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Client Alert

Tort & Environmental Practice Group

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Proximate Cause and Foreseeability Are Required Elements of Endangered Species Act Liability: Fifth Circuit Reverses Injunction Preventing Texas from Issuing Water Permits

The Fifth Circuit Court of Appeals has reversed an injunction that would have prohibited the Texas Commission on Environmental Quality ("TCEQ") from issuing new water withdrawal permits affecting an estuary where endangered whooping cranes winter.[i] The decision confirms that, to impose liability under the Endangered Species Act ("ESA"), plaintiffs must prove that the defendant proximately caused the harm to listed species and that the harm to listed species was reasonably foreseeable. The court also rejected the lower court's finding that a "relaxed" standard for injunctive relief applies in ESA cases, and reaffirmed that plaintiffs bear the burden of demonstrating an injunction is warranted even if they can establish an ESA violation. The decision is a victory for state and local governments, the agriculture and forestry industries, and anyone who engages in potentially regulated activities, because it reinforces important limits on ESA liability in cases where otherwise lawful activities might have attenuated but adverse consequences for protected species.

In *The Aransas Project v. Shaw*, an environmental group alleged that TCEQ's issuance of water withdrawal permits reduced freshwater inflows to an estuary inhabited by endangered whooping cranes. According to the group, these permits authorized withdrawals that decreased freshwater flows which, coupled with a severe drought, increased salinities in the estuary. This allegedly led to a decline in the crane's primary food supplies, which, in turn, resulted in the death of 23 cranes. Based on this causal chain of events, the district court found TCEQ liable under the ESA, granted an injunction prohibiting TCEQ from issuing new water withdrawal permits (later stayed by the Fifth Circuit pending appeal), and required TCEQ to apply for a Habitat Conservation Plan and Incidental Take Permit under Section 10 of the ESA.

The Fifth Circuit reversed. Explaining that ESA liability cannot be based "on remote actors in a vast and complex ecosystem," the court made clear that a defendant violates the ESA only when the harm to listed species is sufficiently direct, and only when the harm was reasonably foreseeable at the time of the defendant's actions. Thus, just as a farmer may not be held liable simply because he "tills his field, causes erosion that makes silt run into a nearby river, which depletes oxygen in the water, and thereby injures

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protected fish," the court found that "the remote connection between water licensing, decisions to draw river water by hundreds of users, whooping crane habitat, and crane deaths that occurred during a year of extraordinary drought" was insufficient to impose ESA liability.

The Fifth Circuit also found that, even if TCEQ's actions had proximately caused the crane deaths, it was an abuse of discretion for the district court to enjoin the agency from issuing new water withdrawal permits. The Fifth Circuit held that the so-called "relaxed standard" for injunctive relief in ESA cases applied by the district court does not excuse plaintiffs from the burden of establishing that such relief is necessary to prevent future injury that is "certainly impending." The court held that the district court erred by focusing all of its attention on the finding that cranes had been harmed in the past, during one extraordinary drought: "Injunctive relief for the indefinite future cannot be predicated on the unique events of one year without proof of their likely, imminent replication."

Finally, the reversal is significant because the district court had adopted a controversial theory under which state agencies can be held liable for failing to regulate private activities that harm endangered species. Environmental plaintiffs have promoted this theory of "vicarious liability" as a tool to address environmental harms resulting from the cumulative effects of many different private actors. By providing a single defendant to sue, vicarious liability would make it possible for environmental plaintiffs to litigate cases that otherwise would be nearly impossible to manage because so many defendants would have to be joined. While finding that it was unnecessary to reach this issue given the problems with the district court's causation analysis, the Fifth Circuit did note that the vicarious liability theory "is challenged by other appellate opinions maintaining that state governments may not be commandeered into enforcing federal prohibitions." Although not definitive, this language bodes well for defendants confronting similar claims in the future.

In the end, the Fifth Circuit's opinion draws an important line against the trend of expanding ESA liability for attenuated harms to listed species. It reaffirms that proximate cause and foreseeability are required elements for ESA liability, and that a plaintiff seeking an injunction must prove that an injunction is warranted even if a violation of the ESA occurred. The case is an important victory for State and local regulators, water users, and anyone else who engages in a potentially regulated activity.

King & Spalding has significant experience in ESA matters. If you have questions about this decision or how the ESA may affect you and your business, please contact Patricia Barmeyer or Lewis Jones.

[i] The Aransas Project v. Shaw, No. 13-40317 (5th Cir. June 30, 2014), available at http://www.ca5.uscourts.gov/opinions/pub/13/13-40317-CV0.pdf.