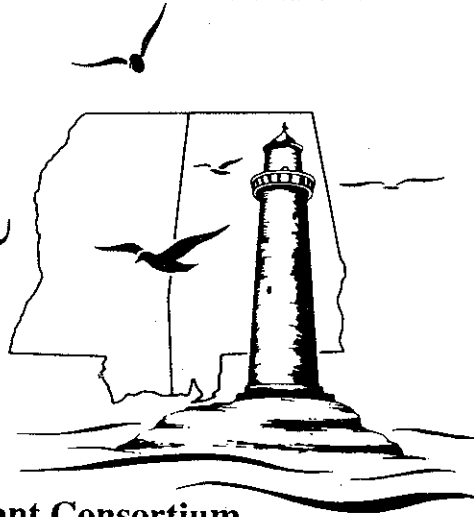


WATER LOG



**A Legal Reporter of the
Mississippi-Alabama Sea Grant Consortium**

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WATER LOG

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If you would like to receive future issues of WATER LOG free of charge, 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 WATER LOG.

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THE HAWK OUTSIDE THE JUDICIAL BUILDING: RECENT ENVIRONMENTAL CASES IN ALABAMA

Ray Vaughan

INTRODUCTION

On December 14, 1987, the Supreme Court of Alabama heard oral arguments in one of the first major environmental cases to come before that Court. Prior to the arguments, a red-tailed hawk perched in the pecan tree outside the Chief Justice's office in the front of the Judicial Building; there in downtown Montgomery was a powerful embodiment of the wild. Some considered the hawk to be an omen, a harbinger of good fortune for the case and for Alabama's environment. In all likelihood, the hawk was there to look for squirrels and pigeons to eat; it had been there on several other occasions that winter. Nonetheless, the hawk was a welcome symbol, and after the arguments were over, it left.

OVERVIEW

Concern with the environment and the problems human beings have been causing our Earth has increased dramatically in the last few decades, and Alabama is no stranger to this trend. However, in the area of environmental law, Alabama's appellate courts have only recently had the opportunity to become involved. While the federal judiciary and the courts of many of the larger states have been dealing with environmental cases for several decades and developing a large body of environmental jurisprudence, active litigation over environmental issues has just begun in Alabama. During the last few years, the appellate courts of Alabama have dealt with a number of environmental cases involving a wide range of issues; however, most of the important cases have been decided in the last few months.

This article will review these Alabama environmental cases and their implications and how they fit into the background of federal environmental law. The legislative enacting of environmental laws, both at the state and the federal levels, is an ongoing and ever evolving process and has a great impact on everything in America. However, it

is the interpretation of the statutes by the courts that gives guidance to the agencies charged with administering the acts and to the public in their efforts to protect the environment.

EARLY CASES

The courts of our state have had to deal occasionally with various health statutes and with environmental problems addressed by the torts of nuisance and trespass. See *Rushing v. Hooper-McDonald, Inc.*, 293 Ala. 56, 300 So. 2d 94 (1974) (a trespass can be committed by discharging pollutants at a point beyond the boundary of the realty), and *Borland v. Sanders Lead Co.*, 369 So. 2d 523 (Ala. 1979) (compliance with the Alabama Air Pollution Control Act does not shield a polluter from liability for damages under the torts of trespass and nuisance). However, cases under the modern federal and state environmental statutory scheme are a recent development.

In *State ex rel. Graddick v. Jebsen S. (U.K.) Ltd.*, 377 So. 2d 940 (Ala. 1979), the State attempted to collect a civil penalty provided by the Alabama Water Improvement Act¹ for an intentional discharge of pollutants into state waters without a permit. The Court held that the State had failed to state a claim upon which relief could be granted for the facts alleged in the complaint clearly showed that the discharge was accidental; indeed, the discharge was due to a ship colliding with a terminal and thereby severing pipelines that discharged pollutants into the water. Since the statute was penal in nature, the Court strictly construed the language of the statute to limit its application to intentional conduct. A different section of the Act provided for recovery for accidental discharges of pollution, but the State had not elected to proceed under that section.

In *Ross Neely Express, Inc. v. Alabama Dept. of Environmental Management*, 437 So. 2d 82 (Ala. 1983), the Supreme Court held that two Alabama Department of Environmental Management (ADEM) regulations were unconstitutional. The regulations at issue dealt with fugitive dust emissions from roads; Ross Neely trucks using an access road maintained by Ross Neely were throwing dust into the air, and ADEM sought an injunction to prevent those dust emissions. In finding both regulations unreasonably overbroad and overly restrictive of a property-owner's right to use his property in a reasonable manner, the Court stated:

While the above matters are clearly subject to the police power, and while the control of air pollution is greatly to be desired, we

find that the restraint imposed by the two regulations before us, as written, imposes a restraint upon the use of private property that is disproportionate to the amount of evil that will be corrected. Thus, they fail the test of constitutionality under *City of Russellville v. Vulcan Materials Co.*, [382 So. 2d 525 (Ala. 1980)].

437 So. 2d at 85-86.

The Court of Civil Appeals ruled on the constitutionality of the appeals procedure in the Alabama Environmental Management Act², the Act that created ADEM, in *Dawson v. Cole*, 485 So. 2d 1164 (Ala. Civ. App. 1986). Dawson appealed a National Pollution Discharge Elimination System (NPDES) permit that had been issued by ADEM to a developer in Baldwin County, and Dawson wanted to enjoin the commencement of the administrative hearing by attacking the constitutionality of the procedures for that hearing. The court held that the lack of any mechanism to postpone the "commencement" of a hearing on an appeal from an ADEM decision does not make the statute and the corresponding regulation violative of due process. Finding that the 45-day deadline for the "commencement" of a hearing was designed to ensure an aggrieved party a timely hearing, the court noted that ADEM regulations provided for a continuance of the hearing once it had been commenced, should any party so require. Dawson had also attacked the lack of prehearing discovery in the appeal process. Following federal interpretation of administrative proceedings, the court held that there is no basic constitutional right to prehearing discovery in such a situation. Further, the Act did indeed provide for some discovery.

The merits of Dawson's appeal of the permit issued to the Baldwin County developer were addressed in *Dawson v. Alabama Dept. of Environmental Management*, 529 So. 2d 1012 (Ala. Civ. App.), cert. denied, *Ex parte Dawson*, 529 So. 2d 1015 (Ala. 1988). There, the court set forth the rules that a decision of the Alabama Environmental Management Commission (AEMC), which oversees ADEM, be taken as *prima facie* just and reasonable, that a presumption of correctness attaches to that decision, and that a reviewing court may not substitute its judgment for that of AEMC as to the weight of the evidence on questions of fact. Deferring to the expertise of ADEM in environmental matters, the court upheld the issuance of the permit. The court also upheld AEMC's interpretation of the state's water antidegradation policy. In denying certiorari, the Supreme Court

stated that the denial should not be construed as approving statements of the Court of Civil Appeals regarding the scope of review; the denial of certiorari was based upon the fact that Dawson was raising constitutional claims in the petition for certiorari that were raised for the first time on appeal. The fact that the Supreme Court denied certiorari for some reason other than approval of the reasoning of the Court of Civil Appeals would later become critical, because the portion of *Dawson* upholding AEMC's interpretation of the water antidegradation policy would be overruled in the later case of *Ex parte Fowl River Protective Ass'n.*, [Ms. 88-561, May 25, 1990] ___ So. 2d ___ (Ala. 1990) (discussed below).

