

WATER LOG



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

Special Focus: Regulation of Mississippi Public Trust Tidelands

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WATER LOG

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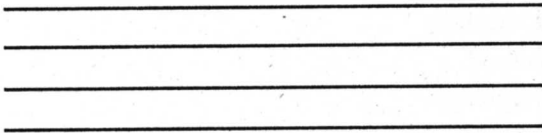
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Secretary of State v. Weisenberg

No. 91-CA-0975

by Scott Lefebvre

This case is the latest installment in Mississippi's struggle to regulate its public trust tidelands.

INTRODUCTION

The public trust doctrine has enjoyed a long lifespan, dating back at least as far as the Roman Empire. The premise of the doctrine is that title to land which is subject to the ebb and flow of tidewaters is in the government, which holds the property for the benefit of the public.

The Public Trust Doctrine became part of the common law of the United States with the original thirteen colonies. The Union granted each of the states the right to control its own tidelands and waterways. When Mississippi was admitted to the Union in 1817, Mississippi was given the same right to control its waterways and tidelands under the Equal Footing Doctrine, which provides that a new state comes into the Union with all of the rights and responsibilities given to the original thirteen colonies. Since 1817, the State of Mississippi has held in trust for the public all land which falls below the mean high water mark.

Since Mississippi attained statehood, disputes over the boundary between public trust tidelands and private property along Mississippi's Gulf Coast have flourished. The State of Mississippi has always argued that all land which is subject to the ebb and flow of the tide is part of the public trust, whether or not the waters are navigable. Conversely, private owners of coastal property have argued that public trust tidelands consist only of tidelands which are navigable-in-fact.

In 1988, the United States Supreme Court seemingly put an end to these disputes, ruling that all land below mean high-tide was part of the public trust, whether under navigable or non-navigable waters. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, *denied*, 486 U.S. 1018 (1988). The disputes, however, were far from over. There remained much confusion among coastal landowners as to what land constituted the public trust. The primary question was "at what point in time does the mean high water mark define the land that is held in trust for the benefit of the public by the State of Mississippi?" There arose two distinct and separate arguments for when to determine the location and extent of public trust lands. The first argument was that the lands held in public trust were defined by the mean high water

mark in 1817, when Mississippi gained statehood. This argument was asserted by citizens seeking to retain Mississippi's tidelands for the benefit of all Mississippi residents. The second argument was that the public trust tidelands were defined by the mean high-tide mark established under the Coastal Wetlands Protection Act of 1973. Coastal landowners who had developed their property prior to 1973 by artificially filling in tidelands asserted this argument as part of a concerted effort to make coastal property more marketable.

Where the mean high-tide mark was drawn would have a severe impact on both groups. If the high-tide mark was determined as of 1817, coastal land owners who had filled in tidelands to develop their property would lose title to the filled in portions of their land and the land would be permanently part of the public trust. On the other hand, if the high-tide mark was determined as of 1973, coastal landowners would gain fee simple title to the developed tidelands and the public would lose land which had been part of the public trust since 1817. At whatever point in time the mean high-tide mark was established, one of the two groups would lose.

In 1988, Mississippi's Secretary of State Dick Molpus sought to resolve the dispute over the date at which the mean high-tide mark would define the public trust tidelands by establishing a Blue Ribbon Commission to study various aspects of the tidelands issue. After six months of studies, reports, hearings, and public comments, the Blue Ribbon Commission submitted a list of recommendations which were adopted as administrative rules for controlling public tidelands. The recommendation which is important to this case is the recommendation that the mean high-tide mark should be determined as close as possible to 1817, the date Mississippi entered the Union.

Upon receiving the recommendations of the Blue Ribbon Commission, Secretary of State Molpus actively sought legislation which would follow the Commission's recommendations. The House and Senate each introduced a bill dealing with tidelands administration. The House bill followed the Commission's recommendation regarding when to determine the mean high-tide mark; the Senate bill did not. Senate Bill 2780 proposed that the mean high-tide mark for developed areas be determined as of the Coastal Wetlands Protection Act of 1973, contrary to the recommendation of the Commission. When the Mississippi legislature passed the public trust tidelands legislation in 1989, it provided that the mean high-tide mark for developed areas would be determined as of 1973. Coastal landowners have welcomed this provision, since it awards them fee simple title to public trust tidelands filled prior to 1973. Secretary of State Molpus and upland residents, on the

other hand, have viewed the provision as the State of Mississippi literally giving away tidelands which belong to the public.

The preceding overview of the Mississippi Public Trust controversy will be helpful in understanding the Mississippi Legislature's resolution of the problem and the culmination of the tidelands dispute in *Secretary of State v. Weisenberg*.

