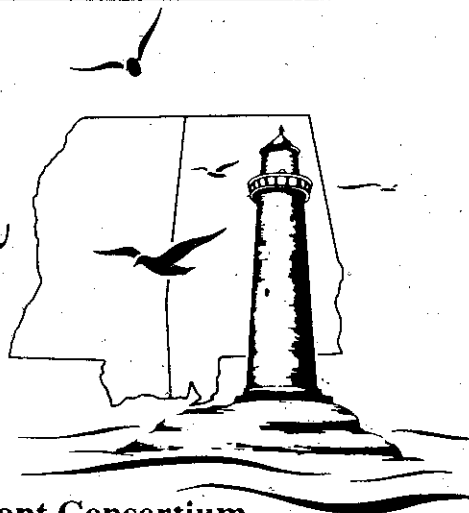


# WATER LOG



A Legal Reporter of the  
Mississippi-Alabama Sea Grant Consortium

## Special Issue: Criminal Enforcement of Environmental Laws

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Volume 13, Number 3, 1993  
Mississippi-Alabama Sea Grant Legal Program

# 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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**MASGP-93-015-03**

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## Preface

This edition of **WATER LOG** addresses the important topic of criminal enforcement of environmental laws in Mississippi, Alabama and Florida. Despite limited resources, states in the Gulf region are stepping up their efforts to impose criminal sanctions for violations of environmental statutes and regulations. We have asked three knowledgeable commentators to provide an overview of recent developments in their respective states.

Joseph Runnels, Special Assistant to the Mississippi Attorney General assigned to the Bureau of Marine Resources, examines criminal enforcement of Mississippi marine resource laws. Mr. Runnels provides a summary of the state's primary marine-related environmental statutes and examines the effectiveness of the existing enforcement system.

Olivia Jenkins, General Counsel to the Alabama Department of Environmental Management, argues that the state's traditional reliance on civil penalties for environmental violations has proved to be inadequate. She suggests that more drastic criminal penalties are required to force violators to comply with the law and describes Alabama's efforts to place growing emphasis on the use of criminal sanctions to protect the environment.

Lonnie Cooper, a second-year student of the University of Mississippi Law School with over ten years experience as a Florida state law enforcement officer, discusses an innovative enforcement program established by the Florida Game and Fresh Water Fish Commission. Under the new program, Environmental Enforcement Teams concentrate criminal enforcement efforts on selected high priority violators.

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# Criminal Enforcement of Mississippi Marine Resource Laws

*by Joseph A. Runnels, Jr.*

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## INTRODUCTION

In Mississippi, the criminal enforcement of marine regulations and laws is the responsibility of the Mississippi Department of Wildlife, Fisheries and Parks (MDWFP). The MDWFP enforces the laws in Mississippi that pertain to the protection of the coastal wetlands and the regulation of the marine aquatic resources in the coastal waters of the state. This article will describe that enforcement scheme.

## DISCUSSION

The MDWFP is organized into four departments: the Office of Wildlife and Fisheries, the Office of Parks and Recreation, the Office of Support Services and, as of July 1, 1993, the Office of Law Enforcement. Within the Office of Wildlife and Fisheries is the Bureau of Marine Resources. It is primarily through the Bureau of Marine Resources that the MDWFP develops and enforces the statutes, rules and regulations affecting marine resources.

The governing authority for the MDWFP is the five-member Mississippi Commission on Wildlife, Fisheries and Parks (Commission). The Commission oversees the development of and approves all rules and regulations for the MDWFP. The Commission has approved fourteen ordinances for the Bureau of Marine Resources. Those ordinances regulate oystering, shellfish sanitation, commercial shrimping, commercial and recreational fishing, live-bait dealing, crabbing, marine aquaculture and derelict vessels. Violation of those ordinances constitutes a misdemeanor.

In addition to the ordinances of the Commission, there are numerous statutes that apply to the protection of the marine environment in Mississippi. However, most violations involve statutes controlling the harvesting of marine life. Those statutes are commonly referred to as the seafood laws and are codified in Title 49, Chapter 15 of the Mississippi Code of 1972, as amended. Mississippi Code §49-15-63 is the general penalty section for violations of the seafood laws and for violations of the rules and regulations adopted pursuant to the seafood laws by the Commission.

Mississippi Code §49-15-63 provides in part for a minimum fine of \$100.00 and a maximum of \$500.00 for a first

offense, not less than \$500.00 nor more than \$1,000.00 for a second offense committed within three (3) years of the first offense; and not less than \$2,000.00 nor more than \$4,000.00, or imprisonment in the county jail for a period not exceeding thirty days for a third or subsequent offense. In addition, the code provides that licenses may be revoked for a period of one year, following the conviction of a third offense.

Although Mississippi Code §49-15-63 is the general penalty section for violations of the seafood laws and regulations, numerous statutes provide for specific penalties for specific offenses.

For example, Mississippi Code §49-15-41 prohibits oystering at night and provides that violations are punishable by a fine of up to \$10,000.00 or up to one year in jail or both. Mississippi Code §49-15-64 prohibits commercial shrimping during the closed season. Violations are punishable by a fine of not less than \$500.00 nor more than \$1,000.00.

Mississippi Code §49-15-27(10) prohibits the removal of oysters from leased lands or from waters that are not of a safe and sanitary quality without a permit. Violations are punishable by the forfeiture of all equipment, excluding boats, and a fine not to exceed \$2,000.00 or one year in the county jail or both. Subsequent violations are punishable by the forfeiture of all equipment, including boats, and \$5,000.00 and/or two years in jail.

Mississippi Code §49-15-65 provides that the justice and county courts of the respective counties have original jurisdiction of all prosecutions under the seafood laws and ordinances of the commission. Tickets for violating the foregoing laws are almost always filed in justice court. The counties' prosecuting attorneys are responsible for the criminal prosecution of violators of the foregoing statutes and for the prosecution of violators of the ordinances of the Commission. Attorneys from the Mississippi Attorney General's Office represent the MDWFP in any civil proceedings resulting from violations, including the forfeiture of boats and motors with altered numbers and the forfeiture of nets and equipment seized for violating shrimping and fishing laws.

