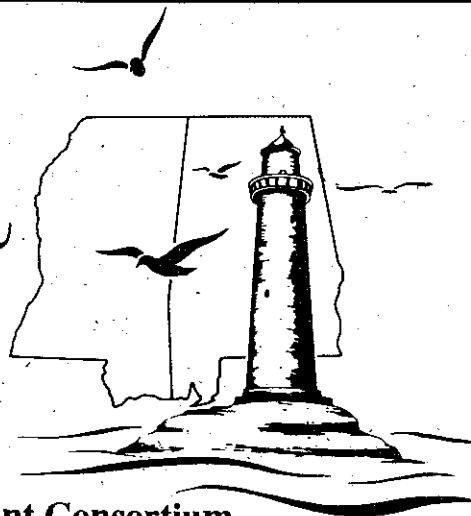


WATER LOG



A Legal Reporter of the
Mississippi-Alabama Sea Grant Consortium

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WATER LOG

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Editor:

Richard McLaughlin

Associate Editors:

Laura Howorth

John Farrow Matlock



Production Assistant:

Niler P. Franklin

Writers:

Matthew Lansford

Greg Glover

David Mettler

University of Mississippi Law Center - University, MS 38677

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Legal Impediments to Limited Entry Schemes in Mississippi and Alabama

by *Matthew Lansford*

INTRODUCTION

Open access to the seas for commercial and sport fishing, which has long been a right in the United States, has over time caused serious depletion of the stocks of the country's fisheries, and measures such as area closings and seasonal limits on catches have proven inadequate to protect fisheries from further exhaustion. "Limited entry" is a general term used to describe any program that restricts a fisherman's access to open fisheries or limits the catch he is allowed to retain. This article will examine two forms of limited entry in use in the United States and will then discuss legal impediments to limited entry legislation in Alabama and Mississippi.

OVERVIEW OF LIMITED ENTRY

Most fishery regulations in American waters are controlled by the federal government under the Magnuson Fishery Conservation and Management Act (FCMA), 16 U.S.C. §§ 1801 *et seq.* These regulations, however, only govern waters more than three miles off the coast. Waters within three miles of the coast are regulated by the individual states. Most traditional methods used for fishery conservation have been implemented for the purpose of maintaining the "maximum sustainable yield" (MSY). The MSY is a theoretical level of the amount of stock that can be taken from a fishery in a season and still allow a full harvest to be available in perpetuity. It would be easy to assume the more plentiful the stock, the more bountiful the harvest. But the last few decades have seen a rapidly escalating demand on fishery resources and a corresponding decrease in the ocean's bounty. Limited entry programs are designed to promote the greatest economic efficiency of fisheries while at the same time ensuring that stocks will be able to replenish themselves.

A limited entry scheme may be effected either by limited licensing or by individual tradeable quotas. Limited licensing consists of issuing licenses to the greatest number of people who can fish the waters without hurting the fishery. A system of individual tradeable quotas (ITQs) allocates shares of the available stock of the fishery to

fishermen, who are then allowed to catch whatever portion they have rights in.

Since limited entry entails restricting the amount of fishing that may be done in an area in which all people have a common property status, inevitable constitutional claims will be made. It is likely these claims will assert either a denial of equal protection (the limited entry program must bear a rational relationship to its intended purpose), due process of law (the state must provide sufficient procedural safeguards to protect the fishermen's rights), or just compensation (the state must pay for any property it deprives the fishermen of).

METHODS OF EFFECTING LIMITED ENTRY

Limited Licensing

License limitation restricts the number of vessels, fishermen, gear, areas, or any combination thereof that are allowed to participate in fishing operations. License limitation has emerged as the favored method of limited entry. The manner of selecting which fishermen, vessels, or gear qualify for these licenses ranges from a simple lottery or a moratorium (capping the total amount allowed in a fishery at the existing level) to selections based on an individual's fishing history, his dependence on the fishery, and his past performance in that fishery.

The first and most difficult problem with limited licensing is determining who will be allowed entry. The system by which a state decides to issue licenses will greatly determine its success in defending a constitutional challenge. If a court finds that a definable group was excluded from a fair opportunity at receiving a license, it may feel free to strike down the program as violative of equal protection.

Provided licenses are issued in a valid manner, the next problem is with transferability. If the state makes licenses freely transferable, the risk arises that most of the licenses will eventually come into the hands of the few, possibly creating monopoly and antitrust problems. On the other hand, free transferability would allow the value of the license to fluctuate so as to reflect its market price, thus allowing the fisherman to make an economically profitable decision to leave the fishery. Along with the ability to use the license as a security interest for loans and the possible creation of a property right, the development of a satisfactory transferability scheme for licenses is one of the most difficult aspects of devising a valid limited entry program.

Individual Tradeable Quotas

Individual tradeable quotas (ITQs) come in two forms. They can either be shares or percentages of an annually determined "total allowable catch," or they can be expressed as a fixed yearly catch. As with license limitation, the primary challenge will likely be directed against the method by which the shares are distributed. Since a fisherman's shares are transferable, the market price of his shares will rise and fall depending on the value of the stock. Fleets can therefore make a reasonably prudent decision about how much stock they can afford to catch in a given season. Another benefit of ITQs is ecological. By adjusting the aggregate of ITQs outstanding through annual adjustment of the total allowable catch, the resulting quotas would accurately reflect the change needed to preserve fishery stocks.

An obvious problem of ITQs is with enforcement: a state regulatory agency may have to spend immense sums of money to ensure that fishermen are not taking more than their share. Further, because the shares are tradeable, the quota system might tend to create a fishery dominated by large fishing concerns. While a state may limit the number of shares owned by any one entity, such a solution would curb a major factor of ITQs which makes the system appealing.

Most troubling is the prospect that this system could encourage wanton discard of caught fish. Since vessels would be limited to the number of fish they could land, they might embark on a course of "high grading" their catch; this means retaining only the largest fish of the catch and discarding the rest. Whether the total allowable catch can be expressed in a weight limit rather a limit on the number of fish caught is unclear.

