



WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Alabama Considers Constitutional "Right to Fish"

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

The Alabama legislature recently passed a bill that could pave the way for voters to approve a state constitutional "right to hunt and fish." Lawmakers drafted the measure in response to a perceived threat from anti-hunting and other animal welfare organizations. Earlier this year, People for the Ethical Treatment of Animals (PETA) and the Fund for Animals indicated that they would protest at recreational fishing tournaments and seek to halt state sponsored workshops that encourage hunting and fishing.

In response, state representative Gerald Willis began gathering support for a Sportsperson's Bill of Rights. Rep. Willis told the press that the proposed amendment was specifically intended to defuse the impact of animal rights groups. He indicated that a constitutional amendment would put an end to such protests and that, as part of the constitution, the guaranteed right would be, "practically impossible to touch."¹ The original House version noted that the right would be "subject only to limitations provided by law."²

In April, the Senate Committee on Agriculture and Forestry reviewed the bill and substituted its own version, modifying the House version to qualify the right, "in

accordance with law and regulations." The Senate passed this version 30-0 and the House of Representatives passed the substituted version 83-1. On May 20, the Legislature forwarded the measure, with the proposed amendment, to the Secretary of State for placement on the November ballot:

PROPOSED AMENDMENT

- (a) All persons shall have the right to hunt and fish in this state in accordance with law and regulations.
- (b) This amendment shall be known as the "Sportsperson's Bill of Rights."³

See ALABAMA - page 2.

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An amendment to the state constitution will only become valid when approved by a majority of the qualified electors voting thereon.

The provision presents some interesting questions regarding what level of protection a constitutional "right to fish" would provide. Constitutional rights are primarily guarantees of freedom from government interference. The Sportsperson's Bill of Rights, however, expressly remains subject to all of the state's laws and regulations. Currently there are over two hundred laws and numerous regulations that govern fishing in the state of Alabama. Such a qualified right may have no greater protective authority than that which is already recognized.

In a 1974 case, an Alabama court held that, "the right of any individual, partnership or corporation to reduce fish from their natural free state to one of private ownership is a privilege, as opposed to a vested right, granted by the State and subject to conditions, regulations and limitations placed on that privilege by the Legislature."⁴ On its face, the proposed amendment does not seem to elevate the guarantees afforded fishermen beyond what is currently recognized.

In recent years, the state legislature has addressed the issue of interference with legal hunting and fishing in the form of a prohibition against such interference. In 1994, the state enacted a law prohibiting the interference with legal hunting on nonpublic lands.⁵ In 1996, the act was amended to also prohibit interference with

legal fishing.⁶ The 1996 amendment also made the law applicable to publicly owned lands or waters.⁷

A constitutional "right to hunt and fish" may afford some added level of protection, however it could also prompt litigation on a number of new legal issues. Would a paroled felon or ex-convict have a constitutional right to possess firearms, pursuant to a constitutional right to hunt? Would hunters and fishers have a higher claim of right to damages if fishing and hunting areas were damaged? Would the new "right" apply only to "sportspersons?" And if so, who is a sportsperson and would equal protection issues arise?

The effect of creating a constitutional right to hunt and fish is uncertain. And the protection from interference from protesters may have been sufficiently addressed in legislation that prohibits interference with legal hunting and fishing.

Endnotes

¹ Handley, *Bill Takes Dead Aim at Hunting, Fishing Protests*, The Montgomery Advertiser, p. 1A (March 4, 1996).

² The original bill, H. 359 (2/21/96 version), proposed the following wording: "All persons shall have the right to hunt and fish in this state subject only to limitations provided by

³ 1996 Ala. Acts 569, § 1.

⁴ *Sanders v. State*, 53 Ala. App. 534, 302 So. 2d 117, 123 (1974).

⁵ Ala. Code § 9-11-270 et seq.

⁶ 1996 Ala. Acts 668. This law amends hunting interference provisions in the Code of Alabama to also apply to fishing. The relevant law now reads "No person shall willfully and knowingly prevent, obstruct, impede, disturb, or interfere with any person in legally hunting or fishing." Code of Alabama 1975, § 9-11-270 (as amended).

⁷ *Id.*

Fifth Circuit Rules Products and Services Must be Provided "to a vessel" to Trigger Maritime Lien Act

Silver Star Enterprises, Inc. v. Saramacca M/V, 82 F.3d 666 (5th Cir. 1996).

by John Duff, J.D., LL.M.
and Peggy Dutton, 3L

Introduction

The Fifth Circuit Court of Appeals recently ruled that the Federal Maritime Lien Act will not apply to leases of bulk cargo containers unless the containers are earmarked for use on board a vessel. In doing so, the court joined the ranks of the Second, Fourth, and Ninth Circuits in holding that, for the Act to apply, goods and services must be expressly provided "to a vessel."

Ship's Liens and Mortgages

The financing, construction, insurance, repair, furnishing and supply of a vessel entail many creditors and suppliers. Under maritime and admiralty law, a ship is a legal person and accordingly liable for certain of its debts.

A ship may be subject to one or more mortgages. Additionally, an owner, master, officer, or agent of a vessel may procure certain necessary goods and services for a vessel. In doing so, the supplier obtains a lien against the vessel for payment of the goods and/or services. These

liens arise automatically at the moment of transaction. Mortgagees and lienholders thus have a proprietary right in the vessel. Payment may be enforceable through an *in rem* action (an action against the vessel itself). Thus providers are more willing to extend credit to a vessel where the owner may be unreachable.

