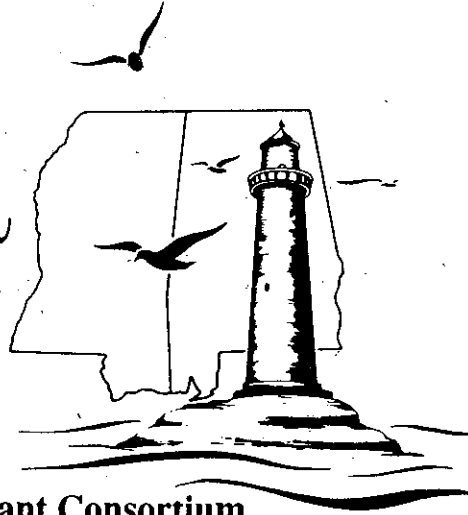


# WATER LOG



A Legal Reporter of the  
Mississippi-Alabama Sea Grant Consortium

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# WATER LOG

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

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**Editor:**

**Richard McLaughlin**

**Associate Editor:**

**Laura Howorth**

**Production Assistant:**

**Niler P. Franklin**



**Writers:**

**Lonnie T. Cooper**

**Danny J. Collier, Jr.**

**Katherine Howie**

University of Mississippi Law Center - University, MS 38677

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# The Federal Government's "Latest" Proposals Regarding U.S. Wetlands

by Lonnie T. Cooper

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## INTRODUCTION

Governmental flip-flopping has generated much confusion among interested members of the public about current federal policy regarding coastal wetlands. This lack of general understanding has been increased in recent years by well-publicized announcements and subsequent reversals of wetlands policy at the highest levels of the federal government. This article is intended to provide a summary that will place the new Clinton administration proposals for protecting America's wetlands in a more understandable context.

## WETLANDS DEFINITION AND FUNCTION

A wetland is land covered by water or saturated with water at a depth of no greater than eighteen inches beneath its surface for at least seven consecutive days a year. The land must also consist of certain kinds of soil and support certain kinds of plants. Wetlands include coastal marshes, swamps, bottomlands, mud flats, and a host of other areas. Wetlands serve a number of functions. Two-thirds of the fish caught in United States waters by commercial fishermen are spawned, reared or feed in wetlands. Wetlands also serve as breeding grounds and habitat for birds and animals; as filters to protect groundwater against sediment and polluted surface water; and as sport and recreation areas.

Of special importance is the role of wetlands in ameliorating the destructive effects of floods. The fact that wetlands create a natural flood abatement system partially explains the rationale behind the fact that the United States Army Corps of Engineers (Corps) shares concurrent jurisdiction over wetlands with the Environmental Protection Agency (EPA). Wetlands that border flooded rivers act as a buffer to protect adjacent uplands from inundation. The absorption and slow release of runoff by wetlands also reduce the likelihood of flooding downstream.

## WETLANDS LOST

Only in the last twenty or so years has there been widespread concern about the preservation of wetlands. According to various estimates, the area of wetlands in the

contiguous forty-eight states has decreased by one-third to one-half since the 17th century. Most of that area was drained or filled to convert it to productive farmland or to improve public health by eliminating breeding grounds for mosquitoes. In this century wetlands have continued to be lost to agriculture, oil and gas drilling, construction of marinas and other waterfront development, and highway expansion.

However, the largest single cause of wetland loss has proven to be the system of levees along the Mississippi River and its tributaries. Ironically these levees were built by the federal government, which has primary responsibility today for wetlands preservation. Before the levees were constructed, seasonal floods carried topsoil southward from thirty-two states and Canada. That natural flooding resulted in most of the topsoil being deposited in Mississippi and Louisiana. Those deposits kept the lands in the lower delta above sea level. Now that the flow of the river is held within the narrow bounds of the levees, wetlands near the Mississippi River's mouth are no longer replenished by the yearly accumulation of sediment. Thus, the lower delta lands are inexorably being eaten away by subsidence, wave action, and the inflow of salt water. The rate of loss of coastal wetlands in Louisiana is approaching fifty square miles a year, most of which is attributable to flood control projects upriver. Based on a survey conducted in the mid-1980s American wetlands are being lost at a rate of 300,000 acres per year.

