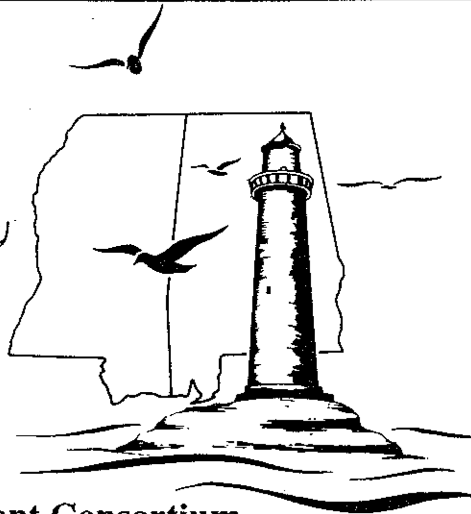
WATER LOG



A Legal Reporter of the
Mississippi-Alabama Sea Grant Consortium

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WATER LOG

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Controversy Stirs OverOyster Bed Leasing In Alabama

George F. Crozier

INTRODUCTION

This article explores an emerging conflict in the State of Alabama. The dispute is between traditional oyster fishermen, who fish by tonging public reefs; riparian property owners, who practice various forms of oyster fishing or "farming," or who lease their rights to third parties who in turn perform some type of oyster production; and the State, whose duty it is to maintain tidal waters and the lands under them in trust for use by all people of the state. The conflict calls into play the public trust doctrine, which provides that the state holds title to tidelands in trust for the benefit of the public, who may use them for navigation, fishing, commerce, or other activites. The scope of public rights in trust property varies from state to state, and because of increasing interest in tidelands and their resources, many states have had to balance the use of limited resources between public and private interests. Riparian rights are private rights, and in Alabama, it is the balance between these rights and public rights that have come into question.

DISCUSSION

Recent years have been characterized by the worst kind of environmental conditions for oysters in Alabama waters. The extremes of drought and flood have exacerbated stock declines associated with heavy fishing pressure and episodic storm perturbation. Any time that a common resource becomes scarce, the user community tends to question the process of allocation and management of that resource.

The majority of the oyster fishermen in Alabama are traditional wild-harvest participants, depending on the state to maintain the viability of the coastal reefs through shell planting and to control the rate of harvest to maintain the fishery. The economic return to the state for these efforts no longer even approximates the amount expended, thus funding has evolved into a virtual entitlement. This fact becomes an emotionally charged issue when coupled with the fact that many of the fishermen think that the decline of the fishery is largely the result of poor management on the part of the state. Unfortunately, the state has little control over the natural disasters that have plagued the area in recent years.

Periods of low productivity have occured in the past, and there have been various responses by the government at all levels, ranging from federal dollars to policy decisions. One of the latter was a decision over one hundred years ago by the Alabama Legislature to add oyster culture to the list of the traditional riparian rights associated with shoreline ownership. Ala. Code § 9-12-22 (1987). This move can almost certainly be viewed as an effort to induce the investment of private money, specifically in areas where state efforts to enhance natural productivity were not successful. The legislature attempted to address the issue of the public trust by clearly specifying that natural reef areas could not be "claimed" or worked exclusively by a riparian owner, even if clearly within his defined riparian area.

Another policy decision allowed state leasing of public submerged lands to private individuals. Although such leasing diminishes the public's use of trust lands, the state clearly retained the right to revoke those leases, supposedly in an attempt to honor their public trust obligations. However, over the years the riparian owners began to offer subleases of their riparian oyster culture rights; placing another layer of private property rights on top of the public's right to use of the trust lands.

The latest effort to lease riparian areas has become the genesis for the present conflict. The problem arose when a riparian owner and leaseholder of oyster culture rights attempted to sublease reefs in an area known as Heron Bay. This attempt ran afoul of a decision by the Alabama Department of Conservation and Natural Resources that the reefs at Heron Bay met the definition of "natural reef" and as such could only be leased by the State. The 1929 decision, *Havard v. State*, 23 Ala. App. 228, 124 So. 912 (1929) supports this position, finding that "the overwhelming weight of the evidence is to the effect that the oyster reefs in Heron Bay were natural and extended from the mouth of Gates' Bayou to Cedar Point—a distance of about one and one-half to two miles and that oystermen had been tonging the catching oysters from that reef for more than fifty years."*Havard*, 124 So. at 915. Nevertheless, the current riparian owner and the potential lessee argue that the majority of the area is actually devoid of natural reef at this time and, therefore, should be available for lease under the existing rules.

The issue may require judicial clarification. The tongers contend that the area is a traditional harvest area—suitable and in need of shell planting, and clearly located on public trust submerged lands. In a period of woefully reduced natural stocks, this user group is little inclined to support any decision that would restrict their access to what is viewed as prime oyster bottom adjacent to freshwater sources. Meanwhile, the riparian owners are organizing to

protect what they believe is a right of ownership, legally granted by the legislature. Furthermore, the lessee oyster farmers have joined them in an effort to protect their own investments and livelihoods. For example, efforts initiated last year to repeal the 1872 act which gave oyster culture rights to the riparian owners stimulated the formation of a politically active group, which can be expected to maintain their opposition to any diminution of what they believe are their property rights.

As the State of Alabama embarks on an effort to develop a workable management plan, the cloudy history of allocation will have to be addressed. Private leaseholders have had the more productive approach over the past several years, simply because they are in the riparian zone, with the best exposure to needed freshwater, and because the leaseholders have pursued independent management plans with money, hard work, and good, old-fashioned capitalistic zeal. People in this area have employed a number of mariculture methodologies—ranging from simple cultch placement within their leases, which draw from the wild population of larvae, to true farming operations, both subtidal and in upland ponds.

The path ahead for the state is complicated, since it appears that what may be workable for oyster production may conflict with the public trust doctrine. Options for the state range from a total commitment to the interests of the wild oyster fishermen, to the alternative of a carefully constructed management plan that makes the best use of private enterprise while recognizing and maintaining the state's public trust obligations.

