



# WATER LOG

*A Newsletter for the Mississippi-Alabama Sea Grant Consortium*

Volume 4, No. 3

Sea Grant Legal Program

July-September 1984

## PREFACE

Each year, millions of tons of organic chemical wastes are generated in this country, chiefly by industrial processes. With recent discoveries of thousands of leaking landfills and lagoons containing hazardous materials, the United States faces a serious problem of hazardous waste disposal. In its 1981 report on "The Role of the Ocean in a Waste Management Strategy," the National Advisory Committee on Oceans and Atmosphere (NACOA) recommended that ocean disposal of industrial wastes be conducted at sites where (1) evidence indicates there will be no unreasonable environmental degradation and (2) human health, environmental, and economic considerations indicate that this is the preferable option. One method of disposal that has emerged as an option is the high-temperature incineration of certain types of organic wastes at sea.

Since 1974, the Environmental Protection Agency (EPA) has issued ten research permits to test ocean incineration of chemical wastes at a site in the Gulf of Mexico. The burns were conducted on a research basis with monitoring of the stack emissions and the ocean near the incinerator ship. As a result of these test burns, the EPA concluded that incineration at sea is an environmentally sound alternative for the disposal of certain highly toxic

wastes and for the safe reduction of America's large inventory of hazardous wastes. However, following a public hearing earlier this year on the EPA's tentative granting of operational and research permits for ocean incineration, Jack Ravan, EPA Assistant Administrator for Water, denied issuance of all ocean incineration permits. In denying these permits, the EPA determined that special ocean incineration regulations are necessary before operational permits can be granted. Furthermore, in order to address the legal, technical, and operational concerns raised during the hearing, completion of a "comprehensive research plan" has been ordered.

The Port of Mobile in Alabama is being considered as a point of departure for incineration ships. The issues surrounding this controversial practice therefore have a potentially significant impact on the Mississippi-Alabama coastal region. This *Water Log* focuses on the current status of the federal legislative and regulatory scheme for at-sea incineration of hazardous wastes and certain liability issues arising from such disposal.



Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). (The distance to which the FWPCA and CERCLA jurisdiction extends into the ocean or gulf is not clear from the legislation. For purposes of this paper, the term "United States waters" will include the area extended from the shore to at least the EPA designated incineration and ocean dumping sites.) Under the FWPCA and CERCLA, any unauthorized discharges "in harmful quantities" must be reported to the U.S. Coast Guard National Response Center upon knowledge of such discharge. Violation of the reporting requirement carries a penalty of a fine of up to \$10,000 and/or imprisonment of up to one year. 33 U.S.C.A. §1321(b)(5) (West Supp. 1984); 42 U.S.C.A. §9603 (West 1983). For the reporting procedures, see 33 C.F.R. §153.203 (1983). Pursuant to the Ocean Dumping Act any dumping of materials from a vessel when necessary in an emergency to safeguard life at sea must also be reported to the EPA. 33 U.S.C.A. §1415(h) (West 1978); 40 C.F.R. §§226.1 *et seq.* (1983).

### Spill Removal Operations

Both the FWPCA and CERCLA contain provisions relating to spill removal operations. Whenever there is a discharge or a substantial threat of a discharge of hazardous substances into United States waters which presents a substantial danger to public health and welfare (including fish, shellfish, wildlife, shorelines, beaches, and other natural resources), the President is authorized under either statute to remove and/or arrange for the removal of the substance when he determines that the removal cannot be done properly by the responsible party. In addition, if a marine disaster creates a substantial pollution hazard because of a discharge or imminent discharge, the government can supervise all public and private efforts directed at the removal of the threat. If necessary, the discharging vessel may be summarily removed or destroyed by whatever means are available. Failure to cooperate can lead to liability to the (Continued on page 5)

## CLEANING UP MARITIME HAZARDOUS SUBSTANCE DISCHARGES: WHO IS RESPONSIBLE?

### Introduction

Many opponents of ocean incineration as a method of hazardous waste disposal are concerned with the safety of the practice. Some of the perceived problems are that: (1) EPA's studies inadequately address the risks from accidents associated with water and land transport and dock loading; (2) the law currently permits the jettisoning of hazardous cargo under life-threatening situations; (3) adequate technology is not available to prevent the potentially catastrophic effects of sinking or spilling the wastes into the Gulf; and (4) chemical fires and explosions could occur as a result of runaway reactions caused when wastes mixed for incineration are incompatible.