The actual enforcement of the laws and regulations falls on MDWFP marine conservation officers. Mississippi Code §49-15-21 provides for the establishment of a marine enforcement unit charged with the responsibility of enforcing the seafood laws in Mississippi. Enforcement personnel employed by the MDWFP pursuant to the provisions of §49-15-21 are designated as Marine Resources Conservation Officers. Enforcement officers employed by the MDWFP for the enforcement of the game laws, freshwater violations and boat and water safety violations are designated as

conservation officers, but their enforcement authority is different. Unlike their upland counterparts, Marine Resources Conservation Officers are specifically authorized in §49-15-21 to enforce all laws of the State of Mississippi. Marine Resources Conservation Officers can and have cited individuals for being drunk in public, having expired license plates, possession of marijuana and other offenses not related to the enforcement of marine conservation laws.

In addition to enforcing state laws, the Marine Resources Conservation Officers can also enforce the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1801 *et seq.*, in federal and state waters. Enforcement of the Magnuson Act is the result of a cooperative enforcement agreement that was executed in 1989 by the MDWFP, the U.S. Department of Commerce and the U.S. Department of Transportation. The cooperative enforcement agreement has allowed Marine Resources Conservation Officers to receive training through the National Oceanic and Atmospheric Administration at the Federal Law Enforcement Training Center in Glynco, Georgia, and to be deputized as federal law enforcement agents to enforce the Magnuson Act.

The Marine Resources Conservation Officers fall under the umbrella of the newly created Office of Enforcement of the MDWFP. There are currently twenty-three Marine Resources Conservation Officers with two supervisors, a district manager and an assistant chief of law enforcement. The marine enforcement officers generally patrol an area marked by U.S. Interstate 10 to the north to the federal waters in the Gulf of Mexico to the south, and from the Alabama-Mississippi line to the east and the Louisiana-Mississippi line to the west. On average, there are no more than three or four marine enforcement officers on patrol at any time.

The MDWFP maintains annual reports on the citations issued by the Marine Resources Conservation Officers. The annual statistics are divided into three broad categories: offenses involving violation of the seafood laws and ordinances, boat and water safety violations, and those offenses related to freshwater fish and game violations. During fiscal year 1992 the marine enforcement officers issued 864 citations with an 87 percent conviction rate. The 752 convictions resulted in court ordered fines totalling \$79,659.00, making the average fine per violation \$105.93. This means that in most cases violators were assessed only the minimum fine.

Of the 864 citations issued in fiscal year 1992, 569 citations were issued for seafood-related offenses, 188 citations were issued for boat and water safety violations and 107 citations were issued for fish and game violations. Nearly one-half of the seafood violations involved posses-

sion of undersize speckled trout and red fish. Most of the boat and water safety violations were for not possessing a boat registration and for insufficient number of personal floatation devices. Almost half of the fish and game violations were for not possessing a freshwater fishing license.

As of May 1993, the MDWFP had registered 39,215 boats in Mississippi's three coastal counties. The National Marine Fisheries Service estimated in the course of a year the number of saltwater recreational anglers (who until July 1, 1993 were not required to obtain a license) fishing in Mississippi was in excess of 194,000. During fiscal year 1992, the MDWFP sold more than 1,750 commercial shrimping licenses. Given the numbers of registered boats, recreational fishermen, commercial shrimpers, and the size of the area patrolled, the number of citations issued by the Department's marine resources conservation officers is anything but excessive. On an average day less than three citations are issued by marine enforcement officers on the Mississippi Gulf Coast.

## CONCLUSION

The MDWFP does a remarkable job enforcing the marine conservation laws with limited personnel. Although the presence of Marine Resources Conservation Officers in the field serves as a deterrent to violations, the minimum fines imposed by the courts do not. The interests of the state of Mississippi in conserving the marine resources and enforcing the laws would be served by providing additional marine conservation officers or enacting an administrative penalty system that bypasses justice court or both. □

*Joseph A. Runnels, Jr. is special assistant to the Mississippi Attorney General assigned to the Mississippi Department of Wildlife, Fisheries and Parks, Bureau of Marine Resources in Biloxi, Mississippi. He is also a member of the Mississippi Bar Association.*

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# Criminal Sanctions for Environmental Violations in Alabama — It's Not Just the Cost of Doing Business Anymore

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*by Olivia H. Jenkins*

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## INTRODUCTION

Since the early days of environmental regulation, the enforcement of environmental laws by states has increased. This increase has been steady and dramatic. Initially, both the states and the federal government focused primarily on civil enforcement actions. However, as regulators have gained experience in environmental enforcement, a concomitant recognition has followed that reliance solely upon civil sanctions is not always adequate to achieve compliance with environmental laws. In some cases violators consider the payment of civil penalties as nothing more than the cost of doing business. More drastic penalties may be necessary to force violators to comply with the law. Thus, a growing emphasis upon the use of criminal sanctions for violations of environmental laws has developed.

In Alabama, the administration of most of the major environmental statutes has been entrusted to the Alabama Department of Environmental Management (ADEM). With the assistance of the Alabama Attorney General, ADEM has been responsible for civil enforcement of the environmental laws it administers. Recognizing the need for criminal, as well as civil enforcement of environmental laws, Alabama Attorney General Jimmy Evans has made a commitment to increasing the use of criminal sanctions in the enforcement of Alabama's environmental laws. Consequently, Attorney General Evans has beefed up his Environmental Prosecution Division and has added a Criminal Section, complete with experienced prosecutors and investigators.

