



WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Alabama Coastal Control Line Loses In Court

Alabama Department of Environmental Management v. Kuglar, 1995 WL 444294 (Ala. Civ. App.).

SUMMARY

The Alabama Court of Appeals addressed the question of whether a coastal construction restriction was correctly applied in refusing a building variance.

Property owner John Kuglar sought to build a home on Fort Morgan Peninsula beyond a state designated Coastal Construction Control Line (CCCL). The Alabama Department of Environmental Management (ADEM) refused to grant him a variance. Kuglar contested ADEM's decision to the Alabama Environmental Management Commission which upheld ADEM's refusal. Kuglar then appealed to the Baldwin County Circuit Court. The court held the CCCL unduly restrictive in this case and ordered a variance. ADEM appealed to the Civil Court of Appeals which affirmed the trial court's decision.

FACTS

In 1979, a hurricane destroyed Kuglar's home in Baldwin County, Alabama on the beach of Fort Morgan Peninsula. In 1988, Kuglar filed a site plan and application permit with ADEM, seeking to construct a house in its former location. However, in 1985, ADEM had promulgated

regulations governing construction on Alabama beaches, including the establishment of a Coastal Construction Control Line (CCCL). Kuglar's plans were partially seaward of the CCCL.

The CCCL delineates an area of Alabama beaches beyond which construction is prohibited. Coastal experts considered factors, such as erosion; location of existing structures; and, storm patterns in establishing the line. The purpose of the CCCL is to protect the dune and shore areas from erosion, hurricanes, and storms; to protect wildlife beach habitat; and, to protect occupants and dwellings along Alabama's beaches.

Since Kuglar's construction plan crossed the CCCL, ADEM asked whether he wanted the permit application treated as a variance request. Kuglar requested a 43-foot variance.

A variance from the CCCL is available when its application would be unduly restrictive or would constitute a taking of property without just compensation. In December 1988, ADEM denied Kuglar's variance request, finding that the application failed to sufficiently demonstrate that a denial would

be unduly restrictive or would constitute a taking.

Kuglar appealed to the Alabama Environmental Management Commission (Commission). The Commission upheld ADEM's denial of the variance. Kuglar then appealed to the Baldwin County Circuit Court. The circuit court reversed the Commission's decision and held that ADEM should grant Kuglar an 18-foot variance. The court determined that without such a variance, the location of the proposed home would be dangerously close to a road; the granting of a variance would not damage the environment; and,

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From the Editor's Desk ...

I recently joined the ranks of the Mississippi-Alabama Sea Grant Legal Program and in so doing came aboard WATER LOG as its Editor. A number of qualified attorneys have guided the progress of WATER LOG over the past fifteen years. I hope to meet the standard they have set.

One of my first tasks at the helm of WATER LOG has been a review of the publication's format. The Water Log staff and I have reviewed hundreds of responses to a survey administered last year. Readers replied positively and have helped us determine ways to make the publication even more useful. Mindful of the axiom, "if it ain't broke, don't fix it," we will maintain those elements of the journal that have served it well. We will continue to publish articles and analyses of the myriad legal and policy issues facing the Gulf Coast and the nation with particular emphasis on the Mississippi-Alabama region. In response to reader suggestions, we have modified WATER LOG's format to take better advantage of space. Additionally, we will add features and noteworthy items that we hope will help readers keep up to date on issues facing our marine resources and the coasts.

In an effort to better serve you, we encourage you to let us know what you think. Please feel free to contact us with comments, questions, suggestions or articles of your own.

You can reach us at:

waterlog@sunset.backbone.olemiss.edu

or

WATER LOG

**Law Center, Room 518
University, MS 38677**

We look forward to working with you and serving you in the future.

Sincerely,

John Alton Duff

John Alton Duff, Editor

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equity favored granting the variance.

ADEM appealed this decision to the Alabama Civil Court of Appeals, arguing that substantial evidence existed in the record to support the Commission's ruling, thus prohibiting the circuit court from substituting its judgment for that of the Commission.

DISCUSSION

The Court of Appeals noted at the outset that, "a presumption of correctness attaches to an administrative agency decision

due to its expertise in a specific area." Moreover, "the decision of the Commission must be upheld unless 'substantial rights of the petitioner have been prejudiced because the [Commission's] action is clearly erroneous... unreasonable, arbitrary, capricious, or characterized by an abuse of discretion.'" Thus, the standard of review employed by the Court of Appeals called for a high degree of deference to be given to the Commission's decision.

The appeals court viewed evidence presented at the administrative hearings and the

circuit court to determine whether it justified the Commission's ruling. Testimony from a county engineer for Baldwin County suggested that without a variance, Kuglar would be forced to build his home close to a curve in the roadway, which could create an unreasonably dangerous situation to Kuglar, his family, and motorists who use the roadway. The engineer also testified that the danger could be lessened if Kuglar's home was built 10 to 20 feet from the roadway.

An expert witness from ADEM agreed that the site would be less

cont.

hazardous if built 10 to 20 feet from the roadway. ADEM's position, however, was that the house could be built up to 20 feet from the roadway and still meet the CCCL. This could be accomplished if Kuglar eliminated a proposed deck, and moved the entrance of the home from the front to the side. ADEM argued that Kuglar had the opportunity to use the property in a reasonable manner without encroaching upon the CCCL.

The court of appeals agreed that building the home in a position five feet from the road would create an unreasonable safety hazard. However, ADEM's argument that Kuglar eliminate a proposed deck on his home and move the entrance was rejected by the court. The court determined that forcing Kuglar to alter his construction plans would not be reasonable.

The court also reviewed testimony from the administrative hearing which revealed that ADEM admitted no incremental damage to the environment would result by granting a variance. The court of appeals gave this evidence considerable weight. In conceding that a variance would not result in damage to the beaches, ADEM left little room for justifying a restriction of Kuglar's intended use.