In response to these and other concerns, the EPA has agreed to restructure its approach to developing ocean incineration regulations. Some of these proposed changes include: (1) making

sea-based technology at least as stringent as land-based, including raising the destruction efficiency from 99.9% to 99.99% (and 99.999% for PCB's); (2) requiring permittees to have a sample of the wastes to be burned analyzed prior to loading the ships; (3) sending consulting engineers along as "shipriders" to observe the incineration first-hand; and (4) requiring burn ships to have a Coast Guard-approved contingency plan.

Even with EPA-imposed safeguards, the chance of an accident will remain. This article examines the federal statutory scheme that governs clean-up operations following a spill.

### Reporting Requirements

The Environmental Protection Agency (EPA) regulates the discharge of hazardous substances into United States waters primarily under three statutes: the Federal Water Pollution Control Act (FWPCA), the Ocean Dumping Act, and the

## SPECIAL THANKS

The authors wish to thank Catherine L. Mills, Sea Grant Intern and staff attorney with the National Advisory Committee on Oceans and Atmosphere (NACOA) for sharing her expertise in the preparation of these articles.

## OCEAN DUMPING ACT

At-sea disposal of hazardous waste material was originally conceived as an inexpensive method of disposing of effluents, dredged materials, and industrial chemical wastes. It soon became apparent, however, that the capacity of the ocean to act as a dumping ground was limited. To help deal with the large quantities and dangerous qualities of waste products produced in this country each day, Congress passed the Marine Protection, Research and Sanctuaries Act in 1972. Title I of the law, commonly called the Ocean Dumping Act, regulates the dumping of waste products into the oceans. 33 U.S.C.A. §§1401 *et seq.* (West 1978 & West Supp. 1984). That same year, the United States signed the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter (London Dumping Convention), an international agreement which provides similar restrictions on an international scale and which has been ratified by over fifty countries.

Under the Ocean Dumping Act, the Environmental Protection Agency (EPA) has three major responsibilities: (1) to designate at-sea disposal sites; (2) to establish and administer a permitting process for ocean disposal; and (3) to conduct research on feasible alternatives to ocean dumping. One such alternative currently being investigated by the EPA is the high temperature incineration at sea of liquid hazardous wastes. Incineration is accomplished aboard specially constructed vessels with burning chambers capable of achieving sustained high temperatures. This technique was developed in Europe in the 1960's and has been utilized on an experimental basis in the United States since 1974. In theory, these furnaces achieve a near total combustion of the hazardous wastes, thereby reducing the need for disposal of residue or ash remaining after the burn. Design construction of incinerator ships is regulated by the International Maritime Organization. In addition, the vessels must be inspected and approved by the Coast Guard. 46 U.S.C.A. §883 (West Suppl. 1984); 46 U.S.C.A. §3301; §§12101-12106 (West Par. Rev. 1983); Title 46 of the *Code of Federal Regulations*; IMCO Technical Guidelines on the Control of Incineration of Wastes and Other Matter at Sea, 1979; IMCO Mandatory regulations for the Control of Incineration of Wastes and Other Matter at Sea, 1978 (Addendum to Annex I of the London Dumping Convention).

Since 1974, the EPA has construed the Ocean Dumping Act to be sufficiently broad to encompass at-sea incineration, allowing temporary, experimental permits to be issued for incineration under the same two-step process which is required for ocean dumping permits. The first step requires the designation of appropriate ocean "burn sites." The Gulf of Mexico has been used for incineration of chemical wastes since 1974. In addition, a Pacific Ocean site was temporarily designated in 1977 to permit the U.S. Air Force to burn Agent Orange. However, the only designated site at present is located in the Gulf of Mexico, approximately 200 miles off the shore of Brownsville, Texas. 47 Fed. Reg. 17817 (April 26, 1982). Another site has been proposed in the North Atlantic approximately 140 nautical miles east of Delaware Bay and about 155

nautical miles southeast of the entrance to New York Harbor. A public hearing on the proposed site took place on April 14, 1983 and a decision on the final designation is still pending. 47 Fed. Reg. 51769 (Nov. 17, 1982); 48 Fed. Reg. 12113 (March 23, 1983). A potential Pacific Ocean site is also being evaluated by the EPA for proposed designation.