THE SHELL OIL DRILLING MUD CASE

The first major environmental case to gain much statewide publicity was *Ex parte Baldwin County Comm'n*, 526 So. 2d 564 (Ala. 1988), the case where the hawk was outside the Judicial Building during oral arguments. This case began with the decision of ADEM to issue to Shell Offshore Inc. (a subsidiary of Shell Oil) an NPDES permit. Required by the federal Clean Water Act³ and the state clean water act⁴, an NPDES permit is a necessary requisite for any discharge into water. The name is somewhat of a misnomer, for although the system is called "Pollution Discharge Elimination System," it provides a vehicle for new pollution sources to begin legally. Such was the application from Shell; it sought the first permit to discharge drilling muds from an offshore drilling rig into Alabama waters. Due more to interagency confusion than to design, Alabama had maintained a "no discharge" policy as to drilling muds for approximately ten years; after the consolidation of the various state environmental agencies into ADEM in 1982, Shell was the first applicant to ask that the no discharge policy be abolished.

After many months of study, ADEM decided to abolish the no discharge policy and to grant Shell a permit to discharge drilling muds and other wastes from its rig. This decision was appealed to AEMC by the Baldwin County Commission with support from the Alabama Chapter of the Sierra Club. After a hearing officer recommended that ADEM's permit to Shell be adopted by AEMC, on August 5, 1987, AEMC voted 4-3 to disapprove ADEM's action, and an order denying the permit was entered on August 10. Shell filed a motion for reconsideration, and on September 8, 1987, AEMC decided 4-3 that it had the power to reconsider its prior decision and then voted 4-3 to reverse its prior order and to approve the issuance of the permit to Shell.

Intertwined with the actions of AEMC was a lawsuit filed by the Baldwin County Commission in Montgomery Circuit Court to prevent AEMC from reconsidering its denial of the permit. The circuit court ruled prior to September 8 that the issue was not ripe, as AEMC had not yet decided that it could conduct a rehearing. On September 8, once AEMC had decided that it could reconsider its prior action, Baldwin County filed a petition for a temporary restraining order with the circuit court minutes later. Rather than wait for the court to hold a hearing, AEMC went ahead and reconsidered its prior decision and reversed it. Only hours later, the court entered an order enjoining AEMC from continuing.

Shell petitioned the Court of Civil Appeals for a writ of mandamus to the Montgomery Circuit Court to prevent the circuit court from considering Baldwin County's petition. The Court of Civil Appeals granted Shell's petition and held that since AEMC had already reconsidered its prior action, the proper method for Baldwin County to proceed was for it to appeal the granting of the permit. Baldwin County petitioned the Supreme Court for a writ of certiorari, which was granted.

In a 6-3 decision, the Supreme Court reversed the decision of the Court of Civil Appeals and held that due to the unique statutory design of AEMC (such as its exemption from portions of the Administrative Procedure Act⁵), AEMC was without jurisdiction to reconsider its order denying the permit. The Court's holding was:

AEMC was wholly without any authority to grant a rehearing or to take further action of any kind in the matter. All actions thereafter taken by AEMC, including its order of September 8, 1987, were null and void. Since there was no appeal [by Shell] from the order of August 10, 1987, the order denying Shell a permit to dump drilling waste is reinstated as the final order of AEMC.

526 So. 2d at 568.

While never reaching the substantive issue of the propriety of a permit for the discharge of drilling muds into Alabama's coastal waters, the decision represented the first major court victory for a group seeking to protect the environment in the appellate courts of Alabama. An ironic note to the case is that Shell had nearly finished its drilling operations prior to the date of the Supreme Court's decision; thus, most of the drilling muds and other wastes that Shell

had wanted to discharge into the water had already been discharged. Even though Shell discharged these wastes without a permit, as the Supreme Court's opinion held, no state agency or environmental group has ever sued Shell for those unpermitted discharges. Therefore, while the pro-environment side won in court, the victory was a paper one. Since then, Shell and Exxon have both applied to ADEM for several more permits to discharge drilling muds from other rigs in Alabama coastal waters. Those permits are presently being contested, and thus, the Supreme Court may yet have the opportunity to rule on the merits of granting a permit to discharge drilling muds into Alabama's coastal waters.

OTHER RECENT CIVIL CASES

While an important case, *Ex parte Baldwin County Comm'n* was little more than an opportunity for Alabama's appellate courts to get their feet wet in the vast sea of environmental law. Other recent cases have delved much more deeply into the substantive issues of environmental management and protection:

In *Marshall Durbin & Co. of Jasper, Inc. v. Environmental Management Comm'n*, 519 So. 2d 962 (Ala. Civ. App. 1987), the Court of Civil Appeals upheld ADEM's 7Q10 standard over a less stringent 30Q5 standard proposed by Marshall Durbin. The 7Q10 standard is used for water design flow criteria and represents the minimum seven-day low flow that occurs once in ten years; this standard is used to help determine the discharge limits placed on an NPDES permit. Using the 7Q10 standard, ADEM issued an NPDES permit to the Jasper Utilities Board for the City of Jasper's sewage plant; Marshall Durbin was a customer of the city's sewer service, and its fees for that use would increase in order to provide funds for the construction of a new sewage plant that would meet the 7Q10 standard. Prior to the issuance of that permit, Marshall Durbin petitioned ADEM for a change in the administrative standard from 7Q10 to 30 Q5, the minimum thirty-day flow that occurs once in five years. The court held:

The practical effect of Durbin's petition would be to permit more pollution to be discharged into the two streams, which result would not promote the purpose of the Alabama Water Pollution Control Act. In applying its expertise to Durbin's petition, the Commission was also justified in finding

that the petition was not sufficiently supported by proper evidence. The Commission was further warranted in finding that the rule change from 7Q10 to 30Q5 would be detrimental to the Department's overall regulatory scheme. The Commission exercised its discretion in choosing the method of achieving legislative objectives, *Alabama Board of Nursing [v. Herrick]*, 454 So. 2d 1041 [(Ala. Civ. App. 1984)], and we must give great weight to its decision. *City of Birmingham [v. Jefferson County Personnel Board]*, 468 So. 2d 181 [(Ala. Civ. App. 1985)].

519 So. 2d at 965.

This holding demonstrates the widely accepted rule that matters within the environmental agency's area of expertise will be left to the agency's discretion, and it gives strong support to the reason behind the state's clean water act: to reduce water pollution.

Marshall Durbin got a second bite at the apple, in effect, when the Supreme Court held in *Ex parte Marshall Durbin & Co. of Jasper, Inc.*, 537 So. 2d 496 (Ala. 1988), that Marshall Durbin had standing to appeal ADEM's issuance of the final NPDES permit to the Jasper Utilities Board. The Court reasoned that, as a customer of the Board, Marshall Durbin's increased sewage fees needed to pay for the new sewage facility made Marshall Durbin an "aggrieved" party under the applicable statute and regulation.⁶ Thus, Marshall Durbin got to challenge the 7Q10 standard in a petition for an administrative rule change and in an appeal from the actual permit involved. This opinion shows that the Supreme Court of Alabama interprets the state's environmental statutes and ADEM's regulations liberally in giving those industries and parties regulated thereunder ample opportunity to participate in the decision-making processes of ADEM.

