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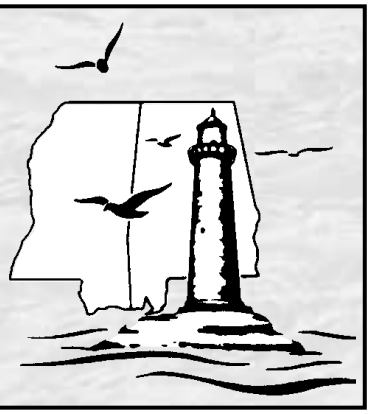
WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium



Sierra Club Challenges the Big Sunflower River Project

Mississippi Sierra Club, Inc. v. Mississippi Department of Environmental Quality, 2001 Miss. LEXIS 97 (2001).

Roy A. Nowell, Jr., 3L

In April, the Mississippi Supreme Court ruled that the Mississippi Commission of Environmental Quality (Commission) failed to make proper findings when it granted certification for a proposed project of the U.S. Army Corps of Engineers (Corps). The certification of the Big Sunflower River Maintenance Project was challenged by the Mississippi Sierra Club (Sierra Club) because of its impact on hundreds of acres of wetlands and streams. The certification was affirmed by the Hinds County Chancery Court. The Sierra Club appealed to the Mississippi Supreme Court where the lower court ruling was vacated, and the issues remanded to the Commission for further findings.

Background

The Big Sunflower River Maintenance Project is a channeling project proposed by the U.S. Army Corps of Engineers to alleviate flooding in the Yazoo-

See Sierra Club, page 8

Fifth Circuit Defines Scope of the Oil Pollution Act

Rice v. Harken Exploration Co., 2001 WL 422051 (5th Cir. 2001).

Craig Pake, 3L

This issue for the Fifth Circuit is a case of first impression on the scope of the Oil Pollution Act (OPA). After Congress' creation of the OPA in 1990, there has been an on-going debate as to the scope of the OPA and the reach Congress intended to give the Act. In recent years, the EPA and Army Corps of Engineers have interpreted the reach of the OPA to include "bodies of water in the United States," similar in scope to the Clean Water Act (CWA). Trial courts have struggled with the question of whether the OPA should be given a broad interpretation or whether its

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In This Issue . . .

Administration Releases National Energy Policy

Executive Orders Charge Federal Agencies with Energy-Related Duties

Kristen M. Fletcher, J.D., LL.M.
Yoshiyuki Takamatsu, 2L

In May 2001, the Bush Administration released the National Energy Policy and two executive orders revealing the administration's priorities in energy development for the nation. Citing a domestic energy crisis defined by a "fundamental imbalance between supply and demand," the Policy declares that this imbalance "will inevitably undermine our economy, our standard of living, and our national security."[1] The Policy consists of the findings and recommendations made by the National Energy Policy Development Group established by the President in his second week in office. The two Executive Orders that followed the Policy are aimed at assessing the effects of federal regulations on energy-related projects and at accelerating the completion of those projects. While the Administration refers to the Policy as a long-term, comprehensive strategy, it has been criticized for its emphasis on increased fossil fuel and nuclear power development with little focus on energy conservation methods.

The National Energy Policy consists of eight chapters (see summary, page 3) which focus on encouraging energy infrastructure modernization by reducing regulatory hurdles. The Plan also proposes to reduce dependence on foreign energy sources by increasing exploration and production of domestic energy sources, including oil, natural gas, coal, nuclear, and renewable energy. Asserting the efficiency and environmental compatibility of modern drilling technologies, the Policy calls for oil and natural gas development on federally owned lands, including the Gulf of Mexico and the Arctic National Wildlife Refuge in Alaska.

The National Energy Policy Development Group, comprised primarily of Cabinet members, recommended that President Bush issue two executive orders to expedite the Policy suggestions. Shortly after the release of the Energy Policy, Bush issued Executive Order 13211 which requires federal agencies to submit a detailed "Statement of Energy Effects" when they undertake "significant energy actions."[2] This statement must consist of an agency's determination of (1) expected adverse effects on energy supply, distribution, or use when a proposed rule or regulation is implemented, and (2) reasonable alternatives to the action and the effects of these alternatives. A federal action is considered significant, and therefore must be accompanied by the statement of energy effects, when it may lead to a rule or regulation that may have "material effects" to the economy and society and is likely to have a significant adverse effect on energy, or is a federal action that is specifically designated as significant.