## A CHECKERED HISTORY OF FEDERAL REGULATION

The federal government regulates wetlands primarily under the Federal Water Pollution Control Act of 1948 (relevant parts of which are today known as the Clean Water Act) 33 U.S.C.A. §§ 1251 *et seq.* (West 1986 and Supp. 1993). In 1972, the Water Pollution Control Act was amended to extend the jurisdiction of the agencies charged with enforcing it. Those agencies are principally the Army Corps of Engineers and the EPA. Jurisdiction was extended from "navigable waters" to "all waters of the United States." The 1977 amendments commonly referred to as the Clean Water Act (CWA) mentioned wetlands by name for the first time. By the end of that decade the CWA, originally intended to prevent water pollution, was being applied to the protection of wetlands.

Regulations published by the Corps of Engineers in 1987 stated that wetlands are "areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for

life in saturated soil conditions 33 C.F.R. 328.3 (b). Thus hydrology (i.e., water content—whether flooded or saturated, and for how long), vegetation (the presence of at least one of 7,000 species of plants as set forth in the regulations), and type of soil are normally considered the three “indicators” of wetlands. The 1987 manual provides that an area will be deemed to support hydrophytic vegetation even where it is in fact lacking so long as both hydric soil and the requisite hydrology are present. This interpretation in effect reduces the requisite number of indicators from three to two. Lands that meet the definition are termed “jurisdictional wetlands.”

Using the 1987 delineations, only about five percent of the land in the contiguous forty-eight states is now classified as wetland by the federal government. Other estimates place as much as half the land in the lower forty-eight states, and more than half the farmland as meeting the current 1987 definition of wetlands. Therefore, all of these lands could be subject to federal regulation, including restrictions on use and development.

However, the government had no single standard for defining what a wetland was until 1989. In that year, the EPA, the Corps of Engineers, the Department of Agriculture’s Soil Conservation Service, and the Department of the Interior’s Fish and Wildlife Service jointly promulgated a common definition. The “saturated for at least one week” definition in the 1989 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* was agreed upon by the four agencies. That publication is commonly called the *Wetlands Delineation Manual*. This federal government definition has been widely criticized by an array of interests. The expressed aim of these groups is “to put the wet back into wetlands.” The criticism most often voiced is that the definition is both too inclusive and too vague. Some of the groups claimed the 1989 wetlands definition was an attempt by the federal government to greatly expand the geographic jurisdiction of its regulatory agencies.

Against this backdrop the President’s Council on Competitiveness, chaired by former Vice President Dan Quayle, began a review of the 1989 *Wetlands Delineation Manual*. A new manual was promulgated on August 14, 1991, and was to take effect on October 15, 1991 following a period for public comment. Public outcry forced EPA to extend the comment period twice. Critics claimed that the 1991 manual definition greatly reduced the scope of federal geographic jurisdiction over wetlands. The proposed revisions were far-reaching in effect. An early estimate suggested that if they had been implemented, the area of wetlands subject to federal regulation would have been reduced by about a quarter. At the heart of the new manual

was a change in the criterion for hydrology as established in 1987. The criterion change would have limited jurisdictional wetlands to land either covered with water for at least fifteen consecutive days during the growing season or saturated with surface water for at least twenty-one days a year during the growing season.

Many environmentalists considered the new policy a step backward. They called the revised hydrology standard arbitrary and unscientific and contended that the Bush Administration had surrendered to business interests. They argued that relaxing standards for issuing wetlands permits was unnecessary, especially in light of the fact that ninety-five percent of the permits applied for in 1990 were granted. The environmental groups argued that the inevitable result of the new policy would have been the destruction of habitat for hundreds of species of animals—many of which were already endangered; more pollution of groundwater; and steady increases in damage from floods and erosion.

The EPA received more than 80,000 comments from the public about the proposed manual. An overwhelming number of them were negative. In January 1993 the EPA announced that it was abandoning the 1991 proposed manual. Thus, the 1987 manual was re-instated pending the Clinton administration’s decision regarding what factors determine the classification of jurisdictional wetlands.