An unpaid mortgagee or lienholder can institute arrest of a vessel, have it sold by order of the court and have the proceeds distributed to the creditors. In most instances the proceeds will not satisfy the full amount owed to all creditors. In such cases, the court must apply a ranking criteria to determine who has priority.

The ranking of a creditor is therefore crucial. A maritime lien may, in some instances, take priority over a preferred ship's mortgage.¹ However a non-maritime lien is subordinate to a ship's mortgage. The purpose of the Federal Maritime Lien Act (FMLA)² is to help suppliers determine who may incur a maritime lien and under what circumstances.

The FMLA creates a

maritime lien for "providing necessities to a vessel on the order of the owner or a person authorized by the owner."³

In *Silver Star Enterprises, Inc. v. Saramacca M/V*, the Fifth Circuit addressed a battle between claimants regarding the priority that ought to be afforded a supplier of cargo containers. A district court ruling ranked a cargo container supplier above a mortgagee in allocating proceeds of the sale of the *Saramacca M/V*. The Fifth Circuit Court of Appeals reversed the district court ruling, holding that where the containers were not expressly leased to a particular vessel a maritime lien did not exist.

District Court Proceedings

Scheepvaart Maatschappij Suriname N.V. (SMS), a corporation of the Republic of Suriname, owned or chartered eight vessels including the M/V Saramacca.⁴ Silver Star Enterprises, Inc., (Silver Star) held two preferred ship mortgages on the M/V Saramacca. The mortgages were not "guaranteed"⁵ and thus were subordinate to maritime liens for necessary goods or services provided in the United States.

See *SILVER STAR* - page 4.

SILVER STAR from page 3.

In 1991, Trans Ocean Ltd. (Trans Ocean) began furnishing cargo containers to the SMS fleet under a bulk lease that neither earmarked the containers for specific vessels within the SMS fleet nor limited their service to sea transport.

In 1992, Silver Star brought an *in rem* action against the M/V Saramacca, having the ship arrested and sold to enforce its preferred mortgage liens. The proceeds were insufficient to satisfy all the creditors' claims. Trans Ocean claimed a superior maritime lien arising from its contract to lease containers to SMS. To support its claim, Trans Ocean delineated which of its containers had been actually used aboard the M/V Saramacca. A maritime lien would outrank, and therefore decrease the funds available to satisfy, a non-guaranteed mortgage of the kind held by Silver Star.

Silver Star argued that Trans Ocean had no maritime lien. The FMLA, they pointed out, establishes a maritime lien for providing necessities to a vessel.⁶ They argued that Trans Ocean's lease did not earmark the containers to specific vessels and left deployment of containers to SMS, thus the

containers had not been provided to the M/V Saramacca.

Trans Ocean argued that case law in the Circuit required a broad reading of the FMLA. In *Equilease Corp. v. M/V Sampson*, the Fifth Circuit had decided that actual physical delivery is not the only means of satisfying the requirement that necessities be provided to a vessel.⁷

The district court held that cargo containers need not be earmarked to a vessel in order to establish a maritime lien, and that accordingly Trans Ocean's claim outranked Silver Star's mortgage. Silver Star appealed on ground that the district court erred in interpreting the law.

Fifth Circuit Review

The Fifth Circuit Court of Appeals reviewed the case in light of other federal appeals court decisions and the seminal Supreme Court case of *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*⁸ In *Piedmont*, the Supreme Court held that while a supply of coal could ultimately be traced to particular vessels, no maritime lien existed where a fisheries company distributed the coal to various vessels at its discretion. The Fifth Circuit noted that other appeals courts have consistently read *Pied-*

mont to mean that a maritime lien may not arise when the user rather than the supplier of the necessities determines to which vessels they will be provided.⁹ The Appeals Court for the Fifth Circuit noted that the Second, Fourth, and Ninth Circuits agreed that "maritime lien rights do not attach for the benefit of bulk lessors of containers to owners or charterers of multiple vessels" because the containers, though necessities, were not furnished "to" the vessels within the meaning of FMLA.¹⁰

The Fifth Circuit distinguished this result from the result it reached in *Equilease*, where a charterer purchased insurance for a number of vessels which strongly suggested earmarking the service to each vessel. In the case at hand, cargo containers leased in bulk were neither earmarked nor limited to use aboard particular vessels.

Conclusion

The Fifth Circuit Court of Appeals found the reasoning of the Second, Fourth, and Ninth Circuits dispositive regarding the meaning of the FMLA and held that those courts were correct in their interpretations of the FMLA in light of *Piedmont*. That fact, together with the Fifth Circuit's concern for uniformity, compelled its decision. The court noted that

cont.

to construe the FMLA differently than the other circuits would be inconsistent with the Supreme Court's method of analysis and would "spawn uncertainty, compounded by forum shopping and extravagant lien claims [and would] launch maritime lien law into ... chaotic waters."¹¹ Accordingly, the Fifth Circuit does not recognize a maritime lien to exist unless goods or services are definitively provided "to a vessel."