CONCLUSION

The current situation appears to be fraught with controversy and presents a challenging opportunity to Alabama policymakers. A judicial determination of the rights of those involved in the current conflict may prove necessary, and beyond that, legislation may be needed to definitively establish the rights and obligations of all who want to use Alabama's tidal waters. Once again, the strength and flexibility of the public trust doctrine will be tested.❑

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A National Coastal and Marine Policy

Catherine Mills

INTRODUCTION

On January 18, 1989, the U.S. Environmental Protection Agency (EPA) issued a "National Coastal and Marine Policy" as an Interim EPA Policy. Since that time, other interested federal agencies with coastal and marine programs and activities of their own have also undertaken the development of similar policies. Earlier this year, EPA and these other agencies began a cooperative effort to formulate a multi-agency federal coastal and marine policy, involving a variety of federal agencies concerned with offshore or coastal activities.

EPA's National Coastal and Marine Policy (NCMP) is, to an extent, the springboard from which the federal effort is being launched. The NCMP itself grew out of EPA's Near Coastal Waters Initiative—a strategic, long term plan for near coastal waters that was completed in 1987 to provide an agency framework for protecting coastal ecosystems. Once several regional Near Coastal Waters Strategies were drafted, EPA Administrator Lee Thomas concluded that a national policy mandating significant improvements in the current management and regulatory regime was necessary to stop the accelerating degradation of our near coastal waters. Such a policy also needed to be responsive to public concerns about threats posed by medical and toxic waste, as well as other pollution that threatened the continued recreational uses of our coastal areas.

DISCUSSION

After nearly two years of development and review, in September 1988, the NCMP assumed its current form, consisting of a statement of goals and objectives. The general policy statement is as follows:

> The Environmental Protection Agency will protect, restore, and maintain the Nation's coastal and marine waters to protect human health and sustain living resources. We will take actions to further reduce pollution of these waters and limit the effect of increasing coastal populations. Future uses of these resources that are vital to the Nation's growth, economy, and security can and must be conducted in an environmentally sound manner.

The goals set forth in the NCMP (of January 18, 1989) include:

- Recovery of full recreational use of shores, beaches, and water by reducing sources of bacterial and other contamination, plastics, floatables, and debris.
- Restoration of the Nation's shell-fisheries and protection of marine mammals and living resources by controlling pollution and causes of habitat destruction and loss.
- Minimization of the use of coastal and marine waters for waste disposal by strictly limiting ocean dumping, tightening controls on land-based sources, and establishing aggressive programs to reduce the amount of waste generated by our society.
- Greater understanding of the effects of pollution on complex coastal and marine ecosystems by expanding scientific research and monitoring programs, and the development of new technology.
- Leadership by the United States in protection of the world's oceans by aggressively promoting international efforts to stop pollution and protect critical marine habitats and living resources.

This EPA Policy was sent in draft stages to federal and state agencies for review and comment, all of which unanimously supported the concept of development of a truly national policy that would be broader than the NCMP and include a spectrum of agencies.

Issued as an interim policy, the NCMP has not yet been finalized. Its continued evolution will be determined in part by the NCMP Standing Committee, which was recently appointed by Administrator William Reilly to oversee the internal implementation of the policy. The Standing Committee began its work by directing each EPA Headquarters program office to develop an Action Plan for NCMP objectives within its purview.

Each EPA Headquarters office has since produced a draft NCMP Action Plan, some more specific and thorough than others. The Agency is in the process of obtaining and responding to review comments on these Action Plans from its regional offices. The intent of the Standing Committee is to gain insight from some of the Regions that have a strong focus on coastal waters as a geographical area, or that have responded to the Near Coastal Waters Initiative by developing their own strategies. These Regions have responded with specific recommendations to the Agency as to the adequacy of Headquarters Action Plans in supporting regional coastal waters programs. The next step will be the revision of EPA Action Plans in the respective Headquarters offices in an effort to focus on implementation of the NCMP in a manner that is supportive of the Regions.

Meanwhile, EPA is meeting with other federal agencies —including the U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, the U.S. Army Corps of Engineers, the Minerals Management Service, the Department of Energy, the U.S. Coast Guard, and others—in a joint effort to create a Federal Coastal and Marine Policy that considers the scope and breadth of the programs and mandates of each participating agency. It was recently agreed among the agencies that the NCMP (still in draft form) will be elevated to the Domestic Policy Council, which has already expressed great interest in proceeding with the active participation of all appropriate federal agencies. However, this does not promise to be a "fast-burn" project; it seems likely at this point that the development of a national energy policy will supercede further progress with a national coastal and marine policy.

CONCLUSION

A purposeful, integrated, cross-media approach for the many federal activities that affect coastal resources is critically dependent upon continued good faith efforts by the agencies participating in the development of a federal policy. While the national policy seems to have been "elevated" to the back burner, interagency efforts to actively pursue improved coordination should not be shunted aside. Perhaps an interim measure that would serve more quickly to translate broad policy statements into coordinated action would be for the agencies that have worked to arrive this far with the policy to proceed with developing their own internal Action Plans to implement the goals of the draft policy.❑

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Fowl River Protective Association, Inc. v. Board of Water and Sewer Commissioners of the City of Mobile

NO. 88-561 (Sup. Ct. Ala., May 25, 1990)

Court overules lower court holding that approved Commission's interpretation of state water anti-degradation policy

INTRODUCTION

This case grew out of a decision by the Alabama Water Improvement Commission (AWIC), the predecessor state agency to Alabama Department of Environmental Management (ADEM), which approved the issuance of a National Pollutant and Elimination System (NPDES) permit to the Board of Water and Sewer Commissioners of the City of Mobile (Sewer Board). This permit allowed the Sewer Board to discharge up to twenty-five million gallons of sewage per day into waters about one-half mile from the western shore of Mobile Bay, in an area called Theodore Outfall. Fowl River Protective Association, Inc. and South Alabama Seafood Association (hereinafter referred to as Fowl River) filed an administrative appeal against the issuance of this permit. Fowl River argued that the permit should not have been issued since it would violate Alabama's antidegradation policy, which is a policy implemented by the State of Alabama for the purpose of maintaining, conserving, and improving the quality of public water supplies, and to provide for the prevention, abatement, and control of new or existing water pollution. Under Alabama regulations, the waters are put into classifications according to quality. ADEM Admin.Code R.335-6-11-.01. The policy provides that waters of a quality higher than that established by the standards shall be maintained at that high quality, but the commission has the authority to increase the discharge of wastes into high quality water upon a showing of economic necessity. ADEM Admin. Code Chap, 6-10, pp. 10-3, 10-4.

