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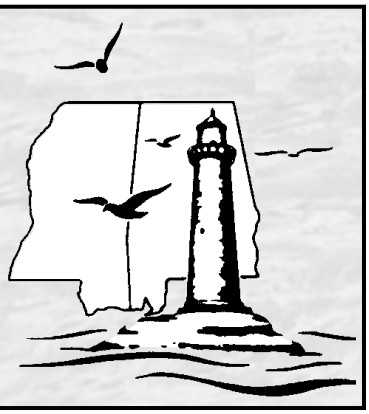
WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



Georgia Scrap Metal Yard Violates CWA, RCRA

Jury Award Will Still Be Reduced

***Parker v. Scrap Metal Processors, Inc.*, No. 03-14516 (11th Cir. Sept. 28, 2004)**[1]

Josh Clemons

In September the U.S. Court of Appeals for the Eleventh Circuit upheld a jury finding that the proprietors of a Georgia scrap metal yard were liable for money damages under the Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA), but remanded the case for a new trial to reconsider the amount of the damages.

Facts

For fifty years the Parker family has owned the property at 9144 Washington Street in Covington, Georgia. Mrs. Quebell Parker lived there from 1983 to 1998, when she moved away for medical reasons. Mrs. Parker continues to own the property in a joint tenancy with her two children, which was established in 2003.

For at least thirty years leading up to 1994 the adjoining property was owned by independent businessman L.B. Frix. Mr. Frix operated a variety of enterprises on the site, including a scrap metal yard. Around 1990 Mr. Frix was joined in his endeavor by J. Wayne Maddox, who took over operation of the scrap metal yard and eventually incorporated as a metal recycling business. Mr. Maddox acquired the property from Mr. Frix in 1994 and continues to own it. However, his son Jason took over the scrap metal recycling business in

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Louisiana Chemical Facility Dodges Bullet

Falsely Reported Emissions Not "Obligations to Pay" under Statute

***U.S., ex rel. Bain v. Georgia Gulf Corp.*, No. 03-30023 (5th Cir. Sept. 27, 2004)**[1]

Lauren Cozzolino, 3L, University of Connecticut School of Law

In this appeal, the Fifth Circuit found that the Georgia Gulf Corporation did not violate the False Claims Act by falsifying polyvinyl chloride emissions records to

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In This Issue . . .

Baton Rouge Trying to Breathe a Sigh of Relief

***La. Envtl. Action Network v. U.S. Envtl. Protection Agency*, 382 F.3d 575 (5th Cir. 2004)**

Luke Miller, 3L, University of Mississippi School of Law

On September 8 the U.S. Court of Appeals for the Fifth Circuit took an opportunity to inquire into what geographic areas are properly under the review of the U.S. Environmental Protection Agency (EPA) when deciding impact areas on non-attainment zones as defined by the Clean Air Act (CAA). The non-attainment zone in question is Baton Rouge (since 1978) and the area being questioned as a possible impact zone is St. Mary Parish. The decision by the Fifth Circuit was split, dismissing several requests by plaintiff Louisiana Environmental Action Network (LEAN) but finding in favor of its request to have St. Mary Parish removed as an impact area for Baton Rouge CAA attainment plans.

Background

The CAA is a federal regulatory scheme designed to help reduce air pollution nationwide. One way the CAA does this is by classifying areas that are not within the regulatory pollution limits as marginal, moderate, serious, severe, or extreme. After classification, the polluted areas are given a deadline by which to reach regulatory compliance, based on the severity of their classification. States are given the opportunity to create and operate state implementation plans (SIPs) to reach attainment, which are subject to review by the EPA. If an area fails to reach attainment, the EPA steps in and is required to reclassify that area to the next higher severity level and impose further regulation. States can again offer a SIP to try and reach pollution reduction targets. At all times the EPA retains the right to find the SIP incomplete or inadequate, which can result in sanctions or federal control of clean air measures.

Baton Rouge has never been a guiding light for clean air, and was re-designated in 1991 as a "serious" zone of non-attainment. With that new title the city was given until 1999 to achieve CAA pollution reduction goals. The mere presence of this case indicates that those goals were never reached. Initially, the EPA failed to step in and reclassify the city into the next level of severity when the city failed to reach attainment. After a judgment requiring the EPA to perform its oversight function the EPA found that the city did not reach its attainment deadline, extended the attainment deadline anyway, approved the state's attainment demonstrations, approved state "new source" review procedures, and approved state substitute contingency measures.[1] While these EPA decisions were coming down, an intermediary ruling from an area close by indicated that the EPA's policy of extending attainment deadlines went against the objectives of the CAA.[2] In light of this, the decision to extend Baton Rouge's deadline was revoked and the city was bumped to "severe" non-attainment status. After the EPA revised its determination on Baton Rouge's status, the attainment demonstrations were going to have to be revised along with the "new source" review standards, so the EPA requested that its original findings be vacated. LEAN's challenge to these original findings became moot once the EPA withdrew its decisions. Therefore, the only issue remaining for LEAN was the EPA's approval of Louisiana's substitute contingency measures.

Court Decision

Contingency measures are those actions designed to limit or decrease the output of pollution, which should eventually lead an area to attainment of its air pollution goals. In this case, LEAN was afraid that the EPA was allowing contingency measures that really were not additional steps, but merely approval of past activities already implemented and not effective. The plaintiffs

