Louisiana Sea Grant Legal Program

Louisiana Coastal Law E-mail Update
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WEBSITES OF INTEREST

Louisiana TMDL Website
http://www.deq.state.la.us/technology/tmdl/

This website is sponsored by DEQ, and is an inclusive site for Total Maximum Daily Load reporting. The site provides the TDML reports and models, as well as watershed surveys. There are also links to water-related laws, and Ambient Water Quality Data. Furthermore, links to TDML notices and the Louisiana Water Quality Management Plan are provided. Access to a list of Louisiana's impaired water bodies is provided.

EPA Oil Spill Program
http://www.epa.gov/oilspill/

This website is a comprehensive site about the Environmental Protection Agency's Oil Spill Program. The site provides the guidelines for reporting spills, and information on preventing, preparing for, and responding to oil spills. The site also has all the oil spill regulations and laws, as well as EPA's oil spill publications. There are also links to region EPA pages, and other oil spill-related websites. Additionally, there are numerous educational links about oil spills and response.

Southern Environmental Law Center
http://www.southernenvironment.org

This website is the Internet headquarters for the Southern Environmental Law Center (SELC), a group that seeks to initiate broad-based conservation issues to strengthen environmental protection and laws. This site is very well organized, and shows a basic conceptualization of land, water, air, forest, and coastal conservation initiatives, as well as the particular projects that SELC is or has been involved in. The site is a helpful place to do research on possible ways to take action, learn about environmental rights, read the latest news regarding environmental issues, and discover facts about the South's rich environmental resources. The site also contains links to several of SELC's publications, their newsletter, and news releases.

WILDLIFE AND FISHERIES NEWS:

NON-RESIDENT FISHING AND CHARTER BOAT LICENSE FEES

Louisiana and Mississippi officials met in March 2001, to discuss the recent fee changes made by both states in the past two years and came away with an agreement to make some legislative adjustments to the current non-resident fishing and charter boat rates. Louisiana had enacted a recent rate hike in order to offset budget short falls in the Department of Wildlife and Fisheries. Following Louisiana's changes, fees for Louisiana residents applying for certain hunting licenses in Mississippi were increased. As a result of the inter-state meeting, two bills have been introduced in the Louisiana 2001 regular legislative session, SB 950 and HB 1716. At this time, SB 950, which reduces the annual non-resident saltwater fishing license, has been passed and been signed by the Governor. HB 1761, which reduces the fee for charter boat licenses has passed the House and is currently on the Senate calendar. Legislation written and introduced in Mississippi in response to the meeting has passed.

LOUISIANA DISTRICT COURT FINDS NON-RESIDENT FEES UNCONSTITUTIONAL

Judge Mike Caldwell found that a 1999 Louisiana Law, Act 177 (enacted and amended R.S 56:8(69.1), (69), 12(a), 301.2 and 301.2(b)), which required non-U.S. residents to pay up to 17 times the amount that a bona fide Louisiana resident pays for commercial fishing licenses to be unconstitutional, saying that the law violates the equal protection and due process provisions of the constitution. While enforced, the law had resulted in non-U.S. citizens paying as much as $2000.00 for a license that would cost $200.00 for a Louisiana resident to obtain.

LOUISIANA HAS SAFEST HUNTING SEASON EVER IN 2000

According to the Louisiana Department of Wildlife and Fisheries (LDWF), 2000 was the safest hunting season on record in Louisiana, with no firearm-related fatalities. This was the first such year since the LDWF has begun to collect such data. 1983 saw 46 accidents with eighteen fatalities, and the number has steadily declined, by about 50% in the 1990's as compared to the 1980's. The decrease is being attributed by the LDWF to the Hunter Education Program, which were mandated in 1984. *11 April 2001, LDWF Website*

GRANT AWARDED TO TERREBONNE PARISH FOR ARTIFICIAL REEF

The Bayou Chapter of the Coastal Conservation Commission has been awarded $35,000 for the construction of a low-profile limestone reef in Lake Pelto for small organisms such as shrimp, oysters, and barnacles to inhabit. This will, in turn, provide habitat for Red Drum, Speckled Trout, and Sheepshead. The project will be completed in conjunction with NOAA and LDWF under the Artificial Reef Program Instituted in 1986 under the Fishing Enhancement Act. *19 April 2001*

RECENT CASELAW:

New Limitations on Federal Authority Under the Clean Water Act: *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 121 S.Ct. 675, 531 U.S. 159, 148 L.Ed.2d 576 (2001).

