

February 17, 2005

Ms. Cathy S. Barnette, Executive Director
Alabama Coastal Foundation
P.O. Box 1760
Fairhope, AL 36533

RE: Advisory request – Grand Bay, Alabama oil drilling lease

Dear Cathy:

You recently contacted the Mississippi-Alabama Sea Grant Legal Program with questions about the proposed oil drilling in Grand Bay. This letter contains the results of my research, which I hope are useful to you. Please understand that the Legal Program does not provide legal representation, that we do not have an attorney-client relationship, and therefore this letter is not formal legal advice and should not be used in any legal action. It is for informational purposes only and does not necessarily reflect the views of the Mississippi-Alabama Sea Grant Consortium or any other agency or entity.

As I understand it, your questions are these: (1) whether the fact that previous state leases have required directional drilling invalidates the Duncan Oil lease, which contains no such requirement, and (2) what type of legal action needs to be taken to safeguard Grand Bay's resources in the future. Before addressing these I will briefly recap the facts that gave rise to your question, as I understand them.

Facts

Grand Bay contains shallow (less than 5,000 feet) Miocene gas deposits, as well as an extraordinarily biologically productive estuarine ecosystem. The sensitive nature of the bay's seagrass beds, which nurture fish and other aquatic species, led the Marine Resources Division of the Alabama Department of Conservation and Natural Resources (DCNR) to ban shrimping in the area in June 2004. The bay straddles the Mississippi-Alabama state line; it enjoys federal and state legal protection from drilling on the Mississippi side as part of the Grand Bay National Estuarine Research Reserve (NERR), but is not similarly protected on the Alabama side.

In the 1980s the State Lands Division of DCNR tried unsuccessfully to lease parts of the bay for gas exploration on several occasions, by a bidding process. Each time, the bid solicitation contained a requirement for directional drilling, which is considered to provide greater ecological protection than direct drilling in sensitive environments.

In 2001 Duncan Oil, Inc., of Colorado proposed drilling in Grand Bay. After being approached again by Duncan in 2004, the state solicited bids for leases. The directional drilling requirement was not included in the 2004 bid solicitation as it had been in previous solicitations. Duncan Oil, the sole bidder, won the lease and has proposed vertical drilling of an exploratory well on the Grand Batture Shoal in water that is approximately five feet deep. The proposed drilling site is 1,500 feet from the nearest island and 2,000 feet from the NERR. Drilling has not begun, and cannot begin until after further review by other state and federal agencies.

The Applicable Statute and Regulations

The state legislature has authorized the Commissioner of DCNR to lease submerged lands for the exploration, development, and production of oil, gas and other minerals.¹ The statute gives the Commissioner broad discretion to set the terms of the lease; the exact language authorizes him or her to lease submerged lands “upon such terms as he [sic] may approve.”²

The Commissioner has promulgated regulations that guide how this discretion is to be exercised.³ The Commissioner should pursue “maximum benefit and use of state owned submerged lands for all the citizens of Alabama” while ensuring “maximum protection for all state owned submerged lands, especially those important to public recreation, and fish and wildlife propagation and management.”⁴ Activities on state owned submerged lands “must be not contrary to the public interest” and leases for such activities “shall contain such terms, conditions, or restrictions as deemed necessary to protect and manage state owned submerged lands.”⁵

The regulation declares that state owned submerged lands must “be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses.”⁶ Other uses may be allowed if they do not “detract from or interfere with” those primary purposes.⁷ DCNR is not to approve any activity that “would result in significant adverse impacts to state owned submerged lands...unless there is no reasonable alternative and adequate mitigation is proposed and accomplished.”⁸ Activities must be designed “to minimize or eliminate any cutting, removal, or destruction of wetland vegetation.”⁹ Activities must “be designed to minimize or eliminate adverse impacts on fish and wildlife habitat” with special attention paid to the habitat of threatened or endangered species.¹⁰

Question 1. Does the fact that previous state leases have required directional drilling invalidate the Duncan Oil lease, which contains no such requirement?