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Sea Grant

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

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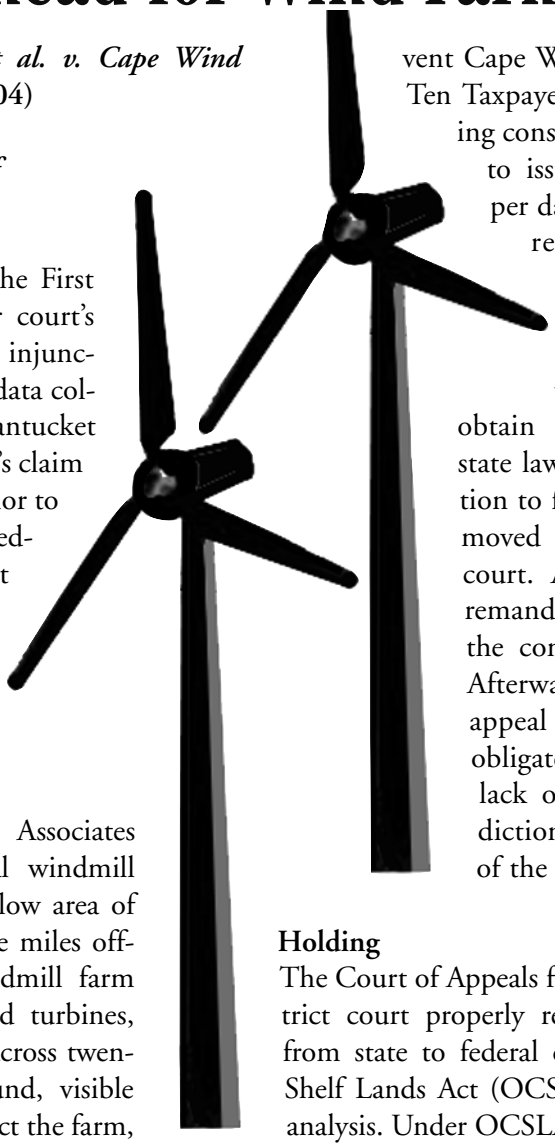
Clear Skies Ahead for Wind Farm Data Tower

***Ten Taxpayer Citizens Group, et al. v. Cape Wind Assocs.*, 373 F.3d 183 (1st Cir. 2004)**

Leah Huffstatler, 3L, University of Mississippi School of Law



The U.S. Court of Appeals for the First Circuit recently affirmed a lower court's dismissal of an action seeking an injunction against the construction of a data collection tower in the seabed of Nantucket Sound. In response to the plaintiff's claim that a state permit was required prior to construction, the court held that federal law solely governed the permit requirements for construction on the outer continental shelf and that those requirements had been met.

Background

Massachusetts-based Cape Wind Associates plans to construct a commercial windmill farm on Horseshoe Shoals, a shallow area of Nantucket Sound more than three miles offshore. Once completed, the windmill farm will include more than 130 wind turbines, each 470 feet tall, and be spread across twenty-eight square miles of the Sound, visible from the shore. In order to construct the farm, Cape Wind must first collect extensive meteorological and oceanographic data concerning conditions on Horseshoe Shoals.

In 2001, Cape Wind announced plans to build a scientific measurement device station (SMDS) — a temporary data collection tower rising approximately two hundred feet in the air and supported by steel pilings driven one hundred feet into the seabed. The U.S. Army Corps of Engineers granted Cape Wind a permit for the SMDS in August 2002 and, after some delay, construction began in October. The SMDS is now complete and operational.

Procedural History

Shortly before construction began, Ten Taxpayer Citizens Group (Ten Taxpayer) and several other plaintiffs filed suit in Massachusetts state court to prevent Cape Wind from erecting the SMDS. Ten Taxpayer sought an injunction blocking construction or, if the court refused to issue the injunction, a $25,000 per day fine for each day the SMDS remained on the Shoals. The complaint alleged that Massachusetts state courts had jurisdiction over the project and that Cape Wind had failed to obtain the necessary permits under state law. Cape Wind removed the action to federal court and Ten Taxpayer moved to remand the case to state court. After denying the motion to remand, the district court dismissed the complaint on August 19, 2003. Afterward, Ten Taxpayer argued on appeal that the district court was obligated to remand to state court for lack of federal subject-matter jurisdiction and challenged the dismissal of the complaint.

Holding

The Court of Appeals first considered whether the district court properly removed Ten Taxpayer's action from state to federal court. The Outer Continental Shelf Lands Act (OCSLA) was central to the court's analysis. Under OCSLA, federal law governs the outer continental shelf, which is defined as all submerged lands under United States sovereign control beyond the three-mile offshore boundary.[1] The court cited the Supreme Court's interpretation of OCSLA that all law applicable to the outer continental shelf area is federal law even if that law occasionally incorporates some state law to fill in substantial gaps of regulation coverage.[2] Thus, the court held that Ten Taxpayer's claims, although premised on Massachusetts law, actually arose directly under federal law and were properly removed to federal court.

After determining that removal was proper, the court then decided whether the district court erred in dismissing Ten Taxpayer's claim. Although Ten Taxpayer asserted that certain Massachusetts statutes required Cape Wind to secure permits from the state prior to constructing the SMDS, the court disagreed and sum-

See Cape Wind, page 7

EPA Must Review Florida Water Rule

State Agency's Word Not Good Enough

***Florida Public Interest Research Group v. EPA*, No. 03-13810 (11th Cir. Oct. 4, 2004)**[1]

Josh Clemons

The U.S. Court of Appeals for the 11th Circuit has vacated a district court decision granting summary judgment to the U.S. Environmental Protection Agency (EPA) in a challenge by environmental groups to the agency's failure to review a Florida Department of Environmental Protection (DEP) Clean Water Act regulation. The district court must now examine the merits of the case to determine whether the disputed regulation alters Florida's state water quality standards, and therefore must undergo EPA review.

State Water Quality Standards Under the CWA

The federal Clean Water Act (CWA)[2] takes a "cooperative federalism" approach in which states that have been approved by the federal government to administer their own CWA programs take the lead in keeping their own waters clean, and the federal government serves in a strong supervisory capacity to ensure the job gets done properly. Water quality standards offer a prime example of this approach.

Sec. 303 of the CWA[3] requires states to establish water quality standards for the waters within their boundaries that are subject to CWA jurisdiction. Although the statute and regulations are quite complex, the concept is simple: determine what each water body is to be used for (for example, swimming, fishing, drinking, etc.) and then determine how clean it must be to be used for those purposes. A completed water quality standard consists of designated uses and quality criteria to allow those uses.

Sec. 303(c) mandates that whenever a state revises a water quality standard it must submit the revision to EPA for review, and EPA may only approve the revised standard if it complies with the requirements of the CWA.

While water quality standards by themselves do not clean up any water, they are a necessary part of the process. Under § 303(d), waters that fail to meet standards are put on a list and prioritized for cleanup, which is accomplished by, among other things, limits on discharges of pollution. Like water quality standards, § 303(d) lists must be submitted to EPA for review and approval. When a water body is placed on a § 303(d) list it becomes subject to considerably more regulation than an unlisted water; thus, there are many people who, because of economic or political interest in minimal regulation of the discharge of pollutants, prefer that waters not be listed.

