



Louisiana Sea Grant Legal Program

Louisiana Coastal Law Email Update Issue #19, February 2005

Recent Court Cases

***Terrebonne Parish School Board v. Castex, Inc.* No. 04-C-0968 (La. 2005)**

The Louisiana Supreme Court overturned the opinion of the First Circuit Court of Appeals and found that a mineral lessee was not required to return the surface of the leased premises to its natural state at the conclusion of the lease. In this case, the lease itself did not mandate that the lessee restore the leased area at the conclusion of the lease. The appeals court had found that even if the lease was silent as to restoration that the Mineral Code and pre-Mineral Code jurisprudence dictated that the lessee restore the surface.

The Louisiana Supreme Court, after finding that the lease did not expressly provide for restoration, examined the Mineral Code and pre-Code jurisprudence. They found that the lessee did not have an obligation to restore the leases premises "absent proof that the lessee unreasonably or excessively exercised his rights under the lease."

The opinion is available at http://www.lasc.org/news_releases/2005/2005-3.asp.

***Reyes v. US*, 2004 US Dist. LEXIS 25180 (D. PR 2004)**

Material removed from a harbor during an emergency dredging operation was deposited along a beach by the U.S. Army Corps of Engineers (Corps) to combat erosion. The Corps failed to obtain a Clean Water Act (CWA) water quality certification permit for the deposit of the material because the deposit site was changed at the last minute due to environmental concerns. Homeowners adjacent to the beach sued for damages caused by the sand and dust being blown into their homes under the Federal Tort Claims Act (FTCA).

The court found that it lacked subject matter jurisdiction to adjudicate the matter under the FTCA because the FTCA "specifically excluded claims based upon the exercise...or the failure to exercise a discretionary function or duty on the part of a federal agency." The homeowners argued that the actions of the Corps were not discretionary because the Corps failed to obtain the proper CWA permit from the Puerto Rico Environmental Quality Board. The court found that the actions of the Corps did involve discretion because they were forced to weigh "significant environmental public policy considerations."

In the News

US Allows Imports of Venezuela Shrimp; Blocks Those from Other Countries

The U.S. State Department has decided to allow the importation of wild-caught shrimp from Venezuela into the U.S. because the methods used by the Venezuela shrimpers prevent harm to endangered sea turtles. The U.S. State Department also determined that Trinidad and Tobago and Panama should be dropped from the list of approved import states because methods used by shrimpers in these countries do not properly prevent harm to endangered sea turtles.

The U.S. State Department certifies countries that require Turtle Excluder Devices (TEDs), countries that are in areas too cold for sea turtles to live, and countries where shrimpers harvest shrimp by turtle-friendly methods, allowing these countries to import wild caught shrimp into the U.S. Shrimp produced via aquaculture are not required to be certified in this manner.

Source: US Allows Shrimp; Blocks Trinidad, Panama Exports; US State Department (January 5, 2005), available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=January&x=20050105165703ebyessedo0.7886164&t=ei/ei-latest.html>

Duties Imposed on Shrimp from Six Countries

The U.S. International Trade Commission (USITC) has decided to impose anti-dumping duties on importers of warm-water noncanned shrimp from Brazil, China, Ecuador, India, Thailand, and Vietnam. The commissioners also agreed to review the cases concerning India and Thailand to determine if the effect of the tsunami justified reopening the investigation.

Dumping margins were imposed on the six countries. Margins for Brazil, Ecuador, Thailand, and India were set at between 2.35 percent and 67.8 percent. Vietnam and China, being non-market economies, were considered separately with the margin being set at 25.76 percent for Vietnam and 112.81 percent for China.

Source: US Duties Imposed on Frozen Shrimp from Six Countries, US State Dept. (January 7, 2005), available at <http://usinfo.state.gov/ei/Archive/2005/Jan/07-302553.html>

Louisiana Supreme Court Sends Second Oyster Suit Back to Appeals

The Louisiana Supreme Court has sent a second oyster lawsuit from St. Bernard Parish back to a state appeals court for determinations consistent with the Plaquemines Parish oyster farmer's case. In the Plaquemines Parish suit, the state Supreme Court dismissed \$1.3 billion in damages for damage caused to oyster leases by state coastal restoration activities. The St. Bernard Parish suit involves a \$661 million dollar judgment, also for damage caused to oyster leases by coastal restoration activities.

