decline to “over-fishing, loss and fragmentation of habitat as a result of historical navigation-related development, and water quality degradation.”³

The sturgeon has been the subject of official concern under the Endangered Species Act (ESA) since Jimmy Carter was president.⁴ The FWS first considered listing the sturgeon in 1980,⁵ and published notice of review of the sturgeon as a candidate for listing in 1982, 1985, 1989, and 1991. During that time, research continued on the little-understood fish. In 1993, having assembled adequate data to support a listing decision, the FWS issued a proposed rule for listing the sturgeon as endangered.⁶

Controversial Listing

Like many listing decisions, the sturgeon's has been fraught with controversy. The ESA prohibits the “take” of an endangered species⁷ and provides for civil and criminal penalties and citizen enforcement.⁸ Although

permits may be obtained allowing takes that are incidental to otherwise lawful activities,⁹ the listing of a species is generally considered undesirable by those whose activities may be curtailed thereby – particularly if those activities are economic.¹⁰ The ESA also restricts federal activities, which may include licensing of hydropower facilities and operation of dams and locks, that could destroy or adversely modify habitat designated as critical for recovery of the species.¹¹ Critical habitat protection potentially burdens economic interests with additional costs, restrictions, and procedural requirements.

With these concerns likely in mind, businesses that use the sturgeon's habitat (for example, Alabama Power and barge companies) formed the Alabama-Tombigbee Rivers Coalition (Coalition) to oppose the listing. The Coalition attacked the 1993 proposed rule under the Federal Advisory Committee Act (FACA), charging that the FWS based its decision on the report of an advisory committee that had not followed FACA procedures. The courts agreed and the FWS was enjoined from publishing, using, or relying upon the report in making the listing decision.¹² The FWS withdrew the rule in 1994 because it was uncertain that any Alabama sturgeon remained.¹³

Subsequently, several Alabama sturgeon were collected and the listing process was resumed. The FWS proposed listing in 1999¹⁴ and issued the final listing rule in 2000. The Coalition sued the FWS again to stop the listing, bringing a smorgasbord of claims ranging from flaws in administrative procedure to violation of the U.S. Constitution. (Secretary of the Interior Gale Norton, in her official capacity, is a named defendant because the FWS is an agency of the Department of the Interior. The FWS is also a defendant.)

The Standing Challenge and its Importance

The FWS challenged the Coalition's standing to bring this case. Under Article III, § 2 of the U.S. Constitution and the decisions of the U.S. Supreme Court interpreting it, a plaintiff must be able to demonstrate by evidence the three elements of standing: (1) injury in fact, that is (2) caused by the complained-of conduct of the defendant, and is (3) redressable by the relief requested. The challenge to standing is a mighty

See Sturgeon, page 11

Coastal Landowners Suffer Setback in Florida Court Decision

Monroe County v. Ambrose, Nos. 3D02-1716, 3D02-1754, 3D02-1800, 3D02-2068 (Fla. 3d Dist. Ct. App., Dec. 10, 2003)¹

Josh Clemons, M.S., J.D.

In December, the District Court of Appeal of Florida, Third District, was faced with a question that is becoming increasingly common in coastal areas: when a person buys undeveloped property, and the government subsequently restricts development, what recourse does the landowner have?

The Landowners

Between 1924 and 1971, the original plaintiffs (including Ambrose) or their predecessors in interest purchased undeveloped land in Monroe County, Florida, which encompasses the Florida Keys. The land was properly platted and recorded when purchased. At the time of purchase, subdivision of the land was governed only by local law.

A Change in the Law

In 1972, the Florida legislature enacted the Florida Environmental Land and Water Management Act (Act).² One of the Act's purposes is to "facilitate orderly and well-planned development," which the state is to accomplish by "establish[ing] land and water management policies to guide and coordinate local decisions relating to growth and development."³ The Act also provides that "such state land and water management policies should, to the maximum possible extent, be implemented by local governments through existing processes for the guidance of growth and development; and...all the existing rights of private property [are] to be preserved in accord with the constitutions of this state and of the United States."⁴

To further this policy, the Act provides for designation of "areas of critical state concern," which are areas "containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance...the uncontrolled private or public development of which would cause substantial deterioration of such resources."⁵ Areas of critical state concern may be subject to more stringent restrictions on develop-

ment than areas not so designated. The underlying idea is that areas of importance to the entire state merit the state's taking a more active role in the traditionally local realm of land use planning. In 1979 the Florida legislature designated Monroe County as an area of critical state concern, for the purpose of protecting the Florida Keys from harmful development.⁶ In 1992 Monroe County enacted the Rate of Growth Ordinance (ROGO), which limited new residential units to 255 per year, and established a point system for landowners to compete for this limited number of building permits.⁷

The Big Issue: Vested Rights

As a relief valve for landowners who acquired their land before such restrictions are enacted, § 380.05(18) of the Act provides

Neither the designation of an area of critical state concern nor the adoption of any regulations for such an area shall in any way limit or modify the rights of any person to complete any development that has been authorized by...recordation pursuant to local subdivision plat law, or by a building permit or other authorization to commence development on which there has been reliance and a change of position, and which...recordation was accomplished, or which permit or authorization was issued, prior to approval...of land development regulations for the area of critical state concern. If a developer has by his or her actions in reliance on prior regulations obtained vested or other legal rights that in law would have prevented a local government from changing those regulations in a way adverse to the developer's interests, nothing in this chapter authorizes any governmental agency to abridge those rights.

The key language in this section is "vested rights." Vested rights are protected from new regulation under the Act, and other property interests are not.

