



## Louisiana Sea Grant Legal Program

### *Louisiana Coastal Law E-mail Update* Issue #16, June 2004

#### **Recent Court Cases**

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##### **Walker Lands, Inc. v. East Carroll Parish Police Jury, 871 So. 2d 1258 (La. App. 2<sup>nd</sup> Cir. 2004)**

The appellate court sustained the trial court's ruling that a drainage ditch and lake were privately owned and overruled a permanent injunction. Due to the lake and ditch being completely landlocked, the court found that they were not navigable. The court also found because the two were not in existence in 1812 and were privately owned in 1910, they were private things susceptible to private ownership.

The court overturned the permanent injunction against use of the water bodies by the state and the public on justiciability grounds. The court found that because the state had never entered into the area and the public at large was not a party to the suit, the conditions for an injunction were not met.

##### **Pontchartrain Levee District v. St. Charles Airline Lands, Inc., 871 So. 2d 674 (La. App. 5<sup>th</sup> Cir. 2004)**

The appellate court sustained the trial court's ruling that use of an area as undeveloped wetlands was not the best use of the property, which was taken by the state to construct a hurricane protection levee. The appellate court found that the former landowner had shown by a preponderance of the evidence that the requisite permits could have been obtained from the Army Corps of Engineers and the Department of Natural Resources to develop the properties into residential and commercial developments. The appellate court also sustained the additional compensation awarded to the former landowner for the taking due to the increased value of the land because of its ability to be developed.

#### **In the News**

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##### **Louisiana Supreme Court Hears Oyster Suit Arguments and Then Oyster Cultivators Make Settlement Offer with State**

The Louisiana Supreme Court heard oral arguments on May 24, 2004, regarding the \$1.3 billion verdict that a Plaquemines Parish jury awarded Breton Sound oyster farmers for damage done to their oyster leases. The oyster farmers sued the state in March 1994, claiming coastal restoration projects damaged their leases. The state requested a jury trial and the jury awarded the oyster

farmers \$1.3 billion in damages. The appellate court upheld the jury verdict, and the state appealed to the Louisiana Supreme Court.

Attorneys for the state argued that there was no evidence that the Caernarvon Diversion Project damaged the oyster leases and instead cited damage from a variety of sources. The state also argued that the oyster farmers were not entitled to damages because they do not own the water bottoms in question, the suit was instituted too late, and that the constitutional amendment that was approved by voters in October 2003 limiting the amount of damages from coastal restoration work should be applied retroactively.

Attorneys for the oyster farmers argued that the state requested a jury, and that the jury's verdict should now be followed. If the Louisiana Supreme Court affirms the verdict, then the award will total more than the value of all of the oysters harvested in Louisiana in the past one hundred years. (Note: Two other groups of oyster farmers from St. Bernard Parish who were awarded \$661 million and \$291 million for damage done to their leases by the Caernarvon project were not part of the hearing before the Louisiana Supreme Court.)

However, in June, the oyster farmers offered to settle with the state. Their settlement offer of \$243.6 million is about 81 percent less than the jury awarded them. Lawyers for the state have yet to comment on the settlement offer, as the case is still pending before the Louisiana Supreme Court. Lawyers for the oyster harvesters say that the settlement offer is fair and that it will not bankrupt the state unlike the original \$1.3 billion verdict. The settlement offer will remain open until the Louisiana Supreme Court rules or July 10, 2004, whichever comes first.

Sources: Joe Gyan, Jr., *Supreme Court Hears Oyster Suit Arguments*, THE BATON ROUGE ADVOCATE, May 25, 2004, available at [http://2theadvocate.com/stories/052504/new\\_oyster001.shtml](http://2theadvocate.com/stories/052504/new_oyster001.shtml) (accessed May 25, 2004).

Doug Simpson, *Oystermen Make Settlement Offer in Diversion Project Suit*, THE BATON ROUGE ADVOCATE, June 14, 2004, at 8B.

### **Army Corps of Engineers Studies Plans to Alleviate Flooding Threats Near Jackson, Mississippi**

The Army Corps of Engineers is undertaking a \$2.8 million study to determine the best course of action for alleviating threats of flooding in the Pearl River Basin. The Pearl River is about four hundred and ninety miles long and flows from east-central Mississippi to the Louisiana-Mississippi Border. The two projects being considered are the 1996 Jackson Levee Plan, which would expand existing levees by thirty-two miles and the LeFleur Lakes Project, which would build two lakes extending from Rankin County to Jackson, Mississippi to control flooding. Preservationists and those in the fishing industry dislike both plans, as they believe they would damage coastal wetlands and kill marine life. Oyster farmers in the area are specifically worried about the diminished flow of freshwater downstream that the projects could cause.

