



Louisiana Sea Grant Legal Program

Louisiana Coastal Law E-mail Update **Issue #9, August 2002**

News Topic

The Environment and The Counter-terrorism Movement

The trend of rolling back environmental protections by the Bush Administration seems to be continuing. In the name of national defense, in May 2002, the Bush Administration announced intentions to scale back protections afforded the environment under the Endangered Species Act (ESA) and the Migratory Bird Treaty (MBT). Pentagon officials have complained that ESA and MBT regulations, which require an avoidance of injuring animals, are hampering efforts at training exercises on military bases. The House Armed Services committee is considering legislation that would exempt military installations from the ESA. According to an Associated Press article in July 2002, the claims of the Bush Administration that the ESA and MBT are hampering military training exercises had been deemed unsubstantiated by the Government Accounting Office (GAO), Congress' investigation office. The GAO has recommended that the armed services report clearer evidence of the encroachment of environmental regulations on military operations prior to gaining approval of the rollback plans.

Lieberman Discusses Wetlands in New Orleans

Senator Joseph Lieberman heard from advocates of Louisiana's coastal restoration during a recent brief visit to New Orleans. Senator Mary Landrieu, the organizer of the briefing is trying to gain Lieberman's support for a provision in the upcoming energy bill that would provide for substantial monetary grants to Louisiana for coastal restoration. If passed the provision could amount to as much as 200 million dollars a year for Louisiana's coast. In addition, Lieberman sits on the Senate Environment and Public Works Committee. That committee will be considering portions of the 2002 and 2004 Water Department Resources Act, which could include a fourteen billion dollar project to help protect Louisiana's coastal wetlands. Lieberman, after hearing the five advocates' speeches, stated that, "You've convinced me that this is a matter of national significance, both economically and environmentally."

Louisiana Law Institute Directed to Study Potential Liabilities of the State Regarding Coastal Restoration

Citing the extensive ecological, economic, and commercial benefits of Louisiana's coastal areas, the necessity to restore and preserve those areas, and the coordinated effort required to complete such a task, the Louisiana Legislature passed House Concurrent resolution Number 41 which directs the Louisiana State Law Institute to conduct a complete study of the State's liability resulting from coastal restoration efforts. The resolution specifically orders the Louisiana State Law Institute to study possible coastal restoration liability stemming from expropriation, inverse condemnation, property rights, contract rights, personal rights, sovereign immunity, and relevant jurisprudence. The resolution also directs the

Louisiana State law Institute to suggest legislation that would reduce the state's liability concerning coastal restoration efforts.

Louisiana Non-Indigenous Aquatic Species Advisory Task Force

The most recent Louisiana Coastal Newsletter featured an article that discussed the potential impact of non-indigenous species on the Louisiana environment, and highlighted efforts by the Louisiana Sea Grant Program and the Louisiana Department of Wildlife and Fisheries to coordinate a centralized response mechanism to these outside threats. In response to the efforts of these agencies, Governor Foster issued an executive order (Executive Order MJF 02-11) on June 4, 2002, which formed the Louisiana Non-Indigenous Aquatic Species Advisory Task Force. The twenty-nine person Task Force, represented by state officials, research scientists, and affected members of the public has been charged with, among other things, the duty of compiling information to be used in the "prevention, containment, control, and/or eradication of non-indigenous aquatic species in a manner that protects, preserves and/or restores native ecosystems." Additionally, the Task Force is to identify a means of coordinating the efforts of the numerous agencies across the state that deal with non-indigenous species. The Task Force is expected to submit a preliminary report of their findings by the end of the year, followed by a final report on July 1, 2003.

Moratorium on New Oyster Leases

The Louisiana Wildlife and Fisheries Commission has continued the moratorium on the issuance of any oyster leases on waterbottoms that have not previously been leased. The moratorium does not affect lease renewals. Applications and fees for the new leases will be held by the Commission until a final ruling is made on this issue or the applicants request a cancellation of their applications. The period for commenting on the intent for rulemaking on the oyster lease moratorium passed on July 3, 2002 and the moratorium will remain in effect until a final rule is promulgated or to the maximum period allowed by the Administrative Procedures Act.

Web Sites of Interest:

Earthjustice

<http://www.earthjustice.org>

Earthjustice is a non-profit environmental law organization with a staff of 50 lawyers in 9 nationwide offices (including New Orleans) with a clientele of over 500 local and national groups. Earthjustice began in 1971 as the Sierra Club Legal Defense Fund and changed its name in 1997 to more adequately reflect their role as legal advocates for environmental justice in America and abroad. The webpage is well organized into links to the history and timeline of the organization; major accomplishments; abstracts and links to federal laws Earthjustice frequently employs in cases it participates in; their current docket and most urgent cases; and a newsroom with relevant press releases and headlines.

An interesting corner of the website is the Policy and Legislation page. Earthjustice supports this Policy and Legislation program to safeguard its' courtroom victories against legislative weakening of the environmental laws it uses to succeed in litigation. The page provides links to detailed information on legislative advocacy, a White House watch including profiles of executive personnel, and news and commentary on judicial nominations, including the background on specific nominees.

