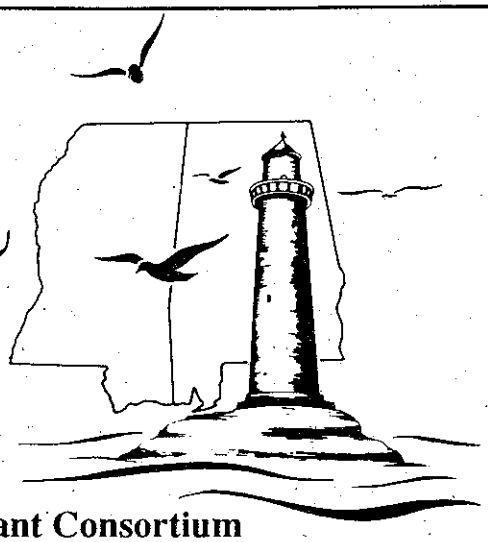
WATER LOG



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Mississippi-Alabama Sea Grant Consortium

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WATER LOG

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In Memoriam
Dr. James I. Jones

With sadness we note the passing of Jim Jones, Executive Director of the Mississippi-Alabama Sea Grant Consortium. During his sixteen year tenure as Director, Jim profoundly influenced the growth and development of the Sea Grant Legal Program. The impact that Jim had on our program went far beyond his funding support. Much more important was his strong belief in the value of legal and policy analysis as an integral part of solving marine-related problems and the faith that he expressed in our personal abilities to carry out our professional responsibilities. Jim was quick to compliment, slow to rile, and consistently fair. His guidance and advice were always welcome. He was a kind and gentle man who asked about our spouses and children not because it was a polite thing to do, but because he was genuinely interested in us and our families. Jim made sure everyone associated with Sea Grant felt as if they were members of his extended family. Although this and all future editions of WATER LOG will be published in Jim's absence, we will all continue to feel his influence and spirit.

American Sand and Gravel Company and Miss. Comm. on Environmental Quality v. Tatum

Miss. S. Ct. No. 90-CC-1258
(decided 17 June 1993)

by David Calder

INTRODUCTION

Although "surface mining" operations are not common sights in Mississippi, such activities take place on a small scale in many parts of the state. The Mississippi Supreme Court's recent decision in *Tatum* will have a profound impact not only on surface mining activities, but also on all activities that are regulated by the Department of Environmental Quality (DEQ). Citing "an old American Indian proverb" which states that "the frog does not drink up the pond in which he lives," eight members of the Court affirmed the trial court's decision to reverse a DEQ order. The DEQ order granted a permit to American Sand and Gravel Company to mine sand and gravel on the Bouie River in Forrest County. The Court upheld the reversal because DEQ failed to properly administer and enforce the applicable environmental regulations.

Significantly, the Court noted that prior to this case, DEQ "had never denied a permit application" for surface mining in Mississippi. However, the Court held that state agencies such as DEQ must "heed the wisdom" of the proverb, and "be more conscientious in fulfilling their duty to protect and preserve Mississippi's most precious natural resources." To accomplish this goal, the Court required "strict adherence to, and application of, relevant statutory and regulatory laws" concerning environmental regulations.

FACTS

The landowners in this case, Joseph and Mary Tatum, lived approximately fifty feet from the Bouie River in a secluded portion of Forrest County. They filed a petition with DEQ seeking to have the river area near their home declared "unsuitable" for mining activities. Subsequently, American Sand and Gravel applied for a permit to mine sand and gravel from the same area covered by the landowner's petition.

The Mississippi Commission on Environmental Quality (a division of DEQ) conducted a consolidated public hearing that lasted five days and encompassed both the landowner's petition and the mining company's application for a permit. DEQ later met in "executive session" and approved the mining company's application, and denied the landowner's petition. The landowners appealed that decision to the Chancery Court of Forrest County, which held another formal hearing, and conducted a *de novo* review of all issues raised in these matters. After the hearing, the Chancellor reversed DEQ's decisions and held that the mining activities would not be allowed on the land in question. The mining company appealed that decision and the Mississippi Supreme Court, on petition for rehearing *en banc*, affirmed the chancellor's decision dening the mining permit.

DISCUSSION

The Supreme Court addressed four primary issues on this appeal including:

A. Whether DEQ properly applied the relevant statutes, rules, and regulations to the facts of this case;
B. Whether DEQ failed to obtain comments on the proposed plan from the Soil and Water Conservation Districts in the affected area;
C. Whether proper notice of the mining permit application was given to all affected landowners; and
D. Whether DEQ's decision granting the mining permit was supported by "substantial evidence."

Applicable Statutes, Rules, and Regulations

Initially, the Court noted that the Mississippi Legislature has charged DEQ with responsibility "for conserving, managing, developing and protecting the natural resources of Mississippi." Miss. Code Ann. § 49-2-7 (Supp. 1991). To carry out this responsibility, DEQ is required to administer and enforce the applicable statutes, rules, and regulations concerning environmental protection, including specifically the Mississippi Surface Reclamation Law (MSRL), Miss. Code Ann. § 53-7-19 (1972), and the Mississippi Surface Mining and Reclamation Rules and Regulations (MSMR), Miss. Code Ann. § 49-2-9 (b) and § 53-7-11 (Supp. 1991). The Legislature enacted the MSMR to minimize the injurious environmental effects of surface mining. MSMR established uniform standards governing

such activities by requiring the reclamation of land altered or affected by surface mining. The goal of MSMR was to "achieve an acceptable workable balance between the economic necessities of developing our natural resources and the public interest in protecting our birthright of natural beauty and a pristine environment."