Source: Jean Gordon, *Fishing Industry Fears Impact of Flood Control Plan*, THE JACKSON (MS) CLARION-LEDGER, (April 11, 2004).

### **Bill in Legislature to Require State Oyster Lease Suits to be Filed in East Baton Rouge Parish**

House Bill (HB) 620, sponsored by Representative Pierre (D-District 44), has passed the House of Representatives and the Senate and has been sent to the Governor. If signed by the Governor, the law would require all suits arising out of disputes for compensation related in any way to an oyster lease granted by the state to be filed in the Nineteenth Judicial District for East

Baton Rouge Parish. This law would not affect the oyster lease disputes pending in the Louisiana Supreme Court.

See [http://www.legis.state.la.us/leg\\_docs/04RS/CVT6/OUT/0000LIEP.PDF](http://www.legis.state.la.us/leg_docs/04RS/CVT6/OUT/0000LIEP.PDF) for the text of HB 620.

### **Legislature Requests Study of Nuisance Fish Around Oyster Beds**

The Legislature passed House Concurrent Resolution (HCR) 65, requesting that the Department of Wildlife and Fisheries study the development and implementation of a plan to manage nuisance fish around oyster beds. Nuisance fish, such as black drum, can consume large oysters but prefer smaller seed oysters, causing greater damage to the industry. The consumption of seed oysters is a large problem for the oyster industry especially in the cooler months when the black drum migrate to shallow waters when the seed oysters are planted there.

See [http://www.legis.state.la.us/leg\\_docs/04RS/CVT2/OUT/0000LELV.PDF](http://www.legis.state.la.us/leg_docs/04RS/CVT2/OUT/0000LELV.PDF) for the text of HCR 65.

### **Six Federally Funded Coastal Restoration Projects Dedicated**

On May 21, 2004, six federally funded coastal restoration projects costing an estimated \$33.3 million were dedicated in Plaquemines Parish. The projects are:

- The West Bay Sediment Diversion Project, which is expected to create 10,000 acres of marsh over the next twenty years;
- The Dustpan Maintenance Dredging project, which is a demonstration project for using sediment to build new marsh;
- The Channel Armor Gap Crevasse project, which taught scientists much about diverting rivers;
- The Chandeleur Islands Marsh Restoration project, which resulted in the planting of about 81,000 plugs of marsh grass;
- The Hopedale Hydrologic Restoration Project, which revamped a damaged 1950s water control structure; and
- The Delta Wide Crevasse project, which uses small breaches in the riverbank to allow sediment to flow into the Pass a Loutre Wildlife Management Area and the Delta National Wildlife Refuge.

Funding for the projects came from the Breaux Act. Legislation for an increase in Breaux Act funding for another ten years (approximately \$110 million annually) is now pending in the U.S. Congress.

Source: Sandra Barbier, *Six Wetlands Dedicated for St. Bernard and Plaquemines*, THE TIMES-PICAYUNE, May 22, 2004, available at <http://www.nola.com/search/index.ssf?/base/library-46/1085209183116850.xml?nola> (accessed May 22, 2004).

### **The U.S. Coast Guard Trumps MMS in LNG Conflicts**

The Minerals Management Service (MMS), a branch of the U.S. Department of the Interior, announced that the U.S. Coast Guard has the final say when plans to site an offshore Liquefied Natural Gas (LNG) import terminal come into conflict with offshore blocks leased to oil and gas producers in the Gulf of Mexico.

Conflicts arise when leased blocks overlap with sites for LNG terminals, because a safety zone is needed between the two operations. MMS had to withhold two blocks from its March 17, 2004 lease sale because they conflicted with Chevron Texaco's proposed Port Pelican project, which is being planned forty miles off of the Louisiana Coast.

MMS Director Johnnie Burton stated in Gas Daily that the MMS and the Coast Guard will work together if a company wants to site and LNG port where the MMS has leases to minimize conflict and determine safety zones. This task is complicated by the fact that the Coast Guard now falls under the umbrella of the U.S. Department of Homeland Security. The two agencies are currently working on a memorandum of understanding on the issue.

Source: JM, *Coast Guard Trumps MMS in LNG Conflicts*, GAS DAILY, May 6, 2004.

