



Louisiana Sea Grant Legal Program

Louisiana Coastal Law E-mail Update Issue #17, September 2004

Recent Court Cases

O'Reilly v. Army Corps of Engineers, 2004 U.S. Dist. WL 1794531 (E.D.La. August 10, 2004).

Plaintiffs sued to challenge a §404 Clean Water Act permit that the Army Corps of Engineers (Corps) had issued to a developer in St. Tammy Parish. The developer received the permit to dredge and fill 39.54 acres of wetlands to construct a new subdivision. The plaintiffs sought to enjoin the permit, arguing that the permit was illegal because the Corps should have prepared an Environmental Impact Statement (EIS) and should have considered the cumulative impacts of the permit.

The district court found that the Corps decision to issue the permit was not supported by the administrative record and thus was an arbitrary and capricious abuse of discretion by the Corps. Namely, the court found that the failure to prepare a full EIS in light of the "long-term and irreversible environmental impacts" associated with the project violated the National Environmental Policy Act. The district court found in favor of the plaintiffs and enjoined the permit.

American Pelagic Fishing Company v. U.S., 2004 U.S. App. WL 1812709 (Fed. Cir. August 16, 2004)

American Pelagic Fishing Company (American Pelagic) filed a lawsuit against the United States after Congress enacted a bill that permanently prohibited the Atlantic Star, a boat owned by American Pelagic, from receiving a permit or authorization to fish in the United States Exclusive Economic Zone (EEZ). American Pelagic tried to put the Atlantic Star to other profitable uses, but failed, and was forced to sell the boat due to financial difficulties.

The U.S. Court of Federal Claims found for American Pelagic, determining that the company had suffered a taking under the Fifth Amendment of the U.S. Constitution and awarded it more than \$37 million in damages.^{1[1]} The government appealed to the U.S. Court of Appeals for the Federal Circuit, which reversed the lower court. The appeals court found that a taking had not occurred because the company did not have a valid property interest in the permits and authorization. The court's rationale was that the permits were not valid property interests because they were nontransferable, did not convey exclusive fishing privileges and could be revoked or modified at any time by the government.

^{1[1]} See American Pelagic Fishing Company v. U.S., 55 Fed. Cl. 575 (Fed. Cl. 2003).

In the News

Study Reports Mislabeled Red Snapper

A study released in the July issue of Nature reported that between 60% and 94% of the fish labeled as red snapper were actually other fish species. The study warned that substitutions of other varieties of fish for red snapper could be disastrous if the substitutions were made before fish catch data was submitted to regulatory agencies because regulatory agencies such as the National Marine Fisheries Service (NMFS) use the data to determine the health of the fisheries stock and set catch limits based upon the amount of fish previously caught.

Some scientists, including those from the National Oceanic and Atmospheric Administration (NOAA), are skeptical of the study. Fueling this skepticism is the fact that the study only examined twenty-two fish purchased from nine different vendors. This has not convinced them that the problem is widespread. These scientists also argued that the uncertainty about where in the process the fish is mislabeled (i.e., at the dock or at the market) makes it even less likely that the statistics upon which federal regulators set fisheries quotas are flawed.

Sources: Peter B. Marko, *et al*, *Mislabeled of Depleted Reef Fish*, Nature (July 15, 2004).

Ken Coons, *NOAA Denies Red Snapper Mislabeled Affects Domestic Stock Assessments*, Seafoodnet.com (July 20, 2004) available at <http://news.seafoodnet.com/newsOpen.asp?key=140202>.

Today's Catch Red Snapper Fakes, CBS News (July 14, 2004) available at www.cbsnews.com/stories/2004/07/14health/main629685.

Fight for Federal Coastal Erosion Dollars Continues

Two laws, the Coastal Wetlands, Planning, Protection, and Restoration Act, commonly known as the Breaux Act, and the Water Resources Development Act (WRDA) have amendments pending in the U.S. Senate that would provide more funds for coastal restoration. While there is general agreement that something must be done about coastal erosion, the amount of money that should be allocated is the subject of debate. The State of Louisiana has requested \$14 billion in coastal restoration funding over a 30-year period, while the Bush administration has recommended \$1.9 billion in funding over a 10-year period. However, the U.S. Senate seems to have a lower figure in mind.

In June, the Senate Environment and Public Works Committee approved the WRDA amendments. The committee cut the original WRDA amendments from \$1.1 billion over 10 years to \$375 million. Of the \$375 million, \$140 million is earmarked to divert more water and sediment down Bayou Lafourche, \$85 million is dedicated to the demonstration projects to experiment with potential coast-saving technologies, and \$50 million is slated to create a group of scientists within the Corps to coordinate the projects and complete research. The WRDA amendments also seek to place a \$70 million cap on Breaux Act restoration funding and rejected reducing the state-matching requirement from 35% to 25%.

