Sea Grant

# WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

# Produced Water Discharge Into Galveston Bay Deemed Pollutant Under Clean Water Act

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc., 73 F.3d 546 (5th Cir. 1996).

*by William C. Harrison, 3L*

## Background

The Fifth Circuit Court of Appeals recently held that "produced water" discharged by a coastal oil drilling company falls within the definition of a pollutant under the Clean Water Act (CWA) as "chemical wastes" or "industrial waste."[1] During the drilling process, chemicals and water trapped underground mix with oil and gas deposits. The resulting liquid is called "produced water." After the extraction of the oil and gas, this "produced water" is separated from the valuable deposits and disposed of as waste.

There are three categories of oil production regulated by the Environmental Protection Agency (EPA): onshore, coastal, and offshore. EPA had promulgated produced water effluent regulations for onshore and offshore oil and gas production. However, they had not enacted similar limitations on produced water discharged through coastal production.

Cedar Point Oil Company, a Mississippi corporation, operates a well in coastal Texas. It began producing oil and gas from the well in September of 1991. From that date until May 1994, Cedar Point discharged produced water from their waste treatment facility directly into Galveston Bay without a National Pollution Discharge Elimination System (NPDES) permit. Although Cedar Point complied with oil and grease limitations required by the Texas Railroad Commission, the Commission informed Cedar Point that they may be required to obtain a NPDES permit. In October of 1992, Cedar Point applied to EPA for a NPDES permit as a coastal operator. EPA failed to issue a permit, however, and Cedar Point continued their discharge.

Sierra Club, Lone Star Chapter (Sierra Club) informed Cedar Point by letter in December of 1992 that they intended to bring a civil action claiming that Cedar Point's unpermitted discharge violated the CWA. Cedar Point insisted that they were not violating the CWA. Following the notice letter, Cedar Point filed suit in the Southern District of Mississippi seeking to enjoin Sierra Club from filing a citizen suit and to force EPA to rule on its NPDES permit application. The district court of Mississippi held that Cedar Point failed to state a recognizable claim against Sierra Club and dismissed that portion of the suit. The suit against EPA is still pending.

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## *From the Editor's Desk ...*

*This is the third issue of WATER LOG in its new format. Reader response has been positive and continues to play an important role in how we suit the publication to your needs. In an effort to fine tune the publication, we continue to solicit reader feedback. Let us know what you think.*

*Congratulations on the new format of WATER LOG. It looks very nice, very professional. I found the articles both interesting and informative. [Ms. Peacock suggested that our bylines include the full name of our authors]. Otherwise I think all the changes are positive.*

*Jane Peacock*
*Cleveland, MS*

*I noticed the new look (nice!). Thanks for your continued good work on this newsletter. [Ms. Coffman suggested we denote the year of each volume on our headers].*

*Andrea Coffman*
*Ocean and Coastal Law Center*
*University of Oregon*
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*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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### Texas District Court Case

On April 20, 1993, Sierra Club filed a citizen suit[2] under the CWA in the United States District Court for the Southern District of Texas.[3] Sierra Club sought damages and an order enjoining Cedar Point's produced water discharge. Cedar Point, classified as a coastal operator, argued that due to the absence of EPA regulations, their produced water was not a pollutant under the CWA.

The district court granted summary judgment in favor of Sierra Club as to Cedar Point's violation of the CWA, a civil penalty, and attorney's fees. The court found that Cedar Point violated the CWA by its discharge of produced water without a NPDES permit. The court fined Cedar Point $186,070 in civil penalties and awarded Sierra Club $60,000 in attorney's fees.

Although Cedar Point could have been fined the statutory maximum of $25,000 per day of noncompliance (for a total of over $20 million), the district court imposed a fine equal to the approximate economic benefit realized by avoiding NPDES permit compliance. Some commentators note that a mere slap on the wrist does little to discourage corporations from violating the CWA. Corporations faced with relatively small fines may choose to incorporate them into the cost of doing business rather than comply with the law.

The district court also enjoined Cedar Point from discharging produced water without a permit. The injunction was later modified, however, to allow Cedar Point to continue

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their discharge under an EPA general permit issued in January of 1995 to coastal operators. This general permit allows the discharge of produced water until January 1, 1997, as long as the coastal operator takes affirmative steps to reach zero discharge. Sierra Club appealed the injunction modification to the Fifth Circuit. Cedar Point appealed the other rulings.

## The Fifth Circuit Case

On Sierra Club's appeal to have the injunction modification reversed, the Fifth Circuit found no abuse of discretion on the part of the district court below. Accordingly, the court let the modified injunction stand. The court of appeals then addressed the issues appealed by Cedar Point, that: 1) Sierra Club lacked standing to sue; 2) Sierra Club failed to state a claim under the citizen suit provision of the CWA because there were no relevant effluent limitations or permit provisions promulgated by EPA; and, 3) produced water is not a "pollutant" within the meaning of the CWA.

### *Standing*

Cedar Point asserted that Sierra Club did not have standing to sue because its members did not show injury in fact that was traceable to Cedar Point's discharge. The court, however, pointed out that two Sierra Club members live near Galveston Bay. These members and one other claimed to use the bay for recreational activities such as canoeing and bird watching. The court held this sufficient to establish an actual or threatened injury. The Fifth Circuit also upheld the district court's finding that the harm was fairly traceable to Cedar Point's discharge. Thus, Sierra Club could bring an action under the citizen suit provision of the CWA.

### *Citizen Suits In the Absence of EPA Regulations*

Under section 1311(a) of the CWA, "the discharge of any pollutant [without a NPDES permit] by any person shall be unlawful."[4] However, EPA had not promulgated any effluent limitations or permit provisions concerning produced water discharged by coastal operators. Cedar Point argued that since there were no specific effluent limitations or permit provisions, there could be no violation of the CWA. Sierra Club asserted that the CWA effectively governs the discharge of produced water.