To carry out this legislative mandate, DEQ adopted the substantive and procedural regulations set forth in the MSMR. Those regulations apply to any individual or entity that engages in surface mining operations. Under the MSMR, a permit must be obtained for every mining operation. DEQ is required to deny any application if: (1) the proposed area is "unsuitable" for mining; or (2) the proposed mining will cause pollution of any water or air; or (3) the proposed mining will endanger the health and safety of the public or will create imminent environment harm. An area is deemed "unsuitable" if the mining activities will threaten areas of historical or archeological value, adversely affect long range productivity of water or food supply, endanger life or property, damage ecologically sensitive areas, adversely affect park and recreation areas, or endanger any road or building.

The permit application may also be denied if the "reclamation plan" is not feasible or adequate. The reclamation plan must include all work necessary to restore the land affected by surface mining "to a useful, productive, and beneficial purpose suitable and amenable to the surrounding land." The Court noted that a reclamation plan must meet the "voluminous" standards meticulously delineated in the applicable statutes and regulations.

The primary reasons that the Court denied the permit in this case were the mining company's failure to provide sufficient information concerning its proposed activities and DEQ's failure to support its decision to grant the permit with accurate factual information. The Court stated: "If one goes beyond the inaccurate and conclusory statements of DEQ's order and considers the scant information provided by American Sand in its permit application, one will quickly notice noncompliance with many of the informational requirements" contained in the applicable statutes. The Court explained that the statutes required detailed information concerning the type and method of operation, the proposed engineering techniques, the amount of excavation, and the total area to be affected, as well as, a statement of the anticipated hydrologic consequences, and a detailed reclamation plan. However, the mining company failed to provide any documentation either in the permit application or at the hearings showing that these requirements had been satisfied, or explaining how the reclamation of the land was to be achieved. Under those circumstances, the Court concluded that the record was "devoid of sufficient evidence--scientific, geological, or hydrological, studies, surveys, data, or otherwise--to support DEQ's conclusion that the portion of the Bouie River cited in the Tatum's petition is suitable for mining sand and gravel." In addition, the Court held that *insufficient* evidence was presented "to support DEQ's rejection of the Tatums' contention that the proposed mining will be located in an area of unstable geological formation; that it will cause erosion; that it may reasonably be expected to endanger life and property; and that it will damage an ecologically sensitive area." Therefore, the Court concluded that DEQ's findings in this matter were not supported by substantial evidence, and that the mining permit should not have been granted.

Failure of Soil and Water Conservation Districts to Make Evaluations and Recommendations

One of the most significant aspects of this case is the Court's holding that the permit should not have been granted by DEQ because the Soil and Water Conversation Districts with jurisdiction over the affected land did not review the permit application or make evaluations and recommendations concerning the proposed mining plans. The Court explained that the applicable statutes *required* DEQ to receive and consider evaluations and comments from these agencies before a permit could be granted. Miss. Code Ann. § 53-7-33 (1972). Therefore, the Court rejected DEQ's contention that it could not compel local Soil and Water Conservation Districts to prepare such reports.

The Court noted that no previously published decision in Mississippi had interpreted the statutory and regulatory provisions which required the DEQ to receive these reports from the appropriate Soil and Water Conservation Districts. However, the Court concluded that these requirements were mandatory. The Court stated that these duties were consistent with the duties which the legislature has assigned to the Soil and Water Conservation Districts to conserve water and soil resources and promote the health, safety, prosperity and general welfare of the people of Mississippi.

Notice to Affected Landowners

Although the hearings in this case were conducted between the two parties primarily interested in the subject property, the homeowners and the mining company, the proof established that Illinois Gulf Central Railroad also owned land that would have been affected by the proposed mining. The

mining company asserted that Illinois Central had received "actual notice" of the proceedings, but DEQ admitted that it did not provide Illinois Central with formal written notice of the hearings as required by the statute. Miss. Code Ann. § 53-7-45 (Supp. 1991). The Court concluded that the hearing conducted by DEQ was void because the record did not establish that all affected landowners had received notice of the hearings. This holding clearly establishes that formal notice to affected landowners must be accomplished by DEQ before it's hearings on environmental issues will be upheld.

DEQ'S Findings of Fact were Inadequate

The final point addressed by the Court in this opinion was the lack of specific and accurate factual findings in the DEQ's order granting this permit. The Court held that the DEQ order granting this permit was wholly inadequate because the decision was not supported by "*at least some findings of fact.*" The mining company argued that such orders are not required to contain "detailed" factual findings. The Court rejected this contention in view of the numerous factual issues that must be addressed in order to satisfy the applicable statutes and regulations.

This portion of the Court's opinion will probably have the most significant impact on future issues concerning surface mining as well as other activities that are regulated by DEQ. The Court's holding in this case clearly requires DEQ to make specific findings of fact regarding all applicable statutes and regulations before activities that pose potential environmental hazards will be permitted.

