Sea Grant

WATER LOG

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Law and Technology Spur Deepwater Oil and Gas Exploration in Gulf of Mexico

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Introduction

The recent surge in oil and gas exploration in the Gulf of Mexico is due in large part to a federal law that reduces, and in some cases eliminates, royalty payments due on oil and gas taken from beneath deepwater offshore federal lands.

As a result of the Outer Continental Shelf Deep Water Royalty Relief Act[1] (DWRRA or Act), as well as technological advances in deepwater drilling, oil and gas companies have increased their activities in the region and are likely to achieve quicker and larger returns on their investments as they open up new sources of oil and gas.

The ability to obtain oil from below submerged lands lying thousands of feet below the ocean surface is nothing new. In 1978, Shell Oil installed a production platform in a one thousand foot-plus depth area of the Gulf. Ten years later, the company contracted with Sonat Offshore Drilling to drill a well in the Gulf of Mexico 7,520 feet under water. However deepwater drilling has been financially risky and technologically challenging. Locating viable oil and gas fields at great depths proved difficult, while producing and extracting oil from deepwater areas proved to be cost-ineffective.

In recent years, advances have been made in both exploration techniques and platform design and construction. 3-D seismic sensing technology provided a finer and more detailed look at prospective oil and gas reserves lying under submerged lands. At the same time, platforms such as Shell's *Auger* proved that oil can successfully be extracted from wells more than half a mile below the water's surface. In late 1996, 23 rigs operated in Gulf of

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Strict Liability for Damage to New Marine Sanctuary

U. S. v. *M/V Jacquelyn L.*, 100 F. 3d 1520 (11th Cir. 1996).

Rick Brownlow, 2L

Summary

The 11th Circuit recently affirmed a district court decision which imposed strict liability on a ship that ran aground on Western Sambo Reef, an area in Florida waters protected by the Florida Keys National Marine Sanctuary Act. The owners of the vessel contended that Western Sambo Reef was not part of the sanctuary because Governor Martinez had at one point objected to Florida territory being included in the sanctuary. Both the federal district court and the 11th Circuit found that the Governor had not objected to the designation and that the state territory where the grounding occurred was part of the sanctuary.

Facts

On November 16, 1990, President Bush signed the Florida Keys

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Mexico waters exceeding one thousand feet. And Conoco recently contracted with a Korean ship manufacturer for a vessel capable of drilling in 10,000 feet of water.

Technological advances aside, deepwater drilling faced a major economic impediment in the form of royalty payments due immediately upon extracting oil and gas from federally leased offshore sites. These up-front and continuous costs, noted the industries, constituted the final barrier to reaching vast amounts of heretofore untapped energy resources. Oil and gas producers argued that royalty relief was necessary to allow the potential of technological advances to be unchained.

Royalty relief was a hotly contested concept in Congress and came to fruition only after years of debate and political strategic drives by the affected industries. Opponents of the Act labeled it "corporate welfare" and argued that it was an unnecessary economic incentive to an industry which would have proceeded with deep water drilling with or without royalty relief. The critics argued that the oil and gas industries would reap windfall benefits at U.S. taxpayers' expense. The financial benefit to, or drain on, the federal treasury remains to be seen. Lease bid prices have risen dramatically at the prospect of exploring deeper sites without the immediate costs of federal royalties. Recent lease sales of federal offshore lands indicate that the oil and gas industries consider it a financially advantageous shift in policy.

Oil and Gas in the Gulf

The oil and gas reserves located beneath federal offshore lands belong to the United States and its citizens. In 1945, President Truman proclaimed exclusive jurisdiction over the resources on and below the continental shelf of the United States. In 1953, Congress passed the Outer Continental Shelf (OCS) Lands Act delineating the boundary between state and federal submerged lands and authorizing the Department of Interior, through the Minerals Management Service, to lease federal OCS lands.

For over forty years, offshore oil and gas development has been concentrated in the resource rich region of the Gulf of Mexico. However, U.S. oil and gas production on land and at sea do not meet U.S. needs. U.S. oil demand is met substantially by imports. The oil embargo of 1973 and 1974 focused national attention on the need to better develop domestic oil and gas supplies in an effort to minimize dependency on imports. OCS lands, especially those off the coasts of Texas and Louisiana, were increasingly explored and exploited to maintain a healthy domestic production level. Environmentalists warned that offshore drilling represented an unreasonable risk of spills similar to the catastrophic blowout off the coast of Santa Barbara in 1969.

Ultimately Congress and the President would enact moratoria on OCS leasing of large areas. The western portion of the Gulf of Mexico remained one of the few open and productive areas for production. As supplies from relatively shallow (less than 200 meters) wells were exploited, the costs of exploration and exploitation rose. As a result, oil and gas exploration in the Gulf of Mexico waned in the 1980s and early 1990s and with it the regional economies of Texas and Louisiana. If deepwater drilling were to become a reality, technologically advanced methods of production would need to be developed. The oil and gas industries lobbied for a new policy regarding royalties on oil and gas produced in deepwater areas.

Offshore Oil and Gas Leases

The U.S. Department of Interior, through the Minerals Management Service (MMS), administers the leasing of federal offshore lands to oil and gas companies. MMS operates under an obligation to lease the lands through a competitive bid process and to charge a royalty rate for all oil and gas extracted. Under the leasing provisions, the minimum royalty rate is twelve and one half per cent of the value of the oil and gas extracted. Royalties on OCS oil and gas production amount to hundreds of millions of dollars annually.

The most lucrative offshore oil and gas extraction takes place in the western and central Gulf of Mexico which provide approximately one sixth of the nation's domestic oil and one fourth of its natural gas. In recent years however, much of the oil and gas in the Gulf's shallower waters has been extracted, forcing exploration into deeper and deeper waters. Since royalties are due and payable immediately upon production, the return on investment in deep

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water production becomes less economically attractive.

