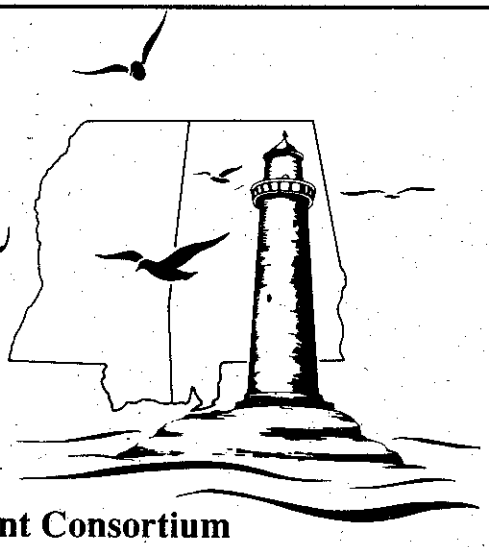
WATER LOG



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Mississippi-Alabama Sea Grant Consortium

Contents

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WATER LOG

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its purpose is to increase public awareness and understanding of coastal problems and issues.

If you would like to receive future issues of WATER LOG free of charge, please send your name and address to: Mississippi-Alabama Sea Grant Legal Program, University of Mississippi Law Center, University, MS 38677. We welcome suggestions for topics you would like to see covered in WATER LOG.

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Lucas v. South Carolina Coastal Council

112 S.Ct. 2886 (1992)

by John Farrow Matlock

The U.S. Supreme Court holds that a landowner is entitled to compensation for the value of his property where a state regulation prevents him from building on an oceanfront tract

INTRODUCTION

On 29 June 1992 the United States Supreme Court held that South Carolina must pay David Lucas the value of beachfront property on which the South Carolina Coastal Council refused to grant him a permit to build two houses. In so holding, the Court reversed a judgment of the Supreme Court of South Carolina. The decision promises to be of signal importance in the area of "takings" law.

FACTS

In 1986, David Lucas bought two vacant lots on the Isle of Palms, a barrier island near Charleston, South Carolina. The lots were about 300 feet from the beach. Lucas planned to build a house on each lot, one for himself and one to sell. When Lucas bought the property it did not qualify as a "critical area" under the then-current form of the South Carolina Beachfront Management Act, and he was thus under no obligation to obtain a building permit from the South Carolina Coastal Council. The Beachfront Management Act aims to preserve and protect the coastal lands of South Carolina by restricting use and by establishing a forty-year plan for moving setback lines landward. The South Carolina Coastal Council is an administrative board which enforces the provisions of the Beachfront Management Act, S.C. Code Ann. §§ 48-39-10 to -360 (Supp. 1990). The Act was amended in 1988 to prohibit building any permanent structure seaward of the setback line. Upon being refused a permit by the South Carolina Coastal Council, Lucas brought an inverse condemnation suit against the state, alleging that the Council's denial of the permit deprived him of all practical use of the property and seeking compensation from the state for the full value of the property. The trial court held for Lucas and awarded him $1,232,387.50. The South Carolina Coastal Council appealed. The Supreme Court of South Carolina reversed, holding that the state's regulation of the use of Lucas' property did not amount to a compensable taking of the property. In reaching its decision the state supreme court relied largely on findings recited by the legislature as an exordium to the Beachfront Management Act and conceded as valid by Lucas. Among the legislature's findings were that the state's coastal lands comprise a valuable natural resource, that new construction causes erosion and destruction of beaches, and that preventing new construction in coastal areas prevents a great public harm. (For a discussion of the decision of the South Carolina Court, *see* WATER LOG Vol. 10, No. 4 (1990).) Lucas appealed, and the U.S. Supreme Court reversed the decision of the South Carolina court.

