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WATER LOG

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

If you would like to receive future issues of the WATER LOG, please send your name and address to: Mississippi-Alabama Sea Grant Legal Program, University of Mississippi Law Center, University, MS 38677. We welcome suggestions for topics you would like to see covered in the WATER LOG.

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MISSISSIPPI'S BLUE RIBBON COMMISSION ON PUBLIC TRUST TIDELANDS

The decision of the Mississippi Supreme Court in *Cinque Bambini Partnership v. Mississippi* 491 So.2d 508 (1986) was affirmed by the United States Supreme Court on February 23, 1988, in the case of *Phillips Petroleum Co. v. Mississippi* 108 S.Ct. 791 (1988) (*see* WATER LOG, Vol. 8, No. 1, Jan.-Mar. 1988). At issue was the geographical scope of the state's public trust obligation. The public trust doctrine derives from English common law, which provided that lands subject to the "ebb and flow" of the tide belonged to the sovereign, who held them in trust for the benefit of all its citizens. Each state upon admission to the Union assumed sovereign control of its tidelands, including the corresponding public trust responsibilities.

In *Cinque Bambini,* the Mississippi Supreme Court determined that the state owns all lands that were below the mean high water mark at the time Mississippi became a state in 1817. In order to implement this ruling, Mississippi Secretary of State Dick Molpus has appointed a "Blue Ribbon Commission on Public Trust Tidelands." Members of this commission are charged with the responsibility of protecting public trust rights and of creating an equitable framework with which to manage the tidelands for the benefit of all of the state's citizens.

The commission, whose members are comprised with only one exception of Mississippi coastal residents, was convened on June 23, 1988. It will examine several problems posed by the *Cinque Bambini* decision and will recommend means to address them, including any legislative changes that may be necessary for implementation. Assuming no legislative changes are needed, Mr. Molpus plans to put the commission's recommendations into effect by January 1, 1989.

The commission is handling its task by adopting a committee format; each committee is responsible for study and recommendations relative to one of the given issues. The issues are as follows:

(1) Boundary: It will be the responsibility of the committee on boundaries to determine where the mean high water mark was in 1817, as well as where it is today. The committee will begin by examining original survey plots, old photos, satellite images, and other data.

(2) Conservation and Development: Members of this committee will be concerned with orderly development of the coast as well as conservation of the coastal ecosystem. Effective utilization of minerals and other resources, compliance with the Coastal Wetlands Protection Act of 1973, protection of the marine environment, and balance between economic development and the public's right of access to public trust property are some of the topics that will be addressed by the committee.

(3) Taxation: How to tax the tidelands will be determined by the taxation committee. It will also address other taxation questions, such as whether to require leaseholders to pay taxes, and how to deal fairly with businesses that are currently on wetlands and have been paying taxes.

(4) Littoral/Riparian Rights: Landowners whose property is adjacent to the shore have certain rights that generally involve use and enjoyment of the water. These

EXECUTIVE ORDER 12630 AND THE WETLANDS "TAKINGS" ISSUE

Introduction

A potential shift is developing in the area of land-use regulation. The actions of governmental regulators seem likely to be held under more scrutiny than in the past, thereby enhancing the property rights of landowners and private developers. The extent of this shift is not yet clear, but there is potential for dramatic change in the way federal agencies regulate land use, especially in the heavily regulated domain of wetlands development. This shift centers around the "takings" issue.

The Office of the President recently issued Executive Order 12630, 53 Fed. Reg. 8859 (1988), entitled "Government Actions and Interference with Constitutionally Protected Property Rights." This document seems to be an attempt by the administration to align federal land-use regulatory practices with a recent line of Supreme Court decisions which broadened the rights of private landowners. This article will examine the takings issue: what it is and how Executive Order 12630 might affect it.

Takings and the Just Compensation Clause

Federal, state and local governments have broad powers to regulate land for the benefit of all citizens of their various jurisdictions. Pursuant to its power of eminent domain, private lands can be "taken" by the government in the interest of public health, safety and welfare. When private land is taken, to build a new road for instance, the fifth amendment to the U.S. Constitution requires that the owner be compensated monetarily, so that the lone private citizen will not have to bear an unfair share of the cost of something intended to benefit all citizens.

The state also may, for the public good, regulate the way in which private landowners use their land. Zoning is an example. However, at least as early as 1921, the United States Supreme Court recognized that regulation of the use of private land could be so intrusive on the rights of the owners that it could constitute a taking. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1921), Justice Holmes stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking". Over the years the Court has proposed and refined various criteria for determining how far a state may go before it has gone "too far". Generally, as long as the state has advanced a legitimate police-power reason for a regulation or its application, and could have reasonably decided that the enactment furthered the legitimate public purpose, the Court has rarely looked further.

In *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987) (*see*, WATER LOG, Vol. 7, No. 3, July-Sept. 1987), the Court modified this long-standing position. The case involved the denial of a building permit to the owner of beachfront property. The California Coastal Commission made approval of the permit contingent upon the owner granting the state an easement over his property. Justice Scalia, writing for the majority, carefully examined the fit between the state governmental purpose and the application of the regulation intended to serve that purpose, and found the connection to be too tenuous. The stated purpose was to

provide easier public access to the beach. However, Justice Scalia found that the easement would not substantially advance the state's purported purpose for it, and that denying a permit on that basis constituted a taking. As Justice Brennan noted in dissent, the majority's opinion took the unprecedented step of strictly scrutinizing a legitimate police-power regulation. The decision clearly calls on states to be more careful about the circumstances under which they deny development permits.

The Court's new attitude towards the takings issue was further evidenced in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987). Prior to *First English*, if a taking was found to have occurred, the state had two options. It could either rescind the action which had constituted the taking, or its could compensate the property owner for the lands taken. In *First English*, the Court added a requirement. In the event that the state chose to rescind its action, the owner must be compensated for the loss of his land, or its use, during the period between the original act and its rescission.

Thus, in 1987 the government was faced with both the increased chances of losing takings litigation and of having the obligation to pay damages for instituting the initial action. As Justice Stevens put it in his dissent to *Nollan*: "because the Court recently held that monetary damages are recoverable for regulatory takings, local governments and officials must pay the price for the necessarily vague standards in this area of the law." 107 S. Ct. 3141, 3163 (1987).

Executive Order 12630

Executive Order 12630 represents an attempt by the present administration to bring the executive branch's regulatory policy into line with the new judicial philosophy expressed in *Nollan* and *First English*. The order requires federal departments and agencies to review their actions so as to avoid "unnecessary takings of private property interests."

The order states that its purpose is "to assist Federal departments and agencies in undertaking such reviews and in proposing, planning and implementing actions with due regard for the constitutional protection provided by the fifth amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful government action." Exec. Order No. 12630, 1(c), 53 Red. Reg. 8859 (1988). To accomplish this task, the order specifies that the Attorney General must promulgate "Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings" and further requires each executive department or agency to refer to such guidelines in making evaluations required by the order or in other wise taking any action that is subject to it.

The list of actions and policies that are subject to the order is quite extensive. It includes all enacted and proposed federal regulations and legislation, comments or policy statements "that, if implemented or enacted could effect a taking." Id. at 2(a). Also specifically included are all "rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property." Id. This list would include almost all regulations and permitting procedures involved with coastal and wetlands development within the purview of federal land-use regulation. For example, present Corps of Engineers policy

requires that "no permit will be granted which involves the alteration of wetlands identified as important . . . unless the district engineer concludes . . . that the benefits of the proposed alteration outweigh the damage to the wetlands resource." 33 C.F.R. 320.4(b)(4) (1987). Order 12630 will undoubtedly add the new factor of "private interests" to that equation.

Section four of the order requires that any department or agency undertaking an action covered by the order follow several criteria. The action must be specifically tailored to meet a specific threat to the public health and safety. If the proposed action interferes with private property interests during a decision-making period (e.g. waiting for a permit approval), the decision must be made as quickly as possible. The acting agency or department must also make an estimate of the "potential cost to the government in the event that a court later determines that the action constituted a taking." Exec. Order 12630, 4(d)(4).

Executive departments and agencies are required to submit reports to the Office of Management and Budget (O.M.B.) that detail the "takings implications of proposed regulatory actions and addres the merits of those actions in light of the identified takings implications, if any." Id. at 5(b). Thus, any agency involved in land-use regulation will apparently have to justify a large portion of its actions to the O.M.B. In addition, they are required to identify each existing federal rule and regulation under which a takings award was made or is pending, and all future awards must be reported annually so that all such awards can be "properly accounted for in agency budget submissions." Id. at 5(d)(1) and (e).