The second step is the issuance of permits to incinerate at the designated sites. There are no specific standards set forth in the Ocean Dumping Act by which the amount of pollution resulting from the incineration must be measured, and the EPA has yet to promulgate special ocean incineration permitting regulations. Previous burns were authorized under research permits granted by the EPA, with EPA monitoring of the stack emissions and the ocean near the incinerator ship. The performance of the ocean incinerators was measured by the destruction efficiency accomplished by the process. The research permits did not require a minimum thermal input rate or auxiliary air pollution control devices, but rather that tamper proof devices be used to monitor the emissions and that the incinerators be operating at a 99.9 percent combustion efficiency. In addition, the EPA provided that the emissions from the incinerators could only be of the type that are "rapidly rendered harmless" and that no washings, residue, or ash could be dumped at sea after the burn.

In October of 1983, the EPA published notice for public comment on its tentative determination to issue three-year special and research ocean incineration permits to Chemical Waste Management, Inc., 48 Fed. Reg. 48991 (Oct. 21, 1983). The notice also solicited public comment on three principles which the EPA had used in formulating the Chemical Waste permit conditions and which could serve as a model for future criteria for at-sea incineration: (1) limiting the compounds eligible for incineration to those which can be incinerated at a destruction efficiency of 99.99 percent, (2) developing operating and performance standards equivalent to those for land-based incineration; and (3) requiring independent verification of the permittee's compliance with the condition of the permit. It also requested recommendations as to what would constitute an adequate demonstration of financial ability. (Under the London Dumping Convention, permittees are required to carry \$350,000,000 liability insurance.)

Substantial public opposition to the issuance of the permits and recent Congressional concern over the lack of specific ocean incineration regulations prompted the EPA to deny the proposed research permits. The agency is currently in the process of developing special ocean incineration regulations due to be promulgated later this year.

The Ocean Dumping Act contains civil and criminal penalties for violations of the act and its accompanying regulations. Civil penalties of up to \$50,000 per violation can be assessed following proper notice and hearing requirements. In addition, a fine of up to \$50,000 and/or imprisonment for up to a year can be imposed for a person who knowingly violates the Act. In both instances, each day of a continuing violation is considered

a separate offense. These provisions do not apply, however, if the violator can show that the discharge was done in an emergency to safeguard lives at sea.

A citizen suit provision is provided in the Ocean Dumping Act which authorizes private persons to file civil suits to enjoin the federal government or any other entity alleged to be in violation of the Act itself or of the terms of a permit issued pursuant to the act. Notice of intention to sue must be given to the EPA and the alleged violator at least sixty days prior to filing the lawsuit. Such suits are not allowed if the violator is already being civilly or criminally prosecuted by the federal government or if permit revocation or suspension procedures have been initiated.

While modifying its stance somewhat since the early seventies, the EPA has indicated that at-sea incineration is a viable method of toxic waste disposal. Its initial findings conclude that the level of technology available for ocean incineration is acceptable, that there are no practicable alternatives to hazardous waste disposal which have less adverse environmental effects than ocean incineration, and that such disposal poses no serious threat to the marine ecosystem or to human life. The issue no longer appears to be whether or not there will be ocean incineration of hazardous substances, but what regulatory scheme is necessary to assure an ocean incineration program that includes strict performance standards and operating conditions sufficient to protect the public health and welfare.

David Calder  
Casey Jarman



**UNIVERSITY OF SOUTH ALABAMA V. STATE OF ALABAMA  
[Civ. Action No. CV-83-1242 (June 11, 1984)]**

In February of 1983, the University of South Alabama filed an action in the Circuit Court of Mobile County seeking judicial determination that the University possessed good title to certain mineral-rich submerged lands located between Cedar Point and Dauphin Island on the Alabama Gulf Coast. Eight months prior to filing this action to quiet title, the University filed a patent application with the Alabama Attorney General claiming title to 15,457 acres of submerged land based on the theory of adverse possession. The University contended that the land, known as Grant's Pass, had been adversely possessed by John Grant and his successors for a twenty year period prior to 1908, a time when adverse possession by an individual against the state was statutorily permitted. It further contended that, subsequently, title to this land had been transferred legally to the University.