ANALYSIS

Over the last seventy years the U.S. Supreme Court has developed a sizeable body of law in the area of "takings." The fifth amendment of the United States Constitution declares that "property shall not be taken for public use without just compensation." In deciding whether a landowner should be compensated for property he alleges to have been taken by the state, the court must determine whether the state action in question rose to the level of a "taking" within the meaning of the Constitution or was merely a regulation of use. The state must pay the owner the value of his property in the case of a taking, but not where the state's action is a regulation of use designed to protect the public from serious harm. Most problematic are those cases where a valid regulation of use has the effect of depriving the owner of any use of his property.

The United States Supreme Court has never enunciated a clear standard to mark where regulation ends and taking begins. Instead it has proceeded by balancing the interests of the parties in each case before it. A compensable taking is almost invariably found where a state takes possession of private property or authorizes some permanent physical occupation of private property, even if the occupation does not deprive the owner of use, and despite whatever public interest the action may serve. Where a state does not formally condemn property but so regulates its use as to cause a total diminution in its value, the state will likely be obligated to render just compensation to the owner. However, the court will look to the facts of the case, including the expectations of the owner when he bought the property and the weight of the public interest that the regulation is intended to protect.

On the other hand, when a state exercises its police power—its power to prohibit acts which the legislature deems injurious to the public health, safety, or welfare—to restrict the use of property, courts hold that there has been no compensable taking, even if the regulation works some diminution of value. Zoning ordinances furnish the most common example of regulation for which no compensation is due. The United States Supreme Court has held that laws designating historical landmarks, banning strip mining, and prohibiting mining that causes subsidence of surface land are all valid exercises of the police power for which a state need not render compensation. In cases where an emergency poses the risk of grave harm to the public, the Court has held that a state may order the destruction of one kind of property in order to save another kind of greater value to the public without payment of compensation.

In the present case Justice Scalia, writing for the majority, began by noting that Lucas' claim was not rendered unripe by the fact that he may yet be able to secure a special permit to build on his property under an amendment to the Act passed after the case was argued before the South Carolina Supreme Court but before that court handed down its decision. (Justice Souter did not join in any of the opinions written in the case, filing instead a statement in which he declared that the Court should not have reviewed the case.) Because the state court disposed of the case on the merits, it would not be in accord with sound process, said the Court, to force Lucas to pursue the new procedure created by the legislature before his takings claim could be considered.

The majority pointed out the two circumstances in which the Court always held there had been a compensable taking without regard to the end served by the regulation: first, regulations requiring a "physical invasion" of private property (as where a state requires landlords to allow cable television companies to run lines through apartment buildings); and second, where regulation precludes any profitable or beneficial use of land. The Court quoted with approval a maxim of Justice Holmes from a 1922 case: "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." To hold otherwise, said the majority, would be to court the risk of pressing private property into public service under the guise of mitigating a harm to the public.

The South Carolina court had predicated its decision in large part upon the fact that Lucas had accepted without contest the findings of the legislature in the Beachfront Management Act. That court found sufficient support for denying Lucas compensation in the legislature's attempt to prevent public harm by passing the Act. The Supreme Court, however, drew a distinction between cases where a state by exercising its police power may properly deprive an owner of some of the value of his property and cases where a "taking" occurs. Preventing "harmful use," according to the majority, cannot be used as a basis for taking private property without paying compensation.

The Court spoke of "citizens' historic understandings regarding the content of and the state's power over the 'bundle of rights' acquired with title to property." Because it is not consistent with a proper historical understanding of the takings clause that all title to real estate is held subject to a state's subsequent decision to eliminate any economically beneficial use, a regulation having that effect cannot be newly decreed and sustained without compensation to the owner. If, on the other hand, the regulation simply makes explicit a limitation already inhering in the title itself through restrictions that the state's law of property and nuisance already place upon land ownership, then no compensation is owed.

The "total taking" approach articulated by the majority requires the government to compensate landowners whenever state action deprives an owner of all valuable use of property unless the owner had no right to the proscribed use to begin with. Courts may thus consider harm to public land or adjacent property, suitability of a use with regard to surrounding property, and the ease or difficulty of abating effects of harmful use. The Court remarked that "the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition."