## THE “LATEST” PROPOSALS

In August of 1993, the Clinton administration unveiled its wetlands policies. The plan calls for the continued interim use of the 1987 Corps of Engineers definition of wetlands. The National Academy of Sciences has been charged with the review of that definition and proposing any changes by November 1994.

Five general principles for federal wetlands policy were developed by an interagency working group chaired by the White House Office of Environmental Policy. These principles were:

- The interim goal of no overall long-term net loss of remaining wetlands and the long-term goal of increasing the quality and quantity of the nation’s wetlands resource base.
- Regulatory programs must be efficient, fair, flexible, and predictable. They must be administered in a manner that avoids unnecessary impact upon private property. Duplication among regulatory agencies must be avoided.

- Non-regulatory programs must be encouraged to reduce the federal government's reliance upon regulatory programs.
- The federal government should develop and expand partnerships with state and local governments and the private sector and approach wetlands protection and restoration in an ecosystem/watershed context.
- Federal wetlands policy should be based upon the best scientific information available.

These general principles are to be accomplished by several specific policy changes or reaffirmations.

The Department of Agriculture's Soil Conservation Service (SCS) has been designated as the lead agency responsible for identifying wetlands on agricultural land. A final regulation was issued by the Corps of Engineers and EPA ensuring that approximately 53 million acres of wetlands converted to cropland prior to 1985 will not be subject to wetland regulations. However, incentives to farmers for them to voluntarily restore wetlands on their property will be provided through increased funding of the USDA's Wetland Reserve Program.

The Corps of Engineers was mandated to develop an administrative appeals process within one year. In the past any applicant whose permit request was denied by the Corps had to appeal through court. Under the proposed administrative appeals process interested third parties may join an applicant in first appealing directly to the Corps. Also, modifications are to be made to existing regulations. These modifications will require the Corps to reach permit decisions within 90 days in most cases. Under new guidelines already issued by the Corps and EPA, field staff have been directed to apply less vigorous permit review to small projects with minor environmental impacts.

Comprehensive advance planning conducted on a watershed basis is preferred over a project-by-project or permit-by-permit basis. This watershed management approach would involve identification, mapping, and preliminary assessment of wetlands. The hope is that more comprehensive incorporation of wetlands conservation attempts into overall land use planning on the local level will provide greater predictability for all interested parties.

The comprehensive watershed planning would be implemented by several specific programmatic policies. Incentives would be provided to encourage states and local efforts to adopt this approach. The federal government would endorse state and tribal wetlands plans.

The Corps would undertake a field level review of Nationwide Permit 26 to develop regional descriptions of the types of waters that would not be subject to authorization under that program. Congress is encouraged to amend section 404(c) of the Clean Water Act to provide for issuance of Programmatic General Permits to state, tribal, regional and local regulatory programs. Statutory changes to allow use of the State Revolving Fund to capitalize mitigation banks is included. The concept of mitigation banking is supported by the administration.

In the past all permit requests for wetland development were treated similarly under Section 404 regulatory programs. Under the new proposals more flexibility will be given to the EPA and the Corps. Small projects with minor impacts are to be subjected to less rigorous review than larger projects with more substantial environmental impacts.

The Natural Academy of Science has been charged with the task of providing a definition of "wetland" based on scientific data. That delineation is expected to be completed in the fall of 1994. Until that time the definition adopted in the 1987 Manual is to be used by all federal regulatory agencies.

Any opportunities to avoid duplication by separate regulatory agencies' functions are to be seized upon. In pursuit of this goal the administration is committed to increasing state, tribal and local government roles in federal wetlands protection and restoration efforts.

Finally, the issue of "takings" is addressed. The term "takings" refers to the requirement of the fifth amendment of the U.S. Constitution that if the government takes the property of a private landowner, the owner must be adequately compensated for his loss. An actual physical conversion of the private land to government use is not necessarily required. Any government action that restricts or diminishes the private landowner's use or enjoyment may amount to a taking. Wetland property owners have argued that the Corps' denial of a permit constitutes a taking. The Clinton administration has expressed sensitivity to the rights and expectations of private property owners. However, the administration does not support a legislative approach to this issue. The courts are available to review situations where the landowner believes government action amounts to a taking. Thus, the current policy is that due to the unique nature of each situation this issue should be decided in the courts on a case-by-case basis.