DISCUSSION

In 1953, Harrison County erected a seawall along U.S. Highway 90 of Biloxi, Mississippi. During construction of the seawall, a portion of tidelands landward of the seawall was artificially filled in by the county. In 1989, when the Mississippi legislature passed the tidelands legislation, William Byrd owned a car dealership on waterfront property along Highway 90 in Biloxi. Mr. Byrd's property included land that was filled in by Harrison County when the seawall was erected, as well as a portion of land seaward of the seawall. In response to the tidelands legislation, Mr. Byrd filed suit against the State of Mississippi, Harrison County, the City of Biloxi, People's Bank of Biloxi, and all other interested parties to confirm title to his coastal property.

After Mr. Byrd filed his suit, Secretary of State Dick Molpus filed suit in Chancery Court in Hinds County, petitioning the court to declare the Public Tidelands Legislation of 1989 to be unconstitutional. The grounds for this lawsuit was that the legislation violated Article IV, section 95 of the Mississippi Constitution of 1890, in that granting fee simple title to filled-in tidelands was an unconstitutional donation of lands under the control of the State of Mississippi to private landowners.

When Mr. Byrd discovered that the Secretary of State was petitioning the court in Hinds County to declare the tidelands legislation unconstitutional, he amended his complaint in Harrison County, seeking a ruling by the court that the tidelands legislation was constitutional. The grounds for Mr. Byrd's petition was that granting fee simple title artificially filled tidelands would not be an unconstitutional donation of public trust land because it would achieve the "higher purpose" of resolving the conflict over public trust land by confirming the titles of coastal landowners.

The judgement issued by Chancellor William L. Stewart in the Harrison County Chancery Court immediately after the close of oral arguments declared the tidelands legislation to be constitutional. The Secretary of State appealed the Chancellor's decision to the Mississippi Supreme Court, which subsequently affirmed the constitutionality of the 1989

tidelands legislation and the use of the effective date of the Coastal Wetlands Protection Act, July 1, 1973, to determine the mean high-tide mark along developed coastline.

ANALYSIS OF MISSISSIPPI SUPREME COURT DECISION

In finding that the Public Tidelands Legislation of 1989 was constitutional, the Mississippi Supreme Court rejected several arguments asserted by Secretary of State Molpus: (1) that the tidelands legislation resulted in an unconstitutional donation of public trust land to private owners; (2) that the tidelands legislation was unconstitutional as local and private legislation; (3) that the tidelands legislation granted the Secretary of State discretion in defining the mean-high tide mark which was unconstitutionally vague; and (4) that the tidelands legislation granted authority to the Secretary of State which violated the separation of powers provision of the Mississippi Constitution.

- Does Establishing the Mean High-Tide Mark as of 1973 Constitute an Unconstitutional Donation of Public Trust Land to Private Owners?

The Court found, contrary to the contentions of the Secretary of State, that establishing the mean high-tide mark as of the effective date of the Coastal Wetlands Protection Act, July 1, 1993, would not result in the donation of public trust land to private owners. In finding that granting title to private landowner of artificially filled-in tidelands did not constitute a donation in violation of Article IV, section 95 of the Mississippi Constitution, the Court reasoned that the legislation's "higher purpose" of resolving the disputes concerning coastal land outweighed the interest of Mississippi citizens in retaining public trust tidelands. The legislation, according to the Court, would result not in the donation of public trust tidelands, but in the final delineation of the boundary between public and private lands.

The Court relied on its prior decision in *Treuting v. Bridge and Park Commission of City of Biloxi*, 199 So. 2d 627 (Miss. 1967) for the proposition that public trust land could be transferred to private owners as long as the transfer was part of a higher public purpose. In *Treuting*, the Court ruled that it was constitutionally permissible for the Biloxi Park Commission to sell portions of public trust land on Deer Island, an island off the coast of Biloxi, to private landowners. The court upheld the sale because it was part of the higher public purpose of accommodating population

growth on Deer Island. The Court in this case found that granting title to some coastal public trust land would similarly be permissible as part of the higher purpose of settling land disputes. The Court reasoned that defining public trust land according to the standard set forth in the 1989 tidelands legislation was permissible to serve the higher purpose of marking the boundary between public and private land.

Finally, the Court found that determining the mean high-tide marks of July 1, 1973 was permissible as the most efficient means of achieving the legislature's higher purpose of defining public trust land. Simply put, it would be too costly to determine the mean high-tide mark on property which was developed prior to 1973.

■ Does the Public Trust Tidelands Legislation of 1989 Violate Article IV of the Mississippi Constitution as Local or Private Legislation?

The court similarly rejected the argument that the tidelands legislation was unconstitutional in that it constituted local and private legislation. Local or private legislation is legislation which benefits or discriminates against only certain persons or classes of persons, or certain districts within a state. Such legislation violates Article IV, sections 87 and 90(u) of the Mississippi Constitution. General legislation, on the other hand, is legislation which affects equally all members of the class of persons for whose benefit the legislation is enacted. The Court found that the tidelands legislation was general legislation for two reasons. First, the tidelands legislation was legislation in response to the statewide problem of defining public trust lands. Thus, the tidelands legislation was enacted to benefit all of the citizens of Mississippi, not just coastal landowners. Second, the tidelands legislation would be applied equally to all landowners whose property bordered tidelands. Since no coastal landowner would be treated differently from any other coastal landowner, the tidelands legislation was a general law and, therefore, not in violation of the Mississippi Constitution.