Executive Order 13212 proposes to expedite the increased supply and availability of energy to the Nation by requiring executive departments and agencies to speed up their review of permits or take necessary actions to accelerate the completion of energy-related projects that will increase the production, transmission, or conservation of energy.[3] The Order establishes an interagency Task Force to ensure federal agencies set up appropriate mechanisms (e.g., by standardizing certain information needs, sharing information received, and integrating required processes and reviews) to coordinate federal, State, tribal, and local permitting activity in regions where increased activity is expected. The Department of Energy will administer the Task Force.

See Energy Policy, page 13

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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National Energy Policy Summary

Visit http://www.whitehouse.gov/energy/ to view the full text of the Policy.

Below is a chapter by chapter summary of the Policy.

1 - Taking Stock: Energy Challenges Facing the United States

Recommends an Executive Order to direct federal agencies to include a "statement of energy impact" on regulatory actions that could affect energy supplies, distribution, or use.

2 - Striking Home: Impacts of High Energy Prices on Families, Communities, and Businesses

Recommends educational programs related to energy development and use, funded and managed by the respective energy industries, which include information on the compatibility of energy with a clean environment.

3 - Protecting America's Environment: Sustaining the Nation's Health and Environment

Recommends multi-pollutant legislation to establish a market-based program, including emissions trading credits and to cap specific emissions from electric power generators; and, recommends the creation of a "Royalties Conservation Fund" to earmark potential royalties from new oil and gas production in the Arctic National Wildlife Refuge to fund land conservation efforts and maintenance and improvements on federal lands.

4 - Using Energy Wisely: Increasing Energy Conservation and Efficiency

Recommends improved energy efficiency of appliances and expansion of the appliance standards program, setting standards "where technologically feasible and economically justified;" recommends fuel economy standards that will not negatively impact the U.S. automotive industry and market-based approaches to increasing the national average fuel economy of new motor vehicles and tax credits.

5 - Energy for a New Century: Increasing Domestic Energy Supplies

Oil and Gas: Recommends promotion of oil and gas recovery from existing wells, economic incentives for offshore oil and gas development such as royalty reductions, and a reexamination of federal laws and policies to determine if changes are needed regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf; recommends authorization of exploration within the National Arctic Wildlife Refuge and renewal of the Trans-Alaska Pipeline System rights-of-way.

Nuclear Energy: Recommends the expansion of nuclear energy in the U.S. including the expedition of applications for licensing new advanced-technology reactors, facilitation of nuclear energy generation by revising the rating of existing nuclear plants, relicensing existing nuclear plants, assessing the potential of nuclear energy to improve air quality, and providing deep geologic repositories for nuclear waste.

Hydroelectric: Recommends the reduction of the time and cost of the hydropower licensing process and optimizing the efficiency and reliability of existing hydropower facilities.

6 - Nature's Power: Increasing America's Use of Renewable and Alternative Energy

Recommends a reevaluation of access limitations to federal lands in order to increase renewable energy production, such as biomass, wind, geothermal, and solar; recommends an increase for research and development of renewable energy resources; and, recommends a review of funding and performance of renewable energy and alternative energy research and development programs.

7 - America's Energy Infrastructure: A Comprehensive Delivery System

Recommends improvements to the reliability of the interstate transmission system and the development of legislation providing for enforcement by a self-regulatory organization subject to FERC oversight; and, recommends the removal of constraints on the interstate transmission system, the establishment of a national grid, and the use of incentive rate-making proposals.

8 - Strengthening Global Alliances: Enhancing National Energy Security and Int'l Relationships

Recommends international initiatives and agreements to open foreign energy to investment, improve dialogue among energy producing and consuming nations, support American energy firms competing in markets abroad, level the playing field for U.S. companies overseas and reduce barriers to trade and investment; recommends expedition of a natural gas pipeline from Alaska and Canada to the lower 48 states; and recommends the increase of international supplies of oil and gas.

