



WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Baseball Stadium On Mobile Bay OK'd

Sierra Club v. U.S. Army Corps of Engineers, 935 F. Supp. 1556 (S.D. Ala. 1996).

by Bradley Peacock and John Duff

Summary

The federal district court in Southern Alabama recently ruled that a decision by the Army Corps of Engineers to permit construction of a baseball stadium on Mobile Bay was valid. Sierra Club had argued that since part of the proposed construction would require the filling of wetlands for a non-water dependent use, alternative sites should have been selected. The court held that the Corps' Environmental Assessment determination was not arbitrary or capricious and that the Corps' analysis of alternatives sufficiently rebutted the water-dependent use presumption.

Background

On January 15, 1996, the city of Mobile, Alabama submitted an application for a wetlands fill permit in an effort to begin construction on a minor league professional baseball stadium. The city filed the application with the

U.S. Army Corps of Engineers, seeking permission to fill 19.9 acres of transitional wetlands for an 8,000 seat stadium and 2,100 space parking lot. Along with the application, the city presented an "Alternatives Analysis" which assessed the possibility of eleven potential sites for the stadium, and concluded that the site chosen was the most feasible. The city based the decision on such criteria as size, accessibility, visibility, and cost-effectiveness.

The Corps gave public notice of the permit application on January 22, and soon received letters from the U.S. Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service raising concerns about the construction site. The EPA voiced doubts about the methods used by the city in its "Alternatives Analysis," and suggested altering the site to avoid or reduce contemplated wetlands impact. The U.S. Fish and Wildlife Service expressed similar dissatisfac-

tion, and recommended that the permit be denied since the stadium was not water-dependent, which is an important factor in wetland development proposals.

The city revised its original proposal on April 23, and offered to reduce the wetlands loss from 19.9 to 16.9 acres by setting aside three acres of wetlands in the 30 acres of stadium development property. The Corps provided public notice of the revisions, and

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both the EPA and the U.S. Fish and Wildlife Service reiterated that wetlands impact should be reduced further or eliminated altogether, and remained unconvinced that the city had adequately explained the necessity of filling the wetlands for a non-water dependent use.

On May 23, the city again redesigned the plans, this time reducing the wetlands impact from 16.9 to 7.4 acres. Without providing notice of this revision, the Corps distributed a Statement of Findings on May 24 which concluded that "public interest would best be served by issuance of the permit." The Corps also released an Environmental Assessment which stated that the stadium project would not significantly affect the environment, and that an Environmental Impact Statement was not required. The Corps then issued a signed permit to the city on May 28, allowing construction to begin on the stadium.

Environmental Concerns

On July 16, the Sierra Club, the Mobile Bay Audubon Society, and the Native Forest Network filed an action in the United States District Court for the Southern District of Alabama against the city of Mobile, the

Corps, and the Corps' district engineer, William S. Vogel. The plaintiffs alleged that the defendants violated the National Environmental Policy Act (NEPA) by failing to fully consider two alternatives to the site: (1) building the stadium on an upland portion of the tract, thereby eliminating any wetlands impact; and, (2) creating satellite parking or building a parking deck, thereby eliminating any wetlands impact. The plaintiffs sought a permanent injunction to void the permit and to compel the defendants to comply with statutory and regulatory authorities.

Court's Analysis

In discussing the appropriate standard of review, the district court noted that it may set aside the Corps' decision to issue the permit only if that decision is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

The court noted that the Corps' authority to issue permits to fill wetlands comes from Section 404 of the Clean Water Act (CWA). Under the CWA, alternatives must be considered before a wetlands fill permit may be issued. Where a proposal is "not water dependent, the regulations create a presumption that

practicable alternatives not involving wetlands are available, unless clearly demonstrated otherwise." The court observed that the degree of scrutiny applicable to these alternatives depends on whether an environmental impact statement is required, as opposed to merely an environmental assessment. The court then noted that the Corps issued an Environmental Assessment which found that the city's project did not significantly affect the environment, and thus, no environmental impact statement was necessary. The court concluded that there was no evidence that the Corps' finding of no significant impact was arbitrary or capricious. "The Corps obligations under NEPA were not to present a detailed EIS, but merely to 'study, develop, and describe appropriate alternatives to recommended courses of action' pursuant to an [Environmental Assessment]."