FEDERAL CONSTITUTIONAL ISSUES

Equal Protection

State governments wield power to enact legislation to protect the public's natural resources. A state can enforce a total prohibition on using certain resources in order to protect those resources from depletion or destruction. But the power to ban the use of a natural resource does not include power merely to limit or restrict the use of a resource. While a total prohibition has an equal effect on all who wish to use the resource, limitation carries with it the potential for unequal treatment. This disparity in treatment is likely to be the argument of those who oppose limited entry.

Under the equal protection clause of the fourteenth amendment to the United States Constitution, a licensing classification will be upheld as long as the legislative classification bears a rational relationship to a legitimate state purpose or interest. This standard is relatively low. To survive equal protection scrutiny, the state would only have to show that its method of allocating entry into the fisheries was legitimately designed to achieve the goals of limited entry. The system the state employs need only be legitimately designed to effect its purpose. The Supreme Court, when deciding cases involving economic regulation or resource management, has shown a desire to affirm the state's legislative evaluations of the public's economic and social welfare. Since limited entry is a legitimate way of achieving economic efficiency in fisheries and preserving the natural resources of a state, as long as access classifications are rationally related to this stated purpose, any equal protection claim would almost certainly fail.

Traditionally licensing was a way for states to finance the administration of fishing regulations. Licenses are required in every state to fish, but unlike this traditional purpose, license limitation is intended to exclude people from fisheries. For a license limitation scheme to pass muster on an equal protection claim, the state must distribute licenses in a rational manner to achieve its purpose and not exclude any definable class of persons. While a limited entry program could be challenged on equal protection grounds by claiming that the plan violates its stated purpose (typically "the economic well-being of fishermen"), a state can easily avoid this problem by announcing in the statute that its goal is "economic efficiency" or "conservation of fisheries."

Of course all equal protection problems are avoided by distributing licenses through a lottery, but the political backlash from such a system would make certain that this method would not be used. Another method of distribution that could be used is sale or auction. This method has its own drawbacks in that it may create a class of wealthy fishermen. However, the Supreme Court has never held a legislative classification based on wealth subject to the heightened scrutiny of equal protection.

Due Process

A second constitutional claim that could be brought against a limited entry scheme in general is one of due process. There are two facets to due process, one substantive and the other procedural. Courts review substantive due process claims challenging industry regulations in much the same

manner as they do equal protection. There need only be the same rational relationship between the regulation and its purpose. A substantive due process claim would likely assert that the right to fish (liberty) or the fish or fishing gear (property) had been taken without due process of law. It is therefore unlikely that a substantive due process claim would succeed in invalidating a limited entry scheme. Procedural due process requires a state to administer sufficient procedures to ensure that any entry rights are distributed and rescinded fairly. The procedures that are required are those of notice of the state's revocation of a right, the right to a hearing upon revocation, and the right to a judicial review of that hearing. It is assumed that any implementation of a limited entry program would fulfill the requirements of procedural due process (notice, right to hearing, and right to review), so a successful due process claim would be unlikely.

Takings and Just Compensation

The final potential constitutional claim against limited entry in general is one of a takings under the fifth amendment. The fifth amendment of the United States Constitution requires the federal and state governments to pay just compensation for any property or property right taken from a private citizen. For any takings claim to be successful, the claimant must have a cognizable property interest in the subject of the taking. No fisherman has an individual property right in fish. Generally, licenses and permits, required for fishing in every state, are deemed to confer a privilege, revocable at the discretion of the issuing agency. Even in cases where fishermen have challenged legislation that had the effect of rendering their equipment useless, the Supreme Court has held that there was no taking. Since a fisherman presumably has no cognizable property right in uncaught fish, and since the courts have held that statutes having the effect of rendering fishing gear useless do not work a taking, an argument grounded in the fifth amendment is not likely to be successful.

Transferability

Any successful licensing program must describe the scope of the property rights vested in the license. This goes to the heart of the transferability problem. At one end of the scale there is no transferability: the license immediately reverts to the state whenever its holder is no longer entitled to it. At the other extreme is free transferability. In the former instance, the state would be granting a use privilege in

issuing a license, thus avoiding the creation of any property rights. But use of this system would discourage efficient fishing entities from expanding their operations and less efficient fishing entities from exiting the fishery. In the latter situation, a state would almost assuredly be inviting the creation of a property right. Therefore, whenever a state tried to defeat a license holder's right to fish, it would have to provide proper due process and possible just compensation. A free transferability scheme could also create monopoly and anti-trust problems and the previously mentioned classifications based on wealth that are subject to stricter scrutiny from the courts.

To achieve the goals of limited entry and to avoid the potential legal entanglements of vested property rights, any transferability scheme would have to take the positive aspects of both approaches. Some suggestions for this approach have been to make any transfer subject to the approval of the state's management agency, or to require that any sale of the license be made to the state's management agency. Limiting the number of licenses one entity could own, or allowing only natural persons, not corporations or organizations, to own licenses, has also been suggested.

Closely related to transferability are the legal problems associated with the disposition of fishery-related interests upon death and their use as security interests. A state could devise a program that required any receiving heir to qualify for a license. Others have suggested a better system would be to have the state automatically buy back all licenses upon death. Besides the unattractive expense of such a scheme, it would probably result in multiple just compensation claims.

As a general rule, licenses should not be available as security interest on loans. Though some argue that using the license as a security interest may increase capital investments in the fisheries, the legal entanglements that would result upon default would be horrendous. In addition, allowing a license to be used as security would give fishermen another argument that a license created some sort of property interest.

Property Rights in Uncaught Fish?

Property law has traditionally held that individuals have no right in fish while free. But if a state were to award a fisherman a fixed percentage of the total allowable catch in a given area, this would appear to give the fisherman a property interest in the fish before they were caught. In theory this might seem attractive to the state. It would

encourage the economic efficiency that a limited entry program seeks to achieve and would also promote private enforcement of fishing regulations.