■ Does the Public Trust Tidelands Legislation Violate Due Process of Law by Granting the Secretary of State Discretion that is Unconstitutionally Vague?

The Secretary of State next argued that the tidelands legislation violated the Fourteenth Amendment of the U.S. Constitution and Article III, section 14 of the Mississippi Constitution by giving the Secretary of State unconstitutionally vague discretion in drawing the map to delineate

the boundary between public and private land. The Court rejected this argument for two reasons. First, the Court asserted that since a person of ordinary intelligence could understand the limits of the discretion granted to the Secretary of State in drawing the preliminary and final maps, the legislation was not unconstitutionally vague. Second, the Court found that since the procedure for establishing the mean high-tide mark was reasonably related to the legislative purpose of defining public trust lands, the tidelands legislation was not void for vagueness.

■ Does the Public Tidelands Legislation of 1989 Violate Article I of the Mississippi Constitution Regarding Separation of Powers?

The final argument the Court rejected was that the tidelands legislation granted the Secretary of State unconstitutional legislative and judicial authority. Article I, section 2 of the Mississippi Constitution provides for the separation of powers of the executive, legislative, and judicial branches of state government, and prohibits exercise of the powers of one branch by either of the other branches. The Secretary of State argued that the tidelands legislation violated the separation of powers in two respects. The first argument was that the tidelands legislation impermissibly delegated to the executive branch the legislative authority to convey public trust lands. The court responded to this argument by stating that while the legislature may not delegate to another branch of government its authority to make the law, it may delegate its authority to administer the law. The Secretary of State's discretion in establishing the mean high-tide mark was a delegation of the legislature's authority to administer the tidelands legislation, and as such did not violate the separation of powers.

The second argument proposed to the court was that the tidelands legislation impermissibly granted judicial power to the executive branch. In giving the Secretary of State discretion in establishing the mean high-tide mark, the tidelands legislation delegated to the executive branch the judicial authority to settle property disputes. In rejecting this argument, the court asserted that establishing the mean high-tide mark would not amount to an encroachment into the court's authority to resolve property disputes, but simply define the boundary between public and private land. In fact, the tidelands legislation provided for landowners settling disputes through the courts if they disagreed with the mean high-tide mark drawn on the final map.

The court further stated that even if the tidelands legislation did delegate a degree of judicial authority to the Secretary of State, the delegation would be constitutionally

permissible if related to the administration of the tidelands legislation and for the purpose of making the government more efficient.

CONCLUSION

The decision in *Weisenberg* will have an immediate and lasting impact on both owners of Mississippi coastal property and all Mississippi citizens. Tidelands which have been part of the public trust since Mississippi attained statehood will be conveyed to coastal landowners who developed public trust tidelands before 1973. Landowners who developed their property prior to 1973 by artificially filling in tidelands will benefit from the *Weisenberg* decision in that the tidelands legislation will convey the filled-in land to the landowners, thus increasing the value of such property and making it easier for coastal landowners to sell their waterfront property. As for the rest of Mississippi's citizens, it will remain to be seen whether relinquishing land held for the benefit of the public since 1817 will do more to protect the public interest in tidelands than retaining the land for public use and enjoyment. □

Scott LeFebvre is a third year law student at the University of Mississippi School of Law and research associate with Mississippi-Alabama Sea Grant Legal Program.

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.

Secretary of State v. Weisenberg

No. 91-CA-0975

by Margaret Anne Bretz

Latest installment in Mississippi public trust tidelands regulation reviewed by Secretary of State's Office.

INTRODUCTION

On January 27, 1994, the Mississippi Supreme Court handed down its decision in *Secretary of State v. Wiesenberg* (no. 91-CA-0975), colloquially referred to as the Byrd Case, effectively ending the most recent litigation chapter of the long-running Mississippi Public Trust Tidelands saga. The suit was spawned by the 1989 Public Trust Tidelands Act (S.B. 2780, Miss. Code Ann. §29-15-1 et seq.). Although the Tidelands Act for the most part codified the recommendations of Secretary of State Dick Molpus's Blue Ribbon Commission of 1988, it contradicted those recommendations in one critical respect. The commission had recommended that the public trust boundary in developed or filled areas be determined using the earliest reliable information available. If surveys, aerial photography, or the like, established that the water boundary had moved seaward as a result of fill activities, the public trust tidelands boundary, under the Molpus Commission recommendation, would be fixed at the mean high water line prior to the filling.

