



Louisiana Sea Grant Legal Program

Louisiana Coastal Law E-mail Update **Issue #12, April 2003**

NEWS UPDATES

Governor to Ask for Amendment for Coastal Fund

Gov. Mike Foster will ask the Legislature for a constitutional amendment allowing large mineral lease settlements to be used for coastal wetlands restoration.

Currently, mineral lease settlements in excess of \$5 million are required by the Constitution to be used for paying the state debt. The proposed amendment would place the settlements in a trust fund to pay the state's share of a proposed \$14 billion federal and state coastal restoration plan. The state needs to come up with \$150 million to \$200 million a year to pay the state matching costs.

Foster Chief of Staff Andy Kopplin acknowledged that the trust fund settlements do not amount to that much a year. Kopplin stated that shifting the mineral lease funds would show Congress that the state "means business" with regards to its share of the restoration plan's costs.

Kopplin also said that persuading federal officials that Louisiana can handle its portion of the costs would be much easier if the state did not have to pay billions of dollars in damages resulting from other coastal projects.

To this end, the governor is seeking a constitutional amendment or a change in the existing law to limit the state's liability attributable to restoration projects.

Louisiana Wildlife and Fisheries Commission Moves Moratorium on New Oyster Leases

The Louisiana Wildlife and Fisheries Commission (LWFC) has unanimously ratified a move for a moratorium on issuing new oyster leases for state-owned waterbottoms in coastal Louisiana. The move was in response to the \$1.7 billion worth of judgments handed out by state district courts to oystermen claiming damage from government freshwater diversion projects, such as the Caernarvon Project that diverts water from the Mississippi River into the Delacroix marshes in St. Bernard and Plaquemines parishes. The result of the diverted water is to render the area useless for cultivating oysters.

Jack Caldwell, the Secretary of the Department of Natural Resources, said that the moratorium would be useful in preventing suits by oystermen in areas that already have freshwater diversion projects in place or where future diversion projects are planned.

Representatives from the Oyster Task Force asked that already applied-for leases be exempted from the moratorium, but the LWFC refused.

Oil and Gas Industry Gets Two-Year Break from Storm Water Permits

The EPA has announced that it will postpone requiring oil and gas developers to get storm water permits until March 2005. The original rule, promulgated by the EPA under the Clinton administration, had assumed that very few, if any, oil and gas sites would be affected by the permit requirements. Since 1999, though, the EPA has learned that around 30,000 sites might have to comply with the new regulations. The delay is so the agency can have more time to assess the impact the new rules will have on the industry.

The permits were meant to aid in preventing the contamination of storm water runoff from small areas of oil and gas exploration and production. The permits also would have applied to smaller pipelines used to transport oil and gas from the wells to other locations, such as processing facilities or storage tanks.

Department of the Interior to Distribute \$35 Million for Endangered Species Habitat Restoration

The Department of the Interior has made available \$34.8 million in state grants as part of a cooperative program with private landowners to help restore the habitats of endangered plants and animals. Groups in 42 different states will benefit from the program which assists states, tribes, conservation organizations, and private landowners with conservation projects. The groups must contribute 25% of the project's funding to qualify for federal funding of the remaining 75%. The Landowner Incentive Program is being implemented in support of the Bush administration's \$113.2 million Cooperative Conservation Initiative in the 2004 budget.

Several states already have landowner incentive programs. For those that do not, these grants will allow for them create a program of their own. The eight states not receiving funds from the program are Alabama, Illinois, Kansas, Louisiana, Mississippi, Rhode Island, South Dakota, and Utah.

FEDERAL REGISTER UPDATES

Final Withdrawal of July 2000 TMDL Rule Takes Effect; Existing Rules Make Progress Cleaning Up Impaired Waters

The EPA has withdrawn a controversial rule that would have changed the EPA's program for cleaning up impaired waters. The July 2000 final Total Maximum Daily Load (TMDL) rule was determined to be unworkable based on more than 34,000 comments and two dozen court challenges. The withdrawal was strongly supported by groups representing agriculture, forestry, states, industry, and the U.S. Congress.

The Clean Water Act requires that states identify waters that do not meet water quality standards and formulate plans for cleaning them up. The Total Maximum Daily Load program provides a system for deciding pollution budgets for the nation's waters that, when executed, will assure that Clean Water Act goals are met.

Christie Whitman, EPA Administrator, stated that withdrawal of the 2000 rule would in no way effect ongoing implementation of the existing TMDL program, development of water quality standards, issuance of permits to control discharges, or enforcement against violators.

King Mackerel Trip Limit Reduced

The daily vessel trip limit for King Mackerel was reduced to 500 pounds on March 5, 2003 for commercial hook-and-line vessels fishing for Gulf group King Mackerel in the southern Florida west coast subzone. The trip limit was reduced when NOAA Fisheries determined that 75% of the 520,312 pound quota for this fishery segment had already been taken.

NOAA Fisheries Publishes Rules to Modify Turtle Excluder Devices (TEDs)

NOAA Fisheries has amended the turtle excluder devices (TEDs) rules to enhance the TEDs' effectiveness in curtailing sea turtle deaths resulting from trawling in the southeastern United States. The modifications affect shrimp fishermen that use bottom trawl gear in state and federal waters and take effect on April 15, 2003 in the Atlantic, and August 21, 2003 in the Gulf of Mexico.