The Chief Counsel of the Alabama Conservation Department, in his capacity as an assistant attorney general, concluded that the patent should not be issued and that the state should vigorously oppose efforts by the University to acquire title to the property. This recommendation was overruled by the State Attorney General, who issued a letter certifying to the Governor that the State had lost its interest in 7,664 acres of the claimed land to the University through adverse possession. In December 1982, Governor James issued a patent to the University for the 7,664 acres of submerged land.

Shortly after the University filed its suit to quiet title, Governor Wallace intervened and filed a counter-claim seeking to have the 1982 patent declared void. The case was then transferred to the Montgomery County Circuit Court on a motion for change of venue. A similar suit was filed by the University in federal district court. However, the federal court has refrained from acting until essential questions of state law are resolved in the state court system.

After reviewing the evidence, the circuit court held that the patent issued by Governor James was invalid for two reasons: (1) the state could not lose title to bottomlands under navigable waters by adverse possession, and (2) the patent was void, as the evidence of adverse possession and the evidence in support of the patent's issuance do not support its validity. Judge Phelps determined that adverse possession must be accomplished

by the open, actual, notorious, hostile, exclusive and continuous possession and use of the land for the requisite statutory period. Since the evidence presented was insufficient to show that these requirements had been satisfied, the granting of the patent based on adverse possession was erroneous.

The court further explained in some detail that even if the requirements for adverse possession under the statute had been satisfied, the title to navigable waters in the state could not have been subject to such adverse possession. This conclusion was based upon two propositions. First, since navigable waters in the State at the time were considered by statute to be public highways and public highways had been declared by courts not to be subject to adverse possession, then water bottoms, title to which is vested in the state, could never have been subject to adverse possession. Second, the court considered the public trust doctrine as explained by the United States Supreme Court in a factually similar case concerning ownership of the bed of Chicago Harbor. *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). That decision recognizes that title to land under navigable waters is held in trust for use by the public. Subject to certain limited exceptions, interference with the public interest by transferring title to such land to private ownership would not be a valid use of this land, thus violating the public trust doctrine. The exceptions encompass situations such as grants for the purpose of constructing piers, docks, and other commercial structures, but only when such grants would not significantly impair the public interest in the lands and waters remaining. Also, a statutorily authorized conveyance which promotes the general interests of the public would be valid.

Following the above reasoning, the circuit court concluded that the University's claim to the land in question did not fall within the "public interest" exception to the public trust doctrine. The purported adverse possession of the land by Grant and his successors would clearly be antagonistic to the public interest, and therefore the patent should be declared void.

David Calder



**CONNOR V. AEROVOX, INC.  
730 F. 2d 835 (1st Cir. 1984)**

The First Circuit Court of Appeals, interpreting the U.S. Supreme Court's *Sea Clammers* opinion, recently dismissed a maritime tort claim for alleged damage to fishing grounds caused by the discharge of toxic substances. [See 1 *Water Log* 3 (July-Dec. 1981) for a brief of the *Sea Clammers* decision.] The plaintiffs (licensed commercial lobstermen, fishermen, and shellfishermen, and the Massachusetts Lobstermen's Association, Inc.) sought \$20 million in damages from defendants whom they claim discharged substantial quantities of toxic chemicals, including PCBs, into the Achusnet River, New Bedford Harbor, and Buzzards Bay in southern Massachusetts. They alleged further that the discharge caused shellfish and bottom-feeding fish to accumulate sufficiently high concentrations of toxic pollutants to require the restriction of commercial fishing in those areas. As a result, plaintiffs stated they have been forced to fish in more remote, hazardous waters, which in turn has increased their costs and risks and reduced the size of their catch. Affirming a lower federal court ruling, the First Circuit held that maritime nuisance actions for damages resulting from water pollution have been pre-empted by the Federal Water Pollution Control Act (FWPCA) and the Ocean Dumping Act (MPRSA).

The court first reviewed the Supreme Court's opinion in *Sea Clammers* and reasoned that the elements of a claim for damages based on the federal common law of nuisance are the same as those for a maritime nuisance action. Therefore, if the Supreme Court foreclosed a federal common law of nuisance remedy for water pollution in *Sea Clammers*, then it must have impliedly precluded the applicability of a maritime nuisance claim. To hold otherwise would mean the Supreme Court left unconsidered in its *Sea Clammers* opinion a basis for recovery virtually co-extensive with the claim rejected.