The major issue at trial was whether the landowners had rights to develop their platted property free from restrictions imposed by Monroe County pursuant

to the Act, particularly the ROGO.⁸ This question turned on whether the landowners' development rights were vested. There is little doubt that the landowners' development rights would have vested if they had actually begun building houses before the regulation took effect. Under Florida common law, "vested rights may be established if a property owner or developer has (1) in good faith reliance, (2) upon some act or omission of government, (3) made such a substantial change in position or has incurred such extensive obligations and expenses (4) that it would make it highly inequitable to interfere with the acquired right."⁹ Apparently, however, some or all of them did not do so, and therefore did not have common law vested development rights. The landowners argued that they nonetheless have statutory vested rights by action of the "recordation pursuant to local subdivision plat law" language in § 380.05(18).

The trial court agreed with the landowners, rejecting the county's argument that the phrase "on which there has been reliance and a change of position" is intended to modify "recordation pursuant to local subdivision plat law" despite the absence of a comma after the phrase "other authorization to commence development." Thus, recordation alone was sufficient to vest development rights and the landowners have, at a minimum, the right to build single-family homes on their lots. The court found the statutory language to be "clear and unambiguous."¹⁰

What is clear and unambiguous to one court, however, may not appear so to another. Perhaps unwilling to believe that the Florida legislature would use an environmental protection statute to vest otherwise unvested development rights, the District Court of Appeal of Florida, Third District, rejected the trial court's interpretation of § 380.05(18) and held that "[r]ecordation alone is not sufficient to establish vested rights."¹¹ The appeals court opined that it "would be unconscionable to allow the Landowners to ignore evolving and existing land use regulations under circumstances when they have not taken any steps in furtherance of developing their land."¹² They would have to show that they relied

to their detriment – that is, substantially changed position or incurred extensive obligations and expenses – on the legal state of affairs in place at the time of recordation to be entitled to relief.

Conclusion

Because the trial court determined that recordation was enough to vest rights under § 380.05(18), it did not determine the detrimental reliance issue. The appeals court remanded the case to the trial court for fact-finding on that issue. If the landowners ultimately prevail, they may be entitled to compensation from the county or, alternatively, allowed to develop free of restrictions imposed pursuant to the Act. The outcome is likely to be appealed either way, and should be an interesting addition to the growing body of law on the tension between private property rights and government regulation for the public good. ✓



ENDNOTES

1. This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal. The Westlaw citation is 2003 WL 22900537.
2. FLA. STAT. §§ 380.012, 380.021, 380.031, 380.04, 380.05, 380.06, 380.07, and 380.08 (2003).
3. *Id.* § 380.021.
4. *Id.*
5. *Id.* § 380.05.
6. *Id.* § 380.0552.
7. Monroe County Code § 9.5-120 to -124.
8. *Ambrose v. Monroe County*, No. 97-20-636-CA-18 (Fla. Cir. Ct., 16th Cir., May 28, 2002).
9. *Monroe County v. Ambrose* at *2.
10. *Ambrose v. Monroe County* at 5.
11. *Monroe County v. Ambrose* at *2.
12. *Id.*

Ninth Circuit Affirms Water Use Restriction to Protect Fish

County of Okanogan v. Nat'l Marine Fisheries Service,
347 F.3d 1081 (9th Cir. 2003)

Lance M. Young, 1L¹

The Ninth Circuit has affirmed a district court ruling that the U.S. Forest Service has the authority to restrict water rights in the Okanogan National Forest for the purpose of protecting endangered fish species. The County of Okanogan, Early Winters Ditch Company, and other private plaintiffs brought suit against the Forest Service for restricting water use from ditches during periods of low flow, intending to protect the chinook salmon, steelhead trout, and bull trout. Plaintiffs alleged that the restriction denied them their vested water rights under state law.

Background

The Skyline Irrigation Ditch and Early Winters Ditch are used for agricultural and other purposes. Feeding from the Chewuch River, the ditches cross National Forest land. The U.S. Forest Service grants special use permits for water use. Permits for both ditches expressly state that they are subject to the discretion of the Forest Service to add terms required by law, federal standards and regulations. Additionally, they can be revoked and do not convey any water rights applicable to the state of Washington.

The Endangered Species Act (ESA) requires a federal agency to consult the National Marine Fisheries Service (NMFS) and Fish and Wildlife Service (FWS) to determine whether its actions adversely affect an endangered or threatened species.² In 1998, water use permits for the two ditches indicated that amendments might be necessary, subject to consultation with these agencies. The Chewuch River is home to the steelhead trout and chinook salmon. The NMFS, under the ESA, listed both fish as endangered species. The bull trout, also native to the Chewuch River, has been listed as a threatened species by the FWS.

A biological assessment of the Chewuch River con-

cluded that amendments to the special use permits were necessary to protect the three species of fish. Restrictions were placed on the users of both ditches to increase river levels during low flow periods. Plaintiffs alleged that the Forest Service, NMFS, and FWS exceeded their statutory authority.

The Court's Analysis

The ESA "amplifies the obligation of federal agencies to take steps within their power to carry out the purposes of this act" but it does not give federal agencies additional authority.³ Plaintiffs contended that the Forest Service was acting on authority that it did not originally have. The court held that it did have the authority to place limitations on water use for a number of reasons.

The Federal Land Policy and Management Act of 1976 (FLPMA) specifies that ditches granted and renewed by the Secretaries of Interior and Agriculture are subject to conditions that "minimize damage to fish and wildlife habitat and otherwise protect the environment."⁴ This Act does limit the government from terminating permits or rights-of-way that existed before the Act. The court, however, reasoned that these particular permits have always expressly stated that they were subject to government discretion or termination. Even though the plaintiff's water rights were vested under state law, the permits have never given users an unconditional fixed right to use the ditches.