Environmental Law Net

<http://www.environmentallawnet.com>

This site was created by an environmental lawyer at the firm of Greenberg Trauwig as a "comprehensive, interactive resource for corporate counsel and environmental compliance managers" to organize internet resources for easy and reliable research of environmental regulations, policies and current events. The site boasts two domains: 1) legal information libraries with state, federal, international, and tribal laws and regulations; court decisions; agency documents; and 2) the community domain with daily environmental news; an international conference and events calendar for environmental professionals; an interactive forum for open online discussions; and links to other environmental sites.

Environmental News Network

<http://www.enn.com>

This fully interactive, busy site features daily, international environmental news, headlines and press releases, which are linked to forum areas that allow site visitors to discuss any of the highlighted current events. Everything environmental is offered here from classified ads, where site visitors can buy and sell environmental goods, make announcements and post or discover environmental related job opportunities; to "earth news radio" where a short reports can be heard using a media player program. Test your environmental knowledge - take the monthly quiz. (Good luck!) The site also provides easy methods of donating to several environmental organizations. A web surfer could spend plenty of time poking around on this colorful, info-packed site, or visitors can simply subscribe to a daily newsletter that informs readers of the same newsworthy events in a much more concise manner.

International Water Law Project

<http://www.internationalwaterlaw.org>

This website provides information on international water law and policy, including caselaw, current news topics and full texts of articles and international and localized treaties. Because almost every country shares its water resources with another country, the project seeks to educate and advise on the importance of management and conservation of transboundary water resources in international law. There are links to other water law related sites, a calendar of international water law conferences and events, and links to past and current caselaw from the International Court of Justice and other tribunals (including some significant cases from the 19th century). The world's transboundary rivers are listed in a convenient table with their riparian countries and other quick facts for easy reference. The table is also linked to international law and policy that affects each particular water basin.

Pew Oceans Commission

<http://www.pewoceans.org>

The mission of the Pew Oceans Commission is "connecting people and science to sustain marine life." The purpose of this website is to provide an easily accessible medium for the public to ascertain research findings on the policies needed to restore and protect living marine resources in U.S. waters. This research was compiled by a diverse group of prestigious American leaders including: policy advisors, scientists, state governors, mayors, commercial fishermen, philanthropic directors and business persons. Areas of inquiry include: the Status of Marine Life, Fishing and Aquaculture, Coastal Development, Marine Pollution, and Law and Programs. The Pew Oceans Commission will present its final report to Congress in early 2003.

The site posts links to its publications on completed research, press releases, fact sheets and commission activities such as site visits, conventions and workshops, including the latest gathering in New Orleans in March. There, the commission gathered information from local government, businesses and scientists on the challenges facing the Gulf of Mexico. Links to the testimonies heard at the panel are provided. Interested parties may sign up for a monthly email newsletter and take an insightful quiz on

ocean literacy. For the more avid environmental trivia buff, the quiz provides links to other fun and fact-filled sites that explain the ocean's deepest answers.

World Environmental Law

<http://www.hg.org/environ.html>

World Environmental Law is just one of many areas of practice that legal research organizer Hieros Gamos supports. HG offers access to law firms, experts, news, and centers for employment, students, business and consumers.

The World Environmental Law webpage is devoted to information on the different countries of the world's environmental laws and policies, including links to supranational organizations and treaties, not limited to GATT and NAFTA. All available environmental laws from every possible world government are presented. There is a list of links to other research sites and publications. The site offers an impressive list of international associations involved with environmental law, from the Antarctic Cooperative Research Center to the United Nations Environmental Program. The site is organized into listed link format under categories and subcategories for more directed research, and is most probably best used as a starting point for world e-law researchers. A special link provides a Comprehensive Internet Guide to U.S Environmental Law.

Recent Louisiana Legislation:

2002-2003 First Extraordinary Session

WILDLIFE & FISHERIES

HCR No. 19

Faucheux

Due to its lack of state park facilities and recreational opportunities, Louisiana ranks last in the demand and need of such when compared to other southern states. Therefore, the legislature requests that the Office of State Parks of the Louisiana Department of Culture, Recreation, and Tourism, and the Louisiana Department of Wildlife and Fisheries develop a plan for successfully establishing state parks with rental cabins in a significant number of the state's wildlife management areas.

HCR No. 24

Faucheux

After the donation of a tract of acreage by the Mellon Foundation to the Louisiana Department of Wildlife and Fisheries, creation of a wildlife management area began, the Maurepas WMA. Since then, this area has been known to be a successful hunting ground. In accordance with the WMA, deer hunting with dogs has long been a pastime for this state. Therefore, the legislature urges and requests that the Wildlife and Fisheries Commission adopt rules and regulations allowing deer hunting using dogs in the Maurepas Wildlife Management Area.