As a result, some Congressmen in the states whose economies stood to benefit most from continued oil and gas development sought opportunities to jump start oil and gas exploration in the Gulf. Royalty relief, or a method of reducing immediate royalty payments, seemed to offer a solution. But the concept fought a three and a half year battle through three different sessions of Congress, two presidential administrations, and the "Republican Revolution of 1994" before it was finally enacted in November of 1995.

In the early 1990s, U.S. Senator J. Bennett Johnston (D-LA) served as the Chair of the Senate Energy and Natural Resources Committee. Johnston prided himself on his role in developing the country's energy policy, including passage of the National Energy Policy Act of 1992. That act aims to maximize production from U.S. domestic resources including coal, oil, natural gas and nuclear energy. In extolling the virtues of the act Johnston labeled it the "most comprehensive energy bill ever to pass Congress." In 1992, Johnston had solicited ideas on how the oil and gas economies of the Gulf of Mexico might be jump started.

Under the then existing law, royalties on oil and gas production became due and payable immediately upon production. Even in the early months or years of a well's life, when most revenue goes towards covering the start-up costs, payments are due to the federal government. The concept of a "royalty holiday" had been used in other countries to spur development by reducing or eliminating the royalty payments during the initial period of production when a well is just paying for itself. Former and current congressional committee staff members well versed in resource and energy issues attribute the "concept of providing limited royalty relief to encourage production in deep waters of the [Gulf's] outer continental shelf" to Victor Beghini, president of Marathon Oil Company.

In August of 1992, shortly after his discussion with industry representatives, Senator Johnston introduced the Outer Continental Shelf Deep Water Production Incentives Act, a bill that incorporated royalty holidays into the nation's OCS leasing process. As Chair of the Senate Committee on Energy and Natural Resources, Johnston called for hearings on the issue and gained qualified support from the Bush Administration. The President supported the concept but was concerned about the budget impact from lost royalties. In October of 1992, Congress adjourned without producing an agreed upon bill.

In the November 1992 elections, the Democrats took the White House and the Clinton Administration appointed Bruce Babbitt to the post of Secretary of Interior. Babbitt, a recognized conservationist, led the oil and gas industry to believe that support for Royalty Relief from the new administration was less likely than ever. Meanwhile, Rep. George Miller (D-Cal.) grabbed onto Beghini's early concept of a royalty "holiday" and turned it against the oil and gas industry. He mounted an attack on the floor of the House. "If the oil industry truly needs a holiday paid by the American people, does it really need to fly on the Concorde [and] stay at the Ritz?" he asked.

In 1993, Senator Johnston introduced the Outer Continental Shelf Deep Water Royalty Relief Act. He called for hearings on the new bill.

Robert Armstrong, Assistant Secretary of Interior, testified on the Administration's concerns regarding Outer Continental Shelf leasing and royalty relief. Armstrong indicated that the Administration acknowledged the importance of oil and gas production in the Gulf of Mexico and that some technological and economic factors were inhibiting possible production. He noted that "some incentive may be desirable to encourage environmentally sound development." But Armstrong also expressed the administration's concern that any government policy should be structured so as not to amount to a give-away of valuable federal resources. He noted that "we have reviewed the bill with an eye toward striking a balance between ensuring the public a fair return on the value of its OCS resources and providing industry with appropriate financial incentives. To the extent possible, legislation should target its benefits to projects that would not be undertaken in the absence of incentives."

The 1993 bill would have granted a limited royalty holiday for production activities in depths of 200

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meters or more. Armstrong questioned this aspect of the bill since currently employed technology allowed for exploration and drilling out to a depth of 400 meters. He explained that, "a Minerals Management Service analysis had indicated that development of tracts in the 200-400 meter depth rangewould likely be profitable without royalty relief," adding that "mandatory [royalty relief therefore] should be limited to tracts in 400 meters of water or greater." Armstrong indicated support for royalty relief in deeper waters since in depths greater than 400 meters, "new and innovative technologies are required to produce the gas and oil, and an incentive that targets these depths may help develop those technologies."

Senator Johnston persevered. With support from the Department of Energy and the Office of Management and Budget, he brought out estimates, using different development scenarios, that a staggered royalty relief system, operating for different initial levels of production at depths of 200, 400 and 800 meters, would result in a net gain of 200 million dollars to the Federal Treasury in the long-term. The Act passed in late November, 1995.

Bids Skyrocket

The Act has had a dramatic effect on bidding for Outer Continental Shelf (OCS) lease areas, most of which will be subject to Royalty Relief. Two leases sales in 1996 brought in over $850 million. In 1995, the last year in which lease sales occurred without the Royalty Relief Act in place, high bids for OCS leases in the Gulf of Mexico totaled $306 million. The financial attractiveness of the new system is evidenced by the fact that of 924 tracts bid for in May of 1996, 471 were in depths that trigger royalty relief. In September 1996 bids, 433 of 617 tracts qualify for royalty relief.

Oil and gas companies are confident that royalty relief will translate into more revenue, quicker return on investment, and higher profits. Technological advances are now being used to their full potential, research and development on new drilling and extraction designs and processes are under way. The Minerals Management Service has responded to the increased interest and activity dubbing the Gulf of Mexico's deepwater areas "America's new frontier."[2]

Endnotes

1. Outer Continental Shelf Deep Water Royalty Relief Act, 43 U.S.C. § 1301.
2. U.S. Minerals Management Service, *The Gulf of Mexico's Deepwaters...America's New Frontier*, at http://www.mms.gov/omm/gomr/homepg/offshore/deepwatr/deepover.html

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National Marine Sanctuary Act (FKNMSA), designating 2800 square nautical miles of coastal waters in the Florida Keys area as the Florida Keys National Marine Sanctuary. The FKNMSA provides that "[t]he Sanctuary shall be managed and regulations enforced under all applicable provisions" of the Marine Protection Research and Sanctuaries Act (MPRSA).[1] Section 5(c) of the FKNMSA provides that the designation of the sanctuary "shall not take effect for any area located within the waters of the State of Florida if, not later than 45 days after the date of enactment of this Act, the Governor of the State of Florida objects in writing to the Secretary of Commerce."[2]