Under the legislative scheme, the Secretary of State was directed to prepare a Preliminary Map of Public Trust Tidelands and thereon to depict the tidelands boundary, in developed areas, as the "determinable mean high water line nearest the effective date of the Coastal Wetlands Protection Act. [July 1, 1973]." The legislation thereafter provided for a comment period, revision, and publication of a final certified map: "The Secretary of State shall allow sixty (60) days after publication of the preliminary map for submission of comments and/or additional documentation and may, at his discretion, revise the map accordingly." Miss. Code Ann. §29-15-7(4).

Molpus contended that the directive to fix the preliminary line at its 1973 position had the effect of "grandfathering" into private ownership all public trust lands filled prior to 1973, in violation of basic principles of the public trust doctrine and in direct contravention of §95 of the Mississippi Constitution, which prohibits donations of lands belonging to the state to private corporations or individuals.

In January, 1989, during the legislative session but prior to enactment of S.B. 2780, Bill Byrd and others sued in Harrison County chancery court to confirm title to waterfront property on Highway 90 in Biloxi, occupied by Byrd's Honda dealership. (The site is, and was at the time of the decision, part of the Biloxi Belle Casino complex.) A short while later, after passage of the Tidelands Act, Molpus sued in Hinds County for a declaratory judgment that the relevant portion of the Tidelands Act was unconstitutional. Byrd amended his complaint to include a similar, but opposite, request for declaratory judgment; the Hinds County action was stayed; and the constitutional issue was joined in the Byrd suit. The Secretary of State was represented by the Attorney General; the State of Mississippi, intervening on behalf of the constitutionality of the Tidelands Act, was represented by special counsel retained by the Attorney General.

A week or so before the hearing on the declaratory judgment issue, the late Karl Wiesenbergs, a citizen and taxpayer and Pascagoula lawyer professionally involved for approximately 40 years with the public trust tidelands issue, moved to join as a counterplaintiff with the Secretary of State. His brief was allowed but his intervention was later dismissed *sua sponte*.

Immediately following oral argument on Easter Monday, April 16, 1990, the Harrison County Chancery Court ruled that the 1989 Tidelands Act was constitutional. In his findings and rulings two days later, the Chancellor stated, "At this time, right after Easter, the Court feels that rather than assess and determine guilt we should heed the admonition of those who advocate forgiveness." The Chancellor found, among other findings, that the Legislature had regulated tidelands, not donated them, that the public trust tidelands boundary was not to be changed by the Act, "for it cannot be changed. It is the same as it was in 1817." The Court found that the Legislature by its Act was merely facilitating location of the boundary. Relying on the preamble to S.B. 2780, the Court agreed that a higher public purpose was served by resolving certainty and stability of land titles and that "incidental transfers of ownership" would not negate that public purpose. The Court agreed "with the State of Mississippi that the Secretary is vested with a great deal of discretion regarding the revision of the preliminary map." Molpus, and Wiesenbergs, appealed the applicable rulings to the Mississippi Supreme Court.

Meanwhile, in neighboring Jackson County, the Chancery Court found in 1991, that the Tidelands Act was unconstitutional. In this instance, the State of Mississippi appealed, (*Mississippi v. Molpus*, No. 91-CA-0975, also known as the McGowan case) and though identical issues were raised, the court refused to consider them together.

The McGowan case, decided the same date as Byrd, was rendered moot by the Byrd decision.

Oral argument was heard November 30, 1992. During the proceedings, the panel appeared most interested in an argument in support of constitutionality advanced by counsel for the State of Mississippi, stating that the Secretary of State had wide discretion to amend the preliminary maps prior to final publication. Never mind that the preliminary line must grandfather into private ownership all fill which occurred prior to 1973, the State argued; the Secretary of State can comment to himself, if necessary, that the encroachments occurred, and the final map can and should incorporate even those areas the Secretary was compelled to exclude in the preliminary map.

This tack of the State of Mississippi was somewhat surprising in light of the positions previously taken by the parties. In its original brief, the State of Mississippi had seemingly taken the same position it did at oral argument, but in milder terms, arguing that the Secretary's directive to revise the map canceled any supposed mandate to fix the boundary line at its 1973 position. Byrd, however, agreed with the Secretary's position, as set forth in the Secretary's original brief: "The Secretary of State ... argues that he has discretion only to revise the preliminary map (which must depict the 1973 boundary) according to comments and documentation received during the sixty day period allowed by law and only to more accurately depict the line of mean high water as of July 1, 1973." Subsequently, in its brief in reply to the cross appeal of Wiesenbergs, the State of Mississippi appeared to agree with the Secretary and Byrd: "As a practical matter, the Secretary's discretion to revise the map is limited to the comments and/or additional documentation submitted to him during the sixty day period after publication of the preliminary map."