The court stated Cedar Point's claim that they did not violate the CWA was "contrary to the plain language of the CWA."[5] According to the court, a citizen can bring suit under the CWA against a polluter even where EPA has not promulgated effluent limitations or discharge permits. The Fifth Circuit thus held that Sierra Club could bring a citizen suit against Cedar Point for violating the CWA despite the absence of EPA regulations dealing specifically with produced water discharges from coastal operators.

*The court found that Cedar Point's claim was "contrary to the plain language of the CWA."*

### *Produced Water as a Pollutant*

The main issue before the court was whether produced water falls within the definition of a pollutant under the CWA. The CWA includes as pollutants "chemical wastes" and "industrial, municipal, and agricultural waste discharged into water."[6] EPA had not specifically listed produced water as a pollutant for coastal oil and gas production.

The district court had held that without a NPDES permit, Cedar Point was in violation of the CWA. Cedar Point argued that the district court erred since only EPA could make this determination. Cedar Point claimed that if courts were allowed to determine whether a substance is a pollutant under the CWA, "chaos will result because courts will reach different results regarding what substances are pollutants and at what levels such substances may be discharged without causing harm to the environment."[7]

However, the appeals court upheld the district court's ruling. Examining the CWA along with its legislative history, the Fifth Circuit stated that Congress did not preclude the court from

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determining that the statutory definition covers a non-listed substance. A court must be able to determine whether a substance is a pollutant to effectuate a valid CWA citizen suit brought where EPA has not listed a substance as a pollutant. The court pointed to other federal appeals court cases determining that particular non-listed substances were pollutants.[8] The Fifth Circuit held that it could in this case determine whether a non-listed substance is a pollutant within the meaning of the CWA definition.

Having established their authority, the Fifth Circuit turned to whether Cedar Point's produced water was a pollutant under the CWA. Although EPA did not specifically list produced water as a pollutant for coastal operations, the definition of pollutant made an exception for produced water in narrow circumstances. The court stated that this fact was strong evidence of "Congress' concern over the effects of produced water on the environment."[9] EPA had also issued regulations listing produced water as a pollutant when produced from onshore and offshore oil and gas operators.[10] In addition, EPA lists several substances included in Cedar Point's produced water as "toxic pollutants."[11] For these reasons, the appeals court concluded that the district court correctly held that the produced water discharged by Cedar Point into Galveston Bay was a pollutant under the definition of the CWA.

*The court can determine whether a non-listed substance is a pollutant within the meaning of the CWA definition.*

## Conclusion

The Fifth Circuit followed other appeals courts in this case by holding that the judiciary can determine whether a particular substance falls within a broader definition of pollutant under the CWA. Having made this determination, the court recognized the validity of a citizen suit regarding the discharge of a non-listed pollutant. Accordingly, the court affirmed the district court's ruling that Cedar Point's produced water, while not specifically listed, is a pollutant; that Sierra Club's suit was proper; and, that Cedar Point violated the CWA.

*Endnotes*

[1] *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 568-69 (5th Cir. 1996); Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1988).

[2] 33 U.S.C. § 1365 (1988).

[3] Civil Action No. H-93-1147 (S.D. Tex. 1993).

[4] 33 U.S.C. § 1311(a) (1988).

[5] 73 F.3d at 559.

[6] 33 U.S.C. § 1362(6) (1988).

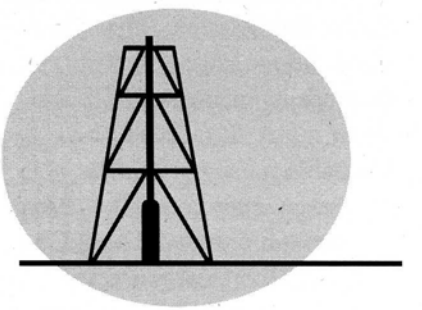
[7] 73 F.3d at 564.

[8] *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied* _ U.S. _, 115 S. Ct. 1793 (1995); *United States v. Plaza Health Labs, Inc.*, 3 F.3d 643, 645 (2d Cir. 1993), *cert. denied* _ U.S. __, 114 S.Ct. 2764 (1994); *United States v. Schallom*, 998 F.2d 196, 199 (4th Cir. 1993), *cert. denied*, _ U.S. _, 114 S.Ct. 277 (1993); *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987); *United States v. Hamel*, 551 F.2d 107, 110 (6th Cir. 1977); *Higbee v. Starr*, 598 F. Supp. 323, 330 (E.D. Ark. 1984), *aff'd*, 782 F.2d 1048 (8th Cir. 1985).

[9] 73 F.3d at 568.

[10] 56 Fed. Reg. 7698 (1991); 46 Fed. Reg. 20,284 (1981).

[11] 40 C.F.R. 401.15 (1994).



# Gulf of Mexico Program

*by William C. Harrison, 3L*

## Introduction

The Gulf of Mexico Program is a partnership between governmental agencies, environmental organizations, and businesses. Located at Stennis Space Center in Mississippi, the Environmental Protection Agency (EPA) established the Program in 1988 pursuant to section 104 of the Clean Water Act[1] to address regional natural resource concerns. The Program began with only a small amount of discretionary funding and five employees, but has grown through federal, state, and private funding and includes the involvement of 37 state and 18 federal agencies. Participants in the Program's activities include state environmental agencies, EPA, the Corps of Engineers, the Food and Drug Administration, the Coast Guard, and the National Oceanic and Atmospheric Administration.

## Program Goals

The goals of the Gulf of Mexico Program are:

- to protect, restore, and enhance the coastal and marine waters of the Gulf of Mexico and its coastal natural habitats;
- to sustain living resources;
- to protect human health and the food supply; and,
- to ensure the recreational use of Gulf shores, beaches and waters in ways consistent with the economic well being of the region.[2]

The Program accomplishes these goals by coordinating natural resource management efforts in the Gulf. Current projects include research, monitoring, habitat restoration, and public education.

The vast natural resources of the Gulf merit serious consideration. For example, the Gulf provides over thirty percent of all domestic fish and shellfish landings, with an annual economic impact of over $2 billion. The Gulf of Mexico contains four of the nation's ten largest ports: New Orleans, Houston, Corpus Christi, and Tampa, which handle nearly half of all U.S. shipping.

