



Louisiana Sea Grant Legal Program

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Recent Court Cases

***Washington County, North Carolina v. U.S. Department of the Navy* , 357 F.Supp.2d 861 (2005)**

The Navy planned to construct a new Outlying Landing Field (OLF) in two North Carolina counties to support the operation and training of new aircraft and future military operational needs. However, plaintiffs Washington County, National Audubon Society, North Carolina Wildlife Federation and Defenders of Wildlife argued the Navy inadequately analyzed the impacts of the proposed OLF on lakes and waterfowl in its Environmental Impact Statement in violation of the National Environmental Policy Act (NEPA) and sought both summary judgment and a permanent injunction against construction of the OLF. The court granted summary judgment for plaintiffs and held that: (1) the Navy inadequately analyzed impacts on lakes and waterfowl; (2) the Navy failed to address cumulative impacts; (3) the Navy improperly utilized reverse engineering; and (4) the Navy fulfilled its notification obligations under the Coastal Zone Management Act. The court also issued a permanent injunction against the Navy until a proper NEPA assessment is completed. The rationale behind the court's holding was that analysis was made in a season when the birds were not present, thus improperly representing its impact on the birds, in addition to failing to address cumulative impacts on the environment.

***Northwest Environmental Advocates v. U.S. E.P.A.* , 2005 WL 756614 (N.D.Cal. 2005)**

The Clean Water Act (CWA) prohibits any discharge of pollutants from ships into navigable waters without the proper regulation and permits. Exceptions were carved into the CWA to allow for the unregulated discharge of pollutants if the discharge is incidental to the normal operation of the as the unloading of ballast water from a ship. Problems may arise when ships carry foreign invasive species naturally in the water from one area to another port area, where when the ballast water was released, so were the foreign biological species. In this case, plaintiffs requested EPA to rescind its exclusion of ballast water from NPDES requirements and repeal 40 C.F.R. 122.3(a) because it conflicts with the CWA and does not exempt discharges "incidental to the normal operation of a vessel from the requirement to obtain a NPDES permit." EPA denied the petition.

Plaintiffs then filed a complaint requesting (1) a declaration from the court that EPA's failure to rescind this regulation violated the CWA and (2) an injunction directing the agency to repeal and rescind 40 C.F.R. 122.3(a). The plaintiffs two claims were that: (1) EPA's promulgation of 40 C.F.R. 122.3(a) is inconsistent with EPA's statutory authority in the CWA and thus unlawful and subject to review under the Administrative Procedure Act, and (2) EPA's denial of plaintiffs' petition was arbitrary and capricious. The court held that EPA did exceed its statutory authority under the CWA by exempting ballast water, which may contain aquatic nuisance species, rust, sediment, and other debris, from the NPDES permit program and ordered EPA to repeal 40

C.F.R. 122.3(a). The court's rationale was that ballast water discharges are pollutants introduced into navigable waters from point sources, i.e, vessels, and, therefore, cannot be exempted from regulation under the NPDES program. The court went on to state the CWA demonstrates Congress' clear intent to require NPDES permits before discharging pollutants into the nation's navigable waters, and that Congress' failure to revise or repeal 40 C.F.R. 122.3(a) was not persuasive evidence that Congress intended EPA's interpretation of the CWA exempting discharges "incidental to the normal operation of a vessel" from the NPDES program.

In the News

Codifying NOAA

The National Oceanic and Atmospheric Administration (NOAA) functions as a centralized organization for environmental science and technology development created by the initiative of President Johnson. NOAA was created by Executive Order in 1970 and has since operated without a Congressional mandate. A bill to officially codify NOAA, H.R. 50, was introduced by Environment Subcommittee Chairman Vernon Ehlers (R-Michigan) earlier this year. The bill would officially codify NOAA as an agency, keeping it in the Department of Commerce, headed by an undersecretary. The bill would also establish a deputy assistant secretary for science and technology. The bill would also mandate that NOAA be reorganized around four themes: the National Weather Service, research and education, operations and service, education and the application of science.

