



## Louisiana Sea Grant Legal Program

### *Louisiana Coastal Law E-mail Update* Issue #13, November 2003

#### **RECENT CASE LAW**

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##### **United States v. Deaton, 332 F.3d 698 (4th Cir. 2003)**

In *United States v. Deaton*, the 4th Circuit Court of Appeals upheld a prior decision allowing Congress to regulate the discharge of pollutants into a roadside ditch. The Deatons (plaintiffs) dug a ditch on their property, which was classified as wetlands. Then they dumped the fill from the ditch into the wetlands. These wetlands drain into a roadside ditch, also on their property, whose waters eventually flow into the navigable Wicomico River and eventually Chesapeake Bay. The Deatons argued that the Clean Water Act (CWA) does not extend The U.S. Army Corps of Engineers's jurisdiction to their wetlands and their ditch. If the jurisdiction was proper, they argue that Congress had exceeded its authority under the Commerce Clause.

The court found that Congress had not exceeded its authority under the Commerce Clause because the Commerce Clause gives Congress power over the channels of interstate commerce, which includes navigable waters. Courts have found that this power extends beyond regulation of purely economic activity to any immoral or injurious use. Congress may then delegate authority to decide what is injurious as it did to the Corps in this case, so long as it provides an "intelligible principle." Therefore, the Corps had jurisdiction under the Commerce Clause because the dumping of fill into wetlands is an injurious use.

The Deatons also argued that even if the law is constitutional, the regulation does not extend coverage to the ditch because that would constitute an unreasonable interpretation of the word "tributary." If the regulation is ambiguous with regard to the meaning of the word "tributary" then the agency's definition should be given deference when ambiguities arise. The interpretation was not clearly erroneous; therefore, the court upheld the agency's definition. The Deatons also argued that the Corp used an incorrect indicator for hydrology. The court found that it was bound to the Corp's manual's interpretation of the regulations because the plaintiffs never argued that the manual was plainly erroneous or inconsistent with the regulatory definition of a wetland.

##### **Amigos Bravos v. US. EPA, No. 02-0230 (10th Cir. 2003)**

This case initially arose out of EPA's refusal to recognize pollution of the Red River from waste rock piles at molybdenum mine as a point source discharge subject to regulation under the CWA. EPA instead continued to issue and renew permits for the mine without addressing the issue of the waste rock piles. Plaintiffs subsequently sued under 33 U.S.C. 1365(a)(1), alleging a violation of the CWA because the waste rock piles were point source discharges without a permit. The case was dismissed and plaintiffs subsequently refiled based on two new counts. Count I stated that EPA was aware of the illegal pollutant discharge and therefore had a duty to either issue a compliance order or institute a suit themselves. Count II alleged that EPA had a non-discretionary duty either to issue a permit or prohibit the discharges. The case was dismissed based on collateral estoppel. The appeals court then reversed and remanded

the case because the elements of collateral estoppel had not been established. While the case was on appeal EPA issued a permit for the waste rock piles, rendering the plaintiff's suit moot.

The court still had jurisdiction to decide whether the plaintiffs were entitled to recover litigation costs under 33 U.S.C. 1365(d), which allows the court to award litigation costs when they deem it appropriate. The plaintiffs argued that they were entitled to costs under the catalyst theory. Under this theory, the plaintiff must show (1) that the lawsuit is causally linked to securing the relief obtained and (2) that law required the defendant's conduct in response to the lawsuit. The court found that the conduct of EPA was not mandated by law. The language of CWA Section 309(a)(3) states that the administrator "shall" issue an order requiring the offending party to comply with the law. This is only discretionary authority and is not mandatory. The court also ruled that CWA Sections 301(a) and 402 were also discretionary. Therefore, EPA action was not required by law, and the plaintiffs lost their appeal for litigation costs.

#### **Rancho Viejo v. Norton, 323 F.3d 1062 (D.C. Cir. 2003)**

The plaintiff in this case is a real estate development company that sought to build a housing development in San Diego, California. However, the U.S. Fish and Wildlife Service determined that construction was likely to jeopardize the existence of the Endangered arroyo southwestern. Therefore, the plaintiff's proposed development project was subject to regulation under Section 9 of the Endangered Species Act (ESA), which precludes the taking of protected species. In light of this determination, the Fish and Wildlife Service proposed an alternative plan that would allow the plaintiff's proposed housing project to go forward. The plaintiff rejected the Fish and Wildlife Service's alternative plan and filed suit, alleging that application of Section 9 of the ESA on its proposed housing development was an unconstitutional exercise of congressional authority under the Commerce Clause. The district court dismissed the suit. The Court of Appeals affirmed the dismissal, stating that the case is governed by *National Association of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). The plaintiff did not allege that the facts of this case were distinguishable from those in *National Association*, but did allege that subsequent Supreme Court decisions had rendered *National Association* "bad law." However, the Court of Appeals found that those cases did not undermine the authority of the decision in *National Association*. Rehearing on this matter was subsequently denied en banc on July 22, 2003.