Next the court found that even if the Supreme Court did not hold by implication that the *Sea Clammers* plaintiffs could not pursue their maritime nuisance claim, a maritime damage claim founded on principles of common law nuisance is nonetheless no longer viable. Utilizing a similar rationale to that of the Supreme Court in *Sea Clammers*, the First Circuit found that the FWPCA and MPRSA were sufficiently comprehensive to pre-empt the federal maritime law of nuisance. In reaching its conclusion the court emphasized the comprehensiveness of the policies embodied in the FWPCA and MPRSA, rather than the adequacy of the provisions to further the policy. As a result, the federal judiciary has taken one more step in limiting an individual's rights to recover damages when a polluter discharges hazardous materials into navigable waters.

Casey Jarman



## RECENT LEGISLATION—MISSISSIPPI

The 1984 session of the Mississippi legislature passed several bills which are important to coastal residents. The following is a summary of these bills:

(1) Effective April 26, 1984, the Mississippi Cooperative Extension Service and the Mississippi Agricultural and Forestry Experiment Station are authorized to conduct any research and extension activities necessary to promote the seafood industry. Senate Bill No. 2722, to be codified at Miss. Code Ann. §37-113-22.

(2) County Boards of Supervisors, acting through their county port authorities or development commissions, have been given the authority to issue up to \$2,000,000 of additional bonds for restoration of sand beaches which had previously been constructed to protect a public highway and which are severely damaged by storms or hurricanes. House Bill No. 1040, amending Miss. Code Ann. §59-9-21.

(3) Senate Bill No. 2673 amends the state trespass statute found at Miss. Code Ann. §97-17-93. Until July 1, 1988, any person who knowingly goes onto another's property without prior permission from the owner or lessee is guilty of a misdemeanor. Penalty for a first conviction is a minimum fine of \$150 and a maximum fine of \$250. Any subsequent conviction can be penalized by a fine of \$250-\$500 and/or incarceration from ten to thirty days.

From and after July 1, 1988, a landowner has the responsibility of posting his land by placing plainly printed signs conspicuously along the border and near entrances to the property. Three such signs will have to be placed for every mile

of boundary along the tract or along every public road. A sign should also be posted at every road entering the premises. It will be a misdemeanor, punishable by a fine of up to \$250, for anyone to knowingly enter such posted land without prior permission of the owner or lessee. Entrance without written permission will be considered prima facie evidence of a violation of the law. Proof that the land was legally posted for three months preceding the offense will be prima facie evidence of knowledge on the part of the accused that the owner did not assent to his entering the premises.

In lieu of the above posting procedure, cultivated land which is contiguous to a body of water or a watercourse (other than artificially created land-locked lakes or ponds) may be legally posted by publishing notice for three consecutive weeks each year in a newspaper having general circulation within the county in which the land is located. Such notice must contain (a) a description by which the land can be clearly identified; (b) an explanation that the land is subject to periodic flooding; and (c) notification that the land is posted. Proof of the above publicized notice must be filed with the sheriff of the county in which the land is located. Following publication and filing, any unauthorized, willful entry upon such land when flooded will constitute a misdemeanor, subjecting a violator to a fine of up to \$250. Proof of publication and filing will be prima facie evidence that the owner or lessee did not assent to the accused entering the premises.

(4) Pursuant to senate Bill No. 2683, the Mississippi Commission on Wildlife Conservation

is directed to establish a "saltwater recreational fishing record list" of marine fish taken in the state. Initial listings are to be compiled by the Bureau of Marine Resources for the largest fish of each marine species common to the waters of the state. Initial listings are to be compiled by the Bureau of Marine Resources for the largest fish of each marine species common to the waters of the state. The Commission is to establish criteria for maintaining and updating the list. All designated state recordholders are to be provided a certificate of achievement in marine recreation fishing.

