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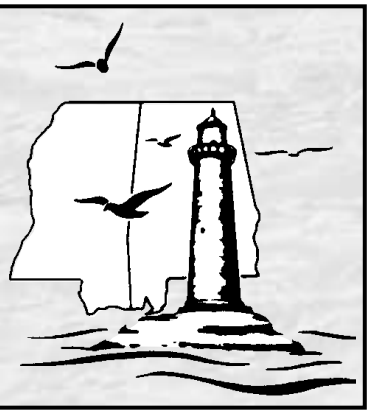
WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



Public Trust Doctrine Protects Beach Access

Claim that Doctrine Doesn't Exist in Connecticut Fails

Leydon v. Greenwich, 57 Conn. App. 712 (2000).

Tammy L. Shaw, J.D.

In the second round of what is becoming a well-known legal dispute over the public's right to beach access in Connecticut, that state's Appellate Court ruled that a Greenwich municipal ordinance violates the public trust doctrine. The challenged ordinance provides that only residents of the town may enter municipally-held parks and beaches, granting non-resident visitors access only if accompanied by a Greenwich resident and upon payment of a fee. This decision reverses a lower court's ruling that the public trust doctrine is not applicable to dry sand beaches in Connecticut and that the plaintiff failed to prove, beyond a reasonable doubt, that the Greenwich ordinance is invalid.

The public trust doctrine asserts that a state such as Connecticut holds lands under tidal and navigable waterways in trust for its citizens. Citizens have the right to use those lands for navigation, fishing, commerce and recreation, and access to the unique coastal and aquatic resources is essential to the utility of the doctrine. (*See box, page 3.)*

See Public Trust Doctrine, page 2

Executive Order Calls for National System of Marine Protected Areas

Kristen M. Fletcher, J.D., LL.M.

In May, President Clinton signed an Executive Order calling for the expansion and protection of Marine Protected Areas (MPAs) across the nation. Drawing on existing local, state and federal MPAs, the Order seeks to

- Strengthen the management and protection of existing MPAs;
- Establish new or expanded MPAs;
- Develop a national system of MPAs; and
- Compel Federal agencies to avoid causing harm to MPAs and consult regarding MPAs.

The broad definition of MPA as *"any area of the marine environment reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein*" will include many sites in the Gulf of

See Executive Order, page 8

In This Issue . . .

Editor's Note . . .

Loggerhead Turtle v. Volusia County, Florida, 92 F. Supp. 2d 1296 (M.D. FL. 2000).
In Issue 18:4, we reported that the Eleventh Circuit found that an incidental take permit issued to Volusia County, Florida which permits takings of sea turtles caused by driving, did not permit takings caused by artificial lighting. On remand to determine whether the County's lighting ordinance violated the Endangered Species Act, the court found no evidence to support liability, holding that the lighting ordinance properly acts to prohibit, restrict and limit artificial beachfront lighting.

Sierra Club v. Glickman, 156 F.3d 606 (5th Cir. 1999).
In Issue 18:4, we reported that the Fifth Circuit held the Sierra Club did have standing to sue the Department of Agriculture over endangered species' dependence on water from the Edwards Aquifer in Texas. The decision was affirmed upon rehearing en banc, on January 21, 2000.

Driscoll v. Adams, 181 F.3d 1285 (11th Cir. 1999).
In Issue 19:4, we reported that the Eleventh Circuit found a landowner liable for violations under the Clean Water Act, even though the necessary storm water discharge permit was not available because there were other permits available. The United States Supreme Court denied certiorari on May 15, 2000.

Sea Grant

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

To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 518 Law Center, University, MS, 38677, phone: (662) 915-7775, or contact us via e-mail at: waterlog@olemiss.edu . We welcome suggestions for topics you would like to see covered in WATER LOG.

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Public Trust Doctrine, from page 1

Residents Only

Brenden Leydon, a resident of the state of Connecticut, filed suit after being turned away by security guards when he attempted to jog onto Greenwich Point, a 147 acre park and beach area located on Long Island Sound. Leydon argued that municipal parks and beaches are public forums that must be open to everyone. He later amended his complaint raising the public trust doctrine by claiming that states hold navigable waters, including the shoreline, in trust for public use and that Greenwich's exclusion of out-of-towners violates that longstanding doctrine.

The policies regarding Greenwich Point Park reach as far back as 1919 and derive from state statutes that give Greenwich authority to establish and maintain public parks and bathing beaches.[1] In subsequent amendments, the town was given authority to enact ordinances and appropriate municipal funds to govern the use of and conduct in the parks and beaches by the *inhabitants of the town*.[2] It is this language that the town relied upon in enacting a municipal ordinance that provides, in part, that only inhabitants of the town may enter, remain upon, or use the town's parks.[3] Greenwich maintains that it has legislative authority to exclude non-residents from its municipal parks and that this same legislation abolished the public trust doctrine, as to municipally-held parks and beaches.

The town argues, alternatively, that the public trust doctrine does not exist in Connecticut and that case law provides that the public trust lands extend only to navigable waters and the land beneath them and not to dry sand beaches, such as the one at issue here.

Beach Access

The Connecticut Appellate Court addressed the issue beginning first with the defendants' claim that the public trust doctrine does not exist in Connecticut. Greenwich argues that case law has never applied the doctrine to areas of dry sand beaches, such as the one at issue here. The town attempts to draw a distinction between the public

The Public Trust Doctrine

The public trust doctrine provides that title to navigable waters, tide waters and the living resources of these waters is held under a special title by the State in trust for the benefit, use and enjoyment of the public. Each state has authority to apply the doctrine according to its own laws and policies but the principles of the doctrine remain that while lands adjacent to navigable waters and tidelands may be conveyed into private ownership or, as in this case, municipal ownership, those lands are still subject to the trust, with the public as beneficiary. This includes the public's right to use and enjoy navigable waters and tidelands for a variety of activities such as navigation, commerce, fishing, recreation and other activities deemed to be within the scope of the doctrine. Since this use and enjoyment, necessarily, implies access to the waters, the doctrine assumes some type of public access to the shore.

park "trust" doctrine, arguing that it applies only to parks, and the traditional public trust doctrine, arguing that it applies only to submerged lands below the low water mark. The court disagrees. Listing Connecticut cases over the last 100 years, the appellate panel finds clear indication that the right known as the public trust doctrine has been applied to grant public access to parks and beaches to all residents of the state and that discrimination between residents and nonresidents, violates the doctrine. The court holds that both doctrines apply in this case, giving the plaintiff the right to access both the parks and the beaches.