In reviewing the plaintiffs claims that the Corps violated the CWA and NEPA by failing to consider constructing a multi-tiered parking deck, the court acknowledged that the Corps never considered this option. However, the court stated that the failure to evaluate this alternative did not imply that the

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Corps violated CWA and NEPA. The court explained that the Corps is only required to consider "practicable" and "reasonable" alternatives. Moreover, the court noted that an Environmental Assessment "cannot be found wanting simply because the agency failed to include every device and thought conceivable by the mind of man." The court stated that the plaintiffs must do more than merely claim that reasonable alternatives including tiered parking, were rejected by the Corps. The court stated that the plaintiffs failed to present any evidence regarding practical alternatives. The Corps, on the other hand, presented evidence that such an alternative parking facility would cost an estimated \$9 to \$10 million, while the city's entire budget for the stadium project was \$7.2 million. The court concluded that, based on this unrebutted evidence, the Corps was not compelled under NEPA to consider the parking deck alternative.

The plaintiffs also alleged that the Corps should have more extensively analyzed the possibility of obtaining different land which would have required no wetland fill for constructing the stadium. However, the court found that the Corps did, in fact, consider securing additional land

for the project, and also contemplated moving the stadium to alternative land. The court relied on the Environmental Assessment prepared by the Corps as asserting "practical and logistical reasons why the stadium could not be moved from its proposed location," and found that the Corps' decision was not arbitrary or capricious. The court noted that this finding did not undermine the existing legal requirement that when a permit involves the use of non-water dependent land a presumption arises that practicable alternatives exist unless clearly demonstrated otherwise. The court agreed that the city presented clear evidence that no practicable alternatives existed, thus overcoming the presumption.

The court also addressed the issue of whether the Corps was required to provide public notice of the city's third and final proposal. The Corps did not provide public notice following the city's final proposal, but asserted that supplemental notice is not required under the applicable CWA regulations. The court stated that, under the CWA, the Corps has the discretion to decide whether to issue supplemental notice in this situation. Since the Corps had provided notice of the previous two proposals, the court determined that no additional notice was neces-

sary because a public hearing would not provide any additional information to assist the Corps in rendering a final permit decision. The court added that there was no proof that the decision by the Corps not to provide notice of the city's final proposal was arbitrary, capricious, or an abuse of discretion.

Conclusion

Even though the Sierra Club ultimately lost this case, they may have helped secure at least a small victory in conjunction with the Environmental Protection Agency and the U.S. Fish and Wildlife Service. After the city's original proposal sought permission to fill 19.9 acres of wetlands, the concerns expressed by the EPA and the U.S. Fish and Wildlife Service appear to have led to the city's revised proposals to fill 16.9 and, finally, 7.4 acres of wetlands. The opinion does not indicate whether the city revised the original and second proposals in direct response to the reactions of the EPA and the Wildlife Service, but the sequence of events logically lead to such a conclusion. Thus, although the plaintiffs eventually lost the war in court, the environmental impact had been minimized. And the environmental organizations sent a signal of their continued scrutiny in these matters.

Weeks Bay Estuary Protected From Pier Pressure

The Weeks Bay National Estuarine Research Reserve (NERR) is located on the eastern shore of Mobile Bay in Baldwin County, Alabama. This shallow sub-estuary is a critical nursery for shrimp, fish, and shellfish which end up in the Gulf of Mexico.

During the past two years, the Weeks Bay NERR has had first-hand experience in addressing a significant resource protection issue that has arisen in many other parts of the country. In the space of one week during the summer of 1994, Reserve staff responded to six public notices from the U.S. Army Corps of Engineers (Corps) for permit applications to construct private piers in Weeks Bay.

These applications proposed enormous and elaborate piers, ranging in length from 260 to 350 feet with terminal decks that included gazebos, toilet facilities, and boathouses up to 4,800 square feet.

A recent subdivision of several large tracts of land along Weeks Bay led to the potential for a large increase in the number of piers proposed. The Reserve staff took the initiative by organizing an interagency

Task Force to address the anticipated increase in privately-owned piers and their potential damage to the fringing marsh, aquatic vegetation, and general ecological health of the bay. Membership consisted of state and federal agencies including the Corps; the Alabama Department of Conservation and Natural Resources (DCNR), the state agency which manages submerged lands; the Alabama Department of Environmental Management, the state CZM permitting and enforcement agency; the Dauphin Island Sea Lab, a marine research consortium of universities in Alabama; and the Weeks Bay NERR.