### **Helicopters Used to Log Raceland-Area Swamp**

A cypress grove in a Raceland-Area swamp is being logged with the use of helicopters. Tandem-rotor helicopters are being used because they produce fewer environmental impacts than logging by conventional means. Helicopters are not commonly used for logging in the South due to their cost, but are common in the Northeast for harvesting trees off mountainsides.

Cypress logging has sparked much debate because environmentalists fear that the cypress groves are incapable of re-growth after being harvested either because of changes in water levels or due to damage that machinery normally causes. Destruction of these cypress groves leads to further coastal erosion because the tree roots provide an important anchoring mechanism for the surrounding soil. Environmentalists hope that by only harvesting mature trees and not damaging smaller trees, which had been fighting for sunlight, the cypress grove will be capable of re-growth.

Source: Mary Swerczek, *Helicopter Swamp Logging May Save Forest Floor*, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, May 26, 2004.

### **NOAA and Gulf of Mexico Fisheries Management Council Considering Ocean Aquaculture**

In an effort to increase domestic production of finfish species, the National Oceanic and Atmospheric Administration (NOAA) and the Gulf of Mexico Fishery Management Council (GMFMC) are pursuing independent efforts to provide better regulatory guidance to offshore aquaculture operators.

The GMFMC is working on an amendment that would permit ocean aquaculture under the Magnuson-Stevens Fishery Conservation and Management Act (FCMA) after NOAA general counsel ruled that commercial production of fish managed under the FCMA in federal waters was considered fishing and thus required a permit.

Replacing the current system that involves half-dozen agencies, draft NOAA legislation seeks to establish a "one-stop" permitting system for aquaculture operators. Under the new law offshore aquaculture facilities would be managed under fishery management plans that exclude farm raised fish from such limitations as size and catch limits.

Source: Andrew Freedman, *Ocean Aquaculture Proposals Drawing Positive Attention From NOAA*, GREENWIRE, June 1, 2004, available at [www.eenews.net/Greenwire/Backissues/060104/06010415.htm](http://www.eenews.net/Greenwire/Backissues/060104/06010415.htm) (accessed June 1, 2004).

## **NMFS Changes Endangered Species Act Policy**

In response to a court order to reconsider its treatment of naturally spawned salmon under the Endangered Species Act (ESA), the National Marine Fisheries Service (NMFS) has established a new legal framework under which naturally spawned salmon will receive ESA protection. An Oregon federal district court had rejected the NMFS final rule which distinguished naturally spawned salmon from hatchery raised stock. The court required the NMFS to consider all fish within a single population group or evolutionary significant unit (ESU) when making ESA evaluations. The new policy assesses whether a stock is geographically distributed well enough to protect against extinction, whether stock genetics are strong enough to allow fish to adapt to changing environments, and whether stocks are reproducing at sustainable levels as well as the number of fish within an ESU.<sup>1[1]</sup>

Using the new framework, the NMFS has reviewed all of the salmon and steelhead on the west coast that are on the endangered species list. As a result, two species were downgraded from "endangered" to "threatened," one species of salmon was added to the threatened species list, and one species was upgraded from "threatened" to "endangered." Many industry groups and environmentalists dislike the new rule due to its ambiguities and promise to sue if the rule becomes final.

Sources: Natalie Henry, *NMFS Hatchery Policy Angers ESA Critics; Enviros Remain Cautious*, GREENWIRE, June 1, 2004.

Reuters, *Salmon Protection Dodges Bullet*, CNN, May 31, 2004, available at [www.cnn.com/2004/TECH/science/05/28/environment.salmon.reut/index.html](http://www.cnn.com/2004/TECH/science/05/28/environment.salmon.reut/index.html) (accessed May 31, 2004).

## **Average Size Dead Zone Expected in Gulf**

The dead zone in the Gulf of Mexico is expected to remain the same size this year as it has been in the last decade, or between 9,000 and 12,000 square miles. The dead zone is an area in the Gulf of Mexico at the mouth of the Mississippi River where a combination of excess nutrients, high temperatures, and salinity produce low oxygen conditions that make the area uninhabitable by marine organisms.

Nancy Rabalais, professor of marine science with Louisiana Universities Marine Consortium, considered higher than normal spring flooding (which means more nutrient runoff), windy conditions (which allows for a mixing of water, diminishing the dead zone), and the amount of fertilizer running off from farms along the Mississippi when making her prediction.

Source: Marty Coyne, *Medium-to Large-Sized 'Dead Zone' Expected in 2004*, GREENWIRE, June 2, 2004.