Florida's Standards and the Disputed Rule

Florida is authorized to administer its CWA program, and has EPA-approved water quality standards. The standards prohibit exceedance of pollutant criteria "at any time," and provide that "*in no case* shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna."[4] This language is clear: even *one* exceedance or imbalance is a violation of water quality standards, which necessitates § 303(d) listing.

In 2001 DEP adopted the "Impaired Waters Rule" (Rule) for the stated purpose of "interpret[ing] existing water quality criteria and evaluat[ing] attainment of established designated uses."[5] The Rule also expressly disclaimed that it altered Florida's existing water quality standards, and thus was not submitted to EPA for review and approval.

The plaintiff environmental organizations, including the Florida Public Interest Research Group, Save Our Suwannee, and the Sierra Club, disagreed with DEP's characterization of the Rule. They argued that the Rule effectively revised the water quality standards in two ways. First, the Rule established a statistical regime in which *multiple* exceedances must be found for a water to be legally impaired. Second, whereas previously a nutrient standard violation would be established by the effect on flora and fauna, under the Rule a nutrient standard violation would be established by exceedance of a numeric standard. If the plaintiffs were correct, and the Rule worked as a revision of the water quality standard (despite DEP's assertion to the contrary), then the Rule should have been reviewed and approved by EPA as required by the CWA.

DEP used the Rule to generate the "Group One Update" to its § 303(d) list,[6] which it duly submitted to EPA. Over one hundred water bodies were de-listed by

the Update. EPA realized that the Rule had affected which waters were listed and, because it had not formally reviewed the Rule, undertook to determine whether the Rule was "a 'reasonable' approach to identifying impaired waters."[7] EPA took an *ad hoc* approach, examining each of the Rule's methodologies individually. If a methodology was found to be "reasonable," then EPA approved the changes to the § 303(d) list that resulted from that methodology. In some instances EPA also analyzed sample data. However, these *ad hoc* methods could not ensure that the de-listing that occurred was appropriate in every case.

The Citizen Suit

The plaintiffs filed suit under the CWA provision that allows "any citizen" to sue the EPA for failure to perform a non-discretionary duty,[8] alleging that EPA did not have discretion to bypass the review mandated by § 303(c) in favor of an *ad hoc* "reasonableness" analysis because the Rule was effectively a revision of Florida's water quality standards.

The trial court sided with EPA, finding that EPA had no non-discretionary duty to review the Rule because (1) DEP had not undertaken rulemaking procedures to revise the water quality standards, (2) EPA had not followed formal procedures to approve any revision, and (3) EPA's review of the Group One Update rendered moot the question whether EPA should have formally reviewed the Rule.[9] Absent a non-discretionary EPA duty, the court held that it lacked jurisdiction to require EPA to review the Rule. Because it found no jurisdiction, the trial court granted summary judgment (that is, judgment without a trial of the facts) to the defendants.

The plaintiffs appealed on the ground that the trial court should have determined whether, despite DEP's and EPA's claims to the contrary, the Rule actually had the effect of revising the state water quality standards. If the Rule had such effect, then the court would have had jurisdiction and summary judgment would have been improper.

The 11th Circuit Decision

The 11th Circuit agreed with the plaintiffs and vacated the trial court's decision. The court reasoned that EPA's "reasonableness" review of the Group One Update could not substitute for formal review of the Rule under § 303(c) because § 303(c) requires significantly more analysis. The court, like the plaintiffs, found it unsatisfactory that EPA, rather than following § 303(c)'s dictates, had essentially taken DEP's word that the Rule did not change the standards. "Our case law suggests," the court pointed out, "that…the only way in which the EPA can satisfy a mandatory duty is by actually discharging that obligation in the manner specifically required by the statute."[10] In other words, the "reasonableness" analysis was inadequate.

According to the 11th Circuit, the trial court should have looked beyond DEP's characterization of the Rule and made its own independent inquiry into the actual effect of the Rule. Otherwise, the State of Florida could "circumvent the purposes of the Clean Water Act" at will simply by claiming that revisions of its water quality standards are not, in fact, revisions of its water quality standards.[11]

To the 11th Circuit, the plaintiffs' most potent argument was that several water bodies that had been included on the § 303(d) list before the Rule went into effect were de-listed by the Group One Update, which followed the Rule. The court called this "the crux of the matter" because it showed that the plaintiffs' claim – that the Rule effectively revised the water quality standards – may well have been meritorious. The court concluded that it was therefore

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offered three arguments: "(1) historical reductions in emissions cannot qualify as a contingency measure, (2) emissions reductions already required by law cannot qualify as a contingency measure, and (3) reductions outside the Baton Rouge non-attainment area, without a finding that such reductions improve air quality within the Baton Rouge area, cannot qualify as a contingency measure."[3] The court analyzed and ruled on each argument separately.

As to argument number one, the court called this phenomenon "early activated continuing reductions."[4] Contingency measures are actually supposed to take effect once a deadline is passed. That is why LEAN believed the EPA should not rely on mitigation measures implemented before the deadline was breached by Baton Rouge. The court, however, found that the CAA neither affirms nor prohibits continuing emission reductions, especially those reductions that continue to have the intended effect of reducing air pollution. To justify this conclusion the Fifth Circuit gives some deference to the preamble to EPA's approval of the Louisiana SIP, which indicates allowing early contingency measures ensures that a state that breaches a deadline at least has some measures in place to work toward emission reductions, while new measures are adopted because of the reclassification to another level of CAA severity. Also, according to the CAA itself, these types of early reductions seem to fit in line with a state implementing "all reasonably available control measures as expeditiously as possible."[5] Lastly, the court notes that the reductions achieved by the previously adopted contingency measure are taken off the table for consideration until attainment is achieved first through other activities. So these previously adopted measures are not given undue credit and only work to further the purposes and requirements of the CAA in general. Therefore, this court found the reduction requirements allowable as contingency measures.

