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Marine Protected Areas and Louisiana Fishermen

By Mindy Heidel

Recently, there has been confusion over the many overlapping federal and Louisiana fishing regulations, especially as these regulations pertain to Marine Protected Areas (MPAs). The purpose of this article is to clarify the different types of MPAs, the differing levels of protection afforded to them, and the specific fishing regulations for MPAs in and around Louisiana. This article will first discuss some of the controversies surrounding MPAs. Then, the general types of MPAs will be examined, followed by a discussion of the general levels of protection afforded to MPAs. Finally, specific regulations pertaining to MPAs in and around Louisiana will be considered.

Controversies Surrounding the Concept of Marine Protected Areas

Two controversies surrounding MPAs are: (1) defining the concept of MPAs and (2) measuring their success. On May 26, 2000, President Bill Clinton signed Executive Order (EO) 13158, which expanded and strengthened the nation's system of MPAs. The EO defines an MPA 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 to part or all of the natural or cultural resources therein." EO 13158 further defines marine environment as "those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands thereunder, over which the United States exercises jurisdiction, consistent with international law." Despite the definitions provided in EO 13158, there has been confusion over what sites should be characterized as MPAs.

Due to the confusion over the definition of "marine protected areas" and the many different levels of protection afforded to them, the term has become controversial both politically and scientifically. For the purposes of this article, sites were labeled as MPAs based on the definition in EO 13158. It should be noted that criteria for designating MPAs at the state level may vary. Therefore, states may not characterize some of the sites mentioned in this article as MPAs, but may characterize some sites that are not mentioned as MPAs.

In an effort to clear up some of this confusion, the Department of Commerce's National MPA Center is conducting a National Marine Managed Area (MMA) inventory. An MMA is a managed area in the marine environment that might indirectly, partially or for a limited duration provide some degree of natural resource or cultural resource protection. The criteria for classifying a site as an MMA is broader than those for classifying an area as an MPA and, therefore, would include all MPAs as well as other areas. Once the MMA inventory is complete, the National MPA Center plans to compose a list of MPAs from the sites included in that inventory.

The second controversy surrounding MPAs is how to measure their success. While most empirical studies to date have shown that MPAs are successful at protecting habitats and fish populations, the studies themselves have flaws. There is usually little, if any, preprotection data available, so it is difficult to show the

effects of increased protection on the environmental attribute being studied. It is also difficult to compare the protected area to unprotected control sites, as protected sites are usually chosen for their biologically rich, if not unique, habitat. Therefore, a true experimental "control" site is hard to find. Adding to this difficulty is that sites adjacent to an MPA, which likely would be the most biologically similar to the MPA before it was designated, are unsuitable controls sites because of "spillover" effects from the MPA.

Types of Marine Protected Areas

In the United States, MPAs include National Marine Sanctuaries, Marine Reserves, National Estuary Programs, National Seashores, National Wildlife Refuges, National Estuarine Research Reserves, state conservation areas, state reserves, and many others.

National Marine Sanctuaries are established under the authority of the National Marine Sanctuaries Act of 1972 (NMSA). The NMSA authorizes the Secretary of Commerce to designate and manage areas of the marine environment with special national significance due to their conservation, recreational, ecological,

Contents

Marine Protected Areas 1
Analysis of Antidumping
Petition 7
South Florida Water Mgmt. District v. Miccosukee Tribe of Indians .. 10
Clean Marina Program 12
Legislation for Creation of LAIS and Advisory Task Force 13
Atty. General Opinions 15-16



historical, scientific, cultural, archeological, educational or esthetic qualities as National Marine Sanctuaries.¹⁰ Currently, there are thirteen National Marine Sanctuaries in the United States.¹¹

Marine Reserves, specifically designated areas in which restrictions are applied to protect an aspect of the marine ecosystem, are established under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (FCMA).¹² One of the main goals of Marine Reserves is to improve the health of marine ecosystems by protecting biodiversity and habitat. The FMCA enables the Regional Fishery Management Councils (which operate under NOAA Fisheries), including the Gulf of Mexico Fishery Management Council, to designate zones and periods within reserves when fishing is limited or not permitted in order to prevent overfishing.¹³ The authority of Fishery Management Councils to establish marine reserves should not be confused with their authority to establish "take" limits on specific species in the regions they manage.

The National Estuary Program was established in an amendment to the Clean Water Act in 1987.¹⁴ National Estuary Programs are created to identify, restore and protect nationally significant estuaries in the United States.¹⁵ The twenty-eight National Estuary Programs are partnerships between the Environmental Protection Agency and the states in which they are located.¹⁶ The programs form cooperatives between federal, state and local governments, citizen's groups, schools and businesses. The programs formulate goals and priorities for their estuaries and then establish and implement Comprehensive Conservation Management Plans to meet those goals.

National Seashores are individually designated by Congress and administered through the National Park Service, a division of the Department of the Interior.¹⁷ National Seashores vary from untouched wilderness to highly developed areas. These areas are

designated to preserve for public use outstanding natural, cultural and recreational areas. Currently, there are ten National Seashores, which are located on the Gulf, Pacific, and Atlantic coasts.¹⁸ The National Park Service places limits and prohibitions on activities at National Seashores and gives the superintendents who manage these areas the authority to establish a system of permits and to regulate government and public use.¹⁹

National Wildlife Refuges are designated under the National Wildlife Refuge System Administration Act of 1966.²⁰ There are National Wildlife Refuges that antedate the Act, however. President Theodore Roosevelt established the United States' first National Wildlife Refuge by Executive Order in 1903: Pelican Island in Florida. Many other National Wildlife Refuges were designated initially by Executive Order as well. These areas are primarily dedicated to fish and wildlife conservation, but other uses such as research, education and hunting are allowed if they are compatible with the primary goals of a particular refuge.

The National Estuarine Research Reserve (NERR) system was established under the Coastal Zone Management Act.²¹ Currently, there are twenty-six NERRs nationwide that protect sites for long-term research, water quality monitoring and education.²² The NERR system is unique in that it is a federal-state partnership between the National Oceanic and Atmospheric Administration and the state in which the NERR is located. NERRs also educate the local community on coastal resource management issues, including nonpoint source pollution, habitat restoration and invasive species.

State conservation areas and reserves differ from state to state. In Louisiana, there are two general types of state conservation areas that can be classified as MPAs: wildlife management areas and wildlife refuges. The major distinction between them is that hunting is allowed in most wildlife management areas, but is not allowed in most wildlife refuges. These areas are

created either by individual Acts of the Louisiana Legislature or under the authority of La. R.S. 56:109, which allows the Louisiana Department of Wildlife and Fisheries to establish these types of protected areas.

Levels of Protection

The level of protection afforded to different MPAs varies from area to area, increasing the confusion surrounding fishing regulations. The National MPA Center has identified six levels of protection for MPAs: No Access, No Impact, Uniform Multiple Use, Zoned Multiple Use, No-Take, and Zoned with No-Take.²³

No Access MPAs prohibit all human access unless special permits are obtained. Permits may be obtained for research, wildlife monitoring and restoration.²⁴ These areas are very rare in the United States, except as part of larger protected areas.

No Impact MPAs allow access to the areas, but prohibit activities that could damage or harm the MPAs in any way.²⁵ Fishing is not allowed in these areas. No Impact MPAs are rare in the United States, except as small research-only areas within larger MPAs.²⁶

Uniform Multiple Use MPAs apply consistent levels of protection and allowable activities across the entire protected area, which include certain extractive uses.³³ This type of MPA is common in the United States and is typical of many National Marine Sanctuaries and National and State Parks.³⁴

Zoned Multiple Use MPAs allocate specific uses at specific times within areas of the MPA to best protect marine resources and to reduce conflict between multiple user groups.³² This type of MPA is common in the United States. Many National Marine Sanctuaries, National Parks, National Wildlife Refuges and state-managed MPAs have this level of protection.

No-Take MPAs allow access and potentially harmful uses of the areas, but do not allow the extraction of natural or cultural resources.²⁷ This type of MPA is rare in the United States, but does occur in some state-managed areas and in some federal areas that are closed for fisheries management or protection of endangered species or as small No-Take zones within Multiple Use MPAs.²⁸ No-Take MPAs are found in other parts of the world as well. Australia has the largest No-Take area in the world at the Great Barrier Reef Marine Park. It is a Multiple Use MPA with a network of No-Take zones that covers 115,000 square kilometers.²⁹ The Marine Park also is the world's largest MPA, with an area that spans 344,000 square kilometers.³⁰

Multiple Use MPAs using marine zoning are known as Zoned with No-Take areas. This type of MPA may include "one or more no-take areas where all extraction is prohibited to manage a range of human activities by allocating specific uses to compatible places or times in order to reduce user conflicts and adverse impacts" while providing protection that exceeds that of surrounding waters.³¹ Therefore, fishing and other potentially damaging human uses are allowed in parts of the MPA, but not in others. This type of MPA is common in the United States. Many National Marine Sanctuaries, National Wildlife Refuges and state-managed MPAs have this level of protection.