With the growing emphasis on criminal sanctions for violations of environmental statutes and regulations, it is imperative that those who engage in activities which are subject to environmental regulation know what requirements must be met and what sanctions may be imposed for failure to comply with those requirements. The following is a brief overview of some of the major state environmental laws which proscribe criminal sanctions for violations.

## DISCUSSION

Many Alabama state statutes which impose criminal liability upon violators require issuance of permits. Some of those are the Alabama Water Pollution Control Act (Ala. Code 1975 §22-22-1), Alabama Air Pollution Control Act (Ala. Code 1975 §22-28-1), Alabama Hazardous Wastes Management and Minimization Act (Ala. Code 1975 §22-30-1), and the Alabama Surface Mining Control and Reclamation Act (Ala. Code 1975 §9-16-70). (Unlike the rest of the state laws discussed in this article, the Alabama Surface Mining Control and Reclamation Act is not administered by the ADEM but by the Alabama Surface Mining Commission). Each of these Acts requires a permit to engage in specified activities. They authorize both civil and criminal penalties for operation without a permit. Additionally, these statutes generally impose sanctions for violations of any provisions of the statutes themselves, their implementing regulations and permits issued pursuant to the respective statutes. Some of the statutes provide specific criminal sanctions for falsifying certain reports and other documents and for tampering with monitoring devices.

The Alabama Water Pollution Control Act requires that each person discharging pollutants into waters of the state, whether the discharge is direct or indirect, obtain a permit authorizing the discharge. The permit then sets forth certain standards which must be met. Any willful or grossly negligent violation of either the permit, the Act, or its implementing regulations carries a fine ranging from \$2,500.00 to \$25,000.00 per day or imprisonment for not more than one year or both. A second conviction carries a fine of from \$5,000.00 to \$50,000.00 or imprisonment for not less than one year and one day nor more than two years or both. A knowingly made false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained under the Act carries a penalty of \$10,000.00 or six months imprisonment or both. Falsifying, tampering with or knowingly rendering inaccurate any monitoring device carries the same penalties.

Pursuant to the Alabama Air Pollution Control Act, a permit is required to construct, install, modify or use any equipment, device or other articles designated by regulation capable of causing or contributing to air pollution or designated to prevent air pollution. A knowing violation of the Act or the submission of false information can result in a year of hard labor at a county facility.

The Alabama Hazardous Wastes Management and Minimization Act requires a permit for the transportation, treatment, storage or disposal of hazardous waste. Imprisonment for one year and one day or a fine of \$50,000.00 or both can result from intentionally, knowingly, recklessly or with

criminal negligence committing any of the following acts: (1) transporting hazardous waste to a facility which does not have a permit or interim status; (2) treating, storing or disposing of hazardous waste identified or listed without a permit or interim status; (3) allowing waste to contaminate groundwater without first having a permit or interim status or by violating a permit or interim status requirements; (4) making, furnishing or filing any false statement, representation or omission in any application, label, manifest, record, report, permit or other document filed, maintained or used under the Act; (5) destroying, altering, concealing or failing to maintain or file any application, label, manifest, record, report or other document required to be maintained or filed; or (6) violating any provision of the Act or its implementing regulations, or any permit or order issued pursuant to the Act. A second conviction carries a fine of not more than \$100,000.00 or imprisonment of not more than twenty years nor less than two years or both. In addition, violation of the Department of Public Safety's motor carrier safety regulations hazardous materials regulations is punishable by not more than one year in jail or a fine of not more than \$2,000.00 or both.

A permit from the Alabama Surface Mining Commission is required for surface mining pursuant to the Alabama Surface Mining Control and Reclamation Act. A willful or knowing violation of any condition of that permit, the refusal to comply with an administrative order issued by the Surface Mining Commission, knowingly making a false statement or certification, or willfully resisting, preventing, impeding or interfering with an investigation by the Surface Mining Commission can result in a maximum penalty of \$10,000.00 or imprisonment for one year or both for each of these offenses. It should be noted that a director, officer or agent of a corporation who willfully and knowingly authorizes, orders or carries out violations of a permit or order issued by the Alabama Surface Mining Commission is subject to the same criminal sanctions which may be imposed upon the corporation.

Criminal penalties are authorized under some environmental statutes if required certifications and approvals are not obtained. For example, a water treatment plant, water distribution system or wastewater treatment plant cannot be operated unless the operator is certified. A violation of this requirement can result in a fine of \$100.00 or thirty days' imprisonment or both, and each day of operation is considered a separate offense. In addition, it is a misdemeanor to build, maintain, or use an unsanitary sewage collection, treatment or disposal facility or one that is or is likely to become a public health menace. It is also a misdemeanor to construct a sewage collection, treatment, or disposal facility without approval of the state or county boards of health.

Violations of the requirements for sewage collection, treatment, and disposal facilities can result in a \$500.00 fine.

The failure to meet certain financial requirements can also result in the imposition of criminal sanctions under state law. Operators of commercial hazardous waste disposal sites must pay a fee for all hazardous waste or hazardous substances received for disposal and must file monthly reports. Failure to pay the fee can result in a ten percent penalty, and failure to file monthly reports can result in a \$250.00 penalty. Rendering false reports can result in a penalty of fifty percent, and the false report is considered to be perjury, with the attendant punishment for that crime. Failure to maintain records as required is punishable by not more than three months in jail a fine of not more than \$500.00 or both.

The Alabama Underground Storage Tank and Wellhead Protection Act of 1988, Ala. Code 1975 §22-36-1 requires that an annual fee be collected from tank owners and that tanks be registered. A willful violation of the Act is punishable by a fine of not more than \$25,000.00 per day or imprisonment for one year or both. A second conviction is punishable by a fine of \$50,000.00 or imprisonment for not more than two years or both. Knowingly making a false statement, representation, or certification in any application, record, report, plan or other document filed pursuant to the Act carries a fine of \$10,000.00 or imprisonment for up to six months or both.