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LEAN's next argument, about adopting emission requirements already in force by other laws as a contingency requirement, was not addressed by the court. The plaintiffs failed to bring this argument before the EPA during the EPA's public comment period, thus waiving their right to bring up the issue later. This decision is a clear application of administrative law and the deference given to complying with agency hearings and procedures.

Moving on to the final argument, the court addressed the issue of whether St. Mary Parish, located twenty-four miles south of the non-attainment zone, could be considered as an impact area for the Baton Rouge zone. It was clearly demonstrated that the parish in question was neither in the actual non-attainment zone, nor in the "ozone influence" parishes that were considered to influence the non-attainment Baton Rouge zone. In an effort to justify using reductions from the St. Mary area for general findings in Baton Rouge, the EPA noted that the inclusion of the St. Mary area emissions in the contingency plans for reduction created an adjustment to Louisiana's baseline overall. Therefore, when reductions occur in St. Mary they influence emission levels in Baton Rouge as well. This is the standard "credits" use of pollution reduction, in which limiting pollution in one place can result in application of that credit for zones in which non-attainment is present. The question for the court became, is it proper to consider an area outside the designated non-attainment or influential zones when establishing baselines of pollution levels? The EPA pointed to an agency policy statement indicating that this type of inclusion of distant areas was acceptable up to one hundred kilometers away. However, the court is not required to give deference to this type of policy statement, and after reading the statement the court found that it did not apply to the issue at hand but rather to demonstrations of "reasonable further progress." It was never demonstrated that St. Mary Parish would help attain proper levels in the Baton Rouge area at all.

Another argument by the EPA was that it had a "modeling" analysis showing what areas influence the Baton Rouge area and the St. Mary Parish was part of that analysis. However, in what appears to be an evi-

dentiary gaffe by the EPA, the agency never actually showed how St. Mary Parish as a whole, or in part, was in the designated area considered influential over Baton Rouge. Subsequently, the court remanded to the EPA to conduct more investigation and explanation, rejecting LEAN's request to reinstate Louisiana's previous contingency measures.

Conclusion

Although the last part of the decision seemed to reprimand the EPA for not clearly establishing why a distant area should be considered in determining air pollution levels in a non-attainment area, the court held in favor of the agency for the most part. The final disposition of the court was a denial in part and grant in part, but practically speaking it was almost a complete denial for LEAN, with a remand to the EPA to reevaluate its findings and continue with what it already tried to do. How this actually will effect Baton Rouge is not clear, but if a parish twenty-four miles away will be given credit in helping the city reach its air quality goals, it looks like the citizens of Baton Rouge are the ones getting the proverbial "short end of the stick." ⌄

ENDNOTES

1. 67 Fed. Reg. 61,786 (Oct. 2, 2002) (to be codified at 40 C.F.R. pts. 52 and 81); 67 Fed. Reg. 61,260 (Sept. 30, 2002) (to be codified at 40 C.F.R. pt. 52); 67 Fed. Reg. 60,590 (Sept. 26, 2002) (to be codified at 40 C.F.R. pt. 52).
2. *Sierra Club v. EPA*, 314 F.3d 735, 741 (5th Cir. 2002).
3. *La. Envtl. Action Network*, 382 F.3d at 582.
4. *Id.*
5. *Id.* at 583-84, *quoting* Clean Air Act, 42 U.S.C. § 7502(c)(1).

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marily dismissed the argument. Next, the court held that even if it had incorrectly interpreted Massachusetts statutes relied upon by Ten Taxpayer, the claim would still be meritless because those statutes were superseded by OCSLA which "leaves no room for states to require licenses or permits for the erection of structures on the outer continental shelf."[3] Consequently, the court held that any Massachusetts permit requirement that might apply to the construction of the SMDS is inconsistent with federal law and inapplicable to the case.

Conclusion

The First Circuit Court of Appeals found that Ten Taxpayer's action fell under federal law and rejected the claim that Cape Wind was required to seek a construction permit under Massachusetts state law. Under the applicable federal law, Cape Wind satisfied its permit requirements and Ten Taxpayer's request for an injunction or fine was properly dismissed by the district court. ⌄

ENDNOTES

1. 43 U.S.C. §1331(a) (2003).
2. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 (1981).
3. *Ten Taxpayer Citizens Group,* 373 F.3d at 196-97.

Florida Water Rule, from page 5

improper for the trial court to grant summary judgment to the defendants. The judgment was vacated and the case remanded to the trial court for a determination of whether the Rule had the practical effect of changing Florida's water quality standards. ⌄

ENDNOTES

1. The Westlaw citation is 2004 WL 2212023 (11th Cir. (Fla.)). This case has not yet been published in the Federal Reporter.
2. 33 U.S.C. §§ 1251-1387.
3. *Id.* § 1313.
4. Fla. Admin. Code r. 62-302.530 (emphasis added).
5. *Id.* r. 62-303.100 - .700.
6. For administrative convenience, Florida's many water bodies are divided into five groups of about 1,600 each.
7. *FPIRG v. EPA*, No. 03-13810, slip op. at 14 (11th Cir. Oct. 4, 2004)(*FPIRG II*).
8. 33 U.S.C. § 1365.
9. *FPIRG v. EPA*, No. 4:02cv00408 (N.D. Fla. May 29, 2003).
10. *FPIRG II*, slip op. at 35-36.
11. *Id.* at 39.

Scrap Metal, from page 1

1999 and operates it under the name Scrap Metal Processors, Inc. (SMP).

SMP purchases scrap in bulk, salvages any included metal and sorts it for recycling, and sells the metal to recyclers. The SMP property is stacked with the non-salable remains, including automobile tires and seat cushions, old underground storage tanks, electrical insulators containing polychlorinated biphenyls (PCBs), and batteries. Storm and surface water flow from the SMP property onto the Parker property and into a nearby unnamed stream. SMP does not have the storm water discharge permit the CWA requires; SMP also lacks a scrap tire identification number, which is required for businesses that store scrap tires. In addition, SMP had not obtained any of the permits it needed under RCRA, which regulates the transportation, storage, and disposal of hazardous waste.[2] In 1991 the U.S. Environmental Protection Agency (EPA) inspected the scrap yard property and found evidence of soil contamination from metals, petroleum products, solvents, and paint wastes; drums containing environmentally threatening levels of chemicals and hazardous waste; and potentially explosive underground storage tanks. In 1993 the Georgia Environmental Protection Division (EPD) made similar findings.