Marine Protected Areas In and Around Louisiana

Louisiana has many of the general types of MPAs discussed earlier in this article. Louisiana has numerous state-managed and federally-managed wildlife refuges and state-managed wildlife management areas. Louisiana also has a National Estuary Program, but there is no National Marine Sanctuary, Marine Reserve, National Seashore or National Estuarine Research Reserve in the state. However, these types of MPAs border Louisiana waters and affect boats moored in Louisiana that may travel out of state waters. For this reason, several MPAs that border Louisiana also will be discussed.

Currently, there are nine National Wildlife Refuges located in Louisiana that can be characterized as MPAs, based on the definition in EO 13158. Generally, commercial fishing is not allowed in these areas. Recreational fishing is allowed, but times, places and methods are regulated. Shrimping, crawfishing and crabbing are allowed in some of these areas subject to refuge-specific regulations. A chart listing each National Wildlife Refuge, their locations and an overview of their fishing regulations follows this article.

Coastal Louisiana is home to seven state-managed wildlife management areas, three wildlife refuges and one barrier island refuge that can be characterized as MPAs. Commercial fishing is allowed in some parts of these areas. Recreational fishing, crawfishing, crabbing and frogging are allowed in most wildlife management areas³⁵ and wildlife refuges, although some do not allow these activities. A chart listing each of these sites, their locations and an overview of their fishing regulations follows this article.

The only National Estuary Program in Louisiana is the Barataria-Terrebonne National Estuary Program.³⁶ This program operates under a Comprehensive Conservation Management Plan.³⁷ This plan identifies priority problems specific to the estuary and lays out fifty-one smaller plans to solve these problems.

Since the National Estuary Program includes the entire Barataria and Terrebonne basins, the level of protection afforded to different areas in the National Estuary Program is diverse. Some of the land is private and thus afforded no real additional protection. Other areas in the estuary, such as Mandalay, Pointe aux Chenes, Salvador, Timken and Wisner Wildlife Management Areas, have greater levels of regulation and protection. See the chart following this article for the specific fishing regulations applicable to each of these areas.

Although Louisiana has no National Marine Sanctuary, the Flower Garden Banks National Marine Sanctuary is located in federal waters

approximately 105 miles south of the Louisiana/Texas border. The Flower Garden Banks are the northern most coral reefs in the United States, providing habitat for many Gulf of Mexico species. In order to protect Flower Garden Banks National Marine Sanctuary, only conventional hook and line fishing is allowed.³⁸ Also, no anchoring is allowed, and mooring is allowed only in designated areas by boats of less than one hundred feet in length.³⁹

Louisiana does not have a National Seashore, but Gulf Islands National Seashore is located close to Louisiana waters. Gulf Islands, the nation's largest National Seashore, is a string of islands located off the coast of Mississippi just past the Louisiana/Mississippi border and extending into Florida waters. Fishing generally is permitted, but not in some areas. The use of spears, gigs, spear guns and similar devices are forbidden in some areas.⁴⁰

Many types of MPAs protect Louisiana's coastal heritage. While these different types of MPAs produce an abundance of fishing regulations, it is important to understand and follow each one of them in order to protect Louisiana's marine fisheries stock. More information about MPAs in the Gulf of Mexico region can be found in the book Marine Protected Areas in the Gulf of Mexico: A Survey, which was written as a joint project between the Louisiana and Mississippi-Alabama Sea Grant Legal Programs. An electronic version of the book is available at the Louisiana Sea Grant Legal Program's website at <http://www.lsu.edu/slegal/publications%20folder/MPA.pdf>.

¹ To read EO 13158 in its entirety, visit <http://www.mpa.gov>.

² National Marine Protected Areas Center, Marine Protected Areas of the United States, available at <http://www.mpa.gov/glossary.html#m> (accessed April 13, 2004). This site also includes the criteria for classifying an area as an MMA.

³ See National Marine Protected Areas Center, About the Inventory of Sites, available at http://www.mpa.gov/inventory/about_inventory.html, for a

discussion about why an MMA inventory is being composed rather than an MPA inventory (accessed April 13, 2004).

⁴ Fiona Gel and Callum Roberts, *MPA Perspective Difficulties in Studying Marine Reserves*, *MPA News* (December 2003), available at <http://depts.washington.edu/mpanews/MPA48.htm> (accessed April 8, 2004).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See National Marine Protected Areas Center, Information and Tools Archives, available at http://www.mpa.gov/information_tools/archives/what_is_mpa.html#operational (accessed April, 14 2004).

⁹ 16 U.S.C. 1431. See also 15 C.F.R. 922 for a list of regulations enacted under the NMSA.

¹⁰ National Oceanic and Atmospheric Association (NOAA), Legislation Page, available at <http://www.sanctuaries.nos.noaa.gov/natprogram/nplegislation/nplegislationact.htm> (accessed April 13, 2004).

¹¹ See NOAA, National Marine Sanctuaries Page, available at <http://www.sanctuaries.nos.noaa.gov/> (accessed April 13, 2004).

¹² 16 U.S.C. 1801 et seq.

¹³ 16 U.S.C. 1851.

¹⁴ 33 U.S.C. 1330.

¹⁵ See Environmental Protection Agency, National Estuary Program Page, available at <http://www.epa.gov/owow/estuaries/> (accessed April 13, 2004).

¹⁶ For more information on all twenty-eight National Estuary Programs, please visit <http://www.epa.gov/owow/estuaries/find.htm>.

¹⁷ See National Park Service, Parks and Recreation Guide, available at <http://www.nps.gov/parks.html> (accessed April 13, 2004).

¹⁸ Visit the National Park Service's web site for information on specific National Seashores at <http://data2.itc.nps.gov/parksearch/topicsearch.cfm>.

¹⁹ 36 C.F.R. Part 7 contains regulations pertaining to National Seashores.

²⁰ 16 U.S.C. 668dd et seq.

²¹ 16 U.S.C. 1461.

²² See NOAA, National Estuarine Research Reserve System Overview, available at http://nerrs.noaa.gov/Background_Overview.html (accessed April 13, 2004). See also NOAA, National Estuarine Research Reserve System: Map of the Reserves, available at <http://nerrs.noaa.gov/Reserves.html>, for a list of all reserves in the NERR system.

²³ See National Marine Protected Areas Center, MPA Classification System, available at http://mpa.gov/what_is_an_mpa/sup_terminology.html (accessed April 13, 2004).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Australian Parliament Passes Re-Zoning Bill for Great Barrier Reef, *Creating World's Largest Reserve System*, *MPA News* (May 2004), available at <http://depts.washington.edu/mpanews/MPA52.htm> (accessed May 3, 2004).

³⁰ *Id.*

³¹ National Marine Protected Areas Center, *supra* note 23.

³² *Id.*

³³ NOAA, *supra* note 22.

³⁴ *Id.*

³⁵ LAC 7:XIX.111.

³⁶ For more information, visit <http://www.btneq.org>.

³⁷ Barataria-Terrebonne National Estuary Program, Comprehensive Conservation Plan, available at http://www.btneq.org/client_files/editor_files/CCMP.pdf (accessed April 7, 2004).

³⁸ 15 C.F.R. 922.122.

³⁹ *Id.*

⁴⁰ See National Park Service, Superintendent's Compendium Gulf Islands National Seashore, available at <http://data2.itc.nps.gov/parks/guis/ppdocuments/compendium.pdf> (accessed April 13, 2004).

National Wildlife Refuge Fishing Regulations

| Name | Type | Location | Fishing Regulations |
|------------------------------------------|--------------------------|----------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Bayou Sauvage National Wildlife Refuge | National Wildlife Refuge | Northeast of New Orleans on the southeast bank of Lake Ponchartrain near Slidell | Fishing is permitted during daylight hours only. Sport fishing and shellfishing are permitted year round on all refuge lands south of the Intracoastal Waterway; from the banks of U.S. Highway 11 and within the banks of the borrow canal and borrow pits between U.S. Highway 11 and Interstate 10. Only sport fishing with hand-held rod and reel or hand-held rod and line is permitted. Gait shrimp may be taken with cast nets 8 feet in diameter or less. Crawfish and crabs can be taken (up to 100 pounds per person) with wire nets up to 20 inches in diameter. All fishing, crabbing and crawfishing equipment must be attended at all times. The use of trotlines, limblines, slat traps, gar sets, nets or alligator lines is prohibited on the refuge. 50 CFR 32.37. |
| Breton National Wildlife Refuge | National Wildlife Refuge | Southeast coast of Louisiana in St. Bernard and Plaquemine parishes | Anglers may fish year-round. Crabbers must tend crabbing equipment at all times. Anglers may not use trotlines, slat traps or nets. 50 CFR 32.37. |
| Cameron Prairie National Wildlife Refuge | National Wildlife Refuge | 25 miles southeast of Lake Charles in Cameron parish | Fishing with rod and reel is allowed in designated areas in the refuge. All other types of fishing gear are prohibited. Crabs may be taken in designated areas with the use of hand lines or drop nets. Drop nets up to 24" outside diameter may be used. All hand lines, dropnets, and bait must be removed from the refuge upon leaving. Cast netting is allowed from sunrise to sunset. Cast nets must have less than a 5' hanging radius. Cast netting for bait is allowed for personal use only. The daily crab limit is 60 per vehicle or boat, and the shrimp limit is five gallons of heads-on shrimp per vehicle or boat. No alligators, frogs, turtles, snakes or crawfish may be taken or possessed in the refuge. U.S. Fish and Wildlife Service, Cameron Prairie National Wildlife Refuge Fishing Regulations, available at http://cameronprairie.fws.gov (accessed April 13, 2004). |