The new executive policies establish as a hallmark the imperative that the impact of wetlands protection policies on private landowners be fully considered and recognized. Statutory, regulatory, and policy decisions should be made whenever possible in a manner that avoids unnecessary

negative impact upon such private wetlands owners. It is estimated that 75 percent of the lower 48 states' wetlands acreage is located on privately owned property. Through the joint efforts of the wetlands interagency work group, the Clinton administration has proposed a framework of new policies that may increase the fairness and flexibility of federal regulatory programs impacting wetlands issues.

## CONCLUSION

Protecting wetlands has become one of the leading environmental issues of the 1990s. This emphasis on wetland preservation is in part because of the steady population growth in the nation's coastal regions and because the regulation of wetlands implicates the interests of vast numbers of private landowners as well as those of commercial and industrial concerns.

The Clinton administration's position and proposals discussed may remove many of the bureaucratic obstacles encountered in the past by wetlands developers. At the same time, these new policies may prove to be a more balanced approach between environmentalists and developers. However, citizens and policy-makers should be mindful that economic growth must be balanced with an eye to preserving this valuable natural resource.

With President Clinton's recent successes, of Congress ratifying the North American Free Trade Agreement and the signing of the GATT treaty, many believe these environmental proposals will come to fruition during his administration's remaining three years. The fifth general principle of basing federal wetlands policy on the best scientific information available, provides some guarded optimism that a higher degree of regulatory consistency will evolve out of these "latest" wetlands proposals. □

*Lonnie T. Cooper is a second year law student at the University of Mississippi School of Law and serves as the Environmental and Marine Policy Assistant for 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.*

*Some of the background information for this article was derived from an earlier piece written by John F. Matlock in 11 Water Log 2 (1991).*

# Mississippi Commission on Environmental Quality v. Chickasaw County Board of Supervisors

621 So. 2d 1211 (Miss. 1993)

*by Danny J. Collier, Jr.*

*Courts may not substitute their own judgement for that of administrative agencies.*

## INTRODUCTION

This was a dispute over a \$4000 penalty that the Mississippi Commission on Environmental Quality (Commission) assessed against the Chickasaw County Board of Supervisors (Board) for the Board's failure to comply with closure requirements of a landfill operated by the Board. The chancery court judge affirmed the Commission's findings of non-compliance but modified the penalty. On appeal, the Mississippi Supreme Court also affirmed the Commission's findings but reinstated the penalty assessed against the Board.

## FACTS

Since September 1, 1981, the Chickasaw County Board of Supervisors had operated a landfill in Chickasaw County for household garbage and solid waste disposal. In November of 1987, the Board informed the Office of Pollution Control (OPC) of their intention to close the landfill in accordance with the Mississippi Nonhazardous Waste Management Regulation.

The pertinent part of the regulation in this controversy was Regulation No. PC/5-1, Section D, "Solid Waste Landfill." Specifically, D-19 required the Board to cover the entire landfill with two feet of earthen material, compacted and graded to certain specifications, within 30 days, barring inclement weather. D-20 required the Board to provide the OPC with a closure and post-closure plan and schedule. The purpose of the regulation is to minimize the amount of rainwater that infiltrates into the garbage. Rainwater infiltration creates leachate and contaminated runoff that might taint nearby water aquifers, woodlands, and creeks.

Due to unforeseen difficulties in contracting with a private landfill facility, the Board continued operating the

county landfill until January of 1988. By the following June, the Board had not closed the landfill in accordance with the regulations and the OPC sent a letter of non-compliance to the Board requesting that closure corrections be made. Two months later, with the Board still in non-compliance, the OPC informed the Board of their intention to initiate enforcement action. In September, the Mississippi Department of Natural Resources issued an Administrative Order finding the Board in non-compliance with D-19 and D-20, and set a compliance deadline of November 15th. November came and went with no compliance. Finally, in February of 1989, the Commission served the Board with a complaint for non-compliance of the Order and scheduled an April hearing.

