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WATER LOG

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MARINE POLLUTION ON THE MISSISSIPPI COAST

Marine pollution is not a new problem to the United States or the Mississippi Coast. As early as 1948, Congress passed its first comprehensive Water Pollution Control Act, and in 1966, the Mississippi Legislature enacted the Mississippi Air and Water Pollution Control Law. Both of these Acts reflect concern over the complex problem of water pollution.

At the time when the U.S. was changing from an agrarian to a primarily industrial-based economy, it was generally believed that our nation's waterways and the oceans were so vast that we could not generate enough waste to have an adverse effect upon them. However, we now know that unless marine pollution, particularly industrial pollution, is controlled our waterways may soon be too polluted to produce edible fish and other marine organisms vital to our survival. Many contaminated materials are toxic to marine organisms, and other non-toxic materials may be dumped in such great quantities that they physically kill or injure marine life. At the very least, they eventually destroy the natural beauty of our oceans and waterways and deprive us of the many forms of recreation that our waters provide.

At present, the Mississippi Coast is the most heavily industrialized area of the state. It is also the location of Mississippi's most fragile ecosystem, the wetlands. This issue of the *WATER LOG* provides a general review of federal and state legislative attempts to deal with water pollution and the myriad of problems it produces. We are doing so in recognition that although the problem is not new, it remains serious and is a long way from being solved. With the Federal Water Pollution Control Act up for renewal this year, the current administration's policy of reducing federal aid to states, and continued industrial expansion on the Mississippi Coast, it is important that all those concerned with marine pollution understand the current legal framework available to combat the problem.

FEDERAL WATER POLLUTION CONTROL ACT

Faced with a severe water pollution problem and its attendant health problems, Congress passed the Water Pollution Control Act in 1948. Several strengthening amendments have been passed since then, but the major amendments went into effect in 1972 and 1977. The stated objective of the Federal Water Pollution Control Act (FWPCA) is to "restore and maintain the chemical, physical and biological integrity of the nation's waters." To achieve these objectives, Congress articulated six major goals: (1) to eliminate, by 1985, all discharge of pollutants into navigable waters; (2) by 1983, wherever possible, to have the water quality at a level that will support recreation and wildlife; (3) to prohibit the discharge of toxic pollutants in toxic amounts; (4) to provide financial assistance for the construction of publicly owned waste treatment works; (5) to develop and implement areawide waste treatment management planning processes in the states; and (6) to develop the technology necessary to eliminate pollutants from the water. These goals reflect Congress' decision to take active steps to coordinate the cleaning of our nation's waters.

Areawide Water Quality Management

Section 208 of the Act deals with the development of state and areawide water quality management programs. Read in conjunction with §303, it requires each state to establish an ongoing planning process which will produce plans that include effluent limitations and schedules of compliance with the effluent limits, incorporation of a water quality management plan, and a priority ranking of construction needs for waste treatment works. It also requires the Governor of each state to identify areas of the state which are experiencing substantial water quality control problems.

Once established, the planning agencies are required to prepare long-range plans providing for a regulatory program for the control of all point and non-point sources of pollution, and for adequate statewide waste treatment facilties. There must be a financial and managerial program for carrying out all parts of the plan. Once the plans are submitted to the governor, he must in turn submit them to the EPA for approval.

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MISSISSIPPI AIR AND WATER POLLUTION CONTROL ACT

The Mississippi Air and Water Pollution Control Act (MAWPCA) was passed by the Mississippi Legislature in 1966 to deal with air and water pollution problems in Mississippi. It designates the Mississippi Commission on Natural Resources as the state air and water pollution control agency for all purposes of federal pollution control legislation and programs. The Commission is primarily responsible for state water quality planning and management and NPDES permitting. The Bureau of Pollution Control and the Permit Board assist the Commission in carrying out these responsibilities.

The Commission has published a statewide water quality management plan pursuant to the FWPCA. The plan encompasses the following: (1) planning boundaries; (2) water quality assessment; (3) inventories and projections; (4) water quality criteria; (5) wasteload allocations; (6) municipal treatment needs; (7) regulatory programs and management agencies; (8) non-point source pollution; and (9) an appendix of county-wide maps which delineate in detail the §201 facilities, planning areas, the location of every known point source discharge, the identification of every water quality limited and effluent limited segment, and the location of every known water quality monitoring station. It designates two areas as areawide water quality management planning areas: (1) the northern part of DeSoto County and (2) Alcorn, Prentiss and Tishomingo Counties. Because of the critical water quality problems of the Gulf Coast and the resultant need for effective water quality management in this area, the Gulf Coast has been treated as a distinct area within itself. A document separate from the state §208 plan was therefore prepared to address the specific concerns and needs of the Gulf Coast.

NPDES permitting is the primary vehicle for ensuring that the water quality standards in this plan are maintained. Someone who intends to dump waste into a water course must first apply for an NPDES permit with the Bureau of Pollution Control. The staff of the Bureau determines what waste by-products can be discharged and in what quantity. Once these effluent limitations have been determined, the Bureau gives the information and its recommendations to the

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FEDERAL WATER POLLUTION CONTROL ACT (Continued)

Section 201 was passed to assist in the development of waste treatment management plans and practices that will achieve the goals of the Act. It makes available to states, municipalities or intramunicipal and interstate agencies grant monies to cover 75% of the cost of construction of waste treatment facilities, and in certain cases will partially cover the cost of reimbursing state and local governments for treatment works already completed or under construction.