In response to Fowl River's appeal, AWIC appointed a hearing officer to conduct an administrative hearing. While the appeal was pending, the Alabama Legislature created ADEM and Alabama Environmental Management Commission (Commission) to replace AWIC. Ala. Code § 22-22A-1 (1975). Subsequently, the hearing officer submitted an opinion with recommendations to the Commission. The commission adopted the officer's opinion, and approved the issuance of the permit with modifications. These modifications reduced the amount of fecal coliform bacteria allowed, and reduced by ten percent the allowance for total suspended solids, total phosphorous, total iron, total aluminum, and total dissolved solids.

Fowl River appealed the commission's decision to the Circuit Court of Mobile County. The circuit court found nothing improper concerning ADEM's interpretation of the state's antidegradation policy, but reversed and remanded the case to the commission for a further study of a phenomenon in Mobile Bay called "stratification." ADEM, the Commission, and the Sewer Board appealed, and Fowl River cross-appealed. The court of civil appeals reversed the circuit court's holding that remanded the case to the Commission. The Supreme Court of Alabama reversed the decision by the court of civil appeals to grant the issuance of the permit.

DISCUSSION

The Environmental Protection Agency (EPA) was given the authority to administer the National Pollutant Discharge and Elimination System (NPDES) program and to issue permits pursuant to it when Congress passed the federal Clean Water Act, 33 U.S.C.A. §§ 1251-1342 (1986). The Clean Water Act gave EPA the authority to promulgate regulations to set water quality standards for those states that wish to issue their own NPDES permits. In accordance with this statutory authority, EPA adopted water quality standards applicable to the states in 40 C.F.R., § 131 (1989). Part of that provision is 40 C.F.R. § 131.12, which sets out the national antidegradation policy. Alabama's antidegradation policy is consistent with the national policy.

ADEM must administer Alabama's antidegradation policy pursuant to federal statutes and regulations. ADEM implements this policy by using water quality standards which provide specific scientific and technical criteria for evaluating water cleanliness. ADEM Admin. Code R. 335-6-10-6. Additionally, water quality standards are established according to the water use. In Alabama, the water use classifications are public water supply, swimming and other whole body water-contact sports, shellfish harvesting, fish and wildlife, agricultural and industrial water supply, industrial operations, and navigation. ADEM Admin. Code R. 335-6-11-.01. There is not any water in Alabama with a rating higher than a public water supply rating.

The Supreme Court of Alabama agreed with Fowl River that the NPDES permit should not have been approved by the Commission. The court concluded this for several

reasons. First, it found that ADEM and the hearing officer did not interpret Alabama's antidegradation policy properly. Second, in the court's opinion the facts showed that the testing method, known as the dynamic estuary model (DEM), which was used to determine the maximum waste load allocations to be discharged in Mobile Bay, had many deficiencies. Third, the court found that the court of civil appeals erred when it only addressed stratification in terms of fecal coliform bacteria.

The hearing officer and the Commission argued that the antidegradation policy did not apply to Mobile Bay, because the policy did not apply to waters that are not of a quality higher than public water supply, and Mobile Bay did not have a water quality higher than public water supply use. The court rejected this argument, because if it was allowed to stand, the antidegradation policy would not apply to any water in the State of Alabama, and because by its own terms the policy applies to the waters in the state. In addition, if this was the case, the policy would not realize its purpose which is to conserve, protect, maintain, and improve the waters of the nation by controlling water pollution. ADEM Admin. Code Chap. 6-10, pp. 10-3, 10-4.

The court also found that the dynamic estuary model (DEM) was unable to adequately compensate for stratification in the Bay, due to deficiencies in the model. One fault in the model is that it is only two dimensional, when a three dimensional model is needed to measure the salinity level in the water, which is a cause of stratification. The DEM uses only one vertical average for salinity.

Another vitally important deficiency in the model is that it assumes a homogenous water mixture. The DEM assumes that the effluent will mix with all of the water, but with stratification present, the effluent will only mix with the water closest to its own density, if there is any mixing at all. Thus, overestimating the amount of effluent which may be discharged can be detrimental to marine life, because the effluent contains chemical and biochemical materials that react with the water and organisms in it to consume dissolved oxygen, which is necessary for the continued existence of marine life.

The court was very concerned over why the decision to issue the NPDES permit was not considered in relation to dissolved oxygen. The decision to issue the permit had been considered in terms of fecal coliform bacteria. As far as the latter was concerned, the standard was met. However, in relations to dissolved oxygen, even if that standard is met at the point of discharge, there is no guarantee that it will be met in other parts of the Bay, because oxygen demanding materials continue to deplete dissolved oxygen concentrations even after discharge.

Dr. Blancher, a Professor of Ecology at the University of South Alabama, testified that water quality violations may result from consumption of the dissolved oxygen by oxygen demanding materials. The Environmental Impact Statement (EIS), which was prepared by the Corps of Engineers went on to say, in more definite terms, that the waste load allocation estimated by the DEM would have to be less than the present estimate to meet oxygen standards. After considering these and other facts, the court concluded that the NPDES permit should not have been issued.