A private consulting firm discovered PCB and heavy metal contamination on the Parker property in 2001. EPD determined that the contamination originated on the SMP property, and in 2002 ordered Maddox to clean up the Parker property.

Mrs. Parker, along with her two children, sued SMP/Maddox for the torts of negligence, trespass, and nuisance, as well as for violations of the CWA and RCRA and Georgia environmental statutes. The CWA is intended to prevent or ameliorate water pollution by, among other things, making it illegal to discharge a pollutant into the waters of the U.S. without a permit.[3] RCRA regulates the transportation, storage and disposal of hazardous waste. Both statutes allow states to administer their own permit programs (which Georgia does), and both allow private citizens to sue violators.The jury found in the Parkers' favor on all counts, and Maddox appealed to the 11th Circuit.

Standing and Subject Matter Jurisdiction

As regular *Water Log* readers know, a plaintiff's standing to bring suit is often challenged by the defendant because if the challenge is successful the case is dismissed.[4] Standing to sue has three elements, all of which must be present: (1) the plaintiff must have suffered a concrete injury; (2) the injury must have been caused by the defendant's conduct; and (3) the injury must be redressable by a favorable outcome in the suit. As might be expected, SMP argued that the Parkers had no standing under RCRA or the CWA.

The court found that the Parkers had standing under RCRA because (1) their land was contaminated; (2) the contamination was caused by SMP's storage of solid waste in violation of RCRA; and (3) an injunction forbidding SMP from allowing the waste to migrate to the Parker property would redress their injury. Under the CWA they established standing because (1) water runoff from the SMP property carried the contamination to their property; (2) the runoff was caused by SMP's failure to comply with the CWA; and (3) a favorable court decision would redress the injury by requiring SMP to comply with the CWA.

SMP also sought to have the case dismissed for lack of subject matter jurisdiction. In their CWA claims the Parkers alleged that SMP had (1) discharged pollutants before acquiring the necessary permit, and (2) violated the permit after acquiring it. SMP argued that the court had no jurisdiction over the first claim because the violations were wholly in the past (and thus were not a "live" case or controversy), and that the federal court had no jurisdiction over the second claim because the permit was issued by the state.

The court held that the Parkers' claim that SMP violated its state-issued CWA permit was adequate for jurisdiction. Although the permit was issued by the state, by the plain text of the CWA it is an "effluent standard or limitation" such that its violation is ground for a citizen's suit in federal court.[5] In addition, the court found that the great weight of precedent indicated that federal jurisdiction over violation of a state-issued CWA permit is appropriate. Having found jurisdiction based on the alleged permit violation, the court did not need to address the "wholly past" challenge. Similarly, the court had supplemental jurisdiction over the RCRA claims because they were part of the same "case or controversy."[6]

The CWA Claims

The heart of a CWA violation is the discharge of a pollutant from a point source into the waters of the U.S. (that is, into navigable waters) without a permit. The Parkers showed that storm water ran over, around, and through piles of debris and pieces of construction equipment on SMP's property before flowing over their property and into the unnamed stream. This

runoff carried pollutants from SMP's property onto the Parker property.

SMP argued that it did not violate the CWA because neither a point source nor "waters of the U.S." was involved. At least with respect to the absence of a point source, SMP had a strong argument. The CWA defines a point source as a "discernible, confined and discrete conveyance,"[7] a definition that does not customarily encompass runoff. The court, however, reasoned that the debris and construction equipment on SMP's land qualified as point sources because they collected water, then released it. This may represent the outer limits of the definition of a "point source," but it is in keeping with long-standing precedent.[8]

SMP's argument that there was no discharge to navigable waters was likewise unavailing, because the unnamed stream that received the polluted runoff was a tributary of the navigable Yellow River, and the tributaries of navigable waters are themselves considered navigable waters for CWA purposes.

Finally, SMP revived its argument that, because it had obtained a permit, the violations were wholly in the past. A CWA citizen suit cannot be brought for wholly past violations; there must be an ongoing violation. Again the court rejected SMP's argument. While SMP had obtained its permit, it was also in violation of it because, among other things, it was not taking the required steps to reduce or eliminate pollution. The violation was ongoing.

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The RCRA Claims

RCRA protects the environment and the public by imposing strict requirements on the transportation, storage, and disposal of hazardous waste. The Parkers alleged that SMP was failing to meet these requirements by (1) operating its facility without the necessary solid waste handling permit; (2) disposing of waste by open dumping; (3) operating as a scrap tire generator without the required state identification number; (4) disposing of prohibited waste (including lead acid batteries and PCBs) at its facility; (5) handling, storing, and disposing of hazardous waste so as to create an imminent and substantial endangerment to the environment; and (6) illegally burning solid waste. At trial, the jury had found in the Parkers' favor. On appeal, SMP was unable to muster any arguments sufficient to overturn the jury's findings, so the court upheld the jury's verdict.

Damages

The jury awarded the Parkers compensatory damages, attorneys' fees, and punitive damages totaling $1.5 million, which the trial court reduced to $1 million. SMP sought to have the compensatory and punitive damages set aside because, among other reasons, Mrs. Parker's children, who were co-plaintiffs, did not own or occupy the property during any of the time relevant to the claims. Here SMP was successful.

Under Georgia law, ownership or occupancy of the subject property is a necessary element of a nuisance claim. Thus, the Parker children should not have been able to collect on the nuisance claim, and the trial court judge should have instructed the jury to that effect. The judge did not do so, and SMP's attorney failed to object to the faulty jury instruction. When a party fails to object to a jury instruction at trial, the issue is usually considered to be unappealable. However, there is an exception to this rule for situations in which the judge's error is so fundamental that to let it stand would result in a miscarriage of justice. In this case the children had been awarded $500,000 to which, under Georgia law, they were not entitled. The appeals court reasoned that making SMP pay this money because its attorney failed to object to the jury instructions would have been a miscarriage of justice.

