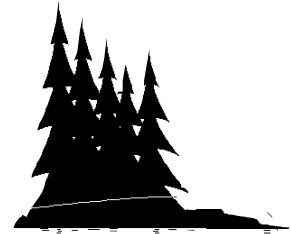

NewsREEL



*A Newsletter for the Mississippi Bar Section on
Natural Resources, Energy and Environmental Law*

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Supreme Court Determines Wetlands Landowner Rights

Palazzolo v. Rhode Island, 531 U.S. 923 (2001).

*Roy A. Nowell, Jr. and
Kristen M. Fletcher*

Last summer, the U.S. Supreme Court issued its latest takings ruling in the case of *Palazzolo v. Rhode Island*, in which the Court rejected Anthony Palazzolo's claim that his land was taken in violation of the Fifth Amendment. The Court addressed three issues in the case: first, whether the case was ripe for adjudication; second, whether Palazzolo had the right to sue based on his successive ownership of the property; and third, whether the Rhode Island Resources Management

Council's (Council) rejection of Palazzolo's development proposal constituted an illegal taking under the Fifth Amendment.

Background

Anthony Palazzolo owns waterfront property in Rhode Island which the law of the state designates as wetlands. The saga behind his ownership of the property in question dates back to 1959, when he and associates formed Shore Gardens, Inc. (SGI) and purchased the property. Eventually, Palazzolo purchased the other associates' interest in the property, thus rendering him the sole owner of the

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Sierra Club Challenges the Big Sunflower River Project

Mississippi Sierra Club, Inc. v. Mississippi Department of Environmental Quality,
2001 WL 393911 (Miss. 2001).¹

Roy A. Nowell, Jr.

In April, 2001, the Mississippi Supreme Court ruled that the Mississippi Commission on Environmental Quality (Commission) failed to make proper findings on the certification of a proposed project of the U.S. Army Corps of Engineers (Corps). The certification, issued by the Commission, was challenged by the Mississippi Sierra Club (Sierra Club) and brought before the Hinds County Chancery Court. The lower court affirmed the Commission's certification of the Big Sunflower River Maintenance Project (Project) proposed by the Corps. The Sierra Club

appealed to the Mississippi Supreme Court where the lower court ruling was vacated, and the issues remanded to the Commission for further findings.

Background

The Big Sunflower River Maintenance Project is a channeling project proposed by the U.S. Army Corps of Engineers to alleviate flooding in the Yazoo-MS Delta, which occurs every 1 to 5 years. The Corps estimates that the Project will result in a six-inch reduction in water level and affect approximately 56,000 acres of the Big Sunflower River Basin and would have a significant impact on a

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NewsREEL

*A Newsletter for the Section on Natural Resources,
Energy, and Environmental Law of the Mississippi Bar*

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Federal Legislative Update 2001

Kristen M. Fletcher, J.D., LL.M.

Roy A. Nowell, Jr.

The following is a summary of federal legislation related to energy, water, the environment and natural resources enacted during the first session of the 107th Congress.

107 Public Law 13 - Act to Authorize Funds for Endangered Species Act Consultation (H.R. 581)

Authorizes the Secretaries of the Interior and of Agriculture to use wildland fire management funds (appropriated in the Department of the Interior and Related Agencies Appropriations Act, 2001) to reimburse the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for the costs of their compliance with Endangered Species Act consultation requirements.

107 Public Law 20 - 2001 Supplemental Appropriations Act (H.R. 2216)

Title I - National Security Matters

Chapter 2: Makes supplemental appropriations for the Department of Energy for defense environmental restoration and waste management.

Title II - Other Supplemental Appropriations

Chapter 1: Appropriates for the (1) enforcement and enhancement of activities under the Animal Welfare Act; (2) the Animal and Plant Health Inspection Service; and (3) Natural Resources Conservation Service, to repair damages to waterways and watersheds resulting from natural disasters. Rescinds specified funds appropriated to the Farm Service Agency for the Agricultural Conservation Program.