#### **Crutchfield v. County of Hanover, 325 F.3d 211 (4th Cir. 2003)**

In this case, plaintiffs, residents of Hanover County, brought suit to enjoin the construction of a wastewater treatment plant near their homes. The project involved the placement of dredge or fill material into wetlands; therefore, the County was required to get clearance from the Army Corps of Engineers. The County initially requested a Nationwide Permit (NWP) under a very rigorous review system which more than likely would have ended the project. The Corps subsequently approved the project proposal, but under less stringent NWP requirements than those originally requested. The court ruled that the Corps is entitled to approve the permit under a different system regardless of the one the applicant requested. The court also found that there was sufficient evidence to support their decision to approve the project. Therefore, the decision was not an abuse of discretion.

#### **U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC, 273 F.Supp.2d 126 (D. Me. 2003) and 339 F.3d 23 C.A. 1 (Me. 2003)**

Since this case was previously featured in LCL 82 (August 2003), there have been two additional court decisions, one at the district court level and the other at the appellate court level. According to the July 25, 2003 decision released by the District Court of Maine, 273 F.Supp.2d 126 (D. Me. 2003), the defendants filed a motion for partial stay pending appeal in a Maine District Court so they would be allowed to continue operations of a salmon farm. The district court had previously held that escaping salmon raised at the defendants' farms were "biological pollutants" within the meaning of the Clean Water Act (CWA). Judge Gene Carter, who authored the decision holding the defendants liable under the CWA, denied the defendants' motion for partial stay, which would have allowed the defendants a window of time in which to deposit a new year class of fish into the water. This, in turn, would have prolonged by two to

two and one-half years the violation of the CWA and effectively frustrate the implementation of the district court's remedial plan. The court found that there was little likelihood of success on the merits and that the defendant's assertion of irreparable harm was "strategic desperation." Also, in weighing the harms of granting the motion against the furtherance of the public interest the court found the consequence "vastly outweighed what little merit there was to defendant's claims of economic damage." Therefore, the motion to stay pending appeal was denied.

In its August 6, 2003 ruling, 339 F.3d 23 C.A. 1 (Me. 2003), the First Court of Appeals of Maine ruled on an appeal filed by the defendant salmon farmers that alleged the permit granted to them by the state after the district court's ruling rendered that decision null. The defendants argued in their appeal that the district court's decision was outside of that court's jurisdiction since that decision was effectively overruled by the State of Maine's grant of a permit to the defendants. However, the appeals court disagreed and stated that the CWA specifically vests in district courts the power to decide such suits. The district court, in its ruling, anticipated the issue of a future permit and specifically stated that the injunction would apply regardless of any future permit. The Appeals Court also ruled that when remedying past violations the district court may give more stringent regulations than would be given under a permit, but not less stringent regulations. Therefore, the injunction of the district court stands, regardless of the less restrictive state permit.

## **FEDERAL REGISTER UPDATE**

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### **Proposed Final Rule for Country of Origin Labeling Program**

On May 13, 2002, President Bush signed into law the Farm Security and Rural Investment Act, more commonly known as the Farm Bill of 2002. One provision of this bill requires country of origin labeling for beef, lamb, pork, fish and shellfish, perishable agriculture commodities, and peanuts. The USDA Agricultural Marketing Service is responsible for the implementation of the mandatory country of origin labeling (COOL) program. The final proposed rule, (7 C.F.R. Section 60) published on October 30, 2003, provides definitions, requirements of consumer notification and product marketing, and record keeping requirements of retailers and suppliers. The regulations, which are to take effect on September 30, 2004, affect all retail establishments, but exclude food service establishments.

The purpose of the COOL program is to provide consumers with additional information so that they may make better informed purchasing decisions. The cost of the program will be negligible to consumers. Not only will the program will require retailers to place a country of origin label on fish, retailers also will be required to distinguish farm-raised and wild fish and shellfish. For farm-raised fish and shellfish, the product must be derived exclusively from those hatched, raised, harvested, and processed in the United States in order to bear a United States country of origin label. For wild fish and shellfish, the product must be derived exclusively from fish or shellfish harvested in the waters off of the United States or by a United States flagged vessel and processed in the United States or aboard a United States flagged vessel. If a product is of mixed origin for example if is caught in U.S. waters and then processed elsewhere it must be labeled a product of the country where it was processed but it may include the designation "harvested in the U.S." The same rule applies if the reverse is true. The rule is also the same for farm fish and shellfish when raised and harvested in the U.S. but processed elsewhere. These rules do not apply when the fish or shellfish are merely an ingredient in a processed food.

