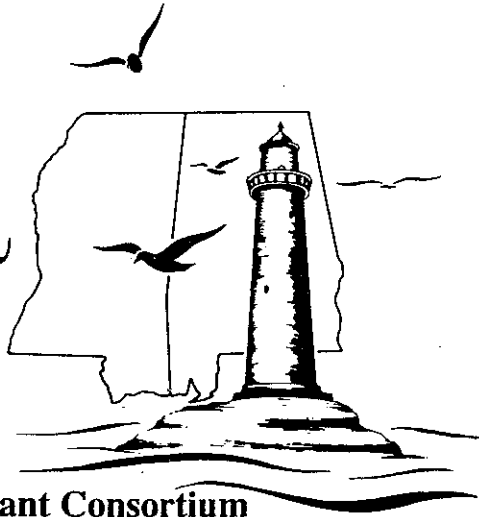


# WATER LOG

A Legal Reporter of the  
Mississippi-Alabama Sea Grant Consortium



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## **WATER LOG**

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

If you would like to receive future issues of 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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## Preface

Fisheries bycatch — the incidental catch of nontargeted species — is a timely and sometimes emotionally charged issue for the Gulf region. Some observers predict that during the next few years the debate over bycatch and what steps should be taken to reduce it could produce the same level of volatility and divisiveness among members of the fishing community as was brought about as a result of the passage of mandatory turtle excluder device (TED) regulations in the late 1980s. This edition of WATER LOG explores the issue and presents a forum for the views of three guest contributors. Gary Gaston provides a general overview of the bycatch issue and its significance to the Gulf region. Dave Burrage looks at bycatch through the eyes of the commercial fishing community and suggests some preventative methods of managing the problem. James Coe communicates the views of recreational fishermen and forcefully expresses their concerns about unregulated bycatch.

We present these articles to provide our readers with a sample of the differing opinions and interests associated with the bycatch issue. The articles presented in this WATER LOG do not necessarily reflect the views or policies of the editors or the Mississippi-Alabama Sea Grant Consortium.

An outstanding source of additional information on the controversy surrounding fisheries bycatch can be found in the Fall/Winter 1991 issue of *Texas Shores*, published by the Sea Grant College Program at Texas A&M University.

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## Shrimping and Bycatch — The Problem is in the Trawl

by Gary R. Gaston

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### INTRODUCTION

A recent television commercial for cajun fried shrimp showed a trawler at sea retrieving its catch. In the afternoon sunshine a shrimp trawl was hauled aboard swollen with hundreds of pounds of clean shrimp, ready for the market. When shrimpers see that advertisement, they must shake their heads at how Madison Avenue can manage such a misleading portrayal of shrimping in the Gulf of Mexico. Shrimping is not a simple, easy, or clean business. Rarely

do shrimpers catch hundreds of pounds of shrimp in a single trawl. When a shrimper retrieves his trawl and dumps its contents onto the deck, out pour hundreds of pounds of bottom-dwelling species: fish of all sorts, several types of crabs, shrimp, and a mix of unwanted fauna. By the time he sorts through the catch, selecting shrimp and other commercially important species, most of the organisms are dead. This unwanted portion of the catch is referred to as "bycatch," and is returned to the water. It is a problem of considerable magnitude, and is the latest dilemma to threaten shrimping.

Shrimpers currently are battling to survive in a threatened industry. Competition for shrimp is increasing and shrimp resources are decreasing. The shrimping fleet in the Gulf of Mexico and U.S. East Coast has grown, and stands at over 17,000 commercial trawlers today. Fuel costs have doubled over the past two decades, turtle excluder devices (TEDs) add to the shrimpers woes, and imported shrimp from mariculture operations and overseas trawling further threaten the industry. It is not surprising that shrimpers now fear proposals that would regulate another aspect of their industry.

### DISCUSSION

The most recent controversy in the shrimping industry revolves around concern over the health of the red snapper fishery. It is estimated that several million juvenile red snapper are caught and killed in shrimp trawls operating in the Gulf of Mexico each year. The red snapper fishery, like the shrimping industry, has developed over several decades and now constitutes a multimillion dollar fishery, encompassing thousands of people in both recreational and commercial fishing. Adult red snapper are excellent foodfish, taken primarily by hook and line from artificial and natural reef areas, near oil platforms, and a variety of other habitats.