Endnotes

¹ See e.g. 46 U.S.C. § 31326(b). A preferred ship mortgage of a foreign vessel must be "guaranteed" pursuant to Title XI of the Merchant marine Act, 1936 (46 App. U.S.C. 1101 *et seq.*) to take priority over a maritime lien for necessities. *Id.*

² 46 U.S.C. §§ 31341- 31343 (1994).

³ 46 U.S.C.A. §31342.

⁴ *Silver Star Enterprises, Inc. v. M/V Saramacca*, 82 F.3d 666, 667 (5th Cir. 1996).

⁵ See *supra* note 1.

⁶ 46 U.S.C. § 31342(a)

⁷ *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 603-604 (5th Cir.) (en banc), cert. denied, 107 S. Ct. 570 (1986)).

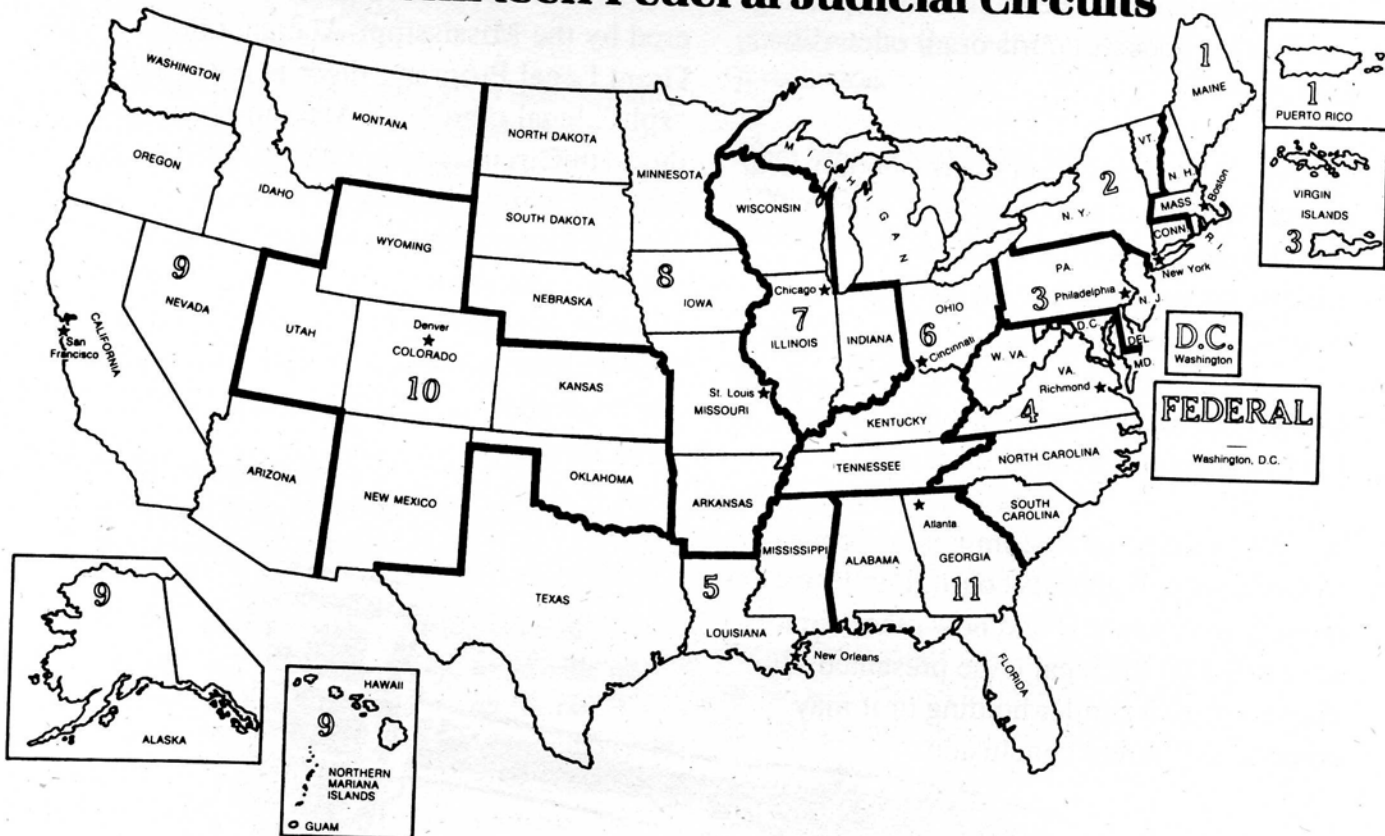
⁸ *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 41 S.Ct. 1 (1920).

⁹ 82 F.3d 666, 669.

¹⁰ *Id.* at 668-669.

¹¹ *Id.* at 669-670.

The Thirteen Federal Judicial Circuits



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Short Circuit Lesson *by John Duff, J.D., LL.M.*

In our coverage of ocean and coastal legal issues, **WATER LOG** frequently presents analyses of court decisions. For those readers unfamiliar with the federal court structure and hierarchy some questions may arise, such as:

Q: What does a federal circuit court do?

A: The federal "circuit" courts or courts of appeals rule on cases that have been appealed from the federal district courts which serve as the federal trial courts.

Q: Is a decision in one circuit court binding on all other appeals courts or all other district courts?