On July 7, 1991, the *M/V Jacquelyn L.* ran aground on Western Sambo Reef, an area that falls within the Florida Keys National Marine Sanctuary. In response to the grounding, the United States, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, and the State of Florida Department of Natural Resources sued for damages to the sanctuary.[3]

The United States filed a motion for summary judgment against the vessel, *M/V Jacquelyn L.*, stating that it is strictly liable for any damages to the reef resulting from the grounding. Vessel owners responded with a motion to strike and a cross motion for summary judgment contending that there was no sanctuary in the territorial waters of Florida because Governor Martinez, had objected to the designation of the sanctuary pursuant to Section 5 (c) of the FKNMSA.[4]

The United States contended that no genuine issue of material fact remained as to whether the State of Florida objected to the designation of areas within Florida waters as part of the sanctuary. Focusing on a letter from Governor Martinez to Secretary of Commerce Robert Mosbacher dated December 31, 1991 and a Resolution of the Governor, Cabinet, and Department of Natural Resources of Florida which stated that Florida resolved to "include state lands and resources within the boundary of the Sanctuary," the United States argued that the State of Florida expressly included state lands in the Sanctuary and intended for the Sanctuary Act to take immediate effect.

The defendants focused on a

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different aspect of the Martinez letter. In the letter, Governor Martinez stated that he and the Florida Cabinet had "passed a resolution on December 18, 1990 to include state lands and resources within the boundary of the Florida Keys National Marine Sanctuary, with certain provisions."[5] The referenced resolution lists the "certain provisions," including the completion and approval by the State of Florida of a Comprehensive Management Plan (CMP) for the Sanctuary. The vessel owners argued that Governor Martinez effectively objected to the designation of the Sanctuary as it applied to Florida waters until such time as a comprehensive management plan was approved.

Court Reviews Letter

The District Court noted that Section 5(c) of the Florida Keys National Marine Sanctuary Act places the burden of objecting to the designation on the Governor of Florida. To prevent the designation from taking effect, they said, the Governor must object in writing to the Secretary of Commerce within forty-five days of the date of enactment. Absent an express objection from the Governor, the Court reasoned that the Act automatically takes effect for all delineated areas, including those areas within Florida waters. Accordingly, the Court stated that the burden is on Defendants to demonstrate that the Martinez Letter constitutes an objection as contemplated by section 5(c).

The District Court noted, and the Appeals Court agreed, that a careful reading of the Martinez Letter indicates that it is not an objection to the designation. In the second and third paragraphs of the letter,[6] Governor Martinez discussed the effect the designation would have on state authority and recognized that the inclusion of state lands would be critical to full implementation of the sanctuary's purpose. In the letter the Governor noted that the State would have an additional forty-five days following development of the final management plant to object to any terms of the designation, including the boundary. Although this language may not have indicated unequivocal acceptance of the designation, the court noted that such acceptance is not required for the designation to take effect. All that is required the court conlcuded, is that Governor Martinez not object. In addition, the court noted that the Governor prefaced the "certain provisions" language with a statement indicating that he believed the inclusion of state lands was "critical" to achieving the Act's purpose. The court interpreted this as an intent to include the state area within the Sanctuary. When read in conjunction with his belief that the State would have a reserved opportunity to object to the designation, it seems clear that the Governor did not intend to object to the designation.

The court concluded that both the State of Florida and the federal government considered the FKNMSA to be in effect with respect to the Florida territory. As a result, the FKNMSA became effective 45 days after the date of passage as to areas within Florida waters. Since the parties did not dispute that the *M/V Jacquelyn L.* damaged a sanctuary resource within the meaning of the MPRSA, the court granted the United States' partial motion for summary judgment.

Analysis

Although the outcome of the case is a simple finding of liability against a single vessel, it is important in that it illustrates the interaction between the state and federal governments when creating marine sanctuaries that encompass both state and federal waters. Here the court could have ruled in favor of the United States by simply noting that the 45 day time requirement had elapsed in January 1991, 12 months before the letter was sent to Secretary Mosbacher. However, the courts considered the arguments of the Defendants and ultimately ruled in favor of the United States based on the intent expressed in the letter.

Endnotes

1. Florida Keys National Marine Sanctuary Act, Pub. L. No. 101-605, & 5 (a), 104 Stat. 3089 (1990).
2. Florida Keys National Marine Sanctuary Act, Pub. L. No. 101-605, § 5(a), 104 Stat. 3089 (1990).
3. In complaint the Plaintiffs alleged violations of the strict liability provisions of the MPRSA. See MPRSA, 16 U.S. C. & 1443.
4. This provision provides, "[t]he designation under subsection (a) shall not take effect for any area located within the waters of the State of Florida if, not later than 45 days after the date of enactment of this Act, the Governor of the State of Florida objects in writing to the Secretary of Commerce." Florida Keys National Marine Sanctuary Act, Pub. L. No. 101-605, § 5(c), 104 Stat. 3089 (1990).
5. U.S. v. M/V Jacquelyn L., 100 F.3d 1520, 1523 (11th Cir. 1996).
6. Id. at 1523. The court noted that the second paragraph of the letter from Governor Martinez to Secretary of Commerce Robert Mosbacher dated (12/31/91) stated that representatives met with officials from the National Oceanic and Atmospheric Administration (NOAA) to discuss the effect of the designation on state authority. Id. at 1523. The third paragraph reads: "[r]ecognizing the inclusion of state lands is critical to full implementation of the sanctuary's purpose and should be highly beneficial to the marine resources of the Keys, both state and federal, the Florida Cabinet and I, acting as the Board of Trustees of the Internal Improvement Trust Fund, and the Executive Board of the Florida Department of Natural Resources, passed a resolution on December 18, 1990 to include state lands and resources within the boundary of the Florida Keys National Marine Sanctuary, with certain provisions." Id. at 1523 (quoting letter from Governor Martinez).

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Sanctuary Law and Florida Keys Area Timeline

October 23, 1972 - National Marine Sanctuaries Act enacted to protect marine sites from pollution and other forms of environmental degradation.