Investigations into the decline of red snapper populations led to suggestions by the National Marine Fisheries Service (NMFS) Miami Stock Assessment Group that red snapper populations could increase 60 percent to 90 percent if shrimp bycatch was stopped today. According to NMFS personnel in Pascagoula, Mississippi, juvenile red snapper are distributed offshore in a pattern similar to that of brown shrimp. Both species occur along the shoreline and in the open Gulf of Mexico. Therefore, shrimping efforts in those areas result in red snapper bycatch. From a fishery management point of view, elimination of bycatch could solve the red snapper problem.

While red snapper bycatch may be the current issue, the nature of trawling operations may be the root of the problem. Most shrimp are harvested with a simple and dependable device known as an "otter trawl." The trawl is a cone-shaped net, with doors that ride along the seafloor, but do not dig in. A tickler chain between the door drags along the sediment and causes shrimp to jump from the bottom and be swept into the trawl. However, the otter trawl is nonselective. Along with the shrimp, the trawl indiscriminately collects near-bottom fish such as juvenile snapper, drum, and catfish.

In addition to the nonselective nature of otter trawls, research indicates that they wreak havoc on the bottom community. Recent studies on the effects of trawling emphasized the impacts on communities of bottom-dwelling invertebrates. The seafloor is covered by thousands of organisms, including shrimp, that live on the sediment surface and sometimes burrow beneath it. Crustaceans and worms build tubes that protrude above the bottom, allowing the organisms access to oxygenated water, and stabilizing the sediments. Shrimp graze the bottom, scavenging among the tube-dwelling species. Trawls pulled over the bottom disrupt this community, destroying tubes, eliminating organisms on the sediment surface, and increasing the turbidity of the water. For example, videos taken of a bottom community off the coast of Florida showed trawling scrapes along the seafloor, damage to sponge communities and reefs, and disruption of other bottom fauna.

Adverse changes to fish communities of the Gulf of Mexico have also been attributed to shrimp trawling. Recent studies by NMFS showed a long-term decline in average biomass (weight) of fish caught by trawling, suggesting that younger fish dominated the bycatch over time, and that the shrimp fishery may be responsible for long-term changes to fish populations. Furthermore, over the past 20 years there were declines to specific near-bottom fish populations, such as Atlantic croaker, spot, catfish, sand seatrout, and silver seatrout.

Other concerns include the health and welfare of a number of species that are attracted to shrimping operations so that they can make a "free lunch" out of the bycatch that is dumped overboard by the shrimpers. In fact, most fisheries biologists now recognize a change in behavior and composition of fauna associated with shrimping. Bottled-nosed dolphins, seagulls, pelicans, terns, and sharks regularly follow shrimp boats to feed on the bycatch. Seaturtles also gather in the shrimp grounds for easy meals, increasing their chances of being caught in trawls.

Finally, bycatch can present problems when it reaches the bottom of the ocean. Bycatch that is not immediately

eaten by scavengers settles to the seafloor to rot. In western Louisiana, where shrimping grounds become devoid of oxygen each summer (termed "dead zone" by shrimpers), the rotting bycatch adds to the problem by depleting oxygen in the surface sediments. Shrimpers in these areas often pull up trawls of decaying fish and crabs mixed with black mud. No one is ready to suggest that rotting bycatch is a substantial contributor to the dead zone, but it certainly creates local problems of low oxygen on the seafloor and is a nuisance for shrimpers.

Once again shrimpers face potential regulatory constraints. In August 1990, the Gulf Coast Fishery Management Council proposed a closure of Gulf shrimping operations from May 1 to July 31 during 1991 and 1992, and suggested additional closures or gear modifications thereafter. The plan was later amended by Congress, and bycatch regulation was delayed until 1994.

Shrimpers are still reeling from the controversy that resulted from the institution of turtle excluder device requirements (TEDs), and it is difficult to believe that they will welcome additional modifications to their traditional methods of shrimping. However, bycatch is a very different issue from seaturtles. Endangered seaturtles were seldom seen by most shrimpers, and it was difficult for them to envision that wholesale changes in their methods were warranted. Bycatch is an everyday problem for shrimpers. They must dig through it to get to their catch.