Government Must Compensate for Water-Use Restrictions

Tulare Lake Basin Water Storage District v. United States, 2001 WL 474295 (2001).

Roy A. Nowell, Jr., 3L

California water users (Plaintiffs) brought suit claiming that their contractually-guaranteed water rights were taken from them when the National Marine Fisheries Service (NMFS) imposed water-use restrictions under the Endangered Species Act (ESA). The United States Court of Federal Claims ruled in favor of the Plaintiffs in April, granting summary judgment and denying NMFS motion for summary judgment. The court ruled that the government could protect the endangered species in question, but they had to compensate for loss of water rights to private citizens.

Background

The NMFS determined that two endangered species of fish, the delta smelt and winter-run Chinook salmon, faced possible extinction because of limited water flows in California. In order to provide water to citizens, water is diverted from the Sacramento and Feather Rivers and eventually distributed to users through a series of canals. Water that is not diverted flows into San Francisco Bay.

In efforts to protect the fish, the NMFS restricted water out-flows in California's primary water distribution system, and as a result, a large number of citizens were denied access to the water given to them by contract. The Bureau of Reclamation and the Department of Water Resources contracted with county water districts to allow the districts to use certain quantities of water. In this case, Tulare Lake Basin Water Storage District and Kern County Water Agency have water contracts with the Bureau and Department for an allotment of water, and the remaining Plaintiffs have water contracts through Tulare and Kern Counties. The Plaintiffs brought this action claiming a Fifth Amendment taking of their private water rights.

Takings Issue

The court first addressed the issue of whether the regulations amounted to a taking of property without compensation, which is prohibited by the Fifth Amendment. That Amendment states, "nor shall private property be taken for public use, without just compensation."[1] The purpose of the Takings Clause is to prevent individual owners of property from bearing the entire burden that should be distributed among the public as a whole.[2] The court stated that the NMFS has the absolute right to protect endangered species, but considered whether water restrictions amounted to a Fifth Amendment taking.[3]

Plaintiffs' Argument: Taking of Water Rights

As a result of the water restrictions, Tulare alleges that they lost almost 10,000 acre-feet of water in 1992, at least 26,000 acre-feet in 1993, and over 23,000 acre-feet in 1994. Kern County claims to have lost at least 319,000 acre-feet during the same time span. The Plaintiffs first urged the court to determine that a taking had in fact occurred, and that the taking by the government was a *physical* taking versus a regulatory taking. A physical taking occurs when the government's action amounts to a physical occupation or invasion of the property or strips the owner of possession of the property. A regulatory taking occurs when the government's action results in a restriction on the owner's use of the property. Plaintiffs contend that a physical taking had occurred because they held rights to a guaranteed quantity of water, and that by stripping them of this contractual right, the government has rendered the water contract valueless.

Defenses Raised

The NMFS offered three arguments as a defense: The restrictions on water out-flows did not violate the contract, but rather only frustrated the contract, using *Omnia Commercial Co. v. United States* as the basis for the argument.[4] In *Omnia*, the Supreme Court rejected the Plaintiffs' takings claim based upon the government's refusal to fulfill obligations under a contract for

steel plates.[5] The court held that the Fifth Amendment does not apply to situations in which the contractual rights have merely been frustrated.[6] The defendant in the present case argued that, although Plaintiffs' rights were certainly injured, the contract had not been rendered valueless. While the regulatory action interfered with the contractual expectations, the interference cost the Plaintiffs only a fraction of the overall value of the contract. Finally, the defendant argued the federal government had merely imposed a limit on Plaintiffs' title for which they could not be held liable. The defendant based this argument on language in the contract that provided immunity for the government in certain situations. The defense argued that the Plaintiffs' rights were contingent upon the availability of water to the Department of Water Resources, and the subsequent unavailability of the water was out of the government's control. The court then addressed each of the defense arguments in detail.

