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Ninth Circuit Grants Partial Reprieve to California Sea Lions

Alicia Schaffner

Roger Williams University School of Law

Stephanie Showalter

University of Mississippi School of Law

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Aquaculture Project Survives Motion for Preliminary Injunction

Food and Water Watch v. U.S. Army Corps of Engineers, 2008 U.S. Dist. LEXIS 60191 (D. Mass. Aug. 6, 2008).

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

Imagine a world in which fishermen ring dinner bells to catch fish instead of towing nets. Sound like science fiction? It's not as farfetched as one might think. In an intriguing twist on Pavlov's experiments with his dogs, researchers at the Marine Biological Laboratory (MBL) at Woods Hole Oceanographic Institution are currently studying whether black sea bass can be acoustically conditioned to return to the net when called. If successful, this project has the potential to revolutionize the way we think about aquaculture.

Could fish be raised similar to free-range chickens, roaming freely while feeding naturally in the wild? Free-range aquaculture, in theory, could produce healthier animals, since animals raised in confinement are at a higher risk of disease and stress, and reduce the environmental impact by minimizing pollution. It could also reduce the costs of aquaculture since operators would not need to buy as much feed or closely monitor dozens of nets. There are a number of disadvantages to free-range aquaculture, of course, including a very good chance that natural predators will eat the farmed fish while they are living in the wild. But, all ranching comes with risks. Foxes eat chickens, coyotes eat sheep, and wolves eat calves. As long as enough livestock comes back to make the business prof-

itable, maybe it is worth the risk. That is, if the released fish are not negatively impacting wild populations.

Most of these questions are a bit premature considering researchers do not even know if fish are amenable to training. A \$270,000 grant from the National Oceanographic and Atmospheric Administration through its National Marine Aquaculture Initiative has enabled researchers to prove that black sea bass will respond to sound. Last summer, researchers placed 6,500 black sea bass in a circular tank. The fish were fed by dropping food into an enclosed area within the tank that the fish could enter only through a small opening. Three times a day for two weeks a tone was sounded for twenty seconds before food was dropped into the enclosure. At the end of the two-week period, according to one graduate student, "you hit that button, and they go into that area, and they wait patiently."¹

So black sea bass will respond to sound, but can they remember? By feeding without the tone for a few days and then testing the fish's response to the tone, the team at MBL observed that some fish seemed to remember to report to the feeding area at the sound of the tone for as long as ten days.² The project was off to a promising start and researchers were ready to launch field experiments in May 2008.

MBL planned to release 5,000 black sea bass raised from local broodstock into an Aquadome, a half-dome structure 32 feet in diameter and 16 feet tall covered with wire mesh, attached to the seafloor in Buzzards Bay, Massachusetts.³ After

Table of Contents

Aquaculture Research Project Survives Motion for Preliminary Injunction <i>Stephanie Showalter</i>	1
Court Dismisses Family Members' Claims of Emotional Distress <i>Terra Bowling</i>	5
U.S. Supreme Court Vacates <i>Exxon Valdez</i> Punitive Damages <i>Terra Bowling</i>	6
Transfer of Riparian Rights Under Scrutiny in Wisconsin <i>Stephanie Showalter</i>	8
Ecosystem-based Management in the Gulf of Mexico: Opportunities and Challenges <i>Richard McLaughlin and Wyndylyn Von Zharen</i>	10
Hawaii Superferry Litigation Continues <i>Stephanie Showalter</i>	14
LNG Terminal in Baltimore Receives Federal Approval <i>Terra Bowling</i>	16
Coast Guard Must Consider Impact of Shipping Routes on Right Whales <i>Terra Bowling</i>	18
Ninth Circuit Examines Whether Dogs Are Livestock <i>Arthur Park</i>	20
Ninth Circuit Grants Partial Reprieve to California Sea Lions <i>Alicia Schaffner and Stephanie Showalter</i>	22
Federal Court Dismisses Lawsuit Alleging Contraction of Hepatitis A from Undercooked Mussels <i>Timothy Mulvaney</i>	24
Coast to Coast	27



Aquadome, from page 1

the released fish are acclimatized to their new environment and reminded of their training, portions of the mesh will be removed to allow the fish to roam. Researchers will then sound the tone, which has a range of about 100 meters, after a few days and after several weeks and record how many fish come back. The Aquadome would be in the water for a total of six months.

Legal Challenge

Because the Aquadome could obstruct navigation, the MBL had to apply for a § 10 (Rivers and Harbors Act) permit from the U.S. Army Corps of Engineers (Corps). On May 30, the Corps issued a permit for the project after concluding in its Environmental Assessment (EA) that there would be only minor negative impacts on water quality near the project site.⁴ MBL placed the Aquadome and released the fish in June. In early July, Food and Water Watch (FWW), a national environmental advocacy organization, filed suit against the Corps alleging violations of the National Environmental Policy Act (NEPA) and seeking to halt the project until a full environmental review is conducted.

Preliminary Injunctions

A party seeking a preliminary injunction has the burden of proving that (1) they are likely to succeed on the merits of the case at trial; (2) they will suffer irreparable harm if the activity is not halted; (3) the balance of harms weighs in their favor, and (4) granting the injunction will serve the public interest. A party unable to demonstrate either likelihood of success on the merits or irreparable harm “must fail in his quest for preliminary injunctive relief.”⁵

FWW claimed that the Corps violated NEPA by issuing the permit without preparing an Environmental Impact Statement (EIS). NEPA requires federal agencies to prepare an EIS for “major federal actions significantly affecting the quality of the human environment.”⁶ An agency may first prepare an Environmental Assessment (EA) to determine

whether the action will have a significant impact. If the agency determines the action will not have a significant impact on the environment, it may issue a “finding of no significant impact” (FONSI) and proceed without preparing an EIS.

Adequacy of the EA

Courts review federal agencies’ EAs and FONSIIs under a four-part analysis. Agencies must identify relevant environmental concerns and take a “hard look” at those concerns.⁷ An agency who decides to issue a FONSI after taking a “hard look” must “be able to make a convincing case for its finding.”⁸ Finally, if the action will have a significant impact, an agency can avoid preparing an EIS “only if the agency finds that changes or safeguards in the project sufficiently reduce the impact to a minimum.”⁹

FWW raised four environmental impacts during the public comment period which it claims the Corps failed to adequately address in its EA: the potential impact of the project on Essential Fish Habitat (EFH) and juvenile fish near the project site and the potential harm to the genetic health and natural behaviors of wild populations. Although the Corps identified each of these concerns in its EA, FWW claimed that the Corps failed to take a “hard look” at these issues primarily because some of the Corps’ responses to the FWW comments were copied verbatim from MBL’s responses to the public comments.

The district court disagreed. “The fact that the Corps sought and relied upon MBL’s comments [was] not, in itself, troubling” to the court.¹⁰ The Corps solicited input from the MBL researchers and state and federal agencies regarding the project’s potential impact. The Massachusetts Department of Marine Fisheries had “no recommendations” for the Corps.¹¹ The National Marine Fisheries Service stated, “it does not appear that this project is likely to have more than a minimal and temporary impact on Essential Fish Habitat and that any associated adverse impacts have been minimized through project design.”¹² The court found MBL’s analy-

sis of the public comments and its explanation as to why the project would have a minimal impact to be compelling, especially in light of the management agencies’ agreement. The Corps, therefore, took the requisite hard look at the issues.

Significance of Impact

FWW challenged the Corps’ conclusion that the project would not have a significant impact. When evaluating the significance of actions, Federal agencies are required to consider, among other things, the “unique characteristics of the geographic area such as proximity to . . . ecologically critical area,” and the degree to which the effects are likely to be “highly controversial” or “highly uncertain.”¹³ FWW claims the Corps must prepare an EIS because this project implicates all three of these considerations.

The district court again disagreed. The project is expected to temporarily impact 80 square feet of EFH consisting primarily of subtidal sand. Except for the first three weeks of the project when the fish are confined to the Aquadome, wastes will be dispersed over a large area as the fish swim freely. Despite the project’s proximity to an “ecologically critical area” (the EFH), the temporary impacts “did not warrant a finding of NEPA significance.”¹⁴ Furthermore, the court found “little evidence” that the project is highly controversial. Although a few agencies and individuals expressed concerns during the comment period, FWW “seems to be a lone voice in its objections to the adequacy of the EA and FONSI.”¹⁵ Nor are the project’s impacts “highly uncertain.” Because of the Corps’ experience permitting large salmon farms in New England, the court accepted the agency’s conclusion that “the impacts of the proposed project are not uncertain, they are readily understood based on past experiences the Corps has had with similar projects.”¹⁶

Irreparable Harm

The district court concluded that FWW was unlikely to succeed on the merits of its NEPA

See Aquadome, page 4

claim because the Corps' EA and FONSI were adequate. The court further found that, even if FWW could establish a likelihood of success, it would be unable to prove irreparable harm. The court stated that FWW "lacks any affidavits from scientists or experts proving that the Project presents a real threat of irreparable harm to the environment."¹⁷ FWW failed to present any evidence that significant numbers of juvenile fish live in the project area or that native fish would become dependent on the food released at the site. Additionally, FWW relied exclusively on scientific studies on the environmental impacts of large-scale aquaculture, not small-scale temporary research projects.