Creating a private property interest in the fish may also help deter water polluters. Typically states and the federal government have the only causes of action against polluters, with their remedies having little deterrent value. If a property interest was created, all fisherman holding an ITQ would have an independent cause of action against the polluter, with a generous amount of damages almost certain. The threat of numerous expensive lawsuits would have a far greater deterrent value than any cause of action held by the state or the federal government. However, the negative aspects of creating a property interest weigh much heavier than the positive. Though recognizing a property interest in the fish might encourage private enforcement of fishing regulation, the state would then be required to respect this property interest. This means that should the law ever be changed so as to deprive a fisherman of his proportion of the total allowable catch, he would have a valid due process and "takings" claim. Since ITQs only allow a percentage of the total allowable catch, a state could determine that no catch was allowable and effectively deprive all fishermen of their right to fish.

LIMITED ENTRY IN ALABAMA

Alabama has used two types of limited entry. One form has been in the nature of ITQs, while the other has been an economic disincentive plan. The ITQ plan in place is a slight modification of the traditional model explained above. Alabama charges gradually increasing license fees as a vessel's harvesting capacity increases. So, as with traditional ITQ systems, the fisherman can make the economic decision, prior to entering a fishery, about how much he wishes to invest in the harvest. The economic disincentive plan the state has enacted is simply an increase in license fees. This program has been quite successful. In 1988, the first year the higher fees were assessed, the number of licenses decreased by 60 percent. The number of licenses issued has varied since then, but the current number is still less than half of the licenses issued in 1988, and no further forms of limitation are presently being considered.

Currently the policy in Alabama is to "enforce and administer all laws providing for the preservation, protection, and propagation and development of ... saltwater fish; shrimp, oysters, crustaceans, and other shellfish ... within the state ... which have not been reduced to private ownership." Ala. Code § 9-2-7(1975). The phrase that stands out

is the one regarding private ownership. If Alabama was improvident in formulating a limited entry scheme so as to have a court determine that the fisherman had a property right in the fish, and this policy statute had not been changed, Alabama would be out of the saltwater fishery management business. The word "preservation" was recently added to the statute. Assumedly this change is part of the environmental movement that has recently swept the nation and in reality creates little change in the statute. The policy mentions nothing of economic factors. If Alabama wishes to avoid litigation in the future, the state legislature would do well to add language to the state justifying it on economic grounds.

The Alabama Constitution adds very few additional obstacles in the implementation of a limited entry scheme not already imposed by the federal constitution. The reason for this is the Alabama court's use of "mirror image" reasoning in deciding claims brought under the state constitution. In essence, when a claim is brought under the Alabama constitution using a provision that mirrors the federal constitution, if the same issue has been settled in the federal courts, it is conclusive in the state courts. *Tartar v. James*, 667 F.2d 964, 970 (11th Cir. 1982). Any obstacles imposed by the federal constitution under equal protection or due process would therefore be identical to those erected by the Alabama constitution under the same provisions.

Although the right to pursue ordinary occupations is a fundamental and inalienable right, it is subject to the paramount right of the state's police power. *State v. Polakows Realty Experts*, 10 So. 2d 461, 462 (Ala. 1942). Alabama declares that it has the right to exercise its police power whenever it is necessary to preserve life, liberty, or property against the encroachments of mere arbitrary power. Also, the state has the right, by exercise of its police power in the interest of the general welfare, to change rules of common law even though such a change deprives one of a claim for personal or property damage. *Pickett v. Matthews*, 192 So. 261, 265 (Ala. 1939). Assuming the common-law right to fish the open seas, and also assuming a limited entry program would exclude or at least restrict a fisherman's access to the seas, if a fisherman could formulate a plausible argument that he had a property right in the fish, Alabama, under its police power, would have no legal problem in depriving that fisherman of his right for the purpose of promoting the general welfare. The only restriction of Alabama's power to institute a limited entry scheme under its police power is that any classifications within the scheme must have a rational basis in relation to the desired objectives.

LIMITED ENTRY IN MISSISSIPPI

Mississippi has only instituted a minor form of limited entry. This is a modified license limitation program which requires anyone desiring a live bait shrimp license to submit an application between January 1 and April 30. Requests filed after this date are not considered. This differs from typical license limitation in restricting licenses by time rather than by number. In effect, this system amounts to little more than an administrative device to manage the license application program. Mississippi has openly admitted that this restriction has had no noticeable effect in reducing the number of live bait shrimpers. No other limited schemes are currently under consideration. Mississippi states its policy "shall be to recognize the need for a concerted effort to work towards the protection, propagation and conservation of its seafood and aquatic life in connection with the revitalization of the seafood industry ... which is one of the state's major economic resources and affords a livelihood to thousands of its citizens; and in this connection, it is the intent of the legislature to provide a modern, sound, comprehensive, and workable law to be administered by specialists." Miss. Code Ann. § 49-15-1 (1972). This statement of policy mentions both economic and biological concerns. However, whether these economic concerns would be served by limited entry is questionable. Some might argue that limited entry might make the fisheries a viable economic avenue to pursue for those allowed to fish, while others might say the exclusion of fishermen does nothing to help the persons involved in the seafood industry.

Mississippi, like Alabama, does not have many serious legal obstacles to implementing a limited entry program. As a matter of fact, Mississippi has no equal protection provision, so any equal protection claim would have to be based solely on the fourteenth amendment of the U.S. Constitution. The state constitution does, however, have a due process clause providing that no person shall be deprived of life, liberty, or property without due process of law. The Mississippi legislature enjoys wide latitude in making laws based upon classification of persons, and those laws will not be invalidated under the due process or equal protection clauses unless they are manifestly arbitrary or unreasonable. There is no doubt that if a classification in a limited entry scheme bore any resemblance to the desired objective, it would pass muster under the standard set by the court.

The legislature, in addition to having broad powers in deciding how to regulate definable groups, has virtual plenary power in deciding which groups to regulate. Under its police power, the legislature may adopt any statutes necessary for the general welfare and convenience of the public. On the subject of fishing, the Mississippi Supreme Court has stated that "by virtue of its police power, the state has the right to regulate the time, manner, and extent of the taking of fish in running streams and lakes with outlets into other waters." *Ex parte Fritz*, 86 Miss. 210, 38 So. 722, 723 (1905). Obviously the troublesome language is "streams and lakes." This can be viewed in one of two ways. First, it can be viewed as a limitation. One could say that the Supreme Court deliberately inserted this language to limit the scope of their decision. But a reading of the case law makes it obvious that this is not the proper view of the court. The Mississippi Supreme Court has held that "statutes regulating and restricting the capture of creatures *ferae naturae* [wild animals], not reduced to actual possession, is a valid exercise of the state's police power, and is not violative of the 14th amendment of the U.S. Constitution, or §17 of the Mississippi Constitution which requires just compensation for the taking of private property." *Ex parte Fritz*, 86 Miss. 210, 38 So. 722, 723 (1905). This statement seems to end conclusively the discussion on whether the Mississippi Constitution would present any impediments to a limited entry program.