In another case dealing with NPDES permits, the Court of Civil Appeals had the opportunity to set forth the doctrine of exhaustion of administrative remedies as it applied to ADEM. The court held in *Save Our Streams, Inc. v. Pegues*, 541 So. 2d 546 (Ala. Civ. App. 1988), that NPDES permits must be final before issues surrounding them are ripe for judicial review. There, the plaintiff environmental group tried to enjoin ADEM from issuing a modified NPDES permit to one party and from issuing another permit to the Shelby County Commission. The plaintiff's issues as to the first permit became moot when

ADEM agreed to suspend the party's original permit and agreed to hold more hearings on the proposed modified permit. As to the permit for the Shelby County Commission, it had not even been issued when the plaintiffs filed suit; thus, any issues surrounding it were not ripe. The plaintiff petitioned the Supreme Court for a writ of certiorari to review the holding of the Court of Civil Appeals, but that petition was denied with an opinion that pointed out that the plaintiff had failed to comply with Rule 39(k), A.R.App.P. *Ex parte Save Our Streams, Inc.*, 541 So. 2d 549 (Ala. 1989). The Supreme Court's opinion on how to comply with Rule 39(k) so that review by certiorari can be had is very important, because many environmental cases in Alabama will be an appeal from an action of ADEM, and thus, as an appeal from an administrative action, it must usually go through the Court of Civil Appeals before it can reach the Supreme Court.

Several of the permits involved in *Save Our Streams* were at issue in *Water Works & Sewer Board of City of Birmingham v. Alabama Dept. of Environmental Management*, 551 So. 2d 268 (Ala. 1989). There, a permit issued to Daniel Realty Corporation was transferred to D & D Water Renovators, Inc., and then Shelby County agreed to operate the facility permitted to D & D. After Shelby County agreed to be an agent for D & D, the location of the facility, but not the discharge point, was altered so that the facility was located in a watershed of Lake Purdy, a major drinking water source for Birmingham. The Birmingham Board argued that Shelby County was operating this facility without a proper permit. The Supreme Court rejected this argument by holding that the agency relationship between the County and D & D did not invalidate the permit held by D & D for the discharge point and that a change in facility location will not necessarily invalidate a permit that was issued for a facility in another location so long as the *discharge point* has not been changed. The Court stated that a change in facility location could cause a permit to be rescinded and would necessitate that the permitting procedure be done again if that alteration presented a hazard. An important point in *Water Works* was that the Court held that ADEM did have the authority to consider facility location and design in making its decision on whether to grant a permit. Throughout its history, ADEM has always interpreted its authority in a very narrow way; without specific guidance from the legislature or from the courts, ADEM has usually declined to act beyond being a permitting agency. In this case, ADEM argued that it could not consider such factors as facility location and design in its permit decision; it contended that it could consider only the effect of the discharge at the discharge point. Quoting

extensively from the hearing officer's findings, the Court found that ADEM's authority is more expansive than ADEM had interpreted it to be and stated:

The hearing officer determined that ADEM has the *authority* to consider the facility location, although he found that ADEM is not under a mandate to do so. What then is the effect on the permit of altering something that may or may not figure into ADEM's issuance of a permit? Certainly, if the facility location were altered and that alteration presented a hazard to the State's water supply, then ADEM would have the authority to rescind the issued permit. However, if the facility location is altered with ADEM's knowledge and that alteration does not prove hazardous or out of line with ADEM regulations, then we are of the opinion that the permit is valid. (Emphasis original.)

551 So. 2d at 271.

The far-reaching effect of this case is to show ADEM that it can implement a more expansive interpretation of its authority than just being a permitting agency. The various acts that ADEM operates under have the express purposes of protecting the environment and of comprehensively managing the state's resources⁷, yet ADEM has long taken the position that its authority extends only to the strictly technical computations involved in the isolated activity sought by an applicant. This case now gives ADEM the guidance it had previously lacked on how its interpretation of its authority should be broadly defined in order to achieve the goals set forth in the state's environmental statutes.

Two other recent cases worth noting are *McCord v. Green*, 555 So. 2d 743 (Ala. 1989), and *Rice v. Alabama Surface Mining Comm'n*, 555 So. 2d 1079 (Ala. Civ. App. 1989), cert. denied, 555 So. 2d 1079 (Ala. 1990).

In *McCord*, the Supreme Court ruled on a more traditional area of environmental law: nuisance. An injunction against an anticipated nuisance (a creosote plant) was reversed for the failure of the plaintiffs to prove that the plant would be a nuisance *per se*, that is, at all times and under any circumstances. The plaintiffs hoped to enjoin the plant's construction by attempting to prove it would be a nuisance due to the air and noise pollution it would create;

however, their level of expert testimony was not sufficient to make their case, and they made no attempt to prove damage to surface and ground water. *McCord* illustrates the heavy burden involved in showing environmental cause and effect so as to prove that an activity will be a nuisance.

The Court of Civil Appeals held in *Rice* that agents for strip mine permittees can be held personally liable under a section of the Alabama Surface Mining and Reclamation Act⁸ for a failure of the permittee to reclaim the land. Such a holding agrees with other jurisdictions in imposing liability for damage to the environment in an expansive manner. Indeed, since no Alabama court had ever interpreted that section before, the court relied upon the interpretation given the federal statute⁹ (upon which the Alabama statute was based) by the Sixth Circuit Court of Appeals in *United States v. Dix Fork Coal Co.*, 692 F. 2d 436 (6th Cir. 1982).

CRIMINAL CASES

Very little enforcement of the criminal sanctions in Alabama's environmental statutes has been undertaken. While a few indictments have been brought in the past few years, only two cases have reached the appellate level: *State v. Clayton*, 492 So. 2d 665 (Ala. Cr. App. 1986), and *Firth v. State*, 493 So. 2d 397 (Ala. Cr. App.), writ quashed, *Ex parte Firth*, 493 So. 2d 405 (Ala. 1986). In *Clayton*, the defendant was charged with causing the formation of an "unauthorized dump" under the Alabama Solid Wastes Disposal Act.¹⁰ The district court found the statutes prohibiting the formation of unauthorized dumps to be unconstitutionally vague. Relying upon the rule that health regulations adopted under the state's police power are to be given great latitude, the Court of Criminal Appeals reversed and held that the statutes were not unconstitutionally vague, because they did give a reasonable description of what wastes fell under the prohibition. In *Firth*, the Court of Criminal Appeals upheld a conviction for the unlawful disposal of a waste into water without a permit under the state clean water act.¹¹

THE LATEST CASES

One of the biggest environmental cases to come before the Supreme Court was *Ex parte Lauderdale County*, 565 So. 2d 623 (Ala. 1990), cert. denied, 59 U.S.L.W. 3229 (U.S. Oct. 2, 1990) (No. 90-235), a case involving the constitutionality of the state's solid waste act.¹² In April of 1987, the Lauderdale County Commission had authorized Waste Contractors, a subsidiary of Waste Management, Inc., to

operate a solid waste landfill near Zip City; the Commission took this action without any notice to the public or opportunity for a hearing. Later, the Commission rescinded its approval for the landfill without any notice to Waste Contractors. Waste Contractors sued, alleging that its due process rights had been violated and that the one subsection¹³ of the state solid waste act giving counties to power to approve or disapprove disposal sites was unconstitutional in that it failed to provide specific guidelines or standards for a county to follow. The state solid waste act provides that both ADEM and the county involved must permit a solid waste landfill site before the landfill can be constructed; at the time of this action by Lauderdale County, the Act was arguably lacking in standards, but the act has since been amended to provide more specific guidelines. However, the resolution of this case turned on whether the solid waste act as it existed in 1987 was constitutional.