The text of H.R. 50 can be obtained via search at <http://thomas.loc.gov/>.

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Resources of the Gulf of Mexico

The National Marine Fisheries Service (NMFS) announced the availability of Amendment 24 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico prepared by the Gulf of Mexico Fishery Management Council. A moratorium on the issuance of new commercial reef fish permits was established in 1992 under Amendment 4 to the Reef Fish Management Plan to evaluate and develop comprehensive, controlled access for the commercial reef fishery. The moratorium was extended through 1995 pursuant to Amendment 9 and then to December 31, 2000 pursuant to Amendment 11 to provide additional time to implement a limited access system to the reef fish fishery. NMFS then implemented Amendment 17 in August 2000 to extend the moratorium for another five years, from its previous expiration date of December 31, 2000 to December 31, 2005 or until replaced with a license limitation, limited access and/or individual fishing quota or transferable quota system.

If implemented, Amendment 24 would establish a limited access system for the Gulf of Mexico commercial reef fish fishery. The intended effect of the amendment is to support the Gulf of Mexico Fishery Management Council's efforts to achieve optimum yield in the fishery, and provide social and economic benefits associated with maintaining stability in the fishery. NMFS has received a proposed rule that would implement Amendment 24 from the Council and is evaluating it to determine whether it is consistent with the FMP, the Magnuson-Stevens Fishery Conservation and Management Act and other applicable law.

The text of Amendment 24 can be obtained at 70 Fed. Reg. 17401-01 (to be codified at 50 C.F.R. Part 622).

Quota Placed On Sharks For Fishers

Dealing with Atlantic highly migratory species for the purpose of commercial shark management, this regulation establishes seasonal quotas for large and small coastal, pelagic, blue, and porbeagle sharks. The seasonal quotas begin on May 1, and last until December 31.

Source: *Wildlife and Fisheries*, 50 C.F.R. § 635.27 (2005)

U.S. Supreme Court Refuses To Hear \$1.3 Billion Oyster Appeal

The United States Supreme Court refused to hear the petition of *Avenal v. State of Louisiana*, the case where oyster farmers sought \$1.3 billion in damages due to the state ruining thousands of acres of oyster beds during a coastal restoration project. In 2004, the Louisiana Supreme Court reversed the 2000 settlement of \$1.3 billion dollars granted to 130 oystermen, stemming from the 1991 incident and subsequent 1994 lawsuit. The court reversed the settlement because 118 of the 130 oystermen signed leases renouncing legal claims to damage from such projects.

Note: A full analysis of the Louisiana Supreme Court decision of *Avenal* will appear in *Louisiana Coastal Law* Vol. 86.

Source: David Loos, *Supreme Court Refuses To Hear Appeal By La. Oyster Farmers*, *Greenwire* (May 5, 2005).

Survey Scientists Use Land-Mapping

U.S. Geological Survey (USGS) scientists have tracked elevations and sand distribution along the shores of barrier islands in the Gulf of Mexico along the coasts of Alabama and Florida. The USGS scientists worked in conjunction with NASA and the U.S. Army Corps of Engineers using laser-based mapping systems attached to airplanes. The lasers monitor sand movement and displacement, along with which large buildings are washed away in hurricanes. They hope to be able to define the vulnerability of the coast in order to determine where building large buildings is safe, even in the midst of a storm-prone area.

Source: Amy Wold, *Scientists Study Sand Motion Along Gulf Coast*, *The Advocate* (Baton Rouge), March 26, 2005.