CONCLUSION

States issuing NPDES permits are bound by federal statutes and EPA regulations. As part of the EPA-administered NPDES program, water standards are established, and required to be maintained, as part of a national antidegradation policy. Alabama's own antidegradation policy is consistent with the national policy. The Supreme Court of Alabama held that if the issuance of the permit was upheld, Alabama's antidegradation policy would be violated. This is true in light of ADEM's misinterpretation of the antidegradation policy, overestimation by the DEM model of the amount of effluent allowable for discharge into stratified waters, and the effect this overestimation has on dissolved oxygen. Accordingly, the court held that ADEM did not have the authority to issue a NPDES permit.❑

Ronnie Jackson

National Solid Waste Management Association, and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management

No. 90-7047 (11th Cir. Aug. 8, 1990)

U.S. Court of Appeals for the Eleventh Circuit strikes down Alabama ban on importation of hazardous waste as unconstitutional

INTRODUCTION

Emelle, Alabama is the location of the country's largest, and Alabama's only, hazardous waste management facility. Until recently, the Emelle site accepted shipments of hazardous waste from forty-eight states and the District of Columbia. Chemical Waste Management, Inc. (ChemWaste), the owner of the Emelle facility, along with National Solid Wastes Management Association, a trade association for the waste management industry, brought this suit challenging Alabama legislation. The law in question is Ala. Code § 22-30-11 (Supp. 1989), known as the Holley Bill, which prevents waste management facilities in Alabama from accepting hazardous waste from other states unless the other states have met certain statutory requirements. Chemwaste also challenged two sets of Alabama regulations: one that requires certain wastes to be pretreated before disposal, and another that requires generators of hazardous wastes to receive state approval before shipping wastes to facilities in Alabama.

ChemWaste challenged the Holley Bill and the state administrative regulations on the grounds that they violated the commerce clause of the U.S. Constitution, and that they were preempted by federal law. The district court examined the questioned act and regulations and upheld their constitutionality. However, upon appeal by ChemWaste, the Court of Appeals for the Eleventh Circuit disagreed, and held that the law and the regulations were unconstitutional for both of the alleged reasons: because they violated the commerce clause, and because they were preempted by federal law.

THE HOLLEY BILL

The United States Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9801-9675 (1982 & Supp 1987) (CERCLA) in an effort to accomplish the cleanup of hazardous waste sites. CERCLA established liability standards for persons responsible for unsafe disposal sites, and created "Superfund," which is a federal fund available for the government to use when the responsible parties do not conduct cleanup efforts.

Part of CERCLA's initiative involves the implementation of a safe hazardous waste program, including the creation of new hazardous waste facilities. To prod states into developing programs that would insure continued disposal capacity, Congress amended CERCLA in 1986, by enacting the Superfund Amendments and Reauthorization Act (codified in scattered sections of 42 U.S.C. (1982 & Supp. 1987) (SARA). SARA requires that each state present a proposal to the Environmental Protection Agency (EPA) showing that the state will have the adequate capacity to dispose of hazardous waste generated within its borders for the next twenty years. If the state does not provide such capacity assurances, it is barred from receiving any Superfund money for cleanup actions it may need to take.

When Congress enacted SARA, it recognized that not every state would be able to create sufficient disposal facilities. Therefore, SARA contemplates that capacity assurance requirements may be met by entering into agreements with other states or with private companies to use their facilities. Importing states are not required to enter into interstate agreements, but most need to because most states cannot adequately dispose of all types of hazardous wastes on their own.

Alabama's concern over the amount of other states' hazardous waste being disposed of within its own borders by virtue of SARA's capacity assurance requirement prompted the passage of the Holley Bill. This legislation prohibits hazardous waste facilities in the state from accepting wastes from any other state that either (1) prohibits disposal within its own borders and has no facility; or, (2) has no facility of its own and has not entered into any interstate agreement for disposal to which Alabama is a signatory. Under authority of this bill, Alabama issued a list of states from which it would not accept hazardous wastes. As of September 13, 1989 (the effective date of the Holley Bill), the Emelle site was precluded from accepting hazardous waste from twenty-two states and the District of Columbia. *National Solid Waste Management Association*, No. 90-7047 slip op. at 11.

Commerce Clause.
The commerce clause of theU.S.Constitution, Art.I, 8 cl. 3, gives Congress the exclusive power to regulate interstate commerce. One of ChemWaste's assertions was that the Holley Bill violated the commerce clause, an argument with which the court agreed. The reasoning it gave for this conclusion was that hazardous waste is an object of commerce, that the bill erects "a barrier to interstate commerce," and that Congress did not "authorize this restriction" on interstate commerce. The following discussion briefly explains these concepts and how the court applied them.

Object of Commerce
The Supreme Court has held that all objects of interstate commerce merit commerce clause protection. However, a product can be exempted from classification as an object if the dangers involved in its movement outweigh its worth in interstate commerce. Alabama's contention was that such was the case with hazardous waste being brought into the state; that it is inherently dangerous and also, as waste, valueless. However, the court found that the dangers did not outweigh the worth of travel in interstate commerce of these wastes, noting that state and federal governments have developed a comprehensive scheme for the regulation and management of hazardous waste. Furthermore, the fact that the Holley Bill does not ban hazardous waste from all states suggests that the legislature did not enact the ban because it felt hazardous waste was too inherently dangerous to be an object of interstate commerce. *Id.* at 14.

Barrier to Interstate Commerce
If a 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. Moreover, a court will look to see if the purpose of a statute is purely "economic protectionism." If it is, the statute will be struck down as violative of the commerce clause.

The Eleventh Circuit found that Alabama's ban was not directed toward, as the state contended, the legitimate state concern of complying with SARA's capacity assurance requirements. Instead, the court found that the law was a protectionist measure not adequately based on a legitimate state concern. The Holley Bill did not regulate evenhandedly, and its effects on interstate commerce are more than incidental. The fact that Alabama closed its borders to some states and not others indicated that the motivation behind the bill was not to save all its disposal capacity for wastes produced in the state.
Id. at 18.

Congressional Authorization
Even if a state statute erects a barrier to interstate commerce, it will be upheld where Congress has authorized the state to regulate in such a manner. Such congressional intent must, however, be unequivocally clear.