"if the legislature intended the town's bathing beaches to be either nonpublic or for the sole use of the town's residents, or both, the legislature could have so stated."

The court then turns to the defendants' claim that the legislature has abolished the public trust doctrine as applied to Greenwich Point Park. The defendants argue that by conferring on the municipality the authority to establish and conduct public parks and beaches, the legislative acts override the public trust doctrine. Citing the fundamentals of statutory construction, the court holds that statutes cannot be read to abolish existing legal principles, like the public trust doctrine, unless the acts expressly overrule the doctrine. The court states, "if the legislature intended the town's bathing beaches to be either nonpublic or for the sole use of the town's residents, or both, the legislature could have so stated."[4] In the absence of any such express provision, a clear and unambiguous reading of the statutes reveals no such intent to abolish the public trust doctrine.

Conclusion

The appellate court determined that it was improper as a matter of law for the lower court to decline to apply the public trust doctrine to the facts of this case and that the plaintiff did not fail to prove that the Greenwich ordinance violates public policy and the public trust doctrine. The defendants have vowed to appeal the decision, during which time the ordinance restricting beach access to town residents will remain in force.

ENDNOTES

1. 18 Spec. Acts 103, No. 124 (1919).
2. 27 Spec. Act 60, No. 71 § 9 (1955).
3. Greenwich Municipal Code § 7-37.
4. Leydon v. Greenwich, 57 Conn. App. 712, at 723.

TMDL Authority Upheld for Nonpoint Source Pollution

Pronsolino v. Marcus, No. C 99-01828-WHA (N.D. Cal. March 30, 2000).

Tim Peeples, J.D.
Kristen Fletcher, J.D., LL.M.

A federal court in California has determined that the EPA and states have the authority to set pollution limits on waters that are affected only by nonpoint source pollution. Landowners along the Garcia River in California claimed that the Clean Water Act (Act) mandated comprehensive limits on pollution, called Total Maximum Daily Loads or TMDLs, for waterbodies that were affected by point source discharges such as industrial effluent.[1] The landowners proposed that those waterbodies that were affected only by nonpoint source discharge such as agricultural or forestry runoff, were not covered under the Act's TMDL mandate. Noting that nonpoint source pollution, including pollution from agriculture and forestry operations, has become the "dominant water quality problem in the United States, dwarfing all other sources of volume," the court dismissed the challenge.[2]

Under the Clean Water Act, Congress acknowledged two different sources of pollution: point source pollution which is pollution discharged from a "discernable, confined and discrete conveyance such as a pipe [or] ditch;"[3] and nonpoint source pollution which is runoff from a variety of sources including urban areas and agriculture or forestry sites. Under the Act, point source dischargers had to obtain permits if they discharged waste into any U.S. water, and each state, subject to EPA supervision and approval, was authorized to regulate nonpoint source pollution as deemed necessary.

Section 303 of the Act also requires states to adopt water quality standards for impaired rivers and waters, without distinguishing between point and nonpoint sources, in the form of TMDLs which establishes the maximum levels of various pollutants that can be allowed into specific rivers and waters to maintain certain water quality standards.

The Garcia River TMDL

As a result of the increase in sediment in the river from nearby logging operations and other nonpoint sources, the EPA directed California to list the Garcia River as impaired in 1992. The EPA later issued a TMDL calling for a sixty percent reduction of sediment, allocating portions of the TMDL to nonpoint pollution sources including pollution associated with roads, timber-harvesting activities, and erosion. Estimating that compliance with the Garcia River TMDL mandate would cost the plaintiffs over ten million dollars collectively, they filed suit.

The key question before the court was whether the EPA had the authority to list the Garcia and prepare a TMDL when the only pollution came from logging and agricultural runoff and other nonpoint sources. The plaintiffs argued that waters polluted solely by nonpoint sources of pollution should not be listed under the Act, and therefore, no TMDL should have been prepared. Section 303(d) states that "[e]ach state shall identify those waters within its boundaries for which the effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters." The plaintiffs argued that because the provision mentioned only "effluent limitations," it applied only to point sources.

The court, however, rejected that narrow interpretation of section 303(d), finding that TMDLs were intended to cover both sources of pollution. If TMDLs failed to consider nonpoint sources of pollution, the mandate, in many cases, would fail to achieve the Act's desired water quality standards. The district court pointed to the U.S. Supreme Court's treatment of the Act as establishing a "comprehensive long-range policy for the elimination of water pollution"[4] which includes states' efforts to control nonpoint source pollution. By limiting the TMDL mandate to only point source pollution, it would "frustrate the comprehensive approach of the Act."[5]

Furthermore, the court found the absence of discussion of nonpoint pollution sources in section 303(d) irrelevant as it did not exempt any rivers or waters or distinguish between types of pollutants: "Any polluted waterway - whether its sources were point, nonpoint, or a combination - had to be listed . . . ."[6] For these reasons, the court ruled that the EPA had the authority to prepare TMDLs for substandard rivers polluted only by nonpoint sources.

Definition of Pollutant

Although not raised by the plaintiffs, the court went on to consider whether sediment constituted a "pollutant" under the Clean Water Act, because TMDLs were designed only to cover certain pollutants identified by the EPA. At the outset, the court noted the absence of the word "sediment" in the Act's definition of "pollutant." Section 502 of the Act defines "pollution" as "dredged spoil, solid waste. . . rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water."[7] The court followed Ninth Circuit precedent that sediment implicitly falls within the meaning of pollutant, relying on the legislative history of the Act which stated that "sediment, often associated with agricultural activities, is by volume our major pollutant."[8]

Yet, the court delved further into whether the phrase "discharged into water" addresses only point source pollutants. The court acknowledged that "discharge" typically applied only to point source pollution, and if that were true here, then TMDLs would only be required for waters polluted by point sources. Ultimately, because the term "pollutant" was used to cover both point and nonpoint sources in the Act, the court found that pollution includes "sediment" from both point and nonpoint sources.