(5) Senate Bill No. 2774 amends certain provisions of Miss. Code Ann. §49-15-29 regarding taxes and licenses for recreational and commercial fishing vessels. First, it deletes the requirement that taxes on oysters harvested in the state be paid on the same day of harvest. Second, it requires an annual recreational license for vessels which engage in shrimping with a net having a corkline length of thirty feet or less. The license can be purchased for \$7.50 and expires on April 30th of the following year. Third, the law provides that beginning in 1985, all commercial fishing licenses provided for under §49-15-29 of the Miss. Code Ann. must be purchased between January 1 and March 31 of each calendar year. All such licenses will expire on April 30th of the following year.

Casey Jarman



## NOAA REVIEW OF FEDERAL CONSISTENCY PROCESS

In the September 20, 1984 issue of the COASTAL ZONE MANAGEMENT NEWSLETTER, Nautilus Press reported on the National Oceanic and Atmospheric Administration's comprehensive review of the federal consistency process. At that time, NOAA's Office of Ocean and Coastal Resource Management (OCRM) had issued an invitation to interested parties to provide comments. The comment period ended on October 15. The following is excerpted from the September 20 COASTAL ZONE MANAGEMENT NEWSLETTER, reprinted with the permission of Nautilus Press, 1056 National Press Building, Washington, DC 20004.

NOAA Administrator John Byrne had promised Congress earlier this year that his agency would conduct a comprehensive study of the experience gained to date in applying the federal consistency provisions of CZMA. Byrne emphasized that any changes to the complex and important federal consistency system should be based on a full and thorough understanding of the system, its problems and successes. NOAA currently is reviewing its consistency regs to determine what revisions may be needed following last January's decision of the U.S. Supreme Court which found that outer continental shelf oil and gas lease sales were not required to be consistent with federally-approved

state coastal zone management plans (CZM, 12 Jan 84).

The federal coastal agency anticipates that the results of the study will be useful to Congress when it considers reauthorization of the federal coastal act next year. A preliminary draft of the study is expected to be completed by the spring of 1985. In addition, NOAA anticipates that the results will be useful to states and federal agencies looking for administrative approaches to increasing the efficiency and effectiveness of government activities; to industry, public interest groups and others concerned with coastal zone management; and to NOAA in exercising its responsibilities to administer the CZMA.

Specifically, the study will document the experiences of states and federal agencies, as well as affected parties, with the implementation of the consistency provision (Sect. 307) of the federal coastal act. In addition, the study will identify any issues surrounding the implementation of the federal consistency process and document areas of successful implementation, as well as unresolved conflicts. Information which OCRM plans to gather includes:

(1) "Statistics for 1983 on the federal consistency process, including numbers of concurrences and non-concurrences on consistency determinations

and certifications by type of federal activity, by state, federal agency, and by location"—i.e., in the coastal zone, landward or seaward of the coastal zone, or in a federal enclave within the coastal zone; /

(2) "brief summaries of consistency cases which are considered especially significant by study participants";

(3) "compilation of information (to the extent it is available) regarding the administration of the federal consistency review process including for example: average length of time for state consistency reviews, the use of pre-application conferences and early coordination mechanisms, the use of conditional and general concurrences, and experiences with using negotiation and/or mediation to resolve conflicts"; and

(4) brief summaries of major issue areas identified by the states, federal agencies, industry groups and public interest groups."

Other subject areas which OCRM may examine, "if there is sufficient information available," include: process simplification initiatives, adequacy of information available for consistency reviews, sufficiency of consistency review time periods, conflict resolution mechanisms, costs and benefits of consistency reviews, sufficiency of notification procedures, treatment of general permits (e.g., the  
(Continued on page 5)

## CLEANING UP . . . WHO IS RESPONSIBLE?

(Continued from page 1)

federal government for the total costs of response and damages. Under CERCLA, punitive damages up to three times the amount of costs incurred by Superfund as a result of failure to take action can also be assessed. 33 U.S.C.A. §1321 (West 1978 & West Supp. 1984); 42 U.S.C.A. §9607(c) (1983).

To facilitate the removal operations described above, a National Contingency Plan has been developed pursuant to the FWPCA and CERCLA. 40 C.F.R. §§300 *et seq.* (1983). In general, the Plan provides for: (1) the division and specification of responsibilities among federal, state, and local governments and private entities; (2) the establishment of a national response organization that may be brought to bear in the event of a spill; (3) procedures for undertaking removal operations; and (4) national policies and procedures for the use of chemicals in response actions. In addition, the Plan requires the development and incorporation of Regional Contingency Plans tailored to each EPA and Coast Guard region and Local Contingency Plans directed towards targeted localities.