§§ 2104, 2107: Provide amounts for water conservation assistance to producers in the Klamath Basin (Oregon) and in the Yakima Basin (Washington).

Chapter 2: Amends a prior appropriation for the construction of a research center at the ACE Basin National Estuarine Research Reserve, making \$3 million available for construction and \$5 million for land acquisition.

§ 2201: Revises the date for the adoption of final regulations concerning permits under the fishing capacity reduction program from May 1, 2001, to as soon as practicable and provides that interim Bering Sea crab fishery certificates issued after December 1, 2000 shall remain valid until the Secretary implements final regulations.

§ 2202: Amends the American Fisheries Act's requirements for commercial lenders, mortgage trustees, and fisheries endorsements, including by revising methods by which commercial fishing vessel lenders demonstrate citizenship status.

Chapter 11: Authorizes the EPA to award grants for work on New York watersheds.

Legislative Update, from page 3

107 Public Law 26 - Act to Reauthorize the Tropical Forest Conservation Act of 1998 (H.R. 2131)

Amends the Tropical Forest Conservation Act of 1998 to authorize appropriations through FY 2004 for the reduction of debt owed to the U.S. by a developing country with a tropical forest as a result of loans made or credits extended and revises language to require “investment reforms” by the country for eligibility.

107 Public Law 63 - Department of the Interior and Related Agencies Appropriations Act, 2002 (H.R. 2217)

Provides funds for the following activities.

- Landowner Incentive Program - Provides for private conservation efforts funded under the Land and Water Conservation Fund for the protection and management of habitat to benefit federally listed, proposed, or candidate species, or other at-risk species on private lands;
- Offshore Oil and Gas Leasing - Allows activities only within the area of Sale 181 in the eastern Gulf of Mexico;
- Glacier Bay National Park Vessels - Directs the National Park Service to complete (by January 1, 2004) an EIS to identify and analyze the possible effects of the 1996 increases in the number of vessel entries issued for Glacier Bay National Park, providing that the number of vessel entries into the Park shall be the same as that in effect during the 2000 calendar year until the Secretary sets levels consistent with the EIS.

107 Public Law 66 - Energy and Water Development Appropriations Act, 2002 (H.R. 2311)

Section 502 Instructs the Secretary of the Army to study and report to Congress on the known and potential environmental effects of oil and gas drilling activity in the Great Lakes, including effects of drilling upon the shorelines and water and prohibits any state or federal permit or lease issuance for new oil and gas slant, directional, or offshore drilling in or under any of the Great Lakes.

107 Public Law 69 - Act to Amend the Reclamation Recreation Management Act of 1992 (H.R. 2925)

Directs the Secretary of the Interior to issue regulations in order to provide for the security of dams, facilities, and resources under the jurisdiction of the Bureau of Reclamation.

107 Public Law 73 - Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002 (H.R. 2620)

Funds the Environmental Protection Agency for fiscal year 2002; in its conference report, it provides \$10 million for coastal states to test and monitor the water at local beaches and to notify the public if the water quality is deemed unsafe for swimming, as required by the BEACH Act of 2000.

107 Public Law 91 - Detroit River International Wildlife Refuge Establishment Act (H.R. 1230)

Establishes the nation’s first international Wildlife Refuge to protect the remaining high-quality fish and wildlife habitats of the Detroit River and to restore and enhance degraded wildlife habitats associated with the Detroit River, assist in international efforts to conserve, enhance, and restore the native aquatic and ter-

restrial community characteristics of the Detroit River in the U.S. and Canada, and to facilitate partnerships among the U.S. Fish and Wildlife Service, Canadian national and provincial authorities, State and local governments, communities, and conservation organizations. The refuge consists of the lands and waters managed by the Secretary in Michigan within the area extending from the point in Michigan directly across the river from northernmost point of Ojibway Shores to the southern boundary of the Sterling State Park, including the Wyandotte National Wildlife Refuge.