The Court remanded for the South Carolina court to determine whether any common-law principles would have prevented Lucas from building upon his land. The Court observed that the South Carolina Coastal Council must identify principles of nuisance and property law that would prohibit Lucas from building on the lot; the Court declared that the state could not prevail merely by proffering the legislature's declaration that the use Lucas proposed was contrary to the public interest, or by making the conclusory assertion that some common-law maxim would be violated. For instance, the state could, wrote the majority, succeed in enforcing the regulation without paying compensation if it could make out the same case as would be necessary to restrain Lucas from building under a theory of public nuisance. (A public nuisance is an act or omission deleterious to the health, safety, or morals of the general public for which there is a remedy at law.)

Justices Blackmun and Stevens each filed dissenting opinions. Justice Blackmun wrote that the court "launched a missile to kill a mouse," and questioned the majority's refusal to inquire into the public interest supporting regulations that deny property owners all valuable use of their property. Justice Stevens found arbitrary the rule set forth by the majority, under which a "landowner whose property is diminished in value 95 percent recovers nothing, while an owner whose property is diminished 100 percent recovers the land's full value."

CONCLUSION

Public response to the Court's holding in *Lucas* was muted by attention on the decision in the Pennsylvania abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which was handed down the same day. The decision in *Lucas* may, however, prove to be of no less consequence. The effect of the holding on coastal management is, at least for the moment, uncertain, and depends upon how *Lucas* is subsequently interpreted and applied by the courts. While the Court's so-called "per se" rule requiring compensation where the entire value of property is lost through regulation—"100 percent takings"—sounds clear enough, courts may prove reluctant to find such sweeping takings except on egregious facts, and the rule in *Lucas* will be a narrow one seldom resorted to. If, however, courts take *Lucas* at face value, agencies issuing coastal permits should realize that the denial of a permit without compensation will be more difficult to support, and that general concerns about preserving the environment will be insufficient unless backed by a showing of public nuisance or the like.

It is also possible that past attempts by the U.S. Congress to define takings for the purposes of wetlands legislation would be unconstitutional under *Lucas*, and that in the future such determinations must be made by the several states. EPA Administrator William Reilly has publicly stated, however, that he believes *Lucas* will have only a negligible effect on the number of takings found when Section 404 determinations of wetlands are made.❑

John Farrow Matlock is a graduate of the University of Mississippi School of Law and staff attorney for the Mississippi-Alabama Sea Grant Legal Program.

The Earth Summit — Its Impact on the Future of Oceans and Coastal Areas

by Vikki Spenser

INTRODUCTION

The "Earth Summit" marks the 20th anniversary of the first United Nations Conference on the Human Environment, which was held in Stockholm, Sweden. For the first time since 1972, the United Nations Conference on the Environment and Development (UNCED), informally known as the "Earth Summit," convened in Rio de Janeiro, Brazil on June 3-14, 1992, bringing together a number of world leaders, environmentalists, and journalists. The goal of the summit was to identify major threats to the environment and reach global agreements on economic development and protection of the Earth's nonrenewable resources. Protection of the oceans, marine life, and coastal areas was one of many agreements reached by the more than 150 national delegates attending this conference. This discussion will focus on Chapter Seventeen of Agenda 21 but will also consider other agreements reached at the conference which have an impact on ocean and coastal matters.

DISCUSSION

Oceans, covering 70 percent of the globe, are threatened by pollution, global warming, and overfishing. Likewise, coastal areas face devastation as a result of pollution and continued rising of global temperatures. Thus, the more than 150 participating nations worked toward a number of agreements that would address these and other critical ocean issues.

Many scientists predict that even a small degree of warming will upset ocean and coastal environments. Some fear if not controlled, continued buildup of heat-trapping gases will result in earth warming, ice caps melting, oceans rising, and flooding of coastal areas, which one-third of the world's population inhabits.