October 25, 1989 - Freighter *M/V Alec Owen Maitland* runs aground on reef off Key Largo cutting 200 foot swath in reef.

October 30, 1989 - Freighter *M/V Mavro Vetranic* runs aground on reef in the Dry Tortugas in Florida Keys area destroying 2 to 3 acres of coral.

November 10, 1989 - Freighter *M/V Elpis* runs aground on reef off Key Largo coast damaging 6,000 square feet of reef.

November 17, 1989 - U.S. Rep. Dante Fascell (D-Fla) introduces House Resolution 3719 to create the Florida Keys National Marine Sanctuary.

November 16, 1990 - President Bush signs the Florida Keys National Marine Sanctuary Act.

June 27, 1994 - First imposition of strict liability for damages to sanctuary resources (U.S. v. *M/V Beholden*, 856 F.Supp. 668 (S.D. Fla. 1994)).

December 5, 1996 - Absent express objection from Florida governor, Sanctuary Act automatically takes effect with respect to areas within Florida waters (United States v. *M/V Jacquelyn L.*, 100 F.3d 1520 (11th Cir. 1996)) (see article p.1).

January 29, 1997 - Florida Governor Chiles approves Final Implementation Plan for Florida Keys National Marine Sanctuary.

February 2, 1997 - *M/V Houston*, a 600 foot container ship, runs aground on Maryland Shoal in Florida Keys National Marine Sanctuary.

February 13, 1997 - Large sailboat strikes protected reef at Sand Key south of Key West.

February 15, 1997 - 71 foot steel-hulled shrimp boat rams Sanctuary at Western Sambo reef near Key West.

National Marine Sanctuaries Act

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Congress enacted Title III of the Marine Protection Research and Sanctuaries Act ("Sanctuaries Act") in 1972 to protect marine sanctuaries that, "possess conservation, recreational, ecological, historical, research, educational, or esthetic qualities which give them special significance."[1]

National Marine Sanctuaries can be created in one of two ways. The Secretary of Commerce may designate sanctuaries pursuant to the Sanctuaries Act.[2] Alternatively, Congress may directly designate a sanctuary. In January 1976, the Secretary of Commerce designated the Monitor National Marine Sanctuary to protect the historic Civil War ironclad USS *Monitor*.[3] Since then sanctuaries have been designated in areas ranging from areas in the Gulf of Mexico to Hawaii to Washington State to New England. These sanctuaries primarily protect marine resources such as coral reefs and sea life.

Once an area becomes a National Marine Sanctuary it is illegal to remove, destroy, or injure sanctuary resources.[4] Since its original enactment, the Sanctuaries Act has metamorphosed through a series of statutory amendments, agency regulations, and court decisions to become an increasing force in protecting marine sites from pollution and other forms of environmental degradation. The Act gives the Secretary of Commerce the authority to manage marine sanctuaries and to specify the particular regulatory requirements for each individual area.[5] The Act had little impact in its first five years. Two sites, the U.S.S. Monitor and a stretch of coral reef off the coast of Key Largo, were designated, with little public comment or ceremony.[6] Funding was not authorized until 1977.[7] The Sanctuaries Act began to acquire its present day character as a result of President Carter's July 1977 Environmental Message, in which he directed the Department of Commerce to, "identify possible sanctuaries in areas where development appears imminent."[8] This statement set the tone for a program emphasizing preservation rather than accommodating industrial use. With funding and a mandate from the President, four new sanctuaries with regulations prohibiting many industrial uses were designated by 1981: Channel Islands,[9] Gulf of Farallones,[10] Gray's Reef,[11] and Looe Key.[12]

Congress amended the Act in 1988 to grant the Secretary of Commerce the authority to take specific enforcement actions in addressing threats to marine sanctuaries;[13] and established liability standards for acts polluting or otherwise harming a sanctuary.[14]

The 1992 reauthorization of the Sanctuaries Act enhanced the scope of the protective measures of the Act by granting new powers to protect sanctuaries from activities outside a sanctuary which might "enter and injure" a site.[15]

Early enforcement of the Sanctuaries Act focused on the review, selection and designation of sanctuary sites and the implementation of regulations governing those sites. Recently, case law has developed assessing large damage awards against violators of the regulations. The courts have been quick to find that the regulations are strict in their assessment of liability. On March 13, 1993, the M/V *Beholden*, a 147 foot Grenadian flagged freighter, ran aground on the Western Sambo Reef in the Florida Keys. The grounding damaged over one thousand square meters of live coral and 133 square meters of established reef framework. The court, considering the question for the first time, reviewed the Act's liability provisions and held that the Sanctuaries Act imposed strict liability.[16]

One Sanctuary that has attracted much attention in recent years is the Florida Keys National Marine Sanctuary. The Sanctuary was designated by President Bush in 1990,[17] with the Final Implementation Plan for the Sanctuary being approved this past Winter.[18] The Keys Sanctuary ecosystem includes a number of habitats that are an "integral link to the reef and the creatures that reside there."[19] These ecosystems include shallow sea grass beds and mangrove roots which serve as nurseries for young fish and shellfish[20] In addition, the Sanctuary's mangrove islands constitute habitat for wading birds, osprey, and even the American bald eagle.[21] Much of the attention focused

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on this Sanctuary results from actions taken against ships that have run aground on the Sanctuary's reef, the third largest barrier reef system in the world (see accompanying articles).

A second Sanctuary in the Gulf of Mexico is the Flower Garden Banks National Marine Sanctuary. Legislation designating the Sanctuary was signed by President Bush on March 10, 1992,[22] the Sanctuary is the northernmost coral reef in the Gulf. It is situated about 120 miles southeast of Galveston, Texas.[23] The Flower Garden Banks formed on the twin peaks of submerged mountains that rise to within fifty feet of the surface.[24] The Sanctuary area constitutes a unique and valuable marine habitat area. It contains 21 species of coral and hosts a wide array of other marine life. The reef is home to 80 species of algae, 250 species of invertebrates and 175 species of fish.[25] Whale sharks, dolphins, manta rays and sea turtles ply the waters of the sanctuary. This multitude of marine life attracts researchers from around the world. The attractiveness in turn poses a potential threat. As a result, the sanctuary's management plan restricts the type of activities that can be conducted and the methods of observation that can be employed. Additionally, the area is protected from the harmful effects of anchoring as well as from oil and gas exploration.