The Breaux Act, which currently provides funds for coastal restoration, also may be extended. The Breaux Act has generated about \$50 million annually for coastal restoration projects since 1990. The act's creator, Louisiana Senator John Breaux (D), is seeking to extend the act, from 2009 to 2019, before he retires at the end of his current term. The proposed extension also seeks to eliminate the \$70 million cap on the Breaux Act contained in the proposed WRDA amendments. While these two acts may both provide funds for coastal restoration, both have yet to be approved, meaning the amount of money approved still could be increased or decreased.

Sources: Alex Kaplan, *Sen. Breaux Seeks to Extend Coastal Restoration Funding*, Land Letter (July 29, 2004) available at www.eenews.net/Landletter/Backissues/072904/07290406.htm.

Louisiana Coastal Restoration Plan Limited, The Associated Press (July 29, 2004) available at <http://forests.org/articles/reader.asp?linkid=33923>.

Cain Burdeau, *Louisiana's Land Loss Still Ringing Hollow in D.C.*, The Advocate (June 25, 2004).

An Act to Amend the Federal Water Pollution Control Act, S.B. 2606, 108th Cong. (2004) available at http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/legislative_home.htm via search engine.

Water Resources Development Act of 2004, S.B. 2773, 108th Cong. (2004) available at http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/legislative_home.htm via search engine.

EPA Will No Longer Consult Wildlife Agencies Over Some Pesticide Approvals

A new rule released by the Environmental Protection Agency (EPA) will allow the agency to approve pesticides without consulting with federal wildlife agencies, as required under the Endangered Species Act (ESA),^{2[2]} if the EPA determines that a pesticide is unlikely to harm any endangered species. If the EPA determines that a pesticide will likely impact an endangered species, the Fish and Wildlife Service (FWS) and/or the NMFS approval will still be required before the use of the pesticide is approved.

The new rule was created by a joint effort of the FWS, NMFS, EPA, and the U.S. Department of Agriculture. FWS officials claim that their involvement in the former process was “duplicative, logistically difficult” and attracted lawsuits. Environmentalists claim that the new rule does not adequately protect endangered species.

Sources: Allison Freeman, *EPA Will No Longer Have to Consult Wildlife Agencies*, Greenwire (July 7, 2004) available at http://www.eenews.net/Greenwire/searcharchive/test_search_display.cgi?q=EPA&file=%2FGreenwire%2Fsearcharchive%2FNewsline%2F2004%2FJuly30%2F07300401.htm.

Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 69 Fed. Reg. 47731 (August 5, 2004) available at <http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/04-17654.htm>.

Two House Bills Seek to Reform the Endangered Species Act

The House Resources Committee passed two bills that may add clarity to controversial portions of the ESA. House Resolution 2933, sponsored by Dennis Cardoza (D-CA), would give landowners and state and local governments a voice in the critical habitat designation process. The resolution also sets a time limit for critical habitat designation, exempts land that is already involved in a federal, state, or local habitat conservation projects from critical habitat consideration, and requires field survey data to show that the endangered species in consideration actually inhabits the area being designated as critical habitat and the area in

^{2[2]} See 16 U.S.C. § 1536.

consideration includes “physical and biological features that are necessary to avoid jeopardizing the species’ continued existence.”

House Resolution 1662, sponsored by Greg Walden (R-OR), requires that the FWS and the NMFS give greater weight to field tested and peer reviewed data before listing a species on the endangered list. The resolution also requires that agencies gather more information before drafting a species recovery plan, and that the governor of the affected state be consulted.

Source: Allison Freeman, *House Resource Committee Advances ESA Reform Effort*, Greenwire (July 22, 2004) available at http://www.eenews.net/EEDaily/searcharchive/test_search-display.cgi?q=ESA&file=%2FEEDaily%2Fsearcharchive%2FDaily%2F2004%2FJuly22%2F07220401.htm.

National Refuge System Proposes to Open More Refuges to Hunting and Fishing

The FWS finalized a rule that amends hunting and fishing regulations in a September 8, 2004 Federal Register announcement. Among the highlights for Louisiana residents, the agency proposed to open Big Branch Marsh Refuge to migratory bird, upland game, and big game hunting. The FWS rule also will open Red River Refuge to upland game hunting. Most of the other proposed rules clarify existing policy on which refuges are open to hunting and recreational and commercial fishing. The final rule also contains a list of existing regulations in Louisiana National Wildlife Refuges.

Source: 2004-2005 Refuge-Specific Hunting and Sport Fishing Regulations, 69 Fed. Reg. 54,350 (September 8, 2004) (to be codified at 50 C.F.R. Parts 31 and 32), available at <http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WaisdocID=74786117369+0+0+0&WaisAction=retrieve>. A PDF version is also available at <http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/pdf/04-19786.pdf>.