The "Framework Convention on Climate Change," also called "The Climate Treaty," seeks to curb gas emissions and drastic climate changes associated with global warming and was signed by over 150 nations. By signing this treaty, countries agreed to carry out national inventories of gas emissions, adopt measures to mitigate climate change,

promote international cooperation (including technology transfers), and create a fund for such transfers. Signatories further agreed to consider climate change whenever implementing social, economic, and environmental policies.

While the Framework Convention on Climate Change attracted a high degree of attention at the Earth Summit, the Agenda 21 action plan, which was signed by all attending nations, addresses a very wide array of environmental and development issues. Agenda 21, so called because it is targeted at the 21st century, is an 800-page document resulting from almost three years of UNCED Preparatory Committee negotiations. It states objectives and policies designed to improve and protect all features of the environment including land and sea, atmosphere, forests, animals, plants, and other resources on which mankind depends for survival. It serves as a blueprint for environmental protection over the next century. Specific Agenda 21 programs will be encouraged by a Commission on Sustainable Development, which will be established by the National General Assembly during its upcoming fall session.

Chapter Seventeen of Agenda 21, entitled "Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources," deals specifically with ocean and coastal matters and is likely to influence program directions and priorities in the years ahead. This chapter is subdivided into seven program areas, which are perceived as chief threats to oceans, coastal areas, and marine resources. All attending nations recognize the need for action in the specific areas dealt with in the ocean chapter and have approved its solutions, which are summarized below.

Integrated Management and Sustainable Development of Coastal Areas, including Exclusive Economic Zones

This program calls for the commitment of coastal nations to integrated management and conservation of rapidly eroding coastal resources and marine environments under their jurisdiction. It also calls for development of international guidelines, which will be one of the topics of discussion next year at an intergovernmental conference hosted by the Dutch Minister for the Environment.

Marine Environmental Protection

Each year, an estimated 20 billion tons of waste is dumped into the seas. Surprisingly, 80 percent of this maritime pollution is attributable to land-based sources and could eventually lead to disease or even death to humans as well as to marine life. Pollutants collect in coastal areas, where the richest fish breeding grounds are and where 90 percent of the world's fish harvest is caught. National environmentalists say that many coastal areas are choking in oil, sewage, industrial wastes, and agricultural run-off. Consequently, this program area focuses on the need for increased efforts at the national and regional levels to prevent land-based sources of marine pollution. This section also urges states to use and strengthen Montreal Guidelines for land-based sources of marine pollution.

Sustainable Use and Conservation of Marine Living Resources of the High Seas

This program area addresses the International Whaling Commission and its role in the conservation and management of whale stocks. It also emphasizes that management of high seas fisheries is inadequate in many areas, largely due to over-utilization, unregulated fishing, over-capitalization, excess fleet size, unreliable databases, and lack of cooperation between states. States are called on to improve conservation of marine living resources of the high seas by attaining maximum sustainable yields.

Sustainable Use and Conservation of Marine Living Resources under National Jurisdiction

Although pollution is a major threat to the future of fisheries, overfishing is also a critical issue. In response, this program area focuses on problems associated with overfishing and unauthorized fishing by foreign fleets. This section is designed to improve conservation and management of marine living resources. States are called on to conserve and manage marine living resources under national jurisdiction and those of the Exclusive Economic Zone (EEZ) in accordance with the provisions of the United Nations Convention on Law of the Sea.

An international meeting on overfishing, which was urged by Canada over concern that overfishing is depleting national fish stocks, is scheduled for next year.

Addressing Critical Uncertainties for the Management of Marine Environment and Climate Change

This program area delineates possible effects of ozone depletion and global warming on the marine environment. It

promote international cooperation (including technology transfers), and create a fund for such transfers. Signatories further agreed to consider climate change whenever implementing social, economic, and environmental policies.