Other state environmental laws which impose criminal sanctions include the Water Well Standards Act, Ala. Code 1975 §22-24-1 and the Solid Wastes Disposal Act, Ala. Code 1975 §22-27-1. The Water Well Standard Act provides that any person guilty of violating any of the provisions of that Act or the rules and regulations promulgated thereunder shall be guilty of a misdemeanor and may be punished by a fine of not less than \$100.00 per day nor more than \$500.00 per day for each violation. Under the Alabama Solid Wastes Disposal Act, any person violating the Act is guilty of a misdemeanor. Upon conviction, they can be fined not less than \$50.00 nor more than \$200.00. Each day of a continuing violation is considered a separate offense. Additionally, the Alabama Solid Wastes Disposal Act provides that any person, firm, or corporation granted a certificate of exception who fails to carry out the provisions of the proposals in the application and plan upon which the certificate was issued is guilty of a misdemeanor, punishable by a fine of not less than \$50.00 nor more than \$200.00. Any person, firm or corporation which has not been issued a certificate of exception and utilizes the solid waste disposal system of any county or municipality and fails to pay the established fee is guilty of a misdemeanor punishable by a similar fine.

In addition to the state laws which impose criminal sanctions, there are numerous federal environmental laws. Some of these are the Toxic Substance Control Act, 15 U.S.C.A. §2601 *et seq.*, the Federal Water Pollution Control Act, 33 U.S.C.A. §1251 *et seq.*, the Solid Waste Disposal Act 42 U.S.C.A. §3251 *et seq.*, the Clean Air Act 42 U.S.C.A. §7401 *et seq.*, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §11001 *et seq.*, and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C.A. §11001 *et seq.* Federal criminal sanctions are important because they may be imposed as a result of prosecution by federal authorities. However, in instances in which the state administers a program, state criminal sanctions must be at least as stringent as the federal criminal sanctions in order to maintain federal approval. If the 1990 Clean Air Act reauthorization is typical, we can expect to see federal criminal sanctions become more and more severe as other federal environmental statutes are reauthorized. As a result, state criminal sanctions must also be increased if the state is to retain the right to administer state environmental programs in lieu of federal programs.

## CONCLUSION

This overview of some of the major Alabama and federal environmental statutes demonstrates the trend toward enhanced use of criminal enforcement sanctions. The expectation of an increase in compliance by companies as well as individuals due to this shift is both logical and reasonable. A director or officer of a corporation who faces personal criminal liability for damage caused to the environment by his company's actions develops an immediate vested interest in doing business within the law. For those who continue to damage the environment in order to improve their profit margin, the punishment better fits the crime. The Alabama Department of Environmental Management with the assistance of the Alabama Attorney General is attempting to get the attention of the state's business community. The message being conveyed is a clear one. The criminal law will be used when appropriate against those who illegally damage Alabama's environment. □

*Olivia Jenkins is General Counsel to the Alabama Department of Environmental Management. She is a member of the Alabama Bar, serving as State Chair for the Administrative Law Section and on the Executive Committee of the Environmental Law Section. She is also a member of the ABA SONREEL Section.*

# The Florida Approach to Environmental Law Enforcement

*by Lonnie T. Cooper*

## INTRODUCTION

The state of Florida has experienced what can only be described as a tidal wave of growth. The growth pains associated with the unprecedented influx of people and corresponding development has generated increasing problems with water pollution, solid and toxic waste disposal, and a myriad of other environmental problems. Over sixteen million tons of garbage are produced yearly in the Sunshine State. Additionally, improperly disposed of crankcase oil accounts for forty percent of pollution on Florida's waterways. In some areas, the state's environmental and natural resources have been stressed to their limit. The quantity and quality of habitat available for fish and wildlife resources has been drastically reduced. Consequently, Florida has sought new approaches to ameliorate some of the environmental problems that is caused by such growth.

## DISCUSSION

Florida has been addressing these challenges in part through the efforts of the Florida Game and Fresh Water Fish Commission's (Commission) establishment of Environmental Enforcement Teams (EETs). The EETs' mission is the conservation of the state's dwindling wildlife and fisheries resources. When regulatory, educational or civil remedies are not effective, appropriate criminal sanctions are applied. The EETs have been using a common type of statute, Florida's litter law, in a rather unique application. Litter laws have been around since the 1960s. However, their application was generally restricted to roadway or public land areas.

In 1988 Florida gave new meaning and dimension to the word "litter." Fla. Stat. §403.413 defines litter as:

any garbage; rubbish; trash; refuse; can; bottle; container; paper; tobacco product; tire; appliance; mechanical equipment or parts; building or construction materials; tool; machinery; wood; motor vehicle or part; vessel; aircraft; farm machinery or equipment; sludge from waste treatment plant, water supply treatment plant or air pollution control facility; or substance in any

form resulting from domestic, industrial, commercial, mining, agricultural or governmental operations.

Elevating the penalty to a felony level for certain types of polluters has proven to be an effective law enforcement tool. Polluters who are found guilty of dumping more than 500 pounds or 100 cubic feet of litter face imprisonment up to five years and fines of up to \$5,000.00. Some judges have viewed each individual occurrence or each day of an ongoing discharge as separate offenses. No pound or cubic feet minimums are required if the dumping involves hazardous waste or is done for commercial purposes.

In addition to imprisonment and fines a violator's vehicle may be confiscated if it was used to commit the crime. These penalty enhancements have caught the attention of commercial polluters who in the past would simply factor the cost of fines by regulatory agencies into the cost of doing business. Managers and owners of companies are now personally subject to these criminal penalties if the dumping is done under their direction with their knowledge.

### Early Efforts

The Commission's new initiative of EETs enforcing Florida's litter law began in October 1989. Thirty-nine existing positions were assigned to the EETs. The teams were to concentrate their efforts in three areas. The targeted groups were violators who:

- (1) illegally dredge or fill wetlands where birds feed, fish spawn and water is filtered by nature;
- (2) wantonly dump construction debris or septic waste in woods or waters;
- (3) allow toxic chemicals to seep into aquifers, where most Floridians obtain their drinking water.