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avoid potential fines or monetary provisions. In their holding, the Fifth Circuit stated that there is no "obligation to pay" within the meaning of the relevant provision of the False Claims Act.[2]

Background

Georgia Gulf owns a chemical facility in Plaquemine, Louisiana where one of its primary products is the known carcinogen polyvinyl chloride (PVC). This facility produces PVC in eighteen reactors which must be opened routinely for physical inspections. Vinyl chloride is released into the atmosphere during these inspections. Known as "open lid loss," these emissions are a regular part of the production of PVC and must be monitored and reported.

Petitioner Ronald Bain was an employee of Georgia Gulf and in the winter of 1995 was transferred to work as a "top deck operator." As top deck operator, Bain's responsibilities included monitoring and measuring releases of vinyl chloride during open lid losses. These measurements were recorded into "open lid loss logs" and submitted to the Environmental Protection Agency (EPA) and the Louisiana Department of Environmental Quality (LDEQ). The complaint alleged that Georgia Gulf's "standard operating procedure" was to vent vinyl chloride into the atmosphere without monitoring or measuring the releases. It was also alleged that false records of the emissions during open lid loss were made to the EPA and LDEQ.

The Reverse False Claims Act Claim

Under the False Claims Act (FCA), the government, or a party suing on its behalf, may recover for false claims made by the defendant to secure a payment from the government. In his complaint, Bain alleged that Georgia Gulf's failure to monitor and report their vinyl chloride emissions was "in contravention of 31 U.S.C. §3729(a)(7)," the reverse false claims provision of the FCA.[3] Bain contended that the unauthorized quantities of vinyl chloride that Georgia Gulf emitted should be considered an "obligation" to the government subject to a monetary penalty under the FCA. Georgia Gulf countered that its LDEQ permit is "merely a grant of authority to discharge, not a contract setting forth obligations owed to and/or from the Government."[4]

Environmental Implications

Bain alleged that Georgia Gulf's obligations under the FCA are based on the environmental permits it must apply for according to the Clean Air Act.[5] Section 110 of the Clean Air Act requires each state to develop a plan for achieving the national standards for air pollution.[6] The LDEQ was established to ensure Louisiana's compliance with these and other environmental standards. The LDEQ permits are enforced by the State of Louisiana.

The outcome of Bain's reverse FCA claim has significant environmental implications. A finding by the Fifth Circuit that falsification of emissions records such as these does not result in a claim under the reverse FCA means that polluters who falsify records may not be held accountable for their infringement of monitoring and reporting laws. The Fifth Circuit's finding in this case that Georgia Gulf's LDEQ permit is merely a grant of authority to discharge and not an obligation to pay can be seen as a green light to polluters who falsify their records instead of monitoring and reporting the harmful emissions they spread into the air.

Conclusion

The Fifth Circuit found that Georgia Gulf's falsification of emissions data does not result in a claim under the FCA or an obligation to pay. LDEQ permits to emit under the Clean Air Act in Louisiana are merely grants of authority to discharge and not obligations to pay.

ENDNOTES

1. This case has not yet been published in the Federal Reporter. The Westlaw citation is 2004 WL 2152360.
2. 31 U.S.C. § 3729(a)(7).
3. *Georgia Gulf* at 1.
4. *Georgia Gulf* at 9.
5. 42 U.S.C. §§ 7401-7700.
6. *Id.* § 7410.

Photograph from the ©Nova Development Corp. collection

Managing Manure at Concentrated Animal Feeding Operations

[Ed. note: reproduced below is the U.S. Environmental Protection Agency (EPA) Fact Sheet for the agency's Clean Water Act guidance on effluent from concentrated animal feeding operations, which was published in September. This guidance may be of interest to feedlot owners and operators as well as those who are affected by feedlot discharges. It applies to feedlots nationwide, including those in the Gulf coastal states.]

Summary

EPA is publishing technical guidance to help NPDES permit authorities (States and EPA Regions), permittees, and technical service providers implement EPA's February 2003 revised Permit Regulations and Effluent Guidelines for Concentrated Animal Feeding Operations (CAFOs). This document will help permit authorities write permits for CAFOs that incorporate the revised effluent guidelines. It will also help operators of CAFOs meet these new limitations.

Background on CAFO Regulations

EPA published revised regulations for CAFOs under the Clean Water Act on February 12, 2003. The rules established performance expectations for existing and new sources to ensure they store manure and wastewater properly and expectations for proper land application practices at the CAFO.

The rules apply to about 17,000 livestock operations across the country. Under the rules all large CAFOs are required to apply for a permit, submit an annual report, and develop and follow a plan for handling manure and wastewater. In addition, the rules move efforts forward to protect the environment by: controlling land application of manure and wastewater, covering all major animal agriculture sectors, requiring all CAFOs to apply for an NPDES permit, and increasing public access to information through CAFO annual reports.

Summary of the Technical Guidance

The guidance focuses on site-specific requirements of the CAFO rules such as adequate storage of process wastewater and alternatives to setbacks for the land application of manure. The guidance presents many examples including land application rate calculations, sampling methods, National Nutrient Management Technical Standards for land application, and case studies for the voluntary alternative performance standards program. Additional technical resources and references addressed in the guidance include Manure Management Planner, appropriateness of winter spreading of manure, Phosphorus Index and Erosion Loss control tools, and USDA Comprehensive Nutrient Management Plans.

Further Information

For additional information concerning this action, you can contact Mr. Paul Shriner at (202) 566-1076 at the U.S. Environmental Protection Agency, Office of Water, Engineering and Analysis Division (4303T), 1200 Pennsylvania Avenue, NW, Washington, D.C. or you can send an e-mail to shriner.paul@epa.gov. You can view or download the complete text of the guidance on the Internet at www.epa.gov/guide/cafo.

Photograph of feedlot courtesy of the USDA Natural Resources Conservation Service

2004 Mississippi Legislative Update

Danny Davis, 2L, University of Mississippi School of Law

The following is a summary of coastal, marine, environmental, and water resources-related legislation enacted by the Mississippi Legislature during the 2004 session.

2004 Mississippi Laws 314 **(S.B. 2921)**
Approved April 12, 2004 *Effective upon passage*
Amends § 49-27-37 to allow an extension for processing coastal wetland permits.