The goal of the Task Force was to develop a set of pier construction criteria that could be approved by the state and incorporated into the Corps' general permitting process for applications in Weeks Bay. The Task Force sought to balance reasonable riparian access with the ecological integrity of the Reserve, navigation rights, and public ownership of submerged lands.

Over a one-year period, the Task Force agreed on a set of

criteria for pier construction in Weeks Bay (page 5). Since DCNR approved and the Corps adopted the Task Force's recommendation criteria in January 1995, all Corps' general permit applicants for pier construction have modified their proposals to conform with the criteria. To date, the affected public seems to accept the new criteria as part of a way to protect local resources.

While the Weeks Bay NERR played an important role in facilitating this successful practical management application, the real strength of the project was in the cooperation and input from all of the relevant agencies. The Task Force recognized that, because of its protected status, Weeks Bay represented an ideal site to test more stringent pier construction criteria. Results of this pilot study may lead to a broader application of the pier criteria in the newly established Mobile Bay National Estuary Program. □

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Criteria for Pier Construction in Weeks Bay

Pier or Walkway

The length of the entire structure may extend no further than 20 feet beyond the point where water is 3 feet deep at mean low water, or 300 feet from mean high water (MHW), whichever is shorter. The pier may be no wider than 5 feet and must be at least 5 feet above MHW. In crossing a marsh, the pier may be no wider than 5 feet and at least 5 feet above the marsh surface. Spacing between the wooden decking of the pier or walkway over a marsh must be at least 3/4 inches, and decking boards may be no wider than 12 inches. Light penetration may also be provided by metal grating.

Pier Deck Area

There may be no more than one deck area per single owner pier and it shall be no larger than 10 x 10 feet. It may be covered and screened but cannot have enclosed or solid walls. No plumbing or toilet facilities are allowed on the pier or deck.

Walkways Crossing Wetlands

Adverse impacts to the marsh must be avoided during construction and during subsequent use. Support pilings shall be installed by hand with no heavy machinery operating in the marsh. Any material excavated for installation of the pilings shall be removed with no resulting changes in marsh elevations.

Boat Berthing Areas

No more than two, uncovered, unenclosed boat berths are allowed for single owner piers. A maximum of 6 mooring pilings may be installed. Boat berthing areas may be up to 20 x 26 feet and pilings may be no further than 20 feet waterward of the access dock.

Construction Requirements

All structures shall be set back at least 25 feet from the lateral riparian rights line; if there is insufficient space, this may be waived to a minimum of 10 feet.

Water Access Rights

Permit applicants must demonstrate riparian ownership during the application process and structures must not infringe upon or restrict rights of others.

Dredging

No dredging to create channels, or any other bottom disturbance, shall be permitted.

Aquatic Vegetation

Pier construction must be done so as to prevent damage to aquatic vegetation. A survey of aquatic vegetation may be required.

Shoreline Protection

Shoreline protection shall be considered in areas where the riparian vegetation proves inadequate in preventing erosion. Shoreline protection is limited to placement of riprap. Filter cloth is required.

Community Piers

Communal areas which share riparian ownership may construct a "community pier" to provide access. The permitting process will take into consideration the number of riparian owners involved in the project.

FEDERAL LEGISLATIVE UPDATE 1996

by Michael L. McMillan, 2L and John Duff, J.D., LL.M.

The 104th Congress enacted several laws relevant to marine, coastal and ocean issues.

104 Pub. L. 91 - National Marine Fisheries Laboratories

This law directs and authorizes the Secretary of Commerce to:

- convey to the Commonwealth of Massachusetts the National Marine Fisheries Service Laboratory in Gloucester, Massachusetts;
- construct a facility for fisheries research on land to be leased from the State of South Carolina, at Fort Johnson, South Carolina; and,
- construct a facility to provide a consolidated office and laboratory for fishery research on Auke Cape, Alaska.

104 Pub. L. 106 - National Defense Authorization Act

The National Defense Authorization Act for Fiscal Year 1996, addresses several areas of marine and oceanic concern, including:

- providing the Secretary of Defense with guidelines and parameters for the use of private marine pollution control devices upon Armed Forces vessels.

104 Pub. L. 143 - Trinity River Basin Fish and Wildlife Management Reauthorization Act

The Trinity River Basin Fish and Wildlife Management Reauthorization Act extends for three years the availability of monies for the restoration of fish and wildlife in the Trinity River, California.