During their first year of operation the EETs issued 773 citations for environmental crimes. Felony arrests accounted for twenty-three of those citations. Several of the more notable cases were typical environmental crimes committed by the targeted groups. A septic tank service operator was charged with dumping 300 gallons of untreated sewage onto pasture land. In a second case, two men stripped and burned a mobile home for scrap metal. They dumped what was left of the home (13,800 pounds of debris) on private land.

The EETs first year of enforcing Florida's litter law was highlighted in more detail in an article written by Commission Information Specialist Mary M. Davis. Ms. Davis's article entitled "Environmental Law Enforcement: One Year Later," appeared in the November-December 1990 issue of *Florida Wildlife Magazine*.

### Current Efforts

The efforts of the Commission's EETs are presently focused on environmental crimes which directly threaten the continued survival of Florida's wildlife and fresh water fisheries. However, the positive effect on the state's overall environmental well-being is both varied and long-term. In the past few years, the EETs have established a rank ordering of their criminal enforcement efforts. The following types of crimes now receive heightened enforcement efforts due to the severity of the affect they have on the Florida environment:

(1) Illegal solid waste disposal (dumping) that degrades wildlife and fish habitats. The materials dumped often release harmful chemicals, including lead, acids, and oils into ground water and the soil. This type of activity has also resulted in the loss of many acres of land that had been available for public use. These areas become a fire hazard as the materials accumulate.

(2) Hazardous waste that by its very nature can have long-term, far-reaching effects. If not properly disposed of these materials show up in the soil, plant materials, water, and living organisms.

(3) Illegally dumped sewage or spills from water treatment plants that cause groundwater or surface water deterioration by increased bacteria counts, eutrophication, and reduced oxygen levels. The water becomes unfit for habitation by fish, mammals and aquatic organisms as well as posing a health threat to humans.

(4) Waste tires that are illegally burned, giving off toxic fumes that are harmful to all organisms and contribute to acid rain problems. The tires also release chemicals into the soil that can eventually reach ground and surface water supplies. (Each tire burned releases approximately one quart of oil). The discarded tires become breeding grounds for mosquitos, pose a fire hazard, occupy valuable habitat space, and degrade by releasing toxic substances.

(5) The release of foreign and harmful chemicals into a water system causes fish and wildlife kills, reduces oxygen supplies, and kills lower-level aquatic organisms. Fish in the lower St. Johns River are afflicted with lesions, a condition known as "ulcerated disease syndrome." This condition is apparently due to the introduction of harmful chemicals into the river environment. Alligators have declined catastrophically on Lake Apopka. Adult alligators have died, eggs do not hatch, and embryos are severely deformed. The prevailing view is that an unknown poison has been introduced into the lake.

(6) Inland fuel and oil spills have long-term negative effects on the ecosystem. The substances spilled settle to the bottom and coat bedding areas and releases toxins into the affected water systems for years. They also kill mammals and birds that come in contact with the oil or fuel.

(7) Heavy metal contamination affects water quality and organisms throughout the food chain. It tends to accumulate in the tissue of the upper level consumers (i.e. largemouth bass in locations throughout the state, Florida panthers, and alligators in the Everglades). Mercury poisoning has been identified as the cause of death of at least one endangered Florida panther.

(8) Wetlands habitat destruction affects aquatic vegetation, water quality, and the production of aquatic species. It can affect spawning and rearing areas for fish and prey species. Endangered species such as the wood stork can be affected by such activities.

(9) Nonapproved aquatic herbicides and insecticides that can cause fish and wildlife kills and can result in the destruction of lower level food chain organisms which in turn impacts all organisms above them. The EETs have conducted several investigations in south Florida involving the use of diuron and diurex. These derivatives of prohibited insecticides have been discovered in the tissues of flightless juvenile waterfowl in the Everglades agricultural area.

(10) The illegal open burning of certain materials other than tires that release toxins into the air, soil, and water. The burning of such materials as shingles and insulated wire also contribute to acid rain which affects ecosystems at all levels. It also releases pollutants into the soil and groundwater supplies which directly degrade habitat. These substances include oil, heavy metals, benzene, arsenic and asbestos.

(11) Upland habitat destruction that directly affects wildlife by destroying their breeding, feeding, and escape areas. It forces them into marginal areas where they are more susceptible to mortality. It disrupts food chains and delicate natural balances.

(12) Illegal disposal of carcasses such as dead chickens or other farm animals present a health hazard to people and can spread disease among wildlife, especially turkey and quail populations.

## EET Case Profiles

The application of Florida's litter law to the above types of illegal activities can best be illustrated by several actual cases.

Two individuals were charged with felony littering for dumping dead chickens in a wildlife management area. The poultry farmers were using the site to dispose of thousands of dead, dying, and diseased chickens. This activity posed a direct and real threat to Florida's native turkey and quail populations.

The owner of a waste oil company was charged with felony commercial dumping after one of his tank trucks was observed driving down a state road with the drain valve open and waste oil pouring out onto the shoulder of the road. In that location the road went right through the Ocala National Forest.

Two violators were charged with felony dumping after illegally disposing of over 3,000 waste tires in a two week period in an isolated area south of Tallahassee. The tires posed a real fire danger and would have released toxins as they degraded.

In Palm Beach County two individuals were charged after they abandoned a semitrailer loaded with excess pesticides and acids at the edge of the J.W. Corbett Wildlife Management Area.

An investigation in the environmentally sensitive Florida Keys revealed an illegal dump site that contained batteries, tires, used motor oil, and some chemicals. The corporation involved and some of its employees were charged with operating an illegal landfill and felony dumping. The water in the dump site was affected by the tide and the contaminants would have found their way into the adjoining bay.