ADEM also argued that allowing a variance in this case would jeopardize the integrity of the CCCL by exposing variance request decisions to claims of arbitrariness. The court dismissed this argument, agreeing with the lower court that equity favored

granting a variance.

The court of appeals then determined whether the Commission's actions in denying the variance were arbitrary and clearly erroneous. Citing a previous Alabama case, the court stated that the Commission had failed to apply its own earlier articulated balancing test. The balancing test should weigh Alabama's interest in protecting the coastal ecosystem and the state's shorelines, against that of the property owner's enjoyment and use.

Since ADEM admitted that no environmental damage would result from granting a variance here, and refusing a variance could arguably result in unreasonable danger to Kuglar, his family and others, the court concluded that the ADEM and the Commission had acted erroneously.

Thus, the court concluded that the Commission's variance denial was unreasonable and unduly restrictive.

ANALYSIS

This is the first case to reach Alabama courts which involves a challenge to a CCCL variance denial. Since variances are granted on a case-by-case basis, it remains to be seen what effect this case may have on future CCCL litigation. This case could very well open the door for future battles between coastal property owners and the CCCL. The appeals court indicates here that the CCCL is not the rigid wall that ADEM might have believed.

ADEM may have failed to

articulate a sufficient rationale for upholding the CCCL restrictions. ADEM admitted here, that a variance would not result in any incremental damage to the environment. With this concession, it is difficult to justify restricting a property owner's proposed use of land simply to enforce a line drawn in the sand.

Is the CCCL merely a line drawn in the sand?

It is interesting to note that the case does not mention any argument about the potential cumulative impact of CCCL variance grants. The court may be telling ADEM that they will not enforce coastal property restrictions unless ADEM provides a clear, articulated, and reasonably related method of protecting the state's shoreline, habitat and inhabitants. □

B. Peacock, 2L

Editor's Note: On July 26, 1995, the Alabama State Legislature created the Alabama Coastal Area Erosion Task Force (1995 Ala. Acts 491). The Task Force will, *inter alia*, examine the possibility of developing a shoreline management plan for the state. This plan may address some of the issues covered in this case. See Alabama Legislative Update on page 6 of this issue of **WATER LOG**.

Supreme Court Settles Island Boundary Dispute

Louisiana v. Mississippi, 44 U.S.L.W. 4003 (1995).

SUMMARY

The United States Supreme Court recently settled a long-running boundary dispute between Mississippi and Louisiana. The Court held that contested land, currently contiguous with Louisiana on the west bank of the Mississippi River, is actually part of the state of Mississippi. A Special Master appointed by the Court determined that the land, formerly a Mississippi island, had merely shifted westward and therefore remained subject to the sovereignty of Mississippi.

FACTS

Louisiana and Mississippi claimed sovereignty over 2,000 acres of uninhabited property near Lake Providence, Louisiana. Currently the land abuts the Louisiana river bank. In the 1880s an island in the vicinity fell within Mississippi's borders. The river's main navigation channel passed to its west. Over the years, erosion and accretion caused the navigation channel to shift east.

A Mississippi family claims ownership of the island based on a federal deed from 1888. Mississippi insisted that the land is a direct remnant of the Stack Island that appeared on 19th century maps, an area indisputably in Mississippi.

Louisiana conceded that there did exist a Stack Island in 1881 and that it was formed in Mississippi territory. But

Louisiana maintained that two years later, in 1883, Stack Island washed away and was replaced by mere alluvial deposits, which were not sufficient in size or stability to be deemed an island. According to Louisiana, the disputed area was not formed from anything that can be said to be Stack Island, but was instead developed by random accretion to the west bank of the river.

In an earlier action, Mississippi citizens brought suit in the United States District Court for the Southern District of Mississippi to quiet title to the property. The district court ruled in favor of Mississippi. The Fifth Circuit Court of Appeals reversed and ruled in favor of Louisiana.

The United States Supreme Court granted Mississippi's petition for *certiorari* and held that neither the district court nor the court of appeals had jurisdiction to grant any relief in the quiet title action of one state against the other, that authority being reserved for the Supreme Court. The case was remanded so that the complaint could be dismissed. Upon remand, Louisiana filed a complaint in the U.S. Supreme Court asking the Court to define the boundary between the two states. The Supreme Court allowed this complaint, and appointed a Special Master to determine factual findings and recommendations.

The Special Master's findings favored Mississippi. Louisiana filed an exception to the recommendations.

DISCUSSION

Jurisdiction

The Court's exercise of original jurisdiction is infrequent, evoked here pursuant to its Constitutional authority to sit as a trial court in resolving disputes between states. Thus, the justices had to delve into questions of fact and law.

Rule of Thalweg and the Island Exception

In this case, as well as prior cases involving Mississippi River boundary disputes, the Supreme Court has applied the rule of the thalweg. In articulating the rule, Justice Kennedy, writing for a unanimous bench, noted, "the river boundary between states lies along the main downstream navigational channel, or thalweg, and moves as the channel changes with the gradual processes of erosion and accretion."

The Rule of Thalweg: *the river boundary between states lies along the main downstream navigational channel, or thalweg, and moves as the channel changes with the gradual processes of erosion and accretion.*

However, Kennedy also noted, "[t]here exists an island exception to the general rule,

which provides that if there is a divided river flow around an island, a boundary once established on one side of the island remains there, even though the main downstream navigational channel drifts to the island's other side." The island

Island Exception to the Rule of Thalweg: *If there is a divided river flow around an island, a boundary once established on one side of the island remains there, even though the main downstream navigational channel drifts to the island's other side.*

exception, explained Kennedy, "serves to avoid disturbing a state's sovereignty over an island if there are changes in the main navigational channel."