Other Acts give the Forest Service authority as well. The National Forest Management Act gives the Forest Service specific guidelines to provide for fish communities.⁵ The Organic Administration Act, the statute granting the agency its original authority, requires the Forest Service to improve forest life and secure favorable water flows in national forests.⁶ The Multiple Use Sustained Yield Act of 1960 (MUSYA) states that "it is the policy of Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."⁷

The plaintiffs relied on a Supreme Court decision, which held that Congress did not intend for the Organic Administration Act and MUSYA to reserve water rights for the purpose of preserving wildlife when establishing national forests.⁸ The Ninth Circuit declined to apply that rationale, finding that water rights and rights-of-way through federal land are legally different. The FLPMA specifically gives authority to the Forest Service to restrict rights-of-way. The court quoted another Supreme Court case to clarify its position: "the pending case 'is not a controversy over water

Forest Service Must Reevaluate Spotted Owl Decision

Earth Island Institute v. U.S. Forest Service, 2003 U.S. App. LEXIS 24887 (9th Cir. 2003)

T.B. Boardman, Jr., 3L¹

The Ninth Circuit recently reversed a Forest Service decision to log and sell timber from an area that provides habitat for the endangered California spotted owl. Earth Island Institute (Earth Island) had attacked the decision as a violation of the National Environmental Policy Act (NEPA)² and the National Forest Management Act (NFMA).³ After the District Court for the Eastern District of California denied the request for a preliminary injunction to halt the logging, Earth Island appealed to the Ninth Circuit which held that certain decisions made by the Forest Service were unreasonable and not in accordance with clear statutory language. The appeals court reversed the lower court decision because Earth Island's claim demonstrated a reasonable probability of success.

Background

In August 2001, wildfire swept through the Sierra Mountains damaging the Eldorado and adjacent Tahoe National Forests. Following the catastrophe, Forest Service personnel for each forest developed and implemented management plans to respond. This case focused on the management plan for the Star Fire area in the Eldorado forest. The Eldorado plan aimed to prevent another catastrophic fire and to maximize the monetary value of dead trees by allowing logging.

The Eldorado forest is subject to the Sierra Nevada Framework, a comprehensive conservation strategy that puts special limitations on logging to preserve its resources and sensitive habitats such as that of the California spotted owl. According to the Framework, the Forest Service must establish a protected area of 300 acres around all known or suspected California spotted owl sites. These areas are known as PACs, or Protected Activity Centers. Two PACs are located in the Eldorado Star Fire area, PAC055 and PAC075. However, the actual nest of PAC075 is located in the Tahoe forest along the river boundary of the Eldorado forest.

Surrounding the PACs is an additional 1,000 acres that are restricted to limited logging activities. These areas are called HRCAs, or Home Range Core Areas, and are established to ensure adequate foraging grounds.

According to the Sierra Nevada Framework, PACs must be maintained unless the habitat is rendered unsuitable by a catastrophe and surveys confirm California spotted owls do not inhabit the area. Additionally, if a PAC is deemed unsuitable, the Forest Service must attempt to relocate it somewhere else within that HRCA.

In March 2002, the Forest Service proposed logging 1,714 acres of the Eldorado forest. Prior to logging the area, a survey was conducted to assess the Forest Service's compliance with the Framework. Even though a pair of owls was noted in the area, the report concluded that the habitat appeared unsuitable to spotted owl populations. Based on the percentage of dead or dying trees, determined by a Forest Service entomologist, the agency dropped both PACs from the Eldorado forest plan and permitted logging of those areas.

Earth Island sought an injunction to immediately suspend logging, claiming that by dropping the PACs from the forest plan, the Forest Service had violated NEPA and the NFMA. The district court denied the injunction determining that the plaintiffs were unlikely to succeed on their challenges because the Forest Service was entitled to rely on its own methodology and experts. Subsequently, Earth Island appealed to the Ninth Circuit.

Forest Service & NEPA

Relying on the requirement that a federal agency must "consider every significant aspect of the environmental impact of a proposed action,"⁴ Earth Island alleged that the Forest Service had ignored contradictory data contained in recent studies. Essentially, several studies not considered by the Forest Service demonstrated that more healthy trees existed in the area one year after the fire than the Forest Service had predicted. Citing the Administrative Procedure Act, which states that an agency action may be overturned when it is arbitrary or capricious,⁵ the Ninth Circuit found that the Forest Service had provided a reasoned explanation for its decisions as required by NEPA.

Earth Island further contended that the Forest Service experts relied on factually incorrect data. The Ninth Circuit emphasized that while an agency need only demonstrate reasonableness when defending its use of data and methodology, it must ensure the professional integrity of such data and methodologies. Therefore, the Ninth Circuit charged the district court to revisit this claim on remand.

Clean Water Act, from page 1

water is navigable as on what exactly indicates the appropriate significant nexus connecting non-navigable water to navigable water. The first case to make a clear statement on this subject was *U.S. v. Deaton*.² Using the idea that a hydrological connection established a significant nexus, the court held that a particular wetland became regulated because it drained into a roadside ditch, which drained into a navigable river and eventually into the Chesapeake Bay. A similar case, *U.S. v. Rapanos*, held that wetland water that flowed into a man-made drain, then into a creek, then into a navigable river had enough of a connection to allow federal regulation of that wetland - an obvious extension of the hydrological connection test.³ The general consensus from these cases is that tributaries of navigable-in-fact waters have the significant nexus required by the decision in *SWANCC* to receive federal protection. Up until this recent Fifth Circuit decision, that interpretation of CWA jurisdiction was the last word officially spoken on the issue.

The split espoused by the Fifth Circuit solidifies the losing arguments from both the *Deaton* and *Rapanos* cases: i.e. federal jurisdiction over waters not actually adjacent to navigable-in-fact waters is not a proper application of the *SWANCC* decision and prior precedent.

