



Louisiana Sea Grant Legal Program

Louisiana Coastal Law E-mail Update Issue #11, February 2003

NEWS UPDATES

More on Caernarvon Oyster Lease Cases

The oyster lease diversion projects which were discussed in previous LCL newsletters (LCL 80) are in the news again. Recently, in a third decision on the Caernarvon freshwater diversion project, State Judge Manny Fernandez awarded nine oyster lease holders 143 million dollars in damages for the losses that they suffered as a result of the State's coastal restoration efforts. This new decision brings the total of damages awarded to oyster leaseholders, to date, to 661 million dollars.

NOAA Announces Proposed Rulemaking:

The National Marine Fisheries Service of NOAA has announced that they will be considering revisions to the Magnuson-Stevens Act and Sustainable Fisheries Act criteria for determining overfishing. Possible revisions may include: revising the definition and uses of the minimum stock size threshold; revising the calculation of rebuilding targets; revising the calculation of maximum permissible rebuilding times; revisions to the definition of overfishing; and revisions to the procedures that are to be followed when revisions are required to rebuilding plans after they have already been implemented. For details on these proposed revisions and for information on how the public can comment on the proposals, see the full Federal Register announcement (68 FR 7492). The deadline for public comment is March 17, 2003. The Federal Register can be accessed for free on the Web at:
http://www.access.gpo.gov/su_docs/aces/aces140.html

WEBSITES OF INTEREST

Research Guide for U.S. Ocean and Coastal Law

<http://lib.law.washington.edu/ref/ocean.htm>

The University of Washington School of Law hosts this web site, which supplements and enhances the textbook, *Coastal and Ocean Law: Cases and Materials*. The site provides a comprehensive Research Guide for U.S. Ocean and Coastal Law, with links to primary law sources, journals and various public and private institutional sites. This web site offers a wealth of information for ocean and coastal law researchers and students.

The links are conveniently organized under the following topics: Public and Private Interests in Coastal Lands and Waters; Protecting Water Quality and Water Habitats; Comprehensive Management of

Coastal Development; U.S. Rights and Jurisdiction in the Ocean under the International Law of the Sea, Ocean Energy and Mineral Resources; Ocean and Coastal Fisheries; Marine Wildlife Preservation; and Pollution of Coastal and Ocean Waters, which coincide with the chapters in the book.

Council on Ocean Law

<http://www.oceanlaw.org/index.html>

The Council on Ocean Law (COL), over twenty years old, is a private, non-profit organization that seeks to preserve the oceans of the world through international cooperation in developing laws for the oceans. The COL web site serves as a reference center for information on the development and application of ocean law, or law of the sea (LOS). Some of the site is under construction, but it still provides an extensive document library, including the 1982 United Nations Convention on LOS as well as other international conventions. The COL site provides executive and legislative U.S. policies on ocean law (the judicial page is coming soon). Finally, the site provides to politicians, practitioners, interest groups, researchers, educators and students many links to LOS sites within the U.S. and international governments, intergovernmental organizations and non-governmental organizations that are dedicated to ocean law.

Ocean Law and Policy

<http://www.sils.org/find/find-ocean.htm>

The Society of International Law, Singapore (SILS) at the National University of Singapore Law School maintains this international law web site, with the understanding that while the Internet is an amazing resource for information and research, it can be overwhelming. Therefore, the group has categorized international law into a highly organized and interesting web site, which is refreshing for any Internet researcher.

The site is organized into research guides, including International Ocean Law and Policy. Everything related to ocean law is here: texts of United Nations and international conventions and protocols of ocean law, from the 1946 International Whaling Convention to the 1998 Protocol for Fixed Platforms on the Continental Shelf; a list of links to U.S., Asian, Pacific, and other international institutional networks; and links to oil pollution regulations. Every link to a web site or .pdf file is given a concise abstract and review. This web site is well structured and user friendly, making it a valuable place for the ocean law researcher, and indeed any international law researcher, to begin study.