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Addressing Critical Uncertainties for the Management of Marine Environment and Climate Change

This program area delineates possible effects of ozone depletion and global warming on the marine environment. It also calls for stronger international methods of collecting, synthesizing, and disseminating information concerning these effects. A chief aim of this section is to strengthen national scientific and technological capabilities so that they may better predict global climate and environmental change.

Strengthening International (Including Regional) Cooperation and Coordination

This program calls for the free exchange of international marine information. Trade sanctions are discouraged as a method for achieving environmental policies. The program area, however, does establish guidelines should they become necessary.

Sustainable Development of Islands

Many small island nations have fragile ecosystems, are vulnerable to sea level rise, and have limited resources. A series of management approaches are listed in this program area and developed nations are called upon to assist small islands in meeting the challenge of sustainable development.

CONCLUSION

Agenda 21 and many other agreements signed during the Earth Summit are self-implementing and establish no strict legal obligations on signatory states. The results of a recent New York Times/CBS News poll, which revealed that only nine percent of Americans surveyed expect the Earth Summit to make substantial progress toward solving world environmental problems, may be largely due to the fact that these agreements are not binding. Nevertheless, there is no doubt that awareness of environmental issues by governments all around the world has been raised by the Earth Summit. If Agenda 21 and the other agreements coming out of the Earth Summit are implemented and used by each nation as a blueprint for the types of environmental policies it should be enacting, great strides will be made towards sustaining oceans, coastal areas, and marine resources for future generations.❑

(Much of the information pertaining to the ocean chapter of Agenda 21 was taken from the periodic reports "The Earth Summit and the Oceans" by Robert W. Knecht and Biliana Cicin-Sain, Center for the Study of Marine Studies, University of Delaware).

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Chemical Waste Management, Inc. v. Hunt

112 S. Ct. 2009 (1992)

by John Farrow Matlock

U.S. Supreme Court holds that an Alabama statute imposing a fee on hazardous waste brought to Alabama for dumping violated the commerce clause of the Constitution of the United States.

INTRODUCTION

On 1 June 1992, the Supreme Court of the United States struck down part of an Alabama statute that levied a fee of $72.00 per ton on hazardous waste brought into the state for disposal at a commercial dump. The Court held that the statute, Ala. Code §§ 22-30B-1 *et seq.* (1990), violated the commerce clause of the federal constitution by discriminating upon its face against out-of-state producers of toxic waste. The statute had been upheld by the Supreme Court of Alabama in *Hunt v. Chemical Waste Management*, 584 So. 2d 1367 (Ala. 1991).

FACTS

This case was the latest battle in a protracted and hard-fought contest between the state of Alabama and Chemical Waste Management, Inc., a corporation based in Illinois, which owns and operates a hazardous waste dump at Emelle, Alabama. (Emelle is about five miles east of the Mississippi-Alabama state line between Columbus and Meridian.) The dump, opened in 1977, operates under permits issued by the Environmental Protection Agency under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq.* and the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.* It receives all manner of poisonous and deadly substances—among them mercury, lead, and cyanide—variously classified as ignitable, corrosive, or toxic, and many of which are capable of leaching into

groundwater supplies. Emelle is the only commercial hazardous waste dump in Alabama and the largest in the country, taking in 790,000 tons of waste in 1989, its busiest year. More than one-sixth of all the hazardous waste disposed of in the United States in 1989 was deposited at Emelle, about 90 percent of which was brought in from outside Alabama.

Alabama first enacted a statute to curtail dumping at Emelle in 1989. The Holley Act prohibited commercial hazardous waste dumps from accepting waste from any state that either (1) had no hazardous waste dump or prohibited disposal of hazardous waste within its own borders or (2) had no hazardous waste dump of its own and had not entered into any interstate compact for the disposal of hazardous waste to which Alabama was a signatory. The Holley Act effectively closed the borders of Alabama to toxic waste from 22 states. Chemical Waste Management challenged the statute in the United States District Court for the Northern District of Alabama, which granted summary judgment in favor of the state. The Court of Appeals for the Eleventh Circuit reversed, holding that the statute violated the commerce clause of the United States Constitution by placing an impermissible burden upon interstate commerce. *National Solid Waste Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d 713 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 2800 (1991).