Review of the Fifth Circuit Case and the Court's Analysis

As the end of January 1999 approached, a call came through to the Louisiana Department of Environmental Quality reporting an oil spill in LaFourche Parish. An employee of Needham Resources, Inc. (NRI) pumped some oil from a containment basin into an adjacent ditch, which flowed into Bayou Cutoff, and then into Bayou Folse. Bayou Folse happens to flow into the Company Canal, which in turn expires into the Gulf of Mexico. Due to the cost of the cleanup NRI could not complete the task and the Environmental Protection Agency (EPA), along with the Coast Guard, took over the operation. Funding for the government cleanup came through the Oil Pollution Act (OPA), which supplies government agencies with money needed to complete oil spill cleanups and then reimburses itself by forcing liable parties to pay. In this case, Needham claims that because the oil was not spilled into a navigable-in-fact waterway, or spilled into non-navigable waters truly adjacent to open bodies of navigable water, NRI is not liable under OPA because no federal jurisdiction exists where the spill occurred. The bankruptcy court, where this dispute was first being examined, sided with NRI and said that neither the drainage ditch nor the Bayou Cutoff are navigable or sufficiently adjacent to navigable

waters; thus no liability under the federal act was possible. An appeal by the United States to the regional District Court yielded the same result. That brought this case to the Fifth Circuit, which reversed the decision holding NRI liable, but set the decision apart from the Fourth and Sixth Circuit decisions regarding federal jurisdiction over tributaries leading to navigable waters.

The U.S. Court of Appeals for the Fifth Circuit decided that accepting the government's regulatory definition of what constitutes "navigable waters" (which includes all tributaries of navigable-in-fact waters) was too expansive and unsustainable under the *SWANCC* ruling. Instead, proximity was the key determination in establishing if a tributary was adjacent to a navigable waterway. Tributaries can meet the "significant nexus" test if they are sufficiently linked to the navigable water. Accordingly, the proximity and significant nexus requirements are met if a tributary flows directly into a navigable body of water.

In the present case, NRI was found not liable in the lower courts because the waterways discussed were located where the discharge of oil had taken place, which happened to be two or three tributaries removed from navigable water. Unfortunately for NRI, they stipulated in those early trials that the oil from their pump station was found nearly twelve miles downstream in Bayou Folse. That bayou happens to flow directly into navigable water; thus it is under federal jurisdiction.

Conclusion and Comparison

It is clear in the Needham decision the Fifth Circuit was not in favor of expanding jurisdiction to all tributaries for the CWA or OPA in light of the *SWANCC* decision. In its view the expansion requested would push the OPA to the outer limits of Congress' power to regulate under the Commerce Clause and certainly raise constitutional questions. *SWANCC* was viewed as reeling in the jurisdictional limits of the CWA and OPA, and placing proximity requirements on tributaries if they are to be considered adjacent to navigable-in-fact waters.

The Fourth and Sixth Circuit decisions were in favor of expanding jurisdiction for the CWA. Their perspectives focused less on defining the ambiguous terms of adjacency or significant nexus, and more on what the CWA is intended to accomplish and whether that purpose was supported by the regulation. Citing Senate Reports, the Sixth Circuit drew attention to the fact Congress realized protecting navigable waters would require some effort to control pollution at the source, possibly in non-navigable waters.⁴ The Fourth Circuit

Pipeline, from page 1

The Pipeline

Longhorn Partners Pipeline, L.P., purchased from Exxon a fifty-year-old, 731-mile petroleum pipeline, which Exxon had stopped using in 1995, with the goal of using it to transport 225,000 gallons of gasoline per day from Houston to El Paso and Odessa, Texas. This plan alarmed ranchers and other property owners who depend on water from the Edwards Aquifer system because the pipeline, which runs over or near the aquifer and associated wetlands and rivers, experienced approximately 173 spills during Exxon's ownership. The region's karst geology makes the aquifer particularly vulnerable to contamination from spills because the overlying rock is relatively porous and permeable. The City of Austin, through which the pipeline runs, joined the plaintiffs to protect its interests.

NEPA and the Legal Battle

The National Environmental Policy Act (NEPA) requires federal agencies to follow certain procedures whenever they undertake "major federal actions significantly affecting the quality of the human environment."¹ NEPA's purpose is twofold: agencies are to consider enough information to make an informed choice, and they are to apprise the public of the issues and decision-making process. To determine whether the action will have the requisite significant impact, the agency is to prepare a preliminary document called an environmental assessment, or EA. If the action will have a significant impact, the agency must develop a highly detailed environmental impact statement, or EIS, which requires substantial additional procedure, time, and money. On the other hand, if the agency makes a "finding of no significant impact" (FONSI), the NEPA process is over and the project can continue.

In the original proceeding, Longhorn and five federal agencies argued that the pipeline project was not subject to NEPA at all because it would be privately owned and operated. Judge Sparks of the U.S. District Court in Austin found their position to be "not only arbitrary and capricious, but ridiculous"² in light of the pipeline project's entanglement with, among others, the Army Corps of Engineers and the U.S. Department of Transportation (DOT). DOT and the U.S. Environmental Protection Agency (EPA) commenced the EA process, gathering data and taking comments from the public. The two agencies apparently disagreed about the results, with EPA wanting to proceed with an EIS and DOT preferring to issue a FONSI. The White House Council on Environmental Quality (CEQ)

advised the agencies of its preference for a FONSI. The agencies issued a "mitigated FONSI," which means that if Longhorn undertakes certain measures to mitigate environmental impacts, then those impacts will not be "significant."

The plaintiffs then sued to overturn the FONSI, on the grounds that the agencies' decision was arbitrary and capricious. This position is a challenging one for a plaintiff in a NEPA action, because courts give great deference to agency NEPA decisions. The agency does not have to make the "best" decision, it only has to abide by the process and make an *informed* decision; thus, courts will uphold a FONSI if "the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors."³ At trial, the plaintiffs pointed out a wide variety of issues that they believed rendered the FONSI invalid: excessive political influence; uncertainty of enforcement of the mitigation measures that made the FONSI possible; uncertainty in the risk modeling; high risk of leaks from old pipe; environmental impact of pump stations; potential impact on water supplies; questionability of Longhorn's assertion that it could shut down the pipeline within five minutes of spill detection; cumulative impact with other pipelines; and third-party damage and sabotage.