Violation of the Open Meetings Act

In apparent disregard for the "Open Meetings Act," Miss. Code Ann. § 25-41-1 (1972), which requires state agencies to conduct most of their business in public forums, DEQ in this case went into "executive session" when it made its final decision on the Tatums' petition to block the surface mining, and the company's application for a permit. Since the Court reversed DEQ's decision on numerous other grounds, the Court dismissed this issue as "moot." However, it should be noted that executive sessions are usually appropriate only for a limited number of matters, such as personnel decisions. It is apparent that DEQ acted improperly when it conducted its final decisionmaking in this case behind closed doors.

CONCLUSION

The *Tatum* decision will significantly impact future surface mining activities in Mississippi, as well as, other areas of environmental concern that are regulated by DEQ. The Mississippi Supreme Court has made it clear that DEQ will be required to adhere to the statutory and regulatory requirements of carefully evaluating all regulated activities that pose significant environmental risks. The Court will not accept a cursory review of permit applications or conclusory findings that are not adequately supported by factual information. Permits granted by DEQ will be upheld only when adequate inquiries concerning the proposed environmental effects of such activities have been made, and only when detailed plans for the operation and for the protection and restoration of the environment have been prepared. Through this decision, the Court has clearly indicated that it will hold state agencies such as DEQ to their appointed task of protecting and preserving Mississippi's natural resources.❑

David Calder is an attorney with the Oxford, Mississippi firm Hickman, Goza, and Gore.

The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

A New Scheme for Wetlands Management?

by Katherine Howie

INTRODUCTION

Two bills, currently pending in Congress, have been introduced to expand wetlands conservation efforts through amending the Federal Water Pollution Act. 33 U.S.C. § 1251 *et seq* (1986 & Supp. 1993)(Clean Water Act or CWA). The following is a summary of these proposed amendments, either of which will have a significant impact on wetlands regulations if enacted. The status of these bill is current as of 7 July 1993.

THE EDWARDS BILL

H.R. 350 - Edwards (D-CA). Introduced by Representative Don Edwards, the Wetlands Reform Act of 1993 seeks to grant greater protection for wetlands. The bill would

require that a permit be obtained not only for dredged and fill discharging activities in wetlands, which is all that is currently regulated by the CWA, but also for many other activities that damage or destroy wetlands. This would include a number of activities currently exempt from permitting or subject to less strenuous regulation, such as clearing vegetation, diverting water, driving pilings or other activities that would impair the flow of surface water or affect the wildlife that depends on such waters.

The purposed amendment also grants a greater role to the resources agencies — Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) — involved in the permitting process. In addition to the requirement that the Corps consult with these agencies (as under current law) the bill would require that the Corps explain in writing reasons for rejecting recommendations made by FWS or NMFS.

The provisions of the CWA dealing with general permits are revised by the bill to limit the Corps to issuing general permits for "narrowly defined" catagories of activities. Additionally, the bill creates an accounting system to monitor the amount of acreage lost under each general permit.

If adopted, the Act will minimize duplication and needless paperwork and expedite the issuance of minor permits. Permits will not be issued when there is a practicable alternative to the proposed activity with less environmental impact. The citizen suits section is amended by allowing citizens to bring a civil action against the Secretary of the Army, as well as the Administrator.

The bill proposes funding for a training and certification program for wetland delineators. H.R. 350 also appropriates funds for completing wetlands mapping, updating mapping and assisting small landowners with delineation. This bill requires the Corps, EPA, FWS, and selected states to initiate a pilot program of wetlands restoration to identify areas where restoration could contribute to preserving the nation's wetlands, to test methods of wetlands restoration and to develop a means of evaluating the success of wetlands restoration efforts.

H.R. 350 directs the Secretary of the Interior to designate a nonprofit organization as a Wetlands Stewardship Trust for the purpose of acquiring interest in wetlands and associated real property for purposes of preservation.

THE HAYES BILL

H.R. 1330 - Hayes (D-LA). The bill introduced by Representative Jimmy Hayes is a stark contrast to H.R. 350. Rather than amending the current regulatory program, it seeks to replace it ith a new regulatory scheme and a new definition for wetlands. The Comprehensive Wetlands Conservation and Management Act of 1993 proposes to strike completely Section 404 of the Act and add a new Section 404 entitled "Permits for Activities in Wetlands or Waters of the United States."

Under this new section is a classification of wetlands based on an assessed value under which each class of wetlands is offered a different degree of protection. "Type A" wetlands would be those with critical significance to longterm ecosystem preservation — these would receive complete protection from development unless it was determined that there was an overriding public interest for such development. No more than twenty percent of wetlands in any county could be classified as type A under this bill. "Type B" wetlands would be those with significant population of wildlife and significant wetland functions; the Corps could issue permits for activities on these wetlands provided the permits ensure that the area affected will not suffer significant degradation (the bill does not specify what would constitute "significant degradation"). "Type C" wetlands would be those with limited wetland functions. No permit would be required for activities on type C wetlands.