Alabama claimed that CERCLA and SARA gave the states more responsibility for hazardous waste management, and in doing effected a redistribution of power over interstate commerce in the realm of transport of hazardous waste. However, the court's interpretation of CERCLA and SARA found nothing that would authorize Alabama to restrict the free movement of hazardous waste in interstate commerce. As it pointed out, if Congress had intended to allow the states to restrict the movement of hazardous wastes, it would plainly say so. *Id.* at 21.

STATE ADMINISTRATIVE REGULATIONS

While CERCLA is designed to cleanup unsafe hazardous waste disposal sites, the federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992 (1982 & Supp. 1987) (RCRA) establishes a "cradle to the grave" regulatory program for the generation, storage, and disposal of hazardous wastes in the nation. Because it became clear that many land disposal facilities were inadequate to dispose of toxic substances without serious threats to public health and the environment, Congress amended RCRA in 1984, prohibiting the disposal of certain highly toxic substances in landfills, unless those wastes were first treated to reduce their toxicity. However, because of a nationwide shortage of other types of disposal areas, EPA exempted from this "land disposal ban" certain waste generated at cleanups conducted under CERCLA or RCRA. As EPA put it, "variances" were granted from the ban for certain wastes until Nov. 8, 1990.

After Congress' amendment to RCRA imposing the land disposal ban, Alabama amended its own hazardous waste program by adopting the challenged state land disposal ban. The regulation is identical to the federal ban, except that Alabama did not allow for the EPA variances for certain CERCLA and RCRA wastes. Additionally, to facilitate enforcement of the ban, Alabama adopted another regulation that was also challenged by ChemWaste. This regulation prohibited a waste management facility in Alabama from accepting waste without specific approval from the state.

ChemWaste claimed that as a result of the regulations, it had been forced to refuse shipments of waste from several CERCLA or RCRA cleanup sites that it would have been

able to accept under federal regulations. Furthermore, it claimed that it been forced to refuse new requests for shipments, and that it had been necessary for it to refuse to honor obligation under existing contracts.

The court found that to the extent that the Alabama regulations failed to allow the same variances as that allowed by EPA, the federal regulations were preempted and thus violated the supremacy clause of the Constitution. *Id.* at 25. Furthermore, the state's pre-approval requirement put an impermissible burden on interstate commerce, and thus was also unconstitutional. *Id.*

CONCLUSION

In this opinion, the court acknowledged more than once that minimizing the dangers to public health and the environment by reducing the risk created by untreated and uncontrolled hazardous wastes is an important task, and one that must be addressed by society. However, Alabama's statute banning waste based solely on the state of origin, and the state's substantially burdensome pre-approval requirements could not stand in the face of the Constitution's commerce clause or supremacy clause. As the Eleventh Circuit stated, "The Constitution...may not be encroached upon, even in an attempt to do something good for the environment." *Id.* at 31.❑

Laura S. Howorth

Dycus v. Sillers

557 So. 2d 486 (Miss. 1990)

Mississippi Supreme Court affirms standards for determining ownership rights to waters in the state

INTRODUCTION

At times it becomes important to determine ownership rights to property. This case involves the battle for ownership of a fishin' hole. The Merigold Blue Hole lies adjacent to Lake Beulah, an oxbow lake of the Mississippi River, located in Bolivar County, Mississippi. The Merigold Blue Hole is connected to Lake Beulah and to the Mississippi River by the Beulah Crevasse. For years people have fished in the Blue Hole, gaining access to the lake by the crevasse. The practice continued although the landowners leased the land, including the fishin' hole, to a hunting and fishing club. After the club leased the property, the public was no longer welcome to fish the Blue Hole. Repeated attempts to keep the public from fishing in the Blue Hole were unsuccessful. Consequently, the landowners and the Merigold Hunting Club, Inc. (by virtue of their leasehold) brought suit to quiet and confirm title and to enjoin the general public from the waters of the crevasse.

DISCUSSION

Mississippi enacted laws in 1840 making any navigable body of water available for use by the general public by declaring these waters "public highways." Miss. Code Ann. § 51-3-3 (1972). A series of court cases interpreting the law then followed. Waterways were regarded either as "public highways" or private waters. If the water was a "public highway" it was available for use by the general public. If the waterway was private, the land owner had sole right to use of the water for any purpose.

Courts consider a number of factors in determining whether a waterway is "public" or "private." The factors include the navigability of the waterway, capacity of the waterway, and the manner in which the waterway was made. Depending on the outcome of these determinations, a waterway is either accessible to the general public because it is a "public highway," or privately owned and not accessible to the public.

Navigability, as defined in *Downes v. Crosby Chemicals, Inc.*, 234 So. 2d 919 (Miss. 1970), is a measurement of the waterway's ability to sustain commercial traffic. Commercial traffic includes both large shipping vessels and the smaller boats of commercial fishermen. A shallow waterway incapable of sustaining boat traffic is not considered navigable. Capacity of the water is also considered. Miss. Code Ann. § 1-3-31 (1972). Capacity is a measurement of the flow of the water. The waterway is studied for the movement of the waters in the waterway. If the water is not "calm" or "at rest," the water is said to have a flow. The Mississippi Legislature enacted a law indicating that the public had rights of "free transportation . . . to fish and engage in water sports" on "all natural flowing streams in this state having a mean annual flow of not less than one hundred cubic feet per second." Miss. Code Ann. § 51-1-4 (Supp. 1989).

Waterways develop naturally or through the efforts of man. Examples of manmade waterways include ponds bulldozed out in farm lands for different purposes, levees and dikes dredged out to widen waterways and assist their flow, irrigation systems created to move water onto farmlands and crops, and drainage ditches. All artificially created waterways remain the private property of the landowners on which the water lies. *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 520 (Miss. 1986) *aff'd*

sub nom. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1986), *reh. den.* 486 U.S. 1018 (1988). If a lake is manmade or artificial, the record title holders own the waters and all life within them. *Black v. Williams,* 417 So. 2d 911, 912 (Miss. 1982).