Under the proposed final rule, the product must bear a label, stamp, mark, or other clear and visible sign on the package, display or holding bin at the final point of sale to consumers. Retailers must maintain records for two years, which would allow investigators to track and verify the origin of all labeled products. Violators of the regulation will be given a 30-day grace period in which to correct the violation. If the violation is not corrected then fines of up to \$10,000.00 per violation may be imposed.

The proposed final rule currently is at the commenting stage. The deadline for submission of comments on the proposed final rule is December 29, 2003. Implementation of the proposed final rule is required by September 30, 2004. For more information on the regulations, including specifications for commodities covered by the COOL program other than fish and shellfish and where to send comments, visit <http://www.ams.usda.gov/cool>.

## **RECENT LOUISIANA EXECUTIVE ORDER**

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### **Executive Order MJF 03-15 - Louisiana Aquaculture Advisory Council**

Executive Order MJF 03-15 established the Louisiana Aquaculture Advisory Council (Council) within the Office of the Governor. The Council was originally established by House Bill No. 2013, which recognized the need to establish a council to develop a program to oversee, coordinate, and regulate aquaculture and to promote aquaculture products. It was recognized that aquaculture is a vital component of Louisiana's economy. However, Governor Foster vetoed HB 2013 because the Council was established within the Department of Agriculture and Forestry. This action was vetoed because Article IX Section 7 of the Louisiana Constitution of 1974 expressly vests "control and supervision of the wildlife of the state including all aquatic life in the Louisiana Wildlife and Fisheries Commission." Governor Foster then reinstated the Council in this Executive Order to ensure the Wildlife and Fisheries Commission's role in protecting and preserving Louisiana's native species and ecosystems. The duties of the Council are:

- To recommend a regulatory framework for development of a modern, sustainable aquaculture industry and promotion of aquaculture and aquaculture products;
- To recommend which species of aquatic livestock and/or finfish species are suitable for aquacultural production and describe any safeguards that may be necessary for a species;
- To recommend appropriate criteria for requiring, granting, and/or denying Louisiana aquaculture licenses or permits;
- To recommend appropriate fee structure for all Louisiana aquaculture licenses;
- To recommend rules and regulations for enforcement of Louisiana aquaculture industry regulatory schemes and penalties for violations thereof;
- To draft a guidebook with all regulations and recommendations for Louisiana aquaculture;
- To identify all impediments to development of aquaculture industry in Louisiana and any other advisory function related to aquaculture.

The Council is required to submit a preliminary report on December 31, 2003 and a final report on all issues enumerated earlier by August 20, 2004. The Council will be composed of twenty-two members appointed by the Governor and will meet at regularly scheduled intervals.

## **RECENT LOUISIANA ATTORNEY GENERAL OPINION**

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### **Attorney General Opinion #03-0055**

This opinion was issued to determine whether the \$1,000.00 fee for issuance of a mariculture permit was an annual fee or a one-time fee. R.S. 56:579.1(C)(5) provides that the permit fee shall be \$1,000.00. However, R.S.56:579.1(I) provides that the secretary shall charge an annual fee for all permits issued under this section. The Attorney General's Office stated that all laws in pari materia (on the same subject matter) must be construed with reference to each other, according to Civil Code Article 17. Therefore, statutory provisions referring to a common subject must be read to produce a unified and coherent import, and these two provisions must be read together to give maximum efficacy to the statute. Accordingly, the \$1,000.00 fee for a mariculture permit is an annual fee.

## **WEBSITES OF INTEREST**

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### **The Heinz Center**

<http://www.heinzctr.org>

The H. John Heinz III Center maintains this web site for Science, Economics, and the Environment. The Center is a non-profit institution dedicated to improving the scientific and economic foundation for environmental policy through multisectoral collaboration among industry, government, academia, and environmental organizations. The center focuses on issues that will confront policymakers within the next two to five years. The website offers access to the center's report released in September 2002, The State of the Nation's Ecosystems. The non-partisan report deals with the condition and use of the nation's lands, waters, and living resources. The center's next report will be released in 2007.

The Center also runs the Global Change Program with studies focused on climate change, fossil fuels, and global warming and the sustainable oceans, coasts and waterways program. All reports are available for free Internet access and print copies are available for private, non-commercial use. The site also produces Crossroads, a quarterly newsletter of the center's activities.