Because Waste Contractors had attacked the validity of the solid waste act, the State was allowed to intervene to defend the constitutionality of the statute.¹⁴ The State argued before the trial court that the court should not read the one isolated subsection which Waste Contractors was attacking in a vacuum and that although the solid waste act was not as specific as it could be in its standards, when read in its entirety, it did contain sufficient standards to guide a county in its decision-making process on a landfill permit. The trial court agreed with this argument and upheld the act and the actions of the County.

On appeal, the Court of Civil Appeals reversed because that court determined that the state solid waste act was unconstitutionally vague. After granting the writ of certiorari, the Supreme Court reversed and, in an 8-0 decision, held that the act did have sufficient standards, when read in its entirety and when read in light of ADEM and health department regulations which a county could not violate. The Court went on to state that the County did violate Waste Contractors' due process rights by rescinding the approval without notice and a hearing; however, the Court also noted that the initial approval without notice and a hearing violated the public's due process rights. In addition to those holdings, the Court went on to uphold parts of the County's sanitary landfill license requirements (adopted after it had rescinded the approval for Waste Contractors' site) that the Court of Civil Appeals had struck down; these included the license fee and the requirement that any applicant receive their ADEM permit first before it could get permission from the County.

The decision in *Lauderdale County* illustrates the Supreme Court's inclination to interpret environmental stat-

utes so as to fully effectuate the legislative intentions of protecting the environment and human health and of allowing full participation in the decision-making process by both the public and the regulated parties.

The latest environmental case to come before the Supreme Court was also its largest to date. In *Ex parte Fowl River Protective Assn.*, [Ms. 88-561, May 25, 1990, as modified on rehearing, September 21, 1990] ___ So. 2d ___ (Ala. 1990), the Court was faced with an extremely complicated factual situation involving the construction of an industrial sewage outfall in Mobile Bay. Involved in the case was an NPDES permit issued by the Alabama Water Improvement Commission (a predecessor agency to ADEM) to the Board of Water and Sewer Commissioners of the City of Mobile for the discharge of up to twenty-five million gallons per day of treated industrial sewage. Despite the long history of this permit battle and the complexity of the facts, basically two issues were before the Supreme Court: whether AEMC's interpretation of the state's antidegradation policy was proper and whether the evidence contained in the record warranted the granting of the permit.

The Court of Civil Appeals had ruled that AEMC's interpretation of the antidegradation policy was correct and that the issuance of the permit was proper. In reversing the decision of the Court of Civil Appeals, the Supreme Court held that the AEMC's interpretation of the policy was clearly erroneous. Based upon the federal antidegradation policy,¹⁵ the state policy is an ADEM regulation that serves "to conserve the waters of the State of Alabama and to protect, maintain and improve the quality thereof"¹⁶ All waters of the state are classified by ADEM as to their quality, according to their uses, and the highest classification ADEM currently gives to water is public water supply. ADEM and AEMC had interpreted the state's antidegradation policy to mean that water quality could be degraded within a classification without any showing, and that water quality could be degraded from its present classification to a lower classification upon a showing of economic or social necessity. This interpretation was in line with *Dawson v. Alabama Dept. of Environmental Management*, *supra*, wherein the Court of Civil Appeals had upheld that interpretation as reasonable. Referring to the federal antidegradation policy for guidance, because ADEM and AEMC's water regulations must conform to federal ones, the Court held in *Fowl River* that AEMC's interpretation of the policy was incorrect and overruled *Dawson* in as much as it upheld that interpretation. The Court stated:

A careful comparison of the statement in *Dawson* to the antidegradation policy

reveals that they conflict. *Dawson* states that the antidegradation policy allows degradation of waters within a classification, but not degradation from a higher to a lower classification without a showing of necessity. Accordingly, under *Dawson*, it would be permissible to degrade water from one water use classification to another, if there were a showing of necessity. The antidegradation policy, on the other hand, provides that water may be degraded within its classification if there is a showing of economic or social necessity. In that degradation, however, the policy requires that the water quality be maintained to 'protect existing uses fully.' Furthermore, the policy in another provision explicitly commands that existing water uses and the level of water quality necessary to protect the existing uses 'shall be maintained and protected.' The policy does not say or even imply that water may be degraded from one classification to another, as *Dawson* states. Thus, if there is a showing of economic or social necessity, water may be degraded within its classification, but water may never be degraded from one classification to a lower one. (Emphasis original.)

___ So. 2d at ___.

In addition to giving the state's water antidegradation policy an interpretation more in line with protecting the state's waters, the Court ruled that a further AEMC interpretation on the policy was erroneous. AEMC and the hearing officer involved in the appeal before AEMC in this case had both stated that the antidegradation policy did not apply to waters which were not of a quality higher than the public water supply use classification. Since the highest classification ADEM currently gives to water is public water supply, AEMC's interpretation of the antidegradation policy that it applied only to waters higher in quality than public water supply meant that the policy applied to no waters in Alabama. The Supreme Court held that such an interpretation was a clear violation of the policy.

After striking down AEMC's interpretations of the antidegradation policy, the Supreme Court went on to address the merits of the permit itself. Finding that the two-dimensional computer model used to predict effluent behavior and to set the permit limits could not predict the im-

port of the discharge on the real-life, three-dimensional Mobile Bay, the Court determined from the record that ADEM had vastly overestimated the amount of effluent that could be discharged into the bay without degrading water quality. In particular, the Court found that the dissolved oxygen water quality standard most likely could not be met with the discharge limits in the permit. The fatal flaw in the computer model was that its two-dimensional calculations completely failed to take into account the stratification of the water in Mobile Bay due to varying water and effluent densities. Because the evidence clearly showed that the real water was much more dynamic than the simple two-dimension computer model, the computed effluent limits were much too high, and the permit would probably allow water quality violations to occur. After coming to this conclusion, the Supreme Court reversed the holding of the Court of Civil Appeals that affirmed the permit and ordered that the permit be denied.

It is important to note that the Court stated in a footnote that the restrictive interpretation given to standing under Alabama's environmental laws by the Eleventh Circuit Court of Appeals was incorrect. In *Save Our Dunes v. Alabama Dept. of Environmental Management*, 834 F. 2d 984 (11th Cir. 1987), the Eleventh Circuit ruled that a person does not have standing, under Alabama law, to challenge an action of ADEM unless that person has a property interest directly affected by the action. The Supreme Court made it clear that standing under Alabama's environmental laws was not so restrictive and that the Eleventh Circuit's interpretation was erroneous. "[M]atters of environmental protection and regulation are of great significance to the citizens of Alabama, and a citizen's statutory right to appeal an ADEM decision should be interpreted broadly." *Fowl River* So. 2d at ___ n. 2.