*The vast natural resources of the Gulf merit serious consideration.*

Gulf beaches provide millions of dollars in tourism and recreation. The Gulf of Mexico Program can provide guidance for the sound management of these resources.

## Program Issues

The Gulf of Mexico Program targets specific region-wide issues. For example, approximately two-thirds of the contiguous U.S. drains into the Gulf of Mexico, which has caused significant stress to the region.[3] Fertilizers and other nutrients from the Mississippi and Atchafalaya Rivers contribute to a "dead zone", a 7,000 square mile area of oxygen depleted water resulting in decreased levels of marine life. Concerns about human health from sewage and pollution contamination resulted in the closure of nearly four million acres of shellfish breeding grounds and miles of beaches. Marine debris clutters much of the Gulf's 1,600 miles of beaches, resulting in harm to humans and other animals.

To address each concern, the Program designates an "action agenda." Each agenda serves as a framework of an issue including background information, mitigatory actions, a time line for action, and key players. Through these "action agendas," the Program works to accomplish its resource stewardship goals.

### *The Dead Zone*

The Gulf of Mexico Program is currently researching the dead zone in the Gulf, a 7,000 square mile hypoxic (low dissolved oxygen) area off the coast of Louisiana caused by nutrient inflow into the Gulf. Fertilizer, animal manure, and other non-point source pollution from corn belt states and southern states flow from the Mississippi and Atchafalaya rivers into the Gulf.

*See PROGRAM - page 6.*

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These nutrients create large populations of oxygen-depleting phytoplankton, which upon decay further deplete oxygen in the water. These hypoxic areas have low populations of fish and shellfish, which disturbs the food chain and harms fishing productivity.[4]

In 1995, the Sierra Club Legal Defense Fund petitioned Louisiana officials and EPA to convene an interstate management conference under section 319 of the Clean Water Act to develop an enforceable strategy to combat the dead zone problem.[5] Under this provision, the EPA Administrator, upon state request, holds a conference of all states which contribute significant nonpoint source pollution to one state's ecosystem.

However, Louisiana chose not to request a conference. Rather, they deferred to EPA to handle the matter. EPA noted that the Gulf of Mexico Program could "develop viable solutions through a strategic assessment process, which will assess the existing data and identify and prioritize the areas of greatest need."[6] Louisiana is now working with the Program to develop strategies to combat the problem.

The Gulf of Mexico Program recently established a twelve month plan of action to address the dead zone issue. The Program will research the issues and organize the key players. Lead agencies will seek to gain the support of all states that contribute significant nutrient loads. In July 1996, the Gulf of Mexico Program will sponsor an implementation conference to set goals and identify immediate possible actions to remedy the hypoxic area. The Program also plans to establish a monitoring program for the area.

*The Program recently established a twelve month plan of action to address the dead zone issue.*

### *Public Health*

The Gulf of Mexico Program also addresses the issue of public health in the region. Pollution from ever-increasing population pressure causes health hazards to humans and animals in a number of ways. Humans suffer from disease by eating contaminated fish and shellfish, and through contact with contaminated water. Beaches close every year due to health concerns caused by pollution from sewage and agriculture. Marine species also suffer from pollution. For example, more than half of the shellfish breeding grounds in the Gulf of Mexico closed in the last few years either on a temporary or permanent basis.

To address the problem of public health in the Gulf, the Program developed an agenda including research, monitoring, encouraging enforcement by appropriate agencies, and public education. One research area is alternative sewage control systems. The Program assisted in the development of a biotic filtration system that is more efficient than artificial systems. Preliminary test results, according to Program officials, are positive.

### *Marine Debris*

The Gulf of Mexico Program also determined that marine debris was a serious problem in the Gulf. Debris from both ships and shore flow into the Gulf of Mexico and land on its beaches. Water-borne debris harms marine species through ingestion, entanglement, and other means. Trash clutters beaches, kills birds, and drives away tourism dollars.

The Program's report on marine debris in the Gulf of Mexico provided technical support to designate the Gulf as a "special area" under Annex V of the International Convention for the Pollution from Ships (MARPOL). MARPOL "special areas" impose additional pollution restrictions on ships traveling through their waters. There are only six designated special areas in the world.

The Program also initiated other steps to reduce debris in the Gulf. It implemented a commercial fishermen education program with the help of Mississippi State University. Available in several languages, the materials educate fishermen on MARPOL regulations and provide information on recycling and waste reduction. In addition, the Gulf of Mexico Program provides educational materials to citizens and businesses on recycling and waste reduction.

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**Gulf of Mexico Agreement**

The Gulf of Mexico Program is seemingly successful in achieving cooperation between key agencies in the Gulf. In a 1992 symposium sponsored by the Program, the governors of the five Gulf states and representatives from ten federal agencies signed an agreement to work together and improve the Gulf of Mexico ecosystem. The agreement seeks to:

- Significantly reduce the rate of loss of coastal wetlands;
- Achieve an increase in Gulf Coast seagrass beds;
- Enhance the sustainability of Gulf commercial and recreational fisheries;
- Protect human health and food supply by reducing input of nutrients, toxic substances, and pathogens to the Gulf;
- Increase Gulf shellfish beds available for safe harvesting by 10 percent;
- Ensure that all Gulf beaches are safe for swimming and recreational uses;
- Reduce by at least 10 percent the amount of trash on beaches;
- Improve and expand coastal habitats that support migratory birds, fish, and other living resources; and,
- Expand public education/ outreach tailored for each Gulf Coast county or parish.[7]

**Supporters and Detractors**

Many U.S. Senators and Representatives support the Gulf of Mexico Program. While not officially designated by law, Congressmen from the Gulf region periodically introduce bills to formally establish the Program.[8] These bills have failed to gain the requisite votes to formally establish the Program, however.