A: No. A federal circuit court can only hear appeals from district courts in its "circuit." Judicial decisions from a circuit court of appeals are only binding on the federal courts in that circuit.

Q: Why do decisions in one circuit often refer to decisions in other circuits?

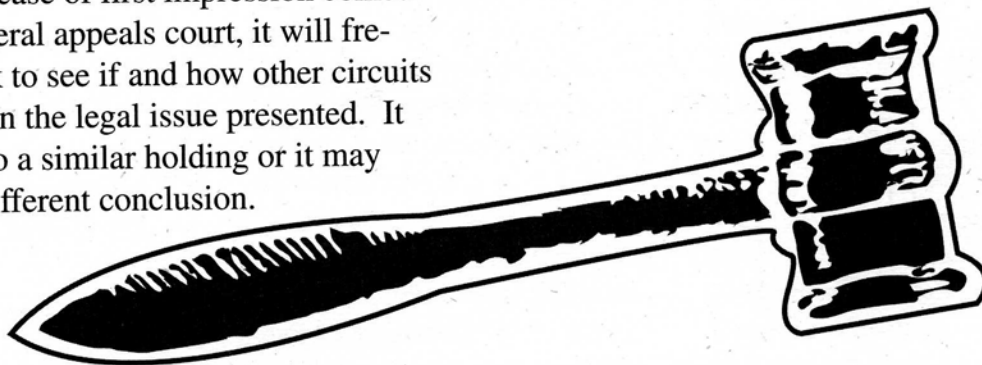
A: When a case of first impression comes before a federal appeals court, it will frequently look to see if and how other circuits have ruled on the legal issue presented. It may come to a similar holding or it may come to a different conclusion.

Q: What happens if the circuits disagree?

A: When the circuits "split" on an important legal issue, the Supreme Court will usually hear one of the cases on appeal and render a decision that becomes binding on all the federal courts in the United States.

Q: How many Circuits are there and what areas do they cover?

A: There are **thirteen federal judicial circuits** and they cover the areas **illustrated by the map on page 5**. As you can see, even in the two state area that is covered by the Mississippi-Alabama Sea Grant Legal Program, there is potential for "split" legal opinions. Alabama is part of the 11th Circuit along with Georgia and Florida, while Mississippi is in the 5th Circuit along with Texas and Louisiana. **WATER LOG** also reports on other circuit court decisions where interesting ocean or coastal legal issues come up that have not yet been addressed in either the 11th or 5th Circuits.



MISSISSIPPI LEGISLATIVE UPDATE 1996

by Michael L. McMillan, 2L

The following is a summary of coastal, fisheries, and marine legislation enacted by the Mississippi legislature during the 1996 session.

1996 Mississippi Laws 355.

Approved March 18, 1996.

Effective July 1, 1996.

Permanently extends the prohibition against the use of purse seines to catch mullet during the roe mullet season.

1996 Mississippi Laws 368.

Approved March 18, 1996.

Effective March 18, 1996.

Reallocated financial certification responsibility regarding Mississippi and Louisiana Estuarine Areas Project from the Department of Wildlife, Fisheries and Parks to the Commission on Marine Resources. This law also authorizes the executive director of the Department of Marine Resources to execute construction agreements with the U.S. Army Corps of Engineers and the State of Louisiana.

1996 Mississippi Laws 371.

Approved March 18, 1996.

Effective July 1, 1996.

Amended the law requiring possession of a waterfowl stamp while hunting, to provide an exception, such that "[a]ny penalty for not having the stamp in possession while engaged in hunting or taking migratory waterfowl shall be waived if the person can verify purchase of a stamp prior to the date of the violation."

1996 Mississippi Laws 389.

Approved March 19, 1996.

Effective March 19, 1996.

Authorized the executive director of the Department of Wildlife, Fisheries and Parks to enter into an affinity relationship with a credit card issuer and to use the funds created from such relationship to improve wildlife management areas.

1996 Mississippi Laws 406.

Approved March 21, 1996.

Effective March 21, 1996.

Clarified the definition of "public waters" under the Alcohol Boating Safety Act to include "all public waters over which the state has jurisdiction."

1996 Mississippi Laws 407.

Approved March 21, 1996.

Effective July 1, 1996.

Removed the requirement that conservation officers complete affidavits for routine citations. This law also established a uniform citation to be used in replacement of the affidavits.

1996 Mississippi Laws 412.

Approved March 21, 1996.

Effective March 21, 1996.

Amended various organizational requirements of the Department of Wildlife, Fisheries and Parks by replacing the unilateral gubernatorial appointment of the executive director with the Mississippi Commission on Wildlife, Fisheries and Parks recommending three persons, from which the Governor shall choose the director.

See MISSISSIPPI - page 8

MISSISSIPPI from page 7.

1996 Mississippi Laws 436.

Approved March 29, 1996

Effective March 29, 1996

Clarified the definition of "domicile," as used by the Mississippi Commission on Marine Resources and the Department of Marine Resources, to include:

- ☐ a person's "principal place of abode" in which their residence is fixed or to which they plan to return after extended periods of absence; or,
- ☐ the state issuing the individual's current driver's license; or,
- ☐ in cases of minors, the domicile of the parents.

1996 Mississippi Laws 455.

Approved April 2, 1996.

Effective October 1, 1996.