Scientists Measure How Fast Louisiana is Sinking

The NOAA announced in 2001 that standard elevation figures, or benchmarks, were flawed. These benchmarks measure how far above sea level different portions of the Louisiana coast are located. With much of Louisiana located between sea level and three feet above sea level, these benchmarks are crucial to ensure that highways and flood control areas are built at the proper elevation to guard against flooding.

Many of Louisiana’s benchmarks were created in the 1920’s. Since then, some coastal areas in the state have sunk due to several factors including flood control systems that restrict the flow of sediment that was historically used to rebuild land. Scientists have found that benchmarks created twenty to thirty years ago can be off by as much as one to two feet. NOAA geologists are currently updating the benchmarks and are finding that parts of the state sink an average of one inch every thirty months.

Sources: Patrick Courreges, *Survey Asks How Fast is Louisiana Sinking?* The Advocate (June 24, 2004) available at http://www.theadvocate.com/stories/062304/new_sinking001.shtml.

Jason R. Mayo, *Scientist: Sinking Land Deserves Attention*, Houma Courier (July 28, 2004) available at <http://www.houmatoday.com/apps/pbcs.dll/artikkel?SearchID=73179834914717&Avis=HC&Dato=20040728&Kategori=NEWS&Lopenr=407280312&Ref=AR>.

State Proposes to Recycle Oysters

After studying the feasibility of using waste oyster shells from French Quarter restaurants to rebuild the state's oyster reefs, the Louisiana Department of Wildlife and Fisheries proposes a different plan. This plan would involve purchasing oyster shells from processors in Terrebonne Parish and depositing them on public oyster grounds.

Collecting oyster shells from restaurants in the French Quarter was deemed logistically infeasible. The proposed plan is estimated to cost the state \$400K per year. The added cultch is expected to increase Louisiana's commercial oyster harvest and provide improved recreational fishing opportunities due to the large numbers of fish that congregate around oyster reefs.

Source: Cain Burdeau, *State Proposes to Recycle Oysters*, *The Advocate* (July 30, 2004) available at www.theadvocate.com/stories/073004/new_oysters001.shtml.

Fight to Narrow EPA Definition of "Navigable Waters" Continues

Two years ago, the American Petroleum Institute (API), the Petroleum Marketers Association of America (PMAA) and Marathon Oil Company filed a lawsuit challenging the EPA's definition of "navigable waters." Under the authority of the Clean Water Act, the EPA has the authority to regulate navigable waters. For some time, the EPA has been regulating isolated intrastate waters, but *United States v. Wilson*^{3[3]} and *Solid Waste Agency of Northern Cooke County v. Army Corps of Engineers*^{4[4]} have limited the ability of federal agencies to regulate intrastate waters solely because the wetlands were used by migratory birds.

In the motion for summary judgment filed by API, PMAA, and Marathon Oil, the plaintiffs argued that the definition used by the EPA is arbitrary and "not grounded in reason." API, PMAA, and Marathon seek to narrow the definition of navigable waters used by the EPA in the federal oil spill rules.

Sources: Mary Coyne, *Industry Claims EPA 'Navigable Waters' Definition is too Broad*, *Greenwire* (June 14, 2004) available at http://www.eenews.net/Greenwire/searcharchive/test_search_display.cgi?q=EPA+and+navigable+waters&file=%2FGreenwire%2Fsearcharchive%2FNewsline%2F2004%2FJune14%2F06140412.htm.

Preliminary Determinations Reached in Shrimp Antidumping Investigations

On July 6, 2004, The U.S. Department of Commerce (DOC) made a preliminary determination that China, Vietnam, Brazil, Ecuador, India, and Thailand sell frozen and canned warm water shrimp in the U.S. at less than a fair market price. Proposed tariffs against the importers range from 4% to 113%, with the largest proposed tariffs affecting importers from China and Vietnam. However, these tariffs will not go into effect unless the U.S. International Trade Commission (ITC) makes a final dumping determination in January 2005.

On August 24, 2004, the DOC amended their original decision adding another Brazilian company to the list of companies dumping shrimp in the U.S. The DOC also reduced the proposed tariff on all Brazilian companies not given a separate rate from 36.91% to 23.66%.

^{3[3]} 133 F.3d 251 (4th Cir. 1997)

^{4[4]} 531 U.S. 159 (2001)

Shrimpers believe that the proposed tariffs “underestimate the seriousness of the [dumping] violations.” Seafood distributors have a different stance. They argue that the imposition of tariffs will raise the retail price of shrimp hurting consumers, decreasing demand, and causing the loss of jobs in the seafood processing industry.