HCR No. 25

Faucheux

Since the creation of the Maurepas WMA, the commission and the department maintain a longstanding policy of refusing private leases within these management areas. They are requiring camp owners to remove their camps by July 1, 2002 or face demolition. Due to the great amount of time the private

individuals have invested to the area, the legislature requests that the Wildlife and Fisheries Commission and the Department of Wildlife and Fisheries allow these individuals to continue to use their existing camps on the Reserve Relief Canal and Mississippi Bayou in the WMA until July 2002.

HCR No. 44

Faucheux

One of the biggest tourist attractions in south Louisiana is the beauty of its waterways and wetlands. Many view it by way of the area containing the tributaries and canals leading to the Blind River. Tourists utilize airboat tours to observe the beauty of such an area. However, current regulations of the Department of Wildlife and Fisheries prohibit air boat tours of the Maurepas WMA including the canals leading to the Blind River. Therefore, the legislature urges and requests the Wildlife and Fisheries Commission and the Department of Wildlife and Fisheries to study the possibility of allowing the use of air boats in the WMA.

HR No. 9

Downer

Since the Louisiana alligator industry plays an important role in Louisiana's economy, bringing in fifty-four million dollars annually, the Louisiana Department of Wildlife and Fisheries has developed an alligator conservation program. This program educates the public and staffs adequate personnel. The Louisiana Legislature established a four dollar tag fee and label fee for each raw alligator skin to be shipped in order to fund the program. The revenue collected from the fees is placed in the Louisiana Alligator Resource Fund. The Louisiana Legislature then created the Fur and Alligator Advisory Council to be responsible for reviewing and approving programs funded by the Louisiana Alligator Resource Fund. The Council has complete authority. Therefore, the House of Representatives of Louisiana Legislature requests that the Wildlife and Fisheries Commission not reduce any fees that fund the Louisiana Alligator Resource Fund without approval of the Louisiana Fur and Alligator Advisory Council.

HR No. 18

Faucheux

(Duplicate of SR No. 30)

Since the donation of the property, now known as the Maurepas WMA, to the Louisiana Department of Wildlife and Fisheries, private leases within the WMA have been forbidden. However, the camp owners have recently donated their interest in these camps to St. John the Baptist Parish, and the parish council has accepted the donation with the intent to lease the camps. Therefore, the House of Representatives of the legislature of Louisiana urges the Wildlife and Fisheries Commission and Department of Wildlife and Fisheries to allow St. John the Baptist Parish to lease existing camps in the Maurepas WMA.

HR No. 26

Faucheux

(Duplicate of SR No. 28)

The newest Wildlife Management Area is the Maurepas WMA. Its primary natural geological feature is the bald cypress-tupelo gum swamp, but it also manifests two major Louisiana highways: Interstate 10 and Airline Highway. Recently, state and local governments have been considering construction of a new route for truck traffic through the area extending from the interstate to the industrial operations along the river. However, a major concern of the health of the wetlands is that of natural flow of water. The construction of such a new route could disrupt such a flow. Thus, the House of Representatives of the Louisiana Legislature urges and requests the Department of Wildlife and Fisheries not to oppose the construction of a new route within the Maurepas WMA, but to ensure that natural drainage through the WMA is sustained.

HR No. 31

Flavin

(Duplicate of SR No. 35)

Due to excessive rain over the past few months, oystermen in Cameron and Calcasieu parishes have not had time for their usual tonging activities. This has caused a great deal of financial difficulty for the oystermen of this area. Therefore, the House of Representatives of the Louisiana Legislature urges and requests that the Louisiana Wildlife and Fisheries Commission extend the oyster season in Calcasieu and Cameron parishes for two additional weeks, until May 15, 2002.

SCR No. 30

Carter, Cazayoux, Riddle, and Sen. Hines and Marionneaux

Act 920 of the 1999 Regular Session of the Legislature authorizes the state master plan for the Atchafalaya Basin that includes a multi-disciplined approach to preserve and enhance the Atchafalaya Basin. Act 920 also allows inclusion of additional proposals to the plan, provided that the total expenditure of state funds over a fifteen-year period does not exceed eighty-five million dollars. However, a proposal must be studied for one year and must meet the appropriate justifications of the plan for that proposal to be included. Thus, the parishes of Avoyelles and Pointe Coupee submitted proposals for inclusion in the plan hoping that it would be studied for one year. The legislature then resolved the proposals to be studied for the one-year period, provided that the proposals would not cause the total expenditure of funds to exceed the maximum amount.

SR No. 22

Beard

At a recent meeting of the LA Wildlife and Fisheries Commission, it proposed deer hunting dates that do not correspond to years past. In fact, it is a dramatic shift and resulted in a great deal of confusion amongst hunters. One dramatic shift is that of archery season in Area 6. Whereas it once opened on October 1 and closed at the end of January, it is now proposed to open on November 1st and close on February 2nd. Area 6 hunters are not happy with the proposed 2002 deer season. Thus, the Senate of the Legislature of Louisiana urges and requests that the Louisiana Wildlife and Fisheries Commission void the proposed deer season in Area 6 and maintain it as has been in the past years.