Judge Sparks rejected the complaints but clearly was moved by them. Among other things, he was concerned that Longhorn had limited liability and only \$15 million in liability insurance, and that the Washington, D.C.-based defendants were less than fully cognizant of regional sociocultural differences when they reasoned that the risk of the pipeline being punctured by rifle bullets was low because the probability of people hunting along the right-of-way in rural Texas was "remote and speculative."⁴ Nonetheless, he noted "Congress has only authorized federal courts to ensure the agencies considered all the relevant factors

See Pipeline, page 13



Endangered Species, from page 2

American tribes, and scientists criticized the rule claiming that without ongoing modification of HCPs, listed species and their habitats would be lost.

In 1999, while litigation challenging the No Surprises rule was pending, the government promulgated the Permit Revocation rule which sets forth the standards under which an ITP issued pursuant to the No Surprises rule may be revoked. The government maintains that the Permit Revocation rule was merely an explanation of how pre-existing revocation power would be applied to ITPs. The plaintiffs, however, claim the rule was a substantive change in regulations and thus subject to federal public notice-and-comment requirements which were not followed. Also, the plaintiffs contend the rule undermines the purpose of the Endangered Species Act by imposing a higher standard for revocation of ITPs compared to those applicable to other permits.

Ruling

Under the Administrative Procedures Act (APA), in most circumstances federal agencies must publish notice of proposed rulemaking in the Federal Register and provide interested members of the public an opportunity to comment on the proposed rules and participate in the rulemaking process. This requirement applies to rules which are "legislative" or "substantive" in nature; in other words, rules which "grant rights, impose obligations, or produce other significant effects on private interests," or substantially curtail an agency's discretion.²

Due to the interplay between the two rules, the court looked first at the Permit Revocation rule since a finding of its invalidity would invalidate the No Surprises rule as well. The court, noting that the Permit Revocation rule changed the circumstances under which ITPs could be revoked and granted ITP holders new rights not to have their permits revoked, held that the

new rule was indeed substantive and thus subject to the APA's notice-and-comment requirement.

The government then asserted that even if the rule was substantive it was still not subject to the APA's requirement because it was the logical outgrowth of a proposal published in the Federal Register in 1997 and opened to public comment. If a member of the public could have anticipated that the proposal would result in the Permit Revocation rule, the APA requirements would be satisfied. The court found, however, that the published proposal did not even suggest a course of action similar to the Permit Revocation rule and, therefore, the Permit Revocation rule could not have been anticipated by the public.

Finally, the government claimed that by publishing a Federal Register notice seeking public comment on the final Permit Revocation rule eight months *after* the rule was finalized cured any violations of the APA. Comments were accepted, but the rule was not repromulgated and no changes were made. The court found this post hoc notice and comment insufficient and noted that such a practice is not in harmony with the APA.

Conclusion

The court vacated and remanded the Permit Revocation rule for further proceedings consistent with the APA's notice-and-comment requirements. The No Surprises rule was also remanded for further consideration along with the Permit Revocation rule.✓

ENDNOTES

1. *Spirit of the Sage Council v. Norton*, 2003 WL 22927492 at *9 (D.C. Cir. 2003) (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978)).
2. *Spirit of the Sage Council* at *15 (citing *Nat'l Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992)).

Clean Water Act, from page 8

noted that non-navigable tributaries have a nexus to their navigable receivers, which could be considered significant according to Congressional concern over water quality and aquatic ecosystems.

Both interpretations have some solid support, like the Fifth Circuit's use of Webster's Dictionary to define adjacent, or the Fourth and Sixth Circuits' apparent support by Congress. It is also clear both sides raise possible constitutional issues, mostly manifested in federalism questions concerning usurping state authority. Because of this split and the issues it might present, a

Supreme Court decision may be necessary to clarify the *SWANCC* decision and how it is to be applied from hereon.✓

ENDNOTES

1. 531 U.S. 159 (2001).
2. 332 F.3d 698, 709 (4th Cir. 2003).
3. 339 F.3d 447, 449 (6th Cir. 2003).
4. *Rapanos*, 339 F.3d at 448 (citing S. Rep. No. 92-414, at 77 (1972)).

Sturgeon, from page 3

weapon in the defendant's arsenal, because a successful challenge operates as a "get-out-of-court-free" card – absent standing, the plaintiff's case is not justiciable. Everyone goes home.

The Coalition described several potential injuries, mostly economic ones related to the procedural and permitting costs associated with doing business where an endangered species lives, that it asserted were likely to be caused by the listing decision. The district court found that the Coalition did not satisfy the standing requirement because the injuries were too conjectural, and/or not adequately traceable to the listing decision, and/or not necessarily redressable by delisting.

The U.S. Court of Appeals for the 11th Circuit reversed the district court, finding that the elements of standing were present. Because the "machinery of the ESA" triggered by the listing would almost inevitably cause the Coalition's members to incur costs associated with permits issued by federal agencies that would be restricted by the listing, and because the members claimed to be already incurring expenses in response to the listing, their injuries were not conjectural.¹⁵ Because the members were expending resources not voluntarily but rather as a result of the "coercive framework" of the ESA, the injuries were traceable to the listing decision.¹⁶ And because current and future expenses would be obviated if the listing were invalidated, the injuries were redressable. The elements of standing being present, the court remanded the case to the district court for trial on the merits.