Policy Implications

Some agencies have expressed concern that the order represents a drastic shift away from the regulatory emphasis on environmental outcomes to an emphasis on the property rights of private landowners and developers. Moreoever, they believe that the order could complicate their regulatory tasks, requiring more man-hours to study issues that are presently not examined in depth. The order will require the documentation of certain economic benefits and losses caused by regulations, and this could create problems for agencies that are geared primarily towards examining environmental rather than economic outcomes.

Others do not believe that the order represents a drastic philosophical shift and instead feel that it merely requires regulatory agencies to show "increased sensitivity" to constitutionally granted property rights. They feel that rather than complicating agency regulatory tasks, the order will reduce them by decreasing the chances of litigation over unanticipated takings.

The potential effects of Executive Order 12630 will depend largely on the final guidelines issued by the Department of Justice. According to one Department of Justice official, they were published in their final form on July 1, 1988, in accordance with the order, and went into effect immediately. It is understood that there will be a transition period before they can be fully implemented. However, officials in other agencies referred to the present form of the guidelines as a draft and said that negotiations on a final form were still taking place. As of two weeks after the "effective" date of July 1, some agency officials had not seen the guidelines in any form. It would appear that there is going to be some continued bureaucratic

maneuvering before the guidelines become final and effective.

Given all of the foregoing, a final caveat is necessary. This executive order is a policy statement issued in the last year of an outgoing administration. Whether or not the next administration will have the same priorities regarding environmental regulation and protected property rights remains to be seen.

Conclusion

Regardless of what shape the final guidelines take, it is likely that, at the very least, Executive Order 12630 will increase the number of reports and evaluations required during the permit issuance decision-making process. Resulting manpower requirements could increase the burden on limited agency budgets. The order may result in a slowing down of environmental regulation processes and emphasis of environmental outcomes to the benefit of private property interests, especially in coastal and wetland areas. It may also result in a net financial savings for the government and increased protection of constitutionally-based property rights. In any event, the order could well be very significant, and its progress should be closely monitored by interested parties on both sides of the wetland development issue.

Luke Fisher

GAMBLING CRUISES IN MISSISSIPPI SOUND — MORE LITIGATION ON THE HORIZON

Introduction

On December 19, 1987 the Panamanian registered *Europa Star* began offering daily gambling cruises in the Mississippi Sound from the port of Biloxi. These cruises have consistently sailed with near capacity crowds and have generated a sizeable amount of spillover tourism business for surrounding coastal communities. *Europa Star* joins a growing fleet of gambling vessels that offer so-called "cruises to nowhere" from a number of Gulf and Atlantic ports. Most of these cruiseships have been welcomed by port officials and local citizens as a source of much needed jobs and tourist-related revenue, although opponents have expressed disapproval of what they perceive as government sanctioned gambling.

Generally, cruise lines provide passengers with daily or twice-daily excursions that include meals, music, dancing, sight-seeing, alcoholic beverages and gambling in fully-equipped casinos. No drinking or gambling takes place until the vessel is outside of state territorial waters (normally three miles) and therefore beyond the jurisdiction of state gambling and tax laws.

Congress enacted the Federal Gambling Ship Statute, 18 U.S.C. §§ 1081-1084, to prohibit gambling on vessels operating in waters outside the jurisdiction of any state, however, the statute only applies to U.S. flag vessels, and to U.S. owned ships that have no purpose other than gambling. Multi-purposed cruiseships such as the *Europa Star* that are registered under foreign flags are not subject to state or federal gambling laws as long as passengers are not allowed to gamble until the vessel has passed beyond state territorial waters.

Gambling within Mississippi Sound

Cruiseships operating within Mississippi Sound must contend with a number of legal problems not encountered in other parts of the ocean. The United States Supreme Court in *United States v. Louisiana (Mississippi Boundary Case)*, 470 .S. 93 (1985), ruled the Sound to be a historic bay and therefore under the jurisdiction of the states of Mississippi and Alabama. As a result, the boundary of the state of Mississippi has been extended significantly seaward to three miles south of a line connecting a group of barrier islands located between eight and twelve miles from the mainland. Rather than sailing the customary three miles before passengers are allowed to gamble, vessels operating in the Sound may have to cruise up to fifteen miles out to sea before being completely outside of state territory. In addition to the added distance, they would have to cope with the heavy swells that are commonly encountered beyond the barrier islands.

Status of Litigation between Europa Star and State

Prior to the *Europa Star's* first voyage, its owners expressed their intention to sail at least three miles from the shore of the mainland, but not beyond the barrier islands before allowing passengers to gamble. They argued that the state had no police power jurisdiction over those portions of the Sound that are over three miles from either the mainland or barrier islands. In response, the Sheriff of Harrison

County pronounced publicly that he would enforce the laws of Mississippi that prohibit gambling within the territorial limits of the state. Moreover, the State Tax Commission stated that it did not recognize the right of the *Europa Star* to sell alcoholic beverages within state territorial limits due to the presence of gambling equipment on board.

On December 18, 1988, Europa Star Cruise Line, Ltd. and Point Cadet Development Corporation, which was formed by the City of Biloxi to administer the Biloxi Waterfront Plan, filed suit in the Circuit Court of Harrison County to obtain a temporary restraining order that would require the Sheriff and State Tax Commission to abstain from enforcing state gambling and alcohol control laws in that portion of the Sound defined as "more than three miles south of the mainland and more than three miles north of the barrier islands." The temporary restraining order was granted and *Europa Star* began offering cruises the next day.

On January 7, 1988, the circuit court issued a preliminary injunction that enjoined state officials from enforcing the gambling and alcohol control laws against the *Europa Star* until such time as the case could be fully heard on the merits. The court awarded the injunction because it found that the cruise line would have a substantial likelihood of prevailing if the merits of the case were fully presented, and that there was a substantial threat of irreparable injury in the form of economic loss and loss of good will if the preliminary injunction was not granted. The court based its decision on the fact that cruise line had relied upon an opinion from the United States Customs Service (later rescinded) that declared the area in which the *Europa Star* proposed to operate outside state territorial limits. In addition, the court found that the *Mississippi Boundary Case* only addressed the application of the Submerged Lands Act of 1953, 43 U.S.C. §§1301 et seq., which awards each state title to and ownership of the lands beneath navigable waters within the state's boundaries. According to the court, *Mississippi Boundary Case* was concerned only with setting or defining the location of the coastline for purposes of determining ownership of the submerged lands pursuant to the Submerged Lands Act and not for purposes of extending criminal jurisdiction.

On February 23, 1988, the Mississippi Attorney General filed a motion to dissolve the preliminary injuction and, in the alternative, requested an interlocutory appeal (an appeal of a matter that is not a final decision of the entire controversy) to the state supreme court. The state argued that the *Mississippi Boundary Case* and Miss. Code Ann. § 3-3-5 clearly provide that the *Europa Star* is subject to the police jurisdiction of Harrison County, Mississippi as long as it operates within any portion of the Sound. Affidavits were attached to the motion from officials of the Bureau of Marine Resources (BMR) testifying to the fact that BMR has for many years enforced state fishery, seafood and boat safety laws throughout the Sound including those portions in question.

Rather than granting or denying the state's motion to dissolve the preliminary injunction, the circuit court held the motion in abeyance and certified the interlocutory appeal to the Mississippi Supreme Court. The lower court, in essence, asked for an advisory opinion before proceeding further.

On July 20, 1988, the supreme court entered an order which denied the interlocutory appeal and sent the case back to the circuit court for a ruling on the

motion to dissolve as well as a ruling for or against a permanent injunction. The high court held that the lower court must make a final ruling before it will grant an appeal. It requested that the circuit court move expeditiously toward a final determination because of the public and state interest in the matter.

Conclusion

Presently, *Europa Star* continues to operate daily gambling cruises in the Sound under protection of the preliminary injunction. The circuit court will likely issue its decision on the permanent injunction sometime during the fall. A court ruling in favor of the state could force Europa Star Cruiseline Ltd. to move its operations to a port outside of Mississippi thereby causing financial hardship to the already depressed tourist industry in Biloxi and surrounding communities.