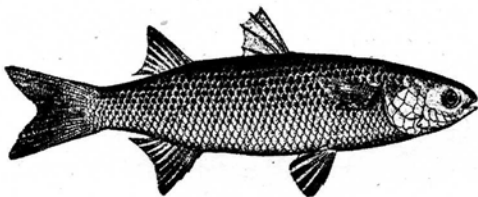
Created the "Water Pollution Control Emergency Loan Fund." The fund shall be used to assist state subdivisions in emergency improvements to existing water pollution abatement projects. All loans are subject to repayment at various interest amounts, all of which shall be redeposited into the fund.

1996 Mississippi Laws 481.

Approved April 12, 1996.

Effective July 1, 1996.

Provides for game or fish legally killed during open season to be possessed at any time during the closed season.



1996 Mississippi Laws 486.

Approved April 11, 1996.

Effective April 11, 1996.

Authorizes the Department of Wildlife, Fisheries and Parks to:

- ☐ regulate the taking of any species of any game in any region of the state according to the Department's determination of need to reduce or increase the game level;
- ☐ designate wildlife refuges needed to secure protection of certain species;
- ☐ regulate the burning of rubbish on marshes which may create dangerous fire hazards;
- ☐ limit the hunting of predatory animals to the open seasons for game animals; and,
- ☐ prescribe the weapons that may be used to hunt wild animals or birds.

1996 Mississippi Laws 499.

Approved April 11, 1996.

Effective April 11, 1996.

Authorized the Commission on Marine Resources to:

- ☐ extend the shrimping season in a designated area south of Long Beach, Point Clear, Lighthouse Point and along the Mississippi coast line;
- ☐ require up to a \$5.00 administrative fee for a recreational crabbers license; and,
- ☐ specifically prohibit the intentional possession of female sponge crabs bearing visible eggs at any time.

1996 Mississippi Laws 503.

Approved April 11, 1996.

Effective July 1, 1996.

Levies a 3 1/2% tax "upon the gross proceeds of sales... of every person engaging" in the business of selling tangible personal property

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upon any floating structure that is moored upon waters within the state and is not normally engaged in the business of transporting people. This includes "casinos, floating restaurants, floating hotels, and similar property, regardless of whether the property is self-propelled."

1996 Mississippi Laws 507.

Approved April 11, 1996

Effective July 1, 1996

Amended the state's child support laws to provide that an individual's "hunting, trapping, or fishing license" may be revoked, or their ability to obtain such a license may be denied, if the individual has been convicted of violating the child support laws of Mississippi.

1996 Mississippi Laws 516.

Re-institutes and amends an on-site wastewater disposal system law that had been repealed in 1995. The law will:

- ☐ delegate duties and responsibilities to the State Board of Health to administer the law;
- ☐ require property owners, lessees, and developers to install acceptable onsite wastewater disposal systems, where connections to sewage systems prove infeasible;
- ☐ regulate any on-site system wastewater effluent or discharge.

1996 Mississippi Laws 545.

Approved April 13, 1996.

Effective July 1, 1997.

Prohibits the operation of a motorboat by anyone under the age of 12 (twelve) unless they possess a certificate of completion

from the state certified Boating Safety Course or are accompanied by a person at least 21 (twenty-one) years of age. In addition, it requires all persons born after June 30, 1980 to possess a certificate of completion of the Boating Safety Course to operate a motorboat.

1996 Mississippi Laws 553.

Approved April 18, 1996

Effective June 30, 1996

Amended the Mississippi Business Investment laws by increasing to \$8,000,000 (eight million dollars) the amount of bond proceeds which may be issued to "state, county, or municipal port and airport authorities" for the purposes of promoting commerce and economic growth. Such proceeds, however, are prohibited from being utilized to provide any facilities which are used by gaming vessels.

1996 Mississippi Laws 554.

Approved April 18, 1996

Effective April 18, 1996

Limits the amount of architectural and engineering fees that may be charged, under the Mississippi Major Economic Impact Act, to 4 1/2 % of the total construction cost. This law governs two categories of projects one of which is:

"Any major capital project designed to improve or enhance any state-owned port facility located on the Gulf of Mexico, providing the project attracts:

- ☐ a minimum increase of 2,000,000 (two million) tons in cargo; and,
- ☐ 350 (three-hundred and fifty) port-related jobs."

EPA Seeks to Amend Ocean Dumping Regulations

by Peggy Dutton, 3L
and John Duff, J.D., LL.M.

The Environmental Protection Agency has proposed amendments to regulations governing ocean dumping testing requirements in light of a 1995 decision by the Third Circuit Court of Appeals. In *Clean Ocean Action v. York*,¹ the Court of Appeals ruled that certain EPA testing guidelines were in conflict with EPA regulations and thus held the testing procedures to be deficient and invalid.

As a result, on February 29, 1996, EPA proposed amendments to clarify its regulations and validate its testing guidelines. The case prompting the proposed amendments involved an action by environmental and fishing groups to stop the dumping of dredged material at a dump site six miles off the New Jersey shore.