Conclusion

The 11th Circuit's ruling means the Coalition will get its day in court to argue against the validity of the decision to list the Alabama sturgeon as endangered (the government is not appealing this decision). The sweeping range of the Coalition's challenges promises to make this an exciting case to watch for those interested in the ever-controversial Endangered Species Act. Future developments will be reported in *Water Log*. ♡

ENDNOTES

1. Final Rule to List the Alabama Sturgeon as Endangered, 65 Fed. Reg. 26,438 (May 5, 2000) ("2000 Rule").
2. *Id.*
3. *Id.*
4. For more information on the sturgeon and associated listing and conservation efforts, see Kristen Fletcher, *Federal-State Alabama Sturgeon Conservation Agreement Signed*, WATER LOG 20:1, 4 (2000), available at

- <<http://www.olemiss.edu/orgs/SGLC/sturgeon.htm>>.
5. Review of Three Southeastern Fishes, 45 Fed. Reg. 58,171 (Sept. 2, 1980).
 6. Proposed Endangered Status and Designation of Critical Habitat for the Alabama Sturgeon (*Scaphirhynchus suttkusi*), 58 Fed. Reg. 33,148 (June 15, 1993).
 7. 16 U.S.C. § 1538(a) (2003). "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).
 8. 16 U.S.C. § 1540(a)-(b), (g).
 9. 16 U.S.C. § 1539(a).
 10. See, e.g. *Hearing on H.R. 3160 Before U.S. House Resources Comm.*, 106th Cong. (2000) (statement of Donald G. Waldon, Administrator, Tennessee-Tombigbee Waterway Development Authority).
 11. 16 U.S.C. § 1536(a)(2).
 12. *Alabama-Tombigbee Rivers Coalition v. Dept. of Interior*, 26 F.3d 1103 (11th Cir. 1994).
 13. Withdrawal of Proposed Rule for Endangered Status and Critical Habitat for the Alabama Sturgeon, 59 Fed. Reg. 64,794 (Dec. 15, 1994).
 14. Proposed Rule to List the Alabama Sturgeon as Endangered, 64 Fed. Reg. 14,676 (Mar. 26, 1999).
 15. *Alabama-Tombigbee Rivers Coalition v. Norton*, 338 F.3d 1244, 1253-54 (11th Cir. 2003).
 16. *Id.* at 1255. Traceability was found despite the fact that the Coalition members would not be regulated directly by FWS, because the direct regulating agencies – for example, the Federal Energy Regulatory Commission – would be compelled by "the coercive effect of the ESA as implemented by the FWS" to impose burdens on the members. *Id.*; see also *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (describing "powerful coercive effect" of FWS' implementation of ESA on U.S. Bureau of Reclamation).



Photo courtesy of Auburn University's Department of Fisheries and Allied Aquacultures

Earth Island, from page 6

Earth Island's NFMA Claim

Earth Island also argued that several Forest Service decisions violated the Sierra Nevada Framework and thus the NFMA. First, Earth Island argued that the Forest Service violated the Framework by concluding that it could log trees exceeding twenty inches in diameter. The Ninth Circuit quickly disposed of this claim, noting that the agency had plausibly concluded that those rules applied merely to undergrowth thinning in live stands rather than salvage logging after a fire.

However, the court did find merit in Earth Island's claim that the Forest Service violated the Framework when it de-listed the PACs and accompanying HRCAs in the Eldorado forest. The Framework calls for maintenance of these protected areas unless: (1) the habitat is rendered unsuitable by a catastrophe, and (2) surveys confirm non-occupancy of the California spotted owls. While the court noted the great detail provided by the Forest Service as to why the habitat was unsuitable, it also recognized that the agency had failed to confirm non-occupancy. In fact, the Forest Service's own survey, as well as Earth Island's, turned up an owl pair inhabiting the area of PAC075. In addition, the Red Star Fire Plan in the Tahoe forest, where PAC075's actual nest exists, did not de-list the Tahoe Section of PAC075 on account of the owl pair.

The Forest Service proposed that if there are obviously no green trees, or very few trees remaining, surveys are not always necessary. Yet, as the court points out, the Forest Service's own data demonstrate that portions of the PAC remain green and therefore warrant a survey. Furthermore, the Eldorado Environmental Impact Statement (EIS) should have addressed the potential role of the Eldorado HRCA in maintaining the Tahoe PAC075.

The court also noted that regardless of the data, the surveys are intended to find out whether or not owls are in the area, despite the determined suitability of the habitat. Thus, if they are present then the Framework should remain in place. Therefore, the Ninth Circuit held that the Forest Service may not simply determine that the habitat is unsuitable and disregard the actual presence of California spotted owls.

Cumulative Impact Requirement

In addition, the Forest Service had conducted EISs on the Eldorado and Tahoe forests individually. Earth Island argued that under NEPA, the Forest Service was required to prepare a single comprehensive EIS covering both the Eldorado and Tahoe National Forests.

Alternatively, Earth Island contended that even if a comprehensive EIS was not required, the Eldorado study failed to adequately consider the cumulative impact of de-listing the Eldorado PAC075 and HRCA that supported the active PAC075 in the Tahoe forest.

NEPA requires the agency to provide "the best way to adequately assess the combined impacts of similar actions."⁶ The Ninth Circuit held that the Forest Service was not required to prepare a single EIS, reasoning that Earth Island failed to demonstrate that the agency's actions were connected, cumulative, or similar. The court factored the existence of prior administrative boundaries, different patterns of ownership and destruction, disparate timetables, and separate supervisory personnel between each forest area to support its holding.

However, even though a comprehensive EIS was not required, the agency must still adequately analyze the cumulative effects of the projects within each individual EIS. The Eldorado EIS failed to assess the potential role of suitable habitat in the Eldorado forest to support the nearby PAC075 in the Tahoe forest. This omission amounted to an insufficient consideration of cumulative impact under NEPA. Thus, the court held that the Eldorado EIS failed to adequately consider the cumulative impact of the Star Fire Sale.

Conclusion

While a reviewing court will generally be deferential to an agency's choice of methodology and use of data, the agency decision will be overturned if it fails to follow the clear intent of Congress. In this case, Congress was clear that the confirmed presence of owls was a determinative factor that would prevent logging, an unreasonable omission by the Forest Service. Additionally, while a comprehensive EIS was not required for both projects, the Forest Service failed to factor in the cumulative impacts that one project would have on another. ♡

ENDNOTES

1. Terry is a student at the Ralph R. Papitto School of Law at Roger Williams University, Bristol, Rhode Island, participating in the J.D. – Master of Marine Affairs joint degree program with the University of Rhode Island.
2. 42 U.S.C. § 4321, *et. seq.*
3. 16 U.S.C. § 1600, *et. seq.*
4. *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002).
5. *See* 5 U.S.C. 706(2)(A).
6. 40 C.F.R. § 1508.25(a)(3).