Act No. 12

SB No. 7; Baldone and Sen. Dupre

Authorizes the Terrebonne Parish School Board, by execution of the presiding officer, to lease certain property in Terrebonne Parish to the Department of Wildlife and Fisheries.

Act No. 32

SB No. 42; Wright and Sen. McPherson and Ellington

Directs and authorizes the office of state lands, on behalf of the state of Louisiana, to transfer certain property in Catahoula Parish to the Department of Wildlife and Fisheries. These lands will then be considered an inclusion of the Dewey W. Wills Wildlife Management Area.

Act No. 55

HB No. 12

(Duplicate of SB No. 102); Montgomery and Sen. Malone
(Enacts R.S. 38:2607)

Instills authority in the Wildlife and Fisheries Commission to prohibit the recreational and commercial use of nets and traps for fishing purposes in Cypress Bayou Reservoir and Black Bayou Reservoir. Also, the board of commissioners of both the Cypress-Black Bayou Recreation and Water Conservation District must maintain public access.

Act No. 66

HB No. 39; Gary Smith and Daniel
(Enacts R.S. 56:1855 (L))

Authorizes the Department of Wildlife and Fisheries to allow certain activities, such as channelization, clearing and snagging, and channel realignment, on Bayou Trepagnier in St. Charles Parish that are in accordance with the state and federal remediation and restoration plan developed for the bayou.

Act No. 77

HB No. 50; Baldone, et al.
(Amends and reenacts R.S. 56:643 (B))

Permits nonresident military personnel on active duty in Louisiana to purchase a recreational hunting and fishing license at an equal fee charged to Louisiana residents but only upon proof of a valid military id from the U.S. armed forces. The Louisiana resident who is issued a military id card representing his active duty, however, shall receive hunting and fishing licenses at a charge of five dollars.

Act No. 114

HB No. 174; Dewitt, et. al. and Sen. Chaisson, Dupre, Gautreaux, and McPherson
(Enacts R.S. 36:4(Y) and Subpart B-1 of Part II of Chapter 2 of Title 49 of the LA R.S. of 1950) to be comprised of R.S. 49:214.11 through 214.15)

Creates the Governor's Advisory Commission on Coastal Restoration and Conservation and provides the duties, powers, and functions of such. It also states the terms in which the elected commission will remain in office.

Act No. 163

HB No. 156; Hill and Thompson and Sen. Hines
(Enacts R.S. 36:509(R) and Part XXV of Chapter 13 of the LA R.S. of 1950)

Comprised in an area of Allen Parish, a site for a lake will be selected. The area will thereby be created as a recreation and water conservation and reservoir district known as the "Allen Parish Reservoir District."

2002-2003 Regular Legislative Session

WILDLIFE & FISHERIES

SCR No. 13

Gautreaux et al.

The state has an obligation to protect its citizens and promote their health and well-being.

Louisiana's crawfish and shrimp industries are vital to this state and its citizens. Recently, testing for chloramphenicol by the Louisiana Department of Agriculture and Forestry on crawfish and shrimp for Louisiana and China has been conducted. However, the traces of chloramphenicol have only been detected in the crawfish and shrimp of Chinese origin. Chloramphenicol is an antibiotic that has been banned in the U.S. for use on animals raised for human consumption because it can cause fatal aplastic

anemia. Therefore, for the well-being of the citizen of this state, the legislature urges the commission of agriculture to require that all shrimp and crawfish meet standards relating to chloramphenicol prior to sale in Louisiana which are consistent with those standards promulgated by the U.S. Food and Drug Administration.

SCR No. 14

Murray and Sen. Gautreaux and Lambert

On February 14, 2002, President George W. Bush introduced his plan to respond to the challenges arising from global changes in the climate. Since then, many states are taking significant actions toward climate changes in conjunction with the President's Climate Change Policy Initiatives. Louisiana is one of those states that is in much need of such an action. Due to its need, the Legislature of Louisiana creates a study commission to develop a strategy for the timely implementation of the President's Global Climate Change Policy Initiatives in Louisiana. It also gives the authority to certain members and lists their duties.

SCR No. 17

(Duplicate of SR No. 36)

Dupre

Due to the shrimping industry being one of the mainstay's of coastal Louisiana's economic prowess, the legislature creates the South Central Louisiana Shrimp Fisherman's Legislative Advisory Committee to study and monitor the shrimp industry and to make recommendations to the Legislature of Louisiana and to the Wildlife and Fisheries Commission on matters pertaining to the management and development of the shrimp industry in Louisiana.

SCR No. 31

(Duplicate of HCR No. 42)

McPherson et al.

Until the fall of 2000, the Department of Wildlife and Fisheries contained within it a hunter education and certification program. It was administered by the information and education section. In the fall of 2000, the information and education section was dismantled, and hunter education and certification was placed under the administration of the enforcement division. Since the focus of the enforcement division is in a totally different direction than education, it would seem more logical to have the office of wildlife to administer the education program. Therefore, the legislature directs the secretary of the Department of Wildlife and Fisheries to place the administration and coordination of the hunter certification and education program under the office of wildlife.