National Wildlife Refuge Fishing Regulations (Cont'd)

| | | | |
|------------------------------------|--------------------------|-------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Delta National Wildlife Refuge | National Wildlife Refuge | Mouth of the Mississippi River near Venice | Recreational fishing and crabbing are permitted only from sunrise to sunset. The use of trotlines, limblines, slat traps, gar sets, nets or alligator lines is prohibited. 50 CFR 32.37. |
| Lacassine National Wildlife Refuge | National Wildlife Refuge | Cameron and Evangline parishes, off of the northwest bank of Grand Lake | Lacassine Bayou, Streeters Canal between the Mermentau River and Lacassine Bayou and the Intracoastal Waterway are not subject to special refuge regulations and are only regulated by state law. Boat and bank fishing and crawfishing are allowed March 15 through October 15 in the refuge. Fishing is prohibited in the headquarters display pond. Only fishing rod and reel and pole and line are allowed in refuge waters. All other gear are prohibited. Crawfishing is permitted in designated areas and may be done with drop nets or hand lines only. There is a 100-pound daily vehicle limit for crawfish. U.S. Fish and Wildlife Service, Lacassine National Wildlife Refuge Fishing Regulations, available at http://lacassine.fws.gov (accessed April 13, 2004). |
| Mandalay National Wildlife Refuge | National Wildlife Refuge | 5 miles southwest of Houma | Commercial fishing is not allowed. Recreational fishing is allowed from sunrise to sunset year-round. Recreational crabbing is allowed. The use of nets, traps and unattended lines is not allowed. U.S. Fish and Wildlife Service, Mandalay National Wildlife Refuge Hunting and Fishing Regulations Brochure, available at http://southeast.fws.gov/mandalay/ (accessed April 13, 2004). |
| Sabine National Wildlife Refuge | National Wildlife Refuge | 8 miles south of Hackberry in Cameron parish | Commercial fishing is not allowed. Recreational fishing with rod and reel, pole and line, or jug line is permitted. The possession of any other gear in the refuge is prohibited. Casting for shrimp requires a special permit and is only permitted from noon until sunset during the Louisiana Inland Water shrimp season. A maximum of 5 gallons of heads-on shrimp may be taken per boat per day. The daily crab limit is 5 dozen per boat. No alligators, turtles, frogs, snakes or crawfish may be taken or possessed within the refuge. Fishing and public access is permitted March 15 through October 15 except for bank fishing along Highway 27, which is permitted year around. Motorized boats are not allowed in some areas. U.S. Fish and Wildlife Service, Sabine National Wildlife Refuge Fishing Regulations, available at http://sabine.fws.gov (accessed April 13, 2004). |
| Shell Keys | National Wildlife Refuge | 20 miles south of New Iberia | The refuge is normally completely underwater. |

State MPA Fishing Regulations

| Name | Type | Location | Fishing Regulations |
|------------------------------|-----------------------|------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Marsh Island Wildlife Refuge | State Wildlife Refuge | Vermilion Bay and the Gulf of Mexico | Commercial fishing is not allowed. Trawling on the refuge is prohibited. The use of trotlines, gill nets, jug lines, trammel, traps and commercial fishing gear are prohibited. Twenty-five pounds of shrimp per boat per day may be harvested for sport fishing or home consumption during the open season. During the closed season, 10 pounds of shrimp per day may be harvested for bait purposes. Only cast nets may be used to harvest shrimp. One hundred pounds of crawfish per day may be harvested from open areas. Set nets may be used, but must be removed daily. Twelve dozen crabs per boat may be harvested per day. One gallon of oysters per day may be harvested by tonging (must have license) or by hand collection from natural reefs. The shells must be returned to the reef, and the area must be approved by the Department of Health and Hospitals. LAC 76:III.310. |
| Rockefeller Wildlife Refuge | State Wildlife Refuge | Eastern Cameron and western Vermilion parishes | Commercial fishing is not allowed. Trawling on the refuge is prohibited. The use of trotlines, gill nets, jug lines, trammel, traps and commercial fishing gear are prohibited. Twenty-five pounds of shrimp per boat per day may be harvested for sport fishing or home consumption during the open season. During the closed season, 10 pounds of shrimp per day may be harvested for bait purposes. Only cast nets may be used to harvest shrimp. One hundred pounds of crawfish per day may be harvested from open areas. Set nets may be used, but must be removed daily. Twelve dozen crabs per boat may be harvested per day. One gallon of oysters per day may be harvested by tonging (must have license) or by hand collection from natural reefs. The shells must be returned to the reef and the area must be approved by the Department of Health and Hospitals. LAC 76:III.309. |

State MPA Fishing Regulations (Cont'd)

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|--------------------------------------------|--------------------------|---------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| State Wildlife Refuge | State Wildlife Refuge | Southwestern shore of Vermilion Bay | Commercial fishing is not allowed. Trawling on the refuge is prohibited. The use of trotlines, gill nets, jug lines, trammel, traps and commercial fishing gear are prohibited. Twenty-five pounds of shrimp per boat per day may be harvested for sport fishing or home consumption during the open season. During the closed season, 10 pounds of shrimp per day may be harvested for bait purposes. Only cast nets may be used to harvest shrimp. One hundred pounds of crawfish per day may be harvested from open areas. Set nets may be used, but must be removed daily. Twelve dozen crabs per boat may be harvested per day. One gallon of oysters per day may be harvested by tonging (must have license) or by hand collection from natural reefs. The shells must be returned to the reef and the area must be approved by the Department of Health and Hospitals. LAC 76:III.323. |
| Atachafalya Delta Wildlife Management Area | Wildlife Management Area | Mouth of the Atchafalya River | Commercial fishing is allowed. LAC 76:XIX.111. |
| Biloxi Wildlife Management Area | Wildlife Management Area | 40 miles east of New Orleans in St. Bernard parish | Same as general outside fishing regulations (as per Land Manager Dave Swallow). |
| Pass a Loutre Wildlife Management Area | Wildlife Management Area | Plaquemines parish | Oyster Harvesting is prohibited. Commercial fishing is allowed, but mullet may only be harvested in designated areas. LAC 76:XIX.111. |
| Pointe Aux Chenes Wildlife Management Area | Wildlife Management Area | Terrebonne and LaFourche parishes | Commercial fishing is only allowed in Cut Off Canal and Wonder Lake. Shrimp may only be taken for recreational purposes with cast nets. Harvest of shrimp is limited to 25 pounds during the open season and 10 pounds during the closed season. Oyster harvesting is prohibited. Fish may be taken for recreational purposes with rod and reel or hand lines only. Crabs may be taken with hand lines or nets and each boat is limited to 12 dozen a day. Crawfish may be taken in some areas with a limit of 100 pounds per boat per day. Crawfish and crab gear may not be left set overnight. LAC 76:XIX.111. |
| Salvador Wildlife Management Area | Wildlife Management Area | Near New Orleans in St. Charles parish | Commercial fishing is prohibited. Shrimp may only be taken for recreational purposes with cast nets. Harvest of shrimp is limited to 25 pounds during the open season and 10 pounds during the closed season. Oyster harvesting is prohibited. Fish may be taken for recreational purposes with rod and reel or hand lines only. Crabs may be taken with hand lines or nets and each boat is limited to 12 dozen per day. Crawfish may be taken in some areas with a limit of 100 pounds per boat per day. Crawfish and crab gear may not be left set overnight. LAC 76:XIX.111. |
| Timken Wildlife Management Area | Wildlife Management Area | Near New Orleans in St. Charles parish | Commercial fishing is prohibited. Shrimp may only be taken for recreational purposes with cast nets. Harvest of shrimp is limited to 25 pounds during the open season and 10 pounds during the closed season. Oyster harvesting is prohibited. Fish may be taken for recreational purposes with rod and reel or hand lines only. Crabs may be taken with hand lines or nets and each boat is limited to 12 dozen per day. Crawfish may be taken in some areas with a limit of 100 pounds per boat per day. Crawfish and crab gear may not be left set overnight. LAC 76:XIX.111. |
| Wisner Wildlife Management Area | Wildlife Management Area | LaFourche parish, 12 miles south of Leeville | Same as general outside fishing regulations (as per Land Manager Dave Swallow). |
| Isles Dernieres Barrier Islands Refuge | Barrier Islands Refuge | Coastal Louisiana, 100 kilometers from the mouth of the Mississippi River | Public access to the exposed land, except for a designated public use area on Trinity Island is prohibited. Boat traffic is allowed in the open waters of the Gulf and bays, but is not allowed in waterways extending to the interior of the islands or within any open landlocked waters in the islands except for California Canal in Trinity Island. Fishing from boats around the islands and wade fishing in the surf is allowed. LAC 76:III.331. |