A pre-hearing inspection of the landfill revealed numerous violations by the Board: erosion; garbage piles; lack of cover; leachate; ponding of water; refuse in a drainage ditch; and no gate to keep the public out. At the hearing the Board argued that from January until Spring, excessive amounts of rain precluded the Board from complying with the closure regulations. Also, the Board testified that they intended to comply with the Order. Nevertheless, on June 15, 1989, the Commission found the Board in violation of the Order. The Commission determined that the Board must comply within 60 days and pay a \$4,000 penalty. Miss.Code Ann. 17-17-68 (Supp. 1992), required the Board to tender the penalty to the Pollution Emergency Fund.

The Board appealed to the Chancery Court of the First Judicial District of Chickasaw County as provided in Miss. Code Ann. §17-17-45 (Supp. 1992). The chancellor recognized the limits on his scope of judicial review when hearing appeals from administrative agencies. However, the chancellor decided to expand his scope of review based on the following facts: the leniency that the Agency showed the Board with regard to enforcement deadlines; the difficulties the Board faced as a result of unusual amounts of rainfall; and Miss. Code Ann. §17-17-45.

Section 17-17-45, which gave the Board a right to appeal, refers to Miss.Code Ann. §49-17-41 (1972). Section 49-17-41 directs the chancery court to "review all questions of law and of fact." The Board also argued that §49-17-41 expanded the chancery court's scope of review by allowing the chancellor, upon review, to reverse and remand the case to the commission for appropriate action if the court found prejudicial error. The Board asserted that *Illinois Cent. R. Co. v. Mississippi Public Service Commission*, 71 So.2d 176 (1954), stood for the proposition that a reviewing court may modify an administrative agency's action.

With an expanded scope of review, the chancellor affirmed the Commission's findings of non-compliance,

but modified the penalty. Instead of the Board tendering the penalty to the Pollution Emergency Fund as required by statute, the chancellor ordered the Board to place the \$4,000 in a special fund out of which the Board was to pay for closure expenses. Any remaining funds were to be transferred to the county's general account.

The Commission appealed this decision to the Mississippi Supreme Court.

## DISCUSSION

The law is well settled that a court may review administrative agency decisions only to determine whether the decision: (1) was supported by substantial evidence; (2) was arbitrary or capricious; (3) was beyond the power of the administrative agency to make; or (4) violated a statutory or constitutional right of the complaining party. Only then may a reviewing court disturb an administrative agency's finding. *Southeast Miss. Legal Serv. v. Miss. Power*, 605 So.2d 796, 798 (Miss. 1992).

When a court reviews an agency's action there is a rebuttable presumption in favor of the agency's decision. *United Cement Company v. Safe Air for the Environment*, 558 So.2d 840, 842 (Miss. 1990). This means that the Board had the burden to prove that the Commission erred. A reviewing court may only consider the record and the agency's findings. The chancery court was precluded from substituting its own judgement for that of the Commission. If substantial evidence existed to support the agency's decision, even if there was room for disagreement, the decision must stand. *Mississippi Public Service Commission v. Merchants Truck Line, Inc.*, 598 So.2d 778, 782 (Miss. 1992).

The Board improperly asserted that *Illinois Central* expanded the chancellor's scope of review. The Court explained that *Illinois Central* involved a statute that expressly conferred upon a reviewing court the authority to affirm, modify, or reverse an agency's action. Here, no such clause existed in the Mississippi Non-hazardous Waste Management Regulation. Therefore, the regulation conferred no additional authority upon the chancellor to disturb the Commission's decision.

The Supreme Court then reviewed the chancery court's decision applying the same standard of review as that court was required to follow when reviewing the Commission's decision. The Court found sufficient evidence in the numerous uncontested violations to support the Commission's action. The Board failed to show any arbitrary or capricious action on part of the Commission. In fact, the \$4,000 penalty was the suggested penalty for medium sized violations and medium sized violators as

articulated in the Commission's *Civil Penalty Guidance* sheet. Also, the Commission did not violate the Board's right to due process. The statutorily required hearing sufficed to give the Board due process. Finally, the Commission was within its bounds of authority in investigating and fining the Board. For example, Miss. Code Ann. §17-17-29(1) (Supp. 1992), authorizes the Commission to fine violators of the Solid Wastes Disposal Law up to \$25,000 per day.