Sources: *Fact Sheet- Preliminary Determinations in the Antidumping Duty Investigations, United States Commerce Department* (July 2004) available at http://www.ita.doc.gov/media/FactSheet/0704/shrimp_070604.html (last accessed August 17, 2004).

Preliminary Determinations in the Antidumping Duty Investigations, United States Commerce Department (August 24, 2004) available at http://www.ita.doc.gov/media/FactSheet/0704/shrimp_072904.html (last accessed August 30, 2004).

Cain Burdeau, *Petitioners Argue Shrimp Tariffs to Small*, *The Advocate* available at http://2theadvocate.com/stories/073004/bus_biz001.shtml (last accessed August 4, 2004).

Sanctions Against U.S. Authorized by WTO

The World Trade Association (WTO) authorized eight countries, including the European Union, to impose over \$150 million in sanctions against the U.S. The sanctions were imposed due to the failure of the U.S. to repeal the Byrd Amendment. The Byrd Amendment redistributes antidumping tariffs charged to exporters to the exporter's domestic competitors. The WTO previously ruled that the Byrd Amendment violated free trade agreements by punishing exporters to the U.S. twice.

The countries authorized to establish sanctions did not immediately institute sanctions and instead issued a joint statement proclaiming they would “exercise their retaliatory rights at any time deemed appropriate.” One reason the countries may hold off imposing sanctions is to give the U.S. more time to repeal the Byrd Amendment.

Source: Paul Ames, *WTO Clears Sanctions of U.S. Over Anti-Dumping Rules*, *The Advocate* (September 1, 2004).

NOAA Releases Study of Shrimp Industry Issues and Options

NOAA has released a study detailing problems the shrimp industry is currently facing and potential solutions to those problems. Among the issues discussed in the report are the impacts that a strong the U.S. economy has had on import growth, how a change in the European Union tariff structure has shifted Thailand imports from Europe to the U.S., and how a shift to farm raised shrimp in Asia has led to a product that is cheaper to produce and more uniform when compared to U.S. wild caught shrimp.

In the study, NOAA also proposes potential solutions to the import problem. These solutions include the creation of a domestic shrimp marketing board, the creation of shrimping cooperatives, government price supports, a government buy back program to reduce the number of shrimp fishermen, and the creation of a fractional license system.

Source: *Summary of Shrimp Industry Issues and Options, NOAA* available at http://www.nmfs.noaa.gov/mediacenter/fish_files/BShrimpBusinessOptionsExecSum.pdf (last accessed August 24, 2004).

Recent Federal Register Notices

National Marine Fisheries Services Promulgates a Final Rule to Reduce Sea Turtle Bycatch and Bycatch Mortality

The NMFS promulgated a new rule to reduce sea turtle bycatch in the Atlantic.^{5[5]} The new rule requires all vessels in the Atlantic fishery that have pelagic longline gear onboard and that have been issued Federal Highly Migratory Species (HMS) limited access permits or who are required to have Federal HMS access permits to follow certain rules.

If fishing in the North East Distant (NED) closed area, only 18/0 or larger circle hooks with a manufacturer offset of no more than 10 degrees are allowed on board. Additionally, only mackerel or squid baits may be possessed with these hooks.

If fishing outside of the NED closed area, 16/0 or larger non-offset circle hooks or 18/0 or larger hooks with a manufacturer offset of no more than 10 degrees may be used. Additionally, only whole finfish or squid baits may be used with these hooks.

Vessels with pelagic longline gear also must have the following gear on board to reduce bycatch mortality: a long-handled line clipper or cutter, a long-handled dehooker for ingested and external hooks, a long-handled device to pull an inverted "V", a dipnet, a standard automobile tire, a short-handled dehooker for ingested and external hooks, a bolt cutter, long-nose or needle-nose pliers, a monofilament line cutter, and two different types of mouth openers or gags.

Websites of Interest

Coastal States Organization

<http://www.coastalstates.org/>

The Coastal States Organization represents the interests of thirty-five governors of coastal states, commonwealths and territories. This website features information about pending congressional legislation, federal agency comments and letters, best environmental practices, state environmental programs, and publications on ocean law.

NOAA's National Ocean Service

<http://oceanservice.noaa.gov/>

This website is operated by the National Oceanic and Atmospheric Administration contains a wide variety of information about ocean and coastal conservation. It contains information on such topics as Marine Protected Areas, coastal decision-making, coastal management, shoreline mapping, as well as many other topics.

^{5[5]} Reduction of Sea Turtle Bycatch and Bycatch Mortality, 69 Fed. Reg. 40733 (July 6, 2004) (to be codified at 50 C.F.R. Pts. 223 & 635).