A preliminary question in resolving the dispute therefore was: has the disputed area continuously existed or did it disappear at some point?

Battle of the Maps

Mississippi presented numerous maps, descriptions and photographs of the disputed area, as it had been characterized since 1879. Together they represented overwhelming evidence that Stack Island existed as an identifiable parcel of land in continuous existence since that time.

Louisiana argued that Stack Island had disappeared so long ago and had left so little trace that the island exception should not apply. The evidence presented by Louisiana to support its theory of Stack Island's disappearance was a Mississippi River Commission map dated April 1883. The state

pointed out a solid green line labeled "present steamboat channel" on the map, which runs over a portion of Stack Island as it was drawn in 1881. Louisiana asserted that the green line meant that Stack Island had disappeared by 1883.

The Special Master indicated that the great weight of evidence supported Mississippi's claim. The Supreme Court noted at the outset that the Special Master's findings reflected careful and well-documented conclusions.

The Supreme Court reviewed the Special Master's determination which cast doubt on the authenticity of the map presented by Louisiana. Testimony indicated that no such map had been published by the Mississippi River Commission, and that a different map had been published by the Commission that same month which showed Stack Island in existence. Furthermore, evidence of sworn testimony taken in 1885 was presented in which a man stated that he and his family lived on the island until 1885. The Supreme Court gave considerable weight to this testimony, and were unconvinced by Louisiana's argument that Stack Island had disappeared in 1883.

The Court concluded that the case is controlled by the island exception to the rule of the thalweg. Pursuant to this conclusion, the Supreme Court agreed with the Special Master's placement of the boundary line on the west side of the area in dispute, rather than the east side. Thus, Mississippi's sovereignty over the area was recognized.

CONCLUSION

This case was unique in that the Supreme Court exercised its Constitutional power to sit as a court of original jurisdiction. The central issue in the case, however, was far from unique, involving the well-established rule of thalweg and its island exception. The fact that the case was argued so strongly by Louisiana on such little credible evidence is testament to the allure of territorial acquisition. □

B. Peacock, 2L

Maritime Tales

"It was a dark and stormy night. A patchy low-lying fog covered the murky waters of the river and obscured the banks. Ships, passing in the night, were but phantoms. Vague outlines disappearing into the mist. Ships' whistles echoing across the dark expanse, seemed like mournful cries from another world. Then suddenly, looming out of the darkness, another ship appeared. The distance was too small; time too short; before anyone could do anything more than cry out, the unthinkable occurred. The ships collided. The tug, helpless, drifted downriver. Floundering like some giant behemoth wounded in battle, the tanker came to ground and impaled itself on some voracious underwater obstruction. And still the whistles, echoing, seemed like cries from another world."

Stephen King? Raymond Chandler? Hemingway? Snoopy? No. This mysterious tale of maritime horror was penned by Judge John R. Brown in *Allied Chemical Corp. V. Hess Tankship Co.*, 661 F.2d 1044 (5th Cir. 1981).

ALABAMA LEGISLATIVE UPDATE 1995 by John A. Duff

Alabama lawmakers enacted several resolutions and laws related to marine resources in 1995. A summary of the relevant actions follows.

1995 Ala. Acts 287.

Approved June 30, 1995. Effective October 1, 1995.

Amends the state's conservation and natural resources laws to, *inter alia*:

- ☐ severely restrict the use of trammel and gill nets in saltwater fishing;
- ☐ impose strict liability for violating trammel and gill net restrictions;
- ☐ allow for confiscation and forfeiture of nets, catch, boats and motors involved in illegal net and seine fishing;
- ☐ impose criminal penalties for certain net and seine fishing violations; and,
- ☐ require a mandatory minimum fine of \$1,000 for first offenses of using a net or seine without the required license or permit.

1995 Ala. Acts 767.

Approved August 8, 1995. Effective November 7, 1995.

Establishes the Alabama Nonindigenous Aquatic Plant Control Act under the direction of the Department of Conservation and Natural Resources to prohibit the introduction of nonindigenous plants into the public waters of the state; and provides misdemeanor penalties for violations of the prohibitions.

1995 Ala. Acts 491 (H.J.R. 324).

Adopted July 26, 1995.

Creates the Alabama Coastal Area Erosion Task Force. The Task Force will be composed of representatives from municipal, state and federal agencies and is called on to:

- ☐ exchange information and technical results of studies or analysis of shoreline changes; and,
- ☐ investigate the feasibility of developing a shoreline management plan for the state.

1995 Ala. Acts 511.

Approved July 31, 1995. Effective July 31, 1995.

Restricts the use of clays which may discolor the natural white sands and waters in certain areas of Baldwin County. ☐

THE BARRIER ISLANDS of MISSISSIPPI and ALABAMA

INTRODUCTION

The six barrier islands separating Mississippi Sound and the Gulf of Mexico protect the wildlife, marine resources, and mainland coastal property of Alabama and Mississippi. However, their unique natural character and location make them particularly susceptible to storms and human development. According to the Cousteau Society, "the original character and shape of two thirds of the Atlantic and Gulf Coast barrier islands have been more seriously altered or destroyed by the actions of human[s] than by the worst storms."

Since 1971, the federal government has taken a number of steps to signify the importance of maintaining these unique natural resource assets. As a result, these six islands have been afforded special protections under the National Seashore designation process; the National Wilderness Act; and, the Coastal Barrier Resources Act. An overview of the islands, their functions and their protection under federal law follows.

THE ISLANDS

As a chain, Mississippi and Alabama's barrier islands span a distance of approximately 70 miles and encompass Mississippi Sound. The five Mississippi islands are Cat, West Ship, East Ship, Horn, and Petit Bois. Dauphin Island is in Alabama's state waters. The islands range in size from 2.5 miles to 14 miles.