Mississippi's limited entry program options are broadened by a taxation provision in its constitution. Section 112 states that, "the legislature may provide for a special mode of valuation and assessment for...particular species of property ... belonging to persons, corporations, or associations." At first glance this provision would only seem to apply to real property, but subsequent case history would belie this view. Though wild animals, brought into an individual's possession, have never been taxed, domestic animals have been. A tax imposed on owners of dogs was held not to be violative of this section. This of course is not dispositive of the issue of whether a tax on landed fish would be valid under this section, but it does not seem to be a great leap of logic that if a tax on domestic animals is valid, a tax on seized wild animals would be valid as well. The only limitation on this mode of taxation beyond typical equal protection and due process concerns is that the rate of taxation for this type of property is limited to 15 percent of its true value. Whether this rate would be high enough to make an economic disincentive tax effective remains to be seen.

CONCLUSION

Limited entry has been growing in favor as a method of managing stocks of fisheries. The legal and constitutional problems with limited entry outlined above have thus far not obstructed the implementation of such programs in Mississippi and Alabama, and it is likely that before long all the Gulf states will have adopted some form of limited entry to prevent valuable fisheries from dwindling further. □

Matthew Lansford is a recent graduate of the University of Mississippi School of Law and a researcher for the Mississippi-Alabama Sea Grant Legal Program. He has recently completed a detailed article on limited entry in the five Gulf States, to be published in early 1993.

The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

Wetlands Mitigation Banking: A Mississippi Perspective

by Greg Glover

INTRODUCTION

Until recently, wetlands were considered useless wastelands, serving only to provide breeding grounds for mosquitoes and snakes, and to impede development and travel. In the last few years it has come to be realized that wetlands serve crucial functions in both the environment and the economy. Wetlands purify water, protect other areas from erosion and storm damage, and serve as habitats for numerous land and aquatic species, some of which are endangered and others which inject billions of dollars into the economy. However, drainage, fill, and construction had destroyed almost forty percent of the country's wetlands by 1954, and fifty-four percent by 1984. This newfound appreciation for wetlands has pushed the issue of wetlands protection to the fore of environmental regulation.

One of the tools now being used to prevent the further destruction of wetlands is mitigation banking, which has been developed as a tool to be used within the framework of wetlands regulation. Wetlands regulation was first established in Section 10 of the Rivers and Harbors Act of 1899 (RHA), 33 U.S.C.A. §§ 401-418 (1986 and Supp. 1992),

but the primary authority for wetlands regulation is Section 404 of the Federal Water Pollution Control Act of 1972, 33 U.S.C.A. §§ 1251-1387 (1986 and Supp. 1992), often referred to as the Clean Water Act (CWA). Section 404 bars the discharge of dredged or fill material into waters of the United States without a permit from the United States Army Corps of Engineers (Corps). Section 404 states that the Corps has the primary responsibility for the issuance of permits "for the discharge of dredged and fill materials into waters of the United States." Section 404 includes a flat ban on permitless discharges. Section 404(c) grants to the Environmental Protection Agency (EPA) the power to veto any Corps Section 404 permitting if after notice and public hearing it is determined that the discharge of materials into the affected areas will have an unacceptable adverse effect on the area. Thus, a developer can go through the process of receiving a permit from the Corps only to have it denied by EPA. The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) play an important part in the permitting process as well, as the Corps is required to give full consideration to the views of the FWS and the NMFS. The Corps must also consider the views of any other agencies that have a significant interest in the project, although not to the extent accorded the FWS and the NMFS.

THE PERMITTING PROCESS

Upon the receipt of a permit application, the Corps is required to conduct a "public interest review" of the application in which it balances the reasonably expected benefits of the project against its reasonably foreseeable detrimental impacts in light of the objectives of the proposal. The Corps must deny the issuance of a permit if, in consideration of the views of the FWS and the NMFS, and the balancing of the public interest review, the project is deemed to be contrary to the public interest. If the benefits to be received from the project outweigh the detriments, then the Corps has the authority to place mitigation conditions on the permit.

The mitigation provisions of section 404 have become a focal point in the permitting process. In placing mitigation conditions on a permit, the Corps requires projects to include procedures that will minimize any adverse effect the project may have on wetlands. The Corps defines mitigation according to guidelines promulgated by the Council of Environmental Quality (CEQ), which define mitigation as: "(a) avoiding the impact altogether by not taking a certain action; (b) minimizing impacts by limiting

the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and (e) compensating for the impact by replacing or providing substitute resources or environments." 40 CFR § 1508.20 (1989).

Under these provisions, the Corps clearly prefers on-site mitigation to off-site mitigation. On-site mitigation is mitigation which takes place in the same locale in the watershed or ecosystem as the impacted area. On-site mitigation is preferred in order to prevent any more destruction to the habitat than is necessary. However, when on-site measures are impossible, the Corps may require off-site mitigation. This last alternative of compensation by substitution spawned the concept of mitigation banking.

MITIGATION BANKING

Mitigation banking is defined by the Fish and Wildlife Service as the intentional creation, restoration, or enhancement of a wetland to protect a habitat for the purpose of compensating for the unavailable, necessary losses from future developmental actions. It is a method of off-site mitigation that works similarly to a bank. However, the exchange unit is not money, but habitat value units as are determined according to the provisions of the individual banks. Habitat value units are the values that are assigned to a bank site according to the perceived environmental qualities of the site and its value to or importance in the ecosystem. A bank is created when a sponsor, which is typically an industry or a governmental entity, develops a plan which provides either for the restoration of degraded wetlands or the creation of new wetlands. The sponsor will work with those entities that have some regulatory authority over the affected wetlands and formalize their negotiations in a contractual agreement called a Memorandum of Understanding (MOU). Signatories to the MOU normally include the bank sponsor and some if not all of the agencies that exercise authority over the bank site wetlands.