Waterways can change course naturally or they may be dredged or filled by man. The two primary methods by which a waterway changes course naturally are avulsion (a sudden and noticeable loss or addition to land caused by the action of water, or by a sudden change in the bed or course of a stream) and accretion (a change in the course of a waterway caused by a gradual build up of silt over time) *Black's Law Dictionary* (5th ed. 1983). Natural changes in the course of a waterway will not affect the public's right to use waters formed by these acts. Acts of man which result in changes in the course of a waterway would affect ownership of the waterway and access to the waterway by the public at large. Any waterway altered by man falls into the private ownership of the adjacent property owner. Furthermore, if the waterway must be dredged or filled to maintain the navigability of the passageway the waters will not be considered accessible to the public. If the waterway and all passages to the waterway are naturally made, then the public has the right to use the waters for any purpose under the Public Trust Doctrine. The Public Trust Doctrine holds that all lands and waters owned by the state are available for use by the public. This includes use for fishing purposes, as fishing has been said to be a primary reason for the enactment of the doctrine. *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, (1988) *reh. den.* 486 U.S. 1018 (1988).

Merigold Blue Hole

The controversy over the Merigold Blue Hole centered on whether the public had a right to fish on the waters. The key determination in the case was whether Beulah Crevasse, the only access to the Blue Hole, was by public or private passage. Landowners filed suit against the public indicating that all entrance to the waters of the Blue Hole by the fishing public constituted trespass, because as owners of the land surrounding the Blue Hole they owned sole title and right to the use of the waters. The Sillers represented the landowners and the Merigold Hunting Club, Inc. in the action. The landowners had leased the rights to hunt and fish on the property to the Merigold Hunting Club.

The fishing public was represented by James Dycus. Dycus claimed the right to fish the waters of the Blue Hole, arguing that the water was owned by the state because of the Public Trust Doctrine. Dycus claimed the lake was part of the public waterway because of the crevasse which joined the lake to the Mississippi River. Dycus noted that at no time did the fishing public trespass on the *land* of the owners to gain access to the waters of the Blue Hole. Dycus argued that because entrance to the Blue Hole was over public waterways, no trespass action could lie against the fishing public. Public access to the waters within the public trust must not interfere with the rights of land owners. "Each person who can, without trespass, reach the waters of an oxbow lake may fish there to his heart's content, subject only to a like use by others." *State Game and Fish Comm'n v. Louis Fritz Co.,* 187 Miss. 539, 564, 193 So. 9, 11 (1940).

To determine the outcome of the case, the court had to decide whether the Merigold Blue Hole was within the public trust and available for use by the general public, or if the Blue Hole was only available to the private owners (and leaseholders). To reach the decision, the court considered the history of the formation of the Merigold Blue Hole and the waters adjoining the hole that permitted the fishing public access to the hole. If the Merigold Blue Hole and the surrounding waters were completely within the public trust, all the fishing public may use the waters. However, if a part of the access to the hole is private, then the land owners and the leaseholders (by virtue of the landowners title to the land) hold private rights to the fishing in the Merigold Blue Hole.

Classification of the Waters

The Mississippi River and Lake Beulah constitute the first bodies of water that the public must traverse to reach the Merigold Blue Hole to fish. The Act of Congress concerning creation of the State of Mississippi declared that "the River Mississippi, and the navigable rivers and waters leading into the same...shall be common highways, and for ever free...." 3 Stat. 348, 349 (1817). Oxbow lakes are considered part of the Mississippi River. Since Lake Beulah is an oxbow lake leading into the Mississippi, it is part of the river as defined above. At trial, both parties stipulated that the waters of Lake Beulah were public.

Even without the congressional act, the court declared that Beulah Lake had become public through the doctrine of prescription. The doctrine of prescription maintains that if the public has access to waters for more than ten years and continuously uses those waters during that time, the waters then belong to the state by adverse possession to hold in trust for the people of the state. The term "adverse possession" refers to a method of acquiring ownership of real property by open and continuous use of the property for a required number of years under certain conditions. *Black's Law Dictionary* 49 (5th ed. 1983). The fishing public had used Lake Beulah for over ten years as a fishing spot, therefore, they acquired the right to continue fishing on the lake. This right continues even if the water moves by

avulsion.

The owner of land surrounding a landlocked body of water has complete ownership of that water. If the body of water *becomes* landlocked, or if the structure of natural waterway is altered by acts of man, the landowner acquires ownership and use of the body of water. Therefore, if the Merigold Blue Hole was a landlocked body of water, or if any part of the access to the Blue Hole was a creation of man, then the landowners could keep the public from using the waters of the Blue Hole, because they would be the sole owners of the waters. *Black v. Williams*, 417 So. 2d 911, 912 (Miss. 1982).

On the other hand, if the crevasse or the Blue Hole, which were created by natural movements of the river and Lake Beulah, remained attached to Lake Beulah through the natural shifting of waterways, the waters would remain within the public trust, because natural movements of the waters do not change ownership. *Mississippi v. Arkansas*, 415 U.S. 289, 291 (1974).

Beulah Crevasse is the only passage into the Blue Hole, from public waters (the Mississippi River and Lake Beulah) without trespassing on land under private ownership. Therefore, in order to allow the public continued fishing in the Blue Hole, the access had to be through public waters. The court had to consider whether natural forces created Beulah Crevasse and if the crevasse *remained* navigable by forces of nature and not through man-made efforts. According to standards set out in *Downes v. Crosby Chemicals, Inc.*, 234 So. 2d 916, 919-20 (Miss. 1970), a waterway must remain capable of supporting substantial navigation by commercial fisherman for the better part of the year without efforts of man to maintain navigability in order to keep the water in the public trust. Prior to a severe flood in 1912, the crevasse was wide and deep enough naturally to sustain boat traffic. The flood of 1912 changed the status of the crevasse from a channel connected to Beulah Lake to a landlocked body of water. Prior to 1929 the crevasse dried to the point that dredging was required to recreate the link between the river and Beulah Lake. The waters were rejoined by the manmade outlet created by the U.S. Army Corps of Engineers by clearing the passage between Lake Beulah and the crevasse. The dredging activity caused the passage to become an artificially created waterway, owned by the landowners and accessible only to them.