The plaintiffs in *SWANCC* were interested in using an abandoned sand and gravel excavation area outside of Chicago as a solid waste disposal site. The site had a number of excavated pits, which, following the abandonment of the site for materials extraction purposes, filled up with water to create permanent and seasonal ponds. The Corps of Engineers (Corps) refused to grant the plaintiff a permit to

fill the man-made ponds relying on its authority under the Clean Water Act (CWA), "which authorized the Corps to issue permits allowing the discharge of dredged or fill material into 'navigable waters.'" *SWANCC*, 121 S.Ct. at 676. The term "navigable waters," as it is used under the CWA, is broadly defined as "the waters of the United States." Pursuant to this authority, the Corps refused to grant the plaintiff the permission to fill the pits that contained "the waters of the United States." Previously, the Supreme Court determined that the "navigable waters" as envisioned by the drafters of the CWA extend to waters that, if degraded or destroyed, would affect interstate or foreign commerce. Additionally, the court had ruled that the term "navigable waters" under the CWA only extended to non-navigable (in the traditional sense of the word), non-commercial water bodies that are adjacent to bodies of open water of the United States. Because the ponds in this case were no where near any open waters and were, themselves, non-navigable in the traditional sense of the word, the court refused to uphold the Corps' jurisdiction over the ponds.

Additionally, the Corps relied on the Migratory Bird Rule of the CWA in their denial of permission to the plaintiff to use the land. The Migratory Bird Rule, 33 CFR § 404(a), allows the Corps to extend its authority from "navigable waters" to waters that "provide [a] habitat for migratory birds." *SWANCC*, 121 S.Ct. at 676. Because the ponds on the land that the plaintiff wanted to use were employed as a habitat by migrating birds, the Corps denied their request. The United States Supreme Court, in a 5-4 decision, refused to extend the Corps' authority to such waters under the Migratory Bird Rule. "Permitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC* 121 S.Ct. at 684. The court suggests that granting such authority to the Corps as requested in this case would significantly encroach on powers reserved to the states under the Constitution and it refuses to so extend the Corps' jurisdiction here. Not only does this case further illustrate what the courts interpret as "navigable waters" (i.e., not necessarily extending to non-navigable waters at reasonable distances from open or navigable waters), but it also provides a limit to the administrations enforcing the CWA by way of limiting their use of the Migratory Bird Rule.

Navigability of Waterways in Louisiana: *Kieff v. Louisiana Land and Exploration Company*, 99-29 (La.App. 4 Cir. 2/15/01), 779 So.2d 85)

Recently, the Court of Appeal for the Fourth Circuit addressed the question of what constitutes a navigable waterway in Louisiana. In *Kieff v. Louisiana Land and Exploration Company*, 99-29 (La.App. 4 Cir. 2/15/01), 779 So.2d 85), the plaintiff was injured when his boat struck a water control structure on the defendant's property. The property consisted of a marshy area between Bayou Jean LaCroix and Cutoff Canal in the Point au Chien area. The case turned on whether or not the defendant could avail itself of the recreational use immunity. The recreational use immunity protects the owner of private land from liability from the "entry or use by others [of the land] for hunting, fishing, camping, hiking, sightseeing or boating or to give warning of any hazardous conditions, use of, structure or activities on such premises to persons entering for such purposes." LSA-R.S. 9:2791. Although the subject of the case, a tort claim, is largely unrelated to environmental law interests, the examination of what constitutes a navigable waterway under Louisiana law is relevant. In order for the property to fall under the recreational use immunity, it had to be designated as non-navigable in nature.

The plaintiff argued that the marshy area was navigable because it was subject to the ebb and flow of the tide. In determining what the nature of a navigable waterway is, the court stated that although the ebb and flow of the tide effects marshy areas such as the area at issue in this case, classifying such areas that are subject to the ebb and flow would be unrealistic "in the vast Louisiana coastal wetlands area which is all subject to the ebb and flow of the tide." *Kieff*, 779 So.2d at 90. The court cites *Sinclair Oil and Gas Co. v. Delacroix*, 285 So.2d 845 (La.App. 4 Cir. 1973) for support of the non-navigable nature of the marsh here, which stated that a waterway can be non-navigable even though it is subjected to the ebb and flow of the tides, is a few feet in depth, is connected to a lake, and if fishermen occasionally enter in their skiffs. The *Sinclair Oil* court states that a waterway is navigable if it can "float a boat of some size, engaged in carrying trade. It implies a possibility of transporting men and things." *Kieff*, 779 So.2d at 90 (quoting *Sinclair Oil*, 285 So.2d at 852-852). "The fact that an oysterman or a crabber might, on occasion, pass

through the area [...] on a small boat does not make it a highway for interstate or foreign commerce." *Kieff* 779 So.2d at 92. The *Kieff* court wholly adopts the commercial nature question to determine if a waterway is navigable in Louisiana. Additionally, the *Kieff* court stated that simply because a waterway can support extremely low draft vessels, this does not make that waterway navigable.

What Constitutes a Navigable Waterway and a "Discharge" into a Navigable Waterway Under the Oil Pollution Act of 1990?: *Rice v. Harken Exploration Company*, 99-11229 (2001 WL 422051 (5th Cir.(Tex.)), –F.3d–.