The importance of the MOU cannot be overemphasized. This instrument should be clear and unambiguous in order to avoid problems with the bank's use. The MOU should state the wetland creation or enhancement objectives and what must be done to achieve these objectives, that the bank should be used only when all other avenues of mitigation have been closed, and it should define the responsibilities of each of the signatories. It should define

the decision-making process to be used in the event of conflict in the use of the bank, limit the use of the bank to a clearly defined geographic area, set out the size of the bank, and perhaps most importantly, the methodology that will be used to determine bank credits and debits and their determination process.

Credits to a mitigation bank are determined by one of several methods, ranging from a simple acre-for-acre ratio to a complicated habitat evaluation procedure (HEP), that is a species-specific method to evaluate the resources of the effected area. Once the method of determining the credits is settled upon, the bank site is evaluated to determine the number of credits it is "worth" and then the credits are "banked" until they are needed for future mitigation. The rate at which credits accrue to the bank depends on the restoration or creation activities taken to develop the bank site. These credits accrue only when objectives set out in the MOU are achieved. The rate at which credits accrue is obviously contingent on the objective.

Each request to use the bank is reviewed by the signatories to the MOU and the appropriate regulatory agencies. These would most often include EPA and the Corps. The FWS and the NMFS, whose roles are reviewing and commenting on those projects affecting resources within their jurisdiction, are also often signatories to the MOU. If the request is approved, then the same methods by which the credits were determined will be used to determine the value of the land that will be affected and debit that amount from the bank. The signatories have the opportunity to review all credit and debit actions made by the bank.

BENEFITS OF MITIGATION BANKING

Mitigation banks were created to provide a simpler, more sensible process for meeting the mitigation requirements of Section 404 and to enhance the value of the resources created or restored through mitigation projects. To this end, mitigation presents some distinct advantages and disadvantages over the present process.

One of the greatest assets of mitigation banking is the ability to consolidate the mitigation needs for numerous projects which, taken separately, cause only limited damage to wetlands. However, the cumulative effect of these projects is quite significant. The mitigation of these projects' impacts that normally would be carried out on an individual basis can be consolidated to create a larger, more environmentally valuable area. Larger areas such as these would be much more efficient and economical in terms of developing and managing the area, as successful mitigation

for limited habitat losses has proven to be very difficult. This is even more true when the developer lacks experience in the designing and creation of wetlands, and whose objective is to meet the mitigation regulations as quickly and painlessly as possible.

The large areas created by a mitigation bank have the advantage of economics of scale, resulting in greater benefits in terms of wetland values per dollar spent than would be possible with small, scattered mitigation sites. In addition, it would allow small permit applicants to share in the financial burden of creation and management of sites. This cost-effectiveness will give the single permit applicant the ability to mitigate for small projects that would otherwise not be mitigated due to the difficulty in designing, monitoring, and evaluating small off-site mitigation projects. This is even more true in areas where there are regional goals which involve the creation or restoration of large contiguous wetland areas that would provide a diversity of habitats.

Perhaps most important is the unfortunate fact that permitting agencies have inadequate staffing and finances to monitor compliance with the mitigation conditions placed on the individual permits. A single, large mitigation site eases the burden of monitoring compliance. It is the inadequate staffing and financing that can turn this advantage into a disadvantage. It is much easier to monitor compliance on a single, large off-site mitigation site than it would be to monitor a number of small on-site efforts. As a result, banking could be attractive to the financially strapped regulatory agencies as an alternative to requiring stringent on-site measures, which would result in unnecessary damage to the habitat on-site.

It must be remembered that all of the problems that must be dealt with when developing a project will also be present when developing a mitigation bank. If incorrect decisions are made in the development of a bank, their effect will be compounded due to the large size of the bank. If the bank does not meet the design objectives, the losses resulting from the numerous development projects will not be fully compensated for and the consolidation could result in compounded losses of habitat.

Another advantage of banking for developers is that once a bank is established, and the value of the mitigation credits has been determined, the permitting agency can give the developer a reasonably accurate estimate as to the cost of the necessary mitigation. Therefore, when a bank is established prior to the developer's application for a permit, it allows the developers to plan more exactly for the level and cost of mitigation that will be required under the conditions of their permit. This may help to prevent the

truly tragic possibility of a project being undertaken that destroys habitat and the developer subsequently running out of funds before completing the project. This would deny whatever benefits the project may have sought to achieve, while still causing the environmental damage. In addition, the developer would not be able to finance the mitigation conditions of the permit. The end result would be that habitat would be destroyed without compensation and with absolutely nothing being gained from the project.

A third advantage of mitigation banks is that the use of a bank may shorten the permit processing time. This is one of the main reasons that banking has been supported by developers. Normally, when a developer applies for a permit, part of the process is exhaustive negotiation concerning the mitigation measures that must be incorporated into the project. This forces the developer to wait until these negotiations have been completed prior to beginning the project, and could keep him from taking advantage of the market conditions that created the need for the development. If the developer is participating in a bank, the negotiations which precede the establishment of the bank are also intensive and time-consuming. However, once the bank is established, negotiations concerning off-site mitigation are not necessary when the Corps considers a subsequent permit request. This apparent advantage has caused a great deal of apprehension among conservation groups. Many fear that in considering applications, the Corps may be lax in attaching on-site mitigation conditions to the permit and allow the developer to mitigate any damages with bank credits.

An additional advantage of mitigation banking is that it may eliminate the lag time between the loss of wetland habitat at the development site and compensation for these lost habitat values off-site. When banks are established, the mitigation required for permits is approved and implemented before any permit action occurs. This is much more desirable than initiating a mitigation project concurrently with the destructive development. Creation or restoration projects typically take several years to become a fully functioning wetland habitat. If restoration takes several years, and the restoration project is initiated concurrently with the development project, there will be a long period of time in which there will not be a fully functioning habitat, and the dependant wildlife will be forced to go elsewhere or die out. This advantage may also become a weakness. Some fear that debits will be taken against a bank before the bank site has been developed sufficiently to determine the number of credits a bank will be "worth," how much viable wetland habitat will be successfully created.