Because the crevasse was landlocked prior to the dredging and because it was the *dredging*, and not a natural force that reconnected Beulah Crevasse with Beulah Lake, the court ruled that the crevasse was owned by the landowners. In order for the public to gain access to the Blue Hole they would have to trespass on the waterway owned by landowners—the Beulah Crevasse. The Merigold Blue Hole was landlocked at the time the crevasse dried to the point of being unnavigable. The landlocking made both Beulah Crevasse and the Blue Hole part of the private ownership of the surrounding landowners. Trespass on the private waters of the surrounding landowners was required for the public to reach the Blue Hole, thus the waters of the Merigold Blue Hole were not within the public trust, therefore not available for public fishing.

CONCLUSION

The surface water of the Merigold Blue Hole was found to be accessible only to the private landowners. The flood of 1912 landlocked the Blue Hole and Beulah Crevasse which previously had connected the two bodies of water to an oxbow lake, Lake Beulah. The landlocking of the waters and the subsequent dredging by the Corps to reconnect the two waterways caused the court to rule that the landowners had exclusive ownership of the waters of Merigold Blue Hole. By virtue of their leasehold gained from the landowners, the Merigold Hunting Club was entitled to prosecute the fishing public for trespass on the waters of the Blue Hole if they had gained access to the hole through the Beulah Crevasse. All landlocked waters and waters created by man remain within the sole ownership of the private property owner on which the water lies. This case upheld a previous line of cases in Mississippi with the same outcome. ❑

Helen Hancock

Recent Legislation: Mississippi

INTRODUCTION

The Mississippi Legislature passed several new bills and amendments to existing laws concerning the environment and coastal issues during its 1990 session. The legislature appeared very concerned about waste management, which is reflected in extensive legislation in that area. The following will briefly summarize this and other legislation.

Wildlife Conservation

Senate bill 2934 amends Miss Code Ann. § 49-15-21 (1972) and creates a Conservative Officers' Reserve Unit for the

purpose of assisting the conservation officers in the performance of their duties. The executive director of the Commission on Wildlife, Fisheries and Parks may require additional training for the enforcement officers reserve unit. Besides requiring additional training, the commission may issue uniform and equipment to the reserve officers if it is necessary for them to adequately assist law enforcement officers in their duties. The Act became effective July 1, 1990.

Senate bill 2697 prohibits commercial fishing activity in the Pascagoula River System. Any person found guilty of violating the law shall be charged with a misdemeanor and shall be fined not less than one hundred dollars ($100.00) or not more than five hundred dollars ($500.00) or imprisoned not more than three (3) months, or both. The law became effective July 1, 1990.

Senate bill 2977 amends Miss. Code Ann.§ 49-15-71 (1972) by prohibiting commercial taking of redfish on any boat or vessel using a purse seine in the territorial jurisdiction of the state. It shall also be unlawful to take or land redfish below minimum legal size as established by regulations promulgated by the Bureau of Marine Resources. Any person who violates the provisions of this section shall be guilty of a misdemeanor and shall be fined in the amount of one-hundred dollars ($100.00) for each redfish in violation of the act.

The bill authorizes the Department of Wildlife, Fisheries and Parks, through the Bureau of Marine Resources, to develop a redfish management plan, and to promulgate regulations to implement the plan. The amendment became effective April 9, 1990, and has a repealer that will become effective July 1, 1994.

Aquatic Products

Senate bill 2420 amends the Aquatic Products Marketing Association Act, Miss Code Ann. § 79-21-53 (1972) by revising the definition of "commercial fishing" to include all persons engaged in the catching, freezing, marketing, processing, transportation, wholesaling or otherwise involved in the utilization of aquatic products from the salt waters of the State of Mississippi or the United States for commercial purposes. The bill became effective March 15, 1990.

Cruise Vessels

Senate bill 2744 amends various provisions of the Mississippi Code relating to the operation of cruise vessels, gambling, and alcoholic beverages. The bill provides that the operator of any cruise vessel or vessels operating within the territorial jurisdiction of the State of Mississippi shall be required to apply for and obtain a privilege license from the State Tax Commission. The commission may investigate for the purpose of prosecution any suspected criminal violation of the provisions. The State Tax Commission shall evaluate and consider any application for a license to operate a cruise vessel.

A bifurcated application process for a license to operate a cruise vessel or vessels is established. This bifurcated process requires the issuance of a privilege license to the applicant and a separate certificate of suitability for each cruise vessel operated by the license.

The possession, repair and replacement of gambling equipment on the business premises appurtenant to cruise vessels or other vessels is allowed. However, any person constructing or repairing any such vessel within a municipality shall comply with all municipal ordinances protecting the general health or safety of the residents. The Act became effective April 1, 1990.

Senate bill 2837 amends numerous provisions of the code that prohibit gambling on cruise vessels. The bill provides for a petitioned referendum on the question of prohibiting certain gambling on a vessel operating on the Mississippi River or navigable waters within any county bordering on the Mississippi River. The minimum distance from shore where gambling may be conducted is eliminated by this Act. The Act became effective April 1, 1990.

Hazardous Waste Facility Siting

Senate bill 2525 known as the Mississippi Hazardous Waste Facility Siting Act of 1990, describes a process to identify appropriate hazardous waste management techniques and to locate a state commercial hazardous waste management facility and if necessary to design, finance, construct, and operate such a facility. The Environmental Protection Council is granted authority by this Act to carry out the purpose of the legislation. All contracts shall be executed by the Department of Environmental Quality and approved by the council.

The Department of Finance and Administration shall have the power to operate a waste management facility, and in conjunction with the Department of Environment Quality shall develop schedules of user fees, franchise fees and other charges and penalties.

The Act creates the Hazardous Waste Facility Siting

Authority, composed of persons with technical, legal, and financial expertise, which shall adopt rules specifying the criteria and methodology for site selections, etc. This Act creates the Hazardous Waste Technical Siting Committee for the purpose of selecting sites for a management facility, and to recommend such sites to the authority.