107 Public Law 107 - National Defense Authorization Act for Fiscal Year 2002

(H.R. 1438)

Creates a pilot program for emission reduction incentives by authorizing the Secretary of Defense to prepare a report on the sale of economic incentives for the reduction of emission of air pollutants attributable to military facilities. In addition, the following should be well detailed in the report: number and type of pollutants involved, extent of loss to U.S., extent to which retention of the proceeds of sales provided incentives, and the environmental impact of the program.

Sierra Club, from page 1

number of rivers, streams, wetlands, and wildlife in the areas within the basin, including the dredging of over 100 miles of stream and the clearing of over 28 miles of rivers.

The Corps filed its application for water quality certification of the Project with the Mississippi Department of Environmental Quality (MDEQ) in August of 1996. After a recommendation from Chief of Water Quality Management, the Commission voted seven to one to certify that the Project would comply with the Mississippi Air and Water Pollution Control Law. The Sierra Club filed suit, challenging the certification.

Analysis

When considering an application for water quality certification, the Commission must address numerous factors set out in the Waste Water Regulations for National Pollutant Discharge Elimination System Permits, Mississippi State Permits, Water Quality Based Effluent Limitations and Water Quality Certification measures. The Sierra Club argued that the Commission failed to adequately address several of these factors, including a balanced assessment of alternatives to the Project, the mitigation of the environmental effects of the Project, the physical, chemical and biological impacts associated with the Project and the Corps' record of compli-

ance with mitigation conditions. The Sierra Club raised three issues:

1. Whether the Commission correctly applied the factors of Mississippi's Water Quality Regulations; and
2. Whether the Commission certified the Project without adequate assurance that measures would be taken to prevent unreasonable and irreparable harm to Mississippi waters; and,
3. Whether the Project violates the Water Quality Criteria for impaired waters.

Standards and *McGowan* Analysis

In 1992, the Mississippi Supreme Court addressed the standards that must be met by an agency so that the Court may properly review certification decisions. In *McGowan v. Mississippi State Oil and Gas Board*, the Court vacated an order of the State Oil and Gas Board for failing to make adequate findings of fact and for failing to disclose the reasoning behind its decision.² In *McGowan*, the court expressly stated an agency *must* state the reasoning behind its decisions and make adequate findings of fact concerning necessary standards.³ The Court held that, in order for courts to review an agency's decision, the agency should not only provide conclusory findings, but should also provide the basis for these findings.⁴ Under *McGowan*, the order of the Commission cer-

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tifying the Big Sunflower River Maintenance Project was deficient on the following points.

- **Feasible alternatives to the Project:** The Commission made only conclusory statements indicating that suggested alternatives to the Project would be cost prohibitive and would not accomplish the purpose of alleviating flooding. The Court held that the order should include the “articulated reasoning” upon which the certification decision was based and without finding of fact and explanation, the certification does not meet the *McGowan* standard.

- **Mitigation Requirements:** The mitigation proposed by the Corps included the reforestation of 1,912 acres of agricultural land subject to frequent flooding. The Commission determined the proposed mitigation was sufficient to minimize any adverse effects resulting from the proposal, but failed to adequately specify what adverse effects were expected and how the mitigation was expected to minimize or prevent these effects.

- **Physical, Chemical and Biological Impacts:** In its order, the Commission notes that there will be “significant unavoidable impacts” related to the Project but fails to discuss those impacts or the details for addressing the impacts, failing to meet the *McGowan* standard.

- **Compliance History:** Finally, no findings were made by the Commission to determine the level of compliance by the Corps with prior mitigation requirements. The Sierra Club provided evidence indicating that the Corps had a relatively poor record of compliance with mitigation requirements. Testimony from the Corps’ Project Manager revealed a compliance rate of only 30%, including the failure to purchase thousands of acres of required mitigation lands. The Commission offered no findings to contradict the arguments offered by the Sierra Club, and the Court ruled the Commission must address the Corps’ compliance history in making certification decisions.