Analysis of the Southern Shrimp Alliance's Antidumping Petition By Carolyn Dupuy

Louisiana boasts the United States' second largest fishing industry, supplying 26% of the nation's fish and shellfish.¹ In addition, Louisiana harvests approximately 40% of U.S. shrimp.² Shrimp prices reached an all time high in 2000, but since then prices have plummeted despite the fact that shrimp is a popular seafood in the U.S. Shrimp harvesters and producers believe that the cause of this drastic price reduction is an influx of inexpensive, imported frozen and warm water shrimp from six Asian and South American nations.³ To combat this influx of imported shrimp, the Southern Shrimp Alliance (SSA), a coalition of shrimpers and producers, recently filed an antidumping petition with the Department of Commerce (DOC). The U.S. Import Administration (USIA) is the division of the DOC that determines dumping. If the petition is successful, then the DOC will impose penalties on the offending countries.⁴

Despite the increasing popularity of shrimp in the U.S., most people who work in the shrimp industry have watched their livelihood become increasingly threatened. In 2000, the U.S. shrimp harvest was valued at \$1.25 billion, but by 2002 it had decreased 50% to \$560 million. Dockside prices for shrimp dropped from \$6.08 per pound to \$3.30 per pound.⁵ Employment levels of shrimp processors decreased by 40% during the same time.⁶ The wholesale value of shrimp is the lowest in forty years, yet the average price for shrimp entrees consumers pay at restaurants is up 28%.⁷ Shrimpers are currently operating at a net loss of \$0.32 per pound. There is also a growing safety concern because fishermen are seeking to lower their expenses by reducing expenditures on insurance, repairs and fishing gear.⁸ Based on this economic evidence and the declining prices, the shrimp industry decided to take action against six countries allegedly dumping shrimp onto the U.S. market. The purpose of

this article is to explain the procedural and substantive requirements the SSA must satisfy to successfully assert an antidumping claim.

To assert an antidumping claim, an industry must file a petition with the DOC. This petition must be signed by a significant percentage of the industry, the traded good at issue must be priced below its normal value and must materially injure a U.S. industry, threaten to injure a U.S. industry or retard the establishment of a U.S. industry.⁹ The USIA first determines if the petition is sufficient and if dumping has occurred. Once it has made this determination, the USIA sets the dumping margin. The dumping margin is the difference between the price of the product in the country of origin and the price of the product in the U.S. or the difference between the cost of production plus a reasonable profit minus the selling price in the U.S.¹⁰ If the USIA determines that dumping has occurred, then the U.S. International Trade Commission (USITC), an independent, nonpartisan, quasi-judicial federal agency determines if the domestic industry experienced material injury.¹¹

Initiation of antidumping proceedings may be done by petition. An interested party, as defined by 19 U.S.C. 1677(9)(C-G), must file a petition with the DOC that alleges the elements necessary under 19 U.S.C. 1673, along with evidence supporting these allegations. The petition must show that a class or kind of foreign merchandise is being sold in the U.S. at less than fair market value, and that the industry is materially injured or threatened with material injury.¹² Once the petition is filed, the DOC must notify all governments named in the petition.¹³ Within twenty (20) days of the filing, the DOC must examine the "adequacy and accuracy" of the petition and determine whether it alleges the elements necessary for

imposition of a duty and determine whether it has, in fact, been filed by or on behalf of the industry.¹⁴ Under 19 U.S.C. 1673a(4)(A), the DOC must make a determination to ensure that a significant percentage of the industry supports the petition.

In 2002, SSA was formed. The nonprofit coalition is comprised of shrimp harvesters and producers from eight states: Louisiana, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi and Texas.¹⁵ After weighing their possible legal options, the SSA filed an antidumping petition with the DOC. The SSA hired the Washington, D.C. law firm of Dewey Ballantine to handle the procedure.¹⁶ The petition alleges that the shrimp industry was injured and continues to be materially injured by imports from Brazil, China, Ecuador, India, Thailand and Vietnam.¹⁷ The Mexican shrimp industry also has supported the filing of the antidumping petition.

The SSA filed its petition under 19 U.S.C. 1672, et al., which is the statutory incorporation of the Less Than Fair Trade Value (LTFV) portion of the Trade Act of 1930.¹⁸ In this regard, the SSA followed the lead of the crawfish industry, which filed a similar, successful petition in 1997.¹⁹ The SSA also could have proceeded under Section 201 of the Trade Act of 1974,²⁰ but this was considered too risky of a proposition because the president of the United States ultimately has veto power. Under the LTFV, an industry may allege that foreign producers are "dumping" their products onto the U.S. market. Dumping is defined as the sale of goods in an importing nation (in this case, the U.S.) at a price below their "normal value"²¹ (i.e., the product is sold for less than its cost of production or for less than the sale price in the country of origin).²²

To show that dumping has occurred, the SSA must first satisfy certain threshold issues. First, the petition must show that the U.S. product is a "domestic like product" to the imported product.²³ This is done on a case-by-case basis. The USIA considers the physical characteristics and uses, interchangeability, channels of distribution, customer and producer perceptions of the product, common manufacturing facilities, production processes, production employees and price. For trade purposes, there is no significant difference between the species of warm water shrimp in the U.S. and the Asian and South American countries listed in the petition. Based on these factors, no dividing line exists within the spectrum of domestically manufactured frozen and canned warm water shrimp.²⁴

Next, the SSA petition must show that imports from the six countries named in the petition may be cumulated because they compete with each other and the domestic like product.²⁵ The four factors considered in this determination are: 1) degree of fungibility between imports from different countries and the domestic product, 2) the presence of sales in the same geographic markets, 3) the existence of common or similar channels of distribution, and 4) whether the imports are simultaneously present in the market.²⁶ Also, impacts from each country must not be negligible, which means that each must not account for less than 3% of the volume of such merchandise imported into the U.S. in the most recent twelve-month period that preceded the filing of the petition or the initiation of the investigation, if the investigation was initiated.²⁷ According to the SSA petition, the named countries together account for 74% of all shrimp imported into the U.S.²⁸ This large influx of shrimp imports is in part caused by overproduction in the importing countries, often encouraged and subsidized by their governments. Import tariffs, controls and occasional bans on shrimp imports by the European Union (EU) have also contributed to this influx. The U.S.

currently places no tariffs on imported shrimp, and imported shrimp are sometimes low quality because they have been rejected under the strict guidelines on EU imports.²⁹

After the threshold issues have been satisfied, the SSA petition must show material injury or threat of material injury.³⁰ The USITC determines material injury or threat of material injury. The antidumping provisions define material injury as "harm which is not inconsequential, immaterial or unimportant."³¹ In making this determination, the USITC considers: 1) the volume of imports of subject merchandise, 2) the effect of imports on prices in the U.S. for domestic like products, and 3) the impact of imports on domestic producers of domestic like products, but only in the context of production operations within the U.S.³² The USITC must examine the impact of subject imports by evaluating all relevant economic factors which bear on the state of the industry in the U.S. within the context of the business cycle and conditions of competition "distinctive to the affected industry."³³

To meet this burden, the SSA identified relevant conditions of the domestic shrimp industry. First, shrimp are sold by count size such that price is the only basis for competition between shrimp. Also, the domestic warm water shrimp harvest is very healthy. The demand for warm water shrimp is limited to the U.S., EU and Japan. The adverse impacts of the imports have spread very quickly through the market, which is indicative of dumping. Also, all of the domestic industry has been affected by imports. Overall consumption of shrimp has increased dramatically while costs have declined. The product mix of imports has also changed dramatically in the last decade. While imports from the six named countries have increased, all other imports have decreased.³⁴

The USITC must examine the effects of the imports by evaluating relevant economic factors, which bear on the state of the industry.³⁵ This requires the USITC to identify all of the relevant conditions of competition. In the case of warm water shrimp, price is the only relevant economic factor.³⁶ The USITC must then collect price data relevant to the industry.³⁷ In this case, evidence related to domestic price is easily accessible, but determining the "normal value" of the product may prove more difficult. None of the importing countries has a domestic market for warm water shrimp. Also, China, one of the named countries, supplies relatively little economic data. This may work to the shrimp industry's advantage because the USITC will have to devise its own formula for determining the "normal price." This worked to the advantage of the crawfish industry in their antidumping petition. The formula devised in that case was favorable to the crawfish industry.³⁸

Finally, the USITC must evaluate whether imports have a significant adverse effect on domestic producers, not the industry as a whole.³⁹ The factors considered are: 1) actual and potential decline in output, sales, market share, profits, productivity, return on investment and utilization of capacity, 2) factors affecting domestic prices, 3) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital and investment, 4) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a more advanced version of the domestic product and 5) the magnitude of the margin of dumping.⁴⁰ In addition to the economic data already discussed, the petition cites that, for producers, production fell 16.8% from 2000 to 2002. Also, the petition states that capacity utilization fell from 68.3% to 58.5% and the operating income ratio fell from 1.73% to negative .03%.⁴¹