The Act creates in the State Treasury, a fund to be designated as the "Perpetual Care Fund" for emergency response and decontamination at the state commercial hazardous waste management facility and for other purposes. The Act became effective March 31, 1990.

Waste Minimization Act

Senate bill 2568, known as the Mississippi Comprehensive Multimedia Waste Minimization Act of 1990, promotes waste minimization, requires state recycling programs, encourages the recycling industry and promotes public education on waste management issues. This Act creates the Mississippi Comprehensive Multimedia Waste Minimization Program to compile, organize and make available for distribution information on waste minimization techniques and procedures.

The Act amends Miss. Code Ann. § 37-7-15 (1972) by giving commodities grown, processed, or manufactured within the state preference over other competitive bids. The Act authorizes the Department of Finance and Administration to adopt bid and product specifications to be utilized by all state agencies that encourage the procurement of commodities made from recovered materials.

The Act amends Miss. Code Ann. § 25-61-9 (1972), by exempting industry waste minimization plans from open records provisions. This bill became effective June 1, 1990.

Environment

House bill 913 amends numerous provisions of the Asbestos Abatement Accreditation and Certification Act by clarifying certain definitions in reference to asbestos abatement requirements and authorizing the commission to adopt additional definitions to carry out the intent of the Act. In addition to this authority, the commission may adopt regulations for certification of contractors, inspectors, management planners, project designers, supervisors, and workers. All the regulations promulgated by the commission shall become effective November 1, 1990.

Under this Act, the Board of Trustees of State Institutions has the authority to designate a university to offer all of the training courses set forth in the regulations and accreditation plan. The university may charge a fee to offset the cost of offering the courses. The Act became effective April 2, 1990.

House bill 803 provides for hazardous waste disposal fees and certain reports regarding hazardous waste; and it provides that commercial solid waste facilities shall pay a per tonnage fee imposed by the state or the fee imposed by the state from which the hazardous waste originated. This Act amends Miss. Code Ann. §§ 17-17-3 through 17-17-53 (1972). This Act became effective June 1, 1990.

House bill 912 imposes a temporary moratorium on the processing of permit applications, the issuance of permits and the transfer of permits for new or expanded nonhazardous solid waste facilities for the incineration, treatment, processing or disposal of solid waste. The Act applies to any applications for permits and transfers of permits before the Permit Board during the moratorium period. This Act became effective April 2, 1990.

House bill 1209 amends Miss. Code Ann. § 49-2-21 (1972) by authorizing the executive director to employ such legal counsel as may be necessary for the operation of the Department of Environmental Quality. The Act amends Miss. Code Ann. § 49-4-21 (1972) by authorizing the Attorney General to designate one of his deputies or assistants to be counsel and attorney for the commission and department in all actions. The Act became effective March 26, 1990.

House bill 402 provides for an environmental protection fee of two-tenths of one cent per gallon be levied upon any bonded distributor who sells or delivers motor fuels to a retailer or user in this state. The State Tax Commission has the authority to conduct an incentive program which provides a grace period from May 18, 1988 through June 30, 1992, in order to encourage early detection, reporting, and cleanup of contamination from leaking underground tanks containing fuel. This Act became effective July 1, 1990.

CONCLUSION

The 1990 Mississippi Legislature passed several new bills and made amendments to existing laws on environmental and coastal issues. The Mississippi Comprehensive Multimedia Waste Minimization Act of 1990 was passed to promote waste minimization. The goal of the Act is to reduce or minimize the generation and toxicity, or other characteristics, of waste generated within Mississippi by a minimum of twenty-five percent (25%) by January 1, 1996.

Further concerns for waste management were reflected in the Mississippi Hazardous Waste Facility Siting Act of 1990, which creates a framework for selecting a commercial hazardous waste facility within the state by January 1, 1992.

In other legislation, commercial taking of redfish is prohibited. The legislature clarified and amended certain code sections relating to gambling on cruise vessels. The legislature also addressed the problem with asbestos containing materials and sought legislation to reduce the problem. Anyone violating specific provisions of the Act may be subject to a civil penalty of not more than twenty-five thousand dollars ($25,000.00).❑

Ronnie D. Jackson

LAGNIAPPE

A Little Something Extra

The U.S. Coastal Guard has passed regulations that require all vessels 26 feet and over to display a durable placard to notify passengers and crew of the new dumping restrictions and penalties that are currently in effect in U.S. waters.

The Mississippi-Alabama Sea Grant Consortium has obtained a limited number of placards which meet the Coast Guard specifications. Placards similar to the one reproduced below are available from the Alabama Sea Grant Extension Service, 3940 Government Blvd., Mobile, AL 36693 or the Mississippi Sea Grant Advisory Service, 2710 Beach Blvd., Suite 1-E, Biloxi, MS 39531.

It is illegal for any vessel to dump plastic trash anywhere in the ocean or navigable waters of the United States. Annex V of the MARPOL TREATY is a new International Law for a cleaner, safer marine environment. Each violation of these requirements may result in civil penalty up to $25,000, a fine up to $50,000, and imprisonment up to 5 years.

U.S. Lakes, Rivers, Bays, Sounds and 3 miles from shore
ILLEGAL TO DUMP
Plastic & Garbage
Paper, Rags, Glass, Food, Metal, Crockery, Dunnage

3 to 12 miles
ILLEGAL TO DUMP
Plastic
Dunnage (lining & packing materials that float) also if not ground to less than one inch:
Paper, Rags, Glass, Crockery, Metal, Food

12 to 25 miles
ILLEGAL TO DUMP
Plastic
Dunnage (lining & packing materials that float)

Outside 25 miles
ILLEGAL TO DUMP
Plastic

State and local regulations may further restrict the disposal of garbage.

WORKING TOGETHER, WE CAN ALL MAKE A DIFFERENCE!

CENTER FOR MARINE CONSERVATION 1725 DeSales Street, NW Washington, DC 20036 (202) 429-5609