National Pollution Discharge Elimination System

The NPDES regulatory program is outlined in §402 of the Act. The purpose of this permit system is to control the amount and type of polluting materials that are discharged into the nation's waters. The EPA is authorized to issue permits for the discharge of pollutants, as long as the permits meet the effluent standards and limitations requirements of sections 301 (effluent limitations), 302 (water quality related effluent limitations), 306 (national standards of performance), 307 (toxic and pre-treatment effluent standards), 308 (inspection, monitoring and entry), and 403 (ocean discharge criteria), as well as any other authorized regulations promulgated by the EPA. Section 402 also authorizes the EPA to approve both inter and intrastate NPDES programs which comply with the provisions of the Act. Thus a state with an EPA approved program may issue NPDES permits, with the EPA retaining the right to veto the issuance of any permit.

Section 309 outlines the federal enforcement procedure available when states or permit users violate the FWPCA. If, after notice, a violator does not comply, the EPA administrator can institute a civil suit for damages or injunctive relief in the appropriate United States district court. If this involves an individual permit user, the state must receive notice of the suit. If a municipality is the defendant, the state in which the municipality is located is to be joined as a party. Violators are also subject to criminal penalities for both willful and negligent violations, including penalties for anyone who knowingly falsifies reports or tampers with monitoring equipment.

Section 404 Permit

The NPDES does not cover the discharge of dredged or fill material into navigable waters and the territorial seas. Such discharges are regulated through the §404 permit program administered by the Army Corps of Engineers. It is illegal to discharge dredge or fill material into navigable waters unless a "404 permit" is obtained from the Corps. A "404 permit" allows dumping of this material into specified disposal sites that have been pre-selected by the Corps. In addition to issuing specific, individual permits, the Corps is authorized to issue general permits on a state, regional or national basis for categories of discharges which are similar in nature, will cause minimal adverse environmental effects when performed separately and have a minimal cumulative adverse effect on the environment. A general permit may be authorized for any period up to five years. Any general permit may be revoked or modified if, after opportunity for a public hearing, the Corps determines that activities allowed under the permit will have an adverse impact on the environment or are more appropriately regulated by individual permits. Any person who willfully or negligently violates a "404 permit" condition is subject to a fine of not less than $2,500 and not more than $25,000 per day of violation and/or by imprisonment for not more than a year.

Marine Sanitation Devices

In order to prevent the discharge of untreated or inadequately treated sewage into navigable waters from both new and existing vessels which have permanently installed toilet facilities on board, Congress included in the FWPCA a section authorizing the EPA and the Secretary of the department in which the Coast Guard is operating to promulgate and enforce regulations governing the design, construction, installation, operation and performance standards for marine sanitation devices (MSD) on board such vessels.

Conclusion

It is apparent that through the FWPCA Congress has made a commitment to improve the quality of United States waters. It seems to recognize that it must gain the cooperation of state and local government officials in order to be successful. Congress, therefore, has attempted to allocate to the states the responsibility of implementing the goals and principles of the FWPCA, with the federal government acting as a paternalistic figure, providing financial assistance, guidance and supervision and also being prepared to enforce the provisions if a state and/or municipal government proves to be less than cooperative.

MISSISSIPPI AIR AND WATER POLLUTION CONTROL ACT (Continued)

Permit Board. It is the responsibility of the Permit Board to take the recommendations under consideration and decide what type permit, if any, to issue. Their decision is published in a local newspaper to afford the public an opportunity to respond to the decision. If at the end of thirty days no responses have been filed, a permit can be issued. If the proposed permit is challenged, however, the issue is investigated further and a second decision announced. The Permit Board may also, in its discretion, hold an informal public hearing to obtain comments from the public. If a permittee disagrees with the Permit Board's decision, it can file a written request for a formal hearing before the Permit Board. The decision reached at this hearing is final unless an appeal is taken to Chancery Court within twenty days of the date that the decision is entered in the Permit Board's minutes.

Since the Mississippi Coastal Program came into effect in September, 1979, all water quality and NPDES decisions are subject to the policy coordination procedures of the Coastal Program. This places the additional responsibility upon the Bureau and Permit Board of determining whether the proposed activity is in compliance with the coastal program.

The Commission is also responsible for enforcing the provisions of a permit after it has been issued. The permitted entity is required to send quarterly monitoring reports to the Bureau of Pollution Control, who then submits them to the Commission. Bureau staff personally monitor discharges from once a year to every other month, depending upon the size of the plant, the amount of discharge, and the plant's past record. If a violation is discovered, the violator is given notice of the violations and generally thirty-one days in which to respond. If the correction is not made within the time specified in the notice, a hearing is held at the next scheduled Commission meeting. A staff member of the Bureau of Pollution Control presents the facts and the violator is given a chance to be heard. The Commission most often takes one of three approaches to a violation, with a formal hearing as a last resort. First, if there have been no problems in the past, the violator will be given a time extension to clear up the problem. When the extension period expires, it is required to submit a report of the situation. The Commission could also, at its discretion, issue an official order which is served on the violating entity. The order includes the time period in which the problem must be corrected and a date to report back to the Commission. The most drastic and least favored option is to file a formal complaint, set a hearing date and notify the violator of the charges against him. This hearing is quasi-judicial in nature and a verbatim transcript is prepared. At the end of the hearing, the Commission issues an official order. An appeal on the record can be made to Chancery Court.

A violator who refuses to comply with any Commission order can have its NPDES permit modified or revoked, or a civil fine of no more than $25,000 for each violation may be assessed. In addition to such fine, any person who violates any provisions of his permit, fails to perform a duty imposed by it or violates any order of the Commission, causing the death of fish or other wildlife, may be liable to pay to the state an additional amount equal to the sum of money reasonably necessary to restock such waters or replenish such wildlife. This sum is determined by the Commission on Natural Resources after consultation with the Mississippi Game and Fish Commission. If a violation causes pollution requiring immediate remedial or cleanup action, the owner or operator of the facility is liable for the cost of such action.