Louisiana Fur and Alligator Council

<http://www.alligatorfur.com/>

The Louisiana Fur and Alligator Advisory Council (FACC) hosts this website, which can also be accessed from the Louisiana Department of Natural Resources website. FACC's mission is to promote the conservation and management of the Louisiana alligator and fur resources through education, promotion and legislative action. The site caters to all parties interested in alligators (as well as wildlife in general), with specialized pages for those in the industry, k-12 teachers of wildlife management, hunters and trappers, and even those who treasure alligator skin handbags, fur coats, and alligator burgers. FACC provides an exhaustive link library, including links to Louisiana hunting and trapping laws and regulations.

FEDERAL LEGISLATION UPDATE

Nutria Eradication and Control Act of 2003 (H.R. 273)

This piece of legislation was introduced into the House by Reps. Gilchrest (R-MD) and Tauzin (R-LA) on January 8, 2003. If enacted, the Nutria Eradication and Control Act would allow the Secretary of the Interior to appropriate federal funds to Maryland and Louisiana "to implement measures to eradicate or control nutria and restore marshland damaged by nutria" (H.R. 273 §3(a)). This federal support can be up to, but not exceeding, seventy-five percent of the total costs of the program. If this legislation is passed, two million dollars will be allocated towards the eradication and control of nutria in Louisiana each year for the years 2004 through 2008 (H.R. 273 §3(f)).

Shrimp Importation Financing Fairness Act (H.R. 155)

This legislation was introduced by Reps. Paul (R-TX) and Kingston (R-GA) on January 7, 2003. H.R. 155 is designed to protect United States shrimpers from financial trouble due to increased competition from abroad. Among the stated purposes of this Act are: protection of U.S. consumers from contaminated products from abroad; reducing competition from non-NAFTA countries; and protecting a domestic food source "at a time when the nation is engaged in hostilities abroad" (H.R. 155 §2). This legislation institutes bans on U.S.-based financial assistance to competitor countries and imposes a moratorium on the issuance of "any new restrictive regulations on the domestic shrimping industry within the area that is under the jurisdiction of the Gulf of Mexico Fishery Management Council" (H.R. 155 §3). This legislation, if passed, would also stop "the proposed regulations modifying requirements relating to turtle excluder devices published on October 2, 2001" from going into effect (H.R. 155 §3).

Crane Conservation Act of 2003 (S. 128)

This legislation was introduced into the Senate by Sen. Feingold (D-WI) on January 9, 2003. The Crane Conservation Act, if passed, would provide for the protection of various species of cranes and their habitats worldwide. The legislation would support perpetuating healthy crane populations as well as providing support for crane conservation organizations in countries where cranes are endangered (S. 128 §3). This legislation may have implications in other areas of environmental protection because of its broad definition of "conservation." This term may be used to protect endangered wetland areas and other habitats frequented by crane species. Additionally, this legislation would establish the Crane Conservation Fund. The Fund would support accepted conservation project proposals for programs in Africa, Asia, Europe, and North America.

National Invasive Species Council Act (H.R. 266)

This legislation was introduced into the House of Representatives by Reps. Ehlers (R-MI) and Gilchrest (R-MD) on January 8, 2003. If enacted, this legislation will provide two million dollars per year from 2004 through 2006 for the creation of the National Invasive Species Council. This Council would be charged with coordinating invasive species control and monitoring among various federal, state, local, and tribal agencies, as well as developing a plan for controlling these species on an international level. One of the specific duties of the Council would be to develop a National Invasive Species Management Plan that will "include recommendations of effective, cost-efficient, environmentally sound, and science-based approaches" for preventing the introduction of invasive species, detecting and responding to invasions, controlling or eradicating invasive species, monitoring established invasive species, promoting public education about invasive species, and "evaluating and documenting the impacts of invasive species on the economy, the environment, and human health" (H.R. 266 §5(a)(3)).

