



## **Louisiana Sea Grant Legal Program**

### ***Louisiana Coastal Law E-mail Update*** **Issue #7, October 2001**

#### **Websites of Interest**

---

##### **Internet Guide to International Fisheries Law**

<http://www.oceanlaw.net>

This recently improved website features international fisheries law. New additions to the site include the Int-Fish Bulletin (an internet magazine), a discussion list on international fisheries law, book review, classified directory of relevant services and products, and additional material on marine mammals and other species. Recent caselaw, legal declarations, organizations, and books that relate to international fisheries can all be found on this thorough and easy to navigate website. It also has a comprehensive glossary of fisheries terms that can be conveniently accessed if an unfamiliar term is encountered. One exciting feature is the "Internet Pathfinder" which contains over 4000 links to other sites on international fisheries law and management and it is conveniently organized into 16 plus categories. There is also an "On-line paper series" for on-line publishing of papers, articles and studies which are peer-reviewed.

##### **Admiralty and Maritime Law Guide**

<http://www.admiraltylawguide.com>

Boasting that it includes over 1,500 annotated links to internet sources in the area of admiralty law, this site focuses on the wide range of internet resources on admiralty and maritime law. While the site has some information on international law, the emphasis is on United States maritime law. It highlights recent caselaw and legislation on admiralty and maritime issues. From law firms specializing in admiralty to conventions relating to admiralty and maritime, this website has it all. Specific pages on the site include caselaw categorized by court (Supreme Court, Circuit Court, etc.), "Arbitration Awards", "Periodicals and Journals", "International Organizations", and "Maritime Law by Country." The website also has its own search engine for easy location of the exact topic desired.

##### **American Law Sources On-Line**

<http://www.lawsources.com/also/>

Known more familiarly as its acronym "ALSO", American Law Sources On-Line is an extensive website covering the legal systems of Canada, United States, and Mexico and all of the on-line legal resources of the Americas that may be accessed without paying a fee. The viewer can find information about the structure of each country's government and legal systems. The website begins with overview information then divides the site by country. Under each country, general legal and governmental information about that country can be found. Each country is divided into states or provinces and just a click on the state or province link will take the viewer to a detailed page. On that page, links to that state's judiciary, government, recent caselaw, codified legislation, and law schools are just a smidgen of the information that may be explored.

The site is neatly organized and easy to navigate. Some of the site is multi-lingual (but this does not make it confusing); the webmaster notes that there are not many Mexican law sources on-line, and only a few are in English.

## **Recent Case Law**

---

### **Sierra Club v. Clifford Reviews the Use of a Special Master to Decide Clean Water Act Compliance Issues**

#### Case Overview:

This case is an appeal by the Environmental Protection Agency (EPA) ("appellant") challenging the district court's appointment of a Special Master to hear the motions for summary judgment, liability, and remedy issues presented by the appellees, and the court's adoption of the recommendations of the Special Master. Sierra Club v. Clifford, 257 F.3d 444 (2001). On appeal, the Fifth Circuit held that the district court abused its discretion in appointing a Special Master to decide the motions and adopting his recommendations. The appellate court remanded the case to the district court for a de novo review and decision on appellees' motions.

#### At issue in Sierra Club v. Clifford:

Under section 303(d) of the Clean Water Act (CWA), the states are to identify those waters within their borders that have existing effluent limitations that are not strict enough to implement any of the water quality standards that are applicable. Next, the state is to rank those waters based on the uses for which the water is designated and the degree of pollution suffered by the water body. Last, the state is to set total maximum daily loads (TMDL's) for the identified pollutants for each water body in accordance with its priority ranking. TMDL's are the maximum amount of a pollutant the water body can sustain in one day and still meet the water quality standards applicable to it. The state was required to set all TMDL's by 1979, yet none were set until 1992 and even then the state was not in full compliance. Under 303(d) of the CWA, if a state fails to submit the TMDL's, the EPA is required to step in and set them, yet EPA did not. The Sierra Club and Louisiana Environmental Action Network, Inc. ("appellees") brought suit against the regional administrator and administrator of the EPA for its failure to comply with 303(d) of CWA and to enforce compliance by requesting an order for EPA to set the TMDL's as required.

Prior to the trial, the appellants requested that a Special Master be appointed under Federal Rules of Civil Procedure (FRCP) 53(b), which allows reference of issues to a special master "only upon a showing that some exceptional condition requires it." They later retracted their request for a special master and asked instead that a magistrate under FRCP 72 be appointed. The district court denied this retraction and appointed the special master. The district court reasoned

"that under rule [FRCP] 53(b) an exceptional condition required the reference because the case had been pending for two years, the filings are voluminous and contain highly technical documents and declarations, and the issues concern compliance with state and federal regulations."

The appellees objected to this appointment to no avail. Clifford at 445. The Special Master was appointed, conducted two hearings, and recommended to the district court that the appellant's motion for summary judgment be denied and appellees' motion be granted in part and denied in part. The district court followed the recommendation in full and it became the opinion of the district court. The district court ordered the appellants to file the administrative record and a timetable for implementation of the TMDL's and refer back to the Special Master. The Special Master conducted a hearing on the administrative record and a week-long trial on the feasibility of the TMDL timetable. He reported to the district court that summary judgment should be granted for appellees on appellant's motion to remove particular water

bodies and pollutants from the impaired waters list, and established a ten year schedule for implementation of TMDL's instead of the twelve year one set by EPA.