Statutory and Regulatory Background

Growing concern about environmental effects of unregulated dumping in the ocean led Congress to pass the Ocean Dumping Act in 1972.² The Act protects human health and the marine environment by regulating the kinds of wastes that may be dumped.³ It authorizes EPA to administer

the program and develop evaluative criteria for ocean dumping permit applications.⁴ EPA established those criteria in its Ocean Dumping Regulations in 1977.⁵

The Act gives EPA permitting authority for all materials proposed for dumping except dredged materials.⁶ The Army Corps of Engineers administers permitting for dredged materials disposal.⁷ The Act directs the Corps to apply EPA regulations and obtain EPA review and concurrence in granting permits.⁸ In 1977, the Corps and EPA developed a technical manual of testing procedures for dredged materials known as the Green Book.⁹ (See page 13 for an overview of the Ocean Dumping Act, the EPA/Corps regulations and the Green Book testing guidelines.)

New Jersey District Court Case

In April, 1990, the Port Authority of New York and New Jersey (Port Authority) sought a permit from the Corps to dredge its silted containerport facilities at Newark Bay and deposit the material at a mud dump site in the Atlantic Ocean six miles off New Jersey's shore.¹⁰ The dredged material contained the carcinogen dioxin. EPA regulations prohibit ocean dumping of materials containing carcinogens unless they are

present only in trace amounts.¹¹

The Port Authority tested the dredged material with EPA-approved testing procedures, as outlined in the Green Book. The Corps and EPA determined that dioxin was only a trace contaminant based on the test results. The Corps issued an ocean dumping permit to the Port Authority in 1993. Clean Ocean Action and other environmental, fishing, and boating organizations filed for declarative and injunctive relief to halt the ocean dumping. They argued that EPA and the Corps failed to follow EPA regulations in determining that dioxin was only a trace contaminant.

Disputed Regulations

Under EPA regulations, carcinogens may not be dumped unless they are trace contaminants only. They are considered trace contaminants when present in such form and amount as "not to cause significant undesirable effects."¹² EPA regulations dictate that potential for significant undesirable effects shall be determined by:

- ☐ bioassays on liquid, suspended particulate, and solid phases of the wastes according to procedures acceptable to EPA and Corps¹³
- ☐ use of one species each of phytoplankton or

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zooplankton, crustacean or mollusk, and fish in the suspended particulate bioassays using procedures approved by EPA and Corps¹⁴

- use of one species each of filter-feeding, deposit-feeding, and burrowing species in the solid phase bioassays using procedures approved by EPA and Corps.¹⁵
- no indication of significant adverse effects including bioaccumulation.¹⁶

Clean Ocean Action argued that testing in this case failed to meet EPA regulations since bioaccumulation testing was not done at all in the suspended particulate phase, and only one species was tested in the solid phase instead of all the organisms referred to in the regulations.

Defendants EPA and Corps argued that the Ocean Dumping Act and regulations give them discretion to designate appropriate testing procedures. They pointed out that the regulations call for tests using procedures approved by them. The Green Book contains no procedure for bio-accumulation testing in the suspended particulate phase. Such testing is not standard practice, they asserted, because dilution and dispersion of the dumped materials occurs so rapidly as to

make bioaccumulation in water column-dwelling organisms unlikely in the suspended particulate phase.¹⁷ They also contended that testing in the solid phase did not require all the organisms specified since some species exhibit more than one of the required characteristics.

The District Court of New Jersey ordered suspended particulate testing and further testing in the solid phase using another species after the preliminary hearing but later determined that those tests were unnecessary. "Reading the regulations in their entirety, . . . it is apparent that the government agencies reserved wide discretion in themselves to determine which tests should be conducted and the manner of conducting those tests," the court held.¹⁸ The court concluded that the tests originally conducted had met the regulatory requirements. The court noted that under the Administrative Procedures Act it must defer to the agencies interpretation of their own regulations. The court denied the injunction and plaintiffs appealed.

Third Circuit Case

The main issue before the Court of Appeals was whether the EPA's regulatory interpretation and use of the Green Book guidelines was consistent with EPA regulations. The district court had deferred to EPA's interpretation. Clean Ocean

Action argued that deference is impermissible where the agency's interpretation is inconsistent with the plain meaning of agency regulations.

The appeals court examined the statutory and regulatory language and found that although the Ocean Dumping Act gave EPA authority to reserve discretion, it had failed to do so. "The EPA's reservation of discretion to determine how to conduct tests cannot be read as a reservation of discretion to determine *whether* to conduct tests required by the unequivocal language of its regulations," the court declared.¹⁹

The Third Circuit stated that the absence of suspended particulate testing in the Green Book could not be read as EPA's interpretation of its regulations because the Green Book as a guideline was in direct conflict with regulations requiring the test. Nor could the Green Book be read as an attempt to amend regulations, noted the court, because the *Federal Register* announcement described the Green Book as guidance, not as an exercise of rule-making authority. The plain meaning of the regulations, said the appeals court, was that testing had to be done in both the suspended particulate and solid phases using three species of marine organisms in each phase.

The Third Circuit held that while the denial of the injunction was proper for other

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EPA from page 11.

reasons, the district court committed serious error in ruling that EPA had complied with its testing regulations.