Endnotes

1. 16 U.S.C. § 1431(a)(2).
2. 16 U.S.C. § 1433.
3. 40 Fed. Reg. 21,706 (1975).
4. 16 U.S.C. § 1436.
5. 16 U.S.C. § 1433.
6. 40 Fed. Reg. 21,706 (1975)(designation of one-square mile area around the remains of the Monitor, a civil war ironclad sunk in battle); 41 Fed. Reg. 2378 (1976)(100 square mile area of coral reef along Key Largo, Florida).
7. Pub. L. 95-153 (Nov. 4, 1977).
8. The Environment-The President's Message to Congress, 7 Envt'l L. Rep. (ELI) 50057, 50066 (1977).
9. Designated pursuant to NMSA (Title III of the MPRSA) 16 U.S.C. §§ 1431-34. See 45 FR 65203, Oct. 2, 1980.
10. Designated pursuant to NMSA (Title III of the MPRSA) 16 U.S.C. §§ 1431-34. See 46 FR 7939, Jan. 26, 1981.
11. Designated pursuant to NMSA (Title III of the MPRSA) 16 U.S.C. §§ 1431-34. See 46 FR 7944 Jan. 26, 1981.
12. Designated pursuant to NMSA (Title III of the MPRSA) 16 U.S.C. §§ 1431-34. See 46 FR 7949, Jan. 26, 1981.
13. 16 U.S.C. § 1437.
14. 16 U.S.C. § 1443.
15. 16 U.S.C. § 1436.
16. Beholden, 856 F.Supp. at 670. The Court held that since the Act's liability provisions had been modeled on the provisions of the Clean Water Act and CERCLA (both of which are held to impose strict liability) that the Sanctuaries Act too, imposed strict liability. Id.
17. Florida Keys National Marine Sanctuary Act, Pub. L. No. 101-605, 104 Stat. 3089 (1990).
18. Florida Keys National Marine Sanctuary Final Regulations, 62 F.R. 4578, (January 30, 1997).
19. Marine Sanctuary, Vol. 3 No. 1, p. 20. (Spring/ Summer 1995).
20. Id.
21. Id.
22. Flower Garden Banks National Marine Sanctuary; Gambling Aboard U.S. — Cruise Vessels; Maritime Boundary Agreement, P.L. 102-251, 106 Stat. 60 (1992).
23. San Antonio Light, 3/10/92 B3.
24. Id.
25. Id.

National Marine Sanctuary Cases

compiled by Heath Franklin, 2L

Florida Keys, N.M.S.: United States v. M/V Jacquelyn L., 100 F. 3d 1520 (11th Cir. 1996). On November 16, 1990, Congress enacted the Florida Keys NMSA designating 2800 nautical miles of coastal waters in the Florida Keys. Pub. L. No. 101-605, 104 Stat. 3089 (1990). On July 7, 1991 the M/V Jacquelyn L ran aground on Western Sambo Reef. U.S. alleged that ship violated the strict liability provisions of the MPRSA. Summary Judgment issued against ship.

Monterey Bay NMS: Personal Watercraft Industry Assn. v. Dept. of Commerce, 48 F.3d 540 (D.C. Cir. 1995). On Sept. 18, 192 NOAA designated Monterey Bay NMS (largest in U.S., 4000 sq. nautical miles). 57 Fed. Reg. 43,310 (Sept. 18, 1992), 15 C.F.R., pt. 944. Personal watercraft industry challenged NOAA's regulation limiting use of motorized personal watercraft in marine sanctuary waters. Court held that statute limiting use to four desig nated zones and access routes, 14 sq. nautical miles, is not arbitrary or capricious.

Channel Islands NMS: Craft v. National Park Service, 34 F.3d 918 (9th Cir. 1994). On Oct. 2, 1980, NOAA designated the Channel Islands NMS. 45 Fed. Reg. 65,198 (Oct. 2, 1980). Divers brought suit against NOAA challenging their authority to impose civil penalties for excavating seabed of Channel Islands NMS with hammers and chisels. Court held statute is neither overbroad or vague as applied to the actions of the divers.

Florida Keys NMS: U.S. v. Fisher, 22 F. 3d 262 (11th Cir. 1994). U.S. awarded preliminary injunction against salvors who were using prop wash deflectors (devices which direct propeller flow at sea floor to remove sediment and expose materials underneath). Court held no abuse of discretion in determining U.S. was substantially likely to prevail on the merits. Note: Injunction covered only those operations using the prop wash deflectors.

All Sanctuaries: NRDC v. Hodel, 865 F. 2d 288 (D.C. Cir. 1988). A review of the Outer Continental Shelf Leasing Program tangentially related provision on sanctuaries.

Gulf of Farallones NMS: Half Moon Bay Fisherman's Mktg. Assoc. v. Carlucci, 847 F. 2d 1389 (9th Cir. 1988). Fishermen sought to enjoin dumping of harbor dredge material into ocean. Corps consulted with the EPA, and EPA approved because measures were being taken to protect the Gulf of Farallones NMS.

Gulf of Farallones NMS: Half Moon Bay v. Carlucci, 857 F, 2d 505 (9th Cir. 1988). Above case amended version.

Florida Keys NMS: U.S. v. M/V Jacquelyn, 900 F. Supp. 668 (S.D. Fl. 1994). District Court case affirmed in first case mentioned above.

Florida Keys NMS: U.S. v. M/V Miss Beholden, 856 F. Supp. 668 (S.D. Fl. 1994). Coast Guard brought action against boat which intentionally ran aground to avoid sinking, damaging the Sambo Reef. Court held that strict liability is appropriate. (Precedent setting)

La Paraguera NMS: U.S. v. Seda Perez, 825 F. Supp. 447 (D. Puerto Rico 1993). Floating homes were causing environmental problems. Army Corp of Engineers chose to pursue a permanent injunction under the authority of the Rivers and Harbors Act, determining that the homes were permanently moored and had to be removed. Court held Corps did not act arbitrary, or capricious, or abuse discretion.