Fortunately, exchanges over the bycatch issue between NMFS and shrimpers have been more cordial than they were over seaturtles. NMFS has received cooperation from many shrimpers in developing fish excluders, and NMFS has welcomed input on gear modifications. As a result, NMFS is currently testing at least a dozen fish excluders. Because the bycatch issue grew out of concern over red snapper, these designs are evaluated primarily on success in excluding various sizes of snapper. The research is conducted under conditions closely mimicking commercial shrimping operations, and include commercial vessels when possible.

## CONCLUSION

There is no simple solution to the bycatch problem. Each region of the Gulf Coast differs in habitat and traditional shrimping techniques. Therefore, each region is being reviewed independently and guidelines likely will be established to fit each area. For instance, the Florida Marine Fisheries Commission divided its shrimping grounds into several shrimp management regions, and proposed detailed guidelines for management of shrimp fisheries in

each one. Other states are still reviewing data, testing trawls, and considering proposals. Most people believe the solution will be a combination of management strategies: modified trawls in some areas, establishment of sanctuaries in other areas, and possibly some seasonal closures that coincide with migrations and distributions of critical species. The acceptance of such strategies by recreational and commercial shrimpers will depend on strong evidence of the success of proposed gear modifications, the potential for reestablishment of a sound red snapper fishery, and the likelihood that the Gulf of Mexico shrimp fishery will not only survive, but benefit from changes to their traditional shrimping operations. □

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## **Bycatch — The Commercial Shrimper's Perspective**

*by Dave Burrage*

### **INTRODUCTION**

Approximately 17,000 commercial boats ply the waters of the Gulf of Mexico and South Atlantic Ocean in search of warm water shrimp. The shrimp fishery is the most valuable fishery in the region and the second most valuable fishery in the United States, close behind the west coast salmon fishery.

With the exception of localized harvesting techniques such as butterfly nets, skimmers, and "chopstick" gear, most wild-caught shrimp is produced using otter trawls — which are nets towed along the sea floor. Otter trawls replaced seines as the primary method of shrimp harvest early in this century and while modifications have been made to increase efficiency, all shrimp trawls work on the same principle. Trawl doors or "boards" are used to spread the nets into a configuration resembling a horizontally flattened ice cream cone. The bottom leading edge of the trawl

(or footrope) is designed to ride on or slightly above the sea floor while the top leading edge of the trawl (or headrope) rides above and slightly ahead of the footrope. The height of the trawl is varied according to the species of shrimp being harvested and varies from about five to twelve feet. A "tickler chain" is used in front of the footrope to scare the shrimp off the bottom where they are more easily swept into the cod end or "bag" of the trawl.

Shrimp trawls are inherently nonselective harvesting gear, that is, nontarget species are caught along with the species being sought. Shrimp fishermen must sort through what comes on board in order to separate shrimp and other marketable species from the catch. The component of the catch which remains is typically shoveled back overboard and comprises what is known as shrimp fishery "bycatch." The magnitude of this bycatch, the fact that most of it is dead when returned to the water, and the fact that some species in the bycatch are experiencing severe population declines have focused attention on this aspect of the fishery.

### **DISCUSSION**

The most recent fishery management issue to call attention to shrimp trawl bycatch came about as a result of the Gulf of Mexico Fishery Management Council's proposed regulatory amendment to the Reef Fish Fishery Management Plan. This amendment was proposed in August 1990 and contained specific regulations designed to help reduce overfishing of red snapper. Because bycatch estimates compiled by the National Marine Fisheries Service indicated about 12 million juvenile red snapper are caught annually in shrimp trawls, these regulations included a proposed closure of the Gulf shrimp fishery from May 1 - July 31 during 1991 - 1992, with additional trawl closures or gear modifications beginning in 1993 in order to effect a 64 percent overall reduction in red snapper bycatch.

During the public hearing phase of the amendment, much opposition to this part of the plan was voiced from all segments of the industry including shrimpers, seafood processors, gear shops and related industries, as well as the Gulf fishing communities. Members of Congress from Louisiana, the leading shrimp producing state, promoted and authored legislation which resulted in an amendment to the 1990 reauthorization of the Magnuson Fishery Conservation and Management Act of 1976, P.L. 101 - 627 (1990). This amendment requires the Secretary of Commerce to begin a study on shrimp trawl bycatch but prohibits its regulations to reduce bycatch until January 1, 1994.