EPA's Proposed Amendments

The Third Circuit's analysis raised concerns in EPA regarding ocean dumping testing. As a result, EPA has proposed amendments to clarify the bioassay testing provisions in the regulations.²⁰ According to EPA, the proposed changes are meant to ensure that it reserves discretion to choose technically appropriate procedures.²¹

Specifically, the amendments would define bioassay to mean "such effects-based evaluations as may be approved by the EPA, or in the case of dredged material, by the EPA and the Corps of Engineers."²² EPA notes that the proposed amendments will:

- ☐ Make clear that EPA can issue guidance that uses both bioassay tests and other scientifically valid methods to assess potential impacts of disposal, and;
- ☐ Make clear that bioassay tests can be run on two species so long as together they represent the three categories of organisms identified in the regulations.²³

EPA notes that the testing guidance outlined in the Green Book, "represents a significant improvement in our ability to identify material that is unsuitable for ocean disposal due to its potential to harm human health or the marine environment."²⁴

The Agency contends that discretion is necessary in determining when and how to use specific types of evaluations, since testing involves complex technical and scientific expertise. The Agency is not changing the evaluative procedures that are currently used and set out in program guidance and thus is not changing the level of environmental protection of the ocean dumping program, EPA notes.²⁵

Endnotes

¹ 57 F.3d 328 (3rd Cir. 1995).

² Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. §§ 1401-1445 (1994).

³ 33 U.S.C. § 1401(b)

⁴ §§ 1402(a), 1412(a)

⁵ 40 C.F.R. §§ 220-229 (1977).

⁶ 33 U.S.C. § 1412(a)

⁷ 33 U.S.C. § 1413(a)

⁸ 33 U.S.C. § 1413(b) and (c)

⁹ Evaluation of Dredged Material Proposed for Ocean Disposal - Testing Manual, Report No. EPA-503/B-91/001 (1991) (hereinafter Testing Manual). The

Testing Manual was revised in 1991. Proposed Testing Requirements for Ocean Dumping, 61 Fed. Reg. 7765, 7767 (1996) (to be codified at 40 C.F.R. §§ 220-227).

¹⁰ *Clean Ocean Action v. York*, 861 F. Supp. 1203, 1207 (D. N.J. 1994).

¹¹ 40 C.F.R. § 227.6(a)(5)

¹² 861 F. Supp. at 1211 (citing 40 C.F.R. § 227.6(b)).

¹³ *Id.* at 1213 (citing 40 C.F.R. § 227.6(c)).

¹⁴ *Id.* at 1209-1210 (citing 40 C.F.R. §§ 227.6(c)(2) and 227.27(c)). In 1994, EPA revised its regulations to clarify that bioaccumulation testing was not required in the suspended particulate phase. 59 Fed. Reg. 26,566 (1994) (codified at 40 C.F.R. § 227).

¹⁵ *Id.* at 1210 (citing 40 C.F.R. §§ 227.6(c)(3) and 227.27(d)).

¹⁶ *Id.* at 1211-12 (citing 40 C.F.R. §§ 227.6(c)(2), (3)).

¹⁷ 861 F. Supp. at 1214 (citing Testing Manual, p. 2-6 (1991)).

¹⁸ *Id.* at 1213.

¹⁹ 57 F.3d at 332.

²⁰ 61 Fed. Reg. at 7765.

²¹ *Id.* at 7766.

²² *Id.* at 7769-70.

²³ Environmental Protection Agency, Ocean Dumping Program Update, EPA 842-K-96-001 (April 1996).

²⁴ *Id.*

²⁵ 61 Fed. Reg. at 7767.

OCEAN DUMPING PERMITTING

edited by Peggy Dutton, 3L

The Law

I. The Ocean Dumping Act

Marine Protection, Resources, and Sanctuaries Act, 33 U.S.C. §§ 1401-1445 (1994).

- ☐ regulates ocean dumping of all materials, § 1401(b)
- ☐ requires EPA to establish evaluative criteria for permitting, § 1412(a)
- ☐ authorizes EPA to issue permits for non-dredged materials, § 1412(a)
- ☐ authorizes Corps to issue permits for dredged materials using EPA criteria, § 1413(a),(b)
- ☐ requires Corps to obtain EPA review and concurrence, § 1413(c).

(Note: The Corps is the major permitting authority today since dumping of nondredged materials constitutes most ocean dumping.)

The Regulations

II. Ocean Dumping Regulations 40 C.F.R. §§ 220-229 (1977).

- ☐ establishes criteria for evaluating ocean permits prohibits dumping of carcinogens unless they are present only as trace constituents, § 227.6(a)(5)
- ☐ defines trace as not caus[ing] significant undesirable effects, § 227.6(b)
- ☐ requires that effects of wastes be determined by bioassays on liquid, suspended particulate, and solid phases of dredged materials according to procedures acceptable to EPA and Corps, § 227.6(c)
- ☐ requires that bioassays in the suspended particulate phase be conducted with appropriate organisms using procedures approved by EPA and Corps, § 227.6(c)(2) appropriate means at least one species each of phytoplankton or zooplankton, crustacean or mollusk, and fish species, § 227.27(c)
- ☐ requires that bioassays in the solid phase be conducted with appropriate organisms using procedures approved by EPA and Corps, § 227.6(c)(3) appropriate means at least one species each representing filter-feeding, deposit feeding, and burrowing species, § 227.27(d)

The Green Book Procedures

III. The Green Book Evaluation of Dredged Material Proposed for Ocean Disposal - Testing Manual, Report No. EPA-503/B-91/001 (1991).