OIL SPILL LIABILITY UNDER THE CLEAN WATER ACT

The primary federal weapon in the ongoing battle against oil spills is the Clean Water Act found at 33 U.S.C. §1321, also known as The Federal Water Pollution Control Act. It prohibits the discharge of oil or hazardous substances in harmful quantities or in quantities which may affect the natural resources of the United States into or upon the navigable waters of the United States. The Congressional policy is given teeth by the Act's penalty and liability provisions, which provide for civil and criminal penalties for negligent and intentional discharges and place liability for oil spill cleanup expenses on those responsible for the spill.

The first duty of any person in charge of a vessel, an onshore facility, or an offshore facility, who has knowledge of any discharge from such vessel or facility, in violation of the Act, is to notify the Coast Guard of the discharge. Any person who fails to immediately notify the Coast Guard is subject to a criminal penalty of not more than $10,000 and/or imprisonment for not more than one year.

The Clean Water Act also imposes civil penalties for oil discharges. The civil penalty has provoked more litigation than the criminal penalty because it is basically a device which imposes strict liability on the violator. The mere occurrence of an unauthorized discharge may result in the assessment of a civil penalty regardless of questions of fault. The Coast Guard and the EPA have been delegated power to bring civil actions against any owner, operator or person in charge of any vessel or facility which violates the Clean Water Act. After the person charged is given notice of the charge and a hearing when the Coast Guard may assess a penalty of $5,000 for each offense. The amount of the penalty may be modified by a consideration of the appropriateness of the penalty to the size of the business of the owner charged, the effect on the owner's ability to continue in business and the gravity of the violation.

If no action is commenced by the Coast Guard then the Administrator of the EPA may bring a civil action. The Administrator may use the same considerations used by the Coast Guard in imposing the penalty. The Administrator may also consider the nature, extent, and degree of success of any efforts made by the owner/operator to minimize or mitigate the effects of the oil discharge. The penalty imposed by the EPA is limited to $50,000. However, if it can be shown the discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner or person in charge, then a penalty of up to $250,000 may be imposed.

A second civil penalty may be imposed on any owner/operator of a vessel or facility for failure to comply with regulations the President may issue consistent with a National Contingency Plan for removing oil spills, found at Executive Order No. 11735. The person charged must be given a notice of the charge and a hearing. The President, in assessing a penalty, may consider the gravity of the violation and the demonstrated good faith attempts of the owner/operator to achieve rapid compliance after notification of the violations. Each violation is a separate offense and a limit of $5,000 for each violation is placed on such penalty.

Depending on the immediate circumstances, cleanup operations of a spill may be conducted by the polluter, a third party with cleanup capacity, or a Coast Guard oil spill task force. The ultimate burden of paying oil spill cleanup costs rests on the polluter absent a showing that the spill resulted from an act of God, an act of war, negligence on the part of the United States or an act or omission of a third party. The maximum liability for cleanup costs differs according to whether the violator is a vessel or facility.

The owner or operator of a vessel from which oil is discharged is liable for the actual costs of the oil removal with set statutory limitations. In the case of an inland oil barge the limitation is $125 per gross ton of the barge of $125,000, whichever is greater. For a vessel carrying oil or hazardous substances as cargo the set limitation is $150 per gross ton of such vessel or $250,000, whichever is greater. The limitation for any other vessel is $150 per gross ton of such vessel. The owner/operator of an onshore facility and the owner/operator of an offshore facility are subject to the same liability under this Act. The facility's owner or operator is liable to the United States Government for actual cleanup costs not exceeding $50,000,000. The owner/operator of vessels and of facilities may be subject to liability for the full amount of cleanup costs, regardless of the statutory limitations if the United States can show the discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner/operator of the vessel or facility. The oil spill cleanup costs may also include any expenses incurred by the Federal or State governments in restoring or replacing natural resources damaged by the oil discharge. The President or State representative may act as trustee for the public to recover the costs of restoring or replacing the natural resources. A maximum limit of liability with respect to any class or category of onshore or offshore facilities for oilspill cleanup costs may be established by the President. Liability for removal costs to facilities may be less than $50,000,000 but not less than $8,000,000. The Act has no provision establishing a maximum limit of liability for oilspill cleanup costs to vessels.

In order to meet any liability which may be imposed under the Act any vessel over 300 gross tons using the navigable waters or parts of the United States must establish and maintain evidence of financial responsibility. Financial responsibility may be established by evidence of insurance, surety bonds, qualifications as a self-insurer, or otherwise. Failure to establish such responsibility shall subject the owner/operator to a fine of up to $10,000.

The Clean Water Act is not an all inclusive remedy for oil spill damages. Nothing in the Act limits or modifies the obligations of a polluter to any person or agency for damages to publicly or privately owned property. The Act does not preempt any State or political subdivision from imposing any requirement or liability for oil discharges into State waters. Furthermore, the Act in no way limits the liability a polluter may face under the Outer Continental Shelf Act or the Deepwater Port Act of 1974.

Paul L. Gunn

AN OPINON ON THE GULF COAST POLLUTION PROBLEM FROM BUREAU OF POLLUTION CONTROL, DEPARTMENT OF NATURAL RESOURCES

After years of study, debates, meetings, hearings, inspections, and enforcement actions, leaders on the Gulf Coast finally seemed sufficiently concerned with the continued deterioration of the quality of coastal waters that they are prepared to move forward and solve their wastewater treatment problems. The next two years will determine the depth of their commitment to solve what, up to now, has been an unsolvable problem.