In April 1990 Alabama's legislature enacted Act No. 90-326, Ala. Code §§ 22-30B-1 *et seq.* (1990). The Act imposed a base fee of $25.60 per ton on all hazardous waste disposed of at commercial dumps and an additional fee of $72.00 per ton on out-of-state hazardous waste disposed of at commercial dumps. The Act also contained a cap provision barring commercial hazardous waste dumps that handled more than 100,000 tons of toxic waste per year from taking in more waste in any year after 1 October 1991 than such dump received between 15 July 1990 and 14 July 1991.

In June of the same year Chemical Waste Management filed suit for declaratory relief to challenge the constitutionality of the statute. Chemical Waste Management also sought preliminary and permanent injunctions to enjoin the state from enforcing the Act. Alabama Governor Guy Hunt counterclaimed for declaratory relief to have the Act declared valid. The Montgomery Circuit Court upheld the base fee and the cap provision but held that the additional fee was invalid under the commerce clause of the Constitution. Both Chemical Waste Management and the state appealed. On 11 July 1991 the Supreme Court of Alabama affirmed the trial court with respect to the base fee and the cap provision but reversed the trial court on the issue of the additional fee, holding that it did not violate the commerce clause. *Hunt v. Chemical Waste Management* 584 So. 2d 1367 (Ala. 1991), *cert. granted* 112 S.Ct. 964 (1992).

The United States Supreme Court granted Chemical Waste Management's petition for a writ of certiorari because of the importance of the federal question and the likelihood that it had been decided in a manner conflicting with the decisions of the Court. The Court granted the motions of the American Iron and Steel Institute, the Hazardous Waste Treatment Council, and others for leave to file briefs as amici curiae and the motion of the Solicitor General to participate in oral argument as an amicus curiae.

ANALYSIS

The Court held the additional fee unconstitutional under the commerce clause. Justice White, writing for the majority, began his opinion by declaring that "no state may attempt to isolate itself from a problem common to the several states by raising barriers to the free flow of interstate trade." A statute taken upon its face that discriminates against interstate commerce and that has the effect of so discriminating violates the commerce clause. The Court noted that the amount of hazardous waste dumped at Emelle fell by nearly two-thirds in the year following the passage of the Act. Likewise state taxes that fall more heavily upon out-of-state business are invalid. Discrimination against out-of-state business alone is normally sufficient to invalidate a statute.

Alabama argued, however, that the Act served legitimate local ends and that there were no means of effectuating those ends that placed a lesser burden on interstate commerce. In such a case, the state has the burden of justifying the goals of the statute and of proving that other means are unavailable. Facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives. Alabama offered a number of reasons for imposing the higher fee on waste from out of state, among which were protecting Alabama's citizens and environment from toxic substances, raising revenue to defray the costs borne by the state in overseeing the dump at Emelle, and reducing the amount of dangerous wastes being transported on public highways. Calling this "rhetoric, and not explanation," the Court held the statute invalid because no showing had been made that out-of-state hazardous waste was more harmful than hazardous waste from Alabama.

The Court mentioned a number of less discriminatory alternatives that were available to Alabama, such as an additional fee levied upon all hazardous waste disposed of in Alabama, a per-mile tax on trucks carrying hazardous waste through Alabama, or a cap on the amount that could

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Alabama argued, however, that the Act served legitimate local ends and that there were no means of effectuating those ends that placed a lesser burden on interstate commerce. In such a case, the state has the burden of justifying the goals of the statute and of proving that other means are unavailable. Facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives. Alabama offered a number of reasons for imposing the higher fee on waste from out of state, among which were protecting Alabama's citizens and environment from toxic substances, raising revenue to defray the costs borne by the state in overseeing the dump at Emelle, and reducing the amount of dangerous wastes being transported on public highways. Calling this "rhetoric, and not explanation," the Court held the statute invalid because no showing had been made that out-of-state hazardous waste was more harmful than hazardous waste from Alabama.