The importance of this issue to citizens living along the coast was clearly demonstrated during the 1987 legislative session by the nearly successful attempt by a coalition of coastal legislators to enact House Bill No. 413. The bill authorized gambling aboard any vessel of a least one hundred and fifty feet in length operating from a port bordering on the Mississippi Sound unless prohibited by municipal referendum. The Bill passed the House, but was defeated in Senate committee.

A ruling in favor of *Europa Star* could, in turn, severely restrict the state's ability to manage and control maritime activities taking place in certain portions of the Sound. Because of the large stakes involved for both litigants, it is likely that the losing party will immediately appeal any decision to the Mississippi Supreme Court.

Although many of the legal problems confronting the *Europa Star* are based on the unique jurisdictional characteristics of Mississippi Sound, the attendant political, economic and legal pressures that have played such an important role in shaping the events to date will undoubtedly occur wherever gambling cruises are offered. In this regard, what happens to the *Europa Star* may be of interest far beyond the borders of the Sound.

Richard McLaughlin

CASE BRIEF:

FRIENDS OF THE EARTH V. U.S. NAVY
841 F.2d 927 (9th Cir. 1988)

Ninth Circuit holds Navy must obtain state and local permits before carrying out dredge operations for construction of homeport.

Introduction

On March 7, 1988, United States Court of Appeals for the Ninth Circuit ruled that the U.S. Navy must obtain state and local permits under the Clean Water Act, the Coastal Zone Management Act, and state and local laws before it could carry out dredge operations in connection with the construction of a homeport in Everett, Washington. While the ruling only applies to those states within the Ninth Circuit, it may nevertheless have an impact outside its jurisdiction, and is thus of importance to other states where homeport projects are planned.

Facts

As a part of its comprehensive defense strategy, the Navy has plans to build a permanent "Carrier Battle Group Homeport" in Everett, Washington. The homeport will provide berthing and base facilities for the aircraft carrier *USS Nimitz*, as well as various other support and service vessels. In order to accommodate the Navy vessels, the harbor must be dredged.

Of chief concern to the plaintiffs, Friends of the Earth (FOE), is the Navy's proposal to dispose of dredge spoils from Everett harbor in Port Gardner Bay. Since approximately one-third of the dredge spoils are contaminated, the Navy's plan involves using a technique call Confined Aquatic Disposal (CAD). However, the CAD method is experimental at the planned depths; should the contaminated spoils not be contained the harm to the marine environment would be substantial.

Under the provisions of both the Federal Water Pollution Control Act (Clean Water Act or CWA) 33 U.S.C. §§1344(t), 1323 (1986) and the National Defense Authorization Act of 1987, Pub.L. No. 99-661, 2207 (1986), the Navy is required to comply with all state and local requirements concerning the discharge of dredged and fill materials. Although the Navy has received a "404 permit" from the Army Corps of Engineers and a Water Quality Certification from the state of Washington, the permit it received under Washington's Shoreline Management Act (SMA) is subject to several conditions, one of which provides that construction shall not begin until all review proceedings initiated within thirty days of the issuance of the permit have terminated.

FOE filed its complaint in district court and asked for a preliminary and permanent injunction to bar the Navy from obligating or expending any funds, and from commencing any construction of the homeport until all shoreline permit review proceedings have terminated. The preliminary injunction was denied by the trial court, and FOE appealed. The Ninth Circuit Court of Appeals reversed.

Analysis

After finding that FOE met the initial requirement of standing and could properly bring suit, the court went on to consider the environmental group's claims. The court held that, because the SMA permit was required and had not been issued, the district court erred in denying the injunction.

Examining the languge and legislative history of the National Defense Authorization Act (NDAA), the court found that no construction should begin before all required permits have been issued and that Congress specifically prohibited the expenditure of funds for any construction until all permits required for the dredging were issued. The court noted that, in addition to the requirement of permits in the NDAA for 1987, Congress re-emphasized in the NDAA for 1988 and 1989 its intent that environmental concerns be addressed before any homeport constuction commenced. Further, the House Committee on Armed Services explained the provision requiring permits before any "dredging activities" were carried out to mean "permits concerning disposal of the dredge spoil as well as the dredging itself." The court concluded that the explicit language of the NDAA evidenced Congress' intent clearly, and thus did not allow the court to deny injunctive relief.

The court also examined provisions of the Clean Water Act (CWA) in which Congress waived sovereign immunity with respect to state regulation of dredging and water pollution. The Navy contended that the SMA did not fall within the provisions of the CWA because it was not a state program "to control the discharge of dredged or fill material" 33 U.S.C. § 1344(t), nor was it a state or local requirement "respecting the control and abatement of water pollution," 33 U.S.C. § 1323. Rather, the Navy argued that the SMA was a land use law implementing the state's Coastal Zone Management Program pursuant to the terms of the Coastal Zone Management Act (CZMA), 16 U.S.C. §§1451-1464, for which there had been no waiver of sovereign immunity.

The court noted that one of the stated purposes of Washington's SMA is "protecting against adverse effects to . . . the waters of the state and their aquatic life . . ." Wash. Rev. Code 90.58.020. To this end, the Act requires local jurisdictions to adopt Shoreline Master Programs that, among other things, protect water quality and aquatic life and control dredging activities. More specifically, the implementing regulations of the SMA provide that "local governments should control dredging to minimize damage to existing ecological values and natural resources of both the area to be dredged and the area for deposit of dredged materials." Finally, the Washington Supreme Court has held that the Act authorizes local jurisdictions to impose water quality controls on substantial developments that require an SMA permit. Based on the foregoing, the court found that the SMA regulates and controls dredging and water quality within Washington's shoreline area and that the Everett Shoreline Master Program (SMP) and the Navy's permit approved pursuant to it, are part of that state program.

The Navy also contended that, although the immunity from prosecution it has been granted because it is a part of the government may have been waived for purposes of the CWA, it has not been waived for purposes of the CZMA. The court pointed out, however, that the CZMA itself specifically provides that it does not interfere with the requirements of the Clean Water Act and, therefore, does not allow the Navy to avoid the requirements of that Act.

Since the Navy's position was that the SMA is primarily a land use planning scheme implementing the CZMA, it further argued that it is not applicable to the Navy's activities in the coastal zone, much of which will allegedly occur on federal lands. The CZMA excludes federal lands from the "coastal zone" subject to state management. The court found that while the SMA contains both land use and environmental regulations, the provisions in controversy were environmental regulations which do not mandate any particular use of the land, but only impose conditions to ensure that damage to the water is kept within prescribed limits. Thus they apply to the construction of the homeport whether the activity is on federal or non-federal lands.

The court dismissed the Navy's argument that the SMA's regulation of water quality and dredging are merely duplicative of other permits which it had obtained, explaining that because land use regulation and environmental regulation are distinguishable, the requirement of an environmental permit by both a state and a federal agency does not necessarily mean that there is duplication. The court also noted that the SMA imposed several conditons for a permit not found in the requirements for permits which the Navy had already obtained.

In summation, the court found that, although the SMA permit had been conditionally approved, construction was not authorized until all review proceedings had terminated. Therefore, the permit had not been issued. Since the permit was required and had not been issued, the court ordered that the Navy be enjoined from obligating or expending any funds for the construction of the Everett homeport until a Shoreline Management Act permit has been issued.

Conclusion

Although the court's holding is unique to the facts of this particular case and has no authority outside the Ninth Circuit, it is an important decision because it clarifies legal issues that may have application not only to other proposed homeports, but to all federal construction projects along our nation's coasts. Conflict between state or local interests and the federal government over regulatory control of the coastal zone is sure to continue, especially in light of the massive construction planned for the coming years. As a result, the Navy's homeport projects may prove to be an important arena in which some of these conflicts may be resolved.

CASE BRIEF:

WESTERN OIL AND GAS ASSOCIATION AND NATIONAL OCEAN INDUSTRIES ASSOCIATION v. SONOMA COUNTY, SAN MATEO COUNTY, MONTEREY COUNTY, SAN LUIS OBISPO COUNTY, SAN DIEGO COUNTY, COUNTY OF SANTA CRUZ, CITY AND COUNTY OF SAN FRANCISCO, CITY OF MONTEREY, CITY OF MORRO BAY, CITY OF OCEANSIDE, CITY OF SAN DIEGO, CITY OF SAN LUIS OBISPO, AND THE CITY OF SANTA CRUZ

City and county ordinances regulating onshore support activities of offshore drilling operations upheld.

INTRODUCTION

County and municipal government regulation of onshore support activities of offshore drilling operations continues to be a contentious issue along the nation's coastal areas. Although the full extent of a local government's authority over coastal development remains confused, a number of important issues were addressed and clarified in a recent decision handed down by the U.S. District Court for the Central District of California.