### **National Estuarine Research Reserve System**

<http://www.nerrs.noaa.gov>

This site is devoted to a partnership between the NOAA and coastal states to protect estuarine land and water; offer educational opportunities for students, teachers, and the public; and serve as a living laboratory for scientists. The system supports a network of 26 areas. Each managed locally to address issues such as non-point source pollution, habitat restoration, and invasive species. Their educational programs are federally mandated including a link to the Coastal Training Program to ensure community members have the science-based information needed to make informed decisions about coastal resources. The site also has links to each of the twenty-six individual programs, which have local educational opportunities for K-12 students and teachers. The site also sponsors the Technical Series, a forum for high quality manuscripts and peer review relevant to the NERRS and its efforts.

### **National Centers for Coastal Ocean Science**

<http://www.nccos.noaa.gov>

This site conducts and supports monitoring, research, assessment, and assistance for all of NOAA's coastal stewardship responsibilities. The Center puts all of the NOAA's coastal research centers in one group: The Center for Sponsored Coastal Ocean Research, The Center for Coastal Monitoring and Assessment, The Center for Coastal Fisheries and Habitat Research, The Center for Coastal Environmental Health and Biomolecular Research, and the Hollings Marine Laboratory. The site focuses on general information and links to publications on pollution, invasive species, climate change, extreme events, and resource and land use. The Centers evaluate environmental, societal, and economic issues through "Integrated Assessments," which describe ecosystems and their future health. The site also highlights a monthly feature story. A list of the Centers' publications is available and articles may be requested from the website.

### **NOAA Coastal Services Center**

<http://www.csc.noaa.gov>

The mission of this Center and the website, sponsored by NOAA, is to support the social, economic, and environmental well being of the coast by linking people, information, and technology. The center provides information mainly to state and local coastal resource managers and federal, non-governmental, and non-profit organizations. The site offers a listing of classes at their training center in South Carolina including GeoSpatial Technology Courses, Coastal Management Training, and Building Process Skills. The site

also provides links to fellowship and funding opportunities, publications, and upcoming events at the center. There are on line maps with data and information regarding issues such as algae blooms and historical hurricane tracks. There is also information on the Coastal Observation Technology System, a network of buoys, satellites and meteorological stations. There is also a listing of software tools for coastal resource managers.

### **NOAA Office of Response and Restoration**

<http://www.response.restoration.noaa.gov>

This site, sponsored by NOAA, offers tools and information for emergency responders, planners, and others to understand and mitigate the effects of oil and other hazardous materials in coastal waters. The site is conveniently divided into separate areas: 1) oil spill responders including job aids, software, a database of historical incidents and reports, manuals and case histories; 2) chemical accident responders including CAMEO software and a chemical reactivity worksheet; and 3) kids including experiments and projects, material for instructors, and answers to common questions. The site also offers an image gallery with tours and slideshows of major oil spills including the Exxon Valdez and other dispersants. There are also various software programs and publications related to spill response available for download.

### **Marine Protected Areas of the United States**

<http://www.mpa.gov>

This website is managed jointly by the Secretary of the Interior and the Secretary of Commerce, as directed by Executive Order 13158. This Executive Order established Marine Protected Areas (MPAs), which is defined as "any area of the marine environment that has been reserved by Federal, State, territorial, tribal or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein." The website is devoted to conservation and research geared toward protecting these areas. The Executive Order was passed in 2000, so the website and the program in general still seem to be in their infant stages. The site has established the Marine Managed Area (MMA) Inventory, which is devoted to collecting data to develop a comprehensive picture of MPAs. The site is devoted mainly to discussing what MPAs are and future plans for their management.

### **United States Commission on Ocean Policy**

<http://www.oceancommission.gov>

The Oceans Act of 2000 (PL 106-256) established the United States Commission on Ocean Policy. The Commission was authorized by Congress and appointed by the President in order to establish finding and make recommendations for a coordinated comprehensive national ocean policy. The Commission held public hearings on the issue and is now in the deliberative phase towards drafting a national ocean policy. Records of all of the Commission's meetings and text of all testimony taken before the Commission are available at this site. All current documents and drafts of documents are also available. There is also information on how anyone may submit a public comment related to national ocean policy to the Commission.

## **SPECIAL NOTICE**

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### **Louisiana Sea Grant Legal Program Archives**

The Louisiana Sea Grant Legal Program's website (<http://www.lsu.edu/sglegal>) now features an Archives page. Most past Louisiana Coastal Law Newsletters since the original edition published in September 1971 are now available online in .pdf format. Law review articles published by current and past Sea Grant Legal Program associates are also available at the Archives page.