## **Federal Register Notices**

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### **NMFS Implements New Rule – Certified By-Catch Reduction Devices (BRDs)**

<sup>1[1]</sup> To read the draft policy and proposed revisions in their entirety and for more information, please visit NOAA's Response to the *Alsea Valley Alliance v. Evans* U.S. District Court Ruling, available at <http://www.nwr.noaa.gov/AlseaResponse/20040528/index.html>. See *Alsea Valley Alliance v. Dept. of Commerce*, 358 F. 3d 1181 (9th Cir. 2004). See also *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001).

In order to reduce by-catch to the maximum extent practicable, as required by the FCMA, the NMFS will require BRDs on shrimp trawls in the Gulf of Mexico Exclusive Economic Zone (EEZ) east of 85[deg], 30' west longitude. The rule also identifies BRDs currently authorized in the Gulf of Mexico EEZ and modifies the Gulf of Mexico By-Catch Reduction Testing Protocol Manual to include specific criteria required for the Gulf of Mexico EEZ Area.

Source: Approved Measures to Amendment 10 to the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, 69 Fed. Reg. 1,538 (Jan. 9, 2004) (to be codified at 50 C.F.R. Part 622). The text of the final rule is available online at <http://www.gpoaccess.gov/fr/index.html> via search engine.

### **NMFS Continues Snapper-Grouper Closed Area Indefinitely**

Due to positive effects that a current experimental snapper-grouper closed area has had on the fishery, the NMFS has decided to close the area indefinitely. The closed area is slightly less than ninety-two square nautical miles in the Gulf of Mexico Exclusive Economic Zone and is located offshore of Florida, extending from Ft. Pierce to Sebastian Inlet. Fishing or retaining South Atlantic snapper-grouper in the in the closed area is prohibited. South Atlantic snapper-grouper incidentally taken by hook and line gear must be released immediately by cutting the line without removing the fish from the water.

Source: Implementation of Amendment 13A to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region, 69 Fed. Reg. 15,731 (March 26, 2004) (to be codified at 50 C.F.R. Part 622). The text of the final rule is available online at <http://www.gpoaccess.gov/fr/index.html> via search engine.

### **NMFS Incorporates New Criteria into the Fisheries Management Plan (FMP) Biomass-Based Stock Status Determination**

When making the FMP biomass-based stock status determination for King and Spanish mackerel and cobia stocks, the NMFS will now consider maximum sustainable yield, optimum yield, minimum stock size threshold, and maximum fishing mortality threshold. The biomass-based stock status determination is used to adjust the management measures of the FMP, so that fish stocks can be better evaluated.

Source: Incorporation of New Criteria Into FMP Biomass-Based Stock Status Determination, 69 Fed. Reg. 16,499 (March 30, 2004) (to be codified at 50 C.F.R. Part 622). The text of the final rule is available online at <http://www.gpoaccess.gov/fr/index.html> via search engine.

### **NMFS Approves New Flap Design for TEDs**

In response to reports by fishers that the former double cover flap Turtle Excluder Device (TED) design stretched overtime and allowed shrimp to escape, the NMFS has approved a new TED design. The modification allows flap panels to extend to a maximum of twenty-four inches past the posterior edge of the TED frame and to be sewn down the entire length of the outside edge of each flap panel. The former TED design only allowed flap panels to extend six inches past the posterior edge of the TED frame. Edge lines can now also be used around the edges of the unattached portion of the flap panels, but only if the flap panels are sewn down the entire length of the outside edge of each flap panel.

This new rule is permissive, meaning that all TED devices that were formerly approved may still be used. The only change in the rule is that this new design may now be used in addition to the designs previously approved.

Source: Turtle Excluder Device Design Modification, 69 Fed. Reg. 31,035 (June 2, 2004) (to be codified at 50 C.F.R. Part 223). The text of the final rule is available online at <http://www.gpoaccess.gov/fr/index.html> via search engine.

## **Louisiana Executive Order**

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### **Governor Blanco Creates Louisiana Wild Caught Shrimp Industry Trade Action Advisory Council**

Executive Order KBB 04-05 created the Louisiana Wild Caught Shrimp Industry Trade Action Advisory Council to assist in the shrimp dumping action. According to the EO, the duties of the council is to assist and support the trade action brought by the wild caught shrimp industry, explore and develop funding sources for the trade action and recommend legislation to fund the trade action. The thirteen-member council will be comprised of the Governor, various legislative officials, the Secretary of Wildlife and Fisheries, members appointed by the Governor from the Louisiana Shrimp Association, the Louisiana Shrimp Association Industry Coalition and the American Shrimp Processors Association, one member appointed by the Governor who possess a current gear and boat license and one at-large member.