In support of the Gulf of Mexico Program, Congressman Greg Laughlin (D-Texas) points out the disparity in federal funding of similar regional programs in the United States. For example, EPA provided 34 million dollars to the Great Lakes Program and 24 million dollars to the Chesapeake Bay Program in 1993. The Gulf of Mexico is seven times larger than the Great Lakes area and almost 200 times larger than the Chesapeake Bay. One sixth of the United States' population live in the five states bordering the Gulf of Mexico. Congressman Laughlin stated that U.S. revenues from oil and gas leases in the Gulf ranked second only to the federal income tax as U.S. Treasury income.[9]

Despite the importance of the Gulf of Mexico, the Program also has its detractors. Some claim that the Program does too much studying without being able to act[10] and that the fate of the Gulf should rest "in the hands of an agency with the teeth to enforce its findings."[11] According to House Appropriations Committee Chairman Robert Livingston (R-Louisiana), the Program "has not been effective."[12] The House Appropriations Committee recently stated in a report that "[u]ntil and unless EPA and other federal entities are specifically directed to develop such a program for the Gulf of Mexico and the broad area that makes up its watershed, the Committee directs that all involvement in this program by the EPA [should] cease."[13] In 1995, U.S. House Members introduced H.R. 2099, which, among other things,

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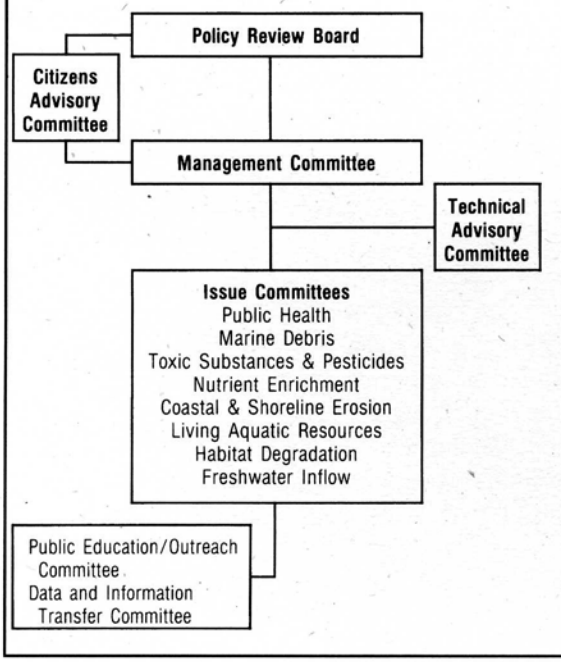
*The budget issue was recently resolved, but the fate of the Program remains uncertain.*

**PROGRAM STRUCTURE**



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sought to eliminate the Gulf of Mexico Program and cut EPA's budget by over thirty percent. President Clinton vetoed the bill. The budget issue was recently resolved, but the fate of the Program remains uncertain.

**Conclusion**

The Program, despite its lack of regulatory authority, has been successful on certain issues. Through sound research and monitoring, effective education programs, and cooperation, the Gulf of Mexico Program represents a positive step in the move to improve the Gulf ecosystem. However, environmental problems often call for enforceable regulations which the Program cannot impose.

Questioning the benefits of the Program may be moot. The 1996 federal budget, recently passed by Congress, cut funding for EPA by nearly ten percent. Therefore, EPA must make difficult financial allocation decisions. The Gulf of Mexico Program could become an economic casualty.

*Endnotes*

[1] 33 U.S.C. §1254(a) (1988).
[2] The Gulf of Mexico Program 1993-1994 Biennial Report (on file with the author).
[3] *Gulf of Mexico: Bills to Address Environmental Problems Reviewed at Joint Hearing*, Daily Env't Rep. (BNA)(July 29, 1993).
[4] Hypoxia Management Plan - Initial Implementation Plan to Address Oxygen Depletion in the Gulf of Mexico, Gulf of Mexico Program, Feb. 23, 1996 (on file with the author) [Hereinafter Hypoxia Mg't Plan].
[5] 33 U.S.C. §1329(g)(1) (Supp. 1996).
[6] Hypoxia Mg't Plan, at 4 (citing Letter from Robert Perciaspepe, Assistant Administrator for the Office of Water, to Robert Wiygul, Sierra Club Legal Defense Fund (Feb. 10, 1995)).
[7] Gulf of Mexico Agreement, *reprinted in* America's Sea - Keep It Shining, p. v, Gulf of Mexico Symposium (1992) (on file with the author).
[8] *See e.g.* S. 1715 (1991), H.R. 5249 (1992), S. 2627 (1992), H.R. 2556 (1993), H.R. 2556 (1993), H.R. 1899 (1993), H.R. 1566 (1993), S. 686 (1993), S. 83 (1993).
[9] 137 Cong. Rec. H8176-03 (Oct. 22, 1991).
[10] Statement of Mary Lee Orr of the Louisiana Environmental Action Network, *West Pearl Joins Mississippi on List of Rivers in Jeopardy*, Times-Picayune, B1 (April 19, 1995).
[11] *Gulf Pollution Finds Its Way Home*, Editorial, St. Petersburg Times, 8A, August 19 (1991).
[12] *Panel Slashes EPA Funding; Rep. Livingston Leads GOP Attack*, The Advocate, A1 (July 19, 1995).
[13] House Appropriate Committee Report, *reprinted in* Daily Env't Rep. (July 17, 1995).

## In Memoriam ...

On April 3, 1996, U.S. Secretary of Commerce Ron Brown was killed in a plane crash in Croatia. Mr. Brown's personal and professional zeal were acknowledged by his friends and colleagues as the source of his ability to win friends, navigate the turbulent waters of politics, and administer the laws and regulations of a department that requires myriad skills and resources.

As Secretary of Commerce he faced the challenge of formulating trade policy with other nations, while at the same time enforcing U.S. marine conservation goals by administering laws that potentially restrict trade. He articulated the need for marine stewardship when he dedicated the most recent additions to the United States National Marine Sanctuaries system. In the 1994 dedication of Stellwagen Bank, Brown referred to the areas as, "a graceful marine companion to the metropolis of Boston and the beautiful environs of Cape Cod and Cape Ann." In the July 1994 dedication of the Olympic Coast National Marine Sanctuary, Brown emphasized the importance of marine conservation in certain areas as, "beautiful, wonderful, worth preserving."