The 1987 Clean Water Act Amendments

The plaintiffs then argued that section 319, added under the 1987 amendments, specifically authorizes states to identify nonpoint sources of pollutants and best management practices. The plaintiffs claimed the amendments would have been unnecessary had section 303(d) been intended to regulate those sources.

While the court admitted section 319 "covered some of the same general ground" covered elsewhere in the Act, the court found no inherent conflict between this section and the TMDL mandate.[9] Section 303(d) addresses waters that could not comply with the Act's standards through the use of state-of-the-art technology, whereas section 319 seeks to determine which waters cannot achieve those standards without taking additional steps to control nonpoint source pollution. While a river could certainly be placed on both the 303(d) and 319 lists as substandard due to nonpoint source pollution, the court found no intention to withdraw nonpoint sources from the coverage of section 303(d). Further, while section 319 adopts strong measures in regard to nonpoint source pollution, the Act already contained a number of references to nonpoint source pollution. Thus, the 1987 amendments did not represent Congress' first attempt to regulate that source of pollution.

EPA'S Authority to Control State Land-Use

The plaintiffs' final claim was that the EPA did not have the authority to regulate California land-use practices. The court agreed that the EPA lacked such authority but ruled that the EPA, in issuing the TMDL, had not attempted to usurp state power. Rather, the EPA had merely established the load limits for the Garcia River, leaving California free to adopt whatever land management practices it desired so long as those practices achieved the goals of the TMDL. Additionally, California could have altered the TMDL or refused to enforce it although subject to the potential withdrawal of federal grants. While the process may be coercive, the court ruled that this procedure did not constitute direct federal regulation.

Future Claims by the Plaintiffs

While the court rejected the plaintiffs' challenge of the EPA's authority to actually impose a TMDL on the state of California when the only source of pollution was a nonpoint source, the court noted that the plaintiffs were not without other avenues of redress. The court suggested that the plaintiffs could appeal California's allocation of the percentages of the total load through state administrative procedures. Additionally, the plaintiffs could challenge the TMDL under the Administrative Procedure Act as being "arbitrary" in future actions.

ENDNOTES

1. For analysis of the TMDL mandate, *see Mississippi and Alabama Reach TMDL Consent Decrees*, 19:4 WATER LOG 1 (1999).
2. Pronsolino v. Marcus, at 2.
3. 33 U.S.C. § 1362 (14) (2000).
4. Pronsolino at 6.
5. *Id.* at 15.
6. *Id.*
7. 33 U.S.C. § 502 (2000).
8. Pronsolino at 22, *citing* S. Rep. No. 92-414, 92d Cong. 1st Sess. 52 (1971).
9. Pronsolino at 23.

EPA Publishes Atlas of America's Polluted Waters

EPA has released a set of maps that depict the waters within each state that do not meet state water quality standards. States listed these waters in their most recent submission to EPA, generally in 1998, as required by section 303(d)of the Clean Water Act under the Total Maximum Daily Load or TMDL program. There are more than 20,000 such waters identified nationally, comprising more than 300,000 miles of rivers and streams and more than 5 million acres of lakes. The map reveals that the majority of Americans—over 218 million—live within ten miles of a polluted waterbody.

Each state map includes a bar chart of the combined number of miles of streams, rivers, and coastal shoreline or acres of lakes, estuaries and wetlands that do not meet state standards, and the pollutant that is causing the impairment. The pollutants most frequently identified as causing water pollution include sediments, excess nutrients, and harmful pathogens. Toxins, including metals, mercury and pesticides, also contribute to these impairments.

To view the atlas, visit http://www.epa.gov/owow/tmdl/atlas/ on the Internet.

TMDL Rules Adopted in Rush to Beat Congressional Rider

Triggers Call for Congressional Review

Kristen M. Fletcher, J.D., LL.M.

The Environmental Protection Agency found itself in muddy political waters in July when it was directed by President Clinton to hurriedly adopt Total Maximum Daily Load (TMDL) rules in direct defiance of a Congressional effort to block the new regulations.

After months of hearings and speculation on the new EPA regulations regarding the TMDL mandate and how the rules would affect development, industries, and land-use practices, the EPA was scheduled to release the rules by June 30. In an effort to block the implementation of the rules, riders were attached to several congressional bills generally forbidding federal funds in fiscal years 2000 and 2001 from being used to "make a final determination on or implement any new rule relative to the . . . Water Quality Planning and Management Regulations Concerning Total Maximum Daily Load."[1] Debate over the provision ranged from statements that the rider will prevent the EPA from overstepping its authority to criticism that the rider is not germane to the underlying bill and puts senators in the position of accepting "the offensive provision or vot[ing] down an appropriations bill containing important funds for disaster relief, humanitarian aid, and national defense."[2]

While TMDL supporters were condemning Congress for taking a back-door approach to halting the EPA's regulations from taking effect, President Clinton directed the EPA to "rush the rules to completion" before the July 13 deadline for his signature making the bill a law. This move circumvents the Congressional effort to block the issuance of the "new" regulations. Because of the new rider, the EPA will still not be able to fund the enforcement or implementation of the rules until at least October of 2001, unless Congress takes additional action to forward the implementation prior to that time. Some members of Congress have called for a review of the rule under the Congressional Review Act.