Court Analysis

First, the court rejected the defendant's argument under *Omnia* that no taking occurred. This argument stated that the actions of the government merely frustrated the contract. However, the court rejected this claim by distinguishing *Omnia* from the present case because *Omnia* involved a situation where the Plaintiff was unable to claim ownership of the property. In the present case, the Plaintiffs can clearly claim an interest in the water via their contracts and because they have a property interest, the court held, a taking clearly occurred.

Once the court determined a taking had occurred, they addressed the issue of whether a regulatory or physical taking had occurred. One situation in which a physical taking can occur is when the government strips the owner of possession of the property, thus rendering the property valueless. The court determined that, by taking away the Plaintiffs' rights to use the water, a physical taking had occurred. By taking away the Plaintiffs' right to use the water, the government had in fact rendered the right to the water valueless, therefore meeting the elements of a physical taking.

Finally, the court addressed the issue of whether the Plaintiffs in fact owned the property in question. The defendants raised several arguments, including contractual limitation on Plaintiffs' ownership, unreasonable use of the water, and public nuisance. However, the court promptly discarded each of these arguments holding: 1) no contractual limitations exist; 2) Plaintiffs' use of the water is reasonable; and 3) Plaintiffs' use of the water does not constitute a public nuisance. In sum, the court held that Plaintiffs had rights to the use of the water that was provided for by contract.

The court determined that, by taking away the Plaintiffs' right to use the water, a physical taking had occurred.

Conclusion

The court plainly rejected all arguments made by the NMFS and agreed with the Plaintiffs by concluding that a physical taking had occurred, and that Plaintiffs were entitled to compensation for the loss of their rights to water use. However, it must be noted that this case does not stand for the proposition that the United States government, specifically the NMFS, cannot take appropriate measures to protect endangered species. The court clearly states that the government has the *absolute* right to protect species under the Endangered Species Act. This case stands for the principle that, when the government takes steps to protect an endangered species, it cannot take away contractual rights in property without compensation.

ENDNOTES

1. U.S. CONST. amend. V.
2. Armstrong v. United States, 364 U.S. 40, 49 (1960).
3. 16 U.S.C. § 1536 (a) (2) (1994).
4. Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).
5. *Id.*
6. *Id.*

Oil Pollution Act, from page 1

scope is more limited and narrow. In this case, the court addressed the question of whether sub-surface waters fall within the scope of the OPA. One of the questions raised by the current case is what is "navigable water" or "waters of the United States." The Fifth Circuit answered the question that subsurface waters are not navigable waters protected under the OPA.

Background

The OPA was enacted in 1990 in response to the Exxon Valdez disaster and was passed in order to impose strict liability on all parties responsible for the spill or discharge of oil. The OPA targets each liable party for the damages and costs of the clean up of waters and/or adjoining shorelines and pertains to any activity which discharges or poses a hazard to discharge oil into any "navigable waters."

This dispute arises between the Rice family (Plaintiffs) and Harken Exploration Co. (Defendants). The Rice family owns the surface rights to Big Creek Ranch in Hutchinson County Texas, located in the Texas panhandle, hundreds of miles inland from the Gulf of Mexico. Harken Exploration Co. operates oil and gas production on the property, pursuant to existing oil leases. Harken began its oil operations in January of 1996, however Big Creek Ranch has been used for oil and gas production for several decades by other oil companies.

The Rices allege that Harken contaminated the ground waters of Big Creek Ranch and the surface waters of the Big Creek in direct violation of the OPA. Big Creek is a small seasonal creek that, for much of the year, is dry and void of surface water. The Rices assert that Harken contaminated sub-surface ground water beneath the ranch and contaminated Big Creek by way of small spills and leaks from their oil tanks and other equipment. Harken does not deny these small leaks and spills occurred but instead states that these small spills are not unusual for any type of oil drilling production. Furthermore, Harken states that at no time did any of the discharges endanger navigable water under the OPA, since all the leaks and spills occurred on dry land. The Rices contend that the surface waters of the creek were contaminated when oil seeped through the ground into the large subsurface water pools that flowed into the Big Creek. They also argue that surface water run-off associated with rain water washed oil into the creek, causing further contamination.