SCR No. 39

Pierre and Sen. Romero and Ullo

Louisiana law in R.S. 49:213.1 provides for the creation, duties, and responsibilities of the Wetlands Conservation and Restoration Authority. Under the provisions of R.S. 49:213.6, the plan is to serve as the state of overall strategy for conserving and restoring coastal wetlands through the construction and management of coastal wetlands enhancement projects. Thus, the legislature approves the Coastal Wetlands Conservation and Restoration Plan for Fiscal Year 2002-2003, as adopted by the Wetlands Conservation and Restoration Authority.

SCR No. 56

Dartez and Smith and Sen. Gautreaux

Act No. 920 of the 1999 Regular Session provides for the development and implementation of a state master plan to preserve and protect the Atchafalaya Basin. As enacted by Act 920, R.S. 30:2000.9(C) provides that any proposal to include a project not already in the state master plan be first reviewed,

studied, and analyzed due to a request provided in a concurrent resolution of the legislature. Pursuant to this particular statute, citizens of St. Mary Parish are in want of consideration for inclusion. Therefore, the legislature authorizes the Atchafalaya Basin Research and Promotion Board, other state entities, to conduct a one-year review, study, and analysis of certain projects submitted by St. Mary Parish for inclusion in the state master plan.

SCR No. 62

Romero

The Legislature of Louisiana urges and requests that both the executive assistant of Coastal and Marine Activities, office of the governor, and the director of the Atchafalaya Basin Program conduct an evaluation, with the assistance of appropriate federal and local partners including representatives of governmental and non-governmental entities, of proposed projects and planned actions within the basin for the purpose of improving water quality in the Atchafalaya Basin.

HCR No. 8

Baudoin and Sen. Ullo

In relation to Senate Concurrent Resolution No. 13, the Legislature of Louisiana memorializes the U.S. Congress to assist the Federal Trade Commission, the Food and Drug Administration, and the U.S. Department of Agriculture in protecting our unsuspecting citizens from buying and inadvertently consuming shrimp, prawns, or crawfish containing chloramphenicol residue. The legislature does this because of such panic that it may cause if a citizen were to digest such an antibiotic. Because of September 11 and continuing threat of agroterrorism, many citizens may completely stop buying crawfish, shrimp, and other seafood, further devastating Louisiana's economy. Louisiana's crustaceans are safe.

HCR No. 26

Montgomery

Commends American Electric Power, the Conservation Fund, and the U.S. Fish and Wildlife Service for their commitment to environmental stewardship, protection of endangered habitats, and sequestration of carbon at the Catahoula Lake National Wildlife Refuge.

HCR No. 60

Beard

Due to Louisiana losing over 25 acres of land from the coast each year, the state will attempt to prevent or slow down coastal loss through the coastal reclamation program. Through this program, new vegetation will be planted and the soils of the wetlands enriched so that vegetative growth will be sustained. A method to enforce the vegetative growth is by using compost blends. One such blend that is found abundantly in Louisiana is that of sugarcane byproducts and waste. Therefore, the legislature urges and requests the Department of Natural Resources to implement a program to use compost blends, including sugarcane compost, as part of the coastal reclamation program.

SB No. 6

Barham

Adds Coastal Conservation Association to the list of organizations receiving an exemption from state and local sales and use taxes.

HSR No. 8

Faucheux

House of Representatives of the Louisiana Legislature requests the House Committee on Ways and Means to study the feasibility of authorizing the Board of Commerce and Industry to enter into tax credit contracts with coastal restoration manufacturing establishments, and to report its findings prior to the 2004 Regular Session.

HCR No. 75

Beard

Due to the increase of inmates in the population of correctional facilities, an increasing strain has been placed on the wastewater treatment plants of such facilities. Therefore, the legislature requests that the Department of Environmental Quality and Department of Public Safety and Corrections, Correction Services, to examine alternative wastewater treatment facilities for prisons and alternatives for operation of those facilities and to report their findings to the House Committee on the Environment and the Senate Committee on Environmental Quality prior to the convening of the 2003 Regular Session.

Act No. 75

(Duplicate of HB No. 241); Downer et al, and Sen. Chaisson, Dupre, et al.
(Enacts R.S. 56:506 and repeals R.S. 56:505)

Repeals the severance tax on saltwater shrimp taken in Louisiana waters and enacts an excise tax applicable to such shrimp and on any shrimp imported into Louisiana. It also authorizes the Wildlife and Fisheries Commission to adopt rules and regulations for the enforcement and administration of the excise tax along with providing the penalties for violation of the tax.

Act No. 86

(Duplicate of SB No. 18); Murray and Thompson and Sen. Romero
(Adds Article VII, Section 21 (J) of Louisiana Constitution)

Exempts from ad valorem taxation drilling rigs used exclusively for the exploration and development of minerals outside the territorial limits of the state in Outer Continental Shelf waters which are within the state for the purpose of being stored, stacked, converted, renovated, or repaired, and any property incorporated in or used in the operation of such drilling rigs.

