



Louisiana Sea Grant Legal Program

Louisiana Coastal Law E-mail Update Issue #15, March 2004

Recent Case Law

Alaska Department of Environmental Conservation v. Environmental Protection Agency, 124 S. Ct. 983 (2004)

This case concerns the authority of the U.S. Environmental Protection Agency (EPA) to enforce provisions of the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) program. Under this program, no major emitting facility may be constructed unless the facility is equipped with the best available control technology (BACT). BACT is defined as "an emission limitation based on the maximum degree of pollutant reduction, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for the facility." Regarding the PSD program, when EPA determines that a major emitting facility does not conform to the PSD requirements of the Act, CAA Section 167 instructs EPA to "take such measures, including issuance of an order, or seeking injunctive relief as necessary to prevent the construction."

This case revolves around a zinc mine owned by Teck Cominco Alaska, Inc. (Cominco) that is located in Northern Alaska, approximately 100 miles north of the Arctic Circle. Operations at the mine are dependent on a series of diesel generators, which provide electricity for the operation. In 1988, the mine obtained permission to operate as a "major emitting facility" which means that the facility emits a certain pollutant over a designated amount. At issue in this case is nitrogen oxide (NO_x) emissions. In 1996, Cominco wanted to expand production at the mine, which would have increased nitrogen oxide emissions by 40 percent. Under the CAA, when the percent increase is that high, a PSD permit must be obtained. The permitting authority for the facility, the Alaska Department of Environmental Conservation (ADEC), initially determined selective catalytic reduction (SCR), a process that reduced nitrogen oxide emissions by 90 percent, was BACT for the project. Cominco rejected this proposal and determined that Low NO_x was the BACT for the project, a procedure that only reduced emissions by 30 percent. ADEC again stated that it believed SCR to be BACT, citing proof that Cominco had overestimated the cost and that the technology had been effectively implemented in similar cases throughout the world. Despite these arguments, ADEC endorsed the BACT proposed by Cominco. Cominco proposed offsetting the higher emissions of the new generators with lower emissions on the generators already operating. This practice is not acceptable under the PSD program.

In 1999, EPA ordered ADEC not to issue the permits unless they could "satisfactorily document" which SCR was not BACT for the project. EPA subsequently determined that ADEC's decision was "arbitrary and erroneous." In February 2000, EPA prohibited Cominco from acting on the permit issued by ADEC.

The U.S. Supreme Court ruled that EPA did have the authority to determine the reasonableness or adequacy of the state's justification for the decision. ADEC argued that the statute only gave EPA

the authority to require that a BACT determination be made, not that they could have any say in the determination. The court ruled that this interpretation would give EPA authority "in name only" since they could do nothing so long as some BACT was given, no matter how arbitrary or unreasonable. This was found to be keeping in line with Congressional intentions. The court also argued that allowing states to determine BACT as they wished would lead to a "race to the bottom" where industries would rush to states which were known for being lenient with their permits. The court emphasized that EPA is authorized only to prevent unreasonable determinations and that they are not asking for the authority to determine the correct BACT.

In the News

Spy Cam Aids Wetlands Law Enforcement in Massachusetts

In Massachusetts, a new technology is allowing for easier detection and prosecution of those citizens illegally filling wetlands. Using aerial photographs and the same photo-analysis software used by the U.S. Department of Defense to spot enemy tanks, investigators from the Massachusetts Department of Environmental Protection can scan photos for violators. The system is relatively affordable and extremely comprehensive, compared to the previous method of relying on tips from other citizens. Also, the photographs are clear evidence that can be easily presented to a jury.

Before the program began, Massachusetts prided itself on its wetland law enforcement. They were unaware of the scope of the problem until the new technology was implemented. Massachusetts has since dramatically raised the level of detection while lowering the cost of enforcement. The new technology is affordable enough that even environmental or other nongovernmental groups could monitor compliance. Environmental groups are excited about the technology, stating that it finally levels the playing field between enforcement and violators. Because of the low cost and high level of effectiveness, other states may soon follow suit.

Source: <http://www.csmonitor.com>

New Sea Turtle By-Catch Reduction Technology

NOAA announced in January that it has developed new technology that would reduce accidental capture and harm to endangered sea turtles. After three years of research, NOAA, in conjunction with private industry, has determined that these turtle by-catch reduction techniques are a viable option. The technology has already been successfully tested in the Grand Banks, an area well known for its valuable fish resources and petroleum reserves that is located off Newfoundland in Canada. Turtle by-catch can be reduced by as much as 90% by changing the hook and bait from a J-style hook with squid to a large circle style hook with mackerel. For turtles that are still captured, NOAA has also developed new de-hooking and releasing techniques. Environmentalists and fishermen alike have approved of the technology. There is an economic incentive for fishermen to use the new technology, as it allows for faster retrieval of gear and means less time spent untangling turtles. In addition to its use in the United States, NOAA is encouraging other nations to use the technology as well.