Although given a temporary respite, commercial shrimpers are determined to be a "part of the loop" in the formulation of any regulations targeted at bycatch reduction in the fishery. The lessons learned in the recent battles concerning turtle excluder devices (TEDs) and tow time restrictions are fresh in every shrimper's mind. Faced with many problems which are beyond their control such as an overcapitalized fleet, higher operating costs, and competition from foreign imports, many shrimpers view any further government regulation of their operations as the final "nail in the coffin" which will force many of them out of business. One of the most prevalent fears currently being expressed by shrimp boat owners and operators is that, beginning in 1994, they will be required to use a device which does not presently exist in order to solve a perceived problem which might better be addressed by other means.

Shrimp trawl bycatch is certainly not a new issue. In fact, shrimpers, net shops, and gear researchers have been experimenting with techniques to reduce bycatch for at least the past two decades with varying degrees of success and failure. Most of the past research has been driven more by a desire to save labor and energy than by a conservation ethic. Throughout the history of the fishery, shrimpers have used gear modification techniques to allow them to work in areas and at times when excessive bycatch has impeded production. In these situations, shrimpers must use "fish chutes" or move to other areas to work. The general consensus is that while there is shrimp loss associated with all of these gear modifications, they are a necessary evil which must be endured in order to work in an otherwise productive area. As soon as excessive bycatch ceases to be a problem, the devices are removed or rendered inoperable in order to prevent further shrimp loss.

There are factors other than the recent red snapper crisis which have focused attention on shrimp trawl bycatch. Paramount among these are the results of many studies which hint at the sheer magnitude of bycatch generated by the industry. The fishery effort is intense, totaling about 373,000 24-hour days per year. Ninety-two percent of this effort is expended in the Gulf of Mexico. Although there is a wide variation in the results of existing bycatch surveys, the evidence suggests a bycatch-to-shrimp ratio of six or eight to one as a useful generalization. In offshore waters (meaning for Mississippi beyond the barrier islands) in the Gulf, the finfish bycatch totals about 1.1 billion pounds annually, according to recent estimates compiled by the National Marine Fisheries Service. However, scientists are quick to point out that there are substantial gaps in existing information. The total extent of trawl bycatch is largely

unknown, in part because of the reluctance of state governments to conduct the needed research. The studies which do exist may or may not be representative of what is occurring in the fishery due to the seasons and areas in which they were performed.

Bycatch weight or numbers is not the whole story, nor is it necessarily the most significant. Although species which are prized by recreational fishermen comprise only a small percentage of the finfish bycatch, they have banded together with environmental groups in a well-organized effort to have regulations formulated to reduce the capture and destruction of nontarget species in the shrimp fishery. Shrimpers are all too familiar with the impact such a campaign can have as a result of their recent experience with TEDs regulations.

There seems to be agreement from all user groups that something needs to be done, but how to best effect bycatch reduction from commercial shrimping operations is a subject of considerable debate. For example, if acceptable finfish excluders are developed, how widespread would the requirement for their use be? By law, any finfish excluder device (FED) must incorporate a federally approved TED. This means that shrimpers who work in inshore waters who are currently using tow time restrictions in lieu of TEDs would have to use TEDs if FED regulations applied to them.

Not all bycatch is "trash" from the shrimpers point of view. Many finfish species such as black drum, sheepshead, flounder, and whiting (known as "ground mullet" in the Gulf) form a valuable component of the shrimper's catch and would be lost if FEDs were required. This, added to the loss of shrimp production associated with current TEDs and FEDs, plus the cost of the devices, would impose a further economic burden on an already troubled segment of the industry.

Although only peripherally related, another fishery management technique that is receiving attention lately is limited entry. All shrimpers are in agreement that there are currently too many boats in the fishery. The National Marine Fisheries Service has announced that anyone entering the commercial shrimp fishery in federal waters after February 1, 1991 may not be assured of future access to the shrimp resource in those waters if a management regime is developed and implemented that limits the number of participants in the fishery. Although the exact mechanism that will be used to reduce effort has not been formulated, limited entry in some form is on the near horizon. It follows that with fewer boats in the fishery there will be a concurrent reduction in bycatch.