Three types of activities are regulated by the Plan: (1) planning and coordinating spill responses, (2) directing operations at the scene of the discharge, and (3) providing information about the discharge. Primary responsibility for performing these activities rests with the EPA or the Coast Guard, depending upon where the discharge occurs. However, some responsibilities have been delegated to several other federal agencies which play a significant role in response actions.

As stated earlier, the National Contingency Plan comes into effect only when it is determined that the hazardous substances cannot be safely and effectively removed by the discharger. Removal by the discharger will be allowed when such clean-up can be done consistent with federal guidelines contained in the Plan. If the violator does not clean up the spill in a responsible manner, the government can act to remove the spill and recover all or part of its costs from the responsible parties.

### Liability for Clean-Up Costs

Liability for clean-up costs can arise under either the FWPCA or CERCLA. The FWPCA provides that if it is necessary for the federal government to jointly remove the spilled material, its costs are recoverable in whole or in part from the owner or operator of the vessel and from third parties whose

actions caused or contributed to the discharge. The costs can include any expenses incurred to restore or replace natural resources damaged or destroyed by the discharge. However, there are limitations on the amount the government can recover. Unless the government can prove that a discharge in violation of the FWPCA was willful, the owner or operator of the vessel is liable for an amount not to exceed \$150 per gross ton of the offending vessel or \$250,000, whichever is greater. If discharges are willful, the government can recover the full amounts of its clean-up costs.

When the owner or operator of the discharging vessel can prove that the discharge was caused solely by act of God, an act of war, and/or negligence on the part of the United States, he will not be liable to the government for any of its costs. However, if he alleges that a third party was the sole cause of the discharge, the owner or operator may still have to pay the government its clean-up costs, becoming entitled by subrogation to the government's right against the third party to recover its costs. Thus, if a third party is the sole cause of the discharge, the government has the option of suing the owner or operator of the discharging vessel and/or the responsible third party to recover its costs.

Third parties are entitled to the same defenses that owners and operators are entitled to (such as proof that the accident resulted solely from an act of God), as well as the same monetary limits of liability, as long as the discharge was not the result of willful negligence or misconduct within the privity and knowledge of the third party.

Liability for clean-up costs is slightly different when both the discharging vessel and a third party contributed to the release. In that case the FWPCA's liability provisions do not affect any alternative maritime, common law or state law actions the owner or operator or the federal or state government may have against such third parties.

In some instances, the owner or operator of the discharging vessel may act to remove or neutralize the material spilled. If he does so, and can prove that an act of God, an act of war, a third party, or the government acting negligently was the sole cause of the release, he can recover from the government all reasonable costs incurred in the removal.

The government may choose, however, to clean up the spill and recover under CERCLA rather than

the FWPCA. In that case, the owner and operator may be held liable for all federal costs of removal or remedial action consistent with the National Contingency Plan. However, for vessels carrying the hazardous substance as cargo or residue such liability is limited to \$300 per gross ton or \$5,000,000, whichever is greater. These liability limits will not apply if the release was the result of willful misconduct or willful negligence within the privity or knowledge of the owner or operator or if the primary cause of the release was a knowing violation of applicable safety, construction or operating standards.

If the discharger can establish that the release and resulting damages were caused by (1) an act of God, (2) act of war, and/or (3) the act of omission of a third party when the discharger himself exercised due care with respect to the hazardous substance concerned and took precautions against foreseeable acts of such third party, he will not be held liable for federal clean-up and remedial costs.

In addition to liability to the federal government, a discharger may also have to reimburse other parties for necessary costs incurred consistent with the National Contingency Plan. This includes liability to any state for injury to or destruction of natural resources under the control of or pertaining to any state. Such costs are to be calculated with the total costs of removal for purposes of the aforementioned limitation of financial liability provision.

### Conclusion

Through the National Contingency Plan and various regional and local plans, the EPA and the Coast Guard have established a networking mechanism for cleaning up maritime hazardous waste discharges. In addition, Congress has established a complex statutory framework to assess liability for the costs of such clean ups. While some claim that the total social and environmental costs resulting from the discharge of hazardous materials into the ocean can never be recovered, it appears that Congress has decided that such losses are an inevitable result of living in a modern industrialized society. As a result, the legislation is designed to reduce rather than eliminate the cost and the risks associated with hazardous waste disposal.