Praise for Restoration of Barrier Island Under Budget

The Timbalier Island Dune and Marsh Restoration project, which was funded through the federal Coastal Wetland and Restoration Task Force, came in approximately \$3.5 million under budget. The project was approved in 2000, but construction was delayed to address land rights issues and due to tropical storms. The barrier island is located off the coast of Terrebonne Parish and was rebuilt with almost 3 million cubic yards of sand, including a 300-foot front beach, a 400-foot wide by 8-foot high ridge, and a descending "back marsh" platform. Approximately 23,000 feet of sand fencing had been installed, as well as barrier island vegetation planted. Sand used to rebuild the island came from about 3 miles away, and since the sand was good quality, dredgers did not have to dredge as much sand as planned. Those involved in the project have been praised for their leadership and Patricia Taylor, a project manager with EPA considers the project "a poster child for some of the barrier island restoration work."

Source: Amy Wold, *La. Island Restoration Praised*, *The Advocate* (Baton Rouge), March 21, 2005 available at http://www.theadvocate.com/stories/032605/new_coast001.shtml.

Southern Co. Looks Off Georgia Coast For Energy Alternative

The Georgia Institute of Technology and Southern Co. announced its intention to engage in a joint study regarding the feasibility of offshore wind power near Savannah. If research shows the wind power to be viable, Southern Co. plans to construct between three and five offshore turbines perhaps far enough offshore that they would not be visible from the state's barrier islands, which are popular tourist destinations. According to Southern Co. and the university, the turbines would be capable of producing 10 megawatts of electricity, which the company and university speculate would be enough to power 2,500 homes. The cost is estimated to be less than \$2,000 per kilowatt of energy produced. The project is slated to begin in July with a design and conceptual engineering phase, followed by an analysis of various platform sites and early-stage environmental permitting. If wind power is deemed to be a viable energy source in the tests, Southern Co. hopes to build the offshore turbines within two years.

Source: Daniel Cusick, *Southern Co. To Pursue Project Off Georgia's Coast*, Greenwire (May 24, 2005).

U.S. International Trade Commission to Review Punitive Tax

The U.S. International Trade Commission (ITC) is to review the decision about a punitive tax on shrimp from India and Thailand. The ITC plans to conduct "changed circumstances reviews" in order to determine revoking the tariff on frozen shrimp from countries devastated by the December 2004 tsunami would hurt American shrimpers. Imports from India are down 54%, and imports from Thailand dropped 27%. However, it is still unclear how much of the decrease can be attributed to the tsunami and how much is related to the tariff, even though 88,000 shrimp boats and 200,000 nets in India were destroyed due to the tsunami. Before the tsunami hit, the ITC decided that American shrimpers were injured by unfair trade, triggering punitive tariffs on Brazil, China, Ecuador, India, Thailand, and Vietnam. Only India and Thailand's tariffs are subject to review.

Source: Nora Koch, *Changed Circumstances: Tsunami prompts review of new tariff on shrimp*, St. Petersburg Times, April 26, 2005, at 1D.

Legislator Attempts To "Navigate" Through Clean Water Act

Senator Russ Feingold (D-Wisconsin) introduced legislation that environmentalists claim would restore the "original intent" of the Clean Water Act (CWA). If passed, the bill would remove the word "navigable" from the text of the act. The term is often used as evidence that the intent of Congress when it passed the CWA was for the law to apply only to large water bodies suitable for navigation, thus limiting the scope of clean water protections. Opponents of the bill argue the inclusion of "navigable" in the text of the CWA prevents the federal government from overreaching its regulatory authority over the nation's waters, while the bill's supporters argue that Congress originally intended to provide broader clean water protections. The bill also would override a 2001 U.S. Supreme Court decision that deemed isolated wetlands outside the scope of federal wetlands regulations under the Clean Water Act, *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

Source: Tasha Eichenseher, *Feingold Attempts To Cut "Navigable" From Clean Water Act*, Environment and Energy Daily (April 28, 2005).