On a geological time scale, the islands are relatively new. As recently as ten thousand years ago, large areas of Mississippi Sound and the Gulf of Mexico were dry

land extensions of North America. Following the last ice age, melting ice forced the ocean inland covering most of this area.

Theories on the formation of the islands vary. Some islands may be vestiges of narrow sand spits or they may represent sand shoals that have grown and shifted over time. Geological features suggest that Dauphin Island developed from an existing land ridge that became surrounded by melting ice. The ridge served as a base which grew westward with accretion and vegetation growth. Other islands likely formed as prevalent shoals in the area emerged and sprouted vegetation which now serves to anchor and stabilize them.

While all land masses shift and move to some small degree, barrier islands are more dynamic. They shift, grow, split, and shrink in short periods. Prevailing currents erode the eastern portions of the gulf coast islands and redistribute the sands westward. As a result, the islands have changed dramatically in size, shape, and location in a matter of decades. Petit Bois and Dauphin were once contiguous. Today more than thirteen kilometers separate them.

Cat Island is the western-most of the chain and is unique in its changing formation. Strong erosion on the island's eastern side has pushed sand spits north and south clearly distinguishing it from the other islands. While the island is privately owned, little development has taken place.

East Ship, the smallest of the islands, is approximately two and one half miles long. In 1947, a hurricane cut Ship Island into East

and West Ship Islands. By the late 1950s the breach between the east and west islands was filled. In 1969, Hurricane Camille again divided the island. West Ship includes historic Fort Massachusetts, a reminder of the island's use during the Civil War.

Horn Island lies twelve miles off the Mississippi coast between East Ship and Petit Bois. Many species of wildlife inhabit the island. Horn and neighboring Petit Bois also serve as a stopping place on the migratory routes of sanderlings en route their annual 8,000 mile trip between the Arctic and South America. Horn and Petit Bois are federally designated wilderness areas.

Dauphin, the largest of the six islands, is 14 miles long and sits off the coast of Alabama. Dauphin's topography and use vary dramatically from one end to the other. The heavily wooded eastern end differs from the low lying vegetation covering the south. Sand dunes and ridges cover the island. Dauphin is the only barrier island that has any significant commercial development.

FUNCTIONS & USES OF THE BARRIER ISLANDS

Protecting the Coast and Maintaining the Ecosystem

The barrier islands serve myriad important functions. As a chain, they form a natural buffer for the mainland, mitigating the effects of hurricanes and tropical storms. They also shield the sound's wetlands, estuaries, and bays from storms and saltwater intrusion from

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the open Gulf of Mexico.

Mississippi Sound serves as a low-salinity, high-nutrient, protected habitat for varied types of marine life. The shallow waters allow sunlight to reach the bottom and increase plant growth thus supporting a vital food chain.

These habitats are essential spawning, nesting, and feeding areas for shellfish, finfish and other aquatic animals. Waters surrounding the islands boast mullet, flounder, speckled sea trout, mackerel, shrimp, oysters, and blue crab.

Protecting Threatened and Endangered Species

The islands also serve as a protective habitat for rare species of wild flora and fauna. Many endangered and threatened species live on the islands or in the waters protected by them. Endangered sea turtles make their nests and lay their eggs on the island beaches. Raptors such as ospreys and peregrine falcons nest in island trees and feed on the area's plentiful prey.

Marshes and inland ponds collect rainwater providing terrestrial wildlife with needed fresh water. Endangered red wolves are raised on Horn Island under a recovery plan administered by the U.S. Fish and Wildlife Service.

Education and Recreation

The barrier islands are important educational, recreational, scenic, and scientific resources. Thousands of people over the years have used the islands as a haven in which to write, paint, hike, camp, and study nature. South side or Gulf-facing beaches offer visitors wide expanses of fine sand fashioned by

the Gulf's strong currents and wave energy. North side or sound-facing beaches offer narrower beaches with calmer waters. The area also provides recreational fishing and scuba-diving opportunities. Fort Massachusetts on West Ship Island serves as a history lesson on the military use of the islands since the Civil War. Local colleges and high schools regularly use the islands for educational field trips and biological research.

FEDERAL LAWS GOVERNING THE ISLANDS

National Seashore Designation

In 1971, Congress authorized the Gulf Islands National Seashore,

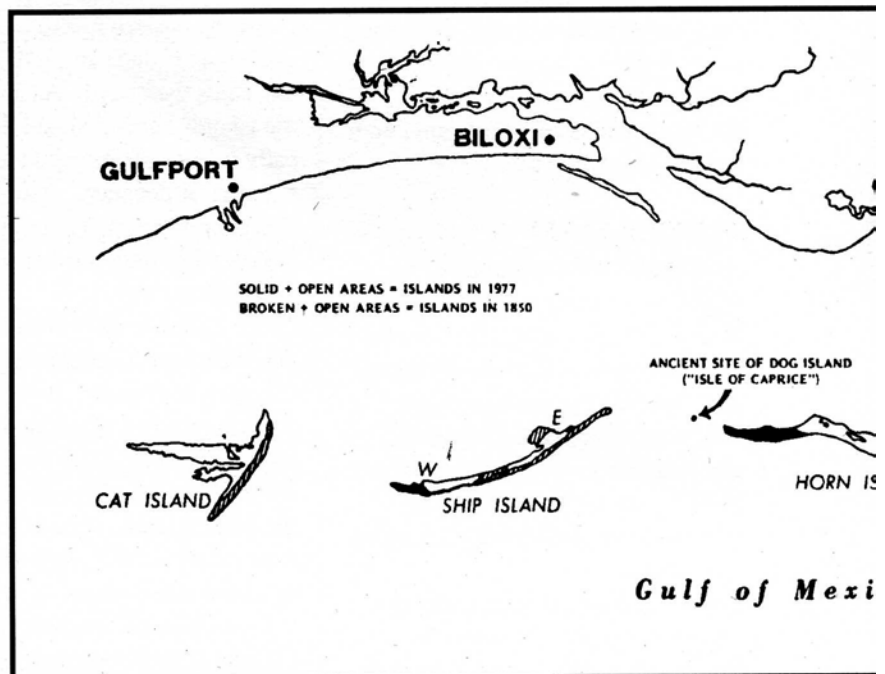
"[i]n order to preserve for public use and enjoyment certain areas possessing outstanding natural, historic, and recreational values." 16 U.S.C. § 459h.