Navigable Waters Under OPA

Plaintiffs argue that the term "navigable waters" in the OPA not only includes oceans, bays, seas, and large rivers but also includes smaller rivers, streams, creeks, and all subsurface waters. To advance their argument the Rices claim that Congress used the same language in both the OPA and the Clean Water Act (CWA) giving the OPA the same broad interruption as the CWA.

Plaintiffs argue that the OPA should be construed as broadly as the Clean Water Act, covering "waters of the United States." However, in a recent Supreme Court decision, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[1] (SWANCC), the nation's highest court restricted the scope of the CWA in defining "waters of the United States." In SWANCC, the Supreme Court ruled that the Army Corps of Engineers had exceeded their authority in the application of the "Migratory Bird Rule," which had been used to extend the reach of the CWA to include any interstate water, which could be used as migratory bird habitat.[2] The SWANCC decision invalidated this Rule, limiting the scope of the CWA to water that is actually navigable or water that adjoins an open body of navigable water.

Defendants argue that the OPA applies only to navigable bodies of water such as seas, inlets, bays, and oceans, not inland bodies of waters hundreds of miles away from the sea. The trial court agreed with the Defendants and refused to apply the OPA to inland bodies of water. However, the Fifth Circuit disagreed on this point, finding that both the House Conference Report and the Senate Report indicate that Congress' intent was for the OPA to "cover all bodies of water and resources covered by § 311 of the CWA, including the inland waters of the United States."[3]

At trial and on appeal, the Rices produced evidence of contaminated groundwater, claiming that oil had seeped through the ground to underground water, which in turn contaminated Big Creek. They failed to produce any evidence that the oil spills directly contaminated the surface waters of Big Creek. Harken argues that the nature of the oil spills on Big Creek Ranch do not fall within the scope of the OPA and that even if the OPA's reach is as broad as that of the Clean Water Act, the CWA has never been so sweeping as to include groundwater as a protected body of water.[4]

In the present case, the Fifth Circuit could not find any evidence to construe the term navigable waters under the OPA any more broadly than in the CWA. Nor was there any direct evidence that Big Creek was a navigable body of water since much of the year it is dry and void of all surface water. The Fifth Circuit held that subsurface waters are not "waters of the United States" covered by the OPA. Furthermore, since the Rices did not present evidence showing direct contamination of Big Creek, the trial court's ruling for a summary judgement was affirmed. However, the court did leave open the question of whether the discharges into subsurface waters may be actionable under the OPA or the CWA if the discharges resulted in a direct contamination of a protected body of water.

Conclusion

The Fifth Circuit affirmed the trial court's ruling for summary judgement in favor of Harken, finding that groundwater is not within the scope of the OPA under these circumstances. The Plaintiffs were not able to prove direct contamination of the surface waters of Big Creek, nor did they present evidence that Big Creek was connected, in any way, to a navigable body of water. While it is unclear what the court would do in a case where contaminated ground water directly contaminates surface water, this case suggests that a plaintiff must show a direct connection of contaminated surface water to a protected or navigable body of water to prevail under the OPA.

ENDNOTES

1. 531 U.S. 159 (2001).
2. *Id.*
3. Senate Report No. 101-94, reprinted in 1990 U.S.C.C.A.N. 722, 733 and House Conference Report No. 101-653, reprinted in 1990 U.S.C.C.A.N. 779, 779-80.
4. Exxon Corp. v. Train, 554 F.2d 1310, 1322 (5th Cir. 1977) (no federal control of any pollution of subsurface waters under the CWA).

To Learn More . . .

Oil Pollution Act of 1990, 33 U.S.C. §§ 2702 to 2761

The Oil Pollution Act (OPA) of 1990 streamlined and strengthened EPA's ability to prevent and respond to catastrophic oil spills through new reporting and damages provisions. A trust fund financed by a tax on oil is available to clean up spills when the responsible party is incapable or unwilling to do so. The OPA requires oil storage facilities and vessels to submit to the Federal government plans detailing how they will respond to large discharges. EPA has published regulations for aboveground storage facilities; the Coast Guard has done so for oil tankers. The OPA also requires the development of Area Contingency Plans to prepare and plan for oil spill response on a regional scale.