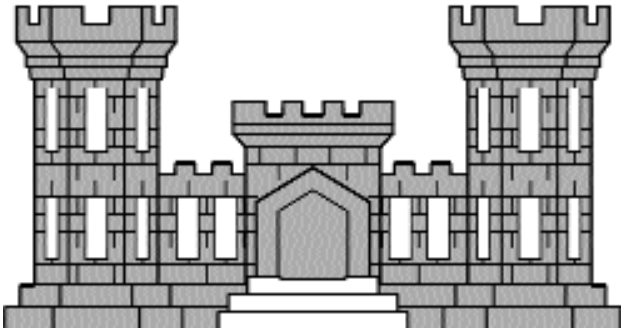
ENDNOTES

1. *See* Military Construction Appropriations Act, H.R. 2465.
2. 146 Cong. Rec. S6225, S6236 (Daily ed. June 30, 2000) (statement of Senator Chafee).

The Corps of Engineers Issue New Nationwide Permits

Tammy L. Shaw, J.D.

In March, the Army Corps of Engineers (Corps) issued 5 new Nationwide Permits (NWPs) and modified 6 existing NWPs to replace Nationwide Permit 26 (NWP 26). Nine of the NWP general conditions were modified and two new conditions were added. The new and modified permits set out specific categories of activities, such as agricultural activities, stormwater management facilities, residential and commercial development (see list below), and the requirements for each, with regard to obtaining a permit. These new and modified permits and conditions became effective on June 7, 2000. According to the Corps, the new and modified permits will substantially increase protection of critical water resources by authorizing many of the same activities previously permitted under NWP 26, but on an activity-specific basis which will result in minimal adverse effects on the aquatic environment.



History

Pursuant to authority granted by section 404 of the Clean Water Act, the Corps issues permits for the discharge of dredged or fill material into any navigable waters of the United States. There are two broad types of permits: individual permits and general permits. Under the heading of general permits, there are regional general permits, and nationwide permits which pertain to groups of similar activities such as building boat docks and shore protection.

Nationwide permit requirements are triggered by the addition of any fill material to navigable waters or adjacent wetlands that impacts or results in a loss to an established threshold of acreage. The Corps establishes guidelines by setting maximum acreage limits that may be impacted by the discharge of dredged or fill materials. NWP 26 is the general permit most often used to authorize discharge of dredged or fill material into headwaters, isolated waters and wetlands.

In 1984, the Corps established an impact limit for NWP 26 of ten acres and a requirement that the Corps be notified for any impact greater than one acre. In 1996, the impact limit was reduced to three acres and one-third acre for the notification requirement. The new and modified permits further reduce the impact limit to one-half acre and most require notification of activities impacting more than one-tenth of an acre. While the new limits are substantially more restrictive than previous limits, the Corps reports that these permit requirements will not result in denial of more permit applications, but will provide for increased protection of the aquatic environment based on a more detailed, activity-specific review of each permit.

In addition to these changes, the new NWPs impose linear foot limits on impacts to certain streams, allow for limited use of the NWPs in 100-year flood plains and provide for compensatory mitigation.

Index of Nationwide Permits

3. Maintenance
7. Outfall Structures and Maintenance
12. Utility Line Activities
14. Linear Transportation Crossings
27. Stream and Wetland Restoration Activities
39. Residential, Commercial, and Institutional Developments
40. Agricultural Activities
41. Reshaping Existing Drainage Ditches
42. Recreational Facilities
43. Stormwater Management Facilities
44. Mining Activities

The March 9, 2000, Federal Register notice (65 FR 12818) is available on the following Corps of Engineers' website: www.usace.army.mil/inet/functions/cw/cecwo/reg/ or through the U.S. Government Printing Office at www.access.gpo.gov/su-docs/aces/aces140.html .

Executive Order, from page 1

Mexico as part of the National MPA System, to provide better coordination and management.

Examples of these sites include federally established areas such as the Weeks Bay and Grand Bay National Estuarine Research Reserves in Alabama and Mississippi, the Flower Garden Banks and Florida Keys National Marine Sanctuaries in Texas and Florida, and the Gulf Islands National Seashore in the Gulf. The recent approval of the Tortugas Marine Reserves by the Gulf of Mexico Fishery Management Council marks potential additions in the Gulf region. (See the Council's webpage at http://www.gulfcouncil.org/index.html).

Water Log will report on the development of the MPA System in future issues. Relevant portions of the Executive Order follow.

Executive Order: Marine Protected Areas

President William J. Clinton

Executive Order 13158, 65 Federal Register 34909, May 26, 2000.

By the authority vested in me as President by the Constitution and the laws of the United States of America and in furtherance of the purposes of . . . pertinent statutes, it is ordered as follows:

Sec. 1. Purpose. This Executive Order will help protect the significant natural and cultural resources within the marine environment for the benefit of present and future generations by strengthening and expanding the Nation's system of marine protected areas (MPAs). An expanded and strengthened comprehensive system of MPAs would enhance the conservation of our Nation's natural and cultural marine heritage and the ecologically and economically sustainable use of the marine environment for future generations. To this end, the purpose of this order is to: (a) strengthen the management, protection, and conservation of existing MPAs and establish new or expanded MPAs; (b) develop a scientifically based, comprehensive national system of MPAs representing diverse U.S. marine ecosystems, and the Nation's natural and cultural resources; and (c) avoid causing harm to MPAs through federally conducted, approved, or funded activities.

Sec. 2. Definitions. For the purposes of this order:

(a) "Marine protected area" means any area of the marine environment reserved by Federal, State, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein.

(b) "Marine environment" means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands thereunder, over which the United States exercises jurisdiction.

(c) The term "United States" includes the several States, District of Columbia, Commonwealth of Puerto Rico, Virgin Islands of the United States, American Samoa, Guam, and Commonwealth of the Northern Mariana Islands.

Sec. 3. MPA Establishment, Protection, and Management. Each Federal agency whose authorities provide for the establishment or management of MPAs shall take appropriate actions to enhance or expand protection of existing MPAs and establish or recommend, as appropriate, new MPAs. Agencies implementing this section shall consult with the agencies identified in subsection 4(a) of this order. . . .