The designated area includes a series of islands stretching from Florida to Mississippi including West Ship, East Ship, Horn and Petit Bois. The area includes a one mile band of water surrounding these islands.

Designation as a National Seashore area protects these islands from commercial development and unrestricted recreational use. Regulations regarding navigation of boats and planes in and around the islands affords wildlife added protection.

Since 1971, Horn and Petit Bois

This map indicates the dramatic changes that barrier islands undergo due to erosion and accretion over relatively short periods of time.



islands have served as refuges for wildlife such as tern, herons, and egrets.

The Wilderness Act

In 1978, Congress designated Horn and Petit Bois islands as wilderness area pursuant to the Wilderness Act of 1964. 16 U.S.C. § 1131 *et seq.* The Wilderness Act gives special areas heightened protection against manmade intrusions. While they may be visited, permanent improvements are prohibited.

In interpreting the requisite level of protection afforded these areas, courts have determined that the primary purpose of wilderness area designation is to guarantee that certain lands are kept in their original untouched natural state.

See *Sierra Club v. Block*, 622 F. Supp. 842 (1985).

This preserved wild state has led to Horn Island's use as an ideal habitat for the endangered red wolf (*Canis rufus*). Once inhabiting areas from Texas to Pennsylvania, and the Southeastern U.S., this species dwindled to fifteen animals in the 1970s. In 1989, a pair of wolves was moved to Horn Island. They have prospered and produced wolf pups. As a result, some of these animals have been reintroduced into other areas of the southeastern United States.

Coastal Barrier Resources Act

Neither the National Seashore designation nor the Wilderness Act governs Dauphin and Cat islands.

However, another federal policy, the Coastal Barrier Resources Act (CBRA), effectively protects them. See 16 U.S.C. § 3501 *et seq.* In 1982, Congress passed the CBRA to restrict certain federal assistance programs which had served to motivate unsound development on barrier islands.

The CBRA prohibits federal subsidies such as federal flood insurance or government loans, from being granted for development within these protected areas. By removing access to these and other federal assistance programs, taxpayers no longer underwrite risky development.

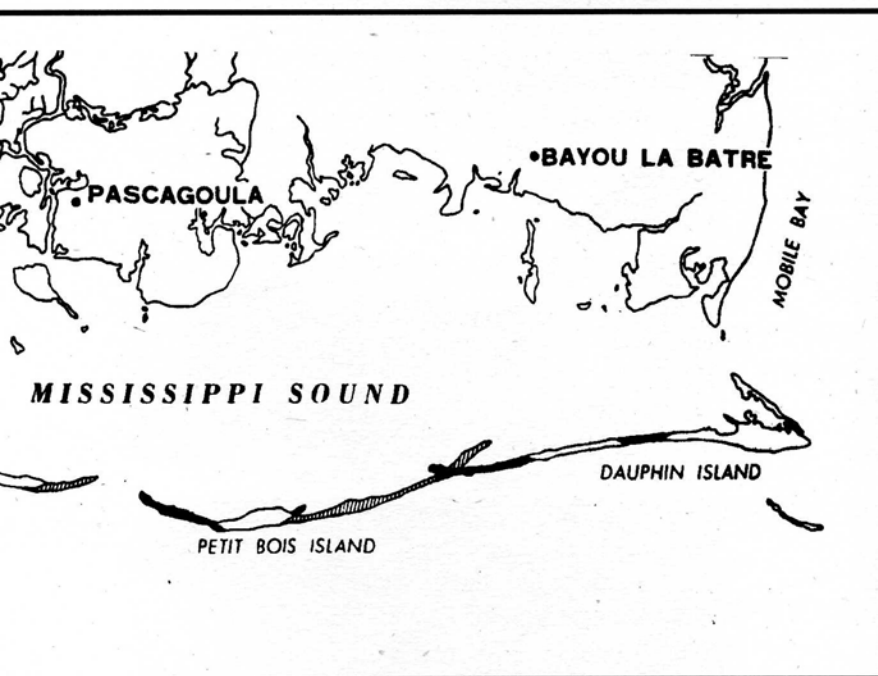
CONCLUSION

Barrier islands such as those off the coasts of Mississippi and Alabama represent unique natural resource assets that protect the mainland; maintain important habitat areas; provide recreational, historical, cultural and scientific opportunities; and preserve wilderness refuges. Accordingly, Congress has afforded them special protections under the National Seashore designation process; the Wilderness Act; and, the Coastal Barrier Resources Act. As a result, humans and other species who value these islands and their functions can be assured of their continued protection from unwise and unnecessary development. □

Melissa Baria, 2L and John Duff



Map courtesy of Gulf Coast Research Laboratory – J. L. Scott Marine Education Center & Aquarium.



1995 Federal Legislation Review by John A. Duff

The 104th Congress has enacted two important bills relevant to marine issues. The first deals with the manner in which marine, ocean and coastal matters are shepherded through the legislative process. The second governs a number of high seas and international fishing arrangements.