For more information, visit: http://www.epa.gov/region5/defs/html/opa.htm

Sierra Club, from page 1

Mississippi Delta, which occurs every one to five years. The Corps estimates that the Project will result in a six-inch reduction in water level and affect approximately 56,000 acres of the Big Sunflower River Basin. The Project is expected to have a significant impact on a tremendous number of rivers, streams, wetlands, and wildlife in the areas within the basin, including the dredging of over 100 miles of stream and the clearing of over 28 miles of several rivers. According to the court, "the project is expected to cause significant, unavoidable negative impacts on waterfowl, terrestrial, wetland, and aquatic resources, including loss of flood plane [sic], riverbank, and fisheries habitat as well as loss of benthic organisms that live in the sediment and form the foundation of the aquatic food chain."[1] It is estimated the Project will render 443 acres of forested wetlands completely unfit for their current uses, and it is believed 552 acres of forested wetlands will face alterations in flood patterns resulting in the drainage of the areas. In addition to damage to the land, approximately 43% of mussel beds in the affected areas will be destroyed, adversely affecting endangered mussel species.

The Corps filed its application for water quality certification of the Project with the Mississippi Department of Environmental Quality (MDEQ) in August of 1996. After a recommendation from the Chief of Water Quality Management, the Commission voted seven to one to certify that the Project complies with the Mississippi Air and Water Pollution Control Law. The Sierra Club filed suit, challenging the certification.

Analysis

When considering an application for water quality certification, the Commission must address numerous factors set out in federal and state permits, Water Quality regulations, and Water Quality Certification measures. The Sierra Club argues that the Commission failed to adequately address several of these factors, including a balanced assessment of alternatives to the Project, the mitigation of the environmental effects of the Project, the physical, chemical and biological impacts associated with the Project and the Corps' record of compliance with mitigation conditions. The Sierra Club raised three issues:

1. Whether the Commission correctly applied the factors of Mississippi's Water Quality Regulations;
2. Whether the Commission certified the Project without adequate assurance that measures will be taken to prevent unreasonable and irreparable harm to Mississippi waters; and,
3. Whether the Project violates the Water Quality Criteria for impaired waters.

Big Sunflower River near Anguilla, MS (Photo USGS)

Standards and *McGowan* Analysis

In 1992, the Mississippi Supreme Court addressed the standards that must be met by an agency so that the court may properly review certification decisions. In *McGowan v. Mississippi State Oil & Gas Bd.*, the court vacated an order of the State Oil and Gas Board for failing to make adequate findings of fact and for failing to disclose the reasoning behind its decision.[2] In *McGowan*, the court expressly stated an agency *must* state the reasoning behind its decisions and make adequate findings of fact concerning necessary standards.[3] The court held that, in order for courts to review an agency's decision, the agency should not only provide conclusory findings, but should also provide the basis for these findings.[4] Under *McGowan*, the order of the Commission certifying the Big Sunflower River Maintenance Project was deficient on the following points:

•Feasible alternatives to the Project: The Commission made only conclusory statements indicating that suggested alternatives to the Project would be cost prohibitive and would not accomplish the purpose of alleviating flooding. The court held that the order should include the "articulated reasoning" upon which the certification decision was based and without finding of fact and explanation, the certification does not meet the *McGowan* standard.

•Mitigation Requirements: The mitigation proposed by the Corps included the reforestation of 1,912 acres of agricultural land subject to frequent flooding. The Commission determined the proposed mitigation was sufficient to minimize any adverse effects resulting from the proposal, but failed to adequately specify what adverse effects were expected and how the mitigation was expected to minimize or prevent these effects. The Commission simply made a conclusory statement that was deemed insufficient by the court to satisfy *McGowan* requirements.