The Hayes bill would also redefine how wetlands are delineated; and would expand the list of activities that are currently exempt from permitting requirements. Additionally, the bill would eliminate any oversight or veto authority by EPA; making the Corps solely responsible for the permitting program. It would create a mitigation banking program in every state and would promote both public and private-sector banks. Finally, H.R. 1330 proposes guidelines for compensating those owning an interest in type A wetlands and provides that if a landowner so chooses, the government must purchase the wetlands at its fair market value.

CONCLUSION

Congress will begin the process of reevaluating and reauthorizing the Clean Water Act this year. As Congress begins this process, wetlands regulation is certain to undergo major revisions. These two bills have emerged as the most likely plans for reform — and are divergent in their approaches. The Edwards bill (H.R. 350 promotes greater protection for wetlands and is supported by many national environmental groups. The Hayes Bill (H.R. 1330) seeks less protection and is supported by farmers, homebuilders, and industry. Both bills have strong support by House members. H.R. 350 is currently in the House Public Works

and Transportation Committee, the House Merchant Marine and Fisheries Committee, and the House Ways and Means Committee. H.R. 1330 is currently in the House Public Works and Transportation Committee and the House Merchant Marine and Fisheries committee.❑

Katherine Howie is as a second-year student at the University of Mississippi School of Law and research associate with Mississippi-Alabama Sea Grant Legal Program.

The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

Mississippi State Highway Commission v. Gilich

609 So. 2d 367 (Miss. 1992)

by Lonnie T. Cooper

BACKGROUND

The public trust doctrine has a history dating back over 1,500 years. From the time of Roman emperors and English kings, the right of all citizens to the benefit and use of the area in and around waters and wetlands has been protected by the ruling powers under the public trust doctrine. This policy was transplanted to the American colonies under the English common-law system.

The thirteen original colonies retained in large part their authority and responsibilities over these public trust lands when they formed the United States. The federal government in turn relinquished much of its power over such lands as the federal territories achieved statehood. However, some notable exceptions to this general rule do exist. One such exception is when the federal government , in the exercise of its sweeping commerce clause powers, regulates navigable waters common to several states. The manner in which individual states administer their roles as trustees varies somewhat from state to state.

All states adhere to the common law historical mandates of the public trust doctrine. State action that affects lands and waterways held under public trust is restricted by these historical mandates. The citizens of a state are the titleholders to trust areas, and the state government merely acts as trustee for the benefit of those citizens.

The public trust doctrine has a dynamic nature. It has been evolving continuously with societal advances. Originally, the doctrine only protected citizens' rights to navigation, commerce, and fishing on navigable waters. In modern society the rights have expanded to include recreational use and have extended the landward boundaries of the protected areas.

The amount of acreage covered by the public trust doctrine in the United States is significant. It exceeds the combined landmass of the states of Maryland, Virginia, North Carolina, South Carolina, and Georgia. Much of this area amounts to some of the most desirable and expensive real estate in the United States.

There are two seperate and distinctive title interests to all lands held under public trusts. They are the public trust

title (*jus publicum*) and the private proprietary title (*jus privatum*). The public trust title encompasses the collective rights of the public to use fully and enjoy trust lands and waters for a variety of public purposes. This interest cannot be conveyed or alienated to private ownership. However, the private proprietary rights of use and possession may be and often are conveyed to private ownership. Nearly one third of all public trust land is privately owned. Whether trust lands are publicly or privately owned, the state retains and holds in trust the public (*jus publicum*) interest. Regardless of title ownership, the *jus privatum* interest always remains subject to the public's dominant *jus publicum* interest.

This rather succinct background on the public trust doctrine will help place the ruling in *Mississippi State Highway Commission v. Gilich* in its proper perspective. For a more indepth overview refer to *Putting the Public Trust Doctrine to Work* prepared as project of the National Public Trust Study and edited by David C. Slade, Esq.,

INTRODUCTION

The question of whether a particular parcel of land is or is not a part of the public trust area is often at the heart of the legal controversy. In *Gilich*, the Mississippi Supreme Court was asked to rule on just such an issue.

Property owners filed an inverse condemnation complaint against the Mississippi State Highway Commission. In this type of suit, the private landower alleges that some action on the part of the government, other than a state's formal exercise of the power of eminent domain, has amounted to a "taking" of his land without just compensation. The Giliches contended that part of their land, comprised primarily of a sand beach that extended to the water's edge, was taken by the Commission without compensation. The Giliches also alleged that the construction of a highway interchange resulted in a wrongful taking of their riparian and littoral rights. All landowners have riparian rights to benefit from certain uses of a stream as it passess through their land. Littoral rights are those rights concerning properties which abut an ocean, sea, or lake rather than a river or stream. Usually, the littoral rights concern the use and enjoyment of the shore.

The Mississippi Supreme Court in reaching its decision relied heavily on the historical use of the portion of the Giliches' lot that was the subject of their suit. The court found that due to natural erosion the land had been completely submerged for a period of years. It was later artificially reclaimed by the pumping up of sand to create the beach. All land in Mississippi that is subject to the ebb and flow of the Gulf of Mexico is classified as part of the public trust. Thus, having been subject to the public trust doctrine at any time in the past, land can never be conveyed or alienated to the point that the *jus publicum* interest is eliminated. The court held that both the *jus publicum* and *jus privatum* titles were held by the state of Mississippi. Therefore, the Giliches were not entitled to compensation for the taking or loss of use of land they did not own.

