



Louisiana Sea Grant Legal Program

Louisiana Coastal Law E-mail Update Issue #14, December 2003

Recent Case Law

Sierra Club v. Norton, 74 Fed. Appx. 376 (5th Cir. 2003).

In this case, the Sierra Club alleged that the National Park Service (NPS) failed to follow the administrative procedures required by the Endangered Species Act (ESA) when it adopted an Oil and Gas Management Plan (OGM Plan) for the Padre Island National Seashore (Seashore) and granted the BNP Petroleum Corporation a site-specific drilling permit for drilling on the Seashore. Compliance with the ESA was required because the Seashore is one of only two nesting grounds for the Kemp's ridley sea turtle, which is classified as an endangered species.

The 5th Circuit Court of Appeals held that under the ESA's citizen suit provision (16 U.S.C. 1540(g)(1)), the court did not have jurisdiction to review the OGM Plan. They reasoned that citizens do not have the right to enforce the agency's failure to comply with a nondiscretionary duty imposed by 16 U.S.C. 1536. The court also held that the OGM Plan also was not subject to jurisdiction under the Administrative Procedure Act (APA) because it did not constitute final agency action. The OGM Plan was not final agency action because it did not establish any rights or obligations. First, the OGM Plan "appeared to be nothing more than a general statement of NPS policy, a collection of statutes and regulations that govern and affect drilling at the Seashore, and suggested mitigation measures." Second, a complete environmental review would be required for each site-specific permit before drilling would be allowed on the Seashore. Therefore, the Sierra Club's challenge to the OGM Plan was the type of programmatic review that has been held to be unreviewable under the APA in Sierra Club v. Peterson, 228 F. 3d 559 (5th Cir. 2000).

On the other hand, the court stated that Peterson does allow the Sierra Club to challenge individual drilling permits later granted by NPS. Finally, the court ruled that NPS did not violate Section 7 of the ESA because it did not act arbitrarily or capriciously when it informally consulted with the U.S. Fish and Wildlife Service about the impacts of drilling on the Kemp's ridley sea turtle.

Note: this case is an unpublished opinion, and therefore is not precedent except under res judicata, collateral estoppel, or law of the case. However, unpublished opinions may be persuasive. U.S. Ct. of App. 5th Cir. Rule 47, 28 U.S.C.A.

Alabama-Tombigbee Rivers Coalition v. Norton, 383 F. 3d 1244 (11th Cir. 2003)

In this case, the Alabama-Tombigbee Rivers Coalition alleged that the U.S. Fish and Wildlife Service had unlawfully listed the Alabama sturgeon as an endangered species. The district court had held that the Alabama-Tombigbee Rivers Coalition lacked standing. However, the appellate court disagreed, found that the plaintiffs had standing, and then remanded the case back to the district court for a review of the agency's actions.

The Coalition is a group of businesspeople that use the Alabama and Tombigbee Rivers for various commercial and recreational activities. Due to the declaration of Alabama sturgeon critical habitat in the rivers in which they operate, their activities will be subject to increased scrutiny, permitting, and mitigation requirements. The court held that the new regulations that would be imposed on the Coalition's enjoyment of the river were redressable injuries, giving the group standing.

Avenal v. State, through the Department of Natural Resources, 858 So. 2d 697 (La. App. 4th Cir. 2003)

This case was a suit by the owners of oyster leases against the state for compensation to remunerate them for a taking off their property under Article 1, § 4 of the Louisiana Constitution. The taking resulted from destruction of oyster leases by the Caernarvon freshwater diversion project. Lessees were compensated for their losses on the basis of a "cultch currency matrix," which is based on replacement cost of oyster leases rather than their fair market value. The state opposed an award on this basis because the replacement cost was greater than fair market value.

The trial court had decided that replacement costs rather than fair market value should be awarded in this case because the takings provision of the Louisiana Constitution requires that the owner of property taken by the government be "compensated to the full extent of his loss." The trial court's rationale was that an award of replacement costs, not fair market value, was necessary to fully compensate the plaintiffs. The appellate court agreed, pointing out that the state itself sponsored the creation of the cultch currency matrix "as a means of determining the amount of compensation for the effective loss of oyster leases by manmade impacts" and had applied the cultch currency matrix in other situations. Therefore, replacement costs was an appropriate measure of damages in order to compensate oyster lessees to the full extent of their loss, as required by Louisiana takings law.

Defenders of Wildlife v. Hogarth, 330 F. 3d 1358 (Fed. Cir. 2003)

In this case, the Defenders of Wildlife opposed a National Marine Fisheries Service (NMFS, now NOAA Fisheries) interim-final rule concerning the protection of dolphins. NMFS was given the task of establishing rules to implement the International Dolphin Conservation Program Act. The International Dolphin Conservation Program requires that dolphins that have been captured using certain techniques be released no later than one-half hour *after* sunset. However, when the U.S. Congress passed the International Dolphin Conservation Act, they required the dolphins to be released one-half hour *before* sunset. When NMFS promulgated the rules under this act they required the dolphins to be released one-half hour after sunset and claimed that the requirement to release the dolphins one-half hour before sunset was a drafting error and not the true intent of Congress.