In considering the advantages presented by mitigation

banking, it must be understood that these advantages are only possibilities, not probabilities. These advantages occur in ideal circumstances, which is a rare situation when considering that wetlands regulation often involves a great deal of money, making the process very visible. In theory, a mitigation bank ensures compliance with mitigation requirements. It provides an avenue for mitigation of projects that have small impacts on wetlands, helps resolve conflicts between the developers and the permitting agencies, and helps developers to budget the cost of mitigation when considering projects. However, mitigation banks do have disadvantages which have prevented their widespread use to date.

PROBLEMS WITH MITIGATION BANKING

The greatest problem created by mitigation banking is that the quality of planning that goes into development projects will suffer. Mitigation banking is a tool of last resort, regardless of the quality of the restored habitat at the bank site. Mitigation banking is not intended as a substitute for proper planning of development projects. In considering a permit application, the Corps must still conduct its public interest review. It must also still follow the mitigation requirements set forth in the statute. However, developers who have created a bank would like to skip the impact avoidance and minimization on-site steps in the federal guidelines and utilize bank credits before all other means of mitigation have been exhausted. This possibility should be squelched in the MOU establishing the bank by making it manifestly clear that the CEQ mitigation guidelines will be strenuously followed.

Another disadvantage of mitigation banking is that it actually may lead to a net loss in wetland habitats, just like any other form of mitigation. Mitigation banks may focus on creation, restoration, preservation, or enhancement of wetlands. However, unless the bank mitigation project involves creation or restoration, there are no new wetlands to compensate for those lost to the development. Restoration or creation of wetlands are yet to be perfected with respect to technology and management and banks allow net losses if they focus on the management of existing wetlands to compensate for the loss of another. For example, the Company Swamp Bank in North Carolina focused on the preservation of 1,436 acres of timber that was to be harvested had the state not purchased it. This did not compensate for wetlands lost, but merely prevented others from being lost, and that resulted in a net loss in wetlands.

Even when the bank involves restoration or creation of

wetlands, existing technology is still insufficient to determine the time necessary to create wetlands, the area needed to provide compensation for those wetlands that will be lost, and whether all the functions of an existing wetland may be duplicated. One study in the state of Florida showed that the overall success rate for the creation of both tidal and non-tidal wetlands created for mitigation purposes was 27 percent, and only 12 percent for freshwater creation sites. (Redmond, *How Successful Is Mitigation?*, 14 National Wetlands Newsletter 1 (1992)). As it may take several years to determine the success of such a project, some banks may continue to be used to mitigate for habitat losses. And if the project is unsuccessful, habitat losses will not be truly compensated.

A third disadvantage to mitigation banking is that no matter how successful the site is in creating new habitat, it will still be off-site mitigation. There is no way of ensuring that all the species lost at the development site will occur at the mitigation site. If the development is an area where the value of real estate is high, establishing a bank in that area may be prohibitively expensive, depriving the local people as well as the local ecosystem of the values of wetland habitat. A long-range problem that may have serious consequences to the environment is that as wetland habitats are destroyed, and new lands are created, the number of areas that could support wetland habitats shrinks. At some point, there will be none of these lands left. This would mean that mitigation banking could result in exhausting the environment while preserving it.

One of the major problems that is yet to be resolved is the lack of a clear, scientifically acceptable method to value the habitat created at the bank site and the value of habitat lost in the development project. The valuation of habitat is the focal point of mitigation banks as it determines the amount of "currency" involved in the site. This is an area that must be decided in the MOU, leaving no room for conflict when the valuation measures are implemented. Some mitigation banks use an acre-for-acre exchange ratio between habitat credits to be used in the bank and those destroyed in the project. This method has the advantage of simplicity and prevents conflict during implementation as there is no need to value the habitat at the mitigation site, or the value of the affected wetlands. However, this method ignores the fact that all wetlands are different, each with its own peculiarities and values. This is what has prompted recognition of the necessity of using a habitat-based method of determining bank credits and project debits that is technically defensible and can be applied consistently.

It is important that the evaluation centers on the dy-

dynamic functional relationships within the ecosystem. The FWS favors a habitat valuation method to population estimates and land area. There is a danger in assessing value on a species-specific approach as the valuation tends to focus on the most economically important species and those with high public importance, rather than an adequate mix of species upon which an ecosystem is built. This provides a very narrow view of the value of the habitat. The FWS's Habitat Evaluation Procedure has been widely used with mitigation banks. It is a complicated species-specific approach based on the assumption that habitat quality and quantity may be described in terms of numbers. This numerical quality is often translated into "mitigation ratios" which sets forth the wetland area that must be replaced per acre of wetland impacted. While this method is yet to be perfected, it would seem to be more exacting in terms of habitat created and lost than an acre-for-acre analysis.

THE MISSISSIPPI MODEL

The Mississippi State Highway Department has established a mitigation bank pursuant to Miss. Code Ann. § 65-1-51 (1991). The statute granted the Mississippi State Highway Commission (MSHC) the authority to acquire by gift, purchase or otherwise, including eminent domain proceedings, public or privately owned wetlands and lands suitable for the erection of wetlands to be used for mitigating wetland losses caused in its maintenance and improvements of the state's highway system.

The MSHD initially tried to organize a bank by pursuing an MOA with the EPA. However, these attempts were unsuccessful, as the MSHD and the EPA were unable to agree on the substantive terms of the bank. The MSHD instead was able to come to an agreement with the Corps, and the Corps approved the MSHD's mitigation plan on 29 December 1989. This approval was part of a state-wide general permit for the construction of roadway embankments and bridge abutments in waters of the United States within the state of Mississippi. Attached to the permit were a number of general and specific conditions as to the amount, type, and manner of discharge that will be allowed under the permit.

As portions of the state are within the jurisdictional boundaries of four different Corps districts, the MSHD must obtain a letter authorizing work from the appropriate district. This letter is in lieu of the normal permitting process, thereby allowing the MSHD to skip a great deal of the time-consuming permitting process. However, under the general permit the District Engineer retains the power

to order that an individual permit is necessary for the project.