Although there are over 200 sewage treatment facilities in the three coast counties, eighty per cent of the sewage is treated in the 15 major publically owned treatment facilities. Some of these facilities are old and are reaching their design capacity. Of the major facilities these include Pass Christian, Long Beach, Ocean Springs, and two facilities in Pascagoula. In addition, facilities were not designed to achieve future federal water quality standards. Small independent treatment plants which may not be properly operated and maintained, the large number of septic tanks in unsewered areas and surface runoff also make major contributions to pollution of the Mississippi Sound.

The Gulf Coast historically has not spent adequate amounts for sewage treatment. A survey of expenditures indicates the Gulf Coast is spending roughly two thirds of the amount normally being spent in the Southeast Region for operation and maintenance of facilities and substantially less in the maintenance category. In addition, EPA surveys show this region generally spends less than the rest of the nation in operation and maintenace of sewage treatment facilities. This situation reflects low pay for personnel, frequent breakdowns, and more rapid deterioration of plant equipment.

The pollution problems that result are two-fold in nature. The first is a public health consideration of bacterial contamination. Documentation of such contamination below treatment facility discharges may be found in 201 and 208 planning documents. Many of the small package treatment facilities in the unincorporated areas are poorly maintained and break down often, resulting in contamination of the small ditches and bayous to which they discharge. Sometimes these ditches are in subdivisions and are potentially subject to children playing in them. Bacterial contamination has also resulted in the closure of eighty percent of the shellfish harvesting beds. The second aspect of the pollution problem is that of decreased oxygen in the receiving stream due to the waste. Although the water may look clean, decreased oxygen means that the more sensitive fish such as trout and bream do not survive there and a healthy aquatic system is destroyed. The vast majority of the existing treatment facilities were not designed to remove enough of the pollutants to maintain adequate oxygen levels in the streams to which they discharge. These problems will only continue to grow unless the Gulf Coast decides to apply better zoning, building controls, and adequate wastewater planning.

The Gulf Coast economy depends heavily upon good water quality for recreational water activities such as fishing and skiing on the bayous and swimming near the beach, and the shellfishing industry. There is a regional and local perception of polluted waters on the Gulf Coast and a dismay in regard to lack of activity to correct it. The Gulf Coast and Mississippi are losing millions of dollars each year in tourist-produced revenue, recreational dollars and income from the seafood industry.

Losses in oyster production from the Biloxi Reefs only, is approximately three million dollars per year, with an additional $150,000 spent by the State to control harvesting from polluted waters. Additional thousands of dollars are also spent moving oysters to non-polluted waters. With all of the information available regarding the wastewater problems, what has been happening to correct the problem and why was it not done sooner?

As early as 1970, the Gulf Regional Planning Commission had a plan drawn calling for regionalizing sewage treatment and management. However, no action was ever taken on this plan. For the next twelve years, efforts were made by the State pollution control agency to achieve wastewater planning under the Clean Water Act. Planning did not begin until after a moratorium on further sewage expansion was applied to the Coast. That planning was finally abandoned in 1976, due to fragmentation of the effort.

In 1977 the Air and Water Pollution Control Commission began comprehensive wastewater planning for the Gulf Coast under Section 208 of the Clean Water Act. A plan was developed calling for regionalized treatment facilities and a single non-political management agency to implement the plan and operate the treatment facilities.

In early 1979 the Coast leadership rejected the plan although public hearings were positive in tone. The newly created Department of Natural Resources agreed to allow the Coast to create a representative body from the Coast responsible for developing a comprehensive wastewater plan and management system. The Gulf Coast Regional Wastewater Management Commission was thus created by the 1979 State Legislature. This Commission formed at the request of the Coast leadership and was supported by the Department and the Gulf Coast legislation delegation.

In 1980 the Commission adopted and sent to the Commission on Natural Resources a plan calling for regionalized facilites and a single management agency to implement the plan. This agency was the Gulf Coast Regional Wastewater Authority. Soon after the creation of the above Gulf Coast Commission, a tour was taken of a regionalized system in South Carolina. The Commission came away impressed with the system of the Western South Carolina Sewer Authority, which had been in existence over twenty-five years, operated in 3 counties, had an excellent bond rating, very low user charges, and attractive treatment facilities. This experience along with the recommendations of their contractor convinced the Commission to adopt their plan by majority vote. However, Commission members were apparently not successful in convincing their local city councils of the wisdom of the approach. Although all of the Gulf Coast communities except Waveland's adopted resolutions in support of creation of the Gulf Coast Regional Wastewater Authority, those in Harrison and Hancock Counties eventually rejected affiliation with it.

The affiliation of Coast communities with the Authority came much closer than may be generally thought. Biloxi published its notice of intention to join, as well as Gulfport and Pass Christian, and in both Long Beach and Bay St. Louis the city councils voted to join but were overruled by the mayor's veto. Only Waveland was clearly opposed. All the communities in Jackson County and the County itself affiliated. However, the public vote in Biloxi blocking its action to join caused the other communities in Harrison County to stop their activities. The public vote in Biloxi was overwhelmingly opposed to Biloxi joining. Much conflicting and inaccurate information was publically presented obviously resulting in a situation of public confusion. One certainly cannot expect voters to be positive on adopting a program that would increase bills when information is conflicting and political leadership divided. Public opposition included concerns with expanded use of the West Biloxi wastewater treatment facility and its location, the simple fact that sewer bills would rise, and that a uniform rate would subsidize some areas at the apparent expense of others.

The Commission on Natural Resources met in July, 1981 on the Coast to address the lack of achieving a solution. Coast towns were given until December of 1981 to develop an alternative plan or join the Authority. A committee was spearheaded by Biloxi and called the Ad Hoc Wastewater Committee. Even after submittal of the plan, Coast communities have not wholly supported the effort. Pass Christian submitted a separate plan along with Waveland.