FACTS

The defendants (hereinafter called cities and counties) in the case were seven California coastal counties and seven California coastal cities; each passed ordinances that regulated the onshore support facilities for offshore oil and gas development. The content of the ordinances varied in that they either 1) placed an absolute moratorium on development of onshore support facilities, 2) imposed a two year moratorium to allow for a study period, or 3) required local voter approval before permits could be issued.

The plaintiffs (hereinafter called Western Oil and Gas) were two non-profit trade associations consisting of member companies with involvement in the oil and gas industry in California. They brought suit seeking injunctive and declaratory relief as to the ordinances passed by the cities and counties. In its complaint to strike down the ordinances, Western Oil and Gas cited a number of causes of action, including claims arising under the supremacy clause, the due process clause of the fourteenth amendment, the commerce clause and the equal protection clause of the United States Constitution.

Along with Western Oil and Gas and the cities and counties, the State of California and two private nonprofit organizations, the National Resources Defense Council and The League for Coastal Protection, were allowed to join in the suit. The following discussion will address each legal claim individually, but will focus primarily on Western Oil and Gas' constitutional claims that the local ordinances were preempted under the supremacy clause by the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331, et seq., and the Coastal Zone Management Act, 16 U.S.C. §§1451, et seq., as well as being in violation of the commerce clause.

ANALYSIS

Ripeness, Standing, Exhaustion of Administrative Remedies

In an effort to have the complaint dismissed, the cities and counties alleged that the case lacked three essential requirements of "ripeness," "standing," and "exhaustion of administrative remedies" that must be met before the court may hear a case. The ripeness doctrine is a constitutional mandate, which requires that a court consider whether a case has matured or "ripened" into a controversy worthy of adjudication. If the court determines that the controversy between the parties is not of substantial immediacy or reality, it will decline to hear the case.

The court held that it could not consider those ordinances that required local voter approval before permits could be issued. Until a permit is denied by the voters, the record is not complete and the matter is not ripe for judicial review.

As to the ordinances that absolutely restricted or prohibited development of onshore support facilities (absolute moratoriums), the court found that it could review the ordinances because they did not require any further permit process and would work a substantial hardship on Western Oil and Gas. However, one absolute moratorium was held not ripe for review by the court because it limited its applicable area to the "coastal zone." Since the land covered by this ordinance was wholly within the California Coastal Commission's jurisdiction, and the Commission is required to review amendments to local coastal plans that are within its jurisdiction (the area within five miles of the coastline), the ordinance could not be held final until it had been submitted to and approved by that body.

The two-year moratorium was held unreviewable also, because it was not absolute and Western Oil and Gas could not show any hardship caused by it. In sum, the only ordinances held ripe for review by the court were those ordinances that placed absolute moratoriums of indefinite duration on support facilities both within and outside the five mile coastal zone.

On the question of standing, the court found that Western Oil and Gas had standing to sue on those ordinances that were ripe for review. Addressing Western Oil and Gas' third allegation, "exhaustion of administrative remedies," the court found that Western Oil and Gas had not exhausted its administrative remedies under the California Public Resources Act (CPRA), which allows appeal to the Coastal Commission for denial of permits. However, CPRA only covers the geographical area within the California "coastal zone," therefore, Western Oil and Gas was only required to pursue administrative procedures for those ordinaces which fall within the jurisdiction of the CPRA.

Preemption Under the Supremacy Clause

Western Oil and Gas pursued several claims based on the supremacy clause of article VI of the United States Constitution, alleging that the ordinances in question were preempted by certain federal statutes. The supremacy clause provides Congress with the power to preempt state law. When Congress exercises a power specifically granted to it by the Constitution, such as enacting a federal statute or regulation, concurrent state law may be challenged pursuant to the preemption doctrine. As the U.S. Supreme Court held in *California Coastal Commission v. Granite Rock Company*, 107 S.Ct. 1419 (1987), state law is preempted by federal

law when 1) Congress evidences an intent to occupy a given field, 2) Congress has not entirely displaced state regulations over a given matter, but compliance with both the federal and state law would be impossible, or 3) where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. The court used this criteria to determine if specific federal statues did in fact preempt the ordinances.

Outer Continental Shelf Lands Act

Western Oil and Gas contended that the ordinances in question were preempted by the Outer Continental Shelf Lands Act (OSCLA). OSCLA was enacted by Congress to give the federal government exclusive control of all submerged lands lying outside of the seaward boundaries of the coastal states. Western Oil and Gas argued that pursuant to this exclusive control, OCSLA preempted the cities' and counties' right to exert any authority over onshore support facilities, since such facilities would be connected with off-shore operations located in federal waters.

The court held that the OCSLA acknowledges states' concern over their coastal environments and therefore does not preempt states from regulating development along their coastal areas. Accordingly, the court held that Congress did not intend to occupy the field with regard to regulation of the coastal areas of the states. Furthermore, since the Act did not address coastal land use in any substantive way except to acknowledge states' rights and compliance with both was possible, there was no conflict between federal and state law. Finally, because the ordinances did not make off-shore drilling an impossibility, only more expensive and inconvenient, they were not true obstacles to the accomplishment of the federal purposes. City and county ordinances were therefore not preempted by the Outer Continental Shelf Lands Act.

Coastal Zone Management Act

Western Oil and Gas also alleged that the Coastal Zone Management Act (CZMA) preempted the ordinances. The court found instead that it was not the intent of the CZMA to occupy the field of regulation of coastal zone lands. Rather, the CZMA was enacted to ensure that states, in creating local laws regarding their coastlines, would consider national interests along with valid local interests. Under the CZMA, the states are to develop their own coastal programs which are to be approved by the U.S. Secretary of Commerce if they meet the conditions and criteria set out in the Act. Since California has a coastal program now in effect that has been approved by the Secretary, the court found that approval presumes that the program gives attention to the national interests articulated in the Act.

Consequently, applying the *Granite Rock* 3-part test, the court made the following conclusions: 1) CZMA did not intend to occupy the field, 2) there was no conflict between the broad language of the CZMA and the ordinances, thus compliance with both was possible, and 3) the CZMA did not require the states to allow any particular type of facility to be sited in the coastal zone, therefore, the ordinances were not an obstacle to the CZMA. Accordingly, there was no preemption of the ordinances by the CZMA.

Coast Guard Regulations

The final alleged violation of the supremacy clause concerned three acts which grant rights and responsibilities to the U.S. Coast Guard concerning the licensing and certification of vessels and tankers and the safety of waterways. The court held that no preemption took place because these acts deal with entirley different subject matter than the ordinances in question.

Violations of the Commerce Clause

Western Oil and Gas also claimed that the ordinances violated the commerce clause of the U.S. Constitution, which gives Congress exclusive power over interstate commerce. The test of whether there has been a commerce clause violation is set out in the U.S. Supreme Court cases of *Pike v. Bruce Church*, 397 U.S. 137, 142-43 (1969) and *Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 470-73 (1981). If the state or locality is regulating a legitimate local interest and the effect on interstate commerce is incidental, the statute will be upheld, unless the burden on interstate commerce is excessive in relation to the local benefit. However, the burden will be tolerated if there are no alternatives which would affect interstate commerce in a less drastic way. Moreover, a court will look to see if the purpose of a statute is purely "economic protectionism," in which case the statute would be declared invalid under the commerce clause. If the statute is not based on economic protectionism and deals evenhandedly with interstate and intrastate commerce, the statute will be upheld unless another approach could be implemented that would have less of an impact on interstate activity.

Applying the above tests to the ordinances in question, the court made the following conclusions. In dealing with the question of whether the ordinances were excessive in relation to the local benefit, the court found that there may be less harsh methods of regulation with regard to the ordinances calling for absolute moratoriums, therefore, they could possibly violate the commerce clause. However, further examination of alternative possibilities would be necessary in order to determine if the moratoriums did in fact constitute a violation. With respect to the issue of purpose, the court found that the ordinances, on their faces, did not indicate that their purpose was economic protectionism. Furthermore, the court noted that the ordinances fit into three categories: 1) ordinances that state only a purpose to protect the local environment, 2) ordinances which state a mixed purpose: to protect the local environment and to oppose the proposed drilling on the Continental Shelf, and 3) ordinances that state no purpose. Finally, the court found that the ordinances regulated both in-state and out-of-state off-shore oil producers evenhandedly.