Fowl River is a strong statement that the Alabama Supreme Court will interpret environmental statutes and regulations broadly so as to implement fully their purpose of protecting the environment. A clear signal was sent to ADEM and AEMC that they are to be vigorous in their protection of Alabama's environment and that any interpretations of their enabling statutes or regulations should be biased toward environmental protection and enhancement. *Fowl River* gives ADEM unmistakable guidance in how it should enforce the state's environmental laws.

CONCLUSION

Although only a few environmental cases have come before Alabama's appellate courts, the courts have already

set the tone for how they will handle these kinds of cases in the future. The Supreme Court has taken a progressive and reasonable stance that gives a expansive interpretation to environmental statutes; the course set by the Court ensures that all affected parties, whether the public, environmental groups or the regulated industries, will have a full opportunity to participate in the decision-making processes of ADEM and of any other governmental entity dealing with the environment. Also, the Court has clearly come down in favor of giving full effect to the purpose of Alabama's environmental laws to protect and enhance the state's environment; the holdings of the Court give much needed guidance to the agencies charged with protecting our environment. Even though environmental cases are relatively new to Alabama's judiciary, the position taken by the Supreme Court in just the last two years has established Alabama as one of the foremost jurisdictions in the handling of environmental cases. Perhaps the hawk was a good sign. □

must be allowed the opportunity to defend the constitutionality of the statute. See Ala. Code 1975, § 6-6-227 (Supp. 1990)), and *Fairhope Single Tax Corp. v. Rezner*, 527 So. 2d 1232, 1237 (Ala. 1987).

¹⁵ 40 C.F.R. § 131.12.

¹⁶ ADEM Admin. Code Chap. 6-10, at 10-3.

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ENDNOTES

¹ Ala. Code 1975, § 22-22-9(o) (1986).

² Ala. Code 1975, §§ 22-22A-7 (1986).

³ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (1982).

⁴ Alabama Water Pollution Control Act, Ala. Code 1975, §§ 22-22-1 *et seq.* (1986). When a state's water statutes and regulations are "equivalent" to the federal scheme under the guidelines of the Environmental Protection Agency, EPA will certify the state scheme, and an applicant for an NPDES permit will have to go only to the state environmental agency for the permit, rather than to both the state and EPA. Alabama's water act program has been certified by EPA.

⁵ Ala. Code 1975, §§ 41-22-1 *et seq.* (Supp. 1990).

⁶ Ala. Code 1975, § 22-22A-7(c), and ADEM Admin. Code Rule 335-2-1-.03.

⁷ See Ala. Code 1975, §§ 22-22-2, 22-22A-2, 22-27-40, 22-28-3, 22-30-2, 22-30A-1, and 22-35-1 (1988).

⁸ Ala. Code 1975, § 9-16-93(f) (1983).

⁹ 30 U.S.C. § 1271(c) (1977).

¹⁰ Ala. Code 1975, §§ 22-27-2(6) and -4(b) (1982).

¹¹ Ala. Code 1975, § 22-22-14 (1986).

¹² Ala. Code 1975, §§ 22-27-1 *et seq.* (prior to the 1989 amendments).

¹³ Ala. Code 1975, § 22-27-5(b) (1988).

¹⁴ Any time the constitutionality of a state statute is attacked by a party, the Attorney General must be given notice and

Coastal Zone Management Act: Highlights of the 1990 Amendments

Laura S. Howorth

INTRODUCTION

When Congress passed the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451 *et seq.* (1984), it envisioned a program of collaborative planning between federal and state authorities. By developing federally approved coastal management programs, states were given the opportunity to participate in a joint federal-state initiative. The Act provided several incentives to the states to participate, including technical and financial assistance, as well as the promise that all federal activities affecting a state's coastal zone would be consistent with its management plan.

The CZMA has been amended several times since its enactment in 1974, the latest being in October of 1990. In the final hours of its second session, the 101st Congress passed the Coastal Zone Management Reauthorization Amendments of 1990. Included as part of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (1990), the new legislation not only reauthorizes the nation's only program to manage its coastlines for the next five years, it also makes several significant changes and additions to the existing coastal program. The following discussion highlights several of the key provisions of the new law.

Section 303 — Findings

Several changes are made to the findings provisions of the Act. These changes include an increased emphasis on proper management of the territorial sea and ocean waters, the importance of controlling land use activities that contribute to non-point source pollution, and the need to anticipate sea level rise.

Section 304 — Definitions

The definition of "coastal zone" is amended in two respects. First, the seaward boundary of the coastal zone is expressly limited to the extent of state ownership under the Submerged Lands Act (in most cases three nautical miles). This change was added to clarify uncertainties raised by the December 1988 Presidential Proclamation, which extended

the limit of the territorial sea to twelve miles. Second, an addition is made that includes "those areas that are likely to be affected by or vulnerable to sea level rise."

Other definitional amendments include a change to the term "water use," which is clarified to mean "a use, activity, or project conducted in or on waters within the coastal zone." The broadened definition of this term is to ensure that a wider category of activities falls under provisions of the Act, and becomes particularly important with reference to the new consistency provisions. Finally, there is the inclusion of a new term, "enforceable policy," which is drafted to conform with existing NOAA regulations.

Section 306A — Resource Management Improvement Grants

This section specifically authorizes grants to restore and enhance shellfish production on publically owned lands.

Section 307 — Coordination and Cooperation

An aspect of the Coastal Zone Management Act that goes to the very heart of the program is the Act's promise to the coastal states that in return for participating in the program and developing federally approved management programs, federal activities that affect a state's coastal zone will be conducted in a manner that is consistent with its management plan. This provision has been the subject of heated controversy in recent years, and the amendments to this section address the issue.

The amended section specifically overrules the U.S. Supreme Court decision in *Secretary of the Interior v. California*, 464 U.S. 310 (1984), which involved the Department of the Interior's decision to offer oil and gas lease sales off the coast of California, and the State of California's subsequent determination that the lease sales were activities that required a consistency review. The Supreme Court held that the lease sales were not subject to consistency review, a ruling that was later broadly interpreted by other federal agencies as applying to their activities as well.

By overruling *Interior v. California*, the 1990 amendments make clear that all federal activities are subject to consistency review. The language provides that any federal agency activity that affects a state's coastal zone must be conducted in a manner that is consistent with the enforceable policies of that state's approved coastal management program, and establishes as a codified rule of law that any federal activity, regardless of its location, will be subject to such review if it affects any natural resources, land use, or water use in the coastal zone.

A final point regarding this section is worthy of note. Language specifically applying consistency requirements to federal dredge activities under Titles I and II of the Marine Protection, Research and Sanctuaries Act (Ocean Dumping Act), 33 U.S.C. §§ 1401 *et seq.* (1988) did not survive passage into the final version of the CZMA reauthorization. However, the legislative history of the Act includes a statement by the Senate/House conferees who negotiated the final version of the new law. That statement endorses the principle, and maintains that the consistency provisions do indeed apply to those activities. H.R. Conf. Rep. 5835, 101st Cong. 2d Ses. (1990).

Section 309 — Coastal Zone Enhancement Grants

This section establishes a program designed to encourage the continued improvement of state coastal programs in eight enumerated areas. Those areas are: (1) coastal wetlands protection, (2) natural hazards protection, (3) beach access, (4) coastal growth and development impacts, (5) special area management planning, (6) ocean resource planning, (7) siting of coastal energy and government facilities, and (8) reduction of marine debris. The funds are to be awarded on a competitive basis, and regulations for the award of the grants are to be promulgated within one year of enactment.