When a reviewing court exceeds its authority and disturbs an agency's action, the Supreme Court will reverse the court to the extent it disturbed the agency's action. The chancellor exceeded his authority when he directed the \$4,000 be placed in a clean-up fund. This effectively nullified the Board's penalty. In so doing, the chancellor improperly substituted his own judgement for that of the Commission. The Court leaves the choice of penalty within the discretion of the agency, only to be disturbed if the penalty appears undeserved in light of the four established criteria.

## CONCLUSION

Administrative agencies play an important role in our complex system of laws and regulations. They act as a quasi-legislature when they enact regulations. In their quasi-executive role, the agencies enforce compliance with the regulations. Finally, in a quasi-judicial capacity, the agencies hear disputes and sometimes penalize violators. Here, the Commission acted within its bounds by compelling regulatory compliance through the assessment of a fine. The chancery court disturbed the Commission's penalty by improperly expanding its scope of review. Consequently the Supreme Court reinstated the \$4,000 penalty against the Board. □

*Danny J. Collier, Jr. is a second year law 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.*

## Gulf of Mexico Bills

*by Katherine Howie*

### INTRODUCTION

Four bills currently pending in Congress deal specifically with the creation of a Gulf of Mexico Commission within the Environmental Protection Agency (EPA). If passed, in any form, the Commission would oversee the protection and preservation of the Gulf of Mexico. The status of these bills is current as of February 3, 1994.

■ **S. 83, 103rd Cong., 1st Sess. (1993)** Sponsored by P. Gramm (R-TX), the Gulf of Mexico Preservation Act of 1993 proposes to establish a Gulf of Mexico Program within the EPA. Under section 4 of the bill the Gulf program will report on the environmental quality and uses of the Gulf of Mexico. It will collaborate with the Gulf States, public and private groups, and other agencies to collect and assess data on the causes of environmental problems, natural and manmade, within the Gulf of Mexico in order to make recommendations for actions to preserve the Gulf and protect its economic resources. Section 5 of the proposal requires that a Gulf of Mexico Program Office be located in a Gulf State with a Director appointed by the EPA to oversee the Program activities. Under section 9 Gulf states, individually or jointly, are encouraged to develop a Management, Protection, and Restoration Plan for the Gulf of Mexico. Section 10 allows that upon approval of such plan, the EPA shall make a grant to further the development and implementation of the Plan.

Upon introduction, S. 83 was referred to the Senate Environment and Public Works Committee where its final status is still pending.

■ **H.R. 1566, 103rd Cong., 1st Sess. (1993)** Introduced by E. de la Garza (D-TX), the Gulf of Mexico Act of 1993 proposes to amend the wetland conservation provisions of the Food Security Act of 1985, establish a Gulf of Mexico Commission, and establish a Gulf of Mexico Program. Title I of the Act amends the Food Security Act of 1985 to direct the Secretary of Agriculture to make recommendations for wetland regulation necessary to promote the economic and environmental interests of the Gulf. Title II requires the establishment of a Gulf of Mexico Commission to promote the environmental and economic interests of the Gulf by coordinating the public authorities and private organizations that are engaged in evaluating and responding to problems relating to the Gulf. Title III establishes the Program Office within the EPA led by a Director required

to research Gulf environmental quality issues, monitor Gulf environmental quality policies, and coordinate activities to improve environmental quality. The EPA Administrator is directed by the Act to publish a Gulf of Mexico Plan to address problems with the environmental quality of the Gulf and recommend preventive measures. The Administrator will also recommend agencies to implement the Plan and is authorized by the bill to make grants to States using the Gulf Plan.

Upon introduction, H.R. 1566 was referred to the House Agriculture Committee and the House Merchant Marine and Fisheries Committee.