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Based on interviews and work with commercial shrimpers conducted by this author in Mississippi, the most widely favored management technique to reduce bycatch in the shrimp fishery would be the implementation of areal and seasonal closures. Shrimpers readily admit that there are certain times of the year and certain areas which should be closed to all forms of harvest (including recreational) in order to protect both target and nontarget species. While there is a marked difference in opinion between inshore and offshore shrimpers as to where and when these closures should occur, most agree that this would be the least onerous option to the industry. Shrimpers support the studies mandated by the 1990 Magnuson Act amendments and point to the relative ease of enforcement when compared to gear modifications. Some have expressed a desire to work together with fishery managers in order to gather the necessary data. In short, these commercial shrimpers want to be "proactive" in resolving the bycatch issue rather than "reactive" as most were with TED regulations. Their belief is that regulations are forthcoming and that more industry input generated prior to the 1994 deadline will result in bycatch reduction regulations which will be more acceptable to shrimpers because they were involved in the decisionmaking process.

The major impediment to a joint industry-regulatory agency effort continues to be peer pressure and lobbying efforts from shrimper's organizations which are determined to fight any further fishery regulations that they perceive as a threat to their livelihoods. This approach did not work with TEDs and in all likelihood will not work with the bycatch issue, if for no other reason than the amount of political pressure being exerted by sports fishermen, environmentalists and other user groups. In all hopes, cooler heads will prevail. □

*Dave Burrage is a Marine Resources Specialist with Mississippi State University's Coastal Research and Extension Center and has nine years experience working with the Gulf Coast seafood industry. The views presented herein do not necessarily represent the opinions of the editors or the Mississippi-Alabama Sea Grant Consortium.*

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## Shrimp Trawl Bycatch — A Recreational Fisherman's Point of View

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by James Coe

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### INTRODUCTION

Perhaps a few rough definitions and descriptions may be in order. One may ask, just what is bycatch? For the purpose of this discussion, it is all marine life captured and killed in a trawl except the shrimp being sought. What is a trawl? It is a large funnel shaped sock-like net pulled through the water behind a boat which captures and kills most marine life in its path. This marine life is then hauled aboard and dumped on deck for sorting. The shrimp being sought is stored iced, refrigerated, or frozen for return to shore. All the other marine life, the so-called bycatch, is simply dumped overboard. For each pound of shrimp thus harvested, roughly seven pounds of dead marine life is dumped overboard. Wasteful? Yes! Destructive? Yes! Polluting? Yes!

### DISCUSSION

Let us suppose for a moment that your favorite fishing lake was "trawled" for catfish. However, seven pounds of bass, bream, and crappie were killed for each pound of catfish caught. Worse yet, these bass, bream, and crappie were mostly fingerlings, and thus seven pounds was a very large number of fish killed. Would this be a terrible waste? Yes! Let's carry this one step further. This lake is trawled 24 hours a day, all year long for catfish. Do you suppose that would hurt the fish population? Yes! Let's assume the fish population did suffer and you, the sportsman (i.e., recreational fisherman), were forced by regulation to restrict your catch by 43 percent to help save the bass. Unfortunately, the "catfish trawler" was not restricted. In fact this was deemed a commercially important endeavor and he was granted federal subsidies to purchase more boats and nets. Yes, you guessed it, the fish population continued to suffer declines. You, the sportsman, were again forced by regulation to reduce your catch by an additional 20 percent. The "catfish trawler" was allowed to continue unrestricted. Careful study and grave deliberations by the appropriate authorities soon found the bass population to be near a point of collapse from which it might never recover! Proposals for additional regulations were quickly put forward. Re-

strict the sportsman anywhere from a low of an additional 50 percent to as much as 100 percent. The "catfish trawler" was to continue unrestricted for at least three more years. Unfair? Yes! Inequitable? Yes! Counterproductive? Yes!

There is a moral to the "catfish trawler" story. It has been established that 78 percent of all American red snapper are killed during their first two years of life by shrimp trawlers in the Gulf of Mexico. The red snapper population, we are told, is near a point of collapse from which it might never recover. The sportsman, fishing with hook and line for red snapper, has had regulations forced on him which restricted his catch by 43 percent in 1984 and 20 percent in 1990. Additional regulations are being considered which will restrict the sportsman by an additional 50 percent to 100 percent.

The shrimp trawler has continued largely unrestricted. In fact, federal subsidies were granted to assist this "commercially important industry" to purchase more boats and equipment. In short, the sportsman is being forced to restrict or eliminate his catch while the "commercially important" shrimp trawling industry continues unabated for three more years.