On February 17, 2004, the DOC and USITC stated that there is a reasonable indication that the shrimp industry has been materially injured by shrimp imports from Brazil, China, Ecuador, India, Thailand and Vietnam.⁴² The two agencies will now launch a full-scale investigation. All investigative activities will continue. The director of the investigation will circulate a draft questionnaire so that any party may comment.⁴³ A final ruling is expected by June 7, 2004.⁴⁴ If it is found that dumping is occurring, the agencies may impose duties on imports. These duties are represented as a percentage of the selling price and are enforced to bring the price of the imports in line with the price of the domestic product.⁴⁵

As mentioned earlier in this article, the SSA petition is not the first antidumping petition filed by members of the U.S. fishing industry. On September 20, 1996, the Crawfish Processor's Alliance filed a similar antidumping petition against crawfish imports from China. The crawfish industry succeeded in proving that dumping was occurring, and on September 15, 1997, duties were approved on imported crawfish for the next five years. Due to poor weather conditions from 1997-2002, however, the crawfish harvests were poor, and the industry still has not had time to recover. To date, there is not enough evidence to determine whether the duties have actually helped the crawfish industry. Under the final determination, crawfish harvesters and producers received proceeds from the tariff under the Continued Dumping Subsidy Offset Act of 2000, also known as the Byrd Amendment.⁴⁶ However, the Byrd Amendment is no longer applicable to dumping cases. The World Trade Organization recently found that this remedy was an unfair trade practice because it allowed U.S. industries to experience a double benefit by receiving the tariff and then a subsidy.⁴⁷ The only remedy for the shrimp industry would be the equalization of prices; they would not receive these extra funds.⁴⁸

The shrimp industry also may likely encounter the same enforcement problems as the crawfish industry. The full effects of the duties have still not yet been felt because large stockpiles of goods from offending companies had amassed in the U.S. The companies are also involved in tariff avoidance actions such as repackaging of products. The USITC is responsible for policing these activities, and violators often slip through. The industries, which file the petitions, are not able to support the policing of these activities. The USITC also has had to enforce higher duties and cash deposit requirement for the importation of crawfish because the old companies simply disbanded and formed new ones to avoid the duties.⁴⁹

Overall, the shrimp industry has a chance of success in obtaining duties on imported warm water shrimp. The petition contains solid economic data as well as convincing anecdotal evidence from those involved in the shrimp industry. It is also beneficial to the industry that the laws are broad and do not require concerted action between the accused countries.⁵⁰ Both agencies filed preliminary rulings in favor of the shrimping industry. Dumping is found in 80% of all cases filed and in 60% of those cases harm is certified, meaning a duty is imposed.⁵¹ Most trade experts agree that the industry has a good chance of winning.⁵² In the meantime, the SSA is developing a quality certification program and a marketing campaign in an effort to secure the U.S. market.⁵³

While the industry awaits the final determination, the shrimp industry struggles to stay afloat. Also, since the filing of the petition, a rift has formed within the industry. The Louisiana Shrimp Association (LSA) is at odds with the SSA. In a March 12, 2004 letter, the SSA asked the DOC to consider only canned and frozen shrimp for tariff protection. This would exclude fresh shrimp, and, therefore, shrimp fishermen who can't freeze shrimp on their freezerless boats. The LSA responded by asking the USITC for clarification, and they confirmed that fresh shrimp

would be included. Some Louisiana shrimpers are worried they may be excluded, just as catfish and crawfish fishermen were excluded from remedies under similar petitions. The LSA is even considering seeking state funds to file its own anti-dumping petition.⁵⁴ Only time will tell if the duties will be imposed, and, if so, whether or not those duties are the answer to the industry's problems.

¹ Louisiana Economic Development, Louisiana Overview, available at <http://www.lded.state.la.us/overview/> (accessed March 30, 2004).

² Cain Burdeau, *Louisiana Fishermen Hope for Shrimp Tariffs*, THE ASSOCIATED PRESS, July 29, 2003.

³ Southern Shrimp Alliance, About Us, available at http://www.shrimppalliance.com/about_us.htm (accessed March 30, 2004).

⁴ *Id.*

⁵ Southern Shrimp Alliance, Shrimp Petitions Fact Sheet, available at <http://www.shrimppalliance.com/Press%20Releases/Filing%20Fact%20Sheet.pdf> (accessed March 31, 2004).

⁶ Southern Shrimp Alliance, Petition, available at <http://www.shrimppalliance.com/Press%20Releases/12-31-03%20Petition.pdf> at pg. 35 (accessed March 31, 2004).

⁷ Burdeau, *supra* note 2.

⁸ Southern Shrimp Alliance, *supra* note 6 at pg. 32.

⁹ 19 U.S.C. 1673 (1).

¹⁰ Agreement on the Implementation of Article VI of the General Agreements on Tariffs and Trade, March 1980, part 1, art. 2, B.I.S.D. 26S/171-188.

¹¹ 19 U.S.C. 1673b.

¹² 19 U.S.C. 1673a(b)(1).

¹³ 19 U.S.C. 1673a(b)(3)(A).

¹⁴ 19 U.S.C. 1673a(c)(1)(A).

¹⁵ Southern Shrimp Alliance, *supra* note 3.

¹⁶ Southern Shrimp Alliance, Current News, available at <http://www.seafood.com/news/current/88206.html> (accessed March 30, 2004).

¹⁷ Southern Shrimp Alliance, *supra* note 6.

¹⁸ *Id.*

¹⁹ The Trade and Environment Database, TED Case Studies: 1997 United States-China Crawfish Trail Meat Dispute, available at <http://www.american.edu/projects/mandala/TED/crawfish.htm>

(accessed March 22, 2004).

²⁰ Section 201 allows domestic industries seriously injured or threatened with serious injury by increased imports to petition the USITC for import relief. 19 U.S.C. 2251.

²¹ 19 U.S.C. 1673.

²² General Agreements on Tariffs and Trade, May 1952, Article VI (3), para. 1, B.I.S.D. I/22-23.

²³ 19 U.S.C. 1677(10).

²⁴ Southern Shrimp Alliance, *supra* note 6 at pg. 5-6.

²⁵ 19 U.S.C. 1677(7)(G)(i).

²⁶ Southern Shrimp Alliance, *supra* note 6.

²⁷ 19 U.S.C. 1677(24)(a)(i).

²⁸ Southern Shrimp Alliance, *supra* note 5.

²⁹ Southern Shrimp Alliance, Initiation of Shrimp Dumping Investigations, available at <http://www.shrimppalliance.com/Press%20Releases/1-21-04%20Initiation.pdf> (accessed March 30, 2004).

³⁰ 19 U.S.C. 1673.

³¹ 19 U.S.C. 1677(7)(A).

³² 19 U.S.C. 1677(7)(B).

³³ 19 U.S.C. 1677(7)(c)(iii).

³⁴ Southern Shrimp Alliance, *supra* note 6 at pg. 25-26.

³⁵ 19 U.S.C. 1677(7)(c)(iii).

³⁶ *Id.*

³⁷ 19 C.F.R. 207.11.

³⁸ American University Trade and Environment Database: The Mandala Projects, TED Case Studies: 1997 United States-China Crawfish Tail Meat Dispute, available at <http://www.american.edu/projects/mandala/TED/crawfish.htm> (accessed March 22, 2004).

³⁹ 19 U.S.C. 1677(7)(c)(iii).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Southern Shrimp Alliance, USITC Preliminary Determination, available at <http://www.shrimppalliance.com/Press%20Releases/ITC%20Prelim.pdf> (accessed March 31, 2004).

⁴³ 19 C.F.R. 207.11

⁴⁴ Southern Shrimp Alliance, *supra* note 16.

⁴⁵ 19 U.S.C. 1673.

⁴⁶ Southern Shrimp Alliance, *supra* note 16.

See also Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 66 F.R. 48546 (Dep't. Treasury Sept. 21, 2001).

⁴⁷ United States Continued Dumping and Subsidy Act of 2000 Report of the Appellate Body, AB 2002-7, Jan. 16, 2003, <http://www.wto.org> (accessed April 16, 2004) (article may be accessed by document search).

⁴⁸ *Id.*

⁴⁹ Southern Shrimp Alliance, *supra* note 16.

⁵⁰ John McQuaid, *Benefit of Law Against Dumping Disputed*, THE TIMES-PICAYUNE, March 14, 2004.

⁵¹ *Id.*

⁵² *Id.*

⁵³ North Carolina Fisheries Association, available at <http://www.ncfish.org/release.asp?id=10> (accessed April 16, 2004).

⁵⁴ Cain Burdeau, *Battle Over Shrimp Trade Action Deepens*, April 1, 2004, available at http://www.2theadvocate.com/stories/040104/new_shrimpbattle001.shtml (accessed April 16, 2004).