Thus the evidence is that even the County-wide approach may not be satisfactory to all communities in either Harrison or Jackson County. It is possible that similar problems as were encountered with the Regional Authority will be encountered with the County plan. It may appear that the real desire is for a status quo situation of each town managing its own problem. The Coast has had this arrangement for the past ten years and little has been done to solve pollution problems on a Coast-wide systematic approach.

While all of this time has been used in planning, construction costs continue to escalate rapidly and the federal government has already acted to decrease its funding support from 75% to 55% on October 1, 1984. Further, independent municipal plant operation does not address the serious problem of the small independent plant nor the discontinuance of

septic tanks.

What is the cost impact of past inactivity. Over 2 million has been spent by local and State authorites on planning over the last decade, and apparently more will have to be spent in Harrison and Hancock Counties.

As an example, if one assumes an 8% inflation rate for the past 7 years, then a project cost of 60 million dollars in 1976 has increased to 95 million. That's 35 million additional dollars today needed to construct facilities.

It is hoped that the present activities of the communities of Harrison and Jackson County will lead to fruition. As of the Commission on Natural Resources meeting on February 11, 1982, a concept has been agreed upon to allow Hancock and Harrison Counties to pursue individual county wastewater management agencies while the Regional Authority represents Jackson County. Two deadlines have been set—August 1, 1982, for the communities of Harrison and Hancock Counties to affiliate through contracts with their respective agency and November 1, 1982, for the communities to turn over the responsibility of operating the plants of the County Authority.

The Commission on Natural Resources is thus taking the position of again allowing the Coast to provide the leadership for solving wastewater management problems. However, not until the individual communities turn over the operation of their facilities to the County Authority will the Commission on Natural Resources agree to modify the 208 Wastewater Plan.

The Environmental Protection Agency is constrained by law to provide federal funding only in accordance with a State/EPA approved 208 Wastewater Management Plan. Thus, funding may be provided only to the Gulf Coast Regional Wastewater Authority as called for in the approved Gulf Coast Regional Wastewater Management Plan. Communities who have not joined the Authority are ineligible to receive federal funding for either treatment facilities or local collection system needs. However, the 208 Plan can be modified through a process of plan revision with public hearings.

Meanwhile, Jackson County has moved forward. Design grants have been awarded for facilities serving Gautier, Pascagoula and Moss Point. Planning is near completion for Ocean Springs and Escatawpa. A recent tour by Bureau of Pollution Control personnel of the main wastewater treatment facility in Pascagoula operated now by the Authority revealed significant activity and improvements. Worker and management attitudes, and knowledge of wastewater treatment process control were also vastly improved. After only 3 months of operation, the Authority is showing aggressive effort to live up to the high expectations for it.

What will be the future of the efforts in Harrison and Hancock County? The Commission on Natural Resources is taking a wait and see attitude, leaving the responsibility up to the Coast. However, there is a feeling that with seven years of planning effort, its time to solve some problems, and sanctions have been clearly identified if success is not forthcoming.

NATIONAL WILDLIFE FEDERATION vs. GORSUCH— U.S. District Court, District of Columbia No. 79-0915, Jan. 29, 1982

In a decision which could have far reaching impact on the effort to combat water pollution, federal district judge for the District of Columbia has ruled that man-made dams are "point sources" under Section 402 of the Clean Water Act and has ordered EPA to establish effluent limitations for dams pursuant to the National Pollutant Discharge Elimination System.

For years, EPA has maintained that dams are non point sources of pollution, such as runoff from agricultural, silvicultural, mining and construction activities, subject only to regulation by states and localities under Section 208 areawide waste treatment management plans. Judge Joyce Hens Green rejected EPA's contention, determining that any other approach would be inconsistent with the Clean Water Act's purposes and policies. The court agreed with plaintiffs that dams are point sources because "they create pollutants that would not exist but for the dam and reservoir."

The court recognized the significance of its decision. If dams are subject to the NPDES requirements, EPA must establish effluent limitations or other performance standards for dams and permits would be required for any future discharges. The permit would restrict quantitites, rates and concentrations of chemical, physical, biological and other constitutents which could be discharged.

The court specifically rejected defendants' assertion that only those pollutants listed in the Clean Water Act, such as heat and sewage sludge, are subject to regulation under the NPDES program. The court interpreted the act broadly to include all water quality changes created by a dam/reservoir facility—if the dam discharges these "pollutants" into navigable waters. Included among the pollutants created by dams are excess sediment, dissolved metals, cold water, low dissolved oxygen and supersaturation.

Many of the nation's more than two million dams could require NPDES permits if the court's decision is upheld on appeal. An appeal is likely. After the suit was filed, every major utility company in the country joined as defendant—intervenors.

The court ordered EPA to issue regulations implementing its order within 90 days.

Mike Gibbs

DEER ISLAND UPDATE

On January 26, the Mississippi Commission on Wildlife Conservation denied developer John Stocks' permit application to build a pier on Deer Island and to run a sewer main and telephone and television cables from the mainland to the island. In doing so, the Commission ruled that Stocks' proposal to build a condominium complex on Deer Island is inconsistent with the policies and goals of the Mississippi Coastal Program (MCP) because it would adversely affect the coastal wetlands environment and, ultimately, the public interest. Under Chapter VIII of the MCP, the Commission is required to evaluate 13 decision factors in reaching a decision on regulated coastal activities. Of these 13 factors, negative findings were made on five: (1) precedent setting effects and existing or potential cumulative impacts of similar or other development in the project area; (2) the full extent of the project, including impacts induced by the project, both intended and unintended but reasonably anticipated; (3) the preservation of natural scenic qualities; (4) the national interest, and (5) comments received through the MCP policy coordination procedure, and comments received through public hearings.