Fifth Circuit Holding:

The Fifth circuit reviewed only the district courts referral to a Special Master and did not rule on the substance of the appellees' claims. The appellate court found the district court abused its discretion by appointing a Special Master. Stating the appointment of a Special Master is the exception not the rule, the court found that the reasons asserted by the district court did not warrant deferring its responsibility to a Special Master. Clifford at 446. The appellate court cited the United States Supreme Court in La Buy v. Howes Leather Co., 352 U.S. 249 (1957), in which the Supreme Court held that a crowded docket, time constraints, and difficult factual and legal issues did not meet the requirements of a FRCP 53 appointment. The appellate court also noted that lack of expertise on the factual or legal issues was likewise not a sufficient reason, and when the court finds itself unfamiliar with the issues, it should educate itself on the subject matter.

## **Executive Orders**

---

### **Governor Issues Executive Order Requiring State Agencies to Notify Public of Contaminated Water Sources**

Governor Mike Foster issued an Executive Order MJF 01-46 on October 1, 2001 that requires specified state agencies who confirm the existence of contaminants in an area to give notice of their findings to the individuals living in that area and to provide information regarding the possible health risks posed by the contamination. Agencies must give notice if through "sound scientific principles" the agency confirms a contaminant in levels in excess of the federal or state health and safety standards that present an adverse health risk. This order is based upon the duty imposed on the state government by the Louisiana Constitution to conserve, protect and replenish the states water and natural resources. The Departments of Agriculture and Forestry, Environmental Quality, Health and Hospitals, Natural Resources, and Wildlife and Fisheries are the agencies affected by this order. Not only do these agencies have to give immediate notice of contamination prospectively, but they must conduct searches of their records for existing contamination and give notice of that as well. This order was possibly sparked by recent cases of drinking water contamination in which the agencies had evidence of the contamination, but did not reveal this information. For the full text of the order, go to <http://www.state.la.us/osr/other/2001exo.htm>.

## **Federal Legislation**

---

### **Conservation and Reinvestment Act (CARA)**

On August 2, 2001 Sen. Mary Landrieu (D-La) introduced her version of CARA as Senate Bill 1328. Her version of CARA would establish the Conservation and Reinvestment Act Fund (CRAF) in the Treasury in which lease revenues for certain outer continental shelf leases, undisbursed funds allocated to coastal states for impact resistance and coastal conservation under CARA, and interest earned on the CRAF account would be deposited. The bill states that funds will not be transferred under this act if such transfers would decrease certain Social Security and Medicare duties. The bill emphasizes that amounts provided under CARA are to supplement monies to the National Park Service, not to take them away. Her bill also amends many federal programs including the National Historic Preservation Act of 1978, Land and Water Conservation Act of 1965, and the Wildlife Restoration Act. Currently, the bill has been referred to the Senate Energy and Natural Resources Committee.

## **Agricultural and Conservation Investment Acts of 2001**

Rep. Frank Lucas introduced H.R. 2480, known as the Conservation Investment Act, on July 12, 2001, which would increase the maximum acreage limits of the conservation reserve and wetland reserve programs by amending the Food Security Act of 1985. The bill also increases funding for the wildlife habitat incentive program. In addition, it calls for the Secretary of Agriculture to establish a reserve program for grasslands that would promote conservation of those lands that have traditionally been natural grass or shrubland. The bill is currently in house subcommittees, and the last major action was on July 20, 2001.

Rep. Larry Combest introduced the Agricultural Act of 2001 (H.R. 2646) on July 26, 2001, which contains conservation incentive programs. It calls for extension of several programs, including the conservation reserve program, environmental quality incentives program and wildlife habitat incentives program. The bill proposes to implement, among others, the tree assistance program, and grassland reserve program. On September 10, 2001, the bill was placed on the Union calendar, and that was the last major action.

## **Conferences**

---

Environmental State of the State -VI conference will be held on October 25-26, 2001, at LUMCON and Nicholls State University. It will be hosted by Nicholls State University, Louisiana Universities Marine Consortium, and Barataria-Terrebonne National Estuary Program. This year's theme is "Rivers and Wetlands" and its objective is to "bring together stakeholders in environmental issues to present and discuss current research and concerns for the Louisiana environment and possible solutions to these issues." To register, contact ERCLA, P.O. Box 80345, Baton Rouge, LA 70808, phone number 225-767-7520.

Governor Mike Foster held "Coastal Summit 2001 — Reaching the Future" on August 15, 2001, at the Pennington Biomedical Research Center in Baton Rouge, where he declared a "holy war" on coastal erosion. While his choice of terms may not be the most appropriate in hindsight, his message certainly is. Governor Foster rallied support for his Coast 2050 plan, a comprehensive fourteen billion dollar plan to save Louisiana's rapidly deteriorating coastline. The projects under the 2050 plan include building up barrier islands, diverting water and silt from the Mississippi River, and erecting barriers to prevent saltwater intrusion. Governor Foster informed attendees that he would use his new position as president of the Southern Governors Association to advocate coastal restoration among our fellow southern and Gulf Coast states in an effort to draw national attention to the catastrophic affects of coastal loss. In addition to Governor Foster, the Summit hosted a number of speakers who covered issues such as the economic benefits of the coast, Louisiana fisheries, and engineering difficulties.