Conclusion

Ultimately the court determined that the scales tipped in the Corps' favor. Granting an injunction in this case would place a significant burden on MBL. By the time the court heard the case, the fish were already in the water. If the project were to be stopped, quite a bit of time and money would have been wasted. Furthermore, the Court concluded that it was in the public interest to deny the injunction. This project had received taxpayer money through a federal grant program and the findings of the researchers could lead to improvements in both aquaculture and stock enhancement programs. For instance, acoustic conditioning could be used to wean hatchery fish from food pellets to natural food sources after release thereby increasing their chances of survival.¹⁸

While the court refused to halt the project, the court case has not ended. The parties are proceeding towards a trial on the merits, although the case could be dismissed on other pre-trial motions, such as a motion for summary judgment. The MBL project has proceeded as well. The researchers recently opened por-

tions of the Aquadome to allow the fish to swim in and out.¹⁹ The project is due to wrap up in late October before the native black sea bass migrate south for the winter.☺

Endnotes

1. Jay Lindsay, *Scientists Train Fish to "Catch" Themselves*, USA TODAY, March 26, 2008.
2. *Id.*
3. Public Notice, U.S. Army Corps of Engineers New England District, Feb. 26, 2008.
4. *Food and Water Watch v. U.S. Army Corps of Engineers*, 2008 U.S. Dist. LEXIS 60191 at *5 (D. Mass. Aug. 6, 2008).
5. *Id.* at *10.
6. 42 U.S.C. § 4332(2)(C).
7. *Food and Water Watch*, 2008 U.S. Dist. LEXIS 60191 at *14-15.
8. *Id.* at *15.
9. *Id.*
10. *Id.* at *17.
11. *Id.* at *18-19.
12. *Id.* at *19.
13. 40 C.F.R. § 1508.27(b).
14. *Food and Water Watch*, 2008 U.S. Dist. LEXIS 60191 at *22-23.
15. *Id.* at *24-25.
16. *Id.* at *26.
17. *Id.* at *34.
18. Interview with Scott Lindell, Project Lead, Woods Hole, Mass. (Sept. 23, 2008).
19. *Id.*

Photograph of striped sea bass courtesy of the National Fish and Wildlife Service.





Court Dismisses Family Members' Claims of Emotional Distress

Cohler v. United States, 2008 U.S. Dist. LEXIS 48158 (D.V.I. June 24, 2008).

Terra Bowling, J.D.

The United States District Court for the District of the Virgin Islands recently rejected the emotional distress claims of five family members who watched a wave strike and injure a relative.

Background

While vacationing on a cruise ship, Norman Cohler and his family took a day trip to Trunk Bay Beach in the Virgin Islands National Park. At the beach, Cohler was struck and injured by shore-breaking waves. Cohler and his relatives who had accompanied him to the beach filed a negligence action against the U.S. government and the tour operator, Paradise Aqua Tours. Cohler sought damages for his injuries, claiming the government had a duty to exercise reasonable care to protect him from the dangerous conditions at Trunk Bay and that Paradise Aqua Tours had a duty to warn him and his family. Cohler's relatives sought damages for the severe emotional distress they claim resulted from witnessing the accident.

Emotional Distress

To prevail on a claim for negligent infliction of emotional distress based on witnessing an injury to a third person, a plaintiff must show that s/he 1) was in the "zone of danger" when the accident occurred; 2) suffered bodily harm as a result of emotional disturbance; and, 3) is a member of the injured third party's immediate family.

To be within the "zone of danger" for the purposes of an emotional distress claim, the plaintiff must either "sustain a physical impact as a result of defendant's negligent conduct, or [be] placed in immediate risk of physical

harm."¹ Because three of the family members were not in the ocean when Cohler was injured, the court found that they could not have sustained a physical impact from the waves or been in immediate risk of harm. They were therefore not within the "zone of danger."

As for the remaining two family members who were within the "zone of danger" because they were in the water, they failed to demonstrate that they suffered physical harm as a result of the accident. Physical harm can "encompass bodily injury brought about solely by the internal operation of emotional distress," but there must be evidence of bodily harm beyond that associated with fright or shock.² While the court recognized that the family members within the zone of danger did suffer from shock, mental anguish and depression, the court found that these injuries were emotional, not physical, and therefore non-compensable. According to the court, neither relative presented sufficient evidence of any physical symptoms or manifestations of bodily harm.

Conclusion

The court determined that there were no material facts in dispute with respect to the plaintiffs' claims of emotional distress and granted the government's motion for summary judgment. Cohler's claims against the defendants for his injuries will move forward.☺

Endnotes

1. *Cohler v. United States*, 2008 U.S. Dist. LEXIS 48158 at *4 (D.V.I. June 24, 2008).
2. *Id.* at *11.

Photograph of cruise ships courtesy of ©Nova Development Corp.





U.S. Supreme Court Vacates *Exxon Valdez* Punitive Damages

Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

Terra Bowling, J.D.

Nearly 20 years ago, the *Exxon Valdez* grounded in Prince William Sound, spilling over 11 million gallons of oil along the Alaska coastline. The spill resulted in the deaths of hundreds of thousands of birds, marine mammals, and marine life. Researchers estimate that as many of 26,000 gallons of oil remain embedded in the shoreline and in nearby rivers and streams. Despite this, in a victory for Exxon, the U.S. Supreme Court reduced the \$2.5 billion punitive damage award against the company for the oil spill to about \$500 million.

Background

In 1993, commercial fishermen and other plaintiffs brought a class action suit against Exxon. The U.S. District Court for the District of Alaska originally entered a punitive damage award of \$5 billion. The Ninth Circuit Court of Appeals remanded the case twice on the issue of punitive damages. The District Court's award was ultimately reduced to \$2.5 million, using formulas derived from previous rulings of the Supreme Court on punitive damages.

Exxon appealed its case all the way to the Supreme Court. The Supreme Court framed the case around three questions: (1) whether there is corporate liability for punitive damages as the result of an employee's acts; (2) whether the Clean Water Act preempts state punitive damage awards, and (3) whether the \$2.5 billion punitive damage award is excessive.

Vicarious Liability

There is a split in the circuits about whether a corporation is responsible for the reckless acts of employees acting in the scope of their employ-

ment. The Ninth Circuit's position is that there is corporate liability in punitive damages for reckless acts of managerial employees. Because the captain of the *Exxon Valdez* acted recklessly by piloting the vessel while intoxicated, the Ninth Circuit found Exxon liable for the punitive damages that resulted from that act. Other circuit courts, however, have held that there is no vicarious liability in such a situation.

The Supreme Court split evenly on the issue, 4 – 4.¹ Because the court was evenly divided, it could not overturn the Ninth Circuit's decision. As a result, the Ninth Circuit's ruling on this issue stands and the split in the circuit remains.

Preemption of Punitive Damages

Next, the Court looked at whether the Clean Water Act (CWA) preempted punitive damage awards in maritime pollution cases. The Court found that it did not, noting that we “find it hard to conclude that a statute expressly geared to protecting ‘water,’ ‘shorelines,’ and ‘natural resources’ was intended to eliminate *sub silentio* oil companies’ common law duties to refrain from injuring the bodies and livelihoods of private individuals.”² There was no clear indication that Congress intended to completely occupy the field of pollution remedies through the CWA. Furthermore, the Court found that punitive damages would not “have any frustrating effect on the CWA remedial scheme.”³ State common law remedies are therefore still available to injured parties.

Is \$2.5 Billion Excessive?

Finally, Exxon challenged the size of the \$2.5 billion punitive damage award. The Court ruled (5-3) that the award, which was five times the amount of compensatory damages, was excessive. Justice Souter, writing for the majority, stated that “the real problem, it seems, is the

stark unpredictability of punitive awards” and “outliers” (extremely high awards). As a solution to that problem, the court created an easy-to-use ratio. The Court’s review of state statutes revealed that a slim majority of states use a 3:1 ratio of compensatory to punitive damages, and some even allow multipliers as high as 5:1. Interestingly, “the court accorded greater reliance on the results of its literature [search] than its statutory review to establish a reasonable limit on punitive damages in the maritime setting.”⁴ The court relied on a number of studies of trends in punitive damage awards in traditional tort and contract cases to conclude that the median ratio of punitive to compensatory awards is less than 1:1. Citing the need to protect against “unpredictable and unnecessary awards,” the Court concluded that “a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.”⁵ In the case of *Exxon Valdez*, a 1:1 ratio results in a punitive damage award of \$507.5 million (the amount equal to the compensatory damage award).

It is unknown at this time whether the court’s 1:1 ratio will remain limited in application to maritime cases. Corporations and their lawyers most certainly will argue that the

Court’s opinion is applicable to the calculation of punitive damages in land-based tort and contract actions. At the very least, the Court’s decision is a strong signal that large punitive damages awards will be under intense scrutiny in the future.

Final Settlement

In late August, Exxon agreed to release approximately \$383 million for distribution to the approximately 33,000 remaining plaintiffs, primarily commercial fishermen.⁶ The parties continue to fight over the remaining \$70 million and whether Exxon owes \$488 million in interest.✎

Endnotes

1. Only eight justices participated in this case because Justice Alito owns Exxon stock.
2. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008).
3. *Id.*
4. Lewis Goldshore and Marsha Wolf, *The Mother of All Oil Spills: U.S. Supreme Court Clarifies Punitive Damages*, N.J. LAW JOURNAL (Aug. 18, 2008).
5. *Exxon Shipping*, 128 S. Ct. at 2633.
6. Wesley Loy and Tom Kizzia, *Exxon Settlement could be Distributed in October*, ANCHORAGE DAILY NEWS (Aug. 27, 2008).

Photograph of clean-up efforts after the Exxon Valdez oil spill courtesy of NOAA.





Transfer of Riparian Rights Under Scrutiny in Wisconsin

Anchor Point Condominium Owner's Association v. Fish Tale Properties, 2008 WL 2609706 (Wis. Ct. App. July 3, 2008).

Berkos v. Shipwreck Bay Condominium Association, 2008 WL 2761313 (Wisc. Ct. App. July 17, 2008).

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

Wisconsin state law prohibits a riparian owner from conveying any riparian right, except for the right to access the water by crossing over the upland.¹ This prohibition is quite unique. In the vast majority of states, riparian rights can be severed from the land and transferred freely. In July, the Wisconsin Court of Appeals issued two opinions which dramatically expand the scope of the prohibition.

Riparian Rights

Owners of waterfront property have some special rights that owners of landlocked property do not have. These rights are referred to as riparian, when the property abuts rivers, and littoral, when it abuts lakes and oceans. In Wisconsin courts often use the terms interchangeably. In Wisconsin, riparian rights include "the right to use the shoreline and have access to the waters, the right to reasonable use of the waters for domestic, agricultural and recreational purposes, and the right to construct a pier or similar structure in aid of navigation."²

In 1994, the Wisconsin Legislature passed a law restricting the ability of riparian owners to transfer these rights to others. Section 30.133(1) of the Wisconsin Statutes states:

no owner of riparian land that abuts a navigable water may convey, by easement or by a similar conveyance, any riparian right in the land to another person, except for the right to cross the land

in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material in the navigable water.

Section 30.133(1) was the Legislature's response to the Wisconsin Supreme Court's holding in *Stoesser v. Shore Drive Partnership*.³ The issue in *Stoesser* was whether riparian owners could convey riparian rights to non-riparian landowners through an easement. Homeowners in a subdivision with no riparian property sought to enjoin Shore Drive Partnership, the owner of a lakefront bar and restaurant, from placing a pier or other structure in the water which would interfere with the homeowners' rights to use the lakeshore. The homeowners claimed riparian rights through an easement in a 1939 deed which reserved for the owners in the subdivision the right "to the use of the channel as a means of ingress and egress" and "to use the lake shore for bathing, boating, or kindred purposes."⁴ The Court concluded that the easement was valid to carry out the parties' intent that the owners in the subdivision have access to the lake via Shore Drive's property because "Wisconsin follows the general rule that riparian rights can be conveyed to non-riparian owners by easement."⁵ Shore Drive could not interfere with those rights. The Legislature obviously disagreed with the court's conclusion and enacted § 30.133 which "seems designed primarily to prohibit the construction of piers by nonriparians."⁶

Right to Use Boat Slips

On July 3, 2008, the Court of Appeals issued its opinion in *Anchor Point Condominium Owner's Association v. Fish Tale Properties*. The Association had filed suit to prevent guests of Fish Tale's restaurant from using the Association's private piers and boat slips. Some of Fish Tale's

customers use the pier to moor their boats to gain access to the land and the restaurant. The question before the court was whether documents purporting to establish the right of a non-riparian to use piers and boat slips were invalid transfers of riparian rights under § 30.133(1).

The properties in question were two adjacent lots, one of which abutted Lake Wisconsin. The restaurant is located on the non-riparian lot. When the riparian lot was sold to develop condos, documents were executed creating an easement for shared driveways and parking lots between the two properties and granting the restaurant property the right to use some of the condos' piers, boat slips, and docks. The Association claimed these documents were invalid because they transfer riparian rights to non-riparian owners.

Fish Tale argued that the right to use piers and boat slips is not a riparian right. The Court of Appeals disagreed, holding that the use of pier and boat slip space is a riparian right. "Both pier use and pier placement are riparian rights, arising from a riparian owner's owning land abutting navigable water."⁷⁷ The court's reasoning adheres to the following logic: if the law grants you the exclusive right to place a pier, you also have the exclusive right to use that pier. Because the court concluded that the right to use a pier or boat slip is a riparian right, the Association could not transfer that right to Fish Tale.

In the alternative, Fish Tale contended that even if the right to use piers is a riparian right, a riparian owner may transfer that right pursuant to the exception in § 30.133(1), which allows transfers to provide access to the water. The court disagreed, stating that the "plain language of the statute states that a riparian owner's transferable rights are limit-

ed to the right to cross the land in order to have access to the water."⁷⁸ Fish Tale wants to use the piers to gain access to private land, not to cross private land to gain access to the water. According to the court, that is a riparian right that cannot be transferred separately from the land.

Reservation of Riparian Rights

In *Berkos v. Shipwreck Bay Condominium Association*, a developer of a condominium complex attempted to reserve his riparian rights when he relinquished ownership of common areas, which included the lake shoreline, to the condo association. When the condominium owners refused to permit the developer to construct a marina along the shoreline, the developer sued asserting he was the owner of the riparian rights of the waters in front of the complex. The Court of Appeals voided this transfer as well.

The court based its conclusion on the similarity of the facts of this case to those in *Stoesser* – a non-riparian owner reserved riparian rights through an easement. Because the Legislature passed § 30.133 to overturn the court's decision in *Stoesser*, allowing a reservation here would run counter to legislative intent. Acknowledging that § 30.133 does not explicitly refer to

See Riparian, page 15

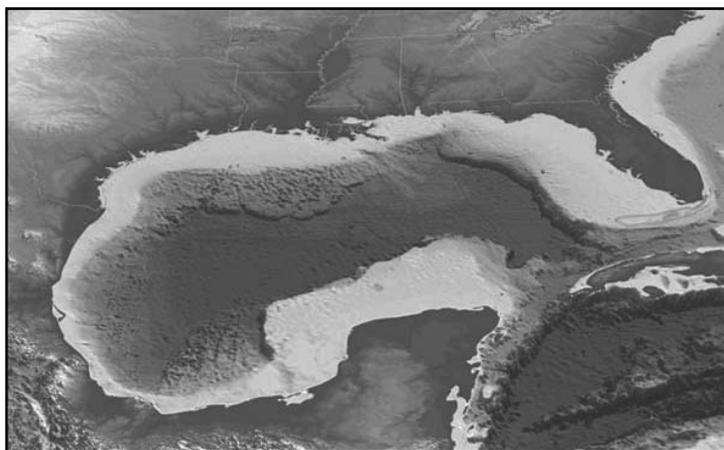
Photograph of marina boats in slips courtesy of ©Nova Development Corp.



Special Feature

Richard McLaughlin, Wyndylyn Von Zharen, and the late Ralph Rayburn received funding from the National Sea Grant Law Center to examine the issues, challenges, and gaps in strategies associated with the current ocean and coastal governance structure in the Gulf of Mexico (GoM) and recommend methods and tools to move toward a more holistic, adaptive, and cooperative management model for the GoM marine ecosystem. A major component of this effort was the input received from over 35 academic, government, and private sector experts who participated in a workshop held at the Harte Research Institute in Corpus Christi, Texas in November 2007. This article summarizes the findings of this effort.

Ecosystem-based Management in the Gulf of Mexico: Opportunities and Challenges



3-D model of the Gulf of Mexico courtesy of NOAA's Ocean Explorer.

Richard McLaughlin, Harte Research Institute for Gulf of Mexico Studies, Texas A&M University Corpus Christi

Wyndylyn Von Zharen, Texas Institute of Oceanography, Texas A&M University Galveston

Background

The shoreline of the Gulf of Mexico (GoM) stretches 3,540 miles making it the ninth largest body of water in the world.¹ About twenty million people live in the U.S. coastal counties that border the Gulf. Many of these counties are among the fastest growing in the nation. A number of key sectors of the U.S. economy such as offshore energy, vessel construction, fishing, marine transportation, and tourism are concentrated in the GoM.

Large portions of the Gulf have been seriously impacted by a combination of natural and anthropogenic stresses. These pressures have caused a variety of environmental and economic threats including degraded water quality, loss

of critical habitat, introduction of invasive species, depleted fish stocks, increased coastal erosion, greater vulnerability to coastal hazards, and other problems.

Traditionally, coastal and ocean areas have been managed and governed at specific, isolated levels with little cooperation or collaboration across local, state, tribal, federal, or international boundaries. Coordinated management of policies or laws to minimize cumulative impacts has been rarely undertaken. Fragmented laws, overlapping and unclear jurisdictions, policies that are not adaptive and responsive to change, and limited communication among coastal and marine law, policy, and manager practitioners are common in the GoM region.

Because of these limitations, coupled with the complexity of new and competing uses of a finite resource and increased understanding of the interrelatedness of the various systems within the GoM ecosystem and in part due to exponentially increasing complexity as multiple

factors are considered, this traditional approach has been rejected in favor of ecosystem-based management (EBM) which considers the cumulative impacts on the entire ecosystem.

To be successful, an EBM strategy requires cross-jurisdictional, interdisciplinary management goals as well as adaptive, collaborative governance mechanisms. Equally critical to the strategy is a strong cooperative management component,² one that enables a sharing of decision-making power, responsibility, and risk among governments and other stakeholders including but not limited to, resources users, environmental interests, experts, and wealth generators. Cooperative management is a form of power-sharing. Cooperative management initiatives begin with the identification of the issues and recognition of a need to make changes. This strategy fosters joint accountability, thus decreasing the likelihood of a stakeholder acting solely in her or his own vested interests and basing decisions exclusively on short-term goals for single issues. The EBM strategy must also be adaptive. Adaptive stewardship is essential because of the complexity of the Gulf of Mexico and the continual development of knowledge about its inhabitants and resources.

Recent efforts by the Pew Oceans Commission,³ U.S. Commission on Ocean Policy,⁴ and the Bush Administration's U.S. Ocean Action Plan⁵ attempt to provide a foundation to advance a more effective EBM approach to coastal and ocean policy. Although these important efforts have generated momentum for changing policies, it is not yet clear how the EBM and other reforms will evolve.

It was within this context that 37 experts participated in a workshop, entitled *Managing for a Healthy Gulf of Mexico Ecosystem: Obstacles, Opportunities, and Tools*, held November 1-2, 2007 in Corpus Christi, Texas. The workshop was a collaborative effort between the Co-principal Investigators and the Environmental Law Institute with funding from the National Sea Grant Law Center and the David and Lucile Packard Foundation.⁶ The following summarizes the most important findings of this workshop.

Obstacles and Challenges to EBM in the GoM

Workshop participants stressed that developing and employing EBM principles will be an essential step towards resolving the multitude of challenges facing the GoM. However, significant obstacles must be overcome. These obstacles are unique to the GoM and include a lack of agreement on a common set of objectives among stakeholders. Despite the difficulty, there needs to be greater effort in facilitating a consensus on a clearly defined set of outcomes. With consensus will come a commitment for change from voters and the development of political leadership.

Important decisions will have to be made in the absence of complete ecosystem information. Ecosystems are dynamic biophysical systems in which organisms interact with each other and the physical environment in complex ways. Marine ecosystems may shift suddenly and much remains unpredictable and uncertain in how they operate. Moreover, many of these processes occur at multiple scales from microscopic events to large interacting populations and from geographically small areas to large-scale regional systems. The difficulty in fully understanding the complexity of these events must not become an insurmountable barrier to making management decisions.

EBM in the GoM would move forward more quickly if there was a serious regional problem that could serve as a common denominator to bring people together. Many participants suggested that the threat from hurricanes may represent such an organizing principle, but do not believe that this has actually occurred in practice. The threat posed by toxic algal blooms in the GoM was also suggested as the type of regional problem that may someday become a unifying issue.

The GoM is a large and heavily-used body of water that is important to a significant and diverse number of stakeholders. Many of these stakeholders such as the energy industry, recreational fishermen, ports and maritime shipping interests, real estate developers, and the tourism industry have tremendous influence over policy decisions in the region. In addition, the five

states that border the GoM have traditionally defended “states rights” and their political autonomy from federal mandates. In light of this political tradition, federally mandated EBM initiatives or even regionally devised approaches may be resisted. The breadth and divergent interests of these stakeholders and state governments make the GoM a difficult area to achieve consensus. There will be little chance of success for EBM initiatives without input and buy-in from these and other stakeholders in the region.

After EBM plans are developed, sufficient funding needs to be provided for proper implementation and enforcement. Expansion in government regulatory and administrative activities or compensation for private property impacts is not possible without additional funding sources. Innovative partnerships between the public and private sectors should be explored to develop new sources of revenue to move EBM forward in the region.

Finally, if EBM is to be properly implemented, there must be some resolution to the reluctance of permit holders, stakeholders, and government agencies to fully embrace adaptive management principles. Institutions and individuals rely on the finality of permitting and other administrative decisions to execute projects and make informed investment decisions. Adaptive management does not provide that finality, but instead advocates change in direction when new information is discovered. Other institutional pressures including fear of potential litigation, commitment to decisions already made, and bureaucratic biases are serious obstacles that must be overcome for adaptive management and EBM to be successful.

Opportunities to Improve EBM in the GoM

EBM in the GoM would be improved by creating innovative visualization tools that will provide an easily accessible information source for integrating law, policy, human dimensions, and science, and identifying small groups and NGOs with which to partner. These groups are often drivers for change. Partnering with the

National Estuary Programs, for example, is important as they may be best suited as test beds and because they are at the right scale. The Gulf of Mexico Alliance also has the potential to assist with these efforts because it builds upon existing programs and resources and adds tasks that lead to small incremental changes. The Alliance has strong federal political support that should not be underestimated.

Benefits may also be achieved by looking at the environment from an ecosystem services perspective as a way to put a value on those services to gain public and legislative support. Providing policymakers with empirical data on the full value of ecosystem services is essential for them to make informed and persuasive political decisions. It also allows uninformed stakeholders to understand that the natural ecosystem of the GoM has hidden monetary and non-monetary values that need to be protected and conserved thereby providing a useful framework for outreach and education efforts.

Stakeholder involvement must be inclusive and transparent. The general public and interested stakeholders should be involved as early as possible. Active participation in the planning and implementation of EBM initiatives is essential to the long-range success of any program. Providing full information and an opportunity for input will avoid the problems of opposition by stakeholders who either misunderstand potential impacts or feel that their concerns have not been considered.

Monitoring and enforcement measures must be well defined and fully funded. This should include a robust program capable of tracking scientific baselines to demonstrate success through environmental indicators. Incentives should be provided for citizen-based monitoring and involvement.

Any problem being addressed through EBM should be examined comprehensively and effectively bound in size and time. Using a “large marine ecosystem” model may or may not be an appropriate geographical scale depending on the specific problem being addressed. The focus should be on matching appropriate size or scale

to achieve goals given existing institutional and jurisdictional constraints. Furthermore, temporal scales should be matched to avoid slow governance changes lagging behind quick ecosystem degradation or quick governance changes overtaking slow ecosystem processes.

Implementation plans should drill down on key issues with firm time constraints. This includes provisions for specific action items to be undertaken within a specific period of time at a specific cost.

Indicator species or issues should be used, when possible, to capture the public's imagination and serve as both an issue upon which to build support and to indicate basic health of the GoM over time. Potential examples include:

- Marine protected areas such as the Flower Garden Banks Marine Sanctuary or the "Islands in the Stream" initiative to develop a network of GoM marine protected areas in the U.S. and Mexico;
- Specific charismatic species such as sperm whales, tarpon, bluefin tuna, billfish, whale sharks, manta rays, or sea turtles; and
- Regional problems such as threats from catastrophic weather events, harmful algal blooms, or sea-level rise.

Stakeholders should have a role in identifying and developing these indicators. If possible, indicators should be chosen that are already being monitored to build upon existing data and programs. Moreover, existing baseline data should be used as an indication of success or failure and managers must be willing to adapt based upon ongoing evaluation criteria.

Conclusion

There is a strong consensus that for EBM to be successful in improving the health and stewardship of the GoM, a strong and vibrant cooperative management regime is required, one in which stakeholders agree on a list of specific objectives and have a willingness to achieve

cooperative management goals. This, of course, is no easy task and will require a long-term commitment to improving our understanding of scientific

baseline information as well as developing better policies and strategies within the region. If this can be achieved, rather than a potential arena for competition and strife due to the ever increasing complexity of issues, the GoM may someday serve as a model of effective cooperative management and collaborative governance. ❧



Photograph of sea turtle courtesy of NOAA.

Endnotes

1. See, e.g., EPA's website: <http://www.epa.gov/gmpo/about/facts.html>. The Gulf of Mexico borders five U.S. states to the north, Mexico's eastern shoreline and the Yucatan Peninsula to the south, and to the east, it is bordered by the island of Cuba.
2. See W.M. von Zharen, *Ocean Ecosystem Stewardship*, 23 *W.M. & MARY ENVT. L. & POL'Y REV.* 1, 85 (1998) (citing the National Round Table on the Environment and the Economy, *Sustainable Strategies for Oceans: A Co-Management Guide* 2 [1990] 12). Cooperative management is synonymous with co-management, joint management, and collaborative management.
3. Pew Oceans Commission, *America's Living Oceans: Charting a Course for Sea Change* (2003) available at http://www.pewtrusts.org/our_work_detail.aspx?id=130.
4. U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century Final: Report of the U.S. Commission on Ocean Policy* (2004) available at <http://oceancommission.gov/documents/welcome.html>.
5. *U.S. Ocean Action Plan: The Bush Administration's Response to the U.S. Commission on Ocean Policy* (2004) available at <http://ocean.ceq.gov/actionplan.pdf>.
6. Katherine Mengerink, Jay Austin, and Rebecca Gruby of the Environmental Law Institute co-organized the workshop.



Hawaii Superferry Litigation Continues

Wong v. Bush, 2008 WL 4093619 (9th Cir. Sept. 5, 2008).

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

Hawaii Superferry is an inter-island ferry service currently offering twice-daily trips between Honolulu, Oahu and Kahului, Maui. The *Alakai*, the company's first ferry, can accommodate 836 passengers and up to 230 subcompact cars.¹ Controversy erupted immediately after the commencement of the service. Environmentalists worry about the ferry's impact on humpback whales and its potential to transport invasive species. Residents of Maui and Kauai voice concern that the ferry's arrival will boost tourism and development on islands already under immense development pressure.

In the latest round of litigation over the Hawaii Superferry, the Ninth Circuit Court of Appeals affirmed the district court's denial of injunctive relief to protestors challenging the

Coast Guard's establishment of a security zone in Nawiliwili Harbor. *Wong v. Bush* is rooted in the February 2005 decision of the Hawaii Department of Transportation (HDOT) to exempt harbor improvements at Kahului, Maui to accommodate the Superferry from the Hawaii Environmental Policy Act (HEPA). On August 23, 2007, the Hawaii Supreme Court ruled that the HDOT may not exempt the improvements to the Kahului Harbor.²

Despite the Supreme Court's order, Hawaii Superferry began service from Kauai on August 26, 2007. An injunction had not yet been issued by the lower court. That day, hundreds of protestors cheered as over thirty surfers and swimmers formed a human blockade to prevent the Superferry from leaving Nawiliwili Harbor.³ The Coast Guard had to forcibly move the protestors out of the way. The Coast Guard soon announced that it was establishing security zones to "provide a safe and secure environment for both recreational vessels and the *Alakai*."⁴

Photograph of the Hawaii Superferry provided courtesy of Sean Gardinier.



Megan Wong and her fellow protestors challenged the Coast Guard's authority to establish the security zones. The protestors claimed the zone violated their First Amendment rights, the National Environmental Policy Act (NEPA) and the Coast Guard's authority to establish such zones. The Ninth Circuit upheld the district court's denial of injunctive relief. The court found that the Coast Guard did not infringe on the protestors' First Amendment right of free speech because the security zone is a reasonable time, place, and manner restriction. The court also found no violation of NEPA or the agency's authority under 50 U.S.C. § 191(b) to establish security zones to safeguard vessels, harbors, ports, and waterfront facilities.

While the Coast Guard won this round, the Superferry's woes continue. In October 2007, in a separate lawsuit, the circuit court enjoined operations until the environmental assessment is complete. While the Hawaii Legislature later

passed a law allowing operations to continue, the Sierra Club has a challenge to that law pending with the Hawaii Supreme Court.⁵ The company continues to operate its ferry service between Oahu and Maui, but has halted service to Kauai indefinitely.☹

Endnotes

1. Hawaii Superferry, Fact Sheet, <http://www.hawaiisuperferry.com/images/pdfs/HSF-Fact-Sheet-Final.pdf>.
2. *Sierra Club v. Department of Transp.*, 167 P.3d 292 (Hawai'i 2007).
3. Jan TenBruggencate and Rick Daysog, *Surfers Block Hawaii Superferry*, USA TODAY (Aug. 27, 2007).
4. Press Release, Coast Guard to Enforce Hawaii Superferry Security Zones, Aug. 26, 2007.
5. Associated Press, *Court Appeal Could Halt Ferry Service Again*, KPUA Hawaii News, <http://www.kpuu.net/news.php?id=15679>.

Riparian, from page 9

the reservation of riparian rights, the court read § 30.133(1) as prohibiting “the severing by easement or by a similar conveyance of riparian rights from the riparian lands to which they are attached.”⁹

*“Why should it matter
to Wisconsin whose
boat is in a pier?”*

Conclusion

Daniel Berkos is expected to appeal his case to the Wisconsin Supreme Court. Berkos maintains that “he didn't convey anything” and will most likely ask the Court to review the meaning of § 30.133.¹⁰ The decision in *Anchor Point* may also be appealed. Fish Tale's attorney has criticized the Court of Appeals decision say-

ing, “Why should it matter to Wisconsin whose boat is in a pier?”¹¹ The Wisconsin Supreme Court had better put its thinking cap on right now.☹

Endnotes

1. WISC. STAT. ANN. § 30.133(1).
2. *ABKA Ltd. P'ship v. Wis. DNR*, 648 N.W.2d 854, 866 (Wis. 2002).
3. 494 N.W.2d 204, 206 (Wis. 1993).
4. *Id.*
5. *Id.* at 208.
6. Dan Tarlock, LAW OF WATER RIGHTS AND RESOURCES § 3:86.
7. *Anchor Point Condominium Owner's Association v. Fish Tale Properties*, 2008 WL 2609706 at *13 (Wis. Ct. App. July 3, 2008).
8. *Id.* at *15.
9. *Berkos v. Shipwreck Bay Condominium Association*, 2008 WL 2761313 at *15 (Wis. Ct. App. July 17, 2008).
10. David Ziemer, *Water Rights Can't Be Reserved, Rules Wisconsin Court of Appeals*, WISC. L. J. (July 28, 2008).
11. David Ziemer, *Use of Piers, Boatslips Held Invalid*, WISC. L. J. (July 9, 2008).



LNG Terminal in Baltimore Receives Federal Approval

AES Sparrows Point LNG v. Smith, 527 F.3d 120 (4th Cir. 2008).

Terra Bowling, J.D.

In a closely watched case in the Chesapeake Bay, the Fourth Circuit recently clarified the role of states with respect to the siting of liquefied natural gas (LNG) terminals. While some unanswered questions remain, the court did finally answer one important question: does the Natural Gas Act (NGA) completely preempt state regulation of LNG terminals?

Background

AES Sparrows Point LNG and Mid-Atlantic Express (collectively, AES) proposes to construct and operate a LNG import and re-gasification facility to receive, store, and convert LNG for residential, commercial, and industrial uses in the mid-atlantic Region. The proposed location is Sparrows Point, a heavily industrialized coastal area in Baltimore County, Maryland.

AES encountered strong public opposition to the construction of the terminal from the outset. Spurred by the public outcry, in 2006 Baltimore County adopted Bill 71-06 amending the county's zoning regulations to prevent the construction of an LNG terminal at Sparrows Point. The new zoning regulations stated that an LNG terminal could only be constructed with a "special exception" and must be located at least five miles from residential zones and 500 feet from businesses.

AES challenged Bill 71-06, arguing that the bill was preempted by the NGA. The NGA grants the Federal Energy Regulatory Commission (FERC) "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal."¹ The NGA, however, contains a "savings clause" providing that the NGA does not affect the rights of states under the Coastal Zone Management Act

(CZMA).² The CZMA authorizes states to create coastal management plans (CMPs) setting forth the state's "objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone."³ Under the CZMA, states with approved CMPs have the authority to review federally permitted projects for consistency with those plans and conditionally veto projects which it finds inconsistent.⁴ The U.S. District Court for the District of Maryland found that Bill 71-06 was preempted by the NGA's exclusive grant of authority to FERC and enjoined the county from enforcing the zoning ordinance.⁵

The county did not give up. In 2007, the county responded by passing Bill 9-07 and amending the zoning ordinance to list LNG terminals among the prohibited uses in the Chesapeake Bay Critical Area (CBCA).⁶ Because Sparrow's Point is located within the CBCA, Bill 9-07 would effectively prevent the construction of the LNG facility.

AES again filed suit, alleging that Bill 9-07 was preempted by the NGA. The county countered by arguing that the bill had been incorporated into the state's critical area laws and was therefore part of Maryland's CMP and saved from preemption. The Maryland Critical Area Commission had amended the county's Chesapeake and Atlantic Coastal Bays Critical Area Protection Program (CAPP) to include Bill 9-07's restriction on LNG terminal siting in coastal areas. The CAPP is one of the state laws identified in Maryland's CMP. This time around, the District Court granted summary judgment in favor of the county concluding "that Bill 9-07 represented an exercise of Maryland's 'delegated authority' under the CZMA and was thus saved from preemption."⁷

Fourth Circuit's Decision

On appeal, the Fourth Circuit disagreed. First, with respect to the NGA, the court stated that

“unless a state law prohibiting the siting of LNG terminals is exempted from § 717b(e)(1)’s preemptive effect by some other provision of federal law, it is unenforceable.”⁸ The Fourth Circuit held that the NGA savings clause does protect state laws that are part of a state’s federally approved CMP, but “the County has no authority under the CZMA to enact a ban on LNG terminals unless, at a minimum, that ban is enacted pursuant to the procedures established by the CZMA.”⁹ Under the CZMA, an amendment to a CMP becomes effective only after the amendment has been approved by the National Oceanic and Atmospheric Administration (NOAA).

The district court concluded that the bill did not constitute an amendment to the state’s CMP, but only “the implementation of it at the local level.”¹⁰ The Fourth Circuit disagreed. The CZMA defines amendments as “substantial changes in” the uses subject to management; special management areas; boundaries; authorities and organization; or coordination, public involvement and the national interest.¹¹ The court held that a complete ban on terminals in the CBCA, not previously part of the state’s CMP, constituted a substantial change in the uses subject to management. Because the county never presented its amendment to NOAA for approval, it is not part of Maryland’s CMP. The Fourth Circuit stated that “mere adoption of Bill 9-07 into the County’s CAPP . . . is not sufficient to make Bill 9-07 part of Maryland’s CMP.”¹²

Conclusion

The Fourth Circuit issued its decision on May 18, 2008. Although Maryland subsequently determined that the project was not consistent with its CMP, the Department of Commerce overrode the state’s objection on June 26, 2008.¹³ The Department concluded that the natural interest served by the facility in helping to meet regional energy demands outweighed the project’s adverse coastal effects¹⁴ and that the impact of dredging on fish and aquatic vegetation would not be significant.¹⁵ FERC may now proceed with normal permitting and licensing procedures for the AES terminal. ☺

Endnotes

1. 15 U.S.C. § 717b(e)(1).
2. *Id.*
3. 16 U.S.C. § 1453(12).
4. *Id.* § 1456(c)(3)(A).
5. *AES Sparrows Point LNG, LLC v. Smith*, 470 F. Supp.2d 586, 601 (D. Md. 2007).
6. The CBCA was established in 1984 by the Maryland Chesapeake Bay Protection Act. The Act requires the counties and municipalities surrounding the Chesapeake Bay to implement a land use and resource management program designed to mitigate the damaging impact of water pollution and loss of natural habitat, while also accommodating the jurisdiction’s future growth. Maryland Critical Areas Commission, FAQs, <http://www.dnr.state.md.us/criticalarea/faq.html#1>.
7. *AES Sparrows Point LNG v. Smith*, 527 F.3d 120, 125 (4th Cir. 2008).
8. *Id.* at 125-26.
9. *Id.* at 126.
10. *Id.*
11. 15 C.F.R. § 923.80(d).
12. *AES Sparrows*, 527 F.3d at 126.
13. Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of AES Sparrows Point LNG and Mid-Atlantic Express, LLC from an Objection by the State of Maryland (June 26, 2008) available at <http://www.ogc.doc.gov/czma.htm>.
14. NOAA, Press Release, Department of Commerce Decides Two Federal Consistency Appeals, http://www.noaanews.noaa.gov/stories2008/20080627_appeals.html.
15. *Id.*

Composite aerial of Sparrows Point LNG site courtesy of the U.S. Coast Guard.





Coast Guard Must Consider Impact of Shipping Routes on Right Whales

Defenders of Wildlife v. Gutierrez, 532 F.3d 913 (D.C. Cir. 2008).

Terra Bowling, J.D.

The District of Columbia Court of Appeals has ruled that the U.S. Coast Guard is required to consider the impact that the designation of ship routing schemes may have on the endangered North Atlantic right whales.

Background

The North Atlantic right whale is one of the most critically endangered species in the world. The 45-55 foot whales were historically heavily hunted. They became known as “right” whales because they “were considered the ‘right’ (correct) whale to hunt due to their close proximity to coastlines, their relatively slow speed, the prized oils they contain, and the large volume of blubber that gives them a tendency to float when dead.”¹ Today, only an estimated 300 remain in the world. The species is listed as endangered under the federal Endangered Species Act (ESA). Although hunting has ceased, recovery has been hampered by the species’ low birthrate and a high mortality rate caused primarily by ship strikes and entanglements in fishing gear.

The right whales spend the spring, summer, and fall in New England waters and migrate to the warmer coastal waters along the southeastern U.S. for the winter. Pursuant to its responsibilities under the ESA, the National Marine Fisheries Service (NMFS) has designated the Great South Channel east of Cape Cod, Cape Cod and Massachusetts Bays, and waters off the coasts of southern Georgia and northern Florida as right whale critical habitat. Unfortunately, some portions of the whales’ critical habitat experience dense shipping traffic.

Litigation

On May 19, 2005, Defenders of Wildlife and several other environmental organizations (Defenders) sub-

mitted a petition to NMFS “requesting emergency regulations [that] require all ships entering and leaving all major East Coast ports to travel at speeds of 12 knots or less within 25 nautical miles of port entrances during expected right whale high use periods.”² Simultaneously, Defenders notified the Coast Guard that it intended to sue the agency for failing to consult with NMFS about the impact its regulation of commercial shipping has on the right whale. NMFS denied the petition six months later. The Coast Guard did not respond.

Defenders filed suit against the federal agencies in November 2005. Defenders claimed NMFS’ denial of the emergency rulemaking petition was arbitrary and violated the Administrative Procedures Act and the ESA. Defenders claimed that the Coast Guard was failing to insure that vessel traffic is not likely to jeopardize the continued existence of the right whale and its habitat as mandated by the ESA. The district court granted summary judgment in favor of the federal agencies. Defenders appealed.

Emergency Rulemaking Petition

Defenders argued that NMFS’ denial of the rulemaking petition was arbitrary “in light of the admitted need for ship speed regulations and the agency’s ESA section 7(a)(1) duty to protect right whales through its programming.”³ Noting that it would only overturn an agency decision not to institute rulemaking in “the rarest and most compelling of circumstances,”⁴ the D.C. Circuit upheld the district court’s grant of summary judgment.

The court found that this case presented no abnormal circumstances that would justify overturning the agency’s decision. NMFS denied the petition on the grounds that a rulemaking on ship strikes was already underway. The agency had issued an Advanced Notice of Proposed Rulemaking (ANPR) in 2004 and was preparing a draft environmental impact statement. At the time, the agency believed this was the best means to implement an effective comprehensive strategy for reducing ship strikes. The court deferred to

NMFS' reasoning that an emergency rulemaking would draw resources and staff time away from the final rule. It makes no difference that, despite the issuance of a proposed ship strike rule in June 2006, NMFS has yet to issue a final rule. The court is "bound on review to the record that was before the agency at the time it made its decision."⁵

Traffic Separation Schemes

Congress, through the Ports and Waterways Safety Act, requires the Coast Guard to "designate necessary fairways and traffic separation schemes" to provide safe routes for boats traveling in and out of U.S. ports and waters.⁶ When establishing TSSs, the Coast Guard must "take into account all relevant factors concerning . . . protection of the marine environment, . . . including but not limited to . . . environmental factors."⁷ In addition, the Coast Guard must comply with other relevant federal laws such as the ESA and the Marine Mammal Protection Act. For example, § 7(a)(2) of the ESA requires federal agencies, in consultation with the Secretary of Commerce, to ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize endangered or threatened species or their habitats.

Defenders claimed that the Coast Guard's failure to consult with NMFS with regard to the TSSs in New England and along the southeastern coast violates its duties under the ESA. The Coast Guard argued that § 7 consultation had not been triggered by the designation of the traffic separation schemes in right whale habitat. Its argument was rather ingenious. The Coast Guard claimed that it was simply following the orders of the International Maritime Organization (IMO). Amazingly, the district court bought it and dismissed the Defenders' claim for lack of jurisdiction. The district court concluded that because the U.S. must submit its recommendations for TSSs to the IMO for adoption on the international level, it was the IMO, not the Coast Guard, who designated the schemes at issue. As such, the Coast Guard had not engaged in any final agency action which could trigger its responsibilities under the ESA.

On appeal, the D.C. Circuit soundly rejected this argument and held "by giving the Coast Guard authority to promulgate traffic separation schemes, Congress intended to make the Coast

Right Whale, see page 26

Photograph of Right Whale and calf courtesy of NOAA





Ninth Circuit Examines Whether Dogs Are Livestock

United States v. Park, 2008 U.S. App. LEXIS 17075 (9th Cir. Aug. 11, 2008).

Arthur Park, 2L, University of Mississippi School of Law

Does operating a dog kennel constitute “livestock farming”? Are dogs “livestock”? These unique questions were recently explored by the Ninth Circuit Court of Appeals.

Background

In 1973, Earl and Iona Monroe, the previous owners of Tract 160A along Idaho’s Clearwater River, granted the U.S. government a scenic easement pursuant to the Wild and Scenic Rivers Act.¹ The purpose of the easement was to permit the U.S. Forest Service to “protect the scenic, recreational, geologic, fish and wildlife, historic, cultural” and other values of the area while preventing development that would detract from those values.²

The language of the easement provides that the “lands within the easement area shall not be used for any professional or commercial activities except such as can be and are, in fact, conducted from a residential dwelling without outside alteration of the dwelling.”² The terms of the easement do protect the “right to use the easement for general crop and livestock farming.”⁴

Ron and Mary Park purchased Tract 160A in 1989. Subsequently, the Parks received permission from the U.S. Forest Service to add horse stalls (in 1989), use part of their home as a craft and hobby shop (in 1990), and run a bed and breakfast out of their home (in 1991). In 1997, the Parks began advertising a kennel and dog training business. In 1998, the Forest Service notified the Parks that the kennel was an unauthorized commercial activity that violated the terms of the easement and that the new structures had been built without Forest Service

approval. The parties exchanged letters, without coming to a resolution, in 1998 and again in 2003. In 2005, the U.S. filed suit.

On cross-motions for summary judgment, the U.S. argued that the kennel was a commercial activity (and thus prohibited) while the Parks contended that the kennel was livestock farming (and thus protected). The Idaho District Court concluded that the terms of the easement were unambiguous and that no matter “how broadly one defines livestock farming, the Parks’ activities do not fall within its terms.”⁵ The district court granted the government’s motion for summary judgment and ordered the Parks to end the kennel business and remove any structures related to the kennel or convert such structures to non-commercial use.

Defining “Livestock”

Under Idaho law, a property conveyance whose language is unambiguous must be interpreted by its plain language, using only what is contained within the four corners of the document. Ambiguity exists only if the language is “subject to conflicting interpretations.”⁶

The easement for Tract 160A does not define the terms “livestock” or “livestock farming.” The Court looked to the dictionary definitions of “livestock,” such as “animals kept or raised for use or pleasure; esp: farm animals kept for use and profit,”⁷ “animals, esp. on a farm, regarded as an asset,”⁸ and “domestic animals and fowls that (1) are kept for profit or pleasure, (2) can normally be confined within boundaries without seriously impairing their utility, and (3) do not normally intrude on others’ land in such a way as to harm the land or growing crops.”⁹ Similarly, a recent California case analyzed the dictionary definitions of “livestock” and concluded that “the scope of domestic animals used or raised on a farm can potentially extend to guinea pigs, cats, dogs, fish, ants, and bees.”¹⁰

The U.S. argued that “livestock” should be defined as “cattle, horses, mules, or asses” as found in an Idaho statute.¹¹ This statutory provision, however, dealt only with the branding of animals. Other Idaho statutes define “livestock” to include cassowary, ostrich, emu, and rhea¹² as well as fallow deer, elk, and reindeer.¹³

Relying on *Mountainview Landowners Cooperative Association, Inc. v. Cool*,¹⁴ a dispute over the language of a property easement that protected “swimming and boating,” the Ninth Circuit found a latent ambiguity in the Parks’ easement. A “latent ambiguity is not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist.”¹⁵ In *Mountainview*, the easement did not define swimming nor was there a uniform definition of swimming in the dictionaries. Furthermore, a strict definition of swimming (to propel oneself through water) would have led to illogical results.¹⁶ Thus, the Idaho Supreme Court found a “latent ambiguity” with regard to swimming.

The Ninth Circuit was not persuaded by the government’s definition of “livestock” as “cattle, horses, mules, or asses.” The easement did not incorporate the definitions of the Idaho Code, so there was no compelling reason to disregard the plain dictionary meaning. And even if the easement did incorporate the definitions of the Idaho Code, there is more than one definition of “livestock” found therein.

Conclusion

The Ninth Circuit reversed the order of the Idaho District Court and remanded the case for further proceedings at the trial level. Since there is no uniform definition of “livestock” or any guidance within the four corners of the document, the Ninth Circuit held that the term “livestock” is ambiguous. The District Court’s granting of summary judgment, based on an unambiguous definition of “livestock,” was therefore premature. It is important to note that the Ninth Circuit did not decide the question of whether the term “livestock” does encompass dogs. The Court merely held that the term “live-

stock” *could* encompass dogs. The Idaho District Court is now charged with answering that question.✎

Endnotes

1. The goal of the Wild and Scenic Rivers Act is to preserve “selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values...in free-flowing condition” for the current and future generations. 16 U.S.C. § 1271.
2. *U.S. v. Park*, 2008 U.S. App. LEXIS 17075, at *2 (9th Cir. Aug. 11, 2008).
3. *Id.*
4. *Id.* at *2-3.
5. *Id.* at *4.
6. *Neider v. Shaw*, 65 P.3d 525, 530 (Idaho 2003).
7. MERRIAM-WEBSTER COLLEGIATE DICTIONARY 728 (11th ed. 2003).
8. THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 797 (9th ed. 1995).
9. BLACK’S LAW DICTIONARY 953 (8th ed. 2004).
10. *Levine v. Conner*, 540 F. Supp. 2d 1113, 1116 (N.D. Cal. 2008).
11. IDAHO CODE ANN. § 25-1101.
12. *Id.* § 25-3601.
13. *Id.* § 25-3701.
14. 86 P.3d 484, 487 (Idaho 2004).
15. *Salfeety v. Seideman*, 907 P.2d 794, 801 (Idaho 1995).
16. The strict definition would not have included cooling one’s feet in the water or parents standing in the water to watch over their children.

Photograph of the Clearwater River courtesy of the U.S. Forestry Service.





Ninth Circuit Grants Partial Reprieve to California Sea Lions

Humane Society of the United States v. Gutierrez,
523 F.3d 990 (9th Cir. 2008).

*Alicia Schaffner, 3L, Roger Williams University
School of Law*
Stephanie Showalter, J.D., M.S.E.L.

The Ninth Circuit Court of Appeals recently granted the Humane Society's request for an emergency stay to stop the National Marine Fisheries Service (NMFS) and the states of Washington, Oregon and Idaho from killing a group of California sea lions in an effort to prevent their predation of salmon. While the emergency order saved the lives of these sea lions, it does not prohibit all government action, as NMFS and the states may still capture and relocate the sea lions.

Background

The California sea lion, as a marine mammal, is protected under the Marine Mammal Protection Act (MMPA). With the U.S. stock estimated at 244,000, however, NOAA Fisheries considers the California sea lion to be at its optimum sustainable population.¹ As the most common pinniped species in California, conflicts naturally arise along the West Coast between the sea lions who eat fish, fishermen who catch the fish, and the government agencies who manage all of the above.

In recent years, sea lions have been congregating 145 miles up the Columbia River where the Bonneville Dam creates an artificial bottleneck for migrating salmon. NMFS estimated that, if left unchecked, sea lions could consume between 212 and 2,094 spring Chinook salmon at Bonneville Dam or .3 to 4.4 percent of the population.² Commercial salmon fishermen and some of their supporters claim that sea lions are pushing the fish to extinction. While predation certainly has an impact, salmon populations are

primarily threatened by habitat modification and overfishing. The difficult question facing NMFS is what species has priority – the sea lions protected by the MMPA or the salmon and steelhead protected by the Endangered Species Act (ESA)?

Congress has tilted the balance towards the salmon. The MMPA permits NMFS to “authorize the intentional lethal taking of individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks” listed as threatened or endangered under the ESA.³ After non-lethal measures, such as acoustic harassment and aversive conditioning, failed to deter sea lions from Bonneville Dam earlier this year, the states sought permission to kill the offending animals. NMFS stirred up a storm when it granted approval, valid until June 20, 2012, for the taking of up to “85 California sea lions annually.”⁴

The Humane Society filed suit to prevent the states from killing the sea lions. The district court denied the Humane Society's request for a preliminary injunction concluding that while the plaintiffs had a “slight edge on the merits of the case,” the balance of harm tipped in favor of NMFS and the states.⁵ The Humane Society subsequently petitioned the Ninth Circuit Court of Appeals for an emergency order to stay the execution of NMFS' approval pending appeal.

Emergency Stay

Courts consider four factors when deciding whether to issue a stay pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”⁶ The Ninth Circuit focused on three facts. First, the lethal taking of

the California sea lions, as well as the consumption of salmon by the sea lions, is irreparable. There is no means of repairing that damage. Second, the granting of a stay should only affect the 2008 salmon run at Bonneville Dam, because the merits of the case should be resolved before next year's run. Finally, the 2008 salmon run was estimated to be very large compared to previous years.

Given these facts, the Ninth Circuit concluded that the balance of harm tipped in favor of the Humane Society. NMFS had argued that the consumption of as many as 2,094 salmon by the sea lions would cause irreparable harm. The Ninth Circuit did not agree, primarily because the total salmon run was estimated to be 269,000 fish and the sea lions would eat, at most, 4.4 percent of the run. Since the district court had found that the Humane Society was likely to succeed on the merits, the plaintiffs met their burden for a stay pending appeal.

The Ninth Circuit stayed the state's authorized action to manage predation at the Bonneville Dam only "to the extent their proposed actions involve the lethal taking of any sea lions."⁷ NOAA Fisheries' approval, however, also authorized the states to relocate up to nineteen California sea lions to zoos and aquariums.⁸ The Ninth Circuit allowed that portion of the approval to stand.

Temporary Reprieve?

The battle lines are clearly drawn and there are casualties on both sides. In late April, biologists began trapping sea lions. One sea lion died during the health exam, but the other six were successfully transported to Sea World. Things went downhill after that. On May 4, two Steller sea lions and four California sea lions were found dead in a trap near the dam. The cause of the deaths is unclear, although heat and stress are the two most likely culprits. Trapping has been suspended until March 1, 2009.⁹

During the 2008 Columbia River salmon run, spring Chinook salmon returned in lower numbers than expected¹⁰ and the Army Corps of Engineers watched nearly 100 sea lions feast on

4,230 salmon and steelhead.¹¹ After a hearing on the merits of the case on September 3, U.S. District Court Judge Michael Mosman stated that he is "inclined to side with the government on the issue of whether it can kill up to 85 sea lions a year at Bonneville Dam beginning next spring to reduce salmon predation."¹¹ An appeal of Judge Mosman's ruling, whatever his decision, is almost a foregone conclusion. ❧

Endnotes

1. NOAA Fisheries: Office of Protected Resources, <http://www.nmfs.noaa.gov/pr/species/mammals/pinnipeds/>
2. *Humane Society of the United States v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008).
3. 16 U.S.C. § 1389(b).
4. *Humane Society*, 523 F.3d at 991.
5. *Id.*
6. *Id.*
7. *Id.* at 992.
8. *Id.*
9. Craig Welch, *Northwest Sea Lions Teach Humans the Folly of Fighting Mother Nature*, THE SEATTLE TIMES (Sept. 7, 2008).
10. Roger Phillips, *Salmon Increase Tenfold in Columbia River Run*, THE SACRAMENTO BEE, at A9 (June 29, 2008).
11. Erik Robinson, *Sea Lions' Share of Salmon Fell*, THE COLUMBIAN (June 28, 2008).
12. Joseph B. Frazier, Associated Press Writer, *Judge Leans Toward Government in Sea Lion Dispute*, KATU.com, <http://www.katu.com/news/local/27841919.html> (last visited Sept. 17, 2008).

Photograph of California sea lion taking a chinook salmon near Bonneville Dam tailrace, April 2004, courtesy of Oregon Department of Fish and Wildlife.





Federal Court Dismisses Lawsuit Alleging Contraction of Hepatitis A from Undercooked Mussels

Foster v. Legal Sea Foods, Inc., and Great Eastern Mussel Farms, Inc., 2008 U.S. Distr. LEXIS 57117 (July 25, 2008).

Timothy M. Mulvaney, J.D.

The United States District Court for the District of Maryland dismissed a lawsuit filed by a couple seeking compensatory and punitive damages as a result of their claim that they contracted the Hepatitis A Virus (HAV) from eating raw or undercooked mussels at a Baltimore restaurant.

Background

On February 7, 2002, the plaintiffs, Ryan and wife Juliet Foster, dined at a restaurant incorporated as Legal Sea Foods, Inc. (Legal). The couple ordered steamed mussels, but after eating several of the mussels, realized that some were still closed. Mussels have a ligament that joins the two shells together, and this ligament contracts when properly heated, causing the shells to open. The Fosters advised the Legal waitress, who took the mussels away and later returned with what appeared to be the same batch, but cooked and, thus, opened.¹

On March 12, 2002, Ryan developed severe flu-like symptoms and an emergency room physician ultimately diagnosed him with acute HAV.² HAV is a temporary but often violent disease of the liver contracted by eating food or drinking water that is contaminated by human waste, with an incubation period of approximately two to seven weeks. The physician referred Ryan to a Dr. Joseph Galati for consultation. On April 4, 2002, Juliet developed similar symptoms and an emergency room physician diagnosed her with the milder second-degree HAV.³

The Fosters initiated this litigation by filing claims of negligence, strict liability and breach

of warranty against Great Eastern Mussel Farms, Inc. (GEMF) and Legal. Plaintiffs alleged that GEMF sold Legal mussels that contained HAV due to their harvesting in polluted waters.⁴ Further, plaintiffs alleged that Legal negligently failed to take proper safety precautions prior to serving these mussels.⁵

Plaintiffs offered an expert report by Dr. Galati. After reviewing Ryan's medical history and analyzing his behavior, Dr. Galati concluded that, "besides Legal's mussels, 'there [were] no other obvious risk factors'" for acquiring HAV, and the mussels therefore were more likely than not the source of Ryan's contraction.⁶

Plaintiffs also offered an expert report by a Mr. Roy Costa, a sanitarian, who concluded that HAV survived Legal's "ineffective steaming" of the mussels served to the Fosters.⁷ Defendant's expert, Dr. Robert Price, contradicted this assertion, stating that the steaming process "may or may not inactivate HAV."⁸

Mr. Costa also asserted that GEMF utilized seawater from a harbor that was most likely contaminated by "overboard dumping of sewage and ensuing pollution," and from areas that were already closed to shellfishing due to pollution.⁹ GEMF denied ever using water from areas closed to shellfishing, as evidenced by its harvesting tags¹⁰, and its expert disputed Mr. Costa's claim that shellfish can be contaminated with HAV from waters approved for shellfishing.¹¹

Further, Mr. Costa cited to 1993-1997 national data of the Center for Disease Control and Prevention (CDC), two published reports from 1984 and 2004, and his own 1990-2002 research in an effort to support his claim that "there is a well-established link" between shellfish and HAV.¹² Dr. Price's report examined more recent CDC data from 1990-2001, which explained that "food was the source of the contamination in just

one percent of the 286,881 acute cases of HAV reported to the CDC,” none of which were from shellfish or mussels.¹³

The defendants filed a motion with the court seeking to bar the testimony of plaintiffs’ experts, Dr. Galati and Mr. Costa. Specifically, the defendants sought an order to exclude from use at trial the following opinions due to their unreliability: Dr. Galati’s conclusions that Ryan likely contracted HAV from Legal’s mussels and that Juliet likely contracted HAV from either Ryan or Legal’s mussels, and Mr. Costa’s conclusions that the HAV was caused by GEMF’s use of polluted seawater to cleanse and prepare the mussels. The defendants further asked the court to grant summary judgment in its favor if it excluded this expert testimony, alleging that plaintiffs would be left without evidence that their consumption of the mussels caused the HAV diagnoses. For purposes of this motion, the defendants conceded that Legal served undercooked mussels to the plaintiffs and that the plaintiffs subsequently contracted HAV. The plaintiffs opposed the motion, positing that they intended to offer their experts’ testimonies to educate the jury on a variety of issues, including Legal’s and GEMF’s food handling practices and whether the undercooked mussels were the source of the HAV contracted by the Fosters.

Expert Reports Found Inadmissible

Federal Rule of Evidence 702 provides that expert reports and expert testimony are admissible if they will assist the trier of fact in understanding the evidence, are based upon sufficient facts or data, are the product of reliable methodologies, and the report or witness presents a reliable application of those methodologies to the facts of the case.¹⁴ The United States Supreme Court has outlined two principles for trial courts to bear in mind when deciding whether to admit expert reports: (1) liberal introduction of relevant reports, with a focus on cross-examination and the presentation of contrary evidence to counterbalance the veracity and reliability of an admitted opinion, and (2) the high poten-

tial for expert opinions to mislead juries.¹⁵ The Court listed four factors to guide reliability determinations: (1) the use of a tested theory, as opposed to a subjective opinion; (2) whether the theory has been subject to peer review; (3) whether there is a known rate of error; and (4) whether the conclusion is accepted within the given scientific community.¹⁶

District Court Judge Catherine Blake determined that both Dr. Galati and Mr. Costa were qualified experts in their respective fields. However, Judge Blake held that the experts’ conclusions that the undercooked mussels caused the Fosters’ HAV were not reliable because they failed to rule out, or at least minimize, alternative causes, such as other foods, contact with infected persons, and medications, as required for a valid causation opinion. In the court’s view, the temporal relationship between the Fosters’ dining at Legal and the onset of HAV symptoms supported Dr. Galati’s conclusion, but because of the long HAV incubation period, any number of unaccounted for causes may have intervened.

Similarly, the court found that Mr. Costa’s methodology failed to establish causation, defining his “traceback” from the Fosters’ illness to the mussels as “disjointed and speculative” in light of the lack of evidentiary support for his suspicions that GEMF withdrew the mussels from polluted waters or that any mussels in any area of GEMF’s facilities were contaminated.¹⁷ In addition, Judge Blake placed significant emphasis on what she termed “scant

Photograph of mussels courtesy of NOAA’s Ocean Explorer.



epidemiological evidence regarding the prevalence of HAV in mussels, or even shellfish generally,” referring to Mr. Costa’s sources as “largely outdated” and not sufficient to “persuasively establish mussels as a frequent source of HAV.”¹⁸

Summary Judgment for Legal and GEMF

Summary judgment is appropriate if the evidence is such that, at trial, no reasonable jury could return a verdict in favor of the non-moving party. In granting the defendants’ motion, and thus, closing the matter, the court held that, without Dr. Galati’s and Mr. Costa’s causation testimony, the Fosters failed to make a sufficient showing to establish an essential element to their claims.☹

Endnotes

1. *Foster v. Legal Sea Foods, Inc., and Great Eastern Mussel Farms, Inc.*, 2008 U.S. Dist. LEXIS 57117, at *3 (D. Md. July 25, 2008).
2. *Id.* at *4-5.
3. *Id.* at *5.
4. *Id.* at *13.

5. *Id.* at *11.
6. *Id.* at *6. Dr. Galati concluded that while the mussels could have been the source of Juliet’s contraction, it was also a possibility that she contracted HAV through her contact with her husband Ryan. *Id.* at *7.
7. *Id.* at *11.
8. *Id.* at *12, FN 4.
9. *Id.* at *15-17.
10. *Id.* at *18. Mr. Costa countered that GEMF’s monitoring of the mussels was inadequate. *Id.* at *19.
11. *Id.* at *18.
12. *Id.* at *20-21.
13. *Id.* at *23. Dr. Price stated that the foods most commonly contaminated with HAV were “frozen strawberries, lettuce, sandwiches, bakery goods, and green onions.” *Id.*
14. See also, generally, *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993).
15. See *Foster*, 2008 U.S. Distr. LEXIS 57117, at *25-26.
16. *Id.* at *30.
17. *Id.* at *40-42.
18. *Id.* at *20-23, *37, *39.

Right Whale, from page 19

Guard accountable for them.”⁸ The IMO is a specialized agency of the United Nations tasked with developing and maintaining a comprehensive regulatory framework for shipping, which it does by facilitating the negotiation and adoption of treaties. Given the international nature of commercial shipping, the court (or legislators) have determined it is reasonable to ask countries to submit their recommendations for shipping routes to the IMO for adoption on the international level. The approval of those recommendations, however, does not provide the IMO with any authority to promulgate regulations in the U.S. Only the Coast Guard has the authority to promulgate regulations governing shipping routes.

The D.C. Circuit found there was ample evidence of final agency action with respect to TSSs. Over the years, the Coast Guard has conducted and published the results of port access route studies, accepted public comments on proposed routes, and ensured that final TSSs appear in the Code of Federal Regulations following adoption by the IMO. The promulgation of a TSS is a final

agency action triggering consultation with NMFS under the ESA.☹

Conclusion

The D.C. Circuit affirmed the district court’s grant of summary judgment with regard to the denial of Defenders’ emergency rulemaking petition. However, because the D.C. Circuit found that the Coast Guard’s designation of traffic separation schemes triggers §7 consultation, the court reversed the district court’s grant of summary judgment and remanded the case for further proceedings.☹

Endnotes

1. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 914 (D.C. Cir. 2008).
2. *Id.* at 916.
3. *Id.* at 919.
4. *Id.* at 921.
5. *Id.* at 919.
6. 33 U.S.C. § 1223(c)(1).
7. *Id.* § 1224(a)(6).
8. *Defenders of Wildlife*, 532 F.3d at 926.

Coast to Coast

And Everything In-Between

Two high school seniors in New York City caused a stir this summer when the results of their science project revealed that one-fourth of the **sushi** they purchased was **mislabeled**. The students purchased samples of sushi from four restaurants and ten grocery stores



in Manhattan and shipped the samples to the University of Guelph in Ontario, where a graduate student had agreed to do the genetic analysis. Comparing the samples with DNA information stored in the Fish Barcode of Life (<http://www.fishbol.org/>), the graduate student determined that two restaurants and six grocery stores had sold mislabeled fish. For example, seven of nine samples sold as red snapper were mislabeled. One sample was actually Atlantic cod. (*New York Times*, Aug. 21, 2008).

Graphic courtesy of ©Nova Development Corp.

The Australia High Court, the country's highest judicial body, recently issued a landmark ruling granting traditional owners, i.e. the **Aborigines**, the **right to exclude** people from using the foreshore (the area between low and high tide) without permission. The ruling only directly affects fishermen on beaches and tidal rivers in Australia's Northern Territory, the area at issue in the case, but could provide precedent for Aboriginal claims in other parts of the country. A spokesman for the traditional owners indicated that they would seek to develop a permit system for uses in the area. (*Associated Press*, July 30, 2008).

Google recently filed a patent for a “**wave-based data center**” and a “crane-removable module,” a container-based data center. As if the regulatory regime for offshore alternative energy is not confusing enough, it appears companies are now trying to figure out how to move their data centers offshore and power them by wave energy. Note to the Mineral Management Service: Brush up on your intellectual property law. (*environmentalleader.com*, Sept. 9, 2008).



Photograph of Australian shoreline courtesy of ©Nova Development Corp.

In another interesting legal development from **Australia**, the New South Wales Court of Appeals overturned a decision of the Land and Environment Court last November that would have legally bound planning departments to consider the risk of **climate change-induced flooding** when approving coastal developments. The Court of Appeals declined to void the Planning Minister's decision even though there was no evidence that he considered the increased risk of flooding due to climate change. The plaintiffs had argued that the departments could not determine whether the developments met the principles of ecologically sustainable development without considering this increased risk. (*The Canberra Times*, Sept. 25, 2008).☞



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Editor: Terra Bowling, J.D.

Acting Editor: Stephanie Showalter, J.D.,
M.S.E.L.

Publication Design: Waurene Roberson

Research Associates:

Alicia Schaffner, 3L, Roger Williams
University School of Law
Arthur Park, 2L, University of Mississippi
School of Law

Contributors:

Richard McLaughlin, J.D.
Timothy Mulvaney, J.D.
Wyndylyn Von Zharen

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THE SANDBAR

Sea Grant Law Center
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848