In summary, the court held that the ordinances that had a clearly stated purpose only to protect the environment and those ordinances that did not impose an absolute moratorium on permit issuances did not on their face violate the commerce clause. The ordinances with mixed purposes, but which allowed examination of permits on a case-by-case basis did not violate the commerce clause because although their purposes were mixed, they did not discriminate and did not represent economic protectionism. Based on the above conclusions, the court granted the cities' and counties' motion to dismiss all of Western Oil and Gas' claims alleging

commerce clause violations except for those ordinances imposing absolute moratoriums.

Equal Protection and Due Process Violations

Finally, Western Oil and Gas alleged that the ordinances violated the equal protection clause and the due process clause of the fourteenth amendment of the U.S. Constitution. The constitutional guarantee of equal protection has been interpreted to mean that no person or class of persons will be denied the same protection of the laws that is enjoyed by other persons or classes in like circumstances. However, a law may discriminate or make a distinction between persons or classes of persons if there is an overriding state purpose for the distinction.

The court found that while there was discrimination between onshore and offshore oil drilling, the cities and counties had a legitimate purpose of protecting the coastal environment from hazards associated with offshore oil drilling. Because the distinction between onshore and offshore oil production had a legitimate state purpose the court found no violation of the equal protection clause.

Under the due process clause, a person is guaranteed that the government will follow fair procedures in deciding questions of life, liberty or property. Western Oil and Gas claimed the due process clause was violated by those ordinances which required land use permits to be issued subject to voter referendum because the permit applicants were deprived of a hearing along with a record for judicial review. The court refused to address this issue because it had held that the voter referendum ordinances were not yet ripe for review. The court noted, however, that if the ordinances did grant adjudicatory functions to voter referendums they may violate the due process clause.

CONCLUSION

The holding in *Western Oil and Gas* has shed some light on a number of issues pertaining to the ability of local governments to regulate the onshore support activities of offshore drilling operations. While the case is far from authoritative on a national level, its importance lies in the fact that the court's handling of the issues before it could well influence other coastal states as they are called upon to consider similar issues. Given the complex nature of federalism in the United States and the lengthy litigation process, it may be many years before the full scope of local authority over the coastal zone is determined. Nevertheless, it is clear that in coming years, local government may be playing an increasingly important role in coastal regulation.

Vicci McReynolds

RECENT LEGISLATION: ALABAMA

During the 1988 session, the Alabama legislature passed several new acts and amendments addressing natural resource and coastal issues. The following is a synopsis of the legislation.

Seafood Regulation

The scope of Act No. 88-577 encompasses marine resource and seafood licenses in the state of Alabama, amending several existing statutes and repealing sections 9-12-81, 9-12-84, 9-12-86, 9-12-88 to 9-12-92, and 9-12-114 of the Alabama Code.

Section 9-12-119 is amended to provide for an issuance fee of $1.00, in addition to the seafood and marine resources licenses fee, to cover the cost of services required by the law. The balance will be remitted to the marine resources fund. Unused licenses and stubs of licenses issued are required to be returned to the commissioner of conservation and natural resources.

Section 9-12-82 is amended to increase the "oyster catcher" license fee to $25.00. Section 9-12-93 increases the fees for certain "shrimp boat" licenses: $50.00 for commercial boats under 30 feet in length owned by residents; $75.00 for commercial boats from 30 to 45 feet in length; $100.00 for commercial boats over 45 feet in length; $15.00 for recreational boats regardless of length. The Act also provides for non-resident license fees. All fees are to be deposited in the marine resources fund.

Section 9-12-113 is amended to increase resident and non-resident fees for certain commercial hook and line and net or seine licenses. Nets and seines which are fished in an illegal manner or in an illegal area are declared to be nuisances and may be confiscated and forfeited under certain circumstances. The game fish taken in such manner will be returned to the water. A recreational gill net license may be purchased for $50.00 by those persons who wish to use a gill net of less than 300 feet for non-commercial purposes; fish taken under this license may not be sold or bartered. A "crab catcher's" license is required to be purchased at a fee of $50.00 by those taking crabs for commercial purposes or by individuals with more than five crab traps who are taking crabs for personal, non-commerical purposes. No license is required for up to five traps for those persons taking crabs for personal, non-commercial purposes. A seafood dealer's license is required by the Act for any person, firm, or corporation who sells fresh or frozen seafood. The fee for the license is $125.00. Certain exemptions and penalties for violation are provided for in the Act. Act No. 88-577 becomes effective on October 1, 1988.

Cave Conservation

Act No. 88-582 designates Alabama caves and caverns, flora, fauna, mineral deposits and formations as worthy of preservation. The Act limits liability for cave-related activities and equipment failure that occur while persons are engaged in cave-related activities. Under the Act, it is a misdemeanor to vandalize a cave, discard litter or refuse in a cave, disturb plant or animal life within a wild cave, risk underground water resource pollution, or engage in other acts which would

be harmful to the caves of Alabama. The Act became effective upon its passage and was approved by the governor on May 10, 1988.

Water Quality Regulations

Act No. 88-602, cited as the Alabama Agricultural Nonpoint Source Financial Assistance Act of 1988, was enacted out of concern for the declining quality of water in Alabama's lakes, streams, rivers, aquifers and estuaries. The Act provides for the State Soil and Water Conservation Committee and Soil and Water Conservation Districts to administer a federal cost-share program which was established by the legislature in 1986 to provide financial assistance to land-users to encourage them to control soil erosion, prevent water pollution, and improve forests. The Act became effective upon passage and was approved by the governor on May 13, 1988.

Act No. 88-537, the Alabama Underground Storage Tank and Wellhead Protection Act of 1988, authorizes the Alabama Department of Environmental Management to promulgate rules concerning underground storage tanks and to seek approval of the United States Environmental Protection Agency to establish a state program in lieu of a federal program regulating the storage tanks. To provide revenue for the regulation, a fee of not less than $15.00 nor more than $30.00 per regulated tank is authorized. The Department is also authorized to promulgate rules to establish and protect wellhead areas, associated with public water supply systems, from contaminants that might have an adverse effect on the health of persons. Penalties are prescribed for violations of the Act. The Act became effective immediately upon its passage and was approved by the governor on May 5, 1988.

Act No. 88-378 establishes the Alabama Underground Storage Tank Trust Fund and imposes fees on underground storage tanks as part of a plan to preserve the quality of the waters of the state in as close to a comparable previous condition as is possible. The Act is intended to provide evidence of financial responsibility for owners and operators of the tanks under the Resource Conservation and Recovery Act, the Superfund Amendments, the Reauthorization Act of 1986, and other federal laws. Payment from the fund for clean-up costs and third party claims are provided for in the Act. The Act becomes effective on October 1, 1988.

Act No. 88-583, cited as the Alabama Lead Ban Act of 1988, requires that lead-free pipes, solder, and flux be used in the construction, repair, or installation of certain drinking water facilities. The Act authorizes the Alabama Department of Environmental Management to promulgate regulations to protect drinking water from lead contamination. The Act was approved by the governor on May 10, 1988, and became effective on its passage.

Hazardous Waste

Act No. 88-535 amends § 22-14-14 of the Alabama Code which relates to radiation control. The Act sets forth penalties of fines or imprisonment in the county jail for users of radioactive material who violate licensing provisions of §§ 22-14-4 or 22-14-06 or any other rule or regulation issued under the licensing provisions. The Act provides that the state radiation control agency will develop and adopt rules for generators of low-level radioactive wastes to implement best management

practices as a condition of access to a low-level radioactive waste disposal facility. The Act became effective upon passage and was approved on May 5, 1988.

Act. No. 88-534 amends § 22-32-1 of the Alabama Code to clarify withdrawal criteria of a party state from the Southeast Interstate Low-Level Radioactive Waste Management Compact. The director of the Bureau of Radiological Health and the director of the Department of Energy will serve as members of the low-level radioactive waste management commission. The amendment took effect upon passage and was approved on May 5, 1988.

Act No. 88-226, entitled the Hazardous Waste Control Amendment of 1988, amends § 22-30-5.1 and provides that no commercial hazardous waste treatment facility or disposal site not in existence on or before December 31, 1988, will be situated until certain conditions are met: (1) a written proposal shall be submitted to the select joint nuclear activities and hazardous chemical toxic waste oversight committee by the applicant desiring to construct the facility; (2) after due consideration, the committee submits its written report and recommendations on the proposed construction to both houses of the legislature, and (3) the legislature gives approval by joint resolution. Legislative approval is not required for facilities with on-site treatment and disposal of their own wastes. The Bill also sets forth criteria to be considered by the committee in its evaluation of the proposal.