Numerous cases were made around the state for the illegal disposal of raw sewage. The situations varied from individuals dumping tank truck loads of sewage onto unpermitted sites in remote areas, to fish camps and RV parks pumping their raw effluent directly into rivers and streams. The raw sewage poses a definite health threat to people as well as fish and wildlife.

EETs encountered instances where individuals and companies illegally and intentionally disposed of hazardous waste materials. In one instance the Florida Department of Environmental Regulation (DER) was monitoring a firm as a hazardous waste generator. An EET's criminal investigation discovered that prior to inspections employees removed barrels of hazardous waste from the premises to unknown locations. Hundreds of gallons of phosphoric acid were being drained into a holding tank. Unknown to DER, the tank had a "convenient hole in the bottom." Disgruntled employees described to EET investigators how the acid

solution drained into the tank, but it never filled up. The extent of the contamination from this activity has not yet been fully determined. However, this company was operating under a consent order that resulted from another hazardous waste discharge. The discharge contaminated neighborhood drinking wells and was detected in the Indian River. The Indian River is a Class II waterway designated for shellfish propagation. So far the investigation has resulted in the highest ever DER penalty assessment for a hazardous waste violation. The penalties recommended total \$425,000.00.

The overall dispositions of EETs' environmental cases have been excellent. Judicial recognition of violations as criminal acts has been supportive. Cases are classified as successful if they are disposed of in one of several ways. If individual or corporate defendants are found or plead guilty or a pretrial intervention agreement is reached where adjudication is withheld, but the violator is placed on probation, had to pay court investigative costs, or remedial action is ordered to restore a damaged site the case is classified successful. In years past, a statewide successful disposition rate averaging ninety percent has been achieved through Commission efforts. In 1990 EETs maintained a ninety-eight percent success rate in the central region of Florida. That region has been a high activity area as far as environmental violations are concerned. Court ordered sanctions against violators have included jail time, fines in excess of \$10,000.00, cleanup orders estimated to cost \$200,000.00 and reimbursement for investigative costs of \$5,000.00.

The Commission believes the detrimental effect of the EETs' criminal investigations has prevented many violations which occurred unabated in the past by regulatory efforts. The cost effectiveness and environmentally positive ramifications of prevention versus penalty imposition can not easily be quantified. However, a past investigation illustrates these benefits.

The open burning of wire to remove insulation is extremely profitable. In the past there was little risk of apprehension. The profits were high. Recycling metal companies would pay top dollars for lead, copper, and aluminum wire. However, the insulation had to be removed first. The easiest way is by burning the wire. This process releases benzene, arsenic, and sometimes asbestos in the air, ground, and water. A load of 23,000 pounds of wire was to be burned before EET investigators intervened. Much of the 23,000 pounds of wiring was stolen. It was transported from south Florida to a rural north Florida county for the actual burning. The leader of the group claimed to have burned over one million pounds of wire each year. Other individuals in the wire recycling business have confirmed that the EETs'

efforts prevented many more loads from being handled in the same manner. The violator and his circle of business acquaintances can no longer operate with virtual impunity due to EET enforcement efforts.

Felony arrests by EETs increased over 1,100 percent between 1989 and 1991. The quality of cases and sanctions leveled on defendants have also increased as the EETs gain valuable experience investigating more complex violations. For example, in 1991 an EET investigation resulted in felony charges against a corporation, its vice president and superintendent. Offshore Shipbuilding Inc. was charged with unlawful treatment and disposal of hazardous waste (pursuant to Fla. Stat. 403.727), willful pollution (under Fla. Stat. 403.161 (1)(a) and (3)), and two counts of felony littering (pursuant to Fla. Stat. 403.413). The vice president of Offshore Shipping was charged with four felonies and the superintendent was charged with two felonies. The violations involved the storage of used solvents, paints, and contaminated soils without a valid permit and the illegal discharge of oil and octane into the St. Johns River. The defendants eventually agreed to the payment of investigative and prosecution costs of \$40,000.00 as part of a pretrial agreement.

## CONCLUSION

The Florida Game and Fresh Water Fish Commission through the efforts of its Environmental Enforcement Teams has demonstrated the effectiveness of criminal penalties in dealing with environmental violators. Similar efforts may be equally beneficial in other states where regulatory sanctions have not achieved the desired level of compliance. Further information regarding the Florida approach to environmental law enforcement can be obtained from Bureau Chief Randy Hopkins, in the Commission's Law Enforcement Division at (904) 488-6254. □

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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.*

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# Kuppersmith v. South Alabama Seafood Association

No. 1920639, 1993 WL 292072 (Sup. Ct. Ala. Aug. 6, 1993)

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by Danny J. Collier, Jr.

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*Heron Bay held to be open to public oyster leasing*

## INTRODUCTION

On August 6, 1993, the South Alabama Seafood Association prevailed in its position that all of Heron Bay is a natural oyster reef. The Alabama Supreme Court ruled against the defendants who had contended that a section of the bay, known as Heron Bay "A", contained a man-made oyster reef. The high court's decision reaffirmed the trial court's factual findings. Thus, all of Heron Bay is open to public oyster harvesting unrestricted by any private leases such as the one between the defendants in this case.

## DISCUSSION

Heron Bay is a small body of water at the southeastern tip of Mobile County, Alabama. Oliver F. Kuppersmith (defendant), who owned land facing Heron Bay, exclusively leased the bottoms of Heron Bay "A" to Lindon C. Johnson (defendant). According to the lease, Johnson had an exclusive right to plant and gather oysters in that section of the bay. The defendants claimed that the area subject to the private lease contained only man-made oyster reefs. Based on Ala. Code §9-12-22 (1975), Kuppersmith claimed he was entitled to lease the bottom lands up to a distance of 600 yards from shore. Alabama law allows such a lease for the purpose of planting and gathering oysters only if the reef is man-made. Specifically, the statute states, "no riparian right shall vest in any person to any part of the natural and public reefs...." Kuppersmith's claim was based on his riparian rights as a landowner whose property abuts a public body of water. Riparian rights give an adjoining landowner some limited private rights to use and enjoyment of public waterways.