Ninth Circuit, from page 6

rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned.”⁹

Conclusion

The Federal Land Policy Management Act provides the government with authority to restrict right-of-way through national forests. The Endangered Species Act

amplifies the obligation of the Forest Service to use that authority for the purpose of protecting endangered and threatened animal species. The effect of this decision will place a burden on those who depend on the Chewuch River as a source of water but does not result in revocation of permits and is within the authority of the Forest Service. ♡

ENDNOTES

1. Lance is a student at the Ralph R. Papitto School of Law at Roger Williams University, Bristol, Rhode Island.
2. 16 U.S.C. § 1536(a)(2).
3. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1978).
4. 43 U.S.C. § 1765(a).
5. 16 U.S.C. § 1604(g)(3)(A) & (B).
6. 16 U.S.C. § 475.
7. 16 U.S.C. § 528.
8. *U.S. v. New Mexico*, 438 U.S. 696 (1978).
9. *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 41 (1917).

Pipeline, from page 9

and has not permitted this Court to decide whether the Court would let Longhorn shoot gasoline through 52-year-old pipe for 731 miles where failure would be disastrous for thousands of people for years to come”⁵ and ruled for the agencies and Longhorn. The plaintiffs did not go away empty-handed, however. Because the suit forced the agencies to acknowledge that the pipeline project was within NEPA’s purview, with the result that potential impacts were analyzed and mitigated, the court found the plaintiffs to have “prevailed” such that they were entitled to recover from the defendants the costs of litigation.

The plaintiffs appealed to the Fifth Circuit and advanced essentially the same arguments as they did at trial: that the FONSI was a predetermined outcome based on a political decision, and thus made in bad faith; that the agencies failed to follow the NEPA regulations; and that it was impossible to find rationally that the project would not have a significant impact.⁶ A three-judge panel, speaking through Judge Jolly, affirmed Judge Sparks’ reluctant decision to uphold the FONSI for the same reason: that Congress intended for the agencies and not the courts to make these decisions, and that a court therefore cannot substitute its own opinion for that of the agencies as long as the agencies followed NEPA procedures, which in this case they had. The EA ran to four volumes and 2,400 pages and

was “exceedingly thorough and comprehensive.”⁷ Further process would be unlikely to supply the substantive relief the plaintiffs really wanted, which was a stop to the pipeline project.

Broader Significance

The decision appears to be another rote upholding of a federal agency NEPA decision, but it has some additional significance: the Fifth Circuit for the first time expressly upholds a mitigated FONSI. The mitigated FONSI concept has been controversial because of the necessarily speculative nature of the efficacy of future mitigation measures. Over the years several other circuits, including the influential D.C. Circuit, have held that mitigated FONSI are acceptable, and that is now the law in the Fifth Circuit as well. ♡

ENDNOTES

1. 42 U.S.C. § 4332(2)(C).
2. *Spiller v. Walker*, No. A-98-CA-255-SS, 2002 WL 1609722, at *2 (W.D. Tex. July 19, 2002).
3. *Id.* at *4 (quoting *Sabine River Auth. v. U.S. Dep’t of Interior*, 951 F.2d 669, 678 (5th Cir. 1992)).
4. *Id.* at *17, n. 7.
5. *Id.* at *13.
6. *Spiller v. White*, 352 F.3d 235, 241 (5th Cir. 2003).
7. *Id.* at 240.



2003 Federal Legislative Update

Stephanie Showalter, J.D., M.S.E.L.

The following is a summary of federal legislation related to coastal, fisheries, water, and natural resources enacted during the 108th Congress.

108 Public Law 16 – Nutria Eradication and Control Act of 2003 (H.R. 273)

Authorizes the Secretary of the Interior to provide financial assistance to Louisiana and Maryland for a program to implement measures to eradicate or control nutria and restore marshland damaged by nutria.

108 Public Law 23 — Ottawa National Wildlife Refuge Complex Expansion and Detroit River International Wildlife Refuge Expansion Act (H.R.298)

Expands the boundaries of the Ottawa National Wildlife Refuge Complex and the Detroit River International Wildlife Refuge. The Fish and Wildlife Service is directed to conduct a study of fish and wildlife habitat and aquatic and terrestrial communities in and around two dredge spoil sites in the Refuge Complex.

108 Public Law 34 – Zuni Indian Tribe Water Rights Settlement Act of 2003 (S. 222)

Approves the settlement of the water rights claims of the Zuni Indian Tribe in Apache County, Arizona. The Act also establishes the Zuni Indian Tribe Water Rights Development Fund to be managed by the Secretary of the Interior.

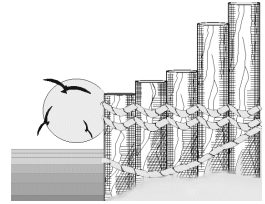
108 Public Law 136 – National Defense Authorization Act for Fiscal Year 2004 (H.R. 1588)

Reauthorizes and amends the Sikes Act, addressing conservation programs on military installations to require the Secretary of Defense incorporate in integrated natural resources management plans for military installations in Guam the management, control, and eradication of invasive species. Authorizes the Department of Defense to participate in wetland mitigation banks. Amends the critical habitat provisions of the Endangered Species Act to exempt DOD lands subject to an integrated natural resources management plan from designation as critical habitat by the Secretary of the Interior, if the Secretary determines that the plan provides a benefit to the species for which the habitat is proposed. Amends 16 U.S.C. § 1533(b)(1)(B)(2) to by inserting “the impact on national security” after economic impact. Amends the Marine Mammal Protection Act to authorize the Secretary of Defense, after consultation with the Secretary of Commerce and/or the Secretary of the Interior to exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of this Act, if the Secretary determines that it is necessary for national defense.