2004 Mississippi Laws 325 **(S.B. 2823)**
Approved April 12, 2004 *Effective upon passage*
Amends § 49-15-37 to delete the requirement that oysters must be relayed in the presence of a conservation officer and allow relaying in the presence of an employee of the Mississippi Department of Marine Resources.

2004 Mississippi Laws 331 **(S.B. 2589)**
Approved April 12, 2004 *Effective upon passage*
Amends § 49-27-15 to require an applicant for a coastal wetlands permit to prepay the costs of publication fees.

2004 Mississippi Laws 333 **(S.B. 2824)**
Approved April 12, 2004 *Effective July 1, 2004*
Amends § 49-15-46 to require a license for a captain of a commercial oyster vessel; amends § 49-15-63 to delete the reference to shrimp boat captains so the penalties are applicable to captains of all seafood harvesting vessels.

2004 Mississippi Laws 340 **(S.B. 3030)**
Approved April 19, 2004 *Effective upon passage*
Amends § 49-7-90 to revise possession of paddlefish violations and provide an exception for lawfully taken paddlefish.

2004 Mississippi Laws 385 **(H.B. 1268)**
Approved April 20, 2004 *Effective upon passage*
Amends §§ 59-7-405 and 59-7-407 to provide that a municipal port commission may be dissolved and the municipality may assume such duties, and creates § 59-7-408 to provide a procedure and requirements for such dissolution.

2004 Mississippi Laws 402 **(S.B. 2725)**
Approved April 22, 2004 *Effective upon passage*
Designates a certain portion of Black Creek in Lamar, Forrest, Perry, Stone, George and Jackson counties, as a state scenic stream and includes the stream in the state scenic streams stewardship program.

2004 Mississippi Laws 428 **(H.B. 785)**
Approved April 28, 2004 *Effective July 1, 2004*
Classifies and defines types of marinas, including public marina, private single-family or multi-family marina, and yacht club marina.

2004 Mississippi Laws 431 **(H.B. 1388)**
Approved April 28, 2004 *Effective July 1, 2004*
Amends § 49-15-313 to allow the Mississippi Department of Marine Resources to exempt participants of certain organized fishing events from the sports license and boat fishing license requirements.

2004 Mississippi Laws 459 **(S.B. 2727)**
Approved April 29, 2004 *Effective upon passage*
Designates a certain portion of the Pascagoula River in George and Jackson counties and a certain portion of Bear Creek in Tishomingo County as eligible for nomination to the state scenic streams stewardship program.

2004 Mississippi Laws 477 **(S.B. 2742)**
Approved May 1, 2004 *Effective upon passage*
Amends §§ 1 through 16, Chapter 503, Laws of 2003, to increase from $4.2 million to $6.07 million the amount of state general obligation bonds to provide matching funds for federal funds for the water pollution control revolving fund.

2004 Mississippi Laws 482 **(S.B. 2853)**
Approved May 1, 2004 *Effective July 1, 2004*
Amends § 29-7-1 to transfer the authority of the mineral lease commission to the Mississippi Major Economic Impact Authority; amends § 29-7-3 to revise the authority of the commission to lease state-owned lands that have development potential for oil or natural gas and provide certain restrictions for drilling for oil or natural gas in offshore waters; amends § 29-7-17 in conformity to the provisions of this act; creates a new section 29-7-19 to provide for hearings to be heard by the commission and creates a new section 29-7-21 to provide for an appeals process for decisions made by the commission.

2004 Mississippi Laws 536 **(H.B. 818)**
Approved April 28, 2004 *Effective July 1, 2004*
Amends § 17-17-415 to create the task force on recycling, to provide appointments to and duties of the task force, and to assign the task force to the Mississippi Department of Environmental Quality for administrative purposes.

Scrap Metal, from page 9

Conclusion

The Eleventh Circuit ruled that the Parkers' victory at trial on their CWA and RCRA claims was warranted, contrary to SMP's assertion. However, the court also found that the trial court erred in its jury instruction on the subject of damages for nuisance, and reversed the jury award of compensatory and punitive damages. The proper damages will be determined in a future proceeding.

ENDNOTES

1. This case has not yet been published in the Federal Reporter. The Westlaw citation is 2004 WL 2160758.
2. 42 U.S.C. §§ 6901-92.
3. 33 U.S.C. §§ 1251-1387.
4. *See e.g.* Luke Miller, *Without Standing, Fisheries Act Lawsuit Tumbles*, Water Log vol. 24, no. 1, at 2 (2004).
5. 33 U.S.C. § 1365.
6. 28 U.S.C. § 1367(a).
7. 33 U.S.C. § 1362(14).
8. *E.g. Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980).

EPA Lodges Consent Decrees in Texas Cases

In October the U.S. Environmental Protection Agency (EPA) published notice in the Federal Register that consent decrees were being filed in cases involving Clean Water Act violations by Texas cities and ConocoPhillips. The decrees were filed in U.S. District Courts in Texas. The text below is taken from the Federal Register.

***U.S. and State of Texas v. City of Carthage*, Civ. No. 6:04-CV-451, DOJ #90-5-1-1-07648 (E.D. Tex.)**

The Consent Decree resolves the liability of the named defendant to the United States and the State of Texas for violations of Section 301 of the Clean Water Act, 33 U.S.C. 1311. The claims arise from the City's discharge of effluent from its pubically [sic] owned treatment works in violation of the effluent limits contained in its National Pollution Discharge Elimination System permits.

The proposed Consent Decree provides that the City will construct an improved treatment system using chlorination to treat the effluent and meet specified operation and maintenance requirements. Additionally, the City will pay a civil penalty of $20,000 for the violations of the Clean Water Act and will perform a supplemental environmental project ("SEP") which consists of hooking up 29 residences that are currently on septic tanks to sewer lines.