Source: La. Supreme Court Pushes Oyster Suit Back to Appeals Court, The Associated Press (January 13, 2005), available at http://www.2theadvocate.com/stories/011205/new_lascoysters001.shtml

State of Louisiana and Corps of Engineers Sign Coastal Restoration Agreement

Governor Blanco has signed an agreement with the Corps of Engineers that calls for them to work together to restore coastal Louisiana. The signing of the agreement coincides with the completion of a ten-year, \$1.9 billion Louisiana Coastal Area Ecosystem Study.

The study sets the cost to repair the entire coast at \$14 billion. The study also includes a ten-

year, \$1.9 billion plan that contains five major restoration projects. These projects include saving the Maurepas Swamp by channeling water into the swamp from the Mississippi River, planting marsh grass and building back beaches to restore the Caminada headlands, stemming erosion caused by the Mississippi Gulf River Outlet, building up the Barataria basin by diverting water from the Mississippi and placing dredged materials in the area, and diverting water from the Mississippi into Bayou Lafourche.

Governor Blanco is looking to Washington, D.C. for federal funding of these projects. She is also working to form a coalition with the governors of other oil-producing states to petition the federal government for more offshore oil and gas revenue.

Sources: *Coastal Deal Signed*, The Advocate (February 1, 2005), available at http://2theadvocate.com/stories/020105/pol_coastal001.shtml
Blanco, Corps to Sign Final Coastal Plan, The Advocate (January 27, 2005), available at http://2theadvocate.com/stories/012705/new_blancocoastal001.shtml

National Coastal Condition II Report Released

The Environmental Protection Agency (EPA) has released a second National Coast Condition Report. The report rates for the overall condition of U.S. coastal waters range from good to poor. The report was prepared through a joint effort of NOAA, the U.S. Geological Survey (USGS), the U.S. Fish and Wildlife Service (USFWS), and the coastal states.

The report indicated that the Gulf Coast estuaries were in fair condition overall, with 20% being in good ecological condition. Of the remaining Gulf Coast estuaries 39% were labeled as "threatened," 35% were classified as "impaired," and 14% showed indications of impaired human use.

Source: *The National Coast Condition Report II*, EPA (2005), available at <http://epa.gov/owow/oceans/nccr/2005/index.html>

State Receives Funds to Repair Oyster Reefs

The Louisiana Department of Wildlife and Fisheries will receive a \$1.4 million grant to study and repair damage done to oyster reefs by Hurricane Ivan. The National Oceanic and Atmospheric Association grant will be used to fund the Oyster Resource Improvement Project and will also be used to survey the public oyster seed grounds east of the Mississippi River. Alabama, Mississippi, and Florida all received similar grants

Source: *State Gets \$1.4 million in Grant to Repair Oyster Reefs*, The Advocate (February 7, 2005).

Corps of Engineers Requests \$8.3 Billion for River Upgrade

The Army Corps of Engineers requested \$8.3 billion to build new locks and improve ecosystems on the Mississippi River. Ecosystem restoration, which includes preservation of wetlands, is estimated to cost \$5.6 billion. The remaining \$2.6 billion is slated to be used to create new locks on the Mississippi River. Congress has yet to approve the funds requested.

Source: Christopher Doering, *Army Corps Proposes \$8.3 Billion for Upgrade of Rivers*, Reuters (December 17, 2004) available at http://www.enn.com/ch_water.html?id=63

Red Tide Algae Lurks in Gulf Coast

A 400-square mile bloom of red algae has caused a massive fish kill and the deaths of several dolphins near the Florida Keys National Marine Sanctuary. Red tide is caused by the presence of algae that produces a toxin that harms the central nervous system. The toxin can be transmitted to humans through the consumption of shellfish. In humans, the toxin causes tingling in the mouth and fingers, loss of coordination, hot and cold flashes, and diarrhea. The bloom appears to be headed southward away from the coastline.

Source: Red Tide Algae Lurks in Gulf Coast, Associated Press (December 8, 2004), available at http://www.enn.com/ch_water.html?id=58

New Reef Found off Florida Coast

Researchers from the U.S. Geological Survey have confirmed that a reef found in approximately 250 feet of water off the Florida coast is the deepest living reef found in the U.S. The reef is three miles wide and runs for about twenty miles. Reefs depend on light filtering down from the surface, which makes a reef in this deep of water unusual. This reef has adapted to the low light conditions by growing horizontally across the ocean floor instead of vertical, toward the water's surface like most reefs. Scientists are currently researching on how to best preserve the reef.