Conclusion

The activity of the 1988 Alabama legislature regarding natural resource issues focused on laws designed to improve water quality through regulation of underground storage tanks, lead-free plumbing, and the administration of cost-sharing programs to give financial assistance to land-users. Certain fees and licenses for seafood and marine resources were increased in the recent session. The legislature also enacted cave preservation measures and promulgated laws concerning hazardous waste treatment facilities.

Karen Luster

RECENT LEGISLATION: MISSISSIPPI

In its 1988 session, the Mississippi legislature passed one bill as well as several amendments to existing laws which relate to natural resource and coastal concerns. The following is a brief summary of the legislation.

Boating

House Bill No. 544, effective July 1, 1988, amends § 59-21-81 of the Mississippi Code which sets forth the requirement that every vessel must have on board a Coast Guard approved personal flotation device for each person aboard that vessel. The new law provides that on sailboats, motor boats, or vessels less than twenty-six feet in length, children aboard who are twelve years of age or younger must wear a type I, II, or III Coast Guard approved flotation device while the vessel is underway. "Underway," is defined as meaning at all times except when the vessel is moved, anchored, or aground.

Senate Bill No. 2801 amends § 59-21-5 of the Mississippi Code and requires the registration and numbering of all sailboats. The Bill becomes effective on July 1, 1988.

Fishing and Seafood Regulations

House Bill No. 1143 amends § 49-7-81 which provides that it is unlawful to take or kill game fish in any manner except by hook and line or through the use of trout or troll lines. Effective July 1, 1988, the new law provides for the circumstances in which dip/landing nets may be used: nets may be used when landing fish caught by trout or troll lines or hook and line; the nets may also be used by residents to capture shad and minnows for bait to be used in sport fishing, and to capture or rescue game fish in certain ponds which go dry in the summer and are cut off from regular streams.

The Bill prohibits the killing or taking of any fish at any time by mudding, or the use of lime, poison, weeds and walnuts, Indian berries, dynamite, gunpowder, giant powder or any other explosive. The Bill makes it unlawful to use seines, nets, or traps to take nongame gross fish without a commercial fishing license and to place nets or seines in any stream in a way which completely obstructs the passage of fish in the stream. The nets are required to be at least 100 yards apart.

The Bill increases the penalty for unlawful fishing methods by making it a Class I violation to kill or capture fish by the use of an explosive substance, poison, or any chemicals (except as to owners of private ponds), or through use of a telephone, battery, or other electronically operated devices. Violations are punishable as provided in § 49-7-141 of the Mississippi Code; a conviction results in a fine of not less than $500 nor more than $1000, imprisonment in the county jail for not less than five nor more than fifteen days, and forfeiture of all hunting, trapping and fishing privileges for twelve consecutive months from the date of conviction.

Senate Bill No. 2720 amends § 49-15-63, by increasing the fine for a first offense in the violation of the commercial shrimping laws if the offense is committed during a closed season. As amended, the law imposes a fine of not less than $100, nor more than $500 for a first offense; however, if the first offense occurs during

the closed season, the penalty is a fine of not less than $500 nor more than $1000. The law also provides for the confiscation of all catch and nets upon an arrest for the violation of the Act, pending the court's determination of guilt. The law requires that the catch be sold by the enforcement agency that made the arrest. The catch must be sold at the average wholesale price for shrimp and the monies derived will be held in escrow pending the court's disposition of the case. If a conviction occurs, the money in escrow and the nets are forfeited. The money is paid to the Bureau of Marine Resources, to be deposited into the Seafood Fund. The amendment is effective July 1, 1988.

Senate Bill No. 2881 amends § 49-15-29 which authorizes the issuance and regulation of certain fishing licenses and taxes. The Act was amended to change the allowable limit for oysters caught for recreational purposes. Prior to the amendment, upon the payment of a $10 annual recreational oyster permit fee, and receipt of the permit, an individual was allowed to catch, for recreational purposes, three sacks of oysters per week or the equivalent. In the amended version, the reference to "or the equivalent thereof" is deleted, leaving the allowable catch of oysters at three sacks per week for recreational purposes.

Senate Bill No. 2935 amends § 49-15-15 to authorize the Bureau of Marine Resources to regulate all matters pertaining to shellfish. Effective July 1, 1988, the law places the responsibility of the management and regulation of all oyster, shrimp, and shellfish sanitation and processing programs with the Bureau. The Bureau is also directed to develop a water management plan to assure the preservation of shrimp, oyster, and shellfish resources and to ensure the safe supply of those resources. The new law deletes all references to the authority of the State Board of Health with respect to shellfish sanitation and safety and removes the shellfish sanitation program from the jurisdiction of the State Department of Health. Under an amendment to § 49-15-29, the assessment of a $45 annual shellfish processing fee will now be made by the Bureau of Marine Resources rather than the State Department of Health.

House Bill No. 547 amends §§49-1-29, 49-7-5 to 49-7-17, 49-7-23, and 49-7-37 to increase the purchasing price of hunting and fishing licenses. A "Free Fishing Day" was abolished in an amendment to § 49-7-9. The commercial fishing license fee was also revised. The Bill was approved on April 25, 1988 and is effective as of July 1, 1988.

Submerged Lands and Riparian Rights

House Bill No. 1035 declares that certain submerged lands and tidelands owned by the state of Mississippi in an area lying between the East and West Pascagoula Rivers may be leased for commercial and port purposes and for industrial development. The city port commission and the governing authority of the city within which the state lands are located are given joint authority under § 59-1-17 to secure a lease from the Secretary of State for a period not to exceed forty years. The law limits the utilization of the submerged land or tidelands so as not to obstruct navigation or natural channels. The city and city port commission are given authority to sublease the lands for commercial or port purposes or for industrial development. The law specifically reserves the mineral rights to these lands in the State.

The law was approved by the governor on April 15, 1988, and became effective on that date.

Senate Bill 2509 amends § 51-1-4 of the Mississippi Code and provides that the portions of natural flowing streams that have a mean annual flow of not less than 100 cubic feet per second are public waterways. The Department of National Resources is charged with determining those waterways that are public and designating them on appropriate maps. The "public waterways" designation gives the public the right of free transport and the right to fish and engage in water sports on the stream. The amendment states that those exercising rights under the Bill shall not have the right to recover damages against owners of property along these waterways, other than those recoverable for intentional torts or gross negligence. The Bill does not authorize persons using the waterways to trespass upon adjacent lands, to launch vessels from the shores of the waterways, or to disturb banks or beds of waterways or discharge substances into the waters. The statute does not restrict any rights of riparian landowners except as specifically provided, and does not affect title to banks or minerals or restrict mining or extraction of minerals. The amendment repeals § 51-1-3 which required waterways to be declared public by the legislature or the board of supervisors. The Bill became effective upon its passage and was approved by the governor on May 25, 1988.

Conservation Easements

House Bill No. 1063 revises the Mississippi Conservation Easement Act to provide procedures for centralized recording of conservation easements. The clerk of the court recording the easement is required to mail certified copies of the instrument, with notice of the date and place of recordation, to the office of the Attorney General and to the Mississippi Department of Wildlife Conservation. The instrument of conveyance must also state the requirement that certified copies are to be mailed to the Department of Wildlife Conservation and to the Attorney General. A holder of a conservation easement which was created prior to the effective date of the bill can qualify for benefits provided under the new law by meeting those requirements previously stated within one year after the effective date of the Bill. Sections 89-19-5 and 89-19-7 are amended to provide that a conservation easement is not extinguished if the holder of the easement becomes the owner of the property and the State Attorney General and the State Department of Wildlife Conservation have the power to enforce conservation easements. The law was approved by the governor on April 18, 1988, and was effective upon passage.

Wastes Disposal and Pollution

Senate Bill No. 2141, effective July 1, 1988, amends § 49-2-13 and empowers the executive director of the Department of Natural Resources to require compliance with conditions placed on any permit issued by the Permit Board pursuant to the provisions of the Solid Wastes Disposal Law of 1974 (§§ 17-17-1 to 47). In addition, the executive director is given the authority to require compliance with all regulations of the Commission on Natural Resources. The new law also allows certain members of the Permit Board to appoint designees to attend meetings. The new law repeals §§ 51-4-1 to 19; the effect of which is that the Board of Water

Commissioners can no longer grant permits for the use of groundwater in capacity use areas.