104 Pub. L. 14 - An Act Re-assigning Committee Matters.

This law indicates the reorganization of the committees of the House of Representatives and specifically the duties of the former Merchant Marine and Fisheries Committee. Those duties are re-assigned as follows:

Matters Related to:

Are Now Assigned to:

Fisheries, wildlife, international fishing agreements, marine affairs (including coastal zone management), except for measures related to oil and other pollution of navigable waters; or, oceanography



Committee on Resources

1324 Longworth House Office Building
Independence & New Jersey Avenues, SE
Washington, DC 20515
(202) 225-2761

Merchant Marine Academy and State Maritime Academies, or national security aspects of merchant marine; and, oceanic canals.



Committee on National Security

2120 Rayburn House Office Building
Independence & South Capitol St., SW
Washington, DC 20515
(202) 225-4151

Marine research



Committee on Science

2320 Rayburn House Office Building
Independence & South Capitol St., SW
Washington, DC 20515
(202) 225-6371

Inspection of seafood or seafood products



Committee on Agriculture

1301 Longworth House Office Building
Independence & New Jersey Avenues, SE
Washington, DC 20515
(202) 225-2171

Remaining matters



Committee on Transportation and Infrastructure

2165 Rayburn House Office Building
Independence & South Capitol St., SW
Washington, DC 20515
(202) 225-9446

104 Pub. L. 43 - Fisheries Act of 1995

The Fisheries Act of 1995 addresses a number of issues regarding high seas fishing and international fishing agreements to which the United States is a party.

Title I - High Seas Fishing Compliance Act of 1995.

- ☐ Establishes a system of permitting, reporting, and regulation for vessels of the United States fishing on the high seas; and,
- ☐ implements the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

Title II - Northwest Atlantic Fisheries Convention Act of 1995.

- ☐ Promulgates implementing legislation governing U.S. participation in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (NAFO Treaty).

Title III - Atlantic Tunas Convention Authorization Act of 1995.

- ☐ Governs U.S. measures to conserve Atlantic Tuna within the International Commission for the Conservation of Atlantic Tunas (ICCAT) regime;
- ☐ calls on the Secretary of Commerce to monitor fishing activities to ensure that foreign nations are not diminishing the effectiveness of ICCAT conservation measures; and,
- ☐ applies the civil penalty and permit sanction provisions found in the Magnuson Act.

Title IV - Amendments to the Fishermen's Protective Act of 1967.

- ☐ Outlines Congress's concern that Canada's \$1,500C license fee requirements for transit through the "Inside Passage" is inconsistent with international law.
- ☐ Accordingly, the Act amends the Fishermen's Protective Act of 1967 (22 U.S.C. § 1971 *et seq.*) and calls on the Secretary of State to reimburse U.S. commercial fishing vessels paying this fee, and directs the Secretary to recover any such amounts from Canada.

Title V - Sea of Okhotsk Fisheries Enforcement Act of 1995.

- ☐ Amends the Central Bering Sea Fisheries Enforcement Act by adding the Central Sea of Okhotsk.
- ☐ Accordingly it prohibits vessels and nationals of the United States from conducting fishing operations in the Central Sea of Okhotsk, except where such operations are conducted in accordance with an international fishery agreement between the U.S. and the Russian Federation.

Title VI - High Seas Driftnet Fishing Moratorium Protection Act.

- ☐ Maintains the United States's role in the global moratorium on high seas large scale drift net fishing.

Title VII - Yukon River Salmon Act of 1995.

- ☐ Implements the interim agreement for conservation of salmon stocks originating from Canada's Yukon River in accordance with the Pacific Salmon Treaty between the U.S. and Canada.

Title VIII - Miscellaneous Matters.

- ☐ Applies certain provisions of the Marine Mammal Protection Act to U.S. vessels fishing in the Pacific Tuna Treaty Area; and,
- ☐ makes certain foreign fishing allocations contingent upon consultation with the affected regional fishery management council and the existence of a fishery management plan.☐

Book Review — Sylvia A. Earle, *SEA CHANGE: A MESSAGE OF THE OCEANS*, 1995. G.P. Putnam's Sons, New York, N.Y. \$25.95. 328 pp.

Sylvia Earle's *SEA CHANGE: A MESSAGE OF THE OCEANS* serves as a clarion call to take a closer look at the life blood of planet earth, the oceans. The thoughtful mixture of wonder and concern outlines Dr. Earle's years of study and thousands of hours working, playing and living beneath the ocean's surface. Earle intersperses tales of discovery and enlightenment with easy to read discussions of biology, engineering, law, and policy, to weave a tale advocating better stewardship of our ocean resources.

A biologist by formal training and explorer by natural curiosity, Earle reminds us of what we learned in elementary school, that water covers most of the planet which we inhabit.

Earle begins by giving the reader a sense of geologic time over which the earth has taken shape and the oceans have formed. She points out that post-Columbus man has occupied this planet for a mere four seconds in the geologic year representing the earth's 4.6 billion year history. She notes modern oceanography, from its origin in the 1870s with the expedition of the *HMS Challenger*, covers less than one second on that time scale.

Having humbled human knowledge of the seas on a temporal scale, Earle assuages our species ego touting the great advancements that have enabled humans to descend, albeit briefly, to the deepest part of the oceans.

Earle revels in the fact that she grew up in an era that saw Cousteau and Gagnan develop self contained underwater breathing apparatus (scuba) equipment. Divers, unfettered from bulky diving helmets and air hose shackles, could now significantly increase access to, "where most of the living action on Earth is concentrated: underwater." She

"Diving made it possible to go where most of the living action on Earth is concentrated: underwater."

relishes the milestone achieved when U.S. Navy Lieutenant Don Walsh and Swiss engineer Jacques Picard descended in the bathysphere *Trieste* to a depth of 35,800 feet in the Marianas Trench. The visit to the deepest point in the ocean in 1960 out-paced the ascent of Mt. Everest in many ways.