South Florida Water Management District v. Miccosukee Tribe of Indians, et al. By Carolyn Dupuy

In March 2004, the U.S. Supreme Court issued a decision in the case of *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.*¹ The lawsuit concerns the pumping of rainwater and runoff from industrial, residential and agricultural areas from a human-made canal into the Everglades. The Miccosukee Tribe (Tribe) alleged that the South Florida Water Management District (District) should be required to obtain a permit under the Clean Water Act (CWA) in order to pump the water. The District, on the other hand, claimed that: 1) no permit is required since they are not adding pollutants to the water, but merely transporting the water containing them, and 2) the canal and the portion of the Everglades at issue are not two distinct bodies of water.²

The Tribe consists of approximately five hundred people who occupy areas near the Everglades in Florida. The State of Florida leases 189,000 acres of the Everglades to the Tribe and has promised to keep that section in its natural state.³ All of the land around

the area that is the source of the dispute was once part of the Everglades. However, in the 1900s, a majority of the land was drained with a series of canals to prevent flooding. The canals proved ineffective, which caused continued flooding in the area and an influx of salt water. In 1948, the Army Corps of Engineers solved this problem by constructing a network of levees, canals, and pumps to protect the area from flooding, conserve water, and facilitate drainage.⁴

This project altered the natural flow of water in the Everglades, but also allowed wetlands to be converted into usable land.⁵ The pump at issue in this case is a part of the Central and Southern Florida Flood Control Project, which has been in operation since 1957.⁶ The pump is part of a three-step process. First, a canal (C-11) collects rainwater and groundwater from surrounding areas. This includes residential, industrial and agricultural areas. Then, the pump station (S-9) moves the collected water from the canal and into a section of undeveloped

wetlands (WCA-3), which are part of the Everglades.⁷ Without this system, the water from the canal would flow back into the surrounding areas and flood populated areas. The water, which is pumped from C-11 and into WCA-3, contains phosphorous that has changed the balance of the ecosystem and stimulated the growth of algae and foreign plants.⁸ The presence and impacts of phosphorous in the water are undisputed by the parties.⁹

In 1998, the Tribe and nonprofit group Friends of the Everglades brought a citizen suit under the CWA, arguing that a federal permit is required to allow S-9 to pump the polluted water into WCA-3. The Tribe sought to enjoin the operation of S-9 and, in turn, the movement of water to WCA-3 from C-11. There are two main issues in this case. First, under the CWA, a National Pollutant Discharge Elimination System (NPDES) permit is required for "discharge of a pollutant" from a "point source."¹⁰ A point source is "any

discernable, defined, discrete conveyance from which pollutants are or may be discharged."¹¹ The Tribe alleged the District should be required to obtain a permit for S-9 because the pump moves phosphorous-laden water from C-11 to WCA-3. The second issue is whether C-11 and WCA-3 are two meaningfully distinct water bodies so that the movement of the water would constitute a "discharge."¹²

The U.S. District Court for the Southern District of Florida granted summary judgment for the plaintiffs. The defendants appealed the District Court's decision to the Eleventh Circuit Court of Appeals, which affirmed the judgment. The case was then appealed to the U.S. Supreme Court.¹³ The Supreme Court affirmed the judgment of the lower court in part, finding that the water moved by the pump was "discharge of a pollutant." However, the case was remanded on the issue of whether or not C-11 and WCA-3 are two distinct water bodies.¹⁴

The court first considered the issue of whether the operation of S-9 constituted discharge of a pollutant. This is important because if it is not considered a discharge of a pollutant, then no permit is required. The District argued that the pump is not a "point source" for pollution, and that a permit is only required when the pollutant originates from the point source and not when pollutants originating elsewhere merely pass through the point source.¹⁵ The test for whether an activity constitutes a point source is whether but for the point source the pollutants would have been added to the receiving body of water.¹⁶ When an activity changes the natural flow of a polluted water body and "causes that water to flow into another distinct body of water into which it would not have otherwise flowed," then that point source is the cause-in-fact of the discharge of pollutants.¹⁷ A point source is by definition a "discernable, defined and discrete conveyance" (emphasis added).¹⁸ This language makes it plain that the

point source need only convey the pollutant, and it is not necessary for the point source to add any pollutants. In fact, examples of point sources listed in the CWA include pipes and ditches. The Supreme Court found that the operation of the pump did constitute "discharge of a pollutant."¹⁹

The second issue is whether C-11 and WCA-3 are two distinct water bodies. The federal government in an amicus curiae brief and the District contend that both water bodies are navigable, and an NPDES permit is only required when a pollutant is added to navigable waters from a nonnavigable source.²⁰ In this case, the polluted water passes unaltered from one navigable water body to another, so the government contends that no permit is required. This approach is known as the "unitary waters" approach, which would not require a permit when "water from one navigable water body is discharged, unaltered, into another navigable water body," even if one water body is highly polluted and the other pristine, and the two would not otherwise mix.²¹ Moreover, the government argued that the activity falls under 33 U.S.C. 1314(f)(2)(F), the local nonpoint source pollution program which governs "pollution resulting from changes in movement, flow or circulation of any navigable waters."²² The court pointed out that this does not exempt the activity from also falling under the NPDES permit system, however. Other NPDES provisions may be read as contrary to the unitary waters approach. The government also suggested that their interpretation is in line with the Environmental Protection Agency's (EPA) position on the issue. However, there are no EPA documents supporting this interpretation, and some evidence suggests the opposite conclusion. Moreover, this interpretation could conflict with some NPDES regulations.²³

The government asked the court to consider the practical consequences of requiring S-9 to operate under a permit. Thousands of new permits

would be required, especially in western states.²⁴ Eleven western states support the government's position because they fear that the permit requirements would lead to large expenses. Fourteen eastern states have expressed support for the Tribe, arguing that denying the permit requirement would undermine existing regulations.²⁵ The government contended that this would raise the costs of water distribution and, therefore, violate the requirement that the CWA not impair states' ability to allocate water.²⁶ The court countered that the CWA also requires states to protect water quality, and that costs could be controlled by issuing general permits to point sources associated with water distribution programs.²⁷ This is the position adopted by Pennsylvania, the only state so far which has interpreted the CWA to apply to navigable water transfers.²⁸

The Supreme Court remanded the case and ordered the lower court to consider the federal government's unitary waters argument. The district court ruled that C-11 and WCA-3 are distinct "because the transfer of water or its contents from C-11 into WCA-3 would not occur naturally."²⁹ The Eleventh Circuit endorsed this view. The Supreme Court found that summary judgment on this issue was inappropriate because factual issues remain unresolved. The unitary waters argument was not presented at the lower court so the Supreme Court felt that it must now be considered.³⁰ Further development of the record is needed to conclude whether C-11 and WCA-3 are meaningfully distinct water bodies.³¹

The case will be reconsidered with the federal government's argument taken into account. No matter the ultimate outcome, the decision in this case will have a significant impact on water districts and future applications of the CWA. If the Tribe prevails, then costs for local water districts could rise significantly due to new permit requirements, but the goals of the CWA may be better served. If the District prevails, some aquatic ecosystems may

be unprotected, including fragile areas such as wetlands.

¹ 124 S.Ct. 1537 (2004).

² *Id.*

³ Coralie Carbon, *Indian Tribe Takes Everglades Fight to the U.S. Supreme Court*, THE ASSOCIATED PRESS, available at http://www.enn.com/news/2004-01-13/s_11989.asp (accessed April 21, 2004).

⁴ *Miccossukee Tribe*, 124 S. Ct. at 1541.

⁵ *Id.*

⁶ *Supra* note 3.

⁷ *Miccossukee Tribe*, 124 S. Ct. at 1537.

⁸ *Id.*

⁹ *Id.* at 1541.

¹⁰ 33 U.S.C. 1342.

¹¹ 33 U.S.C. 1362(14).

¹² *Miccossukee Tribe*, 124 S. Ct. at 1541.

¹³ *Supra* note 3.

¹⁴ *Miccossukee Tribe*, 124 S. Ct. at 1538.

¹⁵ *Id.* at 1542-1543.

¹⁶ *Id.* at 1542.

¹⁷ *Id.* at 1543.

¹⁸ *Supra* note 11.

¹⁹ *Miccossukee Tribe*, 124 S. Ct. at 1543.

²⁰ *Id.* at 1545.

²¹ *Id.* at 1543.

²² 33 U.S.C. 1314(f)(2)(F).

²³ *Miccossukee Tribe*, 124 S. Ct. at 1544.

²⁴ *Id.* at 1546.

²⁵ *Supra* note 3.

²⁶ *Miccossukee Tribe*, 124 S. Ct. at 1545.

²⁷ *Id.*

²⁸ *Id.* at 1546.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1547.

Clean Marina Program Soon in Operation in Louisiana By Marcelle Shreve

Clean water and air are essential to the livelihood of marina owners and operators and essential to the enjoyment of recreational boaters. Unfortunately, some of the routine activities of marina operators and boaters can cause pollution. Some of this pollution is contaminated runoff, called nonpoint source pollution, from surrounding docks, streets, driveways, lawns and even pressure washing a building or recreational vehicle. "Nonpoint source pollution is caused by rainfall or snowmelt moving over and through the ground and carrying natural and human-made pollutants into lakes, rivers, streams, wetlands, estuaries, other coastal waters and ground water."¹ In an effort to reduce and prevent this pollution and protect water quality, the National Oceanic and Atmospheric Administration (NOAA) developed the Clean Marina Initiative. Coastal states may develop a voluntary state-certification program pursuant to the Clean Marina Initiative to offer guidance to marina owners, operators and recreational boaters on environmentally sound best management practices. California, Connecticut, Florida, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, South Carolina, Texas and Virginia already have Clean Marina Programs approved by NOAA. Several other coastal states, including Louisiana, are currently developing their own programs.