All sea turtles in U.S. waters are considered endangered or threatened under the Endangered Species Act of 1973. The new rule will help sea turtles escape from shrimp trawls. It amends regulations controlling the types of TEDs allowed and certain structural characteristics of TEDs. The changes include:

- requiring the use of either the recently approved double cover flap TED or a TED with an opening of at least 71-inch straight-line stretched mesh measurement in all offshore waters and the inshore and offshore waters of Georgia and South Carolina;
- requiring the use of TEDs with a 44-inch straight-line stretched mesh opening in all inshore waters, except those of Georgia and South Carolina;
- requiring that hooped hard TEDs can only be used in inshore waters, and not in Georgia or South Carolina. Those TEDs must have a minimum inside horizontal width of 35 inches and an inside vertical height of 30 inches on the front hoop, and a clearance between the bars and the front hoop of 20 inches;
- requiring the use of grids with minimum outside measurements of 32 inches by 32 inches in all waters;
- disallowing the use of the Jones TED;
- requiring the use of a brace bar on weedless TEDs;
- requiring accelerator funnels to have a 44-inch horizontal opening on the 44 inch TED and a 71-inch opening on the 71-inch and double cover flap TEDs;
- requiring bait shrimpers to use TEDs in states where a state-issued bait shrimp license holder can also fish for food shrimp from the same vessel; and
- requiring tow time restrictions on try nets with headrope lengths of 12 feet or less.

Questions concerning this rule can be sent to: NOAA Fisheries' Office of Protected Resources, Attn: Chief, Endangered Species Division, 1315 East-West Highway, Silver Spring, MD 20910-3282. You may also call Bob Hoffman at (727) 570-5312. Printed copies of the specifications for all TEDs allowed under these rules are available from NOAA Fisheries at the previous address or by calling (301) 713-2332.

National Bycatch Strategy Announced & Notice of Decision on Bycatch Petition Published

NOAA Fisheries recently unveiled its strategy for reducing bycatch. The six-part plan aims to minimize, to the extent practicable, bycatch and the mortality of bycatch that cannot be avoided.

Part one of the plan involves reviewing the progress made toward reaching the national bycatch goal. This is to be done by a headquarters based team in conjunction with a highly migratory species team, regional teams from the National Marine Fisheries Service (NMFS) science centers, and consultation with Regional Fishery Management Councils. The team will be responsible for assessing the progress made toward reaching the national goal, what barriers are preventing full implementation, and what steps should be taken to further the national goal.

Part two is to develop a national approach to a standardized bycatch reporting methodology. This involves convening a group to:

- evaluate the current methodologies for estimating bycatch,
- review the current use of self-reporting to estimate discards,
- evaluate the potential for estimating discards by inferences drawn from fishery independent surveys,
- recommend a statistical design for observer programs to cover all U.S. fisheries,
- recommend standards of precision to be achieved for discard estimates, and
- recommend observer sample sizes and associated costs for all U.S. fisheries.

Part three of the plan is to implement the national bycatch goal through regional implementation plans. This will require the creation of regional and Atlantic highly migratory species implementation plans. These plans will formulate criteria for identifying the vulnerability of discard species to adverse impacts. They will also identify the most severe discard problems and search for ways to reduce adverse impacts on discard species.

Part four increases education and outreach efforts involving cooperative efforts at the regional level with as many stakeholders as possible. Regional working groups will be created to deal with fishery-specific bycatch issues. These groups will formulate fishery-specific, effective, and efficient methods for cooperatively reducing bycatch. The strategy suggests that incentive programs to encourage fishermen to reduce bycatch could be a major component of this part of the plan.

Part five seeks to utilize existing relationships and develop new international approaches to reducing bycatch of living marine resources including fish stocks, sea turtles, marine mammals, and migratory birds, where appropriate. International approaches and agreements for reducing bycatch of this sort will have to be examined and addressed. Regional fishery management organizations will also be examined to determine their efficiency and whether there are alternatives for getting more expedient results.

Part six of the plan is to identify new funding provisions to effectively support the National Bycatch Strategy on an ongoing basis. The NMFS headquarters staff will use the funding needs of the Atlantic HMS team and the regional teams under part one, observer costs from the national working group under part two, and other sources to determine new funding requirements and make recommendations to modify NMFS's comprehensive 5-year Requirements Plan.

RECENT LOUISIANA ATTORNEY GENERAL'S OPINIONS

Undersized Crab Violations:

The Louisiana Attorney General has recently released an opinion (No. 03-0007) regarding La. R.S. 56:326 F (1) which reads as follows:

Notwithstanding any provisions of law to the contrary, a wholesale or retail dealer and a commercial fisherman may be subject to the penalties provided by law for the possession of undersized crabs. If the wholesale or retail dealer can provide to wildlife and fisheries agents at the time of discovery the identity of the commercial fisherman who harvested the undersized crabs and subsequently sold such crabs to the wholesale or retail dealer, the dealer shall not be subject to the penalties. The department may check unboiled crabs for violations of the undersized crab provisions of this Section.

The first aspect of the opinion concerns whether a dealer in possession of more than the allowable limit of undersized crabs should be cited for violation of the statute if he or she properly provides the identity of the harvesting fisherman.

The opinion states that the statute refers to the dealer as being exempt from penalties, not from being cited. The information given to the enforcement officer by the dealer must be truthful and in accord with La. R.S. 56:326 F (2) for the dealer to avoid being cited. La. R.S. 56:326 F (2) reads as follows:

Commercial fishermen shall tag, mark, or otherwise identify any crabs that are sold, in a manner which will insure that such commercial fisherman can be identified as the person who harvested the crabs. The identification required herein shall include the commercial fisherman's name, license number, and date on which the crabs were harvested.

If the enforcement official has probable cause to believe the dealer's information to be false or not in conformity with the statute, a citation should be issued.

The second issue considered by the opinion is whether the Department of Wildlife and Fisheries should check boiled crabs for undersized crab violations.

The opinion states that the statute is clear on this matter. It reads: "The department may check unboiled crabs for violations of the undersized crab provisions of this section". With no mention of boiled crabs in the statute, the Legislature should not be considered to have contemplated their inspection under the law.