Coastal Water Quality Protection

Another addition to the CZMA is the creation of a Coastal Non-Point Pollution Control Program. This program requires coastal states to develop programs to protect their waters from non-point source pollution, and makes grant money available for this objective. The new programs are supposed to be coordinated with state and local water quality plans developed under the Federal Water Pollution Control Act (Clean Water Act) 33 U.S.C. §§ 1201 *et seq.* (1982), and if states fail to submit approvable plans by 1996, funds from their CZMA and Clean Water Act grants will be withheld.

CONCLUSION

Coastal managers and advocates have hailed the Coastal Zone Management Reauthorization Amendments of 1990 as the most significant mandate for the continued administration of the nation's only comprehensive coastal management program since the passage of the original Act in

1972. The new consistency provisions strengthen the states' authority to regulate activities that affect their jurisdictions. Additional programs are aimed at improving the quality of coastal waters, and strengthening state programs in the areas of wetland preservation, beach access, coastal development, ocean resource planning, and marine debris. With stronger tools from the federal government, coastal states can improve the management and protection of the delicate and important resources that exist along their shorelines and in their waters. □

Legislative Update: 101st Congress

Helen Hancock

INTRODUCTION

The 101st Congress responded to growing public concern over environmental issues by enacting many new pieces of environmental legislation. For example, bills addressing growing concerns over the quality of air and oil spills were passed. In addition, a number of existing bills were clarified with amendments. The following is a short summary of some of the environmental legislation enacted in 1990.

THE CLEAN AIR ACT OF 1990 — HR 3030

The primary compromise reached concerning this Act was on the regulation of emissions for cars; aimed to control the level of urban pollution and smog, emissions from cars are limited and time frames are set for compliance with the new regulations. Hydrocarbons emissions are limited to 0.25 grams per mile (gpm), carbon monoxide emissions to 3.4 gpm, particulates to 0.08 gpm, and nitrogen oxides to 0.4 gpm. These limits must be met by cars for ten years or 100,000 miles. In a related attempt to control urban smog, cities which do not meet current ozone standards must sell gas containing 2.7 percent oxygen starting in 1992, provided that reformulated gasolines are developed at that time. Five new categories of non-attainment were enacted to classify the cities involved.

To control the threat of acid rain, utilities may burn only low sulfur coal, a change in standards which raises the potential for many coal field workers to lose their jobs. In

order to facilitate agreement between all representatives, a compromise was reached to grant displaced coal miners a period of thirteen additional weeks of unemployment benefits, provided they are enrolled in approved job training programs.

To encourage businesses and utilities to comply with emission standards, an emissions credit system was established. Under the system, those entities which are subject to the legislative emission reduction requirement will have new flexibility in options to comply with the regulations. The Environmental Protection Agency (EPA) sets emission standards for the 189 toxic air pollutants within the system. Those entities with the ability to control their emissions or to reduce emissions more than required by statute will be allowed to sell their emission allowances to others to help offset the cost of compliance measures. Every affected source must have a continuous emission monitor. At the end of every year, actual annual emissions will be compared with the annual allowances given to that source and owners or operators will be required to pay excess emission penalties of \$2,000 per ton for any annual emission in excess of annual allowances. These excesses must be offset in the following year. The level of emission allowance will be established by EPA and may be traded among sources. Under the new law, many businesses that previously were not required to comply with emission standards and clean air regulations will need permits from state regulatory agencies to do business.

A series of compromises between House and Senate members resulted in several adjustments. EPA became the agency to control air pollution from offshore oil and gas operations, in all areas except the Gulf of Mexico, moving control from the Department of Interior's Minerals Management Service. Additionally, a study of sources of haze around national parks was authorized, although a proposal to pinpoint the sources of pollution around parks was dropped as part of the compromise.

OIL POLLUTION ACT OF 1990 — P.L. 101-380

In the wake of the Exxon Valdez incident and in answer to growing concerns over oil spill liability and prevention, the Oil Pollution Act was passed. The Act provides preventative measures and clean up actions after an oil spill. State oil spill laws currently in place were left intact and no international standards were established.

To prevent future oil spills, the following measures were enacted: crew manning standards, vessel traffic service systems, and alcohol and drug testing. Applicants for licenses, certificates or vessel documentation will have their criminal records and drivers licenses checked; if found to be under the influences of alcohol or illegal drugs a ship's master will be removed. Additionally, tankers carrying oil or hazardous substances are required to have double hulls. Any tanker operating in U.S. ports is required to have the double hull fitting or be retired beginning January 1, 1995. New tankers built after passage of the bill are required to be fitted with double hulls. An existing vessel with double sides or bottoms can continue in operation until Jan. 1, 2015.

A spill response measure establishes a national response unit which monitors removal resources, personnel, and equipments, and also inspects vessels, equipment and facilities. The Act calls for regional response units to be put in place with pre-positioned personnel and equipment. National, regional, and owner-operator plans are to be prepared or revised.

Federal liability systems were streamlined into one system. State civil, criminal, and taxation authorities were left in place. Under the federal system "responsible parties" are liable for removal costs and damages, including liability to state, local and federal governments for removal costs incurred by those agencies. The Act defines responsible parties as "any person owning, operating, or demise chartering a vessel, and any person owning or operating an onshore facility (other than a federal agency, or state or subdivision of the state)." "Removal" includes containments and removal of oil and hazardous substances from water and shorelines and taking actions needed to minimize or mitigate damages to fish, wildlife, and public and private property.

Any person incurring a loss must first seek compensation from the responsible party or its guarantor. If the claim is not settled within ninety days, the party may then seek compensation through the legal system or from the Oil Spill Liability Trust Fund, which would be subrogated to all legal rights against the responsible party that originally belonged to the claimant. The Oil Spill Liability Trust Fund was created in the Internal Revenue Code of 1986, 26 U.S.C. §9509 (Supp. 1989). Penalties paid from Federal Water Pollution Control Act fines will be deposited in the trust fund. All owners and operators of vessel and facilities must demonstrate that they have sufficient resources to cover potential liability for spills or show proof of insur-

ance. Any amounts recovered under this Act by a government entity are maintained by a trustee in a revolving trust account to be used to reimburse or pay costs of damages. Any amounts recovered over the damages are deposited in the fund for settling recovery amounts later.

Damages include the "injury, destruction of, loss of, or loss of use of natural resources, including the costs of assessing the damage recoverable by the United States trustee, State trustee or foreign trustee." Defenses to liability are included in the Act but are limited to proof by the responsible party that the damage was the result of an act of God, war, or an act or omission of a third party other than an employee or agent of the responsible party. Defenses are not allowed if the responsible party fails to report an incident and provide reasonable cooperation and assistance to removal activities.

EXTENSION OF THE SUPERFUND TAX — P.L. 101-508

As part of the Omnibus Budget Reconciliation Act, the superfund program was reauthorized for three years with the tax on the program extended for four years. The major provision of this action was a measure protecting surety bond issuers from exposure to liability greater than the cleanup contractor.

EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT — P.L. 101-508

This Act is a measure calculated to reduce hazardous wastes. The proposal was passed as part of the budget bill and is designed to reduce the production of hazardous waste and encourage its recycling or elimination rather than widespread dumping of the materials. EPA is charged with providing an office to coordinate and collect information about companies and industry activities regarding hazardous wastes.

NATIONAL ENVIRONMENTAL EDUCATION ACT — P.L. 101-619

In consideration of threats to human health because of conventional and toxic contaminants in the air, water, and on land and in recognition of international environmental problems such as global warming, ocean pollution, and species diversity, EPA will establish an office of environ-

mental education under the provisions of this Act. The legislation calls for coordination of the federal government's dissemination of environmental information, and will support efforts to train education professionals in the development and implementation of environmental education training programs and studies. Grants to support projects to design and distribute environmental education and training materials will be awarded. Internships for post secondary students and teachers to work within the federal government are also available. Monetary awards will be given to elementary and secondary students, to teachers for excellence in environmental education, and to individuals for projects in literature, media, and teaching which promote environmental awareness. Finally, the National Environmental Education Fund is established. The non-profit corporation will administer private funding received to assist development of education programs.

SOD-SWAMPBUSTER LEGISLATION ENACTED AS PART OF 1991 FARM BILL — P.L. 101-624

Additional denial of benefits for non-compliance with conservation program and graduated sanctions were enacted to assist with soil conservation measures. The sodbuster provisions designate lands with high potential for erosion. These lands are to be set aside, diverted, devoted to conservation, or not cultivated. The measure is to be used as part of the agricultural commodity reduction program and looks to reduce erosion. This highly erodible acreage will be considered planted for crop acreage determinations and farm program payment purposes.

Wetlands protection under the swampbuster provisions of the Farm Bill includes new enforcement options for the United States Department of Agriculture (USDA). The new legislation attempts to rectify prior inconsistent application of mitigation standards throughout the country that occurred because of unclear authority. A farmer can drain a wetland to increase the efficiency of his operation — provided that the wetland is restored on the farm or at a site in the surrounding area. The plan for the wetland restoration must be developed by the Soil Conservation Service and a notation must be made on the deed to the land where the restored wetland is located that the restored wetland will remain as such for as long as the mitigated wetland remains in cropland or not restored to its original state.

A *graduated* penalty is now acceptable if any violation is a first-time occurrence and a good faith effort has been made to comply with the swampbuster regulations. Under

the previous law, a farmer was faced with loss of *all* farm program benefits for any violation of swampbuster. Under the new law, the USDA can penalize based on the seriousness of the violation. All program payments may be denied or penalties of between \$1,000 to \$10,000 may be imposed if the farmer restores or mitigates the wetland.

The new swampbuster also provides for the creation of maps which show the location of wetlands. If converted wetlands are restored, benefits may be reinstated. Voluntary incentive programs are to be enacted to develop water quality protection plans by farm owners or operators.

COASTAL WETLANDS PROTECTION ACT — OF 1990 P.L. 101-646

The primary goal of this Act is to provide funding for wetlands restoration projects in Louisiana. The Federal government will establish a task force to list coastal wetlands restoration projects in Louisiana. Only those projects which can be completed within five years will be included in the list. Louisiana will benefit from the project, as the Federal government will pay eighty-five percent of the costs of the projects, provided the state develops a coastal wetlands conservation plan.

In another measure, matching grants to coastal states to carry out wetlands conservation programs were approved under National Coastal Wetlands Conservation Grants. Priority in funding decisions will be given to projects in maritime forests on coastal barrier islands and to states with dedicated funding to purchase natural coastal areas. The grants will only be awarded if the real property interest is dedicated to long-term conservation. Fifteen percent of the funds will be dedicated to funding of projects under the North American Wetlands Conservation Act (P.L. 101-233).

Wetlands maps for Texas will be updated by the United States Fish and Wildlife Service. The Service will assess the current conditions of the wetlands and the future developments likely to affect wetlands in that state.

WATER RESOURCES DEVELOPMENT ACT — P.L. 101-640

This Act authorizes the removal of contaminated sediments from submerged lands adjacent to U.S. Army Corps of Engineers (Corps) navigation dredging projects, if such removal needed to comply with Wetlands Protection Act regulations. The Act names environmental protection as a Corps priority in future water resource projects. No net loss

of remaining wetlands is established as an interim national goal, with an increase in wetlands through restoration and creation set as a long range goal. The Corps, along with the EPA and the United States Fish and Wildlife Service, will formulate a plan within one year to realize no net loss as quickly as possible.

Federal flood damage reduction projects will not include improvements or new construction projects conducted in the one hundred year floodplain after July 1, 1991.

A study will be presented to Congress regarding Corps participation in beach stabilization activities if the state requesting assistance does not have a beach front management program.

Contaminated sediments outside of and within the jurisdiction of Corps navigational channels may be removed if EPA is consulted provided the action is necessary as part of the upkeep and operation of the channel. At the request of a private entity, the sediments may be removed by the Corps to improve water quality and the surrounding environment, if the private entity pays one half of the removal cost and the entire cost of disposal.

COASTAL ZONE ACT REAUTHORIZATION AMENDMENTS OF 1990 — P.L. 101-508

Several additions and changes were made to this legislation. For discussion, see *Coastal Zone Management Act: Highlights of the 1990 Amendments* in this issue at page 11.

FISHERY CONSERVATION AMENDMENTS OF 1990 — P.L. 101-627

This provision amends certain parts of the Magnuson Fishery Conservation and Management Act, which is intended to regulate fishing practices and encourage conservation of fishery resources. "Fish" was redefined to include tuna, marlin, oceanic sharks, sailfishes, and swordfish. Also included in the amendments is a provision that addresses the large-scale driftnet fishing impact on living marine resources. "Driftnet fishing" is a method of fishing in which a gillnet made of a panel of webbing, or a series of such gillnets, with a total length of one and one-half miles or more, is placed in the water and drifts with the currents and winds for the purpose of entangling fish in the webbing. Any nation that conducts or authorizes the use of driftnets in its fishing practices is required to obtain certification for the activity. A ban on driftnet fishing in the area subject to

the Atlantic Tuna Convention Act of 1975, 16 U.S.C. §971 (1986) seeks to protect the Atlantic swordfish stock. The 1975 Act covers fishery zones contiguous to the territorial sea of the United States.

Finally, a provision that originally included in the Dolphin Protection Consumer Information Act passed which states that the "Dolphin Safe" label may only be placed on tuna products that are not caught with drift or purse nets that endanger porpoises and that certify that the fish or fish products were not caught with a large scale driftnet in the South Pacific.

OIL AND GAS DRILLING BANS — P.L. 101-74 and P.L. 101-121

Two bans on oil and gas drilling on the Outer Continental Shelf were passed. Public Law 101-74 instituted a total ban on drilling in the Cordell Bank area, which is a four hundred square-mile area of the coast of northern California. Additionally, a one year ban on drilling in eighty-four million acres of the Outer Continental Shelf was enacted as part of the funding appropriations for the Department of the Interior. (P.L. 101-121). This ban includes notices of sale, receipt of bids and awards of leases, as well as other prelease activities that involve the use of explosives or drilling muds for the purpose of exploring for oil and gas deposits. Drilling bans were included in the following planning areas: Eastern Gulf of Mexico, North Aleutian Island Basin, Northern California and Georges Bank area, which is an area that runs from Rhodes Island to Canada.