Unreasonable Degradation and Irreparable Harm

Second, the Sierra Club argued that the Commission failed to determine whether the Project would cause unreasonable degradation and irreparable harm to state waters. The Court ruled there was no evidence that the Commission actually reviewed the measures proposed by the Corps, as it is required to do under Mississippi law. The Court remanded this issue to the Commission for further analysis.

Mississippi Water Quality Criteria

Finally, the Court addressed the issue of whether the Project would violate Mississippi Water Quality criteria for impaired waters within the state. Because the waters are already classified as impaired, the Commission required the Corps to take core samples and to monitor the effects of dredging on bottom pesticides and other sediment. The Commission decided that the waters would not be degraded beyond current water quality conditions. However, the Court determined that the Commission failed to provide sufficient details regarding the standards and ordered the issue placed back before the Commission for further findings.

Conclusion

In sum, the Court ruled the Commission failed to offer findings, details, and explanations relating to their decisions regarding required standards. The Commission simply reported their decisions without providing the reasoning the decisions were based upon. Using the standards set forth in *McGowan*, the Court remanded the case to the Commission for further findings. ✎

Endnotes

1. Or cite as 2001 Miss. LEXIS 97 (Miss. Apr. 19, 2001).
2. *McGowan v. Mississippi State Oil & Gas Board*, 604 So. 2d 312 (1992).
3. *Id.* at 323.
4. *Id.*

Palazzolo, from page 1

property. Over the next few years, he made several attempts to develop the property, but all proposals were denied by the Rhode Island Department of Natural Resources.

In 1971, the land was deemed coastal wetlands by laws enacted by the Council. In addition, SGI's corporate charter was revoked in 1978 for failure to pay taxes. As a result of the revocation, Palazzolo became the corporation's sole shareholder. In 1983, he resumed his efforts to develop the land, and again, the Council rejected the proposal. Subsequently, Palazzolo brought a takings action against the Council. In 2000, the Rhode Island Supreme Court determined that Palazzolo's takings claim was not ripe, he had no right to bring the claim, and that he had not been deprived of all economically beneficial uses of his property, rendering his takings claim ineffective. As a result, Palazzolo chose to continue his fight and appealed the decision to the United States Supreme Court.

Palazzolo's Right to Sue

The owner of an interest in property is deemed to be aware of previously enacted laws regarding that property and cannot later bring a takings claim. In other words, a landowner is considered to have notice of any restrictions or limitations on the property. However, as the Rhode Island Supreme Court noted, the Takings Clause of the Fifth Amendment provides an exception that if the government action is "so unreasonable or onerous as to compel compensation," subsequent owners may be

allowed to bring a takings claim.¹ In effect, this concept prevents governmental entities from taking action that is normally deemed an unconstitutional taking simply because the ownership of property has changed hands. In this case, the U.S. Supreme Court ruled that Palazzolo held the right to sue even though he was a subsequent owner of the wetland property, finding that unconstitutional state action should not be ignored merely because title to the property passed to another landowner.

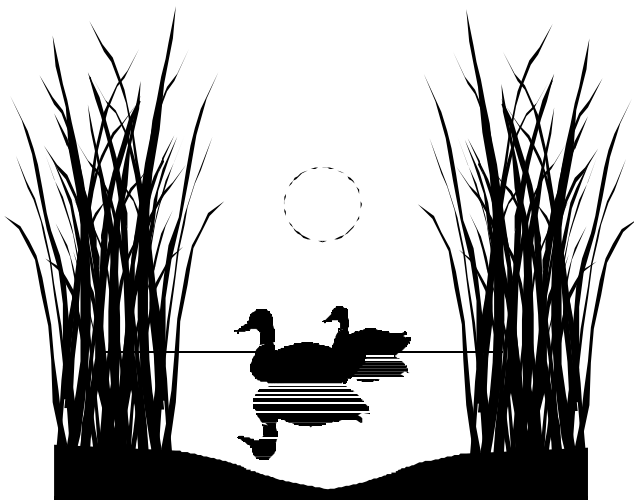
Instead, the nature of the government action should be determinative of whether a taking has occurred. Therefore, even though Palazzolo was a subsequent owner of the property, he still had the right to sue. The Court did not state that every subsequent landowner has the right to sue, but it clearly stated that no blanket rule exists prohibiting a subsequent landowner from bringing suit simply because she was not the owner of the property when the legislation was enacted.²