U.S.S. Monitor NMS: Gentile v. NOAA, 1987 WL 18398 (E.D. Pa. 1987). In 1975 the Department of Commerce designated the wreck as the first NMS. Divers wanted permit to photograph wreckage. NOAA denied citing safety concerns. Plaintiff wanted to supplement the Administrative Record. Denied.

Corps Immune from Clean Water Act Suit

Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Engineers, 87 F.3d 1242 (11th Cir. 1996).

Heath Franklin, 2L

Summary

The Eleventh Circuit Court of Appeals recently held that a U.S. Army Corps of Engineers' decision to issue a wetlands permit is immune from citizen suits brought under the Clean Water Act ("CWA"). The Court also ruled that the "discretionary" decision of the EPA Administrator not to overrule the Corps is not reviewable under the CWA citizen suit provision. The Appeals Court affirmed a district court ruling in favor of the federal defendants.

District Court Case

In April 1995, the Corps of Engineers, pursuant to Section §404 of the CWA, issued a wetlands permit to Cobb County Georgia.[1] Cobb County applied for the permit in order to construct a 4.75 mile stretch of highway. The county determined that the construction would have possible adverse effects on wetlands. They proposed a mitigation plan and the Corps issued the permit contingent on that plan. Citizens to Preserve Endangered Areas of Cobb's History ("PEACH") filed suit against Cobb County, the U.S. Army Corps of Engineers, and the Environmental Protection Agency ("EPA"). PEACH alleged violations of the CWA, National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), and National Historic Preservation Act ("NHPA").

PEACH based their complaint on, among other things, the citizen suit provision of the CWA.[2] This provision allows a citizen to file a civil action on his own behalf when the federal government is in alleged violation of the CWA. The federal defendants filed a motion to dismiss the CWA claim.

Corps of Engineers' Arguments

The Army Corps of Engineers argued for dismissal of the CWA suit based on the Corps' sovereign immunity. They argued that any waiver of immunity must be expressed in "clear and unambiguous terms."[3] They pointed out that nowhere in the language of 33 U.S.C. § 1365 (citizen suit provision of the CWA) does waiver of immunity, with regard to the Corps, appear. The Corps noted that the statute only refers to the Administrator of the EPA, regarding waiver, and then only when the Administrator fails to perform a non-discretionary duty.[4] The defendants argued that given the "clear and unambiguous" language required in order for Congress to waive the federal government's sovereign immunity, the statute should not be read so broadly as to include the Corps of Engineers.

The plaintiffs countered that the court should look beyond the "plain language" of the statute, to include the Army Corps of Engineers. The plaintiffs supported this argument with reference to a Fourth Circuit decision, National Wildlife Federation v. Hanson.[5]

In Hanson, the Fourth Circuit presumed that the Administrator of the EPA would be subject to a CWA citizen suit. Going a step further, the Fourth Circuit thought it only logical to allow a suit against the Corps, if the erroneous wetlands determination were made by the Corps, and the EPA neglected to exercise its oversight authority.Additionally, the Hanson court determined that coupled with the joinder provision of the Federal Rules of Civil Procedure, the citizen suit provision yielded a means by which a citizen could sue the Administrator and join the Corps.[6] The Fourth Circuit reached their conclusion without mention of the sovereign immunity issue.

The Northern District Court of Georgia rejected the Hanson argument proposed by the plaintiffs and dismissed the CWA suit against the Corps of Engineers. Since this was a case of first impression in the Eleventh Circuit, the court said that they would not creatively interpret a statute, as the Hanson court had, in such a way as to totally change the effect that Congress had intended.

Administrator of the EPA's Arguments

The Corps and EPA also argued for dismissal of the CWA suit based on the "discretionary" authority of the EPA Administrator. They argued that the language of the CWA states that the Administrator is 'authorized' to prohibit and 'authorized' to deny or restrict the use of any

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defined area for specification as a disposal site.[7] They contended that the use of the term "authorized" denotes a discretionary function, as opposed to a mandatory one. The defendants also noted that the EPA has historically considered this authority to be discretionary, as evidenced by their use of the word "may" as opposed to a mandatory "must" or "shall" in their guidelines.[8]

PEACH was unable to offer any precedential authority to the contrary. They were only able to once again point to the Fourth Circuit's Hanson decision. The Hanson court had ruled that § 1365(a)(2) and § 1344 of the CWA should be read together to allow a citizen suit against the Administrator. The Fourth Circuit interpreted "authorization" (§ 1344) to denote a mandatory, i.e. non-discretionary, duty reviewable under the citizen suit provision (§ 1365) of the CWA.

Again the Northern District Court of Georgia failed to be persuaded by the Hanson reasoning and dismissed the CWA suit against the Administrator. Although the District Court determined that the Administrator does indeed have authority to veto a Corps' permit if he so chooses, this authority is not reviewable under the language of the CWA.

Eleventh Circuit Court of Appeals

Using the same legal analysis applied by the District Court, the Eleventh Circuit Court of Appeals affirmed the District Court's ruling.

The Eleventh Circuit held that the citizen suit provision does not "clearly and unambiguously" waive sovereign immunity in regard to the Corps of Engineers. Additionally, the Court held that the Administrator of the EPA is authorized, rather than required, to review the Corps' determination.

The Court noted that although plaintiffs alleged their decision would render the CWA citizen suit provision meaningless as applied to §404 wetlands permits, they would not read something into the statute that was not written there by Congress. The Court noted that the Supreme Court has stressed that a court's role in interpreting a statute is limited: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[9]

Split Circuits

The significance of this case is that there is a clear split between the Eleventh Circuit (FL, GA, AL) and Fourth Circuit (MD, WV, VA, NC, SC).