The Court mentioned a number of less discriminatory alternatives that were available to Alabama, such as an additional fee levied upon all hazardous waste disposed of in Alabama, a per-mile tax on trucks carrying hazardous waste through Alabama, or a cap on the amount that could be dumped at Emelle. Any measures taken by Alabama in the future, said the Court, must "not vary with the waste's state of origin." The Court rejected Alabama's contention that the additional fee was a compensatory tax validly imposed to put part of the burden on out-of-state producers of hazardous waste, pointing out that no substantially equivalent tax was imposed on in-state hazardous waste. The Court also dismissed Alabama's arguments grounded in the quarantine cases (most of which were decided between 1878 and 1908), remarking that the laws upheld in those cases "did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin."

Chief Justice Rehnquist alone dissented. He continued to argue that a state should have the right to take actions to preserve the soundness of its environment even if those actions work incidental burdens on interstate commerce. In particular Rehnquist criticized the Court's "all or nothing" approach to hazardous wastes, an approach that allows outright bans but no less stringent mode of regulating its importation into states where dumps are located. The Chief Justice concluded by pointing to various devices Alabama could employ to circumvent the majority's ruling, including subsidies to in-state businesses that produce hazardous wastes and opening a state-run dump that would only accept Alabama waste.

CONCLUSION

To many this decision came as a surprise, as much for the result as for the near-unanimity with which it was reached. A conservative court, one might suppose, would show greater regard for a state's right to protect itself against the results of transporting and burying hazardous waste, although the decision can be viewed as a pro-business one. There is little doubt that Alabama's legislature, given its tenacity in this matter, will at its next session attempt to draft and enact a new statute aimed at preventing continued unrestricted dumping at Emelle.❑

John Farrow Matlock is a graduate of the University of Mississippi School of Law and staff attorney for the Mississippi-Alabama Sea Grant Legal Program.

Mississippi Legislative Review 1992

by John Farrow Matlock

The 1992 session of the Mississippi legislature did not produce any major legislation in the area of coastal and ocean law. Lawmakers did, however, enact several laws pertaining to aquaculture, sport-fishing, and water quality. A summary of the relevant statutes follows.

Senate Bill No. 2689
Effective Date: April 20

This act amends Miss. Code Ann. § 49-15-15(3)(p) to require the Commission on Wildlife, Fisheries, and Parks to establish a transport permit for landing any marine fish and shellfish in Mississippi which is taken outside of state waters. The commission may charge a yearly fee for the permit in an amount not to exceed $100.00.

Senate Bill No. 2830
Effective Date: April 20

This act allows persons on board chartered or private sport-fishing boats that are at sea for more than 24 hours to fillet their catch before returning to shore. The fish may only be filleted, however, if the fishermen file a float plan with the Bureau of Marine Resources before they set sail.

House Bill No. 922
Effective Date: April 27

This act requires all products containing tilapia to be labelled as such. (Tilapia is a tropical fish that is widely used as a food in South America and Africa.) A processor, distributor, or retailer who violates the statute may be fined not more than $500.00.

House Bill No. 500
Effective Date: May 5

Miss. Code Ann. § 65-33-7 is amended to increase the highest annual rate of interest on county bonds for the construction of sea walls from six to eleven percent.

House Bill No. 746
Effective Date: May 11

This statute allows the Board of Supervisors of Hancock County to collect a boarding fee of up to $2.50 from every passenger embarking on gambling ships docked in the county. The county's Board of Supervisors is also given authority to impose a yearly licensing tax of not more than

$100.00 on each gaming machine aboard gambling ships docked in Hancock County.