The Alabama Department of Conservation and Natural Resources (also a defendant) officially recognized the private lease and took the position that unauthorized oystermen would be arrested. Thus, the enforceable lease between Kuppersmith and Johnson prevented Alabama oystermen from harvesting oysters in Heron Bay "A".

The South Alabama Seafood Association, its president, and two members of the Association (plaintiffs), brought suit to prevent state enforcement of the lease between the defendants. The plaintiffs contended that the leased bottoms were natural oyster reefs as defined by Ala. Code §9-12-21 (1975), and that the private lease should not be enforced because riparian owners (land owners such as Kuppersmith with property facing the water) have no private right in any part of natural reefs. §9-12-22 (1975). The plaintiffs also argued that this matter had been resolved in *Havard v. State*, 23 Ala. App. 228, 124 So. 912, cert. denied, 220 Ala. 359, 124 So. 915 (Ala. Ct. App. 1929), when the Alabama Court of Appeals held that all of Heron Bay was a natural oyster reef.

The trial court judge heard expert testimony that all of Heron Bay was a natural oyster reef. Oystermen testified that for close to forty years they have used all of Heron Bay to harvest oysters. Additionally, Heron Bay is the only place for oystering in foul weather conditions. Enforcement of the private lease by the state had the effect of precluding licensed oystermen in Alabama from earning a livelihood during periods when the weather was too rough for oystering in Mobile Bay.

After considering the evidence, the trial court held that all of Heron Bay was a natural oyster reef and therefore not subject to restrictive private leases by riparian landowners. The Court of Civil Appeals affirmed the trial court's holding that the private lease was unenforceable, but reversed the trial court's factual finding that all of Heron Bay was a natural oyster reef protected from private leases.

The Alabama Supreme Court heard oral arguments and reviewed the record. The state high court then reversed the Court of Civil Appeals' decision to the extent that the appeals court had reversed the trial court's factual determination.

The Court of Civil Appeals had violated a basic procedural rule under Alabama law known as the *ore tenus* rule. A trial court has a dual role. It is both the trier of facts and interpreter of the law. The factual evidence presented at trial is usually assessed and judged by a jury. In the absence of a jury trial, a factual determination is rendered by the presiding judge. The trial judge also rules on questions of law. Questions of law are exclusively the judge's responsibility to decide. The *ore tenus* rule restricts courts of appeal from reversing a trial court's findings of fact. The trial court's findings of fact are presumed to be correct. Under Alabama law, unless a trial court's factual findings are "plainly and palpably erroneous," *Robinson v. Hamilton*, 496 So.2d 8 (Ala. 1986), the appeals court cannot reverse the trial court's decision based on a factual review. In light of

the absence of a plain and palpable error in the trial court's findings of fact, the Alabama Supreme Court had no choice but to uphold its decision.

## CONCLUSION

Alabama statutes §9-12-21 and §9-12-23 (1975) both clearly state that private oystering leases are not allowed by riparian landowners where any part of the reef is naturally formed. Thus, the factual findings as to how the oyster reef in this case was formed was dispositive of which party would prevail in the suit.

The trial court's factual determination, with the Alabama Supreme Court's stamp of approval, means that Alabama oystermen will be able to harvest oysters in all of Heron Bay, in fair weather and foul, for generations to come.□

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## United States v. Curtis

*988 F.2d 946, (9th Cir. 1993)*

*by Lonnie T. Cooper*

*Federal employees acting within the scope of their employment may be considered as "persons" under the criminal provisions of the Clean Water Act.*

## INTRODUCTION

A federal employee, John Hoyt Curtis, was convicted in federal district court of discharging a pollutant into the surface waters of the United States. Curtis appealed his conviction to the Ninth Circuit Court of Appeals. His argument was that the Clean Water Act (CWA) 33 U.S.A. §1311(a), §1319 (c)(2)(A) did not apply to federal employees whose alleged violations occurred in the course of their employment. The appeals court unanimously rejected Curtis' argument.

## FACTS

John Hoyt Curtis was Fuels Division Director at Adak Naval Air Station in Alaska during the winter of 1988-89. In that capacity, Curtis managed several civilian employees who were responsible for storing and pumping various types of fuels used in Adak for the generation of steam and electricity.

Specifically, the government charged that on forty-one separate occasions between October 1988 and February 1989, Curtis directed his subordinates to pump jet fuel through the pipeline connecting the main storage tanks to the steam and electrical generating plants. He was alleged to have known at the time that the pumping would cause jet fuel to leak from an abandoned spur line. The government further alleged that Curtis' actions ultimately caused the jet fuel to leak into an intermittent stream, some of which then flowed into Sweeper Creek and the Bering Sea. Hundreds of thousands of gallons of jet fuel were dumped during the course of the separate violations.

The Environmental Crimes Section of the United States Department of Justice in Washington, D.C., developed the case by working with the Environmental Protection Agency (EPA) and Naval Intelligence Service investigators. That investigation culminated on September 21, 1991. Curtis was indicted on five counts of knowingly discharging a pollutant (jet fuel) into the surface waters of the United States in

violation of sections 301(a) and 309(c)(1) of the Federal Water Pollution Control Act of 1972 (Clean Water Act or CWA). 33 U.S.C. §1311(a) and §1319(c)(1).