104 Pub. L. 148 - Amagansett National Wildlife Refuge Act

Directs the Secretary of the Interior to make certain corrections to the Coastal Barrier Resource Map's eastern boundary and to ensure that no area of the map includes certain privately owned areas.

cont.

104 Pub. L. 150 - Coastal Zone Management Act

Congress enacted the Coastal Zone Management Act for the purpose of providing greater legal protection to the coastal zone and its wetlands, flood plains, beaches, barrier islands, coral reefs and fish and wildlife. The Act encourages each coastal state to develop a management program for the purpose of setting forth objectives, policies and standards to guide the public and private use of lands and waters in the coastal zone. Furthermore the Act:

- permits the Secretary of Commerce, until 1999, to make a maximum grant of \$200,000 to coastal states who do not have a management program, contingent upon state matching funds;
- establishes several criteria for the acceptance by the Secretary of Commerce of a state's management program, including:
 - the state's specific adoption and identification of the means by which the State seeks to accomplish control over the land and water uses, including identification of all applicable constitutional provisions, laws, regulations, and judicial decisions;
 - the manner in which the state program is developed and organized within the local area, and has the ability to function effectively and achieve the goals sought through this Act.
- established a Coastal Zone Management Fund for the support of the state management programs through beneficial loans of up to \$4 million.

104 Pub. L. 164 - Defense and Security Assistance Improvements Act

This Act transfers a single STALWART class ocean surveillance ship to both the Government of New Zealand and the Government of Portugal.

104 Pub. L. 182 - Safe Drinking Water Act, Amendments of 1996

These amendments to the Safe Drinking Water Act direct the Environmental Protection Agency to review its drinking water research to ensure the research:

- is "of high quality" through the use of advanced science; and,
- does not duplicate any other research being conducted by the Agency.

104 Pub. L. 188 - Small Business Job Protection Act

Provides an exemption from harbor maintenance tax for certain passengers traveling on United States flag vessels in the state waters of Alaska, Hawaii, and adjacent international waters.

104 Pub. L. 201 - National Defense Authorization Act

Establishes the National Oceanographic Partnership Program to provide a formal mechanism for the sharing of resources and facilities among Federal agencies, academic institutions, and industries.

Section 282, creates within the Program both a National Ocean Research Leadership Council and an Ocean Research Advisory Panel;

Members of the National Ocean Research Leadership Council are specifically named by the Act. Members include:

- the Secretary of the Navy;
- the Administrator of N.O.A.A.;
- the Deputy Secretary of Energy; and,
- the Commandant of the Coast Guard.

The Ocean Research Advisory Panel shall contain between 10 and 18 members appointed by the Council from among persons eminent in the fields of marine science, marine policy, and who are representative of the interests of government, academia, and industry.

104 Pub. L. 204 - Independent Agencies Appropriations Act

Appropriates various monies for the continued operation of the National Flood Insurance Program.

104 Pub. L. 206 - Energy and Water Development Appropriations Act

Appropriates \$10 million dollars for the expenses necessary for emergency flood control, hurricane, and shore protection activities as operated under the Flood Control Act of 1941. Eight million dollars of the funds are specifically designated for the Secretary of the Army to use in the rehabilitation of flood control levees along the Puyallup and Carbon Rivers in Pierce County, Washington.

104 Pub. L. 213 - Carbon Hill National Fish Hatchery Conveyance Act

Directs the Secretary of the Interior to convey the Carbon Hill National Fish Hatchery to the state of Alabama.

cont.

104 Pub. L. 227 - Antarctic Science, Tourism, and Conservation Act of 1996

The purpose of this Act is to implement the International Protocol (Amendment) for Environmental Protection to the Antarctic Treaty. This international amendment recognizes a rising level of potential environmental and economic harm to the Antarctic continent and seeks to prohibit any "harmful interference." Certain definitions of "harmful interference" include:

- the flying or landing of helicopters in a manner that disturbs concentrations of birds or seals;
- the use of explosives or firearms in a manner that disturbs concentrations of birds and seals;
- significantly damaging concentrations of native terrestrial plants;
- introduction of any prohibited product onto land or ice shelves or into water in Antarctica; and,
- disposal of any waste from land into the sea in Antarctica.

104 Pub. L. 264 - Federal Aviation Administration Amendment

This Act directs the Administrator of the Federal Aviation Administration to prepare a report concerning the construction of two offshore platforms, for the support of Doppler radar stations, off of the New York State coastline.