The friends, colleagues and associates of Mr. Brown will remember his personal and professional strength in leadership.

# United States Driftnet Law Reaches Into Mediterranean

Humane Society of the United States v. Brown, No. 95-05-00631, 1996 Ct. Int'l Trade, slip op. 96-38.

*by John A. Duff, J.D. LL.M.*

## Overview

On March 18, 1996, the United States Court of International Trade ordered the Secretary of Commerce to "identify" Italy under the High Seas Driftnet Fisheries Enforcement Act, [1] paving the way for trade sanctions against that nation if its citizens or fishing vessels continue to use large scale driftnets on the high seas, including large areas of the Mediterranen Sea.[2] In the underlying case, *Humane Society of the United States v. Brown*,[3] environmental organizations argued that the United States departments of Commerce and State had failed to apply the driftnet enforcement law. The aim of the law is to enforce a global moratorium on a fishing practice that is perceived to be needlessly wasteful and deadly to a wide array of non-target marine species. Millions of dollars worth of Italian exports to the United States lie in the balance.

The case is noteworthy in that it concerns the reach of a United States law into an area that might otherwise be exclusively controlled by foreign states fishing laws. The entire Mediterranean Sea could be removed from "high seas" designation, and thus the reach of the U.S. law, if Mediterranean States claimed maximum Exclusive Economic Zones. However, the restraint on the part of those States to claim 200 mile EEZs creates a jursidiction vacuum that the U.S. law seems to fill.

## Driftnets and Marine Life

Driftnet fishing entails the use of long panels of almost invisible monofilament netting which is placed in the water and left to drift to entangle and catch large amounts of fish. Driftnets do not discriminate between target species and other marine species. As a result, bycatch, including non-target fish species, whales, dolphins, sea turtles and seabirds become entangled in the nets and die. Driftnets have been used in coastal waters as well as high seas areas. However, large scale driftnetting on the high seas became an an environmental *cause celebre* in the 1980s and 1990s.

The increase in the use of driftnets in the north Pacific Ocean led to the enactment of the Driftnet Impact, Monitoring, Assessment, and Control Act of 1987 (Driftnet Impact Act).[4] Congress intended for that law to serve as a means to address the adverse impacts of driftnet fishing on United States resources.[5] Since most of the driftnet activity was taking place on the high seas, outside United States jurisdiction, the Driftnet Impact Act called on the Secretary of Commerce to negotiate monitoring agreements with nations conducting large scale driftnet fishing in the north Pacific Ocean. The United States entered into agreements with Japan, Taiwan, the Republic of Korea, and China as a result.

Additionally, the United States entered into agreements with a number of nations and helped draft an international agreement to prohibit the use of long driftnets in the South Pacific.[6]

High seas driftnet fishing was not limited to the Pacific Ocean. In 1989, the United Nations General Assembly raised the concern that this method of fishing "is widely considered to threaten the effective conservation of living marine resources . . . [and] that more than one thousand fishing vessels use large-scale driftnets in the Pacific, Atlantic and Indian Oceans and in other areas of the high seas."[7] A United Nations General Assembly (UNGA) resolution called on States to adopt a moratorium on high seas driftnet use to be imposed by June 30, 1992.[8] This UNGA resolution prompted Congress to expand the scope of the 1987 Driftnet Impact Act by passing the Driftnet Act Amendments of 1990 to implement the United Nations moratorium resolution.[9] Some commentators have questioned the scientific basis for the UNGA Resolution, as well as its legal authority.[10]

*See DRIFTNET - page 10.*

*DRIFTNET from page 9.*

**The High Seas Driftnet Fisheries Enforcement Act**

In 1990 and 1991, the United Nations called for renewed and expanded efforts to stop driftnet fishing.[11] In response, the United States enacted the High Seas Driftnet Fisheries Enforcement Act (Driftnet Enforcement Act).[12] The Driftnet Enforcement Act requires the Secretary of Commerce to identify each nation whose citizens or vessels are conducting large-scale driftnet fishing on the high seas.[13] The Secretary of Commerce must then notify the President and that nation of such identification. This "identification" begins a ninety day period within which the nation must cease using driftnets on the high seas. Upon identification, the President must consult with that nation in an effort to obtain an agreement that the nation will immediately terminate driftnet fishing by its citizens or vessels. In the event that such an agreement is not reached within 90 days, the President must instruct the Secretary of the Treasury to restrict the import of that nation's fish, fish products, and sport fishing products. The Driftnet Enforcement Act gives virtually no discretion to the Executive Branch in the application of trade restrictions.

Various Executive Branch departments and agencies were aware that certain nations including Italy had been using large-scale driftnets in high seas areas. Although Congress had enacted a seemingly straightforward and objective Driftnet Enforcement Act, the Executive Branch refrained from applying it, noting that it could not sufficiently identify any nation in violation of the driftnet moratorium. Environmental organizations, frustrated by the Executive Branch's restraint, brought suit to have them apply the enforcement provisions of the Act.

**Reaching into the Mediterranean - *Humane Society of the United States v. Brown***

*Preliminary Injunction Suit*

In 1995, the Humane Society of the United States (HSUS) and other environmental organizations provided the United States departments of Commerce and State with information regarding Italy's use of driftnets in high seas areas of the Mediterranean.[14] The environmental organizations urged the Secretary of Commerce to identify Italy pursuant to the Driftnet Enforcement Act. The Secretary refrained from doing so.