Types of Marina/Recreational Boating Pollution

NOAA has determined some of the particular pollutants and adverse effects caused by marina building and usage.² Some of these pollutants and detrimental effects include: low dissolved oxygen levels, metals, oils, bacteria, disruption of sediment and habitat, shoreline modification, pesticides, litter and the introduction of aquatic invasive species.³ Adequate oxygen levels are essential to healthy aquatic life. When untreated sewage or fish waste is dumped into water, it decomposes and reduces dissolved oxygen levels.⁴ Oils and metals, which can be found in gasoline, pesticides and paints, can be poisonous to marine organisms.⁵ High levels of bacteria from boats and marina runoff may risk human health through contact with polluted water or eating shellfish from polluted water.⁶ Dredging and other operations pursuant to building marinas and related facilities can destroy the habitat of aquatic animals and submerged aquatic vegetation.⁷ Boat traffic can make waves that cause shoreline erosion.⁸

Coastal Nonpoint Pollution Control Program

Recognizing the increasing problem of nonpoint source pollution into coastal waters, section 6217 of the Coastal Zone Reauthorization Act Amendments (CZARA) of 1990

required coastal states to reduce polluted runoff into their coastal waters.⁹ The CZARA directed the creation of the Coastal Nonpoint Pollution Control Program, in which coastal states and federal authorities work together to implement procedures to reduce nonpoint source pollution to restore and protect coastal waters.¹⁰ The Coastal Nonpoint Pollution Control Program, administered jointly by NOAA and the Environmental Protection Agency (EPA), establishes mandatory marina management measures for states to reduce polluted runoff from marinas and other sources.¹¹ Section 319 of the Clean Water Act also addresses nonpoint source pollution.¹² This law provides grant money to states working on controlling nonpoint source pollution through their approved programs.¹³ Participation in the voluntary Clean Marina Initiative shows a state's commitment to implementing the marina management measures required by the Coastal Nonpoint Pollution Control Program.¹⁴

Marina Management Measures

The CZARA states that the Coastal Nonpoint Pollution Control Program should offer guidance to states in the best available, economically achievable management practices for nonpoint pollution of coastal waters.¹⁵ State clean marina program managers take the EPA technical guidelines offered and tailor them into combinations of best management practices for the state's particular coastal areas.¹⁶ The

program has fifteen specific guidelines for marinas that fall into two categories: 1) siting and design and 2) marina and boating operation and management. The following should be considered when siting and designing a marina: marina flushing, water quality assessment, habitat assessment, shoreline assessment, shoreline stabilization, storm water runoff management, fueling station design and sewage facility installation.¹⁷ An example of a best management practice for shoreline stabilization is using natural vegetation, wetlands and beaches as a way to arrest shoreline erosion, instead of structural barriers.¹⁸ The Coastal Nonpoint Pollution Control Program management measures for marina operation and maintenance include: solid waste management, fish waste management, liquid material management, petroleum control, boat cleaning, public education, sewage facility maintenance and boat operation.¹⁹

Louisiana's Clean Marina Program

The Louisiana Department of Natural Resources (DNR) has contracted with the Louisiana Sea Grant College Program to develop a clean marina guidebook and checklist for compliance with the state's clean marina program. The Louisiana guidebook adapts the strengths from other established clean

marina program guidebooks, such as Maryland's Clean Marina Guidebook.²⁰ The proposed program will be administered by DNR and will be voluntary for all marina owners and operators and recreational boaters in the state. NOAA has listed several benefits for marina owners and operators voluntarily participating in a state's clean marina program, including: reduced waste disposal costs; reduced legal liabilities; free publicity leading to increased revenue from knowledgeable clients; technical assistance from state coastal water managers; and improving the water quality on which marinas depend.²¹ It is possible that Louisiana's Clean Marina Program will be implemented in 2004.

For more information on the Clean Marina Initiative, best management practices and other technical assistance and links to the current and developing state clean marina programs, please visit <http://cleanmarinas.noaa.gov/welcome.html>.

¹ Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60653-02 (October 23, 2003).

² NOAA Office of Ocean and Coastal Resource Management, Clean Marina Initiative: Marina Pollutants, available at <http://cleanmarinas.noaa.gov/marinapollution.html> (accessed April 13, 2004).

³ National Management Measures to Control Nonpoint Source Pollution from Marinas and Recreational Boating, Section 2. EPA 841-B-01-005. This guidance from EPA can be found online at <http://www.epa.gov/owow/nps/mmsp/index.html> (accessed April 13, 2004).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 16 U.S.C. 1455b.

¹⁰ *Id.*

¹¹ *Id.*

¹² 33 U.S.C. 1329

¹³ 33 U.S.C. 1329 (h).

¹⁴ NOAA Office of Ocean and Coastal Resource Management, Clean Marina Initiative: Welcome, available at <http://cleanmarinas.noaa.gov/welcome.html> (accessed April 13, 2004).

¹⁵ 16 U.S.C. 1455b(g).

¹⁶ *Supra* note 2.

¹⁷ *Id.*

¹⁸ *Supra* note 3, at Section 4.4.

¹⁹ *Id.*

²⁰ Maryland's clean marina guidebook is available online at <http://www.dnr.state.md.us/boating/cleanmarina/cmprogram.html>. Maryland's Clean Marina website is available online at <http://www.dnr.state.md.us/boating/>.

²¹ NOAA Office of Ocean and Coastal Resource Management, Clean Marina Initiative: Welcome, available at <http://cleanmarinas.noaa.gov/welcome.html> (accessed April 16, 2004).

Legislation Submitted for Creation of Louisiana Aquatic Invasive Species Council and Advisory Task Force By Marcelle Shreve

The water hyacinth may conjure tranquil thoughts of Impressionist paintings, and the nutria may be beloved as a baseball mascot or (un)fortunate road kill, but a consortium of people know these species are nonindigenous to Louisiana, and their presence here is invasive to the degree that steps are being taken to control, if not eradicate, them. Whether brought to the state intentionally or accidentally, Louisiana is now "home" to water hyacinth and nutria, as well as over 30 other invasive aquatic plants and

animals from around the world.¹ Louisiana's port systems, subtropical climate and wetlands provide a ready habitat for all kinds of aquatic species to invade and destroy the natural species and habitats of the state. Aquatic invasive species are detrimental not only to Louisiana's invaluable coastal areas, but also to the state's economy and public health.² For example, water hyacinth congests and depletes oxygen levels waterbodies.³ Nutria feed on coastal marsh vegetation, contributing to coastal erosion.⁴ Formosan

termites cause over one billion dollars in damage and treatment costs per year.⁵ Asian tiger mosquitoes are potential transmitters of viruses and diseases harmful to humans and animals.⁶

The December 2002 edition of *Louisiana Coastal Law*⁷ highlighted the creation of the Louisiana Nonindigenous Aquatic Species Advisory Task Force by then-Governor M.J. "Mike" Foster.⁸ Since then, this task force has been developing a

management plan specific to Louisiana to address the issue and set up a framework to address the problems aquatic invasive species cause, including adverse economic, environmental and human health effects. The management plan has been written and may be submitted to the National Aquatic Nuisance Species Task Force by fall 2004.⁹ The task force also has been busy developing the mechanism for implementation of the management plan through an advisory state council.

Representative Wilfred T. Pierre (D-Lafayette) and Senator Gerald J. Theunissen (R-District 25, coastal southwestern Louisiana) have submitted legislation in the current Regular Session of the Louisiana Legislature, H.B. 718 and S.B. 433, which would create the Louisiana Aquatic Invasive Species (LAIS) Council and Louisiana Aquatic Invasive Species Advisory Task Force. The LAIS Council, with the assistance of Advisory Task Force, would increase communication and cooperation among state agencies, industry, academia, private property owners and other stakeholders, with the Louisiana Department of Wildlife and Fisheries (DWF) as the lead agency. Members of the LAIS Council would include the following members or their designees: the Governor; the Secretaries of DWE, Department of Natural Resources, Department of Environmental Quality, Department of Transportation and Development, Department of Health and Hospitals, and Department of Culture, Recreation and Tourism; the Commissioner of Agriculture and the State Superintendent of Education. The LAIS Council would meet at least once per quarter.

The LAIS Council, with the help of the Advisory Task Force, would implement the state management plan; coordinate all statewide efforts to control, prevent or eliminate aquatic invasive species; identify funding sources available for the implementation of the state management plan; and submit a report to the legislature every two years on the status of the implementation of the state management plan. The

LAIS Council would develop policies to achieve the following goals of the state management plan: 1) prevention of the introduction of aquatic invasive species through an extensive education program; 2) elimination of established aquatic invasive species through monitoring and rapid response; 3) control the spread of established aquatic invasive species through cooperative state, regional and nationwide efforts; and 4) prevention of the introduction of aquatic nonindigenous or invasive species.