- ☐ describes testing procedures to determine biological effects of material proposed for dumping, p. 11-1 through 11-19.
- ☐ developed by EPA and U.S. Army Corps of Engineers.
- ☐ supplemented by Regional Implementation Manuals identifying site-specific contaminants and species to be tested.

ALABAMA LEGISLATIVE UPDATE 1996

by Michael L. McMillan, 2L

The following is a summary of coastal, fisheries, and marine legislation enacted by the Alabama legislature during the 1996 session.

1996 Alabama Acts 476.

Approved May 15, 1996.
Effective May 15, 1996.

Requires the Department of Conservation and Natural Resources to immediately approve all hardship fishing licenses issued under Executive Order No. 12 (November 17, 1995), subjects to:

- ☐ the renewal qualifications as established under the Marine Resources laws;
- ☐ the transfer system established by the Department of Conservation and Natural Resources; and,
- ☐ all of the laws relating to gill net licensure.

1996 Alabama Acts 544.

Approved May 20, 1996.
Effective May 20, 1996.

Exempts from the payment of all state sales and use taxes :

- ☐ the gross proceeds from the sale of fuel and supplies used aboard vessels engaged international or interstate commerce, not to include any material used in the fulfilling of contracts for the repair or reconditioning of vessels, drilling ships, rigs, barges or any commercial fishing vessels having a five ton displacement or greater; and,
- ☐ the use, storage or consumption of materials which at any time may become a component part of a vessel or a commercial fishing vessel having a five ton or greater load displacement.

1996 Alabama Acts 569.

Approved May 20, 1996.
Effective only upon approval by electorate.

Proposed the Sportsperson s Bill of Rights as an amendment to the Alabama State Constitution. The provision will appear on the November ballot. (See *Alabama Proposes Constitutional Right to Fish* at page 1 of this issue of **WATER LOG**).

1996 Alabama Acts 667.

Approved May 28, 1996.
Effective May 28, 1996.

Amended the section providing fishing licenses to disabled persons, to require the licensee to provide recertification documentation of said disability upon the request of a conservation enforcement officer having a reasonable belief that the disability may no longer be present.

1996 Alabama Acts 668.

Approved May 28, 1996.
Effective May 28, 1996.

Prohibits the interference with legal fishing activity and extends the hunting and fishing interference laws to public fishing and hunting areas.

1996 Alabama Acts 723 (S.J.R. 139).

Approved May 28, 1996.

Citing the potential for increased travel to Gulf Shores and the Mobile coastal region, this resolution urges the governor to conduct a study for the construction of a major North-South four-lane highway system along the western side of Alabama.

Lagniappe *(a little something extra)*



Around the Gulf ...

Alabama has placed a five year moratorium on the sale of crab trap licenses to new applicants. The moratorium is part of an effort to maintain sustainable harvests.

Red Tide has been blamed for multi-species fish mortalities on the Gulf Coast. In May, hundreds of dead hardhead catfish washed up on the shores near the Florida-Alabama border. Red Tide has also been identified as causing the deaths of 158 manatees earlier this year.

The "dead zone" off the coast of Louisiana is re-appearing. The hypoxic area is attributed to nutrient runoff flowing into Gulf of Mexico from agricultural states using high levels of fertilizers. The oxygen depletion creates a zone within which most marine life cannot survive.

On Saturday June 15, a manatee was sighted one mile offshore of Gulfport, Mississippi. While the animals are no strangers to Gulf waters, their normal range is Florida's waters.



Around the Nation and the World ...



The Ninth Circuit Court of Appeals upheld restrictions on logging in old growth national forests in Oregon and Washington. The forests serve as egg laying habitat to the marbled murrelet, a seabird protected under the Endangered Species Act. *Northwest Forest Resource Council v. Glickman*, 1996 U.S. App. LEXIS 14518 (1996).

The United States Supreme Court ruled on two Admiralty cases heard in March. In *Exxon Co., U.S.A v. Sofec*, 64 U.S.L.W. 4415, the Court held that an admiralty plaintiff may not recover against a defendant who was a cause in fact, where the plaintiff is the *superseding and proximate* cause of an injury. In *Henderson v. U.S.*, 116 S.Ct. 1638, the Court held that the Suits in Admiralty Act's (SAA) "forthwith" service of process requirement is invalid as inconsistent with the Federal Rules of Civil Procedure. Accordingly a SAA plaintiff will be afforded all the time allowed under F.R.C.P. 4 to complete service of process.

The Center for Marine Conservation announced that the 1995 National Coastweeks Cleanup utilized 135,000 volunteers to remove 2.5 million pounds of trash from U.S. shores and beaches.

On June 24, 1996 the Marine Fisheries Conservation Network called on "All People Concerned About Fish" to urge their Senators to pass the Magnuson Act re-authorization bill (S.39).

Since June, ten more nations became members of the United Nations Convention on the Law of the Sea: Algeria, China, Czech Republic, Finland, Ireland, Japan, Netherlands, Norway, Panama and Sweden. To date the Convention counts 102 members. The United States is not yet a member to the Convention.

In June, the European Commission announced that it would charter a patrol vessel to monitor driftnet fishing in the Mediterranean Sea and northeast Atlantic.

WATERLOG 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@olemiss.edu. We welcome suggestions for topics you would like to see covered in **WATER LOG**.

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