The CWA prohibits the discharge of pollutants from any point source into the navigable waters of the United States unless such discharge complies with a permit issued by the EPA pursuant to the National Pollutant Discharge Elimination System (NPDES) or by an EPA authorized state agency. 33 U.S.C. §§1311(a) and 1342. Section 1319(c)(2)(A) provides for criminal sanctions for "any person" who "knowingly" violates §§1311 or any NPDES permit. After three days of deliberation, the jury found Curtis guilty on one count of knowingly discharging a pollutant and two counts of the lesser included offense of negligent discharge of a pollutant. He was found not guilty on the remaining two counts. The district court sentenced Curtis to ten months imprisonment on each count to be served concurrently. A large part of Curtis' defense was that he was not aware of the cracks in the spur lines and that he was merely following the orders of his supervisors.

## ANALYSIS

Curtis had moved to dismiss the indictment during his trial contending that he was not a "person" subject to the enforcement provisions of the CWA as defined in sections 309(c)(6) and 502(5). The district court had denied Curtis' motion to dismiss. On appeal, Curtis argued that the district court erred in not dismissing the indictment. He contended that the CWA does not apply to federal employees whose alleged violations occurred in the course of their employment.

The CWA, 33 U.S.C. § 1319 (c) (2) provides in part:

Any person who knowingly violates sections 1311, 1312, 1316, 1317, 1318, 1321 (b) (3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title ... shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.

The CWA defines person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). Curtis contended that the CWA must be read *in para materia* with other environmental statutes, several of which explicitly include federal employees as "individuals." *In pari materia* is a legal rule of statutory construction. According to that rule, statutes that relate to

the same subject matter (e.g. environmental regulations) should be read, construed and applied together so that the legislature's intention can be understood from the whole group of similar laws. The rule of *in pari materia* only applies when the particular statute in question is ambiguous. *In re Perroton*, 958 F.2d 889, 893 (9th Cir. 1992).

Curtis suggested that the failure to specifically include federal employees within the definitions of the CWA was a deliberate decision made by Congress with knowledge of the specific inclusion of federal employees in other environmental statutes. Curtis cited Section 2(s) of the Federal Insecticide, Fungicide, and Rodenticide Act of 1972 (FIFRA), 7 U.S.C. § 136(s); Section 304(14) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1453(14); Section 3(e) of the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. § 1402(e); Section 1401(12) of the Safe Drinking Water Act of 1974 (SWDA), 42 U.S.C. § 300f(12); and Section 302(e) of the Clean Air Act (CAA), 42 U.S.C. § 7602(e). Four of these statutes (all except FIFRA) specifically include employees and agents within their definitions of "person." When the CWA is read in comparison with these other statutes, Curtis argued, it demonstrates Congress' intent not to subject federal employees acting within the scope of their employment to criminal prosecution under this group of environmental laws.

The Ninth Circuit Court of Appeals analyzed and rejected Curtis' argument on the basis of several previous federal court decisions. In 1990, the same circuit had held that "[i]f the language of the statute is clear and unambiguous, judicial inquiry is complete and that language controls absent, rare and exceptional circumstances." *Pyramid Lake Paiute Tribe v. U.S. Dept. Navy*, 898 F.2d 1410, 1417 (9th Cir. 1990). The court in Curtis' case found nothing rare or exceptional. A year later the Tenth Circuit Court of Appeals ruled specifically that the CWA's subsections 1319(c) and 1362(5) unambiguously defined "individual" broadly to include city employees who willfully or negligently caused a violation of a NPDES permit. *U.S. v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991). The Fourth Circuit considered a related claim of federal employee immunity in relation to a prosecution under the Resource Conservation and Recovery Act (RCRA). 42 U.S.C. § 6901 *et seq.* The Fourth Circuit held that federal employees were not immune from prosecution in their individual capacities even when acting within the scope of their employment. *U.S. v. Dee*, 912 F.2d 741, 744 (4th Cir. 1990).

Additionally, the U.S. Supreme Court has held that individual government employees are not ordinarily immune from prosecution for criminal acts they commit. *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). The Court has

stated, "All individuals whatever their position in government are subject to federal law." *Butz v. Economou*, 438 U.S. 478, 506 (1978).

The Ninth Circuit further reasoned that nothing in the CWA indicated that Congress intended to depart from the precedents of the cases above. Section 313(a) of the CWA, which governs federal facilities pollution control, provides that:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government ... and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. 33 U.S.C. § 1323(a).

Furthermore, section 313(a), the only section of the Act to mention federal employees, specifically excluded federal employees acting within the scope of their employment from civil liability but makes no mention of criminal liability. It provides in relevant part:

[N]o officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable.

The appeals court expressed the view that if Congress had intended to exempt federal employees from criminal liability under the CWA, it would have specifically stated that exemption as it did for civil liability.

Thus, for the above reasons the Ninth Circuit Court of Appeals held Curtis' *in para materia* argument was inappropriate. The court ruled that the meaning and scope of the term "person" in the CWA was clear and unambiguous. Federal employees acting within the scope of their employment were "persons" under the criminal provisions of the CWA.

## CONCLUSION

The Curtis case is a particularly important federal facilities case because it underscores two significant principles. First, the often attempted subordinate employee defense of "I was only following orders" is no more tenable today than it has been in the past. Second, government personnel and facilities, even on sensitive military bases, are not immune from the nation's environmental laws. □

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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.*

## LAGNIAPPE

### A Little Something Extra

Eleven recommendations pertaining to the Environmental Protection Agency were included in President Clinton's newly released blueprint for reorganizing the federal government. In general, the plan calls for an ecosystem management policy across the federal government. The White House Office of Environmental Policy has put together an interagency task force to develop and implement ecosystem management strategies that cross department lines. The report's specific recommendations concerning EPA were:

- Stop the export of banned pesticides;
- establish a blueprint for environmental justice;
- create a clearinghouse to help streamline EPA's permit process;
- establish guidelines for professional development of EPA's scientific and technical staff;
- improve environmental protection by increasing the flexibility of local government;
- reform EPA's contract management process;
- establish measurable goals, performance standards, and strategic planning within EPA;
- promote use of economic and market-based approaches to reducing water pollution;
- shift EPA's focus away from pollution control and more toward pollution prevention.