Sec. 4. National System of MPAs. (a) To the extent permitted by law and subject to the availability of appropriations, the Department of Commerce and the Department of the Interior, in consultation with the Department of Defense, the Department of State, the United States Agency for International Development, the Department of Transportation, the Environmental Protection Agency, the National Science Foundation, and other pertinent Federal agencies shall develop a national system of MPAs. They shall coordinate and share information, tools, and strategies, and provide guidance to enable and encourage the use of the following in the exer-

cise of each agency's respective authorities to further enhance and expand protection of existing MPAs and to establish or recommend new MPAs, as appropriate:

(1) identification and prioritization of natural and cultural resources for additional protection;
(2) integrated assessments of ecological linkages among MPAs, including ecological reserves in which consumptive uses of resources are prohibited, to provide synergistic benefits;
(3) biological assessment of the minimum area where consumptive uses would be prohibited that is necessary to preserve representative habitats in different geographic areas of the marine environment;
(4) assessment of threats and gaps in protection currently afforded to natural and cultural resources;
(5) practical, science-based criteria and protocols for monitoring and evaluating MPA effectiveness;
(6) identification of emerging threats and user conflicts affecting MPAs and appropriate, practical, and equitable management solutions, including effective enforcement strategies, to eliminate or reduce such threats and conflicts;
(7) assessment of the economic effects of the preferred management solutions; and
(8) identification of opportunities to improve linkages with, and technical assistance to, international MPA programs.

(b) The Departments of Commerce and Interior shall consult with relevant States, tribes, and other entities to promote coordination of Federal, State, territorial, and tribal actions to establish and manage MPAs.

(c) The Departments of Commerce and Interior shall seek the expert advice and recommendations of non-Federal scientists, resource managers, and other interested persons and organizations through a Marine Protected Area Federal Advisory Committee, established by the Department of Commerce.

(d) The Secretaries of Commerce and Interior shall establish and jointly manage a website for information on MPAs and Federal agency reports required by this order. They shall also publish and maintain a list of MPAs that meet the definition of MPA for the purposes of this order.

(e) The Department of Commerce's National Oceanic and Atmospheric Administration shall establish a Marine Protected Area Center to carry out, in cooperation with the Department of the Interior, the requirements of subsection 4(a) of this order, coordinate the website established pursuant to subsection 4(d) of this order, and partner with governmental and nongovernmental entities to conduct necessary research, analysis, and exploration. The goal of the MPA Center shall be, in cooperation with the Department of the Interior, to develop a framework for a national system of MPAs, and to provide Federal, State, territorial, tribal, and local governments with the information, technologies, and strategies to support the system. This national system framework and the work of the MPA Center is intended to support agencies' independent exercise of their own existing authorities.

(f) To better protect beaches, coasts, and the marine environment from pollution, the EPA shall expeditiously propose new science-based regulations . . . to ensure appropriate levels of protection for the marine environment. Such regulations may include the identification of areas that warrant additional pollution protections and the enhancement of marine water quality standards. The EPA shall consult with the Federal agencies identified in subsection 4(a) of this order, States, territories, tribes, and the public in the development of such new regulations.

Sec. 5. Agency Responsibilities. Each Federal agency whose actions affect the natural or cultural resources that are protected by an MPA shall identify such actions. To the extent permitted by law and to the maximum extent practicable, each Federal agency, in taking such actions, shall avoid harm to the natural and cultural resources that are protected by an MPA. In implementing this section, each Federal agency shall refer to the MPAs identified under subsection 4(d) of this order.

Sec. 6. Accountability. Each Federal agency that is required to take actions under this order shall prepare and make public annually a concise description of actions taken by it in the previous year to implement the order, including a description of written comments by any person or organization stating that the agency has not complied with this order and a response to such comments by the agency.

Navigational Servitude Not an Absolute Bar to Takings Claims

Jimmy Hall, 3L
Tammy L. Shaw, J.D.

After nearly twenty years of changing, ambiguous law, the United States Court of Federal Claims, in *Kingsport Horizontal Property Regime v. United States*, awarded South Carolina property owners compensation for erosion caused by the government's construction of the Atlantic Intercoastal Waterway. In a similar decision, the Federal Circuit Court of Appeals, in *Palm Beach Isles Assocs. v. United States*, recently granted a group of private landowners rights to potential compensation by limiting the scope of the navigational servitude as a defense to takings claims. In both cases, the courts held that the government may not use the federal navigational servitude as an absolute bar to takings claims, a decision that opens the door to compensation for other waterfront landowners.

Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000).

In 1956, a large group of investors (PBIA) purchased a tract of land, consisting of 50.7 acres of wetlands and submerged land below the mean high tide of Lake Worth, on the Atlantic Intercoastal Waterway. Shortly after acquiring the parcel, PBIA applied for a dredge and fill permit in order to develop the parcel. Although the Army Corps of Engineers (Corps) granted the permit, PBIA never began the development, and in 1963, the permit expired. Twenty-five years later PBIA renewed its intentions to develop the tract of submerged land and again applied for a permit. This time the application was denied citing potential harm the development would cause to Lake Worth's shallow water habitat. Following this denial, PBIA filed suit in the court of Federal Claims, claiming that denial of the permit application precludes any economically viable use of the 50.7 acres and therefore is a compensable regulatory taking. The government argues that because the parcel is part of the bed of a navigable water body, the doctrine of navigational servitude grants power to regulate and control the tract and provides a defense to takings claims.

The Federal Navigational Servitude derives from the Commerce Clause of the U.S. Constitution and gives the government power to regulate and control submerged lands of the U.S. in the interest of commerce.[1] The doctrine grants the U.S. a dominant interest in property which limits a private landowner's title and subjects it to the government's interest in maintaining navigation. This limitation bars a compensable takings claim that arises from action taken by the government in maintaining navigation.

PBIA argued that because the water level over these lands never exceeded three feet in depth they were incapable of supporting navigation and thus, the land was not subject to navigational servitude restrictions. PBIA further argued that the Corps denied the dredge and fill permits on environmental grounds, rather than navigational concerns and therefore should not be entitled to use the navigational servitude as a defense.