•Physical, Chemical and Biological Impacts: In its order, the Commission notes that there will be "significant unavoidable impacts" related to the Project but fails to discuss those impacts or the details for addressing the impacts. The court again finds the Commission's certification fails to meet the *McGowan* standards.

•Compliance History: Compliance rate is the degree to which a particular agency has complied with prior mitigation requirements, but no findings were made by the Commission to determine the level of compliance by the Corps. The Sierra Club provided evidence indicating the Corps had a relatively poor record of compliance with mitigation requirements. Testimony from the Corps' Project Manager revealed a compliance rate of only 30%, including the failure to purchase thousands of acres of required mitigation lands. The Commission offered no findings to contradict the arguments offered by the Sierra Club, and the court ruled the Commission must address the Corps' compliance history in making certification decisions.

Unreasonable Degradation and Irreparable Harm

Secondly, the Sierra Club argues that the Commission failed to determine whether the Project would cause unreasonable degradation and irreparable harm to state waters. Under Mississippi's Water Quality Law, before certification is issued the Commission must consider what harm will occur and must be assured by the applicant that steps will be taken to prevent unreasonable harm. The court ruled there was no evidence that the Commission actually reviewed the measures proposed by the Corps, as it is required to do under Mississippi law. The court remanded this issue to the Commission for further analysis.

Mississippi Water Quality Criteria

Finally, the court addressed the issue of whether the Project would violate Mississippi Water Quality criteria for impaired waters within the state. Because the waters are already classified as impaired, the Commission required the Corps to take core samples and to monitor the effects of dredging on bottom pesticides and other sediment. The Commission decided that the waters would not be degraded beyond current water quality conditions. However, the court determined that the Commission failed to provide sufficient details regarding the standards and ordered the issue placed back before the Commission for further findings.

. . . the Sierra Club argues that the Commission failed to determine whether the Project would cause unreasonable degradation and irreparable harm to state waters.

Conclusion

In sum, the court ruled the Commission failed to offer findings, details, and explanations relating to their decisions regarding required standards. The Commission simply reported their decision to approve the Big Sunflower River Project without providing the reasoning those decisions were based upon. Using the standards set forth in *McGowan*, the court remanded the case to the Commission for further findings consistent with this opinion and the *McGowan* standards. The outcome of this case will potentially impact other commissions in the State, such as the Commission on Marine Resources.

ENDNOTES

1. Mississippi Sierra Club, Inc. v. Mississippi Department of Environmental Quality, 2001 Miss. LEXIS 97 (2001).
2. McGowan v. Mississippi State Oil & Gas Board, 604 So. 2d 312 (Miss. 1992).
3. *Id*. at 323.
4. *Id*.

Sharing Water in Alabama, Georgia and Florida: An Update on the Tri-State Water Wars

Tammy L. Shaw, J.D.

Introduction

Unlike the western regions of the nation, the southeastern United States has historically enjoyed plentiful water resources. However, changing climatic conditions worldwide has plunged the southeast into first stage drought conditions, with some areas suffering from severe drought conditions. Across much of this region, streams, rivers and lakes, in recent years, have been at the lowest levels ever recorded. This condition has continued to worsen since the late 1980's as the southeast experiences mild winters, very hot summers, and below average rainfall. The persistency of the drought conditions, coupled with increases in water use by industries and growing populations has resulted in a controversy over water quantity and allocation between several southeastern states.

In 1997, the states of Georgia, Alabama, and Florida agreed to form two interstate water compacts, the Alabama-Coosa-Tallapoosa Compact (ACT) and the Apalachicola-Chattahoochee-Flint Compact (ACF), to hammer out agreements on how water resources, shared by the states, should be allocated between the three states. The dispute over surface water usage, commonly referred to as the "tri-state water wars", began in 1990 when the city of Atlanta, after assessing its projected population growth and future water needs, sought a permit from the Army Corps of Engineers (Corps) to create new reservoirs on the Chattahoochee River, the Flint River, and the Coosa River that would hold back an additional 529 million gallons of water a day to be stored in Lake Sidney Lanier, Atlanta's major source of drinking water. Atlanta's long-term plan included an increase in withdrawals of 50% from the Chattahoochee and the Flint by the year 2010.