104 Pub. L. 265 - Walhalla National Fish Hatchery Conveyance Act

Conveys the Wallhalla National Fish Hatchery to the State of South Carolina.

104 Pub. L. 283 - National Marine Sanctuaries Preservation Act

Reauthorizes the National marine Sanctuaries Act. Amendments included the authority to expand:

- Hawaiian Islands National Marine Sanctuary to encompass the Kahoolawe Island waters; and
- Flower Garden Banks National Marine Sanctuary to encompass an area known as Station Bank.

The Act also renames the Stellwagen Bank NMS to honor retiring Congressman Gerry Studds, thus designating the Gerry E. Studds Stellwagen Bank National Marine Sanctuary.

104 Pub. L. 297 - The Sustainable Fisheries Act (An Act to amend the Magnuson Fishery Conservation and Management Act.)

Originally passed in 1976, the Magnuson Act extended exclusive U.S. jurisdiction to 200 miles from American shores and restricted foreign fishing within that area. In addition, the original Act began the process of expanding and subsidizing the U.S. commercial fishing fleet. In 1996, Congress passed this "Sustainable Fisheries Act" as an amendment to the Magnuson Act. Among other things the Act:

- tightens the requirements for members of regional fishery management councils, through additional conflict of interest limitations;
- requires fishery management programs to define when a fishery becomes "overfished" and to follow specified criteria to increase the fishery crop to its maximum sustainable yield;
- requires the specification of "essential fish habit[at]s" and to minimize adverse effects on such habitats due to over fishing;
- prohibits the regional management councils from establishing any additional individual fishing quotas before September 30, 2000; and,
- authorizes the implementation of a fishing vessel buy out program.

104 Pub. L. 325 - Marine Minerals Resources Research Act

Amends the Mining and Minerals Policy Act of 1970. The Act directs the Secretary of the Interior to "establish and carry out a program of research on marine minerals resources." The goals of the Program are to:

- promote research, identification, assessment, and exploration of marine mineral resources in an environmentally responsible manner;
- assist in developing domestic technologies required for efficient and environmentally sound development of marine mineral resources;
- coordinate and promote the use of technologies developed with Federal assistance; and,
- encourage basic and applied research.

104 Pub. L. 332 - National Invasive Species Act

The National Invasive Species Act appropriates \$29 million to be spent toward the prevention of nonindigenous species from entering American waters. Current areas named for research and corresponding action, include the highly infested San Francisco Bay area and the Great Lakes. \$2 million of the monies are specifically earmarked for the creation of a management program to control the foreign ballast water brought into American waters by foreign ships.

Lagniappe *(a little something extra)*



Around the Gulf ...

On November 5, Alabama voters OK'd the Sportsman's Bill of Rights, a state constitutional amendment guaranteeing a right to hunt and fish.

On January 1, the Mississippi Commission on Marine Resources regulation requiring gillnetters to use degradable nets went into effect.

In December, the Commerce Department and NOAA approved Texas' Coastal Zone Management Plan making it the 30th state to have a federally approved and fundable program.

On December 18, 1996, the Department of Commerce published new regulations for turtle excluder devices (TEDs) that establish Sea Turtle Conservation Areas within 10 nautical miles of the coasts of Texas and Louisiana.

In November, the Gulf of Mexico Fishery Management Council voted to require Bycatch Reduction Devices (BRDs) on shrimping activity in the federal waters of the Gulf of Mexico.



Around the Nation and the World ...



In January 1997, four Asian nations signalled the WTO to establish a dispute panel to rule on the U.S. embargo of shrimp. The embargo is part of a U.S. effort to persuade foreign shrimping nations to use TEDs.

In December, Commerce Secretary Mickey Kantor certified Canada under the Pelly Amendment for allowing its Inuit natives to take two bowhead whales this year in the Canadian arctic.

On December 13, 1996, the Corps of Engineers published its final notice of changes to the nationwide wetlands permits. The Corps plans to phase out the controversial Nationwide No. 26 permit in two years and, in its place, establish activity-specific general permits.

The Marine Stewardship Council, a non-governmental organization established by the World Wide Fund for Nature and Unilever, announced that it is developing a set of sustainable fishing principles to be used in certifying seafood products have come from sustainable sources.

Satellite tracking of the New England groundfishing fleet began in January in a three month test to evaluate the effectiveness of enforcing days-at-sea limits and area closures.

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

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