Approximately a month after this decision, the Mississippi Commission on Natural Resources considered a request by Stocks for certifications of water quality for the same facilities. Unfortunately, the Natural Resources Commission failed to follow the lead of its sister agency and the recommendation of the Bureau of Pollution Control in denying the permit as inconsistent with the MCP. Instead it chose to postpone a final decision by ruling that it wouldn't approve plans for development of the island as long as they included the use of septic tanks for the treatment of sewage. As a result of the Natural Resource Commission's ruling, Stocks permit application to the Army Corps of Engineers for construction of the pier and utility corridor is in limbo. The Corps can't approve such a request unless the appropriate water quality certificates are issued by Mississippi.

Whether or not Stocks can or will continue its development plans without these permits remains to be seen. But for now, at least, the MCP is serving its purpose, i.e., planning coastal development in a way that favors the preservation of the coastal wetlands and its ecosystems.

OCEAN DUMPING ACT

The Marine Protection Research and Sanctuaries Act of 1974, found at 33 U.S.C. 1401 (Ocean Dumping Act) implements the United States' role in an international effort to stop the disposal of harmful materials in the ocean.

Since ocean dumping is an international problem, the United States' role in preventing it is somewhat limited by its jurisdictional powers. The Ocean Dumping Act prohibits the transportation without a permit of any material for the purpose of dumping it into the ocean from the United States or from any location if the vessel or aircraft is registered in the United States, flies a United States flag, or if a U.S. department, agency or instrumentality is involved. Without regard to the point of departure or the status of the transporting vessel or aircraft, any dumping without a permit within twelve nautical miles of the United States is also prohibited.

In section 1401 of the Act, Congress has declared that it is the policy of the United States to regulate the dumping of all types of materials into the ocean. There are, however, some notable exceptions to this rule. Oil, for example, is a material only to the extent that it is taken on board for the purpose of dumping it into the ocean. Thus, accidental or even negligent oil spills would not create any liability under this Act. (However, see Oil Spill Liability under the Clean Water Act pg. 3.) Fish wastes are exempted from the Act unless deposited in harbors or other closed areas, or unless the EPA determines that such dumping could endanger health, the environment, or ecological systems in a specific location. The deposit of oyster shells and other materials made in connection with otherwise regulated fisheries resources is exempt from coverage as well.

Another practical exception to the Act concerns the occasional need for emergency dumping to save lives at sea. If an imperiled ship needs to dump cargo in order to avoid disaster, they may do so without incurring liability as long as timely notice is given to the EPA of the time, place and the type of materials that were thrown overboard. Effluent discharges from vessels, as well as the discharge from their sewage treatment systems do not constitute dumping under this Act, nor does the disposition of effluent from any outfall structure, to the extent that it is regulated by the Federal Water Pollution Control Act or the Atomic Energy Act.

Apart from these exceptions, any material that is taken aboard for the purpose of ocean dumping is subject to the regulatory scheme established by the Act. The EPA regulates the disposal of all materials other than dredged material, which is handled by the Chief of Engineers of the Army. Both agencies use criteria set forth in section 1412(a) to determine whether or not a permit should be granted. Before a permit may be issued, the Administrator, or the Chief of Engineers must determine that the proposed dumping "will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities." This determination must be based on the following criteria, although neither Department head is limited to these standards: (1) the need for the proposed dumping; (2) its effect on human health and welfare (including economic, esthetic and recreational values); (3) the effect on marine life, wildlife, shorelines and beaches; (4) the effect on marine ecosystems; (5) the persistence and permanence of the effects of dumping; (6) the effect of dumping particular volumes and concentrations of materials; (7) appropriate locations and methods of disposal, including land-based alternatives; and (8) the effect on alternate uses of the ocean, such as scientific study, fishing, etc. Congress, for example, has flatly prohibited the dumping of high level radioactive wastes and radiological, chemical or biological warfare agents. Since December of 1981, the Act has also prohibited the disposal of "sewage sludge" as defined in section 1402. Many other dangerous substances may be disposed of only if they qualify as "trace contaminants". This category includes oil, mercury, and wastes which would qualify as "hazardous" under the Resource Conservation and Recovery Act. (See 40 CFR 227)

The EPA has chosen particular sites where designated materials may be dumped. These sites are located beyond the edge of the continental shelf whenever feasible. While permit applicants are not limited to the use of a designated site, there are costly additional requirements if the applicant chooses to establish a new one.

In setting up its regulatory scheme the EPA has established general types of permits, none of which may be issued without notice and an opportunity for a hearing. General permits have a broader application in that they are not always issued to individual parties (although they may be). If it wishes, the EPA can publish these permits along with any applicable limitations that it feels are necessary, resulting in a general authorization to engage in the activity that is described. Burials at sea and the sinking of vessels are the only activities that have been authorized by the EPA in this fashion. Other types of EPA permits that are available require specific information from the applicant, and they allow a specific party to dispose of particular materials at a designated site. Permit applicants must supply detailed information about the materials or constituents of materials that are to be disposed. They must also describe the manner in which they plan to dispose of the wastes and prepare an assessment of the anticipated environmental impact of the dumping at the proposed site. When a tentative decision has been made, the EPA will publish its intent to issue or deny the permit so that interested parties can request a hearing.