The Federal Circuit disagreed, holding that the navigational servitude applies to all areas of navigable waters that fall below the mean high water mark, regardless of depth. However, the court went on to say that in order to raise the navigational servitude as a defense to a regulatory takings claim, the government must show that the regulatory imposition is related to navigation. Since the Corps' decision to deny PBIA's permit cites environmental concerns rather than navigation issues, the case is remanded to the Court of Federal Claims to determine the Corps' reasons for the denial.

Navigational Servitude

The Federal Navigational Servitude doctrine arises from two related components:

navigation power which is derived from the commerce clause of the U.S. Constitution giving Congress regulatory power over navigable waters; and

navigation servitude which provides that certain private property may be taken, without compensation to the landowner, if the taking is necessary to exercise the navigation power.

Private ownership of land below navigable or tidal waters is acquired and held subject to the dominant public right of navigation. This dominant public right may be exercised by Congress without giving rise to a compensable taking.

This court relied on *Owen v. United States* [2] for the proposition that the navigational servitude applies to all lands below the mean high water mark of navigable waterways. However, the question of whether the government could raise navigational servitude as a defense to takings claims for property above the mean high water mark, remained unanswered. The United States Court of Federal Claims recently addressed this issue in *Kingsport Horizontal Prop. Regime v. United States.*

Kingsport Horizontal Prop. Regime v. United States, 46 Fed. Cl. 691 (2000).

During the 1930's, the United States constructed the Atlantic Intercoastal Waterway (Waterway) to aid in the inland transportation of goods along the east coast. In order to maintain a continuous waterway, the United States obtained easements from private property owners to construct a connecting channel. Decades later, property owners adjacent to the Waterway noticed that the wave-wash from passing boats was causing parts of their land, outside the easement, to erode. Initially, the Federal Circuit denied compensation for the erosion stating that the landowners had "no property right to be safeguarded by the Army Engineers against collateral consequences of navigation improvements."[3] However, the Federal Circuit later retracted, finding that the navigational servitude has horizontal limits that do not extend beyond the mean high water mark.[4] Following that decision, the claimants filed a takings claim in the United States Court of Federal Claims.

In order to prove a taking, the claimant must prove that governmental action was the proximate cause of the injury.[5] Where a claimant is able to prove that a government action caused erosion above the mean high water mark, courts have often ordered compensation.[6] Here, the claimants argued that while the erosion to their property was caused by the wave-wash from private boats on the waterway, that erosion would not have been possible but for the construction of the waterway. The government, on the other hand, attempted to circumvent the proximate cause issue by arguing that the navigational servitude protected it from liability since the waterway was navigable and the erosion was caused by vessels in navigation.

The court sided with the property owners, stating that the government's use of the navigational servitude as a defense was not applicable in this case. The court noted that the characteristic effects of navigation along a natural waterway, including erosion above the mean high water mark, cannot give rise to governmental liability because the public's right to access and the government's dominant navigational servitude are pre-existing limitations on the property owner's interest in the land. However, unlike a natural waterway, a man-made waterway subjects the property owners to risks and conditions that would not have occurred otherwise. Moreover, in natural waterways, the government's right to encroach on private property is limited by acts necessary to maintain navigation, while in man-made waterways that right is defined by the specific boundaries of the easement. Applying the same rules to man-made and natural waterways would prevent the government from ever needing an easement since it could simply construct waterways over any privately owned property and avoid compensation by claiming a commercial and navigable connection.

The court determined that the navigational servitude does not reach beyond the mean high water mark of the Atlantic Intercoastal Waterway, nor beyond the boundaries of an easement. The court awarded compensation after finding the government's construction of the waterway to be the proximate cause of erosion of the claimants' property.

Conclusion

With these two decisions, the United States Court of Federal Claims and the Federal Circuit held that the government's use of the navigational servitude as a defense to takings claims is not absolute. In cases in which the land in question rests below the mean high water mark, the government bears the burden of proving that its actions are connected with navigation. Similarly, the navigational servitude defense does not reach land above the mean high water mark of a man-made waterway.

ENDNOTES

1. United States v. Rand, 389 U.S. 121 (1967).
2. Owen v. United States, 851 F.2d 1404 (Fed. Cir. 1988).
3. Ballam v. United States, 806 F.2d 1017, 1022 (1986).
4. Owen, 851 F.2d at 1415.
5. Sanguinetti v. United States, 264 U.S. 146, 149-50 (1924).
6. United States v. Dickenson, 331 U.S. 745 (1947).

2000 Mississippi Legislative Update

Jimmy Hall, 3L

The following is a summary of coastal, fisheries, marine, and water resources related legislation enacted by the Mississippi legislature during the 2000 session.

2000 Mississippi Laws 344. (HB 1464)
Enacted April 16, 2000. Effective July 1, 2000.
Amends § 49-15-100.3 to consider possession of a trammel net, gill net, or other equipment prohibited in the harvesting or taking of seafood as prima facie evidence of their use unless the vessel is anchored in a permanent facility or is traveling within a navigation channel marked by the U.S. Coast Guard.

2000 Mississippi Laws 368. (SB 2478)
Enacted April 17, 2000. Effective April 17, 2000.
Amends §§ 49-1-39 and 49-5-7 allowing the Commission on Wildlife, Fisheries and Parks to issue permits for the killing of nonmigratory, native birds that harm agriculture or any other community interest but maintains prohibitions of migratory birds as defined by the Migratory Bird Treaty Act, including owls and eagles.

2000 Mississippi Laws 375. (SB 2553)
Enacted April 17, 2000. Effective July 1, 2000.
Amends § 49-7-21 to allow the Commission on Wildlife, Fisheries and Parks to sell hunting and fishing licenses via the Internet.

2000 Mississippi Laws 378. (SB 2601)
Enacted April 17, 2000. Effective April 17, 2000.
Amends § 49-15-64.5 to include push trawls as equipment permitted for commercial shrimp.

2000 Mississippi Laws 388. (SB 2724)
Enacted April 17, 2000. Effective July 1, 2000.
Amends § 49-7-27 to revoke the hunting, fishing and trapping privileges for persons failing to pay fines for violating a wildlife regulation or law.