The Ripeness Doctrine

The U.S. Supreme Court has held that a claim is not ripe unless a final decision has been reached by the government agency in charge of enforcing the regulation.³ The Court determined that the Rhode Island Supreme Court improperly ruled that Palazzolo's claim was not ripe for the Court to make a ruling. The Rhode Island Supreme Court had determined that Palazzolo had not used every possible avenue to seek a use of his property and still had options for development to pursue. The Court held that the state agency had addressed the issues presented concerning Palazzolo's proposal, and by rejecting the proposal, had made a final decision, thereby satisfying the requirements of the ripeness doctrine. In addition, the court noted that the Council cited no instances in which Palazzolo failed to comply with the requirements of the application process and, as a result, determined that Palazzolo's claim was ripe for adjudication.

The Taking Determination

A regulatory taking has occurred if all economically beneficial uses of the property have been stripped



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by the government action.⁴ Courts are split on the issue of whether the deprivation of economic value should be considered in light of the entire property or the specific parcel in dispute. If only the parcel in dispute is used for determination of a taking, it is likely that a court will rule that the property has been rendered valueless, but if the property is viewed as a whole, a court will probably hold that the property still has value.

The Court did not address the issue of whether the prohibition on the property should be viewed in light of the entire property or just the parcel at issue, but found that because he still had \$200,000 in development value on his property and could still build a large residence on 18 acres of the land, Palazzolo still had economic use of a considerable amount of his property. Thus, the Court ruled that the Council's rejection of Palazzolo's development proposal did not constitute a taking because Palazzolo was not deprived of all economically beneficial use of his land.

When a regulation falls short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed

expectations, and the character of the government action. The Supreme Court remanded the case for an analysis of these factors.

Conclusion

Although a majority of the Court concluded that the government had not taken all economically beneficial use of Palazzolo's property, the resulting concurrences and dissents exemplified the differing opinions of the Court. For instance, Justices Ginsburg and Breyer dissented arguing that the decision of the Rhode Island Supreme Court should have been affirmed. Regardless of the differences, Palazzolo must now await the determination of the Rhode Island Supreme Court to determine if a taking has occurred on his property. ❧

Endnotes

1. *Palazzolo v. Rhode Island*, 531 U.S. 923 (2001).
2. The question remains, then, whether Palazzolo's claim can be distinguished because of his claim on the property title dating back to 1959.
3. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).
4. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Supreme Court Hears Lake Tahoe Takings Case

In January, the Supreme Court heard another property rights dispute from Lake Tahoe area property owners seeking compensation for a moratorium on development first enacted two decades ago in 1981. The new case pits a landowner-based coalition named the Tahoe-Sierra Preservation Council against the two-state Tahoe Regional Planning Agency, which Congress created in 1969. The agency has struggled since 1981 to devise and implement a plan to safeguard the crystal blue lake from what scientists say would be irreversible damage from sediment and runoff due to development. The landowners have been in federal court since 1984 with the Ninth U.S. Circuit Court of Appeals having issued three rulings rejecting arguments that the initial moratorium or two plans adopted by TRPA in 1984 and 1987 amounted to an unconstitutional taking of the landowners' property without compensation. Even though the Council asked the high court to rule on all three of the agency's edicts, the justices narrowed the case to the initial, 32-month moratorium. The case is *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, No. 00-1167, and the Ninth Circuit decision is reported at 216 F.3d 764 (9th Cir. 2000).