Tri-State Dispute

This proposal and announcement by the Corps set off a dispute between Atlanta and its downstream neighbors, Alabama and Florida. Alabama viewed the plan as a threat to its own water supply, possibly stunting industrial and population growth in the state and resulting in degraded water quality due to the decrease in water flow. Alabama argued that the downstream flow already brings with it Atlanta's pollution and that a decrease in the water flow would mean that the pollutants would be even less diluted. Florida joined the dispute contending that the plan to siphon off more water from the Chattahoochee and Flint rivers would deplete the flow into Florida's Apalachicola Bay and would critically injure the state's $70 million oyster industry.

Unable to convince Georgia to halt its plans, Alabama filed a lawsuit in federal court to prevent the Corps from implementing the siphoning plan. Florida later joined the suit. In 1992, the lawsuit was suspended pending a comprehensive study of the future water needs of the three states. The study addressed four broad issues: water resources demands, water resources availability, flood and drought management, and interstate coordination strategies. The early results of the study led the states to construct two interstate water compacts that would allow the states to analyze the study findings and divide the water resources accordingly.

Interstate Compacts

The Compacts encompass two separate river systems. The ACT originates in north Georgia and southern Tennessee where the Coosa and Tallapoosa flow into northeast Alabama, meandering southward to join the Alabama and the Tombigbee rivers, eventually emptying into Mobile Bay. The ACF also originates in the hills of north Georgia, flows through metropolitan Atlanta and winds south along the Alabama-Georgia border, joining the Flint River and emptying into Florida's Apalachicola Bay. The core of the Compacts created a Compact Commission, made up of the governors from each state and one federal official, who share the responsibility for negotiating an equitable apportionment of the surface water resources in each basin. The Compacts also established a series of deadlines for reaching the allocation agreements with the initial deadline set for January 1, 1999. However, the time-lines in each compact have been extended many

times, with the most recent extension ending in June of 2001. A settlement was expected on June 22, but fell through at the last minute. Negotiators are scheduled to meet again on July 30, 2001.

Allocation Negotiations

Negotiations between the three states are ongoing with each state submitting proposed allocation formulas for each of the two basin compacts. The parties agree that this is a complex issue and point out that they are covering new ground in establishing mechanisms for managing shared water resources between the three states. The ACT and ACF compacts are only the second and third such agreements existing between states east of the Mississippi River and the basin areas involved are much larger than the ones usually dealt with in the western United States.

At a recent meeting in Atlanta, negotiators from each state expressed optimism that they are close to reaching allocation agreements and are certain that the lessons learned from this process will benefit other states in managing water resources. The basin-wide study and the ongoing analysis and negotiations have resulted in more reliable methods for predicting growth and development in the region and an understanding of the importance of assessing water needs before scarcity issues arise. The agreements underscore the importance of sound science and accurate information in regional decision-making, and it is the intent that the ACT and the ACF compacts will result in better long-term management and conservation tools for sharing water resources in the southeast.

In what is considered by many as the "worst case scenario", the U.S. Supreme Court has jurisdiction to decide this matter if the three states are unable to reach a complete agreement. All parties acknowledge that resorting to a lawsuit is likely not in the best interest of any of the states involved and recognize that reaching a complete and comprehensive agreement is imperative.

For more information visit the web site of the Alabama Department of Economic and Community Affairs, Office of Water Resources:
http://www.adeca.state.al.us/AOWR/compacts/index-compacts.htm

The Coastal Society 2002 Conference

Call For Papers

The Coastal Society invites papers, posters, and proposals for sessions for its 18th international conference in Galveston, Texas. Preferences will be given to submitted papers and posters that relate closely to the following four tracks:

- Physical Characteristics that Define Ecological and Human Interactions
- Ecological Relationships, Environmental Health and the Need for Sustainability
- Cultural and Economic Influences on Resources Stewardship
- Political and Legal Tools and Their Influences on Resource Stewardship

Abstracts and proposals may be submitted online. Information for online submission is available