A federal District Court in Washington state has analyzed both decisions and decided to follow the Eleventh Circuit decision in P.E.A.C.H.[10] The Washington court noted however, that even following the more narrow P.E.A.C.H. ruling, a plaintiff may still challenge a Corps or EPA decision under the Administrative Procedures Act.

It is likely that the P.E.A.C.H. holding will continue to persuade federal courts not currently bound by the Fourth or Eleventh Circuits.

Conclusion

The Eleventh Circuit ruling raises interesting questions. If citizens cannot sue under the CWA citizen. Also, if Congress did not have the intent to waive sovereign immunity in their drafting of the provision, why did they put the provision in the CWA in the first place?

Congress could amend and clarify the citizen suit provision. However, if Congress refrains, the split among the Circuits makes the issue a valid candidate for Supreme Court review.

Endnotes

1. 33 U.S.C. § 1344 (1987).
2. Under the CWA, any citizen may commence a civil action on his own behalf—(1) against any person (including; the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. 33 U.S.C. § 1365(a) (1988).
3. See United States v. Idaho ex rel. Director, Idaho Dept of Water Resources, 508 U.S. 1, 6 (1993).
4. 33 U.S.C. § 1365 (a) (2) (1988).
5. National Wildlife Federation v. Hanson, 859 F.2d 313 (4th Cir. 1988). (Since the Northern District Court of Georgia is in the Eleventh Circuit, it is not bound by a Fourth Circuit Court of Appeals decision).
6. See Clean Water Act, 33 U.S.C. §1365(a)(2); and Fed.R.Civ. p. 20.
7. 33 U.S.C. § 1344 (c) (1987).
8. See 40 C.F.R. § 231.1(a) (1994); 40 C.F.R. § 231.3(a) (1994).
9. Connecticut National Bank v. Germain, 503 U.S. 249, 253-54, (1992).
10. Cascade Conservation League v. M.A. Segale, Inc., 921 F.Supp. 692 (W.D. WA 1996).

Seabird Habitat Protected by ESA

Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996) *cert. denied*, 117 S.Ct. 942 (1997).

Heath Franklin, 2L and John A. Duff, J.D. LL.M.

Summary

In 1996, the Ninth Circuit Court of Appeals upheld an injunction that prohibited timber companies from logging on private property in a way that might pose a future harm to a rare species of seabird protected under the Endangered Species Act (ESA). On February 18, 1997, the Supreme Court let the decision stand by refusing to hear it on appeal.

Background

The marbled murrelet (*Brachyramphus marmoratus*) is a rare bird that spends much of its life at sea, but flies miles inland to breed in old-growth forests. The species' population has declined significantly over the last one hundred and fifty years. Less than five percent of the murrelet's pre-commercial-logging habitat remains. On September 28, 1992, the marbled murrelet was listed as a "threatened species" under the Endangered Species Act.[1] The ESA protects endangered and threatened species by prohibiting harm to the species themselves and by protecting habitat.

Pacific Lumber, a timber company, owns a 440 acre stand of contiguous old-growth redwood and Douglas fir trees in Humboldt County, California. The area, known as Owl Creek, is 22 miles inland from the Pacific coast. Owl Creek's physical and geographical characteristics constitute ideal breeding habitat for the marbled murrelet. Pacific Lumber proposed logging 237 of the 440 acre stand. Pursuant to California law, the company was instructed to survey the area for marbled murrelets as a condition for acceptance of its harvest plan. The surveys (which would eventually be deemed less comprehensive than required) identified over one hundred "detections" of the bird.[2]

Prior to obtaining state approval for logging, Pacific Lumber began harvesting timber. The United States Fish and Wildlife Service warned the company that its activities were likely violations of the Endangered Species Act.

District Court

On April 16, 1993, Environmental Protection Information Center ("EPIC"), filed suit on behalf of its members and the marbled murrelet, pursuant to the citizen suit provision of the ESA.[3] The trial took place in 1994. On February 27, 1995, the district court issued its decision, concluding that Pacific Lumber's proposed harvest plan would both "harass" and "harm" marbled murrelets and thereby cause a "take" in violation of the ESA.[4]

The court issued an injunction on June 20, 1995, which prohibited Pacific Lumber from logging under its original harvest plan.

What Does "Harm" Mean?

The district court made its decision based on the U.S. Fish and Wildlife Service's defintion of "harm." According to the Service, "harm" includes "an act which actually kills or injures" a protected species, as well as habitat modification which in turn kills or injures a species by "impairing esential behavioral patterns, including breeding, feeding or sheltering."[5] Soon after the district court decision, the Supreme Court, ruled on a different case and issued an important decision regarding the ESA and the definition of "harm."[6] In Babbitt v. Sweet Home Chapter, the Supreme Court ruled that detrimental habitat modification was a reasonable interpretation of the Act's "harm" provision. In a footnote referring to the "harm" definition, the Supreme Court indicated that the definition was intended to "emphasize that actual death or injury of a protected animal is necessary for

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SEABIRD HABITAT from page 12:

a violation."[7] Pacific Lumber decided to use the footnote to appeal the decision in its case. They argued that "harm" must be actual. Appearing before the Ninth Circuit, Pacific Lumber argued that the injunction granted in the Marbled Murrelet district court case should be reversed because there was no showing of past actual harm at trial. Given the possibility that Sweet Home served as an intervening change in the law, the Ninth Circuit heard this argument.

Pacific Lumber relied on the Sweet Home footnote to argue that injunctive relief is allowed only against someone who has already violated the Act. The Ninth Circuit disagreed with this argument. The court found nothing in the Sweet Home footnote that would limit injunctive relief to past violations. The Ninth Circuit reasoned that the purpose of the definition was to ensure that mere habitat modification alone would not give rise to injunctive relief, but that "activities that are reasonably certain to harm a protected species" would justify such relief.[8]

The Appeals Court reasoned that in Sweet Home, the Supreme Court did not intend to alter case law which held that a showing of a threat of imminent harm may give rise to an injunction.