As a result of the reduction in time necessary to obtain permission to commence work under the general permit, the Corps approved the mitigation plan offered by the MSHD. The approved mitigation plan states that to the maximum extent possible, the filling of wetlands will be avoided. If avoidance is not practicable, impacts will be minimized by keeping the disturbed area to the minimum required to accomplish the projects' objectives. Any unavoidable wetland losses will be compensated at not less than a 1:1 ratio and that compensatory mitigation will be provided in the immediate vicinity of the work site. If this not practicable, then the losses will be compensated for from land set aside as a mitigation bank. The plan also sets out the order of preference of types of land to be purchased for the use of the bank.

In a Memorandum of Agreement (MOA) between the MSHD and the Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) that took effect on March 18, 1988, it was established that upon the acquisition of mitigation sites pursuant to the general permit, such lands may be transferred by warranty deed to the MDWFP. These lands will be managed by the MDWFP.

The bank established by the MSHD has been in use since 1990. The bank is composed of three separate mitigation sites in Bolivar, Greene, and Grenada Counties. The first site was established in Bolivar County in August 1991. The MSHD obtained special permission under the general permit to transfer this piece of property to the U.S. Fish and Wildlife Service as a part of the Dahomie National Forest. This second site was established in January of 1992 in Grenada County, and title to this land has been transferred to the MDWFP pursuant to the 1988 MOA. The final site was established in Greene County in March 1992, with an addition in May 1992. This site will be transferred to the MDWFP when the MSHD completes a selective tree-cutting program on the site.

The MSHD uses an acre-for-acre method of crediting and debiting habitat values. This method obviates the need for value assessment of habitat on-site. The MSHD has a minimum ratio of 1:1 for the compensation of lost habitats, but has employed ratios greater than 1:1. Debits were first taken against these sites in September 1990 when the plan was first implemented, and a second time in August 1991. As of 1 June 1992, there have been no other debits taken against the bank sites and all three sites still have habitat value credits remaining.

This plan suffers from the same problems that have

plagued a number of other banks. The first site for the bank was established in August 1991, but the first debit taken against the bank took place 11 months before the site was established. The second debit taken against the bank was concurrent with the establishment of the first site. This means that there was a definite lag time between the loss and creation of wetlands, an occurrence that banking was meant to eliminate. The other major problem with Mississippi's banking plan is that valuation is determined on an acre-for-acre basis, with no valuation of habitat on-site. This ignores the fact that some wetlands may be more environmentally valuable than others, which could result in a net loss of wetland values on a different level. This method was chosen despite the views of commenting agencies, notably the EPA and FWS, that oppose acre-for-acre replacement. These agencies believe that acre-for-acre replacement results in inadequate compensation and that habitat evaluation methodology is more appropriate.

CONCLUSION

Mitigation banking has shown a great deal of promise as an effective environmental protection tool. However, it has significant problems that prevent an enthusiastic endorsement. The possibility exists that a developer may be deemed to have met its mitigation requirements by simply buying wetlands that are vulnerable to habitat loss and then preventing that loss results in an obvious net loss of wetlands. In addition, the lack of the technology necessary for the successful creation of wetlands makes banking a dubious proposition. Banking should not be permitted against sites that have not been determined to have fully completed the transformation to viable wetland habitat. Another concern is that as wetlands are created in order to compensate for those lost, other habitats must be protected that are equally important in the ecosystem. Therefore, while banking may prevent a net loss in wetlands, it will do so at the cost of other habitats.

Some conservation groups have not been great advocates of mitigation banks. They fear that powerful developers will be able to influence the issuance of permits prior to the actual establishment of the bank. They also believe that banking allows developers in effect to buy the privilege of destroying crucial resources. Regulators have also been apprehensive in their use of mitigation banks. They fear that their cooperation in these ventures might be perceived as deference to developers' wishes. In addition, there have been no national guidelines for mitigation banking promulgated by the agencies with permitting au-

thority, which may result in the creation of banks that could be closed for failing to meet non-existent regulatory requirements.

These are reasonable concerns as long as banking is used on an ad hoc basis, lacking uniform national guidelines. The only guidelines that are currently available are those promulgated by the FWS as interim rules set out in 1983. President Bush, however, in a memo from the White House dated 12 November 1991, declared that an Inter-agency Committee on Categorization and Mitigation Banking be formed for the purpose of creating a complete draft of a mitigation banking program by September 1992. As of 12 October 1992, these rules have yet to be published. This is to be expected in an election year in which the environment has played a significant role. If Governor Bill Clinton wins the Presidency, many believe that the presence of Senator Albert Gore in the administration will bring stricter environmental policies, and could cause the Inter-agency Committee to reconsider their guidelines in the context of the new administration's views.

As long as wetlands preservation remains important to the public, conflict between preservation and development will remain likely. Therefore a great deal of money and political influence will be involved in the issuance of permits. The only way to minimize the effects of these influences is with national guidelines and uniform enforcement. This would significantly reduce the amount of deference given to individual decisions, reducing the ability of developers to influence the permitting process. Even with such guidelines, the disappearance of our nation's wetlands will remain a problem, which only a complete prohibition of development could stop. □

Greg Glover is a third-year law student at the University of Mississippi School of Law and serves as the Mississippi-Alabama Sea Grant Legal Program's Environmental and Marine Policy Assistant.

The views expressed in this article are those of the author and do not necessarily represent the view of the editors or the Mississippi-Alabama Sea Grant Consortium.

Sierra Club v. Alabama Environmental Management Commission

No. 2910056 (Ala. Civ. App. 1992)

by David Mettler

The Alabama Court of Civil Appeals holds that information about how two state agencies adopted water quality standards must be disclosed.

INTRODUCTION

On 5 June 1992, the Court of Civil Appeals of Alabama granted the Sierra Club's petition for requested discovery materials ordering two Alabama environmental agencies to disclose why they had adopted the Food and Drug Administration's less stringent water quality standards for certain pollutants such as dioxin. The Court held that the information relied on by the Alabama Department of Environmental Management in the determination of water standards was not protected from discovery under the "deliberative process privilege," which is a kind of executive privilege.