As a result, HSUS brought an action in the United States Court of International Trade (Trade Court) alleging the Commerce Secretary's inaction violated the mandate of the Driftnet Enforcement Act. The environmental organizations sought a preliminary injunction and immediate writ of mandamus directing the Secretary of Commerce to identify Italy.[15]

This was the first time that the Driftnet Enforcement Act would be reviewed, interpreted, and applied by the Trade Court.[16]

The departments of Commerce and State argued that the Driftnet Enforcement Act did not provide for citizen suits, and that further, the Act should be read to allow discretion in the Executive Branch.[17] Finally, they argued that their earlier forbearance from applying the Act could not be subject to judicial review because there had been no final agency action.[18]

*Standing, Citizen Suits, and Agency Actions*

The Trade Court assessed the parties claims and held that the plaintiffs had standing. The court noted that they had demonstrated a legally sufficient injury in fact from Italy's fishing practices and the Commerce Department's failure to take measures to stop those practices.[19]

Responding to the federal agencies' argument that the Driftnet Enforcement Act did not contain an explicit opportunity for a citizen suit, the Trade Court cited numerous Supreme Court decisions supporting the principle that "judicial review of an agency action, 'is available [to citizens] absent some clear and convincing evidence of legislative intention to preclude review.'"[20] Further, the Trade Court reminded the federal defendants that an agency action subject to judicial review, may include a failure to act.[21] While the Trade Court ultimately held that the plaintiffs failed to meet the high burden required to warrant a preliminary injunction and immediate writ of man-

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damus, it did order an expeditious hearing on the merits.[22]

*Trial on the Merits*

In the hearing on the merits, the Trade Court noted that the action could be resolved upon a determination of two issues:

"1) whether or not there is reason to believe that nationals or vessels of Italy are conducting large-scale driftnet fishing . . . beyond the exclusive economic zone of any nation; and,

2) whether or not the plaintiffs have the requisite standing . . . to obtain a declaration adjudging defendant Brown in violation of [the Driftnet Enforcement Act identification provision]"[23]

The plaintiffs argued that the departments of Commerce and State ignored overwhelming evidence that Italy's vessels were driftnetting on the high seas. Both departments acknowledged the existence of some driftnet activity but they deemed it insufficient to trigger the application of the Enforcement Act.[24] The Trade Court sided with the plaintiffs and held that Italy's activities rose to such a level as to require a finding that they were acting in contravention of the U.N. moratorium and U.S. enforcement standards.[25] In the face of clear evidence, the Trade Court held that the Secretary of Commerce was required by the statute to identify Italy.[26] The court did not recognize any congressional intent in the statute that might be read as giving the Commerce Department discretion in the identification process.[27]

Accordingly, on March 18, 1996, the Trade Court ordered the Secretary of Commerce to:

"(i) identify Italy as a nation for which there is reason to believe that its nationals or vessels are conducting large-scale driftnet fishing beyond the exclusive economic zone of any nation; and,

(ii) notify the President of the United States and the nation of Italy of this identification."[28]

On March 28, 1996, the Secretary of Commerce identified Italy as a nation conducting large-scale driftnet fishing on the high seas.[29] He also recommended that the Department of State promptly notify Italy of the identification.[30] Some commentators indicated that the application of Driftnet Enforcement Act might trigger a trade war.[31] However, the Department of Commerce noted that Italy's response to the identification was cooperative.[32]

## Analysis

The application of the High Seas Fisheries Driftnet Enforcement Act raises important political questions regarding the authority to conduct foreign affairs. The United States Court of International Trade in this case, has deemed the Driftnet Enforcement Act to be a Congressional grant of international relations power. As such, the Trade Court recognizes the Act's mandatory provisions to be applied by the Executive Branch. This effectively eliminates the discretion of the Secretary of Commerce and the President in determining whether trade sanctions should be imposed.

However, the President may have an opportunity to refrain from imposing sanctions, if a satisfactory agreement with the offending nation can be concluded.[33] In this case, Italian officials have not challenged the United States action. Rather, they have immediately acknowledged the problem admitting their difficulty in regulating their own fishermen. They have stated that they wish to resolve the issue in time to prevent sanctions.[34] Italy's cooperation and forthright expressions could lead the Executive Branch to more readily recognize a valid "agreement" that would avert the imposition of sanctions.

If no satisfactory agreement on the cessation of Italy's driftnetting can be reached, the Executive Branch will have no choice but to place an embargo on certain Italian imports to the United States. If that occurs, Italy may be forced into arguing that the United States High Seas Driftnet Fisheries Enforcement Act is an improper extension of prescriptive jurisdiction.

The driftnet activities cited in this case took place in waters of the Mediterranean deemed high seas. However, the locations referred to in the case were within 30 miles of Mediterranean States' coasts. But for the restraint of larger EEZ claims, the U.S. law would not apply. This raises certain questions regarding prescriptive jurisdiction in areas that are potentially within the exclusive fisheries

*cont.*

*DRIFTNET from page 11.*
jurisdiction of coastal states. If those states have refrained from claiming extensive EEZs for other reasons, e.g. to prevent boundary disputes, should a distant third party state reach into that area and subject it to laws which could not apply but for the coastal states' restraint? Application of United States law in the latent EEZs of Mediterranena States could effectively force those States to claim the area.