Nevertheless, the "great deal of discretion" argument was the winning one. Justice Pittman, writing for the Court, affirmed "the use of the July 1, 1973, date as a starting point for the determination of the mean high tide line in developed areas." In compliance with the court's decision, the Secretary of State will continue to assert public trust ownership of tidelands filled prior to July 1, 1973, such as the Broadwater Marina and filled areas south of Highway 90 at Point Cadet in Biloxi.

The court reiterated that public trust lands can be alienated only for a higher public purpose and only upon legislative enactment consistent with the public purposes of the trust. Payment of taxes will not warrant a grant of fee simple ownership to the taxpaying occupant; nor will equitable doctrines of adverse possession or laches. The Court struck down the Secretary's arguments that the Tidelands Act constituted local and private legislation in

the guise of general act, that the Act was unconstitutionally vague, and that it violated the separation of powers provisions of the Mississippi Constitution. Except for the issue concerning separation of powers, it refused to consider the arguments raised by Wiesenbergh. Six justices concurred in the decision; Justice Prather did not participate. Justice McRae was the sole dissenter. His opinion incorporates the Jackson County Chancery Court's opinion in *State v. Molpus (McGowan)* and invites appeal to the U.S. Supreme Court.

In explaining its decision, the court first referred to the presumption of constitutionality of any legislative enactment. The Court disagreed with the Secretary's interpretation of the limitations of his authority, and said "Absent this [vast] discretion, the [Tidelands] Act might not have passed constitutional muster." In fact, the court continued, "The Secretary of State, after mapping, hearing comments and applying discretion, must hold to a minimum, any incidental or accidental public trust land losses. In upholding this legislation, we interpret the use of the July 1, 1973, date as a starting point in ascertaining the mean high water line in developed areas. Contrary to the Secretary of State's interpretation, this date is not a mandatory bench mark." The burden of proof shall be by a preponderance of evidence and shall in all cases rest with the Secretary of State. In finalizing the map, he shall have to show that fill placed before July 1, 1973, was not done "pursuant to a constitutional legislative enactment and for a higher public purpose." Unconstitutional donations, says the Court, should not survive this process.

Despite Justice McRae's invitation, the Secretary of State decided not to appeal the court's decision. Although the chancery court decision which the Secretary appealed was affirmed, the Supreme Court's decision allows, in fact mandates, the Secretary to "hold to a minimum, any incidental or accidental public trust lands losses." This was the Secretary's goal in challenging the Tidelands Act's directive to depict the preliminary line at its 1973 position. The preliminary Public Trust Tidelands Map, published in 1990, will be reissued, indicating the 1973 mean high water line as the preliminary boundary line, and specifically showing the historical boundary line in developed areas. The Secretary will state, at the time of republication, his intention to depict the historical line as the final boundary line, except in areas where public comment or his own research indicate that fill occurred pursuant to legislative enactment and for a higher public purpose. The burden of proof is fairly placed by the court on the Secretary, and he is confident that at the end of the legislatively dictated and judicially explicated process, Mississippi's valuable public

trust tidelands will indisputedly remain in public ownership. □

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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.

James City County, VA. v. EPA

12 F.3d 1330 (CA. 4, 1993)

by Danny J. Collier, Jr.

Under & 404(c) of the Clean Water Act, the Environment Protection Agency has authority to veto county's permit to build a dam and reservoir based solely upon environmental considerations, without regard to county's need for water and without regard to practicability of other alternatives to building.

INTRODUCTION

This dispute concerned the water supply needs of James City County, Virginia (County), the Clean Water Act (CWA), and the Environmental Protection Agency's (EPA) authority to preclude the County's construction of a dam and reservoir. The people of Virginia's Lower Peninsula are in need of additional water supplies. In the early 1980s, the County began planning the Ware Creek reservoir project in an effort to satisfy the county's water needs. In 1988, pursuant to section 404(b) of the CWA, the U.S. Army Corps of Engineers issued the County a permit to build the proposed dam and reservoir. EPA asserted its authority under section 404(c) of the CWA and vetoed the permit.

Not content with EPA's veto, the County took the matter into federal district court. EPA had found that "practicable, less environmentally damaging alternatives" were available to the County and the proposed water project would result in unacceptable adverse effects to the environment. *James City County v. EPA*, 758 F.Supp. 348, 351 (E.D.Va. 1990). The district court held that EPA lacked substantial evidence to support its findings that the County had practicable alternatives to building the proposed water project. *Id.* at 353. Consequently the court granted summary judgement in favor of the County. The Fourth Circuit Court

of Appeals affirmed the judgement, but remanded the case to determine whether EPA had the authority to veto the permit based on environmental considerations alone. *James City County v. EPA*, 955 F.2d 254 (CA4 1992)(JCC 1). In other words, the question became whether EPA could exercise its veto power based solely on the unacceptable adverse effects on the environment or whether EPA must also consider factors such as the County's need for water and the availability of alternatives to the project.