Harken Exploration Company operates several oil production and storage facilities on the plaintiff's property. Over a period of time, spills and discharges of hydrocarbons, produced brine and other pollutants have lead to the contamination of the plaintiff's groundwater sources, surface areas and several adjoining waterways. The lower court dismissed this case, because it interpreted a navigable waterway under the Oil Pollution Act of 1990 (OPA) as limited to coastal or marine areas, not inland waterways. *Rice*, –F.3d– at FN2. The federal appeals court that decided this appeal examined the use of the term "navigable waterway" in the Clean Water Act (CWA), which uses the same language as OPA, but has been the subject of much more jurisprudential examination. The court states that evidence from CWA cases as well as OPA Senate Report suggest that OPA extends the meaning of navigable waterways to inland waters. Under this act, citing the U.S. Supreme Court decision in *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed. 419 (1985), navigable waters do not necessarily have to actually be navigable to be protected. Discharges into waters adjacent to navigable waters may be sufficient to fall under OPA's protection. This court also cites *Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055, 106 S.Ct. 791, 88 L.Ed. 769 (1986), which held that "non-navigable creeks and arroyos are covered by the CWA where intense rainfall could create surface connections with navigable streams." *Rice*, –F.3d– at –.

While the opinion opens with an acknowledgement of a history of expansive interpretations of terms in the CWA, the court turns to highlight the recent Supreme Court decision*, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC) 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001)*, which limited the scope of the CWA. After reviewing *SWANCC,* the court opens its discussion on jurisdiction over ground water and intermittent streams under the CWA and the application to OPA. The court in *Rice* refused to extend the definition of navigable waters under OPA to the protection of the plaintiff's groundwater, arguing that the Fifth Circuit's jurisprudence does not support the protection of ground water under the CWA. In *Exxon Corp. v Train 554 F.2d 1310, FN6 (5th Cir. 1977),* the Fifth Circuit clearly stated that the legislative history of the CWA belied any intent to impose direct federal control over any phase of pollution of subsurface waters. The court additionally held that the intermittent stream, Big Creek, which ran on the plaintiff's property could not be protected under OPA because water only flowed through it sometimes and it was not sufficiently linked to an open, navigable body of water to warrant such protection.

The plaintiff's complaint was further complicated by the suggestion that contamination occurred from pollutants leaching through the soils into the stream, a fact which was not sufficiently supported by the evidence. The court, closed their discussion by addressing the question of whether or not OPA (and CWA) protection extended to discharges that seeped from ground waters into navigable waters (in this case, a river also near the plaintiff's property was affected by Harken's discharges). In addressing this question, the court stated that "[i]t would be an unwarranted expansion of OPA to conclude that a discharge onto dry land, some of which eventually reaches groundwater and some of the latter of which still later may reach navigable waters, all by gradual, natural seepage, is the equivalent of a 'discharge' 'into or upon the navigable waters.'" *Rice*, –F.3d– at –. However, the court's statement that "we are reluctant to construe OPA in such a way as to apply to discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters'" suggests that their decision not to extend OPA's protection in this case was due to the plaintiff's failure to prove a direct and immediate connection between the defendant's discharges and the contamination of the navigable waters, and that future cases on this issue may be decided differently if stronger evidence is presented.

CURRENT HOT TOPICS:

Revisions to the Clean Water Act Section 404-Definition of Discharge of Dredged Material

In January 2001, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers enacted a final rule, that went into effect on February 16, to amend the Section 404 regulatory definition of "discharge of dredged material." The new rule provides that agencies regard the use of mechanized earth- moving equipment to conduct land-clearing, ditching, channelization, in-stream mining, or other mechanized activity in waters of the U.S. as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results only in incidental fallback. The definition is important to determining whether a particular discharge is subject to regulation under the CWA. The new rule clarifies the types of activities that would result in a regulated discharge under the CWA. An earlier proposed rule created a rebuttable presumption that a discharge of dredged material resulted from certain activities. The final rule expressly rejects the use of a rebuttable presumption. The final rule also provides a definition of incidental fallback, which is not regulated under the CWA. Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the Unites States when such material falls back to substantially the same place as the initial removal. The Corps and EPA state that the final rule will continue to allow them to evaluate activities on a case-by-case basis and make a determination of whether a discharge of dredged materials has occurred using fact-specific information.

Recent Supreme Court Decision May Impact Future of Environmental Justice Claims

An Alabama woman brought suit claiming that Alabama's policy of administering driver's license exams in English only had discriminating effects, and therefore violated Title IV of the Civil Rights Act of 1964. (Alexander v. Sandoval, 121 S.Ct. 1511 (2001)) Title VI prohibits discrimination based on race, color, or national origin in covered programs and activities that receive federal funding. Title VI §601 provides a private cause of action for damages and injunctive relief in cases where there is intentional discrimination. Title VI §602, however, prohibits covered programs from creating a disparate impact on minorities. The Supreme Court focused on the narrow issue of whether private individuals may bring suit to enforce disparate- impact regulations promulgated under Title VI, and found there was no private right action to enforce such claims.

This 5-4 Supreme Court decision may have dampened the hope of those who planned to use Title VI as the legal basis for bringing environmental justice suits. The environmental justice movement claims there is a history of locating pollution-prone industries in minority neighborhoods. After this decision, a successful claim may require a showing of intentional discrimination and plaintiffs may no longer be able to rely on a showing of a disparate impact. It is unclear at this time how this seemingly unrelated case will impact the future of environmental justice claims.