■ **H.R. 1899, 103rd Cong., 1st Sess. (1993)** Sponsored by G. Laughlin (D-TX), the Gulf of Mexico Economic and Environmental Protection Act of 1993 proposes to establish a Gulf of Mexico economic and environmental protection program. Section 4 of this bill authorizes an inter-agency program for the preservation and protection of the economic and environmental resources of the Gulf of Mexico to be known as the Gulf Program. The EPA is designated the lead agency of the program. Section 5 establishes Gulf of Mexico Program office within the EPA to be located in a Gulf State. The Program is to be headed by a director appointed by the Administrator of the EPA who will coordinate and oversee the preparation of each plan or report under this act. Section 6 requires the President establish a Gulf of Mexico Executive Board over which the Administrator shall serve as chairperson. The Board is directed to establish a Gulf Citizens Advisory Committee. The bill also directs the Board to develop a preliminary comprehensive joint plan for the Gulf to recommend a mechanism for balancing priority actions to address Gulf economic and environmental problems and report this to Congress. The EPA is also directed to develop a similar final plan.

Upon introduction, H.R. 1899 was referred to the House Merchant Marine and Fisheries Committee, the House Public Works and Transportation Committee, and the House Science, Space and Technology Committee.

■ **S. 686, 103rd Cong., 1st Sess. (1993)** Introduced by R. Krueger (D-TX), the Gulf of Mexico Act of 1993 is proposed to establish a Gulf of Mexico Commission and a Gulf of Mexico Program Office within the EPA. Section 4 of this Act requires the President, upon receiving agreement from the Governor of each Gulf State, to establish Gulf of Mexico Commission to promote the environmental and economic interests of the Gulf by coordinating the public authorities and private organizations that are engaged in evaluating and responding to problems relating to

the Gulf. This bill requires the establishment of a Gulf of Mexico Program Office under the supervision of the EPA. The bill also directs the Head of the Program to research environmental quality issues, establish policies to improve environmental quality and coordinate activities to improve environmental quality. The EPA Administrator is directed to publish a Gulf of Mexico Management Plan to summarize data on the environment of the Gulf, recommend preventive measures, and recommend agencies to be charged with implementing the Plan. The proposal also authorizes grants to states implementing the Plan.

Upon introduction, S. 686 was referred to the Senate Environment and Public Works Committee where its final status is still pending.

## CONCLUSION

As demonstrated by these bills, there is a substantial amount of concern about the need to address the particular problems facing the Gulf of Mexico. It remains to be seen whether Congress will act on that concern and pass legislation that will provide more protection for this special body of water. □

*Katherine Howie is a second year law 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.*

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# United States v. Pozsgai

999 F. 2d 719 (3rd. Cir. 1993)

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by Katherine Howie

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*Filling wetlands with pollutants an unlawful discharge under the Clean Water Act*

## INTRODUCTION

On June 25, 1993, the United States Court of Appeals for the Third Circuit affirmed judgment against John and Gizella Pozsgai for the discharge of fill material into wetlands on their property without a Section 404 permit in violation of the Clean Water Act (CWA), 33 U.S.C. Sect. 1251 *et seq.* (West 1986 & Supp I 1993).

## FACTS

In April 1987, the Corps of Engineers learned that fill material was being dumped into wetlands on a 14 acre site in Pennsylvania. After investigation, the corps determined that almost the entire property constituted wetlands noting areas of standing water, a stream along the border of the property that is a tributary to the Pennsylvania Canal, and several species of wetland thriving vegetation.

During this period, John and Gizella Pozsgai were planning to buy this property for the purpose of expanding their business. Such an expansion required the land to be filled so a garage could be constructed. On three separate occasions before purchasing the property, Pozsgai was informed of the need to obtain a permit to fill the wetlands in compliance with the CWA. In June 1987, Pozsgai purchased the property and continued to fill the property. The Corps, upon confirmation of the property as wetlands continued to monitor Pozsgai's activities.

Following repeated warnings and two Cease and Desist Orders, the U.S. government filed civil charges in federal district court alleging that defendants had violated the CWA and criminal charges against John Pozsgai on the same grounds. Pozsgai was convicted of forty counts of unpermitted discharge in the criminal proceeding. In the government's civil proceeding, the district court granted the permanent injunction and ordered the defendants to restore the property.

On appeal in the civil action the defendants assert that their filling activities did not constitute discharge of pollutants into water within the meaning of the CWA, that their wetlands fall outside the Corps' regulation and permit

requirements, and that the Corps' regulation of their filling activities is not within the purview of power granted by the commerce clause.