Recent changes in the Magnuson Fishery Conservation and Management Act, which regulates fishing within federal waters, require the Secretary of Commerce to begin a study on shrimp trawl bycatch, yet prohibits regulations to reduce bycatch until January 1, 1994. However, early estimates indicate that "fish excluders" will reduce fish bycatch by 30 percent to 50 percent.

Consider for a moment, shrimp (like catfish) can be pond-raised commercially without the waste of the shrimp trawl. Over 50 percent of the shrimp consumed in the United States in 1990 were pond-raised. This pond-raised percentage grows yearly while trawl caught shrimp sales declined by comparison. Shrimp trawling has become less profitable each year for the last several years. Thus, it could be said that shrimp trawling is a wasteful, unnecessary, and dying industry. Yet the "bycatch" of this industry is causing recreational fishermen to be severely (and unfairly) restricted.

The possible collapse of the American red snapper population is driving this controversy; but when other fish populations are considered, such as weakfish and croaker, the full extent of the problem will stagger the mind. The red snapper is just the tip of the bycatch iceberg.

Recreational fishing, like most leisure activities today, is a healthy, vibrant industry. The recreational industry, in general, has been booming worldwide for the last several years. The dollars spent provide jobs and turn over many times in the economy.

From the recreational fisherman's point of view, bycatch must be addressed. It is counterproductive to protect the inefficient and wasteful practices of the commercial shrimp fishing industry at the expense of recreational fishing interests. It is also a shame to allow fish populations to decline precipitously as a result of such a devastating harvesting technique. □

*James Coe has been practicing optometry in Pascagoula, Mississippi since 1968, and has been an avid red snapper fisherman since 1969. He is the president of Gulf Coast Fishing Banks, Inc., which has placed 11 artificial reefs comprising 1,900 acres of Mississippi Gulf bottom for the purpose of enhancing red snapper habitat. The views presented herein do not necessarily represent the opinions of the editors or the Mississippi-Alabama Sea Grant Consortium.*

## Lucas v. South Carolina Coastal Council

*No. 23342 (So. Car. Sup. Ct. Feb. 11, 1991)*

*Under South Carolina's Beachfront Management Act, which regulates the use and development of coastal lands, a landowner is not entitled to compensation for the value of waterfront property on which he is denied a permit to build.*

### INTRODUCTION

On February 11, 1991 the Supreme Court of South Carolina held that the state was not required to pay David Lucas the value of beachfront property on which the South Carolina Coastal Council refused to grant him a permit to build two houses. The South Carolina Coastal Council is an administrative board which enforces the provisions of the Beachfront Management Act, S.C. Code Ann. §§ 48-39-10 to -360 (Supp. 1990). The Beachfront Management Act, as amended in 1988, aims to preserve and protect the coastal lands of South Carolina by restricting use and by establishing a forty-year plan for moving setback lines landward.

### FACTS

David Lucas owned two vacant oceanfront lots near Charleston, South Carolina. He planned to build a house on each



lot, one for himself and one to sell. The Beachfront Management Act prohibits building any permanent structure seaward of the setback line. Upon being refused a building permit by the South Carolina Coastal Council, Lucas brought an inverse condemnation suit against the state, alleging that the Council's denial of the permit deprived him of all practical use of the property and seeking compensation from the state for the full value of the property. The Court of Common Pleas held for Lucas and awarded him \$1,232,387.50. The South Carolina Coastal Council appealed. The Supreme Court of South Carolina reversed, holding that the state's regulation of the use of Lucas' property did not amount to a compensable taking of the property.

## ANALYSIS

The fifth amendment of the United States Constitution provides that "private property shall not be taken for public use without just compensation." While South Carolina's constitution also requires that a landowner be compensated for the value of property taken for public use, the federal constitution controls because the United States Supreme Court has incorporated the compensation clause of the fifth amendment into the due process clause of the fourteenth amendment. The due process clause provides that no state shall deprive a person of property without due process of law and applies to actions taken by state governments.

In deciding whether a landowner should be compensated for property he alleges to have been taken by a state, the court must determine whether the state action in question rose to the level of a "taking" within the meaning of the Constitution or was merely a regulation of use. The state must pay the owner the value of his property in the case of a taking, but not where the state's action is a regulation of use designed to protect the public from serious harm. Most problematic are those cases where a valid regulation of use has the effect of depriving the owner of any use of his property.