Source: www.noaanews.noaa.gov/stories2004/s2147.htm

Additional Lake Borgne Public Oyster Seed Grounds Approved By Commission

In January, the Louisiana Wildlife and Fisheries Commission approved a designation of certain public water bottoms in portions of Lake Borgne in St. Bernard Parish to be added to the public

oyster seed ground system. The designation was made for the long-term benefit of oyster resources in the area. The additional acreage will immediately come under the management of the State, which will provide for a more orderly and efficient harvest of oyster resources while enhancing economic benefit to the oyster industry.

Source: <http://oysterweb.dnr.state.la.us/oyster/>

Portion of Louisiana Offshore Territorial Waters Closed to Shrimping

The Louisiana Wildlife and Fisheries Commission announced a shrimp closure in a portion of Louisiana offshore territorial (outside) waters in January. The closure affects waters around the western shore of Freshwater Bayou Canal. The closure should protect white shrimp in the area and provide an increased opportunity for growth to a more valuable size. The action allows the LDWF Secretary to close any part of the remaining state outside waters if biological and technical data indicate the need to do so and to re-open any area when the closure is no longer needed. The Commission also re-emphasized that, with the exception of Breton and Chandeleur Sounds, all inside waters remain closed to shrimping.

Source: <http://www.wlf.state.la.us/apps/netgear/index.asp?cn=lawlf&pid=13&id=1073670630>

Fishing Regulations Pamphlets Now Available

Regulation pamphlets for the 2004 commercial and recreational fishing seasons are now available. The pamphlets have been shipped to commercial license holders and recreational license vendors. An online version is available at www.wlf.state.la.us under "Special Publications."

Source: <http://www.wlf.state.la.us/apps/netgear/index.asp?cn=lawlf&pid=13&id=1074029918>

LDWF Announces Designated Disposal Sites for Derelict Crab Trap Removal Program

LDWF has established a derelict crab trap removal program. Use of crab traps within specific areas during closure periods will be prohibited. The program will designate all remaining crab traps in these areas as abandoned and subject to removal. The program also allows individuals to retrieve abandoned traps and bring them to designated disposal sites. Removing derelict traps should reduce navigational hazards, conflicts with shrimp fishermen, and mortality of blue crabs and other organisms. The program will be volunteer-based. Volunteer days are scheduled for February 28 and March 6. Additional information on volunteering may be found at www.blue-crab.net/derelict.html under "Volunteer Information."

Source: <http://www.wlf.state.la.us/apps/netgear/index.asp?cn=lawlf&pid=13&id=1077206390>

Money Tight for Coastal Restoration

A federal-state task force has approved four new coastal restoration projects, totaling \$90 million. Adding the 122 projects already approved, the total comes to \$1.4 billion. This figure is around \$470 million more than will be available from the federal program, which will continue through 2009. The projects are part of the Coastal Wetlands Planning, Protection, and Restoration Act, also known as the Breaux Act. The task force has become a vehicle for developing a coast-wide restoration plan, called Coast 2050. In order to accommodate all plans, projects will have to be re-evaluated and prioritized with weaker projects being cancelled or delayed.

Source: http://2theadvocate.com/stories/012904/new_oks001.shtml

New Budget for Coastal Restoration Lower Than Requested

The new budget presented by President Bush contains only \$8 million for Louisiana's Coastal Restoration. In a personal meeting with Bush, Governor Blanco had asked for at least \$50 million to help start projects to slow coastal erosion. The money proposed by Bush is mainly for studies including money to complete a draft study outlining what projects should be built. Other monies would be used for a study of a new channel and determining whether the mouth of the Mississippi may be altered to create new sedimentary deposits. Blanco cites this as an indication that more money is needed to convince the nation that this is a problem that affects the entire country. However, Blanco hopes that Congress will add more money to the 2005 budget proposal. While the budget for coastal restoration is lower than many had hoped for, the small allocation is at least official recognition that national policies on dredging and shipping have contributed to Louisiana's coastal losses. This recognition could be the beginning of more national involvement in Louisiana's coastal restoration efforts.