2000 Mississippi Laws 394. (SB 2959)
Enacted April 17, 2000. Effective April 17, 2000.
Amends § 49-27-9 to revise the permit application requirements for regulated activities potentially affecting coastal wetlands and permits the Commission on Marine Resources to reduce an application fee by 50% upon finding that the proposed activity, entity, or area requires no permit or is exempt from the process.

2000 Mississippi Laws 416. (SB 2826)
Enacted April 17, 2000. Effective July 1, 2000.
Amends § 49-15-78 to prohibit the use of trammel, gill, and entanglement nets within one-half mile of the Mississippi shoreline.

2000 Mississippi Laws 442. (HB 1174)
Enacted April 18, 2000. Effective July 1, 2000.
Amends § 49-17-86 to create the Water Pollution Control Emergency Loan Fund in order to assist the replacement of or repair to emergency structures, equipment, materials, machinery and devices used in the abatement of water pollution.

2000 Mississippi Laws 476. (SB 2822)
Enacted April 25, 2000. Effective July 1, 2000.
Amends § 49-15-96 to limit the amount of white trout, black drum, guafftopsail catfish, flounder, and croaker caught for personal consumption to twenty-five pounds and permits each vessel to keep up to three dozen blue crabs.

2000 Mississippi Laws 522. (HB 1080)
Enacted April 30, 2000. Effective July 1, 2000.
Amends § 49-15-64 to increase the fine for persons, corporations, or firms caught fishing for shrimp during the off season.

2000 Mississippi Laws 557. (HB 673)
Enacted May 20, 2000. Effective July 1, 2000.
Amends § 49-15-15 to allow the Commissioner of Agriculture to enter into an MOU enumerating the specific duties, including distribution of information, of each agency participating in the seafood sanitation program.

2000 Mississippi Laws 575. (HB 1494)
Enacted May 5, 2000. Effective July 1, 2000.
Amends § 65-1-51 to permit the Mississippi

Transportation Commission to acquire wetlands in order to mitigate wetland losses caused by the use and development of highways, provided that a governmental agency agrees, without compensation, to accept title and maintain the wetlands. In addition, the Act permits the commission to acquire wetland credits from approved organizations with the intention of setting up a mitigation bank.

2000 Mississippi Laws 590. (SB 2720)
Enacted May 20, 2000. Effective May 20, 2000.
The Act authorizes the Board of Supervisors of any county to enter into development agreements with the developers of Master Planned Communities to authorize such communities, and to administer, manage, and enforce land use restrictions, covenants, zoning regulations, and building codes.

2000 Mississippi Laws 597. (SB 3053)
Enacted May 20, 2000. Effective May 20, 2000.
Creates the Mississippi Storm Water Management District Act to provide for the creation of a storm water management district by counties or municipalities.

2000 Mississippi Laws 600. (SB 2559)
Enacted May 22, 2000. Effective July 1, 2000.
Creates the Organic Certification Program establishing the rules pertaining to the livestock, crop and production standards; the processing, manufacturing, labeling and packaging standards; permitted and prohibited substances; and, standards for out-of-state organic foods and ingredients.

2000 Mississippi Laws 602. (SB 2588)
Enacted May 22, 2000. Effective July 1, 2000.
Amends § 49-15-313 to require all nonresident charter boats, guide boats, party and head boats to obtain a license before operating in Mississippi waters. The Act exempts nonresident boats engaged in sport fishing competitions not exceeding twenty days from the permit requirements.

2000 Mississippi Laws 603. (SB 2598)
Enacted May 22, 2000. Effective May 22, 2000.
Authorizes the Department of Marine Resources to remove hazardous, derelict vessels from coastal wetlands and channels having a navigable connection to the wetlands. In addition, the Act imputes the costs of removal, wetland restoration, and attorneys' fees to the owner of the vessel if known.

2000 Mississippi Laws 604. (SB 2600)
Enacted May 22, 2000. Effective July 1, 2001.
Creates the Channel Maintenance Act, which, in order to enhance and preserve the recreational and economic value of the coastal region, requires the Department of Marine Resources to develop management plans for the maintenance of coastal channels.

2000 Mississippi Laws 618. (HB 1320)
Enacted May 23, 2000. Effective May 23, 2000.
Authorizes the Commission on Marine Resources to modify, repeal, or enact regulations for the management, conservation, utilization, protection, and preservation of marine resources under its jurisdiction. The Act permits the commission to grant variances and make exceptions from any adopted rules and regulations.

Scenic Streams Stewardship Program

2000 Mississippi Laws 308. (HB 461)
Enacted March 17, 2000. Effective March 17, 2000.
Designates Magee's Creek in Walthall County, from the confluence of Varnell Creek to the Bogue Chitto River as eligible for nomination to the Program.

2000 Mississippi Laws 309. (HB 462)
Enacted March 17, 2000. Effective March 17, 2000.
Designates the Wolf River in Pearl River, Hancock, Stone and Harrison Counties from Highway 26 in Pearl River County to the Bay of St. Louis in Harrison County, as a state scenic stream.

2000 Mississippi Laws 310. (HB 883)
Enacted March 26, 2000. Effective March 26, 2000.
Designates the Tangipahoa River in Pike County beginning at U.S. Highway 51 and extending to the Mississippi-Louisiana state line as eligible for nomination to the Program.

2000 Mississippi Laws 360. (SB 2150)
Enacted April 17, 2000. Effective April 17, 2000.
Extends the life of the Joint Natural and Scenic River Study Committee for one year.

Fourth Circuit Decides Sidecasting Requires Permit

United States of America v. Deaton, 209 F.3d 331 (4th Cir. 2000).

Tammy L. Shaw, J.D.

In April, the Fourth Circuit ruled that the Clean Water Act (CWA) prohibits sidecasting in a wetland area without a permit. Sidecasting is the practice of piling excavated soil on either side of a trench while digging a wetland drainage ditch. The decision is the result of an enforcement action instituted by the U.S. Army Corps of Engineers (Corps) against developers in Maryland and it addresses the long-standing uncertainty over whether the deposit of dredged material from a wetland back into the same wetland should be considered discharge of a pollutant.