The United States Supreme Court has never enunciated a clear standard to mark where regulation ends and taking begins. Instead it has proceeded by balancing the interests of the parties in each case before it. A compensable taking is almost invariably found where a state takes possession of private property or authorizes some permanent physical occupation of private property, even if the occupation does not deprive the owner of use, and despite whatever public interest the action may serve. Where a state does not formally condemn property but so regulates its use as to cause a total diminution in its value, the state will likely be

obligated to render just compensation to the owner. However, the court will look to the facts of the case, including the expectations of the owner when he bought the property and the weight of the public interest that the regulation is intended to protect.

On the other hand, when a state acts through its police power—its power to prohibit acts which the legislature deems injurious to the public health, safety, or welfare—to restrict the use of property, courts hold that there has been no compensable taking, even if the regulation works some diminution in the value of the property. Zoning ordinances furnish the most common example of regulation for which no compensation is due. The United States Supreme Court has held that laws designating historical landmarks, banning strip mining, and prohibiting mining that causes subsidence of surface land are all valid exercises of the police power for which a state need not render compensation. In cases where an emergency poses the risk of grave harm to the public, the Court has held that a state may order the destruction of one kind of property in order to save another kind of greater value to the public without payment of compensation.

In the present case, the Supreme Court of South Carolina first recited the findings of the legislature in the Beachfront Management Act. Among its findings were that the state's coastal lands comprise a valuable natural resource, that new construction causes erosion and destruction of the beaches, and that preventing new construction in coastal areas averts a great public harm. The policy set forth in the Act is within the scope of the state's police power. Since Lucas did not contest the legislature's findings, but in fact admitted their validity, the court was bound to accept them. Notwithstanding these concessions, Lucas asserted that he was entitled to compensation because the regulation deprived him of economically practical use of the property.

The court, relying on decisions of the United States Supreme Court, rejected Lucas' argument. The court remarked that, under Lucas' reasoning, if a regulation deprived the owner of all use he would automatically qualify for compensation, and inquiry into the legitimacy of the state's exercise of its police power would be irrelevant. The court noted that the United States Supreme Court considers several facts in determining whether there has been a compensable taking: the economic effect of the regulation; the expectations of the property owner when he invested in the property; the character of the state's action (physical occupation or regulation of use); and the weight of the state's interest in the regulation. The court also observed by way of analogy that a state may enjoin a public

nuisance (that is, a condition dangerous to public health, safety, or welfare, or offensive to public morals) without payment of compensation.

Repeating that Lucas had not challenged the findings in the Act, the court held that the Coastal Council had properly denied Lucas' application for a permit in order to prevent serious harm to a compelling public interest, and that Lucas was therefore not entitled to compensation for the value of his property.

## CONCLUSION

The enforcement of South Carolina's Beachfront Management Act in circumstances similar to those presented in Lucas will not result in a compensable taking even where the owner is deprived of the use of his property. While the decision of South Carolina's Supreme Court is not binding in other states, it may well be treated as persuasive authority if a case involving like facts arises elsewhere. In Alabama the statute controlling the preservation and development of coastal areas, Ala. Code §§9-7-10 to -20 (1987), sets forth policy and findings similar to those of the Beachfront Management Act. The statute governs all coastal lands, both publicly and privately owned, and requires that the Department of Environmental Management review the application for a building permit filed by a property owner wishing to build on waterfront property apply to the Coastal Area Board for a permit. The Supreme Court of Alabama has not addressed the question of whether the denial of a permit under its statute is a taking for which the state must compensate the owner. The purview of the Coastal Wetlands Protection Act of Mississippi, Miss. Code Ann. §§49-27-1 to -69 (1990), is narrower than that of the statutes of South Carolina and Alabama, and §49-27-9 provides that an individual who wishes to build a dwelling on his own coastal property need not apply for a permit from the Commission on Wildlife, Fisheries and Parks. □

*John Farrow Matlock*

## Beard v. South Carolina Coastal Council

*NO. 23363 (So. Car. Sup. Ct. Mar. 11, 1991)*

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*In a companion case to Lucas v. South Carolina Coastal Council, (briefed in this issue) the Supreme Court of South Carolina held that the state's denial of a permit for a landowner to build bulkheads on beachfront property is not a taking for which the state must render compensation.*

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## INTRODUCTION

On March 11, 1991, the Supreme Court of South Carolina held that Robert and Alice Beard were not entitled to compensation from the state for the value of the seaward portion of their oceanfront property after the state denied them permits to build bulkheads that would have protected part of their property. (As in Lucas, above, the Beachfront Management Act, S.C. Code Ann. §§ 48-39-10 to -360 (Supp. 1990), controlled.)