Recently Introduced Federal Legislation:

S.2759

Hollings (D-SC), Lott (R-MS), and Breaux (D-LA)

On July 18, 2002, Senate bill 2759, the Seafood Safety Enforcement Act, was introduced and referred to the Senate Committee on Health, Education, Labor, and Pensions. The proposed legislation is aimed at reducing the amount of contaminated seafood coming into the United States from abroad. The legislation would amend the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 381) to restrict the importing of seafood from countries whose export seafood contains chloramphenicol, clenbuterol, diethylstilbestrol (DES), dimetridazole, ipronidazole, other nitroimidazoles, furazolidone, nitrofurazone, sulfonamide drugs in lactating dairy cattle (except approved use of sulfadimethoxine, sulfabromomethazine, and sulfaethoxy pyridazine), fluoroquinolones, and glycopeptides. Tests from Louisiana, Canada, and the European Union have identified these toxins in seafood originating primarily in Thailand, Vietnam, and China. The Act would also put tolerance levels for these toxins in place and create a means of identifying them in shipments to the United States. No hearing have been held on this bill to date.

H.R. 3389

Gilchrest (R-MD)

House of Representatives bill 3389, a reauthorization for the National Sea Grant College Program Act, was passed by the House by a vote of 407 to 2 on June 19, 2002 and sent to the Senate for consideration. Somewhat changed from its original form as introduced in the House in November of 2001, the Act proposes to raise the appropriations to the Sea Grant Program gradually over the next six years from \$60,000,000 per year to \$85,000,000 per year. Other proposals in the Act would make \$5,000,000 available for research in each of the following categories: nonnative species (zebra mussels, etc.), oyster health hazards, and harmful algal blooms. No hearings have yet been set for the House version of the bill in the Senate.

H.R. 3885

Pallone (D-NJ)

Titled the Seafood Safety and Mercury Screening Act of 2002, this proposed legislation would amend the Federal Food, Drug, and Cosmetic Act (24 U.S.C. 341) to mandate screening of seafood for methyl mercury. The screening will be based on scientific studies that will set a safe tolerance level of this toxin for human consumption. The House Subcommittee on Health within the Committee on Energy and Commerce has not yet held hearings on this bill since it was sent to them in March 2002.

H.R. 4749

Gilchrest (R-MD)

House of Representatives bill 4749 proposes amendments to the Magnuson-Stevens Fishery Conservation and Management Act. The proposed amendments would include seabirds under the bycatch definition, allow donation of dead bycatch for charitable purposes, directs the Secretary of Commerce to work with groups to develop new fishing equipment intended to reduce bycatch, prohibits the selling and purchasing of recreationally caught fish, and authorizes appropriations through the 2007 fiscal year. The amendments also include a special provision to limit longline fishing in parts of the mid-Atlantic to help protect white marlin populations. The bill has been debated in several hearings since its introduction in May 2002. Although no final votes have yet occurred, it has favorably passed in the House Subcommittee on Fisheries, Conservation, Wildlife, and Oceans.

S. 1961

Graham (D-FL), Jeffords (I-VT), Smith (R-NH), Warner (R-VA), and Crapo (R-ID)

Senate bill 1961 proposes the institution of The Water Investment Act of 2002, which generally increases funding for cleaner water across the country. The proposed bill would involve research and implementation efforts from the Environmental Protection Agency, the National Academy of Sciences, the Department of the Interior, and the U.S. Geological Survey to provide for monitoring and improvement of water resources, promote alternative approaches to water quality management. The Act would also allow state governors to make grants under the Act to benefit water pollution and drinking water treatment revolving funds. The bill has been in debated in various hearings since its introduction in February of 2002, no vote has been held to date.

H.R. 4781

Gilchrest (R-MD)

House of Representatives bill 4781 is a set of proposed amendments to the Marine Mammal Protection Act. The bill proposes to reauthorize the Act with very few changes from the current version. The new amendments would require a tracking of "the number of animals from strategic stocks being incidentally lethally taken or seriously injured each year through recreational and commercial fishing. The proposal also includes amendments to research means for removing and controlling nuisance pinnipeds and

makes it unlawful to release any captive marine mammal anywhere in the U.S. without authorization. The bill is currently under consideration by the House Subcommittee on Fisheries, Conservation, Wildlife, and Oceans.

Strengthening Science at the Environmental Protection Agency Act, P.L. 107-311

On April 30, 2002, the House of Representatives passed this act which seeks to focus the Environmental Protection Agency's (EPA) central mission on conducting, sponsoring and evaluating environmental science and technology research. New positions were created to enforce this new goal, including a Deputy Administrator for Science and Technology who will be appointed by the President to coordinate and oversee the EPA's science research activities, and an Assistant Administrator for Research and Development.