U.S. Will Only Import Shrimp From Turtle-Safe Shrimpers

Public Law 101-162 Section 609 prohibits the import of shrimp from “any foreign nation that fails to adopt a shrimp harvesting program to prevent the accidental drowning of endangered sea turtles.” Thirty-seven countries and Hong Kong have been cleared to sell shrimp to U.S. businesses by using at least one of various turtle protection techniques, e.g., they save sea turtles or do not fish for shrimp in sea turtle habitat. Thirteen nations satisfy the certification by using trawls fitted with sea turtle excluder devices in their commercial boats. The thirteen nations are Belize, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Pakistan, Suriname and Venezuela. Hong Kong and seven nations retrieve their nets by hand as opposed to mechanically, and thus pose no threat to the turtles. The seven nations are the Bahamas, China, the Dominican Republic, Fiji, Jamaica, Oman, Peru and Sri Lanka. Sixteen nations pose a negligible risk of harm to turtles due to their fisheries being located in cold water. The sixteen nations are Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, Britain and Uruguay. Imports of shrimp would be prohibited from all other nations unless their shrimp are harvested via aquaculture, in cold-water regions unlikely to be inhabited by sea turtles or via specialized fishing methods that do not threaten sea turtles.

Source: Associated Press, *U.S. Says 37 Countries Satisfy Sea Turtle Rules, Can Sell Shrimp in U.S.* (May 5, 2005).

National Park Service in Mississippi Fights Over Mineral Rights

Senator Thad Cochran (R-Miss) added a provision to the 2005 appropriations bill that would permit the National Park Service in Mississippi to use directional drilling for exploration and production from under the Gulf Islands National Seashore, as well as seismic testing. Mississippi granted the islands to the Park Service in the 1970's, but the Clinton Presidential Administration ruled in 1999 that Mississippi did not keep the mineral rights to the islands. The language added in the provision would award the mineral rights of the Mississippi barrier islands to the state of Mississippi, thus creating the potential for drilling under the seashore. Representatives of the Sierra Club in Mississippi say the language has the potential to harm the seashore for short-term gains in oil or gas production. Opposition says the drilling equipment would damage the aesthetics of the coast. Drilling could also cause the barrier islands to subside, and the state would lose an important hurricane buffer.

Sources: Dan Berman, *Supplemental Could Allow Drilling In Miss. National Seashore*, Environment and Energy Daily (April 12, 2005).

Daniel Cusick, *Miss. Officials Ready To Tap National Seashore*, Environment and Energy Daily (May 2, 2005).

Dan Berman, *Senate Sends \$82B Supplemental To The White House*, Environment and Energy Daily (May 11, 2005).

Invasive Species Pose Problems

Invasive species are becoming more and more of an issue in the United States. The U.S. Department of the Interior estimates \$100 billion in ecological and economic damage annually on account of the myriad invasive species. President Clinton created the National Invasive Species Council (NISC) in 2000 by Executive Order. Since its formation, the NISC has grown to involve 25 federal laws, 300 federal programs, 40 agencies, and 175 organizations, all of them working to curb the problems that arise from invasive species in the United States. The NISC's most challenging task is preventing the entry of new invasive species into the country. Addressing the

problem after the new species are established is more difficult and expensive than preventing their original entry. One challenge facing the NISC is fund allocation. Federal agencies will spend an estimated \$1.2 billion combating invasive species, the bulk of the funding goes to combating the high-profile non-native species. What constitutes an invasive species is also at issue in the NISC. Some groups think that government should not indiscriminately target “non-native” or “invasive” species, but should only concern itself with harmful, non-native species.

Source: Allison A, Freeman, *At Five-Year Mark, Council Calls Pathways to the Next Big Challenge*, Land Letter (May 19, 2005).

National Park Plans to Eliminate Deer

A draft plan for Point Reyes National Seashore calls for the eradication fallow and axis deer, popular with tourists, from the park by 2020 by sterilizing approximately 25% of the population and killing the rest. Fallow deer are originally from Asia Minor and the Mediterranean; axis deer are from India. Both species breed year-round, can live in grasslands, and weigh up to 200 pounds. Point Reyes scientists view the deer as invasive species that threaten native deer and elk. The invasive deer consume excessive vegetation, hurt agriculture, and possibly spread disease. In the 1940s, about thirty-five fallow and axis deer were introduced into the area, purchased from the San Francisco Zoo for hunting before the region became a national park in 1962. Today, there are now more than 1,000 in the 71,000-acre park. The fallow deer population of 850 is increasing by 11% yearly, and the axis population of 250 increases by 20% each year.