FACTS

The Giliches owned a parcel of land located north of Highway 90 and that extended on its south side to the water's edge of the Gulf of Mexico in Biloxi, Mississippi. The Commission built an interchange known as the "I-110 loop." This interchange was built partially on the southernmost part of the property to which the Giliches claimed title. The Commission took the position that the sand beach lying south of Highway 90 was held in public trust. The Mississippi high court felt that the historical context was crucial to the determination of whether the section of sand beach under dispute was part of the public trust lands.

In 1817 Mississippi was admitted to the Union. The federal government simultaneously conveyed title to all land under tidewater to the new state. Mississippi was to hold these lands in trust for the public benefit. This included all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability.

In the early 1900s, Highway 90 ran parallel to the sand beaches of the Mississippi Sound on the Gulf Coast. Long sections of the road were washed away twice by severe hurricanes. In response to the inadequate protection of the roadway the Mississippi legislature passed Chapter 319, Laws of 1924, the predecessor to Miss. Code Ann. §65-33-1 *et seq.* (1972). This 1924 law granted to the counties bordering tidewaters the power to erect seawalls or other structures for the protection of the public highways. The Act also empowered the counties to erect and maintain sloping beaches as protective barriers against roadway damage.

In 1924, the Giliches' predecessors in title allowed an easement over and across the beach front section of their lot. A seawall was contructed. Ownership of the easement land was eventually transfered to Harrison County, Mississippi through adverse possession. "This included all elements of the right of way ownership as authorized by the statute (Chapter 319, Laws of 1924), including the right to construct sand beaches at any future time." *Henritzy v. Harrison County*, 180 Miss. 675, 178 So. 322 (1938).

After construction of the seawall the natural destructive

action of the Gulf waters washed away the sand south of the wall. In the 1930s and 1940s the beaches south of the artificial barrier gradually ceased to exist. In 1952 Harrison County authorized the pumping up of sand onto the property south of the highway.

Jacobina Gilich purchased lot 20 of the Gulf View Property on 5 July 1945. The Giliches always believed they owned the sand beach south of Highway 90 and thought they paid property taxes on it as well. Not until 1985 when the Commission began the construction of the I-110 loop did the Giliches have any reason to question their ownership of the beach area.

ANALYSIS

The Commission relied on numerous authorities to support its position that the sand beach south of the Gilich property was a public beach held in trust by the state. Only two of these authorities dealt with the public trust doctrine.

First, the Commission relied on two previous court rulings in *United States of America v. Harrison County, Mississippi*, 399 F.2d 485 (5th Cir. 1968) and *Cinque Bambini Partnership v. State*, 491 So. 2d 508 (Miss. 1986), *aff'd, Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). In *Harrison County*, the federal appeals court was ruling on the status of land south of Highway 90. "Such beaches as existed south of the seawall disappeared" and "[t]he land formerly occupied went under the water bottoms of the Mississippi Sound and became the property of the state, in trust for the people." This ruling reinforced 100 years of court precedent that any lands which are subject to the ebb and flow of the tides are a public trust area. When nature expands the reach of tidal forces, the new tidelands so affected accrete to the trust. *Parks v. Simpson*, 242 Miss. 894, 137 So. 2d 136 (1962). That is what occurred to the disputed beach section in the *Gilich* case during the 1930s and 1940s. Once the land became a part of the trust area, the artificial reestablishment of the beach by Harrison County's pumping of sand in 1952 did not alter its status. *Cinque Bambini* additionally held that the original grant of public trust land to the new state of Mississippi in 1817 may be augmented by accretions and by the natural inland expansion of the tidal influence. Under this ruling acrease may be added to existing public trust lands by any natural rising or inland expansion of the tide. Once this natural process has occurred, the new acreage has in law been added to the trust so that title is held by the state.

Secondly, the Commission relied on Section 95 of the Mississippi Constitution of 1890. "Lands belonging to, or under the control of the state, shall never be donated directly or indirectly to private corporations or individuals." *Rouse v. Saucier's Heirs*, 166 Miss. 704, 146 So. 291 (1933). The court applied a plain and unequivocal meaning to the language of the Mississippi Constitution. Once the state possesses public trust lands it is deemed to possess such land forever.

The Giliches relied heavily on a previous Mississippi Supreme Court ruling in *Harrison County v. Guice* 244 Miss. 95, 140 So.2d 838 (1962). In the *Guice* case, land that was at one time below the mean high tide level was artificially recovered by the pumping up of sand. Guice was awarded title to the land which abutted his property. The court reasoned that the recovered land belonged to Guice by virture of the doctrine of artificial accretion. To rule otherwise would result in allowing the state to take Guice's littoral right of direct access without compensation. The court in *Gilich* overruled its previous decision in *Guice*. Under the *Phillips Petroleum* decision the land in question in the *Gilich* case was clearly public trust land during the period it was under the Mississippi Sound's tidial influence. In Mississippi, if land ever becomes part of the public trust the property can not revert to private ownership that would diminish the dominant *jus publicum* interest. Therefore, the precedent of the *Guice* case had to yield to the clear prohibition against alienation of any trust lands contained in Section 95 of the Mississippi Constitution.