The author recounts her own fascination and relationship with the sea from her days as a child on the coasts of New Jersey and Florida to her study of marine flora in the Gulf of Mexico as a graduate student. In self-deprecating style, Earle outlines the series of circumstances that led from her participation in an otherwise all male oceanographic expedition in 1964 to an underwater living experiment in 1970 "manned" by an all-women research team.

As her curiosity grew and technological development allowed, Earle began venturing into those depths and activities that had not yet hosted human activities. She participated in early observations of humpback whales off the coast of Hawaii. In 1979 she made a record dive to 1250 feet in an untethered specially designed diving suit. Each adventure strengthened her conviction that the ocean as a living system merited additional research.

Earle's sense of wonder and desire to further scientific observation led her to co-found Deep Ocean Engineering, Inc. The private company designs and manufactures deep sea remotely operated vehicles (ROVs) and manned submersibles. Balancing the limits of the human body and the desire for feasible access to the ocean depths, Earle notes that while economics and human frailty may favor ROVs, "there is no completely satisfactory substitute for being there."

Engineer Earle notes that while her own business venture is successful in making inroads to deep sea exploration, the United States lags behind other nations in developing a national policy toward deep ocean exploration. She illustrates her point in recounting her opportunity to descend more than two and one half miles, not in one of her own creations or one sponsored by the U.S., but in a Japanese built

submersible.

In the second part of her book, Dr. Earle outlines the results of unbridled technology on the ocean and its resources. Fisheries, once thought inexhaustible, have been decimated by commercial ventures, "ever reaping, never sowing." Earle notes that the world's ocean resources suffer a tragedy of the commons of global proportions.

She laments the effects of the well meant, but perhaps ill-implemented Magnuson Fishery and Conservation Management Act. While the goals of the Act are laudable, she notes, the policies to effect those goals are flawed. Earle contends that the establishment of Regional Fishery Councils, controlled to a large degree by commercial fishing interests, is akin to letting the "barracuda guard[] the fish coop." She further observes that while the Act allowed the United States to control fishing access in its 200 mile Exclusive Economic Zone, it merely drove out foreign fishing and replaced it with an overcapitalized domestic fishing industry.

Earle notes that scientists and policy makers have addressed the problem of overfishing with naive or weak analytical methods. Scientist Earle very succinctly questions the credibility of maximum sustainable yield (MSY) estimates of fish stocks, given the multiple and uncertain factors necessary to determine such an estimate. Such "scientific" methods may in fact do more harm than good, contends Earle, "the concept of MSY snares good minds, creates

unrealistic expectations and encourages the setting of unattainable goals."

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Earle paints a picture of myopic policies which have resulted in problems of bycatch of non-targeted fish, marine mammals, turtles and birds. The original goals of the MFCMA, asserts Earle, have been undermined by practices which have led to, "a squandering of natural assets deliberately encouraged by national policies." She does note that some of these problems are slowly being addressed. Congress, federal agencies and fishery councils are developing new methods such as individual fishing quotas (IFQs) and individual transferable quotas (ITQs) which may achieve better success in conserving our ocean resource capital. And policy makers are shifting their population analyses away from MSY concepts.

Earle also paints a picture of the "coral bleaching" of tropical reefs. Slight variations in ocean temperatures have dramatic effects. Wide expanses of reefs once alive and vibrant in color are now dying and leaving behind expansive white coral corpses.

The decline of fish stocks and the death of coral communities are detrimental not only in their short term loss, but also in the long term. "Each species is a part of a planetary insurance

policy for maintaining gradual, not cataclysmic, adjustments to changing environmental circumstances," explains Earle.

Earle examines the extensive effects of human activity on marine life. Toxins disposed of in the water infiltrate the marine food chain. Fish, polar bears, whales and penguins who have never directly encountered species *homo sapiens* suffer increased levels of toxins in their organs and tissues. While ocean disposal may appear attractive to our species it is by no means benign. Highly persistent plastics and other wastes dumped at sea have led to an alarming, but common, post-mortem determination of many forms of sea life: "death by debris." The casualties included an estimated 50,000 North Pacific Fur seals annually during the 1980s. These more obvious concerns have led to international laws banning or restricting ocean dumping.

Earle rounds out her discussion of manmade threats to the ocean environment with eyewitness accounts of the *Exxon Valdez* spill and the act of environmental terrorism perpetrated by Saddam Hussein in the Persian Gulf. The former disaster affected some of the world's most pristine coastline, a stretch the size of California's shore. The latter spill was an intentional dumping of the equivalent of 50 *Valdez* spills.

In the final part of her book, Earle notes the cumulative impact that twentieth century civilization has had on the shore and the sea.

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SEA CHANGE - from page 14

In addition to the cataclysmic events outlined earlier, Earle indicates that increasing populations, advances in technology, and the affinity for people to live closer to the shore leads inevitably to a proliferation of sea walls, marinas, channels, and shoreline development. The marine life in these areas suffer a "death of a thousand cuts." While the ocean may have the assimilative capacity to absorb many human uses, there are significant areas of the ocean that have lost a vitality and mixture of life which they will likely never regain.

Human impact on the oceans, cautions Earle, warrants a sea change in attitude: We must maintain the environmental capital that our ocean resources represent. The first step in attaining a better attitude towards the ocean system is a better understanding of it explains Earle, "perhaps with knowing will come caring, and with caring an impetus toward the needed sea change of attitude."

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Earle points to the establishment of marine sanctuaries or reserves as one step towards better understanding. She presents an overview of national and international efforts in a concise appendix. She contends, however that marine reserves, specifically those under the U.S.

National Marine Sanctuaries Program, ought to be funded and protected in a manner analogous to the National Park Service system.