Coastal Zone Enhancement Reauthorization Act of 2003 (S. 241)

This legislation was placed on the Senate Calendar on January 30, 2003 (introduced January 23, 2003). It was introduced by Sens. Snowe (R-ME), Kerry (D-MA), McCain (R-AZ), and Hollings (D-SC). If enacted, the Coastal Zone Enhancement Reauthorization Act will amend the Coastal Zone Management Act (CZMA) (16 U.S.C. 1451 et seq.) with changes to the Coastal Resource Improvement Program, the Coastal Zone Management Fund, Coastal Zone Enhancement Grants, the Coastal Community Program, and the National Estuarine Research Reserve System. Generally, the policies of the CZMA would be expanded under this bill to provide for the protection of habitats as well as coastal waters (S. 241 §4). Additionally, clear definitions of "coastal nonpoint pollution" and "qualified local entities" would be added to the CZMA (S. 241 §5). The Coastal Resource Improvement Program would be amended by providing for implementation of nonpoint pollution plans and the "preservation, restoration, enhancement or creation of coastal habitats" (S. 241 §8). The Coastal Zone Management Fund would be amended by changing the terms of loan repayments. Coastal Zone Enhancement Grants would be expanded in their scope for more coastal protections and for an inclusion of nonpoint pollution control. The Coastal Community Program would be amended by creating Coastal Community Grants that would "assist coastal communities in assessing and managing growth, public infrastructure, and open space needs," among other policies (S. 241 §11). The National Estuarine Research Reserve System would be amended by expanding its purposes from research to "research, education, and resource stewardship" (S. 241 §15).

RECENT CASE LAW

Wetlands and the Clean Water Act:

Kentuckians for Commonwealth Inc. v. Rivenburgh
2003 WL 192095, -- F.3d — (4th Cir. 2003)

This suit was brought in an effort to revoke a permit issued by the Corps of Engineers to the Martin Valley Coal Corporation (MVCC). The permit allowed the corporation to dispose of excess overburden spoil from a mining project into valleys and local waters in Martin County, Kentucky. The permit allowed MVCC to displace the spoil in 27 different valleys, filling and burying some 6.3 miles of streams. The permit was authorized under the Corps's interpretation of "fill material" in § 404 of the Clean Water Act (CWA).

The district court determined that "fill material" referred only to "material deposited for some beneficial primary purpose" and therefore the authorization given by the Corps was beyond its authority. The Corps (and EPA) had recently redefined "fill material" as material placed in United States' waters that replaces any part of that water with dry land or changes the bottom elevation. The district court considered this definition to be inconsistent with the statutory scheme established by the CWA. As a result, spoil from the coal mining operation was determined to be "waste" by the court under § 402 of the CWA. This resulted in the court issuing an injunction blocking the Corps from giving "further § 404 permits within the Huntington District [covering portions of five states] that have no primary purpose or use but the disposal of waste," specifically targeting permits that allow for waste disposal in the valleys of coal spoils.

The initial part of the appellate court's decision dealt with whether the injunction was overbroad. The Court of Appeals then states that the district court ruled beyond the issues presented to it in declaring the new definition established by the Corps as inconsistent with the CWA. The new rule had only been in effect a short time and should not have been considered by the district court.

The Court of Appeal phrased the remaining question as whether the CWA authorizes the Corps to issue permits for the creation of valley fills when the fills only serve to dispose of excess overburden from the mining activity. Citing *Chevron v. Natural Resources Defense Council* (467 U.S. 837), the court stated that the first task in this analysis is to examine the statute itself for authorization of the Corps' activities.

The next step is to determine whether or not the Corps' action is reasonable under the regulatory scheme.

The Court of Appeals noted that the CWA itself contains no definition of fill material. Such ambiguity normally results in deference to the regulatory agency in its interpretation of the terms in question. Following this procedure, the court deferred to the Corps' definition, rejecting arguments that doing so is contrary to the CWA and allows the Corps to evade water quality standards. The court also rejects the argument that similar passages in §10 of the Rivers and Harbors Act (33 U.S.C. 403; 33 U.S.C. 407) and in the Surface Mining Control and Reclamation Act (30 U.S.C. § 1265(b)(22)) indicate a Congressional intent to define "fill material" as meaning anything other than what the Corps has said it means.