## FACTS

Robert and Alice Beard owned four contiguous tracts of waterfront property across which they wished to build a bulkhead or retaining wall 205 feet in length. There was already a bulkhead on three of the lots. The proposed bulkhead would have been about 20 feet seaward from the existing bulkhead and would have been the first bulkhead put up on the fourth lot. In applying for a permit, the Beards said they were building the bulkhead to prevent erosion. When it came to light that the beach was accreting, not subsiding, the Beards admitted that their actual purpose in building the wall was to make the property more attractive to prospective buyers and to level the property so that their tenants would not have to walk over dunes to the beach. The South Carolina Coastal Council refused to grant the permit. The lower court upheld the denial of the permit but held that the state must compensate the Beards for the value of the property that lay between the existing and proposed bulkheads. The Supreme Court of South Carolina affirmed the Coastal Council's denial of the permit and reversed as to the taking, holding that the state's action was a valid exercise of the police power for which no compensation was due.

## ANALYSIS

The land that the Beards contended was taken by the state amounted to about a 20-foot deep portion of each lot, and it was for this portion of each lot, and it was for this portion only that the Beards sought compensation. The Supreme Court of South Carolina declared that the theory on which the Beards' sued for compensation was flawed because the law of takings "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," but rather looks to the effect of a regulation on the parcel as a whole. The Court observed that the Beards retained complete dominion over all of each lot, including the power to use and enjoy, to sell, and to exclude trespassers. Because the denial of the permit did not deprive the Beards of all use of their property or work a total diminution of its value, the state's action, in the eyes of the court, was analogous to the creation of an easement or setback under a zoning ordinance. Zoning, unless arbitrary and capricious, is a valid exercise of the police power for which the state need render no compensation. The Court noted that the state's action in protecting the public from serious harm was within the ambit of the purpose and policy set forth in the Beachfront Management Act, the findings of which the Beards did not challenge. The Court therefore held that the denial of the permit to build the bulkheads was not a taking for which the Beards should be compensated.

## CONCLUSION

Beard and Lucus read together clearly reflect the South Carolina Court's deference towards the legislature's findings in the Beachfront Management Act and its reluctance to find a compensable taking where a restriction on use is authorized by the Act. Statutes in Alabama and Mississippi limit new construction on coastal lands, although there is no case law construing these statutes. While Ala. Code § 9-7-20 (1987) requires that a permit be issued for any construction in a coastal area, Ala. Code § 9-7-13(4) (1987) allows property owners to repair existing bulkheads with seeking a permit. Under Miss. Code Ann. § 49-27-5(c) (iv) (1990) anyone wishing to build a structure which would materially affect the ebb and flow of the tide must apply to the Commission on Wildlife, Fisheries and Parks for a permit; Miss. Code Ann. § 49-27-7(f) (1990) exempts from the operation of the Coastal Wetlands Protection Act the normal maintenance and repair of bulkheads. □

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## LAGNIAPPE

### *A Little Something Extra*

*Erratum* - An inaccurate statement contained in the summary reference to the 1990 Magnuson Act amendments in the last issue of WATER LOG, Volume 10, Number 3, (1990) at page 15 has been brought to our attention by Professor William T. Burke of the University of Washington School of Law. Professor Burke points out that "the sentence that refers to nations obtaining certification for driftnet activity seems to me a misrepresentation of the provision that calls for certification by the President when driftnets are used in a fashion that diminishes the effectiveness of or is inconsistent with any international agreement concerning driftnets to which the U.S. is a party or otherwise subscribes. This certification, of course, is for the purpose of an economic embargo against such a state, not to approve the activity by its certification." The editors welcome any comments or corrections from our readers.

On January 21, 1991, Governor Ray Mabus announced that Jack Herring would be the new executive director of the Mississippi Department of Wildlife, Fisheries and Parks. Herring had been serving as acting director since August 1991, and has been with the agency for 22 years. Among Herring's stated goals are: improvement and vigorous marketing of the state's parks and historical sites, easier public access to the agency's services, such as hunting and fishing licenses, and improvement of the state's seafood industry.