Casey Jarman

## NOAA REVIEW

(Continued from page 1)

Corps of Engineers nationwide permits under Sect. 404 of the Clean Water Act), and the Secretarial mediation and appeals processes provided by the CZMA.

OCRM's plans also call for examination of existing studies of the federal consistency process, the legislative history of CZMA and its amendments (including recent testimony on proposed amendments), and the information received in response to NOAA's Advance Notice of Proposed Rulemaking on consistency (CZM, 2 Aug, 7 Jun & 9 Feb 84). In addition, OCRM announced that it will review the consistency litigation brought under Sect. 307 of the federal coastal act.

States and contributors will be provided the opportunity to review the statistics, once gathered, "to assure their accuracy, completeness and comparability," the federal coastal office said. Furthermore, OCRM has requested that federal agencies examine their consistency records and provide statistical information.

OCRM intends that the federal consistency study information base will "provide a comprehensive and factual background for the consideration of administrative, regulatory and/or legislative approaches to resolving any identified problems and developing any needed improvements of the federal consistency process. Based on the information gathered in the study, OCRM will then determine whether follow-up activities are

"advisable to discuss further federal consistency issues with interested persons and/or to develop advice to NOAA regarding any needed revisions of the federal consistency process."

Specifically, OCRM plans to consider the "feasibility and advisability" of a number of possible alternative follow-up actions such as: an alternative dispute resolution task force, regulatory negotiations, a national consistency workshop, or other means for involving outside interests and obtaining the advice of parties likely to be affected by federal consistency decisions.



## WATER LOG

This newsletter is a quarterly publication reporting on legal issues 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.

This publication was prepared with financial assistance from the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, Office of Sea Grant (under Grant Number NA81AA-D-00050), the State of Mississippi, and the University of Mississippi Law Center.

*Editor:*

Casey Jarman

*Associate Editor:*

Cornelia Burr

*Editorial Assistants:*

David Calder

## NOTES

The National Advisory Committee on Oceans and Atmosphere (NACOA) has recommended revision of the U.S. policy of excluding for consideration disposal of low-level radioactive waste in the ocean. In its report entitled "Nuclear Waste Management and the Use of the Sea," NACOA concludes that ocean disposal should not take place until there are adequately funded monitoring and research projects sufficient to fully assess such disposal. The report is available from NACOA, 3300 Whitehaven St., NW, Washington, DC 20235.

The Gulf Islands National seashore has been added to the National Park System to be preserved for public use and enjoyment. Ship, Petit Bois, and Horn Islands in Mississippi are part of the seashore included in the System.

Several coastal states, including Alabama and Mississippi, were recently offered a 16.67 percent share of escrowed revenues and bonuses generated from oil and gas leases in federal and state OCS areas. Of the proposed settlement under the Outer Continental Shelf Lands Act, Alabama would receive \$36 million and Mississippi \$8.5 million. In response to this offer, and out of a broader concern for the role of the states in responding to federal management of Outer Continental Shelf Lands funds, governors and/or their representatives from Alaska, California, Texas, Louisiana, Mississippi, Alabama, and Florida met in Austin, Texas on September 5. They unanimously rejected the federal offers and have requested a conference with Secretary Clark of the Department of the Interior. To date, Secretary Clark has issued no formal response to the request to meet and discuss funding and allocation issues.

The Mississippi-Alabama Sea Grant Legal Program would like to welcome the two newest members of our staff. Linda Spence, an Oxford "native" has assumed secretarial duties. Cornelia Burr, who recently received her J.D. degree from the University of Wisconsin and is a candidate for a Ph.D. in Land Resources there, is serving as staff attorney. She is focusing her research primarily in the areas of public trust lands and water-shore transportation of hazardous materials.

The University complies with all applicable laws regarding affirmative action and equal opportunity in all its activities and programs and does not discriminate against anyone protected by law because of age, creed, color, national origin, race, religion, sex, handicap, veteran or other status.

The University of Mississippi  
Sea Grant Legal Program  
University of Mississippi Law Center  
University, MS 38677