James and Rebecca Deaton, developers of a residential subdivision in Maryland, hired a contractor to dig a 1240 foot ditch through portions of non-tidal wetlands in order to drain low lying wet areas in preparation for onsite sewage disposal systems. As the contractor dug, he piled excavated materials on either side of the ditch, an action that prompted a stop-work order from the Corps and marked the beginning of an 11-year dispute. The Corps warned that placement of fill material in the wetland violated § 404 of the CWA which prohibits the discharge of dredged or fill material into a wetland without a permit and that no further work could be done until a permit was issued. The Deatons submitted a permit application in December of 1990 but the Corps returned it as incomplete. After the Deatons failed to resubmit the application, the Corps filed civil charges alleging violations of the CWA.

The Deatons argued that the area of the property on which the excavated material had been deposited was not a wetland subject to the CWA and that redepositing this material did not constitute discharge of a pollutant. The district court disagreed, granting a partial summary judgment in favor of the Corps, holding that the Deatons' property contained wetlands subject to the Corps authority and that redepositing the excavated material violated the CWA. Following the district court's subsequent reversal of this decision, the government appealed to the Fourth Circuit.

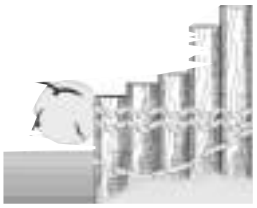
The issue before the Court was whether sidecasting required a permit under the CWA. The Court determined that the act of disturbing the soil during excavation, in essence, changed the nature of the soil. Once the material is removed from the ditch, it becomes dredged spoil, a "pollutant" under the CWA, and that redepositing that material on either side of the ditch constitutes the discharge of a pollutant. The Court did not agree with the Deatons' argument that since nothing "new" was added to the excavated dirt, it could not be a pollutant. The Court instead pointed out that the CWA does not prohibit the addition of material; it prohibits the addition of any pollutant.[1]

While this ruling appears to conflict with a decision by the U.S. Court of Appeals for the District of Columbia[2] overturning the Tulloch Rule regarding "incidental fallback", a closer examination of the D.C. Court's decision reveals otherwise. That Court held that the act of excavating, in which a small amount of the dirt falls back into the ditch is not an addition of material, but a net withdrawal of material and as such is not the addition of a pollutant. The D.C. Court recognized, however, that the practice of sidecasting, where material is redeposited into a jurisdictional wetland, has always required a permit.

ENDNOTES

1. 33 U.S.C. § 1362(12)(A) (2000).
2. National Mining Assoc. v. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998).

Lagniappe *(a little something extra)*



Around the Gulf . . .

For the third consecutive year, in Baldwin County, Alabama, the Marine Police are enforcing an emergency regulation that precludes the use of water craft above an idle speed between the first sandbar and the beach. This regulation is aimed at protecting all water users.

In June, the Federal Emergency Management Agency (FEMA) issued findings that Gulf Coast shorelines are receding by as much as 5 to 6 feet per year and predicts one in four structures located within 500 feet of the coast will be lost within the next 60 years, with an eventual cost of $50 million a year. The report recommends erosion hazard maps be distributed to inform the public and that the agency include the costs for erosion-related losses in setting National Flood Insurance Program rates for coastal areas.

The latest sale of oil and gas leases in the Gulf of Mexico, conducted by the Mineral Management Service resulted in acceptance of 334 bids worth $292.8 million. The oil and gas companies with winning bids are allowed to explore a 5,760-acre tract for 10 years. High bidders include Anadarko Petroleum, Vastar Resources, Inc. and Chevron, USA.

The Gulf of Mexico Fishery Management Council, which includes representatives from the states of Alabama, Florida, Louisiana, Mississippi, and Texas, welcomes the following new members:

Karen L. J. Bell - seafood restaurateur, Cortez, FL
Dan Dumont - Executive Director/Counsel, Alabama Forest Resources Center, Mobile, AL
Myron J. Fischer - recreational fisherman, Cut Off, LA
Bobbi M. Walker - charterboat owner, Orange Beach, AL (at-large seat)
Harolyn Kay Williams - fishery manager, Vancleave, MS (at-large seat)

Around the Nation and the World . . .

A non-native algae known as Caulerpa taxifolia was discovered by divers off the coast of San Diego in June. The same species of algae is responsible for damage to habitat and fisheries in the Mediterranean Sea, its growth likened to spreading "astroturf" over the seabed, proving toxic to fisheries.

In response to an executive order issued last year by President Clinton, the Council on Environmental Quality has proposed guidelines that would subject future foreign trade agreements to tougher environmental reviews. The draft guidelines are available at 65 Federal Register 42, 743 (June 11, 000).

The International Whaling Commission held its 52nd Annual Meeting from July 3 - 6 in Adelaide, Australia, where members declined to designate a South Pacific whale sanctuary but discussed a fast-track initiative to complete the Commission's Revised Management Scheme which some argue can lead to a lift of the moratorium on commercial whaling. The total membership of the IWC has grown to 41 following signing of the International Convention for the Regulation of Whaling by the African country Guinea. The 2001 meeting will be July 23-27 in the United Kingdom.

Congratulations!

The Water Log Staff wishes to congratulate the following Sea Grant Research Associates and Policy Assistants who earned their Juris Doctorate during the 1999-2000 academic year.

Jonathan Huth ***Tim Peeples***

Brad Rath ***Tammy Shaw***

We wish these lawyers great success in their future endeavors.

In the Next Issue

• Review of a Supreme Court case finding the U.S. Government must pay restitution to oil companies for money paid for lease agreements that were later repudiated by the Government.

• Review of the use and success of conservation easements in Alabama and Mississippi, giving private landowners a flexible tool for conservation.

• Review of recent decisions by courts and regional fishery management councils to close large areas to particular types of fishing gear such as longlining and trawling.

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