### *Endnotes*

[1] High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. § 1826a (1992) [hereinafter Driftnet Enforcement Act].
[2] *Humane Society of the United States v. Brown*, No. 95-05-00631, slip op. 96-55 (1996) (judgment) [hereinafter HSUS - Judgment].
[3] *Humane Society of the United States v. Brown*, No. 95-05-00631, 1996 Ct. Intl. Trade LEXIS 49, slip op. 96- 38 (1996) [hereinafter HSUS - Trial on the Merits].
[4] Pub. L. 100-220, Title IV, §§ 4001-4009, 101 State. 1477. (codified as Driftnet Impact, Monitoring, Assessment, and Control Act at 16 U.S.C. §1822 note).
[5] *Id.* at §4004. The Act focuses on anadramous fish stocks which the United States considers marine resources of the United States even when found in waters beyond the United States exclusive economic zone. *Id.*
[6] *See* Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington Convention), 29 I.L.M. 1449 (1990) (entered into force on May 17, 1991).
[7] Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's oceans and seas, 44 U.N. GAOR, U.N. Doc. A/Res/44/225 (1989).
[8] *Id.*
[9] Pub. L. 101-627, Title I, §107(a) (codified at 16 U.S.C. §1826). 16 U.S.C. §1826(c).
[10] Burke, *et al.*, *United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management*, 25 OCEAN DEV'T & INT'L L. 127 (1994) [hereinafter Burke, *et al.*] (critical analyses of United Nations high seas driftnet moratorium and United States driftnet enforcement laws).
[11] 45 U.N. GAOR, U.N. Doc. A/Res/45/197, para. 2 (1990);46 U.N. GAOR, U.N. Doc A/Res. 46/215, para. 3 (1991). Wherein the United
[12] Pub. L. 102-582, Nov. 2, 1992, 106 Stat. 4900. Codified at 16 U.S.C. §1826a.
[13] *Id. See also*, United Nations Convention on the Law of the Sea opened for signature December 10, 1982, at Art. 86, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 I.L.M. 1261 (1982). Those ocean areas beyond the exclusive economic zone of any nation are considered high seas. *Id.*
[14] *Humane Society of the United States v. Brown*, 901 F. Supp. 338, 345 (Ct. Int'l Trade 1995) (citing plaintiff's complaint at para. 47) [hereinafter HSUS - Preliminary Injunction Suit].
[15] *Id.*
[16] 901 F. Supp. 338, 346.
[17] *Id. Passim.*
[18] Id. at 347.
[19] 901 F. Supp. 338, 347-348 (CIT 1995).
[20] 901 F. Supp. 338, 349 (1995) (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. at 230 n. 4 (1986); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141, (1967)).
[21] 901 F.Supp. 338, 349 (citing 5 U.S.C. § 551(13) and 5 U.S.C. § 701(a)(2)).
[22] 901 F.Supp. 338, 352.
[23] HSUS - Trial on Merits, *supra* n. 3 at 6-7.
[24] 1996 Ct. Intl. Trade LEXIS 49 at 40.
[25] 1996 Ct. Intl. Trade LEXIS 49 at 43. The evidence gives reason in the mind of an ordinarily intelligent person to believe that Italians continue to engage in large-scale driftnet fishing in the Mediterranean Sea in defiance of the law of their own country and of the rest of the world. *Id.*
[26] HSUS - Trial on Merits, *supra* n. 3 at 90.
[27] 1996 Ct. Intl. Trade LEXIS 49 at 41. While maintenance of the best possible foreign relations may commend [it] . . . the statute under review does not [provide] it. *Id.*
[28] HSUS - Judgment, *supra* n. 2 at 1-2.
[29] Letter from U.S. Secretary of Commerce Ron Brown to the President of the United States (March 28, 1996) (on file with author).
[30] *Id.*
[31] *U.S. Government Faced with Tough Decision on Italian Fishing Case*, Deutshce Presse-Agentur (March 14, 1996).
[32] *Commerce Department Says Response Positive from Italy on Driftnets*, U.S. Department of Commerce News, Press Release NOAA 96-19 (March 29, 1996).
[33] 16 U.S.C. § 1826a(b)(3).
[34] Thomas Lippman, *Italy Faces Cutoff of Exports to U.S.*, The Washington Post, A 24 (March 14, 1996).

# State Department Adopts Environmental Diplomacy Role

*by John A. Duff, J.D., LL.M.*

Secretary of State Warren Christopher recently announced that the United States would integrate environmental objectives into U.S. foreign policy to ensure peace and global prosperity.

In an April address at Stanford University, Christopher noted that, "environmental forces transcend borders and oceans to threaten directly the health, prosperity and jobs of American citizens." "Addressing natural resource issues is frequently critical to achieving political and economic stability," said Christopher, adding, "the United States [must] lead in safeguarding the global environment on which . . . prosperity and peace ultimately depend."

*"environmental forces transcend borders and oceans."*

The Secretary of State outlined the circumstances that demanded an articulated environmental foreign policy agenda. "Since 1946, population growth, economic progress, and technological breakthroughs have combined to fundamentally reshape our world . . . these changes are putting staggering pressures on global resources." "We must contend with the vast new danger posed to our national interests by damage to the environment and resulting global and regional instability."

In announcing the new emphasis on environmental diplomacy, Christopher outlined environmental objectives and the manner in which the State Department would pursue them. He categorized the efforts into global, regional, and bilateral approaches as well as partnerships with businesses and nongovernmental organizations.

## Global Efforts

"Our approach to [to the environment] must be global because pollution respects no boundaries, and the growing demand for finite resources in any part of the world puts pressure on the resources in all others," explained Christopher, particularly noting the impact and threat of global climate change as well as the use of dangerous and persistent chemicals that find their way into air and water throughout the world. In illustrating the plight of diminishing resources and its economic impact, he pointed seaward, "overfishing of the world's oceans has put thousands of Americans out of work."

*"overfishing of the world's oceans has put thousands out of work."*

Christopher indicated the importance of U.S. leadership in promoting international agreements on the use of the world's oceans, "we led the way . . . to ban ocean dumping of low level radioactive waste." And he emphasized the need for the United States to maintain its leadership role in ocean use issues, "we will also seek ratification of the Law of the Sea Treaty which safeguards our access to ocean resources."

The Secretary acknowledged that a serious shortcoming of global environmental agreements is compliance and enforceability. In an effort to address this issues, he stated that the U.S. would, "by the end of 1997, . . . host a conference on strategies to improve our compliance with international environmental agreements, to ensure that those agreements yield lasting results not just promises."

## Regional Efforts

Secretary Christopher went on to address the role of regional diplomatic efforts to ensure environmental security, "the second element of the strategy . . . is to confront pollution and scarcity of resources in key areas where they dramatically increase tensions within and among nations." "Nowhere is this more evident than in the parched valleys of the Middle East, where the struggle for water has a direct impact on security and stability."