SEA CHANGE delivers a tale of discovery and adventure while advocating an effort to increase our understanding of the planet's ocean system. It serves as a valuable reference for the casual reader as well for professionals involved in ocean and coastal issues. It merits space among Carson and Cousteau on the bookshelf. □

Reviewed by John Duff

Publications Reviewed

Aquatic Resources and Non-Point Source Pollution - Self Study Guide, Virginia Department of Conservation and Recreation. A useful tool for government agencies, private organizations, and citizens to gain a better understanding of aquatic resources and the impacts of non-point source pollution. Contact Department of Conservation and Recreation, Div. Of Soil and Water Conservation, 203 Governor Street, Richmond, VA 23219-2094. (804) 786-2064.

Decision Guide to Individual Quota (IQ) Management of Fisheries, April 1995. By K. Roberts. A brief introduction to the fishery management approach known as Individual Quotas. This twenty-one page primer sets out some of the fundamental aspects of designing an IQ system in a straightforward question and answer approach. Contact: Louisiana Sea Grant College Program, Communications Office, Louisiana State University, Baton Rouge, LA 70803-7507. Phone: (504) 388-6448.

Directory of Water Resource Professionals in Mississippi, 1994.

A helpful directory of organizations and researchers involved in preserving, protecting, and improving the water resources of Mississippi. For information, contact Mississippi Water Resources Research Institute, P.O. Drawer AD, Mississippi State, MS 39762-5529. (601) 325-3620.

Environmental Permit Directory, March 1995 ed. Mississippi Department of Environmental Quality. A helpful guide to business owners, resource managers and others interested in the process of securing permits for activities that may have a substantial impact on the environment. Contact DEQ, Southport Mall, 2380 Highway 80 West, Jackson, MS 39289.

Fisheries Management for Fishermen: a manual for helping fishermen understand the federal management process, 1994. By R. Wallace, W. Hosking, S. Szedlmayer. An easy-to-read overview of federal marine fisheries management as mandated by the Magnuson Fishery Conservation and Management Act. Contact your local Sea Grant College Program or the Auburn University Marine Extension and Research Center, 4170 Commanders Drive, Mobile, AL 36615.

Methodologies and Mechanisms for Management of Cumulative Coastal Environmental Impacts, B. Vestal, A. Rieser, *et al.* An overview and analysis of programs for management of cumulative environmental impacts in coastal areas. Part of the NOAA Coastal Ocean Program's Decision Analysis Series. Contact: NOAA Coastal Ocean Office, 1315 East West Highway, Silver Spring, MD 20910. Phone (301) 713-3338; fax (301) 713-4044. □

Lagniappe *(a little something extra)*

Around the Gulf ...

From Texas to Florida, states have adopted gill net restrictions in the form of statutes, agency regulations, and state constitutional amendments. Commercial fishermen are challenging many of the restrictions. An upcoming issue of **WATER LOG** will focus on the issue and present an overview of the legal implications.

The Alabama legislature selected Representative Walter J. Penry, Jr., as the State of Alabama's legislative representative to the Gulf States Marine Fisheries Commission.

The National Marine Fisheries Service (NMFS) issued a final rule, effective November 13, 1995, prohibiting the taking of coral in most federal waters in the Gulf of Mexico (60 FR 56533).

In November, a federal district court ruled on motions by the Center for Marine Conservation (CMC) to force NMFS to implement measures to protect endangered sea turtles from shrimping practices. The court held that CMC's ostensible verbal settlement agreement with the federal government lacked the requisite contractual elements. The court also temporarily denied CMC's motion for a temporary injunction to require protective measures. The court indicated that it would rule on the matter by February 16, before the start of the 1996 shrimping season in the Gulf of Mexico. See Center for Marine Conservation v. Brown, 1995 U.S. Dist. LEXIS 17442.

Congress amended the Outer Continental Shelf Lands Act in November by waiving royalty payments on deep water oil and gas leases in the Gulf of Mexico. See Pub. L. 104-58 - Title III.

Around the Nation and the World ...

In October, the U.S. House of Representatives passed amendments to the Magnuson Fishery Conservation and Management Act. A similar bill awaits Senate action.

The United States hosted the Intergovernmental Conference to Adopt a Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (October 23- November 3).

In November, the Scripps Institution of Oceanography began its Acoustic Thermometry of Ocean Climate (ATOC) experiment. The experiment is designed to transmit low frequency sounds across the Pacific Ocean in an effort to measure ocean temperature changes.

On November 29, the United States submitted its letter of accession to the depositary of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fishery. The US will implement the Convention through Title II of the Fisheries Act of 1995 - 104 P.L. 43 (see Federal Legislation Update in this issue).

On December 4, twenty-five countries including the United States signed the Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Stocks, the Convention now must be submitted to the Senate for its advice and consent. □

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

If you would like to receive future issues of **WATER LOG** free of charge, please send your name and address to: Mississippi-Alabama Sea Grant Legal Program, University of Mississippi Law Center, University, MS 38677, or contact us via e-mail: waterlog@sunset.backbone.olemiss.edu. We welcome suggestions for topics you would like to see covered in **WATER LOG**.

This work is a result of research sponsored in part by the National Oceanic and Atmospheric Administration, U.S. Department of Commerce under Grant Number NA16RG0155-02, the Mississippi-Alabama Sea Grant Consortium, the State of Mississippi, and the University of Mississippi Law Center. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. The views expressed herein are those of the authors and do not necessarily reflect the views of NOAA or any of its sub-agencies.

Editor:

John Alton Duff, J.D., LL.M.

Associate Editor:

William C. Harrison, 2L



Production Assistant:

Niler P. Franklin

Writers:

**Melissa S. Baria, 2L
Bradley Peacock, 2L**

University of Mississippi Law Center - University, MS 38677

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MASGP-95-002-03

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