108 Public Law 148 - Healthy Forest Restoration Act of 2003 (H.R. 1904)

An act to improve the capacity of the Secretary of Agriculture and the Secretary of the Interior to conduct hazardous fuels reduction projects on National Forest System lands and Bureau of Land Management lands aimed at protecting communities, watersheds, and certain other at-risk lands from catastrophic wildfire, to enhance efforts to protect watersheds and address threats to forest and rangeland health, including catastrophic wildfire, across the landscape. Authorizes the Secretary of Agriculture to implement hazardous fuel reduction programs on certain classes of federal lands, not to exceed 20,000,000 acres. Hazardous fuel reduction programs may not be conducted on components of the National Wilderness Preservation System, wilderness study areas, or federal lands on which the removal of vegetation is prohibited or restricted by law. Amends § 307(d) of the Biomass Research and Development Act of 2000 to authorize funding for the development of tools to assist forest managers and research into forest thinning systems. Establishes the Watershed Forestry Assistance Program to strengthen watershed partnerships, provide best management practices to owners of nonindustrial private forest land, and protect water quality. The Secretary is also required to develop an accelerated basic and applied assessment program to combat infestations by forest-damaging insects and associated diseases and a healthy forests reserve program for the purpose of restoring and enhancing forest ecosystems. ✓

Lagniappe (a little something extra)



Around the Gulf . . .

Commercial marine sport fishing has been shown to provide Mississippi with **serious money**. A recent study by the Forest and Wildlife Research Center of Mississippi State University reveals that marine sport fishing rings up \$31.8 million in economic impacts in the coastal counties and \$35.9 million statewide, and supports 585 regional jobs and 100 statewide jobs. These figures will help guide management efforts at agencies like the Department of Marine Resources, which funded the study. Go dip a line - it's good sport and good for Mississippi's economy.

The 2004 Department of Interior appropriations bill, Pub. L. 108-108, includes funding for additional acquisitions for **Gulf Islands National Seashore**. \$4 million is budgeted for acquisitions on Cat Island, and \$1.1 million for portions of Horn Island.

A proposal to **fill twenty-four acres of wetlands** in Pass Christian, Mississippi, is stirring up controversy, and not just among wetlands watchers. DuPont Titanium Technology's DeLisle facility would use the site for additional **waste pits**, and area residents fear contamination of groundwater and Mississippi Sound by toxic substances like lead, cadmium, antimony, manganese, and tetrachloroethylene ("perc"). Leaks at older waste pits have introduced pollutants into soil and groundwater, but DuPont claims the new pits will be built not to leak.

Speaking of wetlands, International Paper Company has its eye on 736 acres of them in Moss Point, Mississippi, for use as a **wetlands mitigation bank**. The proposed Rhodes Lake Mitigation Bank would allow people to impair or destroy wetlands elsewhere in exchange for restoration and conservation activities at the bank. The bank requires approval by the U.S. Army Corps of Engineers. For more information, contact Michael Moxey of the Corps' Mobile District at (251) 694-3771.

And speaking of wetlands, and the Department of Interior, yet again, the DOI is awarding **\$17 million in grants for wetlands assistance in coastal areas**. Projects funded under the National Coastal Wetlands Conservation Program, selected in a competitive process, will restore, conserve, and preserve coastal wetlands. States and private partners will kick in approximately \$42 million for the effort. For more information, visit <http://www.fws.gov/cep/cwgcover.html>.

Officials in Key West are trying to curtail **offshore sewage dumping** by cruise ships that dock there. Cruise ship operators typically dump wastewater twelve miles out, easily exceeding the three-mile mandate of the Clean Water Act. Nonetheless, Key West mayor Jimmy Weekley says the dumping is hurting the Keys' fragile ecosystem and wants cruise ships to discharge into the local sewage system instead, for five cents a gallon. Establishing a workable policy and equipping all cruise ship piers with pumping stations could take up to a year.

Two loggerhead turtles were returned to their native Florida waters after being **turtle-napped** by Midwestern tourists. The family of purloining Illinoisans, allegedly unaware that loggerheads are a threatened species, spotted the pair shortly after they (the turtles) hatched near Port St. Lucie. Fearing for the turtles' safety, and thinking they (the turtles) might make good pets, the wily grandmother and her two grandchildren collected the beasts and spirited them away to the somewhat less sea turtle-friendly climes of the Prairie State, breaking state and federal law in the process. A pet-shopkeeper in their home state alerted them to their crime and may have also advised them that loggerhead turtles, at 300 pounds when fully grown, do not in fact make good pets. Duly chagrined, the unwitting poachers returned the turtles to the U.S. Fish & Wildlife Service. The government is not pressing charges. The armored orphans will be returned to their proper habitat in the Atlantic. ✓

WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA16RG2258, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The views expressed herein do not necessarily reflect the views of any of those organizations. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. Graphics and/or photographs by ©Corel Gallery, © Nova Development Corp., and NOAA



The University complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, disability, veteran or other status.

MASGP-03-012-04

This publication is printed on recycled paper.

Upcoming Conferences

• March, 2004 •

Aquaculture 2004

March 1-5, 2004 • Honolulu, HI

<http://www.was.org/main/FrameMain.asp>

The 7th National Mitigation & Conservation Banking Conference

March 3-5, 2004 • New Orleans, LA

<http://www.mitigationbankingconference.com>

Rousing the Restless Majority

March 4-7, 2004 • Eugene, OR

<http://pielc.org>

White Water to Blue Water Initiative Conference

March 21-27, 2004 • Miami, FL

<http://www.international.noaa.gov/ww2bw/>

First Annual Sustainable Beaches Summit

March 29-31, 2004 • Sandestin, FL

<http://www.cleanbeaches.org/sustainable/default.cfm>

• April, 2004 •

ICZM Conference

April 21-24, 2004 • Devon, UK

http://www.science.plym.ac.uk/pass/PASS_ICZM.htm



WATER LOG

Mississippi-Alabama Sea Grant Legal Program
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848



Non-Profit Org.
U.S. Postage
PAID
Permit No. 6