The court further clarified riparian and littoral rights as they are codified in Miss. Code Ann. §49-15-9 (1972). These rights include the right to plant and gather oysters, construct boathouses, piers, and other structures in front of any land bordering on the Gulf of Mexico or Mississippi Sound. These rights are not property rights. They are mere licenses or privileges and as such are revocable. *Crary v. State Highway Commission*, 219 Miss. 284, 68 So. 2d 468 (1953) and *Catchot v. Zeigler*, 92 Miss. 191, 45 So. 707 (1908). Thus, abutting property owners, such as the Giliches, have no claim for damages under Section 17 of the Mississippi Constitution. Additionally, the Giliches were not entitled to any compensation for loss of littoral rights because they did not suffer any such loss. The building of the Interstate 110 loop left the shore line the same as prior to the construction. Thus, the Giliches have all the littoral rights and privileges they enjoyed prior to the construction.

CONCLUSION

The ruling in *Gilich* reinforces several of the historical and modern tenets of the public trust doctrine. The original lands ceded to the states upon admission to the Union may be accreted by the natural expansion of tidal activity

landward. Once land navigable or otherwise has become part of the public trust, the *jus publicum* interest must dominate over any *jus privatum* interest. The land may be alienated from the state only upon the authority of a legislative enactment and then only when consistent with the purpose of the public trust. The Mississippi Constitution bars the common law doctrine of artificial accretion. Lands once a part of the public trust may not become the property of private individuals by the action of the government in artificially recovering such lands. Lastly, riparian and littoral rights are mere licenses and privileges which may be revoked without compensation for the greater public good.❑

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The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

Marine Aquaculture in Mississippi—State Cancels Lease

by Ellen Peel

INTRODUCTION

Articles in WATER LOG vol. 11, no. 4 (1991) and vol. 12, no. 1 (1992) discussed the development by the State of Mississippi of marine aquaculture guidelines and permit procedures. The state action was in response to a proposal by Sea Pride, Inc. to place six 400-foot barge-type vessels in Mississippi waters about two miles south of Horn Island, a National Park Service wilderness area within the boundaries of Gulf Islands National Seashore. This wilderness area provides habitat for eagles, osprey, terns, pelicans, cormorants, gulls, loggerhead turtles, and green turtles. To accommodate this proposed development, a 15-year renewable lease was issued by the Governor's office in 1991, followed by the issuance of a coastal wetlands permit from the Mississippi Bureau of Marine Resources in February, 1992. Since then, Sea Pride's progress regarding its aquaculture project has been hampered significantly. This article aims to inform readers about recent developments with regard to that proposed aquatic farm project.

DISCUSSION

Net-Pen Farm Lease Requirements

The lease issued by the State of Mississippi to Sea Pride, Inc. granted the use of submerged lands and superjacent water column for a 15- year period, with an option to renew for an additional 25 years. The lease provided for the initial placement of one barge estimated to occupy 40 "non-specified contiguous acres and the superjacent water column" and was considered to be one parcel within a leased tract containing about 767 acres.

The lease also allowed for the expansion of the aquaculture operations up to a "maximum total" of six 40-acre parcels within the 767-acre tract. Approval of each expansion was contingent upon Sea Pride's undertaking to spend at least $300,000.00 on each additional barge. This stipulation is discretionary, however, for the lease also provides that "nothing herein, however, shall preclude the lessor [Mississippi], in his discretion, from allowing the lessee [Sea Pride] to expand as described herein *prior to* lessee's ability to provide a minimum financial commitment of $300,000.00 on each expansion option" (emphasis added).

The fee to be charged by Mississippi for the use of its public resources had two parts. The first was a fixed annual rent in the amount of $25.00 per acre. The second was a fee similar to a royalty, to be assessed on the "cumulative sales of products attributable to the aquaculture ventures" and figured on a sliding scale according to pounds produced and sold, with the fee ranging from one cent per pound up to five cents per pound.

The lease also specified that Sea Pride must use a cage or pen system for fish farming, defined as "a single Viking Oceanic Aqua System 102 or comparable." This system was approved for the purpose of "raising redfish, hybrid striped bass, snapper, grouper, oysters, shrimp, crabs and other marine species naturally found in the Gulf; and . . . research for possible new species for commercial aquaculture production."

The right of possession and use of the leased area was contingent upon Sea Pride's obtaining all necessary permits and licenses within two years of the date of execution of the lease. This two-year period expired in March 1993, by which time Sea Pride had not obtained an National Pollution Discharge Elimination System (NPDES) permit. An NPDES permit is required by the federal Clean Water Act,

33 U.S.C.A. §§ 1251 *et seq.* (West 1986 and Supp. 1993), for all point-source discharges into waters of the United States. Aquaculture facilities, which are considered "concentrated aquatic animal production facilities," C.F.R. § 122.24 (1992) are point-source dischargers. In order to provide Sea Pride an opportunity to comply with the lease requirements, Mississippi extended the compliance period by an additional two months, which expired in May 1993. On Thursday, June 3, 1993, the Office of the Secretary of State notified Sea Pride that the lease had been canceled. (Sea Pride may now begin negotiations with the State of Alabama to place the project south of Mobile Bay rather than in Mississippi waters.)