After consideration, EPA again vetoed the permit based solely on the unacceptable adverse effects the project would have on the environment. Back in the district court for the second time, the court held that EPA did not have authority to veto based solely on environmental concerns. The court granted summary judgement for the County and ordered the issuance of the permit. Once again, the County appealed. This time, however, the court of appeals reversed the lower court's ruling and held that EPA was justified in vetoing the permit based solely on environmental considerations. *James City County v. EPA*, 12 F.3d 1330, 1336 (CA4 1993). Also, the court concluded that the district court should have employed the "arbitrary and capricious" standard rather than the "substantial evidence" standard when reviewing the agency's conduct under § 404. *Id.* at 1337, note 4. Finally, the court held that the record did in fact support EPA's findings that the project would have unacceptable adverse effects on the environment. *Id.* at 1339.

DISCUSSION

The Proper Standard of Judicial Review

Based on the Fourth Circuit's holding in the first *James City County*, the district court reviewed the case for the second time employing the substantial evidence standard. Under such a standard, the district court must have affirmed EPA's findings if there was substantial evidence to support them. The Fourth Circuit describes substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion." Employing this standard, the district court concluded that EPA lacked substantial evidence to support its findings of "unacceptable adverse effects" on the environment.

While recognizing little actual difference between the substantial evidence standard and the arbitrary and capricious standard, the Fourth Circuit reconsidered the matter and decided that the correct standard in reviewing EPA's § 404(c) veto was the arbitrary and capricious standard. This standard is theoretically more narrow and the court is

not to substitute its judgement for that of the agency. The arbitrary and capricious standard requires the court to inquire whether the agency considered the relevant information and whether there is a "rational connection between the facts found and the choice made." *Id.* at 1338, note 4. Applying this standard the court must not disturb EPA's findings unless there was a "clear error of judgement." *Id.*

Whether EPA was Justified in Vetoing the Permit Based Solely on Environmental Considerations

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). While the county argued that the EPA had authority to consider their need for water, EPA asserted that its only requirement was to consider the adverse impacts on the environment. The county pointed to the statutory language in section 404(c) that states EPA has the authority to deny permits in cases such as the present whenever EPA determines the project will have "unacceptable adverse effect[s] on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas." The County's argument was that EPA must consider a wide range of factors before concluding the project would have unacceptable adverse effects on the environment.

EPA, on the other hand, used the preamble to 40 C.F.R. Part 231 to make its point: "[S]ection 404(c) does not require a balancing of environmental benefits against non-environmental costs such as the benefits of the foregone project." In other words, 404(c) refers only to the consideration of environmental factors without regard to the county's need for water.

The county pointed out that in the district court EPA took a position that it was now arguing against. In JCC 1 EPA stated that its long-standing policy had been that "the 'acceptability' of adverse effects can best be evaluated in light of all relevant factors, including such concerns as the availability of alternatives." 12 F.3d at 1335. EPA's stated policy in JCC 1 was just what the county was arguing for. The county argued that since EPA had lost in the lower court based on a lack of evidence to support its normal policy of all-encompassing consideration, EPA now took an inconsistent position by arguing that there was no requirement whatsoever to consider extra-environmental factors before vetoing the permit.

The Fourth Circuit Court noted that Congress had indeed intended for the U.S. Army Corps of Engineers to consider all relevant factors in the initial stages of the permitting process. 12 F.3d at 1335. However, Congress

recognized EPA's expertise and gave the agency the final decision of whether to allow a permit to stand. *Id.* at 1336. EPA's "authority to veto to protect the environment is practically unadorned." *Id.* In this case, would have an unacceptable adverse effect on the aquatic environment. *Id.*

Whether EPA's Decision of 'Unacceptable Adverse Effects' was Grounded in Fact

Once the court of appeals determined that EPA had the authority to veto the permit based purely on environmental considerations, the court reviewed the record of the case to determine whether the district court properly held that EPA's "unacceptable adverse effect" finding was not supported by the record. The court of appeals reversed the lower court's findings and determined that the record did support EPA's findings. The record indicated that EPA had in fact considered the project's detrimental effects on wildlife, fisheries, recreational areas, and areas outside the immediate Ware Creek site. These considerations led to the finding of "unacceptable adverse effects." The findings cited inevitable harm to a number of fish and wildlife species. In addition, losses included hundreds of acres of wetlands, marshes, estuaries, lakes, and forests. Though the county had a plan to mitigate damages, EPA concluded that the plan did not adequately compensate for the harm to the environment. Finally, the court held that EPA's findings were "supported by the administrative record, [were] not arbitrary and capricious, and, for that matter, [were] supported by substantial evidence." *Id.* at 1339.