Senate Bill No. 2087, approved on April 6, 1988, and effective July 1, 1988, creates § 49-17-60 for the purpose of establishing a pollution emergency fund. The fund will be administered by the Mississippi Commission on Natural Resources and will consist of monies derived from the payment of fines, penalities, and other revenues received by the Department of Natural Resources. The new law authorizes the transfer of $250,000 from the Water Pollution Abatement Bond Fund into the Pollution Emergency Fund. The law is effective on July 1, 1988.

House Bill No. 666 amends § 77-47-1 to effect certain changes in the Southeast Interstate Low-Level Radioactive Waste Management Compact. As it now exists, the Bill provides that no state is required to operate a regional facility for longer than twenty years or to dispose of more than thirty-two million cubic feet of low level radioactive waste. The new law also specifies that for a state with a regional facility to withdraw from the compact, certain criteria must be met. If not met, withdrawal can occur only with the unanimous consent of the commission and the approval of Congress. The new law was approved April 1, 1988, and became effective upon its passage.

County Port Authority

Senate Bill No. 2906 amends §§ 59-9-5, 59-9-25 and 59-9-27 to expressly give to the county development commission (or county port authority) the authority to develop tourism and service facilities. This law empowers them with the authority to sell, lease, or otherwise dispose of the facilities. The law was effective June 1, 1988.

Aquatic Products

Senate Bill No. 2652 enacts the Mississippi Aquaculture Venture Act of 1988 (for a more detailed examination of the Act *see infra* p. 29). The purpose of the Act is to increase opportunities in the cultivating and marketing of aquatic products. The Act is to create new industries, job opportunities, tax benefits, and other benefits to the state of Mississippi. The law provides for the leasing of state waters for aquaculture purposes. Aquaculturists must obtain a cultivation or marketing permit from the Department of Wildlife Conservation, the price of which is not to exceed $100. Penalties are provided for violations of the Act. A study is authorized by the law to assess the feasibility of the establishment of an Aquatic Ventures Center at the National Space Technology Laboratories. The Act defines aquaculture as "the process of growing, farming, cultivating, and/or harvesting cultured aquatic products in marine or fresh waters" and includes management by an aquaculturist. The bill was approved by the governor on April 27, 1988, and became effective July 1, 1988.

Conclusion

Most of the activity of the Mississippi legislature during the 1988 session dealing with natural resource and coastal matters involved amendments to existing laws in the areas of boating safety, fishing and seafood regulations. The amendments

increased certain fees and the costs of licenses and increased the penalties for violations of some regulations, particularly those that occur during the closed season for shrimping. The legislature addressed the authority of city or county port commissions in the development of tidelands and submerged lands as well as tourism and service facilities. The legislature also created a new pollution emergency fund and increased public access to certain rivers and streams.

The only new bill passed by the legislature concerning natural resource or coastal law was the Mississippi Aquaculture Venture Act of 1988.

Karen Luster

SUMMARY OF THE MISSISSIPPI AQUACULTURE ACT OF 1988

The Mississippi legislature has enacted the Mississippi Aquaculture Act of 1988 which became effective on July 1, 1988. Its stated purpose is: 1) to expand the growth of aquaculture in the state by amending existing regulations and improving the effectiveness and coordination between state agencies involved in aquaculture, 2) to conserve and enhance aquatic resources and 3) to provide mechanisms for increasing aquaculture production that will lead to the creation of new industries, job opportunities, and income for the aquaculturists and tax revenue and other benefits for the state. This article will present a summary of the key elements of the Act and explain how it will likely be implemented.

Permits: The Act aims to regulate aquaculturists (persons who are engaged in the cultivating of cultured aquatic products) by requiring them to have a cultivation and marketing permit in certain instances as follows:

A. Activity Requiring No Permit: All native aquatic plants, animals, and nongame fish may be freely produced and marketed by aquaculturists unless specifically regulated elsewhere. If a marketing permit is needed to sell these in other states, the Department of Wildlife Conservation is to issue one upon the request of the aquaculturist.

B. Activity Requiring A Permit: A cultivation and marketing permit is required for cultured aquatic products produced from:

1) all nonnative aquatic plants and animals
2) fish classified as game fish in Mississippi (the department will not issue permits for the following game fish, however: black bass, bream, crappie, flathead catfish, walleye, and all members of the family Centrachidae and Percidae.
3) endangered, threatened, or protected species
4) aquatic plants and animals that have been genetically modified (except by breeding or crossbreeding)

These permits may be issued only to U.S. citizens. The permit fees are not to exceed $100.00 each and the permits are to be renewed annually. Before the Department of Wildlife Conservation will issue a permit they are required to approve the facility. (Requirements placed on the aquaculture facility buildings are not to exceed those requirements specified for agriculture operations.) The department may also conduct periodic inspections to ensure that the operational activities comply with approved permit specification.

The Act allows the department to withhold a culture or marketing permit if it determines it would be detrimental to the public interest. However, the department must present this determination in writing along with the supporting justifications (reasons). If an aquaculturist fails to provide information to the department to verify that his products are produced under controlled conditions and are not harvested from natural wild stock, his permit will not be renewed.

Game Fish for Brood Stock: The Act also provides that, by permit, game fish may be obtained for use as brood stock subject to regulations by the Department

of Wildlife Conservation. The department may require the permittee to: 1) obtain a temporary variance permit from the department, 2) give compensation for each fish taken for brood stock, and 3) not sell or transport out of state the brood stock taken from state waters.

Products for Human Consumption: Aquaculture operations must comply with applicable Department of National Resources regulations and Department of Health regulations if the aquatic products are to be processed for human consumption.

State Educational Institutions: State educational institutions are subject to the above regulations but are exempt from fees.

Catfish Farming: It has been emphasized that the Act does not apply to the catfish farming industry.

Violation of the Act: Any person found violating the Act or any regulation of the department issued under the Act may be subject to a fine of not more than $1,000 but not less than $250 for each violation. In the case of violation involving the marketing of non-cultured game fish, each fish is counted as a separate violation.

One-Stop Permitting: All state governmental entities that are involved in aquaculture activities or aquaculture-related activities will develop a coordinated procedure for one-stop permitting. One-stop permitting is a procedure that will allow an aquaculturist to fill out a joint application form to a particular agency and that agency will send copies of the application to the appropriate regulatory entities for review and expeditious action. The document will contain the time schedule for review and action taken by the agencies after the permit has been received and dated. This one-stop permitting is intended to help prevent confusion that is occurring today in which aquaculturists are required to go to many different agencies in order to complete various applicable permit forms.

Several topics other than permitting have been incorporated into the Act. These topics include:

The Secretary of State May Lease State Waters: The Act provides that the Secretary of State upon recommendation of the commission (the Act does not define its reference to commission) may lease state waters. The commission may develop an aquaculture lease management program and adopt rules and regulations to implement it.

Aquatic Ventures Center: The Department of Wildlife Conservation shall develop a management plan with the federal government for the purpose of establishing an Aquatic Ventures Center at the National Space Technology Laboratories. This plan shall include but is not limited to the following activities: 1) plan and conduct a program to promote cultured aquatic products, 2) give out information about the technology and species suitable for Mississippi, 3) produce and coordinate the production of species of aquatic products that can be introduced into the state's waters in order to increase recreational and commercial fishing opportunities, 4) encourage the expansion of aquatic activities which add to the economy, 5) provide an opportunity for state agencies, colleges, federal agencies, and Mississippi aquaculture associations to participate in the Center's program and display or advertise their products, 6) maintain a coordinated liaison with other aquacultural enterprises, including federal agencies, 7) increase opportunities to market Mississippi cultured aquatic products by exposing tourists who will visit

the Center to such products (i.e. finger-size samples of prepared products), 8) increase tourism to the Mississippi gulf coast area by attracting tourists to visit the Center and 9) to inform aquaculturists of the availability of forming aquatic products marketing associations under the state "Co-operative Aquatic Products Marketing Law" and, as needed, aid them in forming such associations. Finally, the department may solicit and accept financial and professional support from private and public sources, including the federal government.

Aquaculture Parks: The Act states that it encourages aquaculture parks and asks that governmental entites, universities, and colleges provide coordinated support. At this time, three such parks are under development.