The president of Sea Pride, John Ericsson, maintains that the compliance period should have been extended until the state completes its assessment of the project and is prepared to make an NPDES permit determination. According to Ericsson, Sea Pride did not apply for the NPDES permit until recently because an official at the state's Department of Environmental Quality (DEQ) told him in 1990 that a permit was not necessary. The cancellation could have been avoided had the state required satisfaction of all permit and license requirements prior to the issuance of the lease. If Sea Pride applies for a new lease, perhaps Mississippi will make satisfaction of all permit and license requirements a condition of negotiating a lease agreement.

The U.S. Environmental Protection Agency (EPA) reviewed Mississippi's decision not to require an NPDES permit early in 1992. At that time, DEQ not only maintained that the permit was not necessary, but further contended that EPA, from whom permitting authority is delegated, had not provided any guidance on the subject of NPDES permitting. There is no indication that DEQ requested guidance or assistance at any time from the delegating agency (EPA) in drafting discharge standards or in reviewing projects potentially requiring an NPDES permit, even during the pendency of Sea Pride's application.

With the delegation of NPDES authority, the EPA still retained review authority of state decisions. 40 C.F.R. § 123.24(d) (1992). Therefore, even though Mississippi's Department of Environmental Quality initially informed Sea Pride that a permit was not required, the federal government's authority to review pre-empted the state decision. The federal agency's decision was based on a national policy recognizing aquaculture facilities as point source dischargers.

In deciding whether to issue Sea Pride an NPDES permit in light of the national policy, Mississippi's DEQ must now evaluate the amount and potential impact of the project's pollution discharge. If it is determined that a permit will be issued, a draft permit must first be made available for public comment for a one-month period. DEQ will also hold a public hearing on the matter. When notice of termination was given to Sea Pride, DEQ was about two months away from completing a draft permit.

Change In Farming Method

Just before the end of the two-month extension period granted for lease compliance, Sea Pride informed the Mississippi Bureau of Marine Resources of its intent to change its cultivating system from net pens to what is described as "barrel cages extending from a platform." This proposed system would include six 140-foot long barrels attached to a modified oil platform. Since the original lease specified the cage or pen system of aquaculture, Mississippi's consideration of a new lease application by Sea Pride would have to take into account this proposed change. A different farming method will probably affect NPDES and coastal wetlands permits as well. The state can simplify the process for itself and for Sea Pride by requiring all permitting and licensing requirements to be met before a lease is granted.

Local Opposition to Aquaculture

Opposition to putting the net-pen farm near the designated wilderness area began to surface at the first public meeting in January 1992. Soon thereafter, the Sierra Club Legal Defense Fund added its voice, expressing concern over possible threats to coastal public resources presented by the net-pen farm. In addition, a citizens' group, the Gulf Islands Conservancy, has since been formed to advocate the conservation of the natural resources of the five offshore barrier islands and several nearshore islands in the Gulf waters of the Mississippi coast, waters including the planned site for the Sea Pride farm. This group also opposes the Department of Energy's proposed expansion of the Strategic Petroleum Reserve, which would mean construction of a pipeline to dump hypersaline water near Horn Island, one of the designated wilderness areas at issue in the Sea Pride application. Likewise the Conservancy opposes Chevron's plans to build a natural gas pipeline through Gulf Islands National Seashore at the eastern end of Petit Bois Island, also within the designated wilderness area thought to be imperilled by the net-pen farm.

Other Obstacles to Sea Pride's Application

Subsequent to the issuance of the lease from the Office of the Secretary of State, the Mississippi Commission on Wildlife, Fisheries, and Parks approved a coastal wetlands permit in February 1992. Sea Pride's ability to begin operations within the previously leased area was also contingent upon specific conditions named in this permit. Among the conditions in the February permit was a requirement that Sea Pride operations comply with marine aquaculture guidelines to be approved by the state. These guidelines were not approved until April 1992, with an effective date of May 30, 1992, another instance of poor coordination by Mississippi's environmental authorities.❑

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The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

Mississippi-Alabama Legislative Review 1993

by John Farrow Matlock

The 1993 session of the Mississippi legislative saw the passage of a small number of bills in the areas of fishery management, marine conservation, and offshore gambling. The 1993 session of the Alabama legislature produced two bills on the subject of saltwater fisheries. Below is a summary of the newly enacted statutes.

MISSISSIPPI

House Bill No. 732

Effective Date: 1 July 1993

Miss. Code Ann. § 49-15-15(3)(n) (Supp. 1992) is amended to grant authority to the Bureau of Marine Resources to prescribe the permissible length of lead lines used by commercial fishermen.

House Bill No. 732

Effective Date: 27 March 1993

Miss. Code Ann. § 17-17-231 (Supp. 1992) is amended to give the Commission on Environmental Quality authority to adopt rules and regulations governing municipal solid waste landfills that accept household wastes. The Commission is also granted authority to promulgate rules concerning landfills on points where the Subtitle D. regulations of the Environmental Protection Agency are silent.