The Court of Appeals then chastised the lower court for looking to the regulatory history between the EPA and the Corps of Engineers to examine the extent of the Corps statutory authority. The proper mode of examination, the court said, is to look for congressional intent in the statute and doing otherwise goes outside the first step of the *Chevron* analysis.

The Court of Appeals went on to say that the Corps was reasonable in interpreting the new definition, formulated in conjunction with the EPA, as allowing it to issue permits to dispose of the coal spoil as "fill material." According to the court, such an interpretation was neither "plainly erroneous nor inconsistent with the regulation" (*Auer v. Robbins*, 519 U.S. 452).

Since the Corps' issuance of the permit was not "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law" the Court of Appeals reversed the district court's holdings and vacated the injunction.

Oyster Injury Liability:

Grayson v. State ex rel. Dept. of Health and Hospitals
2002 WL 31927768, -- So.2d -- (La. 4th Cir. 2002)

This case was a wrongful death action brought by the decedent's daughter against the Department of Health and Hospitals (DHH) alleging that the agency did not properly enforce certain health regulations.

The decedent died due to a bacterial infection from eating raw oysters. The bacteria, while not dangerous to most, proved fatal due to the weakened state of the decedent's alcohol-damaged liver. The district court found that DHH was 100% liable for the decedent's death because it had not enforced a State Sanitary Code provision that required restaurants serving raw oysters to display health warnings targeting potential consumers with a number of health problems who might be vulnerable to bacteria from the oysters. DHH had not enforced the regulation because the Interstate Shellfish Sanitation Conference (ISSC) had objected to some of the language used in the health warnings described by the Sanitation Code.

DHH argued that it had the authority to suspend enforcement of the regulation due to the ISSC's objections under La.R.S. 40:5.E. The court rejected this argument, saying that the statutory language only referred to emergency rules and that the oyster warnings in this case were not emergency rules.

DHH then argued that since it held the statutory authority to make the rule requiring the oyster warnings and to repeal the rule if needed, it also had the implied power to suspend the enforcement of the rule. The court rejected this argument as well, stating that DHH may make and repeal rules as may be required, but that while a rule exists, it has no choice under the statute but to enforce the rule as written (La. R.S. 40:4).

DHH's next argument claimed that the non-enforcement of the health provision was done in the DHH's role as policy-making public entity and so should be free from liability under La. R.S. 9:2798.1. The court rejected this argument, holding that the policy-making role of DHH ended once the health provision was promulgated. Beyond that point, the rule's enforcement was mandated by the statute (La. R.S. 40:4).

Since DHH had no choice in the matter, there was no policy being made or discretionary action to consider that would immunize it from liability.

DHH's next argument was that it was protected by legislative immunity. The court quickly dispatched this argument without much discussion, saying only that even if legislative immunity applied to administrative agencies, it would only be in their rule-making capacity. Since the claim against DHH arose from its enforcement powers, its role would be executive rather than legislative. Immunity would therefore not apply.

The rest of the case considers arguments based on comparative fault and that the warnings would not have made a difference to the decedent. The latter argument claimed that since the decedent was an alcoholic who had been warned to stop drinking but refused, he would not have stopped eating oysters just because he was warned they might be dangerous. The court rejected all of these. The ruling of the district court, against DHH, was affirmed.

RECENT LOUISIANA ATTORNEY GENERAL'S OPINIONS

Opinion No. 02-0468 (Atchafalaya Basin Floodway Boundaries)

Louisiana Attorney General Richard Ieyoub responded to a request to identify the legal eastern and western boundaries of the Atchafalaya Basin Floodway (ABF). Specifically, State Senator Romero (R-New Iberia) wanted to know whether the government-owned lands of the ABF extended to the levees and levee servitudes or only to the inner edges of the floodway. The Attorney General stated that La. R.S. 31:149(D) and La. Civil Code Art. 784 suggest that "the boundaries of the ABF on the east and west are the eastern and western most lines on the land side of the levees that separates the land acquired for the permanent levee servitude from the lands contiguous thereto." (Atty. Gen. Op. No. 02-0468 at 1).