The Executive Order is available at <http://www.state.la.us/osr/other/kkb04-05.htm>.

## **Shrimp Antidumping Petition Update and Clarification**

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### **Dumping Determination Postponed**

The U.S. Department of Commerce (DOC) has moved the date of announcement of the preliminary decision as to whether there has been dumping of shrimp in the United States. The DOC moved the announcement for Vietnam and China from June 8, 2004 to July 2, 2004 and moved the announcement for Brazil, Ecuador, India, and Thailand from June 8, 2004 to July 28, 2004.<sup>2[2]</sup>

### **Clarification of Shrimp Antidumping Petition Article Published in LCL 84**

The Byrd Amendment was discussed in LCL 84, and it was suggested that the potential subsidies the Byrd Amendment may provide to shrimpers were no longer available. While the World Trade Organization (WTO) has found the Byrd Amendment to be an unfair trade practice because it allows industries to receive a double benefit (a tariff and a subsidy), the Byrd Amendment has yet to be repealed by Congress, meaning the amendment is still in effect.<sup>3[3]</sup> The WTO cannot force the United States Congress to bring the Byrd Amendment into compliance with the WTO rules. However, it is the position of the Bush administration that the Byrd Amendment should be

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<sup>2[2]</sup> *Commerce Department Postpones Preliminary Determination of Duties in Shrimp Trade Case*, PR NEWSWIRE, May 19, 2004.

<sup>3[3]</sup> *Trade Tiff Could Cost Millions*, CBS NEWS, Jan. 15, 2004, available at <http://www.cbsnews.com/stories/2004/01/15/world/main593452.shtml> (accessed May 31, 2004).

repealed so that the funds could be used elsewhere in the budget.<sup>4[4]</sup> When and if the shrimpers become eligible for Byrd Amendment funds, they *may* receive funds if the amendment is not repealed in the interim.

In addition, because the United States missed the December 2003 deadline to bring the Byrd Amendment into compliance with WTO rules, the WTO sought retaliatory measures.<sup>5[5]</sup> The United States rejected these measures as too onerous and has entered into arbitration with the WTO.<sup>6[6]</sup> The results of the arbitration are expected by the end of the summer.

## **Websites of Interest**

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### **FindLaw.com Environmental Law Page**

<http://library.lp.findlaw.com/environmentallaw.html>

The Find Law website features articles, subject matter guides, federal and state cases, and statutes on all types of legal topics. The environmental law page includes links to articles about wetlands, wildlife, water pollution, and other topics. This site has a user-friendly search engine and allows the user to create a free account, which tailors the site to meet the individual's needs.

### **The Interstate Shellfish Sanitation Conference**

[www.issc.org/](http://www.issc.org/)

The Interstate Shellfish Sanitation Conference (ISSC) was formed to promote shellfish sanitation through the cooperation of state and federal agencies, the shellfish industry, and the academic community. This website contains information about the ISSC, educational information, consumer information, information about the National Shellfish Sanitation Program, and links to other sites about shellfish.

### **The Louisiana Department of Wildlife and Fisheries**

<http://www.wlf.state.la.us/apps/netgear/page1.asp>

This website contains information about the Louisiana Department of Wildlife and Fisheries, hunting and fishing license and regulation information, and information about the different Wildlife Management Areas and Refuges the agency manages.

### **Coast 2050**

<http://www.coast2050.gov/>

Coast 2050 is a sustainable wetlands conservation plan that was created in cooperation with federal, state, and local government entities in 1998. This website provides information about the restoration plan including a time line. It also contains land change graphs, salinity graphs, and information on opportunities for public comment.

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<sup>4[4]</sup> Doug Palmer and Richard Waddington, *U.S. to Fight EU Trade Sanction Threat*, REUTERS, Jan. 15, 2004, available at [http://www.boston.com/news/world/europe/articles/2004/01/15/us\\_to\\_fight\\_eu\\_trade\\_sanctions\\_threat?mode=PF](http://www.boston.com/news/world/europe/articles/2004/01/15/us_to_fight_eu_trade_sanctions_threat?mode=PF) (accessed May 31, 2004).

<sup>5[5]</sup> *Request for Trade Sanctions Against the United States Goes to Arbitration*. THE ASSOCIATED PRESS, Jan. 26, 2004.

<sup>6[6]</sup> *Id.*