House Bill No. 1633

Effective Date: 1 April 1993

Chapter 855, Local and Private Laws of 1992, is amended to authorize the Board of Supervisors of Hancock County to impose a fee in an amount not to exceed 3.2 percent of the gross revenue of gambling ships which dock in the county. The Act also makes clear that the county's authority to impose this fee and other licensing taxes extends only to cruise vessels which dock at sites in the county that are outside of municipal boundaries.

House Bill No. 2906

Effective Date: 1 July 1993

This Act amends several sections of the Code that relate to mussels. To Miss. Code Ann. § 49-9-1 (Supp. 1992) is added this definition of "Mussel Abatement Program:" "the killing, destruction, or permanent eradication of mussels which are attached to or blocking water-intake structures solely for the purpose of safeguarding mechanical equipment used in a company, commercial operation, or farm and to maintain the continued safe operation of such water-intake structures and mechanical equipment."

Miss. Code Ann. § 49-9-7 (Supp. 1992) is amended to raise the fee for a license to catch mussels from $100.00 to $750.00 (companies, commercial operations, and farms running a mussel abatement program are exempted from this provision). The fee for a license to purchase mussel shells as mussels in the shell is raised rom $250.00 to $2,500.00. A fee of not less than $2,000.00 is to be levied on non-residents for a license to catch mussels in fresh waters of Mississippi.

A new statute is added to Title 49, Chapter 9, to be codified as Miss. Code Ann. § 49-9-10, which requires exporters of mussels from the state to pay the Department of Wildlife, Fisheries, and Parks a severance fee in an amount not to exceed one-tenth of the value of the mussel shells. Exporters of mussels must also file with the Department a surety bond in the face amount of $5,000.00.

The penalties for violating provisions of Chapter 9 as set forth in Miss. Code Ann. § 49-9-17 (Supp. 1992) are increased. Any person who violates a section of the Code relating to mussels shall be fined in an amount that is twice the statutory fee for the appropriate license or be imprisoned for not more than three months or both, and in addition he shall forfeit his license for at least 12 months. The punishment for a person who takes mussels while his license is revoked shall be imprisonment for a term of not less than 30 days and not more than six months.

ALABAMA

House Bill No. 424

Effective Date: 5 May 1993

This statute allows residents of Alabama to purchase a seven-day trip saltwater fishing license in lieu of obtaining an annual saltwater fishing license pursuant to Ala. Code § 9-11-53.1 (Supp. 1992). The seven-day license, which costs $6.00, is valid only for a one-time period of seven consecutive days or less.

Ala. Code § 9-11-53.2 (Supp. 1992) is amended to provide for the issuance of a resident annual combination saltwater-freshwater fishing license at a total cost of $24.50, with $15.00 of the price going to the Marine Resources Fund and $8.50 going to the Game and Fish Fund. Residents who do not possess a current saltwater fishing license may purchase, at the cost of $5.00, an annual saltwater pier fishing license for the purpose of fishing from piers open to the public on the Gulf of Mexico. The fine for violating any section of this statute is set at not less than $50.00.

House Bill No. 806

Effective Date: 24 July 1993

This statute makes it unlawful for any person to kill or take from public waters the state saltwater fish, the tarpon (*megalops antlanticus*), without first obtaining tags from the Marine Resources Division of the Department of Conservation and Natural Resources. Tags cost $50.00 apiece, and one must be attached to each tarpon immediately upon its being caught. The Marine Resources Division may promulgate rules and regulations about the sale of tags. Persons convicted of violating the law are subject to a fine or not less than $100.00 and not more than $250.00.❑

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LAGNIAPPE

A Little Something Extra

June 8, 1993, a state court judge declared Mississippi's Legislative Environmental Protection Council (EPC) an unconstitutional body, holding that because lawmakers serve on the EPC, it violates the constitutionally required separation of powers. Consequently, if that decision stands, Mississippi's previously submitted plans to the U.S. Environmental Protection Agency as required by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) will be invalid. CERCLA was passed to assure that a state has adequate capacity to store and treat its own hazardous waste or that it has made arrangements with other states to handle it. If Mississippi's plans become invalid then the state will not be in compliance with CERCLA. CERCLA prohibits the federal government from providing any remedial action funding to states without plans. There could be far-reaching ramifications for Mississippi if it is barred from receiving any federal funding to deal with hazardous waste problems.

In the short term, the court action puts on hold plans for a hazardous waste treatment facility in Noxubee County. The blocking of such a facility was the primary purpose of the suit filed by five state residents.

Grenada Lake, Mississippi is the site of a new 330-acre public use wetland ecosystem complex. The opening of the complex is the result of joint efforts by government and private sector nonprofit organizations. Wetlands, a wildlife management area, millet ponds, moist soil areas, a greentree reservoir and hardwood forests are all incorporated into the planned site.

The Clinton Administration has announced plans to create a high-level task force to address wetlands issues. The group will be comprised of EPA head Carol Browner and appropriate cabinet members from the Department of Interior, Agriculture, Defense, Transportation, and Housing and Urban Development. The task force would advice Congress and make recommendations regarding which wetland issues to address during the Clean Water Act reauthorization. Several areas to be addressed during reauthorization include wetland delineation, mitigation banking, landowner rights, and state roles in wetland regulation.