The LAIS Advisory Task Force would be chaired by the DWF Secretary or his designee and would meet at the call of the Chair. Members would advise the LAIS Council by gathering data and information relevant to aquatic invasive species and would make recommendations to the Council on the implementation and revision of the state management plan. Members of the task force would include representatives from relevant state, regional, national, public and private institutions, including the U.S. Coast Guard; U.S. Army Corps of Engineers; U.S. Geological Survey; U.S. Fish and Wildlife Service; U.S. Department of Agriculture; National Park Service; representatives of Louisiana's colleges and universities, including the Director of the Center for Bioenvironmental Research of Tulane and Xavier Universities; Louisiana Wildlife Federation; Louisiana Farm Bureau Association; Louisiana Marine and Motorcycle Trades Association; Louisiana Sea Grant College Program; Barataria-Terrebonne National Estuary Program; Louisiana Landowners Association; Louisiana Nursery and Landscape Association; Louisiana Forestry Association; Ports Association of Louisiana; Gulf States Marine Fisheries Commission; Louisiana Chemical Association; Steamship Association of Louisiana; the electrical utility industry in Louisiana; Louisiana Mid-Continent Oil and Gas Association; Louisiana Aquaculture Advisory Task Force; and the National Oceanographic and Atmospheric Administration Habitat Conservation Division Office in Louisiana.

For more information on aquatic invasive species in Louisiana, the original task force, and the state management plan, please visit <http://www.cbr.tulane.edu/is/>. Look for an update in a future edition of *Louisiana Coastal Law* on the release of the state management plan and status of the legislation.

¹ Center for Bioenvironmental Research at Tulane and Xavier Universities, Louisiana: A Hot Spot for Species Introduction, available at <http://is.cbr.tulane.edu/LouisianaHotSpot.html> (accessed April 14, 2004).

² Center for Bioenvironmental Research at Tulane and Xavier Universities, Portals and Pathways: Invasive Species in Louisiana, available at <http://www.cbr.tulane.edu/is/> (accessed April 14, 2004).

³ Center for Bioenvironmental Research at Tulane and Xavier Universities, Aquatic Plants: Water Hyacinth, available at http://is.cbr.tulane.edu/Species_WaterHyacinth.html (accessed April 14, 2004).

⁴ U.S. Geological Survey, Nutria Eating Louisiana's Coast, available at <http://www.nwrc.usgs.gov/factshts/020-00.pdf> (accessed April 14, 2004).

⁵ Center for Bioenvironmental Research at Tulane and Xavier Universities, Insects: Formosan Termite, available at http://is.cbr.tulane.edu/Species_FormosanTermite.html (accessed April 14, 2004).

⁶ Center for Bioenvironmental Research at Tulane and Xavier Universities, Insects: Asian Tiger Mosquito, available at http://is.cbr.tulane.edu/Species_AsianTigerMosquito.html (accessed April 14, 2004).

⁷ *Louisiana Coastal Law* Vol. 81, p.5-6 (December 2002).

⁸ Executive Order MJF 02-11 (June 4, 2002).

⁹ See 16 U.S.C. 4701 et seq. The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (P.L. 101-646) was reauthorized and amended by the National Invasive Species Act of 1996 (P.L. 104-332). 16 U.S.C. 4724 authorizes the U.S. Department of the Interior to receive monies for states to create management plans for reducing the risk of nonindigenous species invasions.

Attorney General Opinion No. 04-0082
By Carolyn Dupuy

Act 802 (Senate Bill No. 98) of the 2003 Regular Legislative Session amended and re-enacted La. R.S. 14:63 and repealed La. R.S. 14:63.1, 14:63.2, 14:63.5, 14:63.6, 14:63.7, 14:63.8, 14:63.9, 14:63.10 and 14:63.12. This statute defines criminal trespass and lists the penalties for violations. The statute formerly read, "No person shall without authorization intentionally enter any structure, watercraft or movable owned by another." Act 802 amended the statute to read, "[N]o person shall enter any structure, watercraft, or movable owned by another without express, legal or implied authorization."¹ In all places in the statute where criminal trespass is referenced, the phrase "without express, legal or implied authorization" is used.

The affirmative defense to this violation is that the alleged violator does in fact have "express, legal or implied authority to be in the movable or on the immovable property."² Some persons may enter or remain upon the structure, watercraft, movable or immovable of another. These include police officers, firefighters, employees of the Louisiana Department of Agriculture and Forestry engaged in locating or suppressing a fire or public employees engaged in dealing with an emergency that poses an imminent threat to human life.³ Some people are authorized to enter or remain unless expressly forbidden. These include: registered land surveyors, an employee of a business regulated by the Louisiana Public Service Commission while engaged in his or her duties, anyone making a delivery, anyone conducting a survey, an employee of an owner or lessee of the property performing his duties, the owner of domestic

livestock or animal in the process of retrieving the livestock or animal, a candidate for public office or the owner of watercraft or vessel in saltwater engaged in any lawful purpose for the retrieval of property.⁴

The penalties for violation vary depending on the number of offenses. The offenses do not have to be on the same property to qualify as an additional offense(s). The fines range from \$100 to \$1000 and from thirty days to six months in jail or both.⁵ A minor ten years or younger may not be arrested or detained for this crime.⁶

Act 802 also repealed all provisions that mandated how owners should mark their property to prevent criminal trespass. These provisions, which included the type of signs and wording thereon and vertical lines on trees and how they could be used to define property, have been repealed.⁷

In light of these amendments, the Honorable Dale Erdey requested an opinion from the Louisiana Office of the Attorney General concerning how the amendments affect the "entry, access, passage, and/or use of leased property of public waterways."⁸ Navigable streams of the state as well as other waterbodies, which contain running water, are subject to public use and, therefore, cannot be posted.⁹ Nonnavigable waterways may not be posted if they contain running water, which may be used by the public. Because of this, the newly revised statute does not apply to persons using waterways with running water.¹⁰

A private waterbody that is not commercially navigable may be posted by the owner against trespass.¹¹ Courts have defined the word

navigable as "a body of water that is large enough to float a boat of some size, engaged in carrying trade, and implies a possibility of transporting men and things."¹² Courts also consider depth, width and location in determining navigability.¹³ Other courts have found that bodies of water may not be navigable if they are isolated, with no natural inlet or outlet, even though they may be large enough to float watercraft.¹⁴ Therefore, the statute at issue may be applied to private water bodies that are not commercially navigable and do not have running water.¹⁵

The issue turns on whether or not the water bodies in question are commercially navigable or contain running water, which may be used by the public. If either of these conditions is met, then they cannot be restricted from public use, and La. R.S. 14:63 does not apply. Otherwise, they may be posted by the owner, and the statute may be enforced.¹⁶

¹ Louisiana State Legislature, *available at* http://www.legis.state.la.us/leg_docs/03RS/CVT10/OUT/0000KT2M.PDF (accessed April 2, 2004).

² *Id.*

³ *Id.* See also La. R.S. 14:63(E)(1-7).

⁴ *Id.* See also La. R.S. 14:63(F)(1-9).

⁵ *Id.* See also La. R.S. 14:63(G).

⁶ *Id.* See also La. R.S. 14:63(I)(1).

⁷ *Id.*

⁸ La. Atty. Gen. Op. 04-0082.

⁹ La. Atty. Gen. Op. 90-557.

¹⁰ *Supra* note 8.

¹¹ La. Atty. Gen. Op. 90-418.

¹² *Shell Oil v. Pittman*, 476 So. 2d 1031 (La. App. 3 Cir. 1985).

¹³ *Id.*

¹⁴ *State v. Sweet Lake Land and Oil Co.*, 113 So. 833 (La. 1927).

¹⁵ *Supra* note 8.

¹⁶ *Id.*

Attorney General Opinion No. 04-0082A
By Carolyn Dupuy

Paragraph two of Article 450 of the Louisiana Civil Code states that "public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial seas and the seashore."¹ The issue of use of running waters was recently addressed in the case of *Buckskin Hunting Club v. Buddy Bayard, et al.*² In that case, the court stated that the owner of an estate through which running waters pass must allow water to leave his estate through its natural

channel and not to diminish its flow. This does not mandate that the landowner allow public access to the waterway, however. The general public has a right to access running water, but does not have the right to cross private lands to avail themselves of it.³

Public rights to use of a canal located on private property does not arise from the fact that running water flows through the canal. The issue of public use of waterways in Louisiana

turns on the issue of commercial navigability, which is determined on a case-by-case basis.⁴ This opinion also recalls Attorney General Opinions 90-557, 03-407 and 04-0082.⁵

¹ LA Civil Code Art. 450.

² 898 So. 2d 266 (La. App. 3 Cir. 2004).

³ *Id.*

⁴ La. Atty. Gen Op. No. 04-0082A.

⁵ *Id.*

Announcement

LCL Email Update Service

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