This idea has prompted debate among wildlife biologists, animal activists, environmentalists, and ranchers. Though cognizant of the emotional impact of the proposed plan, supporters claim that eradicating the two deer populations is necessary to protect the biological diversity of the ecosystem. However, the plan's opponents question whether the deer are truly a threat to the local ecosystem and call the idea of killing animals because they are nonnative “cruel.” Sterilization costs close to \$3000 per animal compared to \$300 to shoot them. Under the park's eradication proposal, the cost would be around \$4.5 million, with the meat from the killed animals donated to charities.

Source: Terence Chea, *Plan to Wipe Out Exotic Deer Sparks Debate*, The Associated Press, March 28, 2005.

Liquid Natural Gas Terminal Updates

The gas industry wants the Federal government to be responsible for determining liquefied natural gas (LNG) siting for the entire United States instead of each state controlling its own waters. Language placed fairly surreptitiously in the omnibus spending bill passed in November of 2004 stated the Federal Energy Regulatory Commission (FERC) has sole authority over siting of LNG import facilities. The California Public Utilities Commission is suing the Federal Energy Regulatory Commission to determine who has siting power.

Louisiana is facing the dilemma of accepting a potentially hazardous process that would strengthen the economy, and possibly create more jobs, protecting its environment while hindering economic development and expansion, or convincing private, profit-driven corporations to exchange profit potential to protect the interests of a state when the company has the option of forgoing the problems altogether and taking its business elsewhere.

David Dismukes of the Center for Energy Studies at Louisiana State University says LNG is becoming a larger part of the nation's fuel mix. Dismukes says Louisiana will lose jobs related to the building and operation related to the terminals if those terminals are build elsewhere. He

also says LNG will become cheaper, and if plants in Louisiana cannot get cheaper gas, they will become less competitive. He estimates the permanent workforce to be 1,600 jobs if the 15 projected LNG terminals are approved and built.

Environmental activists are asking the 5th circuit to review the permit issued for Shell's Gulf Coast Landing LNG port under the Deepwater Port Act. The Sierra Club, Gulf Restoration Network, and Louisiana Charter Boat Association, along with commercial fishermen have joined together to form the "Gumbo Alliance," whose lawsuit is being filed by the Tulane Environmental Law Clinic. The alliance is not sure if the court will consider their petition, but if it does, they will allege the U.S. Department of Transportation failed to abide by environmental, clean water, and environmental species law when it approved the permit February 26, 2005.

Note: An article regarding the regulatory procedure for obtaining a permit to construct and operate a liquefied gas terminal will appear in *Louisiana Coastal Law* Vol. 86.

Sources:

Cain Burdeau, *Environmentalists, Fishermen Seek to Stall LNG Port*, The Advocate (Baton Rouge), April 15, 2005 available at http://www.2theadvocate.com/stories/041505/new_lng001.shtml.

John Laplante, *LSU Expert: La. Needs to Import More LNG*, The Advocate (Baton Rouge), May 20, 2005 available at http://www.2theadvocate.com/stories/052002/pol_lnglaplante001.shtml.

Daniel Cusick, *Enviro Appeal Could Snarl Gulf of Mexico Projects*, Greenwire (May 17, 2005).

Mary O'Driscoll, *Industry Sees Gloomy Outlook If States Regulate Terminals*, Greenwire (March 31, 2005).

Website of Interest

National Hurricane Center Tropical Prediction Center

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

This website gives information on all hurricanes and tropical storms threatening areas surrounding the United States and provides satellite imagery as well as a U.S. weather radar. The site features sections that teach hurricane preparedness techniques. The site also includes an explanation of the Saffir-Simpson hurricane rating scale, as well as a history of hurricanes in the United States, tracking charts, and storm updates.