Recent Caselaw:

STRICT LIABILITY FOR MBTA POSSESSION OFFENSES. U.S. v. Morgan 283 F.3d 322, (5th Cir. 2002)

Case overview:

Defendant was convicted of possessing migratory game birds exceeding the daily bag limit in violation of the Migratory Bird Treaty Act at bench trial in the U.S. District Court for the Eastern District of Louisiana. The Fifth Circuit Court of Appeals held that possessing migratory game birds exceeding the daily limit is a strict liability offense; evidence that the hunter exceeded the limit was enough to support a conviction; and hunter's argument that leaving other hunter's birds would constitute wanton waste was not an available defense.

Facts:

Defendant and his dog were separated from his hunting party around Sawdust Pond in Plaquemines Parish. An agent of the Louisiana Department of Wildlife and Fisheries stopped defendant and upon search of the pirogue, found defendant to be in possession of 8 ducks, which exceeded the daily limit by 2. At trial, defendant testified that he shot 2 birds and his untrained dog retrieved the other 6 birds that other hunters had shot. The other hunters corroborated his testimony. Defendant claimed his conduct was justified because refusal to accept the birds from his dog would constitute wanton waste in violation of another MBTA provision. Defendant argued he did not intend to violate the daily bag limit.

Holding:

Intent is not necessary for a violation of Section 703 of the MBTA. Congress, as well as other circuits, has construed 16 U.S.C. §703, which provides the possession offenses, as strict liability offenses. Defendant's justification of no alternative to violating the wanton waste law fails. That provision, 50 C.F.R. §20.25, applies to leaving birds that the individual actually shot. Defendant testified that he shot only 2 of the 8 birds he possessed, therefore the statute does not provide a justification of defendant's actions. In conclusion, possession of migratory game birds exceeding the daily limit is a strict liability offense and evidence of the offense without justification will support conviction.

CAVEAT EMPTEUR BY THE SANITATION CODE: LIABILITY FOR DEATH DUE TO CONSUMPTION OF RAW OYSTERS. Gregor v. Argenot Great Central Insurance Co., La. App. 4th Cir., (2/6/02)

Case Overview:

Survivors brought wrongful death and survival action against the Department of Health and Hospitals (DHH) because restaurant patron died after eating raw oysters. The Civil District Court, Orleans Parish, found that the DHH negligently enforced the sanitation code and awarded damages. The Court of Appeal held that the discretionary function did not exempt DHH from liability; there was no error in apportioning fault; damages awarded were not excessive and on rehearing; and procedural technicalities allowed recovery of past medical expenses.

Facts:

In 1993, the DHH began enforcing Louisiana Sanitary Code, Chapter XXIII, 23:006-4 which requires that "All establishments that sell or serve raw oysters must display signs, menu notices, table tents, or other clearly visible messages at point of sale with the following wording: THERE MAY BE A RISK ASSOCIATED WITH CONSUMING RAW SHELLFISH AS IS THE CASE WITH OTHER RAW PROTEIN PRODUCTS. IF YOU SUFFER FROM CHRONIC ILLNESS OF THE LIVER, STOMACH OR BLOOD OR HAVE OTHER IMMUNE DISORDERS, YOU SHOULD EAT THESE PRODUCTS FULLY COOKED.

15 Aug 96: Dan Gregor ate raw oysters at Pascal's Manale in New Orleans. The restaurant had posted the warning in one place: behind the oyster bar. Gregor ate the oysters in the dining room, not at the bar. Gregor had recently been diagnosed with Hepatitis C. 25 Aug 96, Gregor died from a bacteria from eating the raw oysters.

Survivors sued several parties, and DHH was the only party that did not settle. The trial court found that DHH negligently enforced the sanitary code and assessed 25% of fault to the restaurant and 75% to DHH. The damages awarded included \$50,000 for survival action and \$550,000 for wrongful death.

DHH argued that it did not negligently enforce the sanitary code because there was a discretionary function entitling DHH and its employees to immunity under LSA -R.S. 9:2798.1. However, the Court of Appeal found that no discretion was involved because the sanitary code has mandatory language, in that establishments "must" post the warning at the point of sale.

The trial court found no evidence of fault on Gregor's part. Because no evidence was presented that Gregor knew or should have known of the risks associated with eating raw oysters, the Court of Appeal found no error in the trial court's findings. The Court of Appeal affirmed the 75% apportionment to DHH because of its role in protecting the health of Louisiana's citizens.

DHH appealed the damages for the survival action and wrongful death, but the Court of Appeal found no error in the trial court's award. Gregor was a young man, about to be married with no evidence of a shortened life expectancy, so the survival damages were appropriate. Also, the Court of Appeal found no evidence presented that Gregor was not close to his parents, and while the damages were generous, deference was given to the trial court in awarding damages for wrongful death.

On rehearing the Court of Appeal granted Gregor's survivors medical expenses of \$70,176.21, because DHH agreed to the special expenses to enlarge the pleadings.

Holding:

The DHH was 75% liable for the death of a restaurant patron when the agency negligently enforced the Louisiana sanitation code. The discretionary function was not applicable to the sanitation code. Awarded

damages of \$600,000 for survival and wrongful death actions and \$70,176.21 for stipulated medical damages were not found to be excessive.