CONCLUSION

For over ten years the county has labored to remedy its shortage of water supplies. It is undisputed that there is a real need for additional water sources in Virginia's Lower Peninsula. This case represents a clash between parties with different priorities. The Fourth Circuit Court of Appeals set in bold type with this case the authority granted to EPA by Congress. Without regard for the water needs of a given group of people, and without regard for the availability of other practicable alternatives, EPA has the authority to preclude a county's water project based entirely upon their assessment of environmental concerns. □

Danny J. Collier, Jr. is a second year law student at the University of Mississippi School of Law and research associate with Mississippi-Alabama Sea Grant Legal Program.

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.

Legislative Update: Mississippi

by Danny J. Collier, Jr.

The 1994 session of the Mississippi legislative produced several bills dealing with fisheries regulation, coastal management and environmental protection. The following is a summary of the new legislation.

Senate Bill No. 3079

Effective Date: 1 July 1994

This Act creates the Mississippi Commission on Marine Resources to regulate all matters pertaining to saltwater aquatic and marine resources. The Commission will administer the Coastal Wetlands Protection law and the Public Trust Tidelands Act. The Department of Wildlife, Fisheries and Parks is responsible for law enforcement jurisdiction over this chapter. This new structure for Marine Resource Management in Mississippi will be discussed in detail in the next issue of **WATER LOG**.

Senate Bill No. 3059

Effective Date: 1 July 1994

This Act creates a cause of action for producers of aquacultural food products who suffer damage as a result of another person's disparagement of the producer's aquacultural food products. Disparagement occurs when one disseminates false information to the public stating or implying that the food is not safe to eat.

Senate Bill No. 1224

Effective Date: 1 July 1994

This Act prohibits anyone, other than law enforcement officers on duty, from using oscillating or rotating blue lights on a vessel operated on the state's public waters. When a law enforcement vessel displaying the rotating blue light approaches, vessel operators must yield the right-of-way and stop, unless otherwise directed, until the law enforcement vessel has passed.

Violation is a misdemeanor with penalties not to exceed \$500.

House Bill No. 899

Effective Date: 1 July 1994

House Bill No. 899 makes it unlawful for commercial fishermen to operate a vessel from sunset to sunrise when the season for such fishing is closed or in an area where fishing is prohibited without the use of lights in compliance with the federal regulations applicable to the vessel in question. Violation is a misdemeanor with penalties for first-time offenders not to exceed \$500. Repeat offenses can result in penalties up to \$4000 or 30 days in jail.

House Bill No. 917

Effective Date: 1 July 1994

This Act allows nonresident of Mississippi less than 16 years of age to hunt or fish without a license. Conversely, nonresidents 16 years of age and older must obtain and possess a valid license before hunting or fishing. Violation is a misdemeanor punishable under Miss. Code Ann. Section 49-7-21(3).

Senate Bill No. 2818

Effective Date: 1 July 1994

Senate Bill No. 2818 makes it a felony to obtain a hunting, trapping, or fishing license under an assumed name or by making a materially false statement. Penalties include a \$2000 fine and/or one year in jail.

Senate Bill No. 3058

Effective Date: 21 March 1994

This statute authorizes the Department of Wildlife, Fisheries and Parks to establish and operate a fish hatchery in North Mississippi. The purpose of the act is to enable the Department to stock public lakes and streams in North Mississippi.

Senate Bill No. 2878

Effective Date: 23 March 1994

This act amends Miss. Code Ann. § 49-15-42 (1972) Mississippi requires that all oysters caught in state waters must be tagged and unloaded in Mississippi. In addition, prior to tagging and unloading, there are other requirements such as sacking and packaging. This amendment exempts persons from the unloading requirement if he is transporting the oysters to a state that has a reciprocity agreement with Mississippi exempting Mississippi residents from the unloading requirements of that state.

Senate Bill No. 3085

Effective Date: 1 July 1994

In addition to restating the content of Senate Bill No. 1224, establishes the fishing season for Mullet with gill or

trammel nets. The season begins on October 15 until December 15 of each year. This season is conditional upon the Department of Marine Resources determination that the fish harvest is of sufficient maturity. Gill or trammel nets may not be set in the marine waters of the state north of Highway 90. First offenders face penalties between \$100 and \$2,500.

Senate Bill No. 3053

Effective Date: 8 April 1994

Amending Miss. Code Ann. §51-1-4 (1972), this statute states that floodwater is not a part of the public waterway. The right to hunt and fish on public waterways does not include floodwaters.

House Bill No. 1305

Effective Date: 1 July 1994

House Bill No. 1305 creates a Forest and Wildlife Research Center at Mississippi State University. The Center will conduct research relevant to the utilization of the state's forest, wildlife and fisheries resources. Research will also work towards the enhancement of the natural environment associated with those resources.

House Bill No. 1544

Effective Date: 1 March 1994

This Act amends Miss. Code Ann. § 17-17-311 (1972) and sets down the procedures whereby a member of a regional solid waste management authority may withdraw from the authority.