The establishment of guidelines for implementing the Act has been delegated to various state agencies. The Bureau of Marine Resources within the Mississippi Department of Wildlife Conservation along with other state agencies have begun the process of drafting these guidelines. It may take several months to several years before all of the guidelines are finalized and put into actual practice. Whether the Aquaculture Act of 1988 will significantly increase aquaculture production in Mississippi remains to be seen. It does, however, represent a valuable first step in the effort to reduce legal impediments and to make Mississippi aquaculturists more competitive in national and global markets.

Vicci McReynolds

NEW TEST FOR *FORUM NON CONVENIENS* IN JONES ACT AND MARITIME CASES

Introduction

The United States Court of Appeals for the Fifth Circuit recently changed the test used to determine whether a suit in admiralty may be removed to another court under the doctrine of *forum non conveniens* (FNC) in the case of *In re Air Crash Disaster New New Orleans, LA.*, 821 F.2d 1147 (5th Cir. 1987). By virtue of this ruling, courts no longer need first engage in choice-of-law analysis before applying the doctrine in Jones Act and maritime cases.

FNC serves to protect defendants from law suits filed in a distant, inconvenient, or unjust forum. The doctrine allows a court to decline to exercise its jurisdiction if it feels that a defendant would be exposed to injustice and the litigation should be brought before another court. If granted, removal to another forum under FNC does not automatically set the defendant free and the plaintiff adrift without a remedy. Instead, to ensure justice, the court may condition this removal upon the defendant's promise to submit to litigation in the new forum. Courts most commonly apply FNC when foreign plaintiffs with little legitimate contact with the United States file suit in American courts.

Old FNC Test

For a number of years courts in the Fifth Circuit had followed the "modified analysis" approach to determine FNC in Jones Act and maritime cases. Under this rule, the court first determined which law controlled: foreign or American. To answer this choice-of-law question, the court applied the so-called *Lauritzen-Rhoditis* test which required weighing the following: place of wrongful act; domicile of injured party; inaccessibility of foreign forum; law of forum; and shipowner's base of operations.

If American law was found to apply, the court exercised its jurisdiction and proceeded with the case. But, if foreign law applied, it utilized an additional balancing test know as the *Gilbert* FNC analysis, based on factors drawn from the wellknown 1947 decision, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Specifically, *Gilbert* introduced a different two-part test that first evaluates private interests of the litigants and then weighs public interest factors.

The five private interest factors include: relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses and cost of obtaining attendance of willing witnesses; if appropriate, the possibility of viewing the premises; any other practical considerations of efficiency and justice; and enforcement of any judgement.

Similarly, public interests consist of five separate elements: administrative problems due to overcrowded trial docket; policy of resolving local litigation in home forum; policy of holding trial in forum whose law applies; policy to avoid interpreting law of foreign forum; policy to avoid burdening unrelated forum with jury duty on cases which should propriety be decided in a different forum.

For some time, courts have questioned the propriety of performing complex exercises in comparative law as the first step of its FNC analysis. For example,

in the products liability case of *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Supreme Court raised this issue and held that a court need not first determine if American or foreign law applied because it was found to be only tangentially related to the factors in the *Gilbert* FNC test. However, an important question remained unanswered after *Piper*: did the scope of this rule include Jones Act and maritime cases?

New FNC Test

An affirmative answer was provided by *In re Aircrash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987). This case involved a suit brought against the United States and Pan American World Airways Inc. (Pan Am) by heirs of Uruguayan citizens who were among the 154 passengers killed in a crash occuring immediately after takeoff. Conceding in a footnote that the traditional modified analysis in Jones Act and maritime cases may no longer be appropriate after the *Piper* decision, the *Aircrash* court specifically approved the *Gilbert* test and expressly overruled prior caselaw (more than fifteen decisions) that utilized the old modified analysis approach. Applying the new test, the court retained jurisdiction, based in part upon a finding that Pan Am had failed to meet one element of the *Gilbert* test, namely, that the co-defendant United States could not be adequately tried in the foreign forum.

Since *Aircrash*, the court has had at least two opportunities to apply the new rule. First, in *Gonzalez v. Navierra Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987), the mother of a Peruvian sailer sought damages under the Jones Act and general maritime law for the loss of her son, who was killed while working aboard a Peruvian ship docked at Port Arthur, Texas. Except for the interests by the state of Texas in the safety of its ports, nearly all contacts and interests involved Peruvian citizens, ships and law. Applying the *Gilbert* FNC test, the court ruled that *Navierra Neptuno* had indeed shown sufficient prejudice to permit the case to be tried in a Peruvian court.

It should be noted that *Aircrash* and *Gonzalez* did not abandon the choice-of-law determination. Rather, they merely reduced the importance attached to American versus foreign law by making it supplementary to the *Gilbert* FNC analysis. The court in *Gonzalez* reiterated that no single factor should be given conclusive weight. While choice-of-law may no longer stand alone as the exclusive or predominant element, it may be considered an important factor under the public interests heading.

On March, 7, 1988, the Fifth Circuit handed down another decision involving the new FNC test in *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988). A deceased diver's widow alleged that two American firms negligently designed and manufactured the diving helmet worn at the time of her husband's fatal accident. Except for the diving helment, practically all interests involved including the ships, witnesses and applicable law were Brazilian. The decedent's Brazilian employer never even appeared before the district or appellate courts in the United States.

In reviewing Ocean Drillings' motion to dismiss in favor of a Brazilian forum, the appellate court applied the new standard. First, the court asserted that it is

the defendant who must bear the burden of motioning for removal under FNC. Next, the motioning party must show, at the time the motion is filed, that any and all defendants share an adequate and available alternative forum. As defined in *Piper*, a foreign forum is "available" when the entire case and all parties can come within the jurisdiction of that forum. A foreign forum is "adequate" when the parties will not be deprived of all remedies or treated unfairly.

As a final requirement, defendant must produce information sufficient in detail to permit the court to hold that the public and private interests weigh heavily in favor of removal to the foreign forum. Based on the *Gilbert* FNC analysis, the court of appeals found removal in *Camejo* to be justified and so affirmed.

Conclusion

By abandoning the requirement that courts first determine if American or foreign law applies prior to dismissing a case under the doctrine of *forum non conveniens*, the Fifth Circuit has made it somewhat riskier for foreign plaintiffs to bring suit in U.S. courts. Under the new test, judges will have more discretion to refuse jurisdiction over suits brought by foreign plaintiffs even though American law is found to apply. As a consequence, foreign plaintiffs may be less likely to bring suit in American courts unless they are confident that the *Gilbert* private and public interest factors clearly weigh in their favor.

Jonathan Hunt

LAGNIAPPE
(A Little Something Extra)

The House and Senate recently approved a fishing vessel safety bill sponsored by Rep. Gerry Studds (D-MA) that will require fishing vessels to be equipped with an array of safety gear. Three categories of vessels are created by the bill. Small vessels not operating in federal waters will have to carry fire extinguishers, life preservers and flares. If they operate in federal waters an EPIRB (emergency position-indicating radio beacon) is also required. Vessels working in federal waters or that have more than sixteen crew members must also carry life rafts and survival suits for everyone aboard, and navigation and radio gear designated by the Secretary of Transportation. Vessels with crews of over sixteen which are built after 1988 must contain lifesaving and firefighting equipment and bilge alarms. In addition, the bill calls for a number of formal studies of safety problems in the industry.

On June 16, 1988, President Reagan signed a bill to ban the use of toxic marine paints. Public Law 100-333, now known as the Organotin Antifouling Paint Control Act of 1988, regulates the use of tin-based biocides, known as organotins, in two ways: (1) the Act prohibits the application of paints containing organotins on all boats under 82 feet and (2) prohibits the sale of organotin paints which leach into the environment at a rate greater than 4.0 microgram per square centimeter per day.

The Department of Interior's Minerals Management Service (MMS) announced final prospecting regulations governing prelease activities for marine minerals mining under Section 8(k) of the Outer Continental Shelf Lands Act. Published in the July 5, 1988, *Federal Register*, the regulations pertain to all minerals other than oil, gas and sulphur on the U.S. Outer Continental Shelf. The prospecting rules are the first in a set of three for marine mining on the OCS to be initiated by the Minerals Management Service. Proposed rules for leasing and for post lease activities are scheduled to be published later this year, according to MMS. Copies of the final rule may be obtained from: Gerry Rhodes, Branch of Rules, Orders and Standards, MMS, 12203 Sunrise Valley Dr., Reston, VA 22091, telephone (703) 648-7816.