Although DCNR deviated from recent practice by leaving the directional drilling requirement out of the bid solicitation, my research did not uncover a legal principle that would invalidate the Duncan Oil lease for that reason. The state legislature, as noted above, has given the Commissioner very broad latitude in this area. The Commissioner’s decision not to require directional drilling, while perhaps not ideal from an environmental perspective, does not seem to exceed the bounds of his statutory discretion.

The DCNR regulations put a much stronger emphasis on environmental protection and, in theory, constrain the Commissioner’s discretion. A strong argument could be made that the Commissioner has not given due consideration to these regulations. For instance, allowing vertical drilling in this

¹ Ala. Code § 9-17-62.

² *Id.*

³ Ala. Admin. Code r. 220-4-.09, “Placement And Configuration Of Piers And Other Improvements On State Submerged Lands.”

⁴ *Id.* r. 220-4-.09(1)(b), (d).

⁵ *Id.* r. 220-4-.09(4)(a)1, 2.

⁶ *Id.* r. 220-4-.09(4)(b)1.

⁷ *Id.*

⁸ *Id.* r. 220-4-.09(4)(b)2.

⁹ *Id.* r. 220-4-.09(4)(b)4.

¹⁰ *Id.* r. 220-4-.09(4)(b)9.

case, rather than mandating directional drilling, may not be providing maximum protection for Grand Bay's submerged lands. A directional drilling condition might reasonably have been "deem[ed] necessary to protect...state owned submerged lands." The activities associated with vertical drilling might reasonably be considered to "detract from or interfere with" the primary purposes of submerged land management, which are "the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses." If, in fact, vertical drilling could have "significant adverse impacts," then directional drilling may have been a "reasonable alternative." Vertical drilling, as opposed to directional drilling, might not "minimize or eliminate...destruction of wetland vegetation." Finally, vertical drilling may not "minimize or eliminate adverse impacts on fish and wildlife habitat" when directional drilling is a viable option.

Regardless of the merits of these arguments, I am unaware of a legal mechanism by which the Commissioner can be called to account for failing to adhere to DCNR regulations (if that is the case). The usual method of challenging a state agency action would be judicial review under the state's Administrative Procedure Act (APA), but Alabama's version of the APA¹¹ provides for judicial review in a much narrower range of cases than most APAs. Specifically, many APAs allow for judicial review of virtually any final agency action at the behest of an aggrieved citizen.¹² The Alabama APA, however, provides for judicial review only of "a final decision in a contested case."¹³ A "contested case" is an "administrative proceeding[] in which there is a constitutional or statutory entitlement to a trial-type hearing."¹⁴ To my knowledge there is no entitlement to a trial-type hearing in the leasing process, so the granting of the lease does not qualify as a contested case and is not reviewable under the Alabama APA.

Question 2. What type of legal action needs to be taken to safeguard Grand Bay's resources in the future?

The ultimate source of the Alabama Coastal Foundation's dissatisfaction with the Grand Bay lease is the broad discretion that the state legislature has given the Commissioner to enter into such leases. The only way to change this situation effectively is through legislation. Therefore, in my opinion, the ACF's resources would best be used in public relations and lobbying campaigns for additional statutory safeguards for Grand Bay and other sensitive submerged lands.

I hope this letter is useful to you. If you have any further questions on this or other topics, please feel free to contact me. Thank you very much for bringing your questions to the Mississippi-Alabama Sea Grant Legal Program.

Sincerely,

Josh Clemons
Research Counsel
Mississippi-Alabama Sea Grant Legal Program

¹¹ Ala. Code tit. 41, ch. 22.

¹² *E.g.*, 5 U.S.C. § 702 (federal APA).

¹³ Ala. Code § 41-22-20(a).

¹⁴ *Gibbons v. State Ethics Commn.*, 827 So.2d 801, 803 (Ala. Civ. App. 2001).