- 69 Fed. Reg. 61040 (Oct. 14, 2004)

***U. S. and State of Texas v. City of Plainview*, Civil Action No. 5-04CV0218-C (N.D. Tex.)**

In this action the United States sought civil penalties and injunctive relief for violations of Sections 301, 309 and 402 of the Clean Water Act ("the Act"), 33 U.S.C. 1311, 1319, and 1342, and for violations of the City's National Pollutant Discharge Elimination System ("NPDES") permit for the City's publicly owned wastewater treatment works ("POTW"), located in Plainview, Texas. The Consent Decree settles the claims that the city violated the Act and its NPDES permit by: (1) Discharging pollutants in excess of the effluent limitations specified in its NPDES permit; (2) failing to comply with the final effluent limitations specified for Ammonia-Nitrogen by March 1, 2000; and (3) failing to operate and maintain its POTW as required by the permit. The Consent Decree requires that the City pay a $75,000 civil penalty to the federal government. The Consent Decree also requires that the City implement and comply with a comprehensive Management, Operation and Preventative Maintenance Program for its POTW during the term of the Consent Decree, and provide quarterly and annual reports to the EPA with copies to the State of Texas.

- 69 Fed. Reg. 61042 (Oct. 14, 2004)

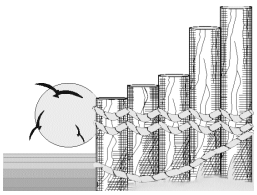
***U.S. v. ConocoPhillips Co.*, Civ. No. H-04-3813, DOJ #90-5-1-1-07664 (S.D. Tex.)**

The Consent Decree resolves the liability of the named defendant to the United States for violations of section 301 of the Clean Water Act, 33 U.S.C. 1311. The claim arises from the defendant's discharge of effluent from a wastewater treatment facility at its Sweeny Refinery in Old Ocean, Texas, in violation of effluent limits, including limits for Whole Effluent Toxicity, contained in its National Pollution Discharge Elimination System permit.

Under the proposed consent decree, Defendant will pay a civil penalty of $610,000 and will perform a Supplemental Environmental Project which consists of the donation of 128 acres to the Austin Woods Unit of the San Bernard National Wildlife Refuge. Additionally, Defendant is required to take the necessary measures to comply with the CWA and its permit.

- 69 Fed. Reg. 61862-61863 (Oct. 21, 2004)

Lagniappe *(a little something extra)*



Around the Gulf . . .

The Louisiana Supreme Court has overturned a **$1.3 billion jury award** won by oyster fishers against the State of Louisiana in 2000. The fishers sued when their oyster bed leases in Breton Sound were damaged by a state project designed to restore Louisiana's eroding coastline. The state's highest court found that all but twelve of the leases contained language renouncing legal claims arising from this kind of damage, and that the holders of the remaining twelve leases waited too long to file suit.

An oil company is making progress in its efforts to **drill for natural gas in Grand Bay off the Alabama coast.** According to the *Mobile Register*, state officials may be preparing to grant Colorado-based Duncan Oil Inc. the approval it needs to enable it to seek other necessary permits from federal agencies including the Army Corps of Engineers, the Environmental Protection Agency, and the Fish & Wildlife Service. The proposed drilling area is less than half a mile from the Grand Bay National Estuarine Research Reserve, which has been described by the National Oceanic and Atmospheric Administration as "one of the most biologically productive estuarine ecosystems in the Gulf of Mexico region." Directional drilling, which is more expensive than conventional drilling, is typically used to protect such sensitive areas. However, in a break from recent custom, the state has not asked Duncan to use directional drilling. The necessary permits have not yet been granted, and because of the many regulatory requirements it will likely be quite some time before any drilling is done. Local environmental groups are opposing the drilling project.

Recent months have seen ups and downs for **endangered beach mice** along the northern Gulf coast.

•In July, a federal judge in Florida ordered the U.S. Fish & Wildlife Service to reconsider its refusal to designate critical habitat under the Endangered Species Act to protect the rare, nocturnal St. Andrew beach mouse. The mouse lives only on Cape San Blas, a spit of sand about eighty miles southwest of Tallahassee. Designation of critical habitat could lead to greater protection from threats like development, vehicle traffic, and feral cats. The agency has until Sept. 30, 2006, to complete its reconsideration.

•In August, the selfsame U.S. Fish & Wildlife Service issued permits that will allow construction of seventeen new houses in the habitat of the endangered Alabama beach mouse on the Fort Morgan peninsula. A local real estate salesman described the agency's action as "a real milestone for us." The best may be yet to come for the development community: the Service's local field supervisor says that if the agency approves Gulf Shores, Alabama's citywide habitat conservation plan, residences could be built on beach mouse habitat at an even faster clip because the plan would "vastly streamline" and "simplify the permitting process drastically." The affected beach mice, lacking the capacity for speech, have not commented on the priorities of their protectors at the Service.

•In September, Hurricane Ivan - nature's own real estate redeveloper, bowing to no federal agency - wiped out habitat of the Alabama beach mouse and the Perdido Key beach mouse in Alabama and Florida. Beach mice are well adapted to recovering from storms under natural conditions, but development that fragments their habitat and blocks migration corridors impedes their ability to re-establish themselves after a hurricane. Ironically, the very rules that are intended to benefit the mice and that have been hotly contested by developers, such as building setbacks and other restrictions, saved many properties that otherwise would have been destroyed in the storm.

Around the country . . .

Michael O. Leavitt, Administrator of the U.S. Environmental Protection Agency, announced in August that every state except Alaska and Wyoming issued warnings about **mercury-tainted fish** in 2003. Mercury has been shown to be a threat to pregnant women and young children. There were 3,094 advisories in 2003; nonetheless, Mr. Leavitt asserted that mercury emissions levels have come down in the last decade and will continue to fall. For more information please visit http://www.epa.gov/waterscience/fish/.

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Upcoming Conferences

•NOVEMBER 2004 •

International Wildlife Law and the Protection of the Marine Environment
http://www.law.tulane.edu/prog/specialty/environmental/-envirolaw/international_wildlife.cfm
November 19 - 20, 2004, New Orleans, LA

Deep Offshore Technology 2004
http://dot04.events.pennnet.com/
November 30 - December 2, 2004 - New Orleans, LA

• DECEMBER 2004 •

22nd Annual International Maritime Law Seminar
http://www.lloydsmaritimeacademy.com/NASApp/
December 1 - 3, 2004, London, UK

Northeast Aquaculture Conference & Expo
http://northeastequaculture.com
December 2-4, 2004, Manchester, NH

1st National Conference on Ecosystem Restoration (NCER)
http://conference.ifas.ufl.edu/ecosystem/
December 6-10, 2004, Orlando, FL

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