Senate Bill No. 2931
Effective Date: May 14

Miss. Code Ann. § 49-15-15 is amended to require that the Commission on Wildlife, Fisheries, and Parks not promulgate any rule or regulation pertaining to marine resources that is more stringent than federal regulations or regulations of contiguous states. The Commission must revise its regulations to comply with this statute by 31 December 1992. This provision does not, however, apply to regulations with regard to the wild stock of marine finfish off the Mississippi coast. The statute is also amended to require the Commission to hold a public hearing before it issues, modifies, or revokes any regulation pertaining to marine resources. The statute is further amended to provide that the Bureau of Marine Resources need not monitor processing and sanitation at a plant where oyster, shrimp, or shellfish is processed if the plant hires an in-house inspector from a federal agency such as the Food and Drug Administration or the Department of Commerce.

Senate Bill No. 2936
Effective Date: May 14

This bill creates the Mississippi Water Resources Management Planning Commission. By 1 January 1995 the Commission will submit recommendations to the Commission on Environmental Quality about maintaining abundant and safe surface and ground water. The Commission will be made up of seven members appointed by the Governor, one from each congressional district and two from the state at large. An Advisory Committee is also established to provide technical information to the Commission. At least four public hearings will be held in various parts of the state for the purpose of collecting information, and at least another four hearings will be conducted to receive comments from the public before the final recommendations are issued.❑

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LAGNIAPPE

A Little Something Extra

The governor of Alaska signed a bill on 22 June to compensate municipalities that lost tax revenues from fisheries in the aftermath of the Exxon Valdez oil spill of 24 March 1989. Funds for the local governments will come from money the state expects to recover in litigation against Exxon, Alyeska Pipeline, and the Trans-Alaska Pipeline liability fund. The governor signed several other bills in June related to the notorious accident. Two of the statutes provide for appropriation of Alaska's share of the interest that will accrue in the state-federal trust fund established as part of the settlement against Exxon. Another law requires oil companies doing business in Alaska to show proof of "financial responsibility" to the state Department of Environmental Conservation. The governor also signed legislation exempting well and terminals for natural gas from certain state regulations aimed at preventing oil spills.

In related news, the conviction of the captain of the Exxon Valdez, Joseph Hazelwood, for negligent discharge of oil was reversed by the Alaska Court of Appeals on 10 July. The court held that the state could not prosecute Hazelwood because the Federal Water Pollution Control Act grants immunity to ships' masters who immediately report oil spills to the government; Hazelwood complied with the statute promptly after the vessel ran aground.

The National Oceanic and Atmospheric Organization (NOAA) promulgated guidelines for making coastal zone "enhancement grants" to the states on 14 July. The regulations were the first of a number of new rules required under the 1990 amendments to the Coastal Zone Management Act (57 Federal Register 31105). The enhancement grants were made available to encourage states to improve coastal management programs in areas such as protecting wetlands and controlling unrestrained development. The regulations also revised procedures for evaluating state coastal management programs. NOAA must now issue notice at least 45 days before public meetings and must publish its report within four months of the last public meeting held. For questions call Vicki Allen at the Policy Coordination Division of NOAA, phone (202)-606-4100.

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On 12 August the United States Coast Guard published interim regulations regarding double hulls on vessels carrying oil in bulk. The Oil Pollution Act of 1990 requires these vessels to have double hulls by 1995, and the interim regulations provide shipbuilders and shippers information necessary to meet the deadline. More information is available from Stephen Shapiro at the Merchant Vessel Inspection and Documentation Division, phone (202)-267-1181. On the same day the Coast Guard promulgated an interim rule under the Oil Pollution Act of 1990 with respect to filing claims for uncompensated damages arising from discharges of oil. The rule tells claimants how to file against the Oil Spill Liability Trust Fund. For more information call L.E. Burgess at the National Pollution Funds Center, phone (703)-235-4796.