Source: Deepest Reef Found off Florida Coast, Associated Press (January 3, 2005), available at http://www.enn.com/ch_water.html?id=77

New LNG Terminal Proposed for the Gulf Coast

ConocoPhillips has proposed to build a Liquefied Natural Gas (LNG) terminal in the Gulf of Mexico. The company is seeking permission to build the LNG terminal 56 miles off the Louisiana coast. The project is estimated to cost about \$30 million, with an additional \$48 million needed to build four tugboats. It is estimated that the facility could provide 1.5 billion cubic feet of gas daily.

The project could lower natural gas prices in Louisiana, aiding petrochemical companies. However, commercial fishermen worry that the company's suggested heating process to return the natural gas from a liquid to gaseous state, known as an open loop system, could kill eggs, plankton, and other microorganisms that could get sucked into the heating mechanism. The water discharged from the system also could pose a threat to the ecosystem, as the discharged water would be about 15 degrees cooler than the surrounding water.

There is an alternative system that could be used, known as a closed loop system, that purportedly would have less impact on the coastal ecosystem. This system currently has the support of NOAA, but the natural gas industry considers it cost-prohibitive and believes fish losses from the open loop system would be minimal.

Sources: Gulf Liquefied Natural Gas Terminal Proposed, The Advocate (February 1, 2005) Gulf Council Opposes the Use of Open Loop LNG Systems in the Gulf of Mexico, Gulf Fishery News Vol. 26 No. 2 (March-June 2004) (a publication of the Gulf of Mexico Fisheries Management Council).

Older, Bigger Groundfish May be Key to Restoring Fishery Stocks

Researchers from Oregon State University have discovered that bigger, older groundfish not only produce more eggs than their younger and leaner counterparts, but also produce higher quality

eggs. Eggs produced by these older fish have much larger oil globules in their yolk allowing the larvae that they produce to avoid starvation longer and to grow faster than larvae produced by younger fish.

This new research, coupled with other research showing that fish stocks do not migrate as far as once thought, underscores the importance of Marine Protected Areas (MPAs). It is postulated that if MPAs were plentiful and properly located, old fish living within those reserves would be able to help replenish nearby fisheries. Researchers claim that "[MPA's] offer some benefits that frankly cannot be found with any other management plan."

Source: *Big, Old Fish Key to Restoring Groundfish Stocks*, Oregon State University (January 18, 2005), available at <http://oregonstate.edu/dept/ncs/newsarch/2005/Jan05/bigfish.htm>

Tsunami May Have Damaged Coral Reefs

While the exact damage caused to coral reefs by the tsunami is unknown, scientists from the National Marine Fisheries Service (NMFS) speculate that many reefs were damaged, and could perhaps take years to recover. The reefs would have been first damaged by the large amount of energy as the wave initially crashed into shore, but it is speculated that the brunt of the damage caused to the reef occurred when the wave swept back into the ocean carrying tons of debris including silt, plastic, and other chemicals. The silt and sludge is capable of burying the reef, suffocating it. While the sludge may be eventually washed away, plastics will exist for years. Chemicals swept out to sea could further damage the reefs by causing disease. The destruction to the reefs could be devastating to the coastal communities that depend on the sea for food as the reefs support an ecologically rich environment for fishing.

Source: Paul Recer, *Experts Fear Coral Reefs May Have Been Severely Damaged by Tsunami*, Reuters (January 7, 2005), available at <http://www.enn.com/today.html?id=6888>

Bush Administration Proposes Tsunami Alert System

The Bush administration has proposed expansion of the nation's tsunami alert system to include the East Coast and the Caribbean. The plan is proposed to cost \$37.5 million over two years. Although eighty-five percent of tsunamis occur in the Pacific Ocean, officials say that the system should be expanded regardless of the reduced risk due to the potentially devastating affects.

Source: Andrew Freedman, *Admin Proposes East Coast and Caribbean Tsunami Alert*, Greenwire (January 14, 2005), available at <http://www.eenews.net/Greenwire/include/print.php?single=01140508>.

States Sue Federal Government over Global Warming

Eleven states are preparing to sue the EPA to determine whether the Clean Air Act (CAA) requires federal regulation of carbon dioxide emissions. In recent years, states such as California and those in the Northeast have enacted legislation to reduce greenhouse emissions. Much of this legislation has resulted in lawsuits currently pending, challenging whether states can force automakers and electric utilities to reduce carbon dioxide emissions.