Conclusion

The Ninth Circuit's Marbled Murrelet decision is significant in interpeting the Endangered Species Act to prohibit habitat modification, that has not yet, but likely would, adversely impact protected species. The Supreme Court's refusal to hear the case on appeal indicates that this interpretation of the law is a valid extension of the Supreme Court's ruling in Sweet Home.

Endnotes

1. 57 Fed. Reg. 45328 (Oct. 1, 1992).
2. 83 F.3d. 1060, 1063.
3. 16 U.S.C. § 1540(g)
4. Marbled Murrelet v. Pacific Lumber Co., 880 F. Supp. 1343 (N.D. Cal. 1995).
5. 50 C.F.R. § 17.3 (1993).
6. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 115 S.Ct. 2407 (1995).
7. Babbitt v. Sweet Home Chapter, 115 S. Ct. 2407, at note 2.
8. 80 F. 3d 1060, 1066 (quoting Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995).

Endangered Species Act

The purpose of the Endangered Species Act (ESA) is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species"[1] To help achieve this purpose, Congress placed within the ESA a provision allowing for citizen suits to "enjoin any person, including the United States and any other governmental instrumentality or agency. . .who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." [2] The ESA and its associated regulations make it a violation for anyone to **take** an endangered or threatened species.[3]

The term "take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[4] The Secretary of the Interior defines "harass" and "harm" as follows: "Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering."[5]

"Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[5]

Endnotes

1. 16 U.S.C. § 1531(b).
2. 16 U.S.C. § 1540(g)(1)(A).
3. See 33 U.S.C. § 1538(a)(1)(B) (1988) and 50 C.F.R. § 17.31(a) (1996).
4. 16 U.S.C. § 1532(19) (1988).
5. 50 C.F.R. § 17.3 (1996).

POSITION ANNOUNCEMENT

Research Counsel
University of Mississippi Law Center

Duties:	Conduct research on ocean, natural resource, and related environmental legal issues; prepare reports of research in the form of briefs and articles for publication; provide assistance to governmental agencies concerning interpretation of statutes, regulations, and case law; assist in the prepara tion and publication of the WATER LOG, a quarterly Sea Grant legal reporter; travel to conferences to present research papers; and supervise law student research associates.
Qualifications:	Bachelor's Degree; Law Degree by starting date; relevant coursework and or work experience in one or more of the following (in preferred order): ocean/coastal, natural resources, environmental law; demonstrated ability to conduct research and writing; familiarity with Westlaw and/or Lexis; ability to communicate easily and work well with others; and, membership in the Mississippi Bar or commitment to acquire membershipin the Mississippi Bar.
Desired Qualities:	Strong law school academic record; law journal writing, judicial clerkship or equivalent; experience with personal computers; and familiarity with internet and World Wide Web resources.
Salary:	$32,809.00

Application deadline is May 16, 1997. Starting date is summer 1997.

Send resume of experience and education, copy of law school transcript research and writing sample, references and other pertinent information to:

Richard J. McLaughlin,
Associate Professor of Law &
Director of Mississippi/Alabama Sea Grant Legal Program
Law Center, Room 518
University, MS 38677
(601) 232-7775
Fax (601) 232-5267

Lagniappe *(a little something extra)*

Around the Gulf...

On February 26, 1997, the Mississippi Department of Environmental Quality recommended that plans to solicit bids for oil and gas drilling leases be postponed. Proposals to allow drilling in Mississippi sound raised concerns and prompted protests by some of the state's coast residents.

On March 11, 1997, about 380 Alabama oyster farmers participated in a waterway trash cleanup program, developed to provide assistance to oyster farmers whose livelihood has been disrupted by state harvesting bans. Funds to pay oyster farmers were provided by a grant from the Alabama Dept. Of Economic and Community Affairs.

Two agreements aimed at creating and enhancing habitat for fish and wildlife were recently announced by the National Oceanic and Atmospheric Administration, the Louisiana Department of Environmental Quality and Conoco, Inc. These restoration projects will compensate for natural resource injuries associated with a March 1994 chemical release (ethylene dichloride) into the Clooney Island Loop area of the Clacasieu Estuary.

On January 9, 1997, Louisiana State District Judge Janice Clark upheld portions of state law banning the use of gillnets on weekends, but rejected measures that required commercial rod and reel applicants to have held gillnet licenses in 2 of the past 3 years.

In January, severe cold weather along the lower Texas coast was believed reponsible for the stranding of 78 green sea turtles (about half being dead or near death) as well as the death of about 300,000 game fish, including striped mullet, black drum, red drum, and seatrout.

On March 5, 1997, U.S. District Court Judge Thomas Porteous Jr. ruled that, before a pending federal lawsuit challenging LA's ban on gillnets can be heard, review of an earlier-filed but similar state court lawsuit on appeal must be completed. The gillnet ban took effect on March 1, 1997.

On February 13, 1997, a Wakilla Co. (FL) court jury found three fishermen not guilty of violating state law regarding possession of an illegal gillnet and an excessive amount of mullet. The fishermen claimed that they had not used the gillnet in state waters and bought the mullet for baiting crab traps.

Around the Nation and World

On January 8, 1997, Senator Olympia Snowe of Maine was named Chair of the Senate Commerce Committee's Subcommittee on Oceans and Fisheries.

In mid-February 1997, at the annual meeting of the American Association for the Advancement of Science (AAAS) in Seattle, WA, AAAS President Jane Lubchenco and panel of fisheries experts proposed setting aside 20% of the world's oceans as permanent biological preserves, off-limits to fishing.

In late March 1997, the National Oceanic and Atmospheric Administration unveiled final management plan for the Hawaiian Islands Humpback Whale National Marine Sanctuary in Honoloulu, Hawaii.

In February, a chance encounter by marine biologists with a pod of whales in Bristol Bay has resulted in the first confirmed sighting of a right whale calf in the North Pacific ocean in 150 years.

On February 25, 1997, the World Trade Organization (WTO) agreed to establish a dispute panel to consider the complaint raised by India, Pakistan, Malaysia, and Thailand that U.S. law - prohibiting shrimp devices (TEDs), to protect sea turtles - violates international trade obligations.

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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