SHARK FISHING RESTRICTIONS: Loga v. Daley, 2002 WL 188401 (E.D. La. 2002).

Case Overview:

The plaintiffs in this case were caught at a dock unloading and purchasing (by the fisherman and buyer, respectively) shark caught in federal waters during a closed federal season. Although the case does not put a new slant on any existing law it is an interesting application of federal regulation of shark fishing restrictions. The ultimate holding of the case is that the enforcement of federal shark permit rights can occur in federal waters, state waters, or at the dock.

Facts and Important Points:

Loga (manager of Tuna Fresh, Inc.) and Williford (the fisherman) were caught by Louisiana Department of Wildlife and Fisheries officers during a transaction for the sale of illegally caught shark on a dock in Dulac, LA. Although Loga was a federally licensed shark buyer and Williford was a federally and state licensed shark fisherman, both were found to be in violation of the Magnuson-Stevens Fishery Conservation and Management Act by an administrative court of the National Oceanic and Atmospheric Administration (NOAA) for the buying and selling described above. This case was an appeal by Loga to the Federal District Court for the Eastern District of Louisiana from NOAA's prior administrative decision. In a recapitulation of NOAA's administrative law judge's findings and the subsequent interpretation of this case, Judge Clement highlighted several important components of the federal law that are important to illustrate.

- "A burden is imposed upon a dealer to independently verify the federal permit status of a fisherman landing large coastal shark during a closure... This may be accomplished by calling any of the National Marine Fisheries Service permit offices."
- Federal and state closed seasons may be somewhat different, dependant on various conditions (as was the case here). Catching shark illegally in federal waters and then moving to state waters does not erase the illegality of the activity.
- State officials are allowed to enforce federal fisheries laws.
- Enforcement of federal shark permits can occur in federal waters, state waters, or at the dock.
- "Assurances from a seller that the fish are legally caught do not excuse the [purchaser] from liability."

Holding:

The NOAA administrative decision was correct. Under the facts of this case, both Loga and Williford were in violation of federal law. Federal fisheries law can be enforced by state or federal officials in federal waters, state waters, and at the dock. Interestingly, the Louisiana regulations on commercial shark fishing (which can be found in the Louisiana Administrative Code, Title 76, Part VII, Section 357) almost identically mirror the federal regulations at issue in this case.

PILOTAGE IN THE CALCASIEU SHIP CHANNEL: Gillis v. Louisiana, --- F.3d --- (5th Cir. 2002).

Facts and Procedural History:

This case involves the question of whether or not the State of Louisiana has the authority to regulate pilotage beyond the three-mile seaward borders of the State as established under the Submerged Lands Act (43 U.S.C. 1312). The plaintiffs in this case filed suit against the State when the Louisiana Public Service Commission (LPSC) ruled that Louisiana does not have jurisdiction over pilotage beyond its

three-mile seaward boundary. The plaintiffs sought a decree affirming the LPSC ruling that they were not subject to Louisiana regulations beyond the three-mile seaward boundary within the Calcasieu Ship Channel (CSC). The plaintiffs argued that they were only subject to United States Coast Guard regulations beyond the Submerged Lands Act boundary. The district court ruled against the plaintiffs, stating that the State of Louisiana does retain regulatory authority over pilotage beyond its three-mile seaward border.

Fifth Circuit Holding and Reasoning:

The United States Court of Appeals for the Fifth Circuit, in an opinion by Judge Garza, held that the district court ruling was correct and Louisiana does indeed retain regulatory authority over pilotage beyond its three-mile seaward boundary. The appellate court largely adopted the reasoning and thought of the trial court in its affirmation. The district court held that, due to the treacherous shallow waters of the Outer Continental Shelf, Louisiana has a significant interest in regulating the safety and conduct of pilots beyond the three-mile boundary. Indeed, the trial court stated that "it is within the State's authority to protect ships approaching the CSC from invisible hazards and to control navigation to and from the port through the [sic] regulating of pilotage out to the 33 mile buoy." This holding was adopted by the Fifth Circuit. Additionally, no federal law was identified that would preempt the state's power to so regulate.

An argument by the plaintiffs that the Commerce Clause powers of the United States Constitution removes such power from Louisiana and grants it to the Congress of the United States was rejected by both courts. The Commerce Clause often allows Congress to regulate areas that would normally fall under state control. Such regulation is allowed because the absence of it may cause a detriment to the flow of interstate commerce. The rejection of the plaintiff's argument was supported by Judge Garza's citations to numerous United States Supreme Court cases that uphold the rights of states to regulate pilotage.

Interestingly, the Fifth Circuit narrowly applied the Submerged Lands Act to the facts of this case when it stated that the Act only applies to "who retains title to submerged lands both within and beyond the three-mile line, with particular reference to ownership and exploration of natural resources in the seabed and subsoil. It does not address the regulation of pilotage on the waters above." Such a holding may have far reaching effects with respect to claims to jurisdiction over other issues beyond the State's three-mile boundary (e.g., fishing rights, etc.).