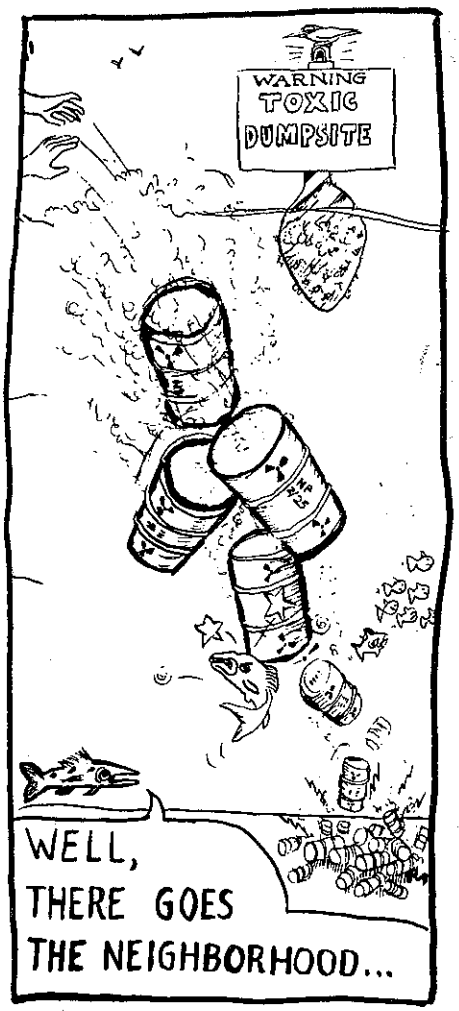
Although the Corps of Engineers is authorized to develop its own regulations to govern the issuance of dredged material permits, currently it is relying on standards developed by the EPA. (See 33 CFR 320) However, the procedures are somewhat different. (See 33 CFR 324 et. seq.) The information that must accompany an application is more or less the same as that required by the EPA. It seems, however, that economic considerations play a greater role in the decision to issue or deny a permit. The EPA cannot veto a permit for dredged material where it has been shown that there is no economically feasible alternative.

For those who fail to get a permit or otherwise violate the regulations that govern ocean dumping, the Act has several different enforcement provisions which may come into play. After notice and a hearing, the Administrator of the EPA can levy a fine of up to $50,000 for each violation. The amount of the penalty depends upon the gravity of the offense, any previous violations and the good faith of the individual charged. If anyone knowingly violates the provisions of the Act, he may also be subject to an additional fine of $50,000 and imprisonment for less than a year. The Act authorizes suits for injunctive relief by the Attorney General or by private parties.

Conclusion

While the effectiveness of the Act will depend to some extent on the administration and enforcement of the dumping permit program, the program itself appears to go a long way towards keeping harmful materials out of the oceans. The passage of this Act was certainly an important measure in protecting the ocean resources that are so critical to our existence.

Cathy Jacobs



THE GULF COAST WASTEWATER SAGA

The 1972 Federal Water Pollution Control Act established 1977 as the year by which communities should have secondary treatment for their sewage, a deadline which most communities could not and did not meet. The 1977 Clean Water Act amendments established two new goals: an interim goal of "fishable, swimmable" water by July 1, 1983 and zero pollutant discharge by the year 1985. To achieve these goals, the power to regulate discharges into the nation's waters could be delegated to any state which established water quality standards in accordance with the FWPCA. In addition, each state was also required to prepare a state management program. (See discussion of FWPCA on page 1.) In Mississippi a statewide water quality management plan designated the Mississippi Gulf Coast as an area requiring special areawide planning.

In December, 1978, the Mississippi Department of Natural Resources (DNR) completed a special study of the water pollution problem on the Mississippi Gulf Coast. DNR considered about 60 plans to deal with the Coast's wastewater problem and finally chose Plan 21, which called for a tri-county wastewater management district. Plan 21 called for a single sewage treatment authority to oversee all of the Coast's wastewater treatment efforts. The plan met with considerable resistance caused, in no small part, by the political ramifications of a regional approach to a traditional function of city and county government. In short, coastal governments would not go along with the DNR's plan.

At this juncture, the Coast was given another opportunity to solve its own problem. The Gulf Coast Regional Wastewater Management Commission was established by the legislature in March of 1979 to formulate a comprehensive plan for wastewater management for the control and abatement of pollution. The commission was comprised of representatives from each county and municipality within the tri-county area. The commission decided that the tri-county management scheme proposed by DNR was the best overall approach to the problem.

In August, 1979, an order was issued by DNR instructing coastal cities to adopt the commission's management plan or set forth their alternative plans by October 30, 1979. In October, legislation was introduced to establish the Mississippi Gulf Coast Regional Wastewater Authority—the actual tri-county management agency—and the cities requested an extension of the DNR deadline to November 15 in order to review the proposed legislation. DNR granted the extension and informed the cities that compliance with the November 15 deadline could be accomplished by submitting either an alternative plan or a resolution supporting the bill before the legislature, and informed them further that, 30 days after the commission completed its plan, a final decision would have to be made as to whether or not to accept the plan. All of the cities, with the exception of Waveland, drafted resolutions favoring the creation of the regional authority. In March, 1980, the Mississippi legislature established the Mississippi Gulf Coast Regional Wastewater Authority, *Miss. Code Ann.* §49-17-301, (1981 Supp.), *et seq,* covering all three coastal counties, and the Waveland Regional Wastewater Management District, *Miss. Code Ann.* §49-17-161, (1981 Supp.), *et seq,* encompassing only Hancock County.

The 30 day period proscribed by the November 15, 1979, extension was triggered in November, 1980, by the approval of the DNR, the Governor's Office, and the EPA of plan 13 which was jointly submitted by the interim commission and the newly created regional authority. Although the deadline passed, the state took no action, choosing rather to see whether the cities would join or not. The picture changed daily, with cities deciding to join and then changing their minds or having the decision defeated by mayoral veto.