House Bill No. 1059

Effective Date: 1 July 1994

This Act amends Miss. Code Ann. Sec 17-17-53 (1972). Manufacturing facilities that use hazardous waste as fuel as part of its manufacturing process are excluded from the tax otherwise levied against commercial hazardous waste management facilities. The subsection that creates this exemption will be repealed on December 31, 1996.

House Bill No. 1345

Effective Date: 29 March 1994

This Act amends Miss. Code Ann. Sec 17-17-503 by revising the application procedure for permits required for treating, processing, storing, or disposing of solid waste material.

House Bill No. 1461

Effective Date: 1 July 1994

House Bill No. 1461 imposes penalties upon persons who unlawfully discharge solid waste onto public land or

waters or onto private property without consent. Minor violations which are not committed for commercial purposes are misdemeanors and maximum penalties entail a \$1000 fine or one year in jail. Major violations (amounts exceeding 500 pounds in weight or 100 cubic feet in volume) or violations in any amount or volume of solid waste for commercial purposes, or any amount or volume of hazardous waste, are felonies and maximum penalties entail a \$50,000 fine or 5 years incarceration. For purposes of the fine, each day constitutes a separate violation.

House Bill No. 1624

Effective Date: 1 July 1994

This Act, known as the "Mississippi Multimedia Pollution Prevention Act," declares the intent of the Legislature to promote pollution prevention, require state agency recycling programs, encourage the recycling industry, and promote public education on these issues. The Mississippi Multimedia Pollution Prevention Program, created within the Department of Environmental Quality, will provide information, sponsor workshops, promote technologies and procedures, provide funds, and develop programs targeting business, industry, academic institutions, private and governmental entities, and the public in general in the pursuit of the Act's goals. □

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LAGNIAPPE

A Little Something Extra

Mississippi's Board of Trustees of the Institutions of Higher Learning has named Jesus B. Tupaz, director of the Mississippi-Alabama Sea Grant Consortium. Tupaz has served as MASGC interim director for the past year.

The IHL Board of Trustees approved the recommendation by the Sea Grant Consortiums Board of Directors to appoint Dr. Tupaz executive director of the two state program.

Sea Grant, a program of the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, promotes the understanding and wise use of the nation's marine and coastal resources. Sea Grant in Mississippi and Alabama is administered through a consortium of institutions of higher learning. Members are Auburn University, Gulf Coast Research Laboratory, Marine Environmental Sciences Consortium, Mississippi State University, University of Alabama at Birmingham, University of Mississippi, University of South Alabama and University of Southern Mississippi.

Tupaz, a native of San Pedro, California joined Sea Grant in 1991 as associate director. Prior to that, he served as Commanding Officer of the Naval Oceanographic and Atmospheric Research Laboratory (now the Naval Research Laboratory) at the Stennis Space Center.

Tupaz received his Ph.D. in meteorology and applied mathematics and his M.S. in meteorology and oceanography from the Naval Postgraduate School. He received his B.S. in naval science from the U.S. Naval Academy.

Tupaz sees Sea Grant as an investment in the health of the nation's marine and coastal resources, and in dealing with expected population growth along the coast during this decade and into the 21st century.

"Population growth will have an impact on our economy and coastal water quality and fisheries. Sea Grant is a unique institution that is working and will continue to work through universities, research and outreach programs to solve the problems of water quality and loss of fisheries productivity. I see Sea Grant being an instrument to work with coastal businesses, fisheries and coastal managers to develop the coast into being an even greater place to live."

Two-thirds of Tupaz' 30-year Naval career was devoted to executive and technical management in top oceanographic and atmospheric research laboratories and operational centers. He successfully merged and reorganized three laboratories and actively directed and managed the

resulting Naval Oceanographic and Atmospheric Research Laboratory.

He directed the Fleet Numerical Oceanography Center in Monterey, California that provides global environmental support to the Department of Defense. He also implemented an innovative concept of research and operational interdisciplinary/integration teams throughout the U.S. Navy's oceanographic community.

He was a catalyst for the Navy's world leadership in environmental data assimilation, numerical ocean and atmospheric prediction, database management systems, satellite data applications and numerical acoustic prediction. He was an early advocate in the early 1980s for the Class VII supercomputer (LSC) for the U.S. Navy's oceanographic community. The first LSC was installed in 1990 at the Naval Oceanographic Office, and the second LSC was installed in 1992 at the Fleet Numerical Oceanography Center. He also served as Technical Advisor in Meteorology and Oceanography to the Oceanographer of the Navy and the Commander, Naval Oceanography Command.

Dolan v. City of Tigard, 1994 U.S. LEXIS 4826, is the latest U.S. Supreme Court pronouncement on the issue of land use takings law. The Court ruled against the city in its attempt to place conditions on a development permit, holding that when placing a condition on a permit the city must show specific harm from the project that would warrant the restriction. Further, the Court required that any remedy show a "rough proportionality" to the harm through a site specific analysis of the property. Watch for details in upcoming **WATER LOG**.