Source: http://2theadvocate.com/stories/020404/new_coast001.shtml

Louisiana State Bird Makes Comeback

For the first time since brown pelicans were brought back to Louisiana in 1968, the birds were found west of Terrebonne Parish. Four nesting pairs and hundreds of pelicans on the move were seen on Rabbit Island, which is located between the Sabine and Cameron Prairie National Wildlife Refuges. Previously, all of Louisiana's brown pelicans were found offshore on barrier islands from the Chandeleurs to Isles Dernieres. This news is encouraging, especially in light of Tropical Storm Bill which destroyed nearly 1,000 nests. The total pelican population is currently stable, with new banding programs being established to track the birds. Pelicans banded in Louisiana have been recorded as far as Guatemala, Belize, and the Pacific Coast of Mexico.

Source: http://2theadvocate.com/stories/012504/new_brownsp001.shtml

Sick Pelicans in South Louisiana

Despite the good news about pelican populations, sick and dead pelicans have been found south of Grand Isle. Fishermen have reported pelicans with red sores on their necks and bills and holes in the pouches. This, in turn, causes fish to fall out of the holes in the pelicans' bills. Brown pelicans remain a threatened species, but Russ Wilson, a U.S. Fish and Wildlife Service official, says that these reports are not necessarily cause for alarm since pelican kills are known to occur during cold weather. At this time, it is unknown whether the cause is a chemical, parasite, or disease.

Source: http://2theadvocate.com/stories/011104/new_pelkns001.shtml

Sand Sought To Join Two Barrier Islands

In 1985, Hurricane Juan broke apart a barrier island near Terrebonne Parish, forming East and Trinity Islands. The gap between the two was called New Cut, and has continued to widen due to subsequent storms. In 2000, a project to fill in the gap was approved through the Coastal Wetlands Planning, Protection, and Restoration Act Task Force. The plan included placing dredged sand into the gap between the two islands, tying together restoration efforts done on each island. While project managers argued over where the sand would come from and faced problems from local fishermen and residents, New Cut began to fill itself. After a restoration project was completed on East Island in 1999, New Cut began to shrink. Officials still see the need for dredge material to be brought in because the stability and lifespan of the self-filled

material is too uncertain. The task force is currently researching sites from which to gather the dredged materials.

Source: http://2theadvocate.com/stories/012604/new_sand001.shtml

Update on Alleged Shrimp Dumping

The recent allegations from shrimp producers that six Asian and South American countries are illegally dumping its catches in the U.S. market has intensified. The U.S. Department of Commerce (DOC) has agreed to probe these allegations, which claim that imported shrimp is selling from 32 to 35 percent below average prices in home markets. Asian importers have called the lawsuit "flagrant protectionism." Protection for shrimpers may be a double-edged sword, however. Shrimpers should be protected in order to protect the industry, but this may raise prices in restaurants, which will have to pay more for shrimp. In July 2003, when it was found that Vietnam dumped catfish on the U.S. market, tariffs of 36.84 to 63.88 percent were imposed on Vietnamese exporters. DOC will first whether imports are harming the shrimping industry. If they find harm then dumping allegations will be investigated. If a tariff order results, it could come as early as mid-October 2004.

Source: http://2theadvocate.com/stories/012204/bus_shrimp001.shtml

The DOC's International Trade Administration has published a Fact Sheet regarding Initiation of Anti-Dumping Duty Investigations for Certain Frozen and Canned Warm Water Shrimp at http://www.ita.doc.gov/media/FactSheet/0104/shrimp_012104.html.

Spending Bill Delays Food Labeling Program

A \$373 billion spending bill passed by the Senate in January has delayed the country of origin food-labeling program until 2006. The program, which would require Made in the USA labels for many products, was supported by small farmers and ranchers, but viewed as a retail ploy by corporate ranchers and the meatpacking industry. Some politicians cited the recent mad cow scare in Washington as proof of a need for labeling requirements. Senator Tom Daschle (D-SD), who sponsored the bill, stated that the delay amounted to a killing of the program. Senate Democrats are holding out hope that the provision may be rewritten to ensure that the program will continue, but its fate is still uncertain.

Source: <http://msnbc.msn.com/id/4030241/>

Governor Blanco Makes Secretarial Appointments

Scott Angelle was named Secretary of the Department of Natural Resources. He was formerly the Parish President of St. Martin Parish and a Parish Police Juror. He brings to the position a vast knowledge of petroleum resources and coastal restoration issues.

Mike McDaniel was named to head the Department of Environmental Quality. Mr. McDaniel is an environmental scientist with 35 years of experience in the private sector with Mike D. McDaniel and Associates. He also served as Assistant Secretary in the Office of Air Quality from 1988-1992.

William Landreneau was named Secretary of the Department of Wildlife and Fisheries. Mr. Landreneau was formerly Assistant Secretary for the Louisiana Department of Recreation, Culture, and Tourism, Office of State Parks. Mr. Landreneau led the execution of the Louisiana State Parks Master Plan which improved existing parks and created new ones.