In another significant measure, the year-to-year moratorium on drilling and oil and gas lease sales in the Outer Continental Shelf was ended when President Bush announced on June 29, 1990 that all development activities in the Outer Continental Shelf are banned until the year 2000, with the exception of Alaska and the Gulf of Mexico. An area off the coast of Central California was designated the Monterey Bay National Marine Sanctuary, and a permanent ban on oil and gas exploration was placed on this area.

Studies of the impact of oil and gas development activities were ordered for the Washington and Oregon coasts. Lease sales in this area were also placed off limits until 2000.

AQUATIC NUISANCE PREVENTION AND CONTROL ACT — P.L. 101-646

Under this Act, guidelines will be established and enforced

to stop the infestation of nuisance species into the Great Lakes by exchange of ballast waters in the lock and dam system. Because of recent problems, special emphasis is placed on reduction of zebra mussel infestation throughout the system.

COASTAL BARRIERS IMPROVEMENT ACT OF 1990 — P.L. 101-591

This Act amends the present Coastal Barrier Resource System. One of the most significant aspects of the new legislation is that the area included in Coastal Barrier Resources System is doubled. The system now includes islands in the Florida Keys, Puerto Rico, the Virgin Islands, the Great Lakes, and New Jersey. A task force is created to study activities of the Federal government that contribute to the destruction and degradation of coastal barriers. All federal flood insurance subsidies for developments in these barrier regions are prohibited. In areas deemed "otherwise protected," if an improvement built in the area is inconsistent with the purpose that is protected in the barrier regions, no federal flood insurance will be available to the structure. Included in the barrier system are surplus government lands, such as former military installations, recreational areas, and undeveloped failed savings and loan and bank properties which are adjacent to lands managed by the government for things such as wildlife refuges, sanctuaries, and historical sites. States are given eighteen months to add state and local coastal parks to the barrier system. An extensive mapping of undeveloped barriers throughout the United States is to be undertaken, including mapping of the Pacific Coast south of Alaska.

CONCLUSION

The reauthorization of certain provisions and the passage of new provisions within the 101st Congress signifies congressional recognition of increasing public awareness of the need for federal guidelines and enforcement of environmental protective measures to guarantee a level of environmental quality throughout the United States. Whether the measures will be enforced and followed as enacted remains to be seen. Some of the measures, such as the oil and gas drilling bans may have significant impact on American fuel resources, due to current uncertainty in the Middle East. Even though a wide variety of environmental bills were passed, the impact of the legislation is inconclusive at the present time. □

LAGNIAPPE

A Little Something Extra

All of the bills designed to establish mandatory seafood inspection programs (*See, WATER LOG*, Vol. 9, No. 4 (1989)) were defeated during the 101st Congress. It is believed that the primary reason the legislation did not pass was disagreement over which federal agency would take the lead role in the inspection program. Two legislators have already signaled that they plan to reintroduce similar bills in 1991.

The Gulf of Mexico Fishery Management Council has issued its final proposed catch limits to reduce the harvest of severely depleted red snappers in federal Gulf waters. The new limits, scheduled to be implemented in 1991, include a red snapper recreational bag limit of two fish per person per day and an annual commercial quota of 2.0 million pounds. Earlier in the year, much harsher restrictions were proposed by the council that included the closure of the Gulf shrimp fishery for months to reduce bycatch. The original proposal was scrapped after it generated a firestorm of protest from Gulf shrimpers. Recent congressional action has prohibited any federal efforts to reduce shrimp trawl bycatch, estimated to be as high as 12.5 million juvenile snappers annually, until 1994.

OCS Lease Sale 131 in the Central Gulf of Mexico will be the first federal oil and gas lease sale since passage of the revised Coastal Zone Management Act, and federal and industry officials are concerned that under the new Act's provisions, the sale could be delayed. The new CZMA gives the affected states (in this instance Louisiana, Mississippi, and Alabama) a 90-day review period, which would delay the sale beyond the proposed March sale date. However, it is likely that the states will waive the 90-day requirement. Mississippi and Alabama expected to follow the lead of Louisiana, which has indicated that it will find the sale consistent, although adding that its cooperation with this lease sale and future sales will be contingent on a more equitable sharing of revenues from the federal oil and gas lease sales.

Violation of state and federal authority requiring the use of turtle excluder devices (TEDS) has produced its first imprisonment. In early December, 1990, U.S. Magistrate Elizabeth A. Jenkins sentenced a shrimper to thirty days behind bars for failing to use a TED while trawling off the coast of Florida, at Tarpon Springs. On December 12, 1990, thirteen Texas shrimpers were sentenced for TED violations, but received suspended sentences, fines and community service terms. These actions indicate that enforcement of TEDS regulations is being taken seriously by government officials.

The recently passed Oil Pollution Act of 1990 mandates that oil tankers be equipped with double hulls, and sets a timetable for the requirement, which begins in 1995. As an indication that the Coast Guard intends to move quickly on implementing this provision of the new law, it recently issued proposed regulations setting standards for double hulls on oil tankers constructed or undergoing major conversion after June 30, 1990. The standards are intended to help shipbuilders comply with the Act. 55 Fed. Reg. 50192 (Dec. 5, 1990). Comments on the proposed regulations are due by April 1, 1990.

The first step in securing designation of the Gulf of Mexico as a Special Area under Annex V of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/75) was accomplished during the November meeting of the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO). After negotiations with Gulf and Wider Caribbean nations on the designation, an agreement by the regional parties was signed. The next step to making the Special Area designation effective is for these countries to ensure that their ports are adequately equipped.

In June 1990, Alabama Governor Guy Hunt issued an executive order creating the Alabama Coastal Waters Initiative, a program designed to be the state's first long-range plan for the comprehensive management of its coastal resources. The lead body responsible for the program is the Policy Council, made up of gubernatorial appointees. The Council is aided in its duties by an "action team," also appointed by Hunt. The action team's duty is to identify areas of concern for the coastal region, and is made up of representatives from a variety of state agencies, including the Department of Economic and Community Affairs, Alabama Geological Survey, the Department of Environmental Management, the Department of Conservation and Natural Resources, the Coastal Research and Development Institute of the University of South Alabama, the Marine Environmental Sciences Consortium, and Auburn Sea Grant. For additional aid in developing the management plan, the Policy Council appointed two standing committees — the Citizen's Advisory Committee, a broad base group of citizens with interest in coastal issues, and the Science and Technical Committee, which operates as the Council's technical support group. The Policy Council's recommendations for the coastal waters management plan are to be presented to the Governor by February 15, 1991. Look for more information on the Alabama Coastal Waters Initiative in future issues of **WATER LOG**.

On January 3, 1991, the National Aeronautics and Space Administration issued a Supplemental Final Environmental Impact Statement (SFEIS) concerning site selection for Space Shuttle Advanced Solid Rocket Motor testing facilities at the John C. Stennis Space Center on the Mississippi Coast. The SFEIS provides updated, specific information on the proposed facility, and addresses a number of public concerns that were raised subsequent to the April 17, 1989 signing of the Final Environmental Impact Statement. According to the statement, NASA will develop an environmental assurance program to implement state and federal permit conditions and assure that the testing program is conducted in an environmentally sound manner.