## DISCUSSION

The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. Sect. 1251(a). The CWA prohibits the discharge of pollutants into navigable waters without a permit. Section 404(a) of the CWA authorizes the Army Corps of Engineers to issue permits for the discharge of dredged or fill materials into navigable waters at particular sites. The terms of the Act are defined broadly and the United States Supreme Court has extended the jurisdiction of the Corps by upholding the Corps' regulation of wetlands as "waters of the United States."

The Pozsgais dispute the interpretation given to the word "pollutant" and the phrase "discharge into water." Section 301 of the CWA provides that absent a permit, "the discharge of any pollutant by any person shall be unlawful." "Pollutant" is defined by the Act as "dredged spoil, rock, sand" and other materials "discharged into water." In the present case, the Pozsgais claim the absence of the words "fill material" in this definition is significant. However, the federal district court found that the defendants placed concrete rubble and cinder block on their property, either of which would qualify as pollutants within the meaning of the Act.

The commerce clause found in Article I, Section 8 of the United States Constitution expressly allows the federal government to regulate interstate commerce. The commerce clause, as interpreted by the Supreme Court, justifies Congress' exercise of its power to regulate commerce to achieve police power objectives concerning health, morals, and well-being. Because so much commerce is conducted over water, federal commerce controls and regulates a substantial number of the bodies of water in the United States.

While there is a traditional test of navigability that must be met for a waterway's control to be deferred to Congress, the test is not always applied. Specifically, several lower courts have held that the CWA extends beyond traditional navigable waters to all bodies of water within the United States. *See United States v. Holland*, 373 F.Supp. 665 (M.D.Fla. 1974); *United States v. Weisman*, 489 F.Supp. 1331 (M.D.Fla. 1980); *Parkview Corp. v. Department of the Army, Etc.*, 490 F.Supp. 1278 (E.D. Wisc. 1980). The reason is that the purity of navigable waterways cannot be maintained unless other bodies of water which directly or indirectly connect to those navigable waters are also cleaned

up. In this case, Pozsgais' argument that wetlands are not equivalent to navigable water in the context of the Act fails because of the extension of the commerce clause to reach health objectives. The court cited case law as well as legislative history to support the proposition that "water" within the meaning of the Act extends to some wetlands.

The Pozsgais further contend that the regulation does not apply to them or their "isolated" property because the government failed to establish that their discharge affected interstate commerce and that the Corps wetland regulation violates the commerce clause. However, courts will justify the Corps' regulation if there is a "rational basis" for the determination that the regulated activity affects interstate commerce and if the method chosen to regulate the activity is reasonable.

Using the cumulative effect principle, the regulation is reasonable because the Corps has determined that discharge into wetlands which are adjacent to tributaries of waters used or usable in interstate commerce, if aggregated, increases water pollution, the end the CWA seeks to prevent. Under the CWA, Congress has delegated the authority to the Corps to determine that wetlands adjacent to tributaries of waters usable or formerly used in interstate commerce themselves affect interstate commerce. The Corps in this case has done so.

## CONCLUSION

Pozsgai petitioned the United States Supreme Court for review November 8, 1993. The Supreme Court is in a position to affirm the Court of Appeals' decision, thereby approving federal regulation wetlands beyond that which actually affects interstate commerce or reverse the lower court's decision by requiring the Corps to prove current or future effect on interstate commerce with respect to fill material placed on isolated wetlands. □

*Katherine Howie is a second year law 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.*

## LAGNIAPPE

### *A Little Something Extra*

In a much anticipated opinion, the Mississippi Supreme Court handed down its opinion in *Secretary of State v. William Byrd*, No. 90-CA-0692, on January 28, 1994. At issue in the case is the constitutionality of the Public Trust Tidelands Legislation of 1989. The court found the legislation to be constitutional, and also affirmed the use of the July 1, 1973 date as a starting point for determining the mean high tide in developed areas. However, the court also held that the Secretary of State would have to be aware that there may be instances where a transfer of public trust property to private parties may best serve a "higher public purpose." Look for an in-depth summary and analysis of this complex holding in an upcoming **WATER LOG**.