FACTS

There are at present ten paper mills discharging dioxin into Alabama waters. The Alabama Department of Environmental Management (ADEM), as part of its triennial review of all water quality standards, proposed amendments which included the adoption of the FDA's estimate of cancer potency factors for dioxin. The record reveals that the FDA's estimates of dioxin's cancer risk is the lowest of any of the four federal agencies that have developed a cancer potency factor for the chemical pollutant. Even though the FDA's estimate concerning the risk of cancer posed by dioxin is nine times lower than EPA's, the cancer potency factors used by the FDA were still within the bounds of uncertainty with respect to the EPA standards and were therefore acceptable by EPA.

This acceptance by EPA did not necessarily suggest outright approval of the proposed standards. In fact the EPA had encouraged ADEM to study the state consumption patterns of Alabama fish and shellfish. Since the FDA's determinations were based on nationwide esti-

mates, the adopted standards may not have proven sufficient to protect Alabamians who eat more fish than the national average. The EPA even offered to help the state of Alabama seek funding for a study to determine state fish consumption patterns.

In accordance with state law, ADEM held a public hearing in order to solicit comments concerning its proposed amendments of water quality standards. Members of the Sierra Club were present at the meeting and opposed ADEM's proposed amendments, claiming the new water quality standards would violate the citizens' implicit right under the Alabama Constitution to have a clean and healthful environment. The Sierra Club claimed that ADEM should adopt EPA's water quality standards, which recommend a criterion of zero for dioxin. According to the Sierra Club, the correct standard for water quality should be determined in accordance with the state constitution, the Alabama Water Pollution Act, the Alabama Environmental Management Act, state policy, and the public trust doctrine. On 20 February 1991, however, ADEM submitted the proposed amendments unaltered to the Alabama Environmental Management Commission for approval.

The Sierra Club immediately filed an administrative appeal before the Alabama Environmental Management Commission (AEMC). Since AEMC maintains certain powers which include the right to adopt or reject ADEM proposals as well as the authority to hear all appeals of ADEM's administrative actions, AEMC appointed an administrative law judge to preside over the case and make a recommendation to AEMC regarding the proposed water standards. During the depositions, the Sierra Club attempted to enquire into certain decisions made by ADEM members, but the members refused to answer questions concerning the formulation of the proposed water quality amendments. The Sierra Club sought discovery from some of the commissioners in an attempt to find out what information they had relied upon in adopting ADEM's proposals. ADEM claimed it was cloaked with the deliberative process privilege, a form of executive privilege, and thereby refused to reveal their decision-making process. The administrative law judge agreed with ADEM's contention and prohibited any further inquiry into the matter.

After the trial court denied the Sierra Club's petition for mandamus in an attempt to depose further ADEM members, the Sierra Club appealed, claiming that the deliberative process privilege claimed by ADEM and AEMC was inapplicable in the case at bar.

ANALYSIS

The Court of Civil Appeals of Alabama, in a case of first impression, held that the deliberative process privilege was not available in this case. In its analysis, the Court linked this claim of privilege to the traditional basis of executive privilege, "a privilege claimed by a governmental body when it fears that discovery of its confidential information will seriously impair its ability to function. Historically, it has been reserved for military and diplomatic state secrets." *LaMonte v. The Personnel Board of Jefferson County*, 581 So. 2d 866 (Ala. Civ. App. 1991). The Court adopted reasoning from other jurisdictions in determining that the deliberative process privilege is a qualified privilege, and thus should be applied as narrowly as possible. In its review of these related cases, the court held that the agency has the burden of proof in substantiating a claim of privilege.

The court did not find the answers to questions posed by the Sierra Club to be revealing confidential information, nor did the Court determine that responses to the Sierra Club's questions would seriously impair ADEM's ability to function. Since the Court found the administrative record completely lacking in factual explanation of the adoption of proposed water standards, the Court held that the Sierra Club had a right to make inquiries into ADEM's decision-making process. The case was therefore reversed and remanded to the trial court with instructions to grant the Sierra Club's petition to compel the administrative law judge to permit discovery from ADEM and AEMC members responsible for proposed water quality standards.

CONCLUSION

The Alabama legislature has imposed a statutory duty on Alabama environmental agencies to strive to maintain and improve water quality. The Court of Civil Appeals of Alabama did not believe the factual material relied upon by ADEM and AEMC was worthy of a protective privilege. Although the state commissions must now put forth its reasons for adopting the amendments, it is uncertain that this lawsuit will cause anything more than delay in implementing the rules. □

David Mettler is a graduate of the University of Mississippi School of Law and a member of the bar of the Commonwealth of Virginia.

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LAGNIAPPE

A Little Something Extra

A fine of \$189,000 was levied against Georgia-Pacific on 27 August after a discharge from the company's Leaf River pulp mill in Perry County killed 117,000 fish in late July. Decaying wood pulp was accidentally let out of a waste-water holding pond; the rotting pulp consumed dissolved oxygen in the water, killing fish along a 12-mile stretch of the river. The fine was assessed by the state Department of Environmental Quality, which added the estimated value of the fish, \$63,767, to the maximum amount for violating standards for quality of water, \$125,000, to arrive at the figure. Georgia-Pacific was also ordered to modify its waste-treatment system to guard against future discharges. While the multitude of suits against Georgia-Pacific and International Paper for releasing dioxin into several south Mississippi rivers are still ending, state officials said the amount of dioxin released in this incident was well within the limits set by Georgia-Pacific's discharge permit.

On 8 September 1992 the Environmental Protection Agency announced that it plans to draft new regulations to control the discharge of effluents from a wide range of sources, including pulp mills, coastal and offshore oil wells, waste treatment plants, and manufacturers of metals, chemicals, plastics, and pesticides. The regulations, which are being drafted with a view to reducing the disposal or release of all pollutants, will be published at various times between 1993 and 1996. EPA intends to take final action to establish new guidelines for offshore oil and gas wells at the end of January 1993.

EPA recently awarded grants of more than \$200,000 to the Gulf Coast Research Laboratory in Ocean Springs, Mississippi. One grant of \$104,000 will be used to study skeletal deformities in fish as a means of evaluating the effects of pollution of coastal waterways. The other grant of \$100,000 will be used to explore the validity of laboratory tests that are used to determine risks posed by rain-water runoff of pesticides.