Source: Brian Stempeck, *States Prepare for Global Warming Lawsuits*, Greenwire (January 14, 2005), available at <http://www.eenews.net/Greenwire/include/print.php?single=01141509>

Federal Register Notices

EPA Approves Revisions to the LPDES Program

The Environmental Protection Agency (EPA) has approved Louisiana's revisions to the Louisiana Pollution Discharge Elimination System (LPDES) Program. The LPDES program is a state-administered National Pollution Discharge Elimination (NPDES) Program created by the CWA.

Several citizen groups had petitioned the EPA to remove the Louisiana Department of Environmental Quality's (LDEQ) authorization to administer the program. In response to this petition, the EPA delineated seven new performance measures that the LDEQ will be required to undertake. A memorandum of agreement has been signed by the LDEQ and the EPA agreeing to the revisions of the LPDES program.

Source: Approval of Revisions to Louisiana Pollution Discharge Elimination System Program, 70 Fed. Reg. 810 (January 5, 2005).

Documents relating to the revisions may be found at:
<http://www.epa.gov/Arkansas/6xa/lpdes-program.htm>

NMFS to Prepare New Criteria for the "Taking" of Marine Mammals

The National Marine Fisheries Service (NMFS) has announced that it will prepare new guidelines to determine what constitutes a "taking" of a marine mammal under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA) as a result of exposure to anthropogenic noise. NMFS has been using generic sound exposure thresholds since 1997 to determine when an activity produces enough noise to cause an "acoustic take." An acoustic take occurs when noise is loud enough to harass or kill a marine mammal. The NMFS plans to base these new harassment guidelines on exposure characteristics derived from empirical data and tailored to particular species groups and sound types.

Source: Notice of Public Scoping and Intent to Prepare an Environmental Impact Statement; Request for Written Comments, 70 Fed. Reg. 1871 (January 11, 2005).

Executive Orders

Federal

President Creates Committee on Ocean Policy

On December 17, 2004, President Bush signed Executive Order No. 13366, creating a cabinet level committee on ocean policy. This committee will coordinate the activities of the executive departments and facilitate coordination between federal, state, tribal, local and foreign governments on ocean-related matters.

This committee was formed in response to the report of the Ocean Commission, which found "federal oversight too fractured to protect ocean ecosystems." Environmentalists are excited, yet critical about the creation of the committee. While they are pleased about the creation of the new committee, they argue that it will not be enough to solve current environmental problems.

The administration also has stated that it will propose new legislation to reauthorize the Magnuson-Stevens Fishery Conservation and Management Act, the Coastal Zone Management Act, and the MMPA.

Source: Executive Order 13366; Committee on Ocean Policy, 69 Fed. Reg. 76589 (December 21, 2004).

Andrew Freedman, *White House Proposals Garner Mixed Response from Advocates*, Greenwire (December 21, 2004).

The Ocean Commission Report and supporting documents, including the White House's response, can be found at <http://www.oceancommission.gov>.

State

Governor Continues Maritime Advisory Task Force

On December 9, 2004, Governor Blanco signed an executive order authorizing the continuation of the Maritime Advisory Task Force. The duties of the task force include recommending legislation and economic development programs, determining a means to enhance Louisiana's maritime industry's competitiveness, evaluating maritime safety concerns, and developing a five year ports plan for economic development.

Source: Exec. Order No. KBB 2004-55 (December 9, 2004), *available at* <http://gov.louisiana.gov/2004Executiveorders/55MaritimeAdvTF.pdf>

Websites of Interest

Aquaculture Network

<http://www.aquantic.org/>

This website provides access to aquaculture information on both a national and international level. It includes links to thousands of aquaculture-related sites, a job posting service, industry calendars, news stories, and species-specific information. This website is a joint effort of Sea Grant, the USDA, Purdue University and Auburn University.

United Nations Division for Ocean Affairs and the Law of the Sea

<http://www.un.org/Depts/los/index.htm>

This website contains the text of the United Nations Convention on the Law of the Sea and related documents including a database of maritime legislation. The website also contains procedures for the settlement of disputes related to the ocean.

NOAA Tsunamis Page

<http://www.noaa.gov/tsunamis.html>

This website explains how tsunamis are created and why they are so destructive. The page also contains links to information about the International tsunami center and the advanced warning system among links to many other sites.