In Biloxi, a petition calling for a referendum on the issue was circulated. A vote was taken in Biloxi on May 19, 1981. Voter turnout was light at only 14%, but 94% of those voting rejected the Gulf Coast Authority. According to one commentator, opponents of the regional system had "won the battle, but [not] the war." It seemed, however, that Biloxi, with its West Biloxi plant, was a keystone in the plan, and after it fell, the enthusiasm for the Authority in Hancock and Harrison Counties markedly flagged.

On July 29, 1981, DNR informed coastal municipalities that they were in non-compliance, and December 1 was given as the date by which a city must either join the Mississippi Gulf Coast Regional Wastewater Authority or submit a viable alternative plan. Jackson County and its municipalities joined, but an ad hoc committee with members from Harrison and Hancock Counties and the cities therein, was formed to devise another plan. Under this committee's recommendation, submitted just under the December 1 wire, two separate authorities would be established, one for Harrison and one for Hancock Counties, all existing facilities would be upgraded and utilized, and costs would be substantially less for all cities except Pass Christian. Bay St. Louis and Pass Christian submitted their own plans along with the ad hoc committee's report.

As of this writing, the Gulf Coast Regional Wastewater Authority is still the only state and federally approved method of dealing with the coast's wastewater problem. Despite its name, Jackson County and its municipalities have joined the authority. It is not likely that Harrison or Hancock counties will ever be forced to join. A bill currently before the legislature would create a separate authority for Harrison County and Hancock County as the Waveland District. It appears that the ad hoc committee's position will be adopted.

The successful treatment of wastewater on the coast is dependent upon the creation of a regional agency capable of obtaining the necessary capital for implementation. Federal planning, design, and construction grants distributed by EPA are crucial to the successful solving of the problem. As it now stands, construction grants will be available until 1985, but their amount will be reduced substantially in October, 1984. Planning and design grants have already gone by the boards, although reimbursement for a portion of construction costs will be refunded when construction is actually commenced. Without some type of state or federal funding, Mississippi could find itself in the position of saying to the coast "sinner heal thyself" without providing the needed ointment.

Stanton Fountain

SUMMARIES

RIVERS AND HARBORS ACT

The Rivers and Harbors Act, found in 33 U.S.C. §§403, 407, 411 (1970), prohibits the dumping of refuse into navigable rivers and or beaches and banks of rivers, without a permit authorization from the Secretary of the Army based on a recommendation by the Army Corps of Engineers. An exception is made for the disposal of liquid sewage runoff. Although the basic purpose of this prohibition is to prevent the obstruction of navigation, the discharge of refuse or fill can be banned for reasons other than obstruction to navigation (such as conservation grounds). The Refuse Act was later added to extend the coverage of the Rivers and Harbors Act. It provides a permit system for the disposal of refuse into specified sites and expands the Secretary's authority to cover non-navigable waters.

DEEP WATER PORT ACT OF 1974

The Deep Water Port Act is found in 33 U.S.C. §1501. A deep water port is any structure, other than a vessel, beyond the territorial sea off the coast of the United States, which is used for a port for loading and unloading, and handling, of oil going to the United States. Federal liability is imposed for oil discharges at or near any deepwater port. Liability can be unlimited for fines and clean-up costs if the licensee is grossly negligent or willfully engages in misconduct. Absent such factors, fines are limited to $50 million, and clean-up costs are limited to $150 per gross ton or $20 million. The Act also establishes the Deepwater Port Liability Fund, which compensates injured parties when clean-up costs and damages exceed the liability limits. A fee of 2¢ per barrel is collected when the oil is loaded or unloaded at the port to finance the fund.

Some of these articles are excerpts from longer articles written by staff writers of the Water Log. These articles are "The Federal Water Pollution Control Act"; "Oil Spill Liability Under the Clean Water Act"; and "Ocean Dumping Act". Free copies of the full text of these articles are available upon request.

WATER LOG

This newsletter is a quarterly publication reporting on the activities of the Mississippi-Alabama Sea Grant Consortium and on issues and events affecting the Mississippi-Alabama coastal area. The purpose of the newsletter is to increase public awareness of coastal problems and issues.

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

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NOTES

The EPA has announced that it is preparing a draft EIS regarding the disposal of wastewater to freshwater wetlands in Region IV's eight southeastern states (including Mississippi). It plans to evaluate existing wetlands disposal practices and problems and to develop a strategy or procedure to determine the feasibility and acceptability of using wetlands for wastewater disposal. For more information, contact Ronald J. Mikulak at (404) 881-7458.

The U.S. Coast Guard and EPA are conducting a formal review of MSD regulations, including possible alternatives to the present system. For more information, contact USCG's J. C. Arner at (202) 755-7917 or EPA's Jonathan Amson at (202) 472-3401.

The Mississippi Marine Advisory Service is sponsoring a "Symposium on Energy Conservation in Commercial Fishing Industry" on April 5 and 6. The April 5 symposium will be held at the Bilxoi Beach Motor Inn. On April 6 it will be held at City Hall in Bayou La Batre. Both workshops begin at 9:00 a.m. and continue throughout the day. For more information contact David Veal at (601) 388-4710.

The Sea Grant Legal Program will provide assistance during 1982 to the Mississippi Law Research Institute on several water resource projects which are directly related to water supply and water quality problems on the Mississippi Gulf Coast. These projects will be funded primarily by the Mississippi Water Resources Research Institute. One project involves an analysis of the legal ramifications of interstate and interbasin transfers of water from the Escatawpa River in southeast Mississippi. As water resource problems become critical throughout the country, it is important for resource managers to be aware of legal rights and remedies which may be relevant to proposed solutions.

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