Christopher emphasized the importance of U.S. participation in efforts to address past environmental policy miscalculations, "in Central Asia, we are helping nations recover from Soviet irrigation practices that turned much of the Aral Sea into an ocean of sand." He also illustrated how similar situations might be prevented in the future, "to intensify our regional environmental efforts, we will establish Environmental Hubs in our embassies in key countries."

*See DIPLOMACY - page 14.*

*DIPLOMACY from page 13.*

## Bilateral Efforts

Christopher illustrated the importance of developing bilateral agreements, especially with our North American neighbors.

*"Whether it is fishing on Georges Bank or in the Gulf of Mexico, or clean drinking water from the Great Lakes or the Rio Grande, we cannot separate our environmental interests from those of Canada or Mexico."*

"Whether it is fishing on Georges Bank or in the Gulf of Mexico, or clean drinking water from the Great Lakes or the Rio Grande, we cannot separate our environmental interests from those of Canada or Mexico."

Bilateral agreements are not limited to our immediate bordering states. Christopher noted that through the U.S.-Japan Common Agenda, " the world's two largest economies are pooling their resources and expertise to stabilize population growth, to eradicate polio, to fight AIDS, and to develop new 'green technology'."

Christopher noted developments in bilateral environmental strategies with the European Union regarding climate change and toxic chemicals, and with Russia regarding nuclear safety, preservation of the Arctic environment, and the reduction of greenhouse gases. He commended recent efforts, led by Vice President Gore, to "launch an initiative that will expand U.S.- China cooperation on sustainable development." Christopher also cited recent efforts to increase cooperation with Southern hemisphere nations to increase "our knowledge about climate change and improve management of forest resources."

## Partnerships with Businesses and NGOs

Secretary Christopher explained that U.S. diplomatic strategies would not be limited to intergovernmental efforts. Citing the importance of private businesses and nongovernmental organizations in achieving environmental objectives, the Secretary outlined some of the efforts in this area. He noted the work of the late Commerce Secretary Ron Brown who "helped an American firm win a contract that will protect fisheries and fresh water supplies for 30 million people in Uganda, Tanzania and Kenya."

Christopher recounted his own recent visit to El Salvador where, "U.S. firms, nongovernmental organizations and their Central American partners are pioneering the use of solar and wind power stations." He lauded the efforts of U.S. based environmental organizations who have spearheaded efforts to maintain biodiversity, confront deforestation, and protect wildlife preserves. He described the State Department's new Partnership for Environment and Foreign Policy, as a program designed to "bring together environmental organizations, business leaders and foreign policy specialists to enhance our cooperation in meeting environmental challenges."

## Within the State Department

In his closing remarks, Christopher discussed the efforts that have already been taken to achieve the policies outlined above. "I have instructed our bureaus and our embassies to improve the way we use our diplomacy to advance our environmental objectives." The Secretary also indicated the increased responsibility and authority that these efforts demand, "we will reinforce the role of the Under Secretary for Global Affairs which was created at the beginning of our administration to address transnational issues." Christopher also announced that, "starting on Earthday 1997, the [State] Department will issue an annual report on Global Environmental Challenges . . . [to be used as] an essential tool in our environmental diplomacy, bringing together an assessment of global environmental trends, international policy developments, and U.S. priorities for the [following] year."

*"starting on Earthday 1997, the [State] Department will issue an annual report on Global Environmental Challenges"*

Christopher concluded his remarks by pointing to these new efforts as a natural progression of U.S. concerns regarding the sound stewardship of natural resources, "drawing on the same ideals and interests that have led Americans . . . to put a priority on preserving our land, our skies and our waters at home, we must meet the challenge of making global environmental issues a vital part of our foreign policy."

# Lagniappe *(a little something extra)*

**Around the Gulf ...**

On March 26, the Mississippi Commission on Marine Resources voted against a proposed ordinance which would have further restricted the use of gill nets in Mississippi waters.

In Florida's gulf coast waters, a mystery illness has been killing manatees. The virus, which manifests itself with pneumonia-like symptoms, has claimed over 200 of the endangered species, whose population is estimated at less than 3,000.

In February, NOAA announced that a settlement had been reached which would require Chevron Products Company to create new marsh habitat in the Mississippi River Delta to replace marsh damaged in a January 1995 oil wellhead failure. The February 15, 1996 settlement was agreed to by Chevron, NOAA, the U.S. Department of Interior and the state of Louisiana pursuant to provisions of the Oil Pollution Act of 1990.

In March, the Secretary of Commerce announced that NMFS has proposed to eliminate six federal fishery management plans (FMPs), including the Gulf of Mexico stone crab fishery, which are believed to be adequately managed by states or interstate fishery commissions.

In Louisiana, a federal court continues to address the validity of certain portions of that state's recently enacted gillnet restriction law. Enforcement of certain provisions have been temporarily blocked.

On April 24, the National Marine Fisheries Service proposed more stringent regulations regarding the use of Turtle Exclude Devices (TEDs) to protect sea turtles. The proposed regulations would apply to coastal waters of Texas and Louisiana and take effect December 31, 1996 (61 Fed. Reg. 18102).

**Around the Nation and the World ...**

On March 22, the National Marine Fisheries Service began implementing the High Seas Fisheries Compliance Act. This Act makes the United States one of the first nations to carry out the provisions of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. The move requires U.S. vessels fishing on the high seas to obtain a permit and comply with international conservation and management measures (61 Fed. Reg. 11751).

On March 28, 1996, the Secretary of Commerce identified Italy as a nation whose vessels were using large scale driftnets on the high seas. This identification may result in the imposition of trade sanctions if Italy does not agree to prohibit this type of fishing. (*See* article in this issue of WATER LOG).

On April 19, 1996, the U.S. State Department, pursuant to an order of the U.S. Court of International Trade, issued revised guidelines for determining whether a foreign nation has a "comparable" regulatory program for protecting sea turtles (61 Fed. Reg. 17342) (*See also, ESA Turtle Protection Applies to All Shrimp Exports to U.S.*, 15:4 WATER LOG 7 (1995)).

**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.

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