The court upheld the rule because the International Dolphin Protection Act, as passed by Congress, allowed NMFS to adjust the requirements of the law to comply with appropriate "fishing practices." The court also approved the method by which NMFS had created the rules. The court stated that NMFS took a "hard look" at whether to require that an environmental impact

statement be made, used appropriate and accurate information to arrive at its decision, and considered the cumulative impacts of its dolphin regulation.

FEDERAL AGENCY DECISION

EPA and Army Corps of Engineers Issue Wetlands Decision

On December 16, 2003, President Bush, EPA, and the Army Corps of Engineers announced that they would not issue a new rule on federal regulatory jurisdiction over isolated wetlands. In Solid Waste Management of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), the U.S. Supreme Court ruled that the Corps' rule extending the definition of "navigable waters" under Clean Water Act (CWA) to include intrastate waters used as habitat by migratory birds exceeded authority granted to the Corps under the CWA. In light of this decision, EPA and the Corps revised their field office guidelines and asked for public comment. After reviewing suggestions made by the public, they decided not to issue a new rule.

For more information, contact Cathy Milbourn at 202-564-7824 or milbourn.cathy@epa.gov.

RECENT LOUISIANA EXECUTIVE ORDER

Executive Order MJF 03-25: Louisiana Wild Caught Shrimp Industry Trade Action Advisory Council

Executive Order 03-25 established the Wild Caught Shrimp Advisory Council (Council) within the Office of the Governor. The Council's duties include:

- Supporting and assisting a trade action brought by a consolidated wild-caught shrimp industry;
- Exploring and developing funding sources and mechanisms to assist and support such trade action; and
- Recommending proposed legislation to fund the trade action.

The Council consists of thirteen members, who are representatives of industry, the Department of Wildlife and Fisheries, and various other interests. The council is to submit a final report to the Governor and the Secretary of Wildlife and Fisheries on or before March 1, 2004.

IN THE NEWS

Governor-Elect Blanco Pushing for Coastal Erosion Committee

Governor-Elect Kathleen Blanco has asked the Louisiana Legislature to create a committee dedicated solely to coastal erosion. The governor-elect asserts that a committee devoted to coastal erosion would keep coastal erosion issues from being parceled out among diverse committees, and allow them to be judged as a whole. This, in turn, would lead to better oversight for ongoing studies and show the state's commitment to fighting coastal erosion. The governor-elect has yet to decide whether the committee will be a standing or temporary committee.

Governor-Elect Blanco Names Fish and Wildlife Advisory Group

Governor-Elect Blanco has named twenty-two members to her Fish and Wildlife Advisory Group. Although comprised of mostly businesspeople, conservation organizations and state colleges are also represented within the group. The Group's chairman, Mr. Michael 'Mitch' Ackal, Jr., works for Dominion Exploration and Production, Inc. and also is chairman of the Louisiana Gas and Oil Association.

Food-Origin Labels May Be Delayed Two Years

On December 8, 2003, the House of Representatives passed H.R. 2673. If passed by the Senate, it could push back the deadline for a mandatory country of origin labeling rule from September 30, 2004 to September 30, 2006. The country of origin labeling rule, discussed in *Louisiana Coastal Law* E-mail Update Service No. 13, requires country of origin labeling for beef, lamb, pork, fish and shellfish, perishable agriculture commodities, and peanuts. This change notably did not include farm-raised and wild fish. This means that even if the Senate passes this resolution the labeling requirements for farm raised and wild fish will still go into effect September 30, 2004.

The sponsor of the amendment to push back the deadline, Henry Bonilla (R-Texas), claims that the labeling requirements are "potentially onerous" due to their costs and asserts that the two year delay will give the USDA the opportunity to investigate the full economic impacts of the labeling requirements.

For more information, visit <http://www.house.gov/dunn/leg/108-1/billspassed/HR2673.pdf> and <http://www.house.gov/bonilla/pressreleases/1208cool.html>.

Thirty Percent Reduction in Nitrogen May Not Reduce Dead Zone

A study released in the *Journal of Limnology and Oceanography* reported that a thirty- percent reduction in nitrogen might not reduce the dead zone to an average 2000 square miles along the Louisiana Coast. Donald Scavia, author of the article and chief scientist for the National Oceanographic and Atmospheric Association, wrote that due to variability in oceanographic and climatic conditions, a forty to forty-five percent reduction in nitrogen would be necessary in order to reduce the affected area to 2000 square miles in most years. The author also suggested that the dead zone should be measured based on a five-year average and not a year-to-year assessment for the purposes of making nitrogen policy and management decisions due to the variability and impacts of other factors.

WEBSITE OF INTEREST

Louisiana Fisheries

<http://www.seagrantfish.lsu.edu>

This website provides information for those involved in the Louisiana fisheries industry. The site has sections devoted to species information, gear and regulations, habitat information, legal information, publications, and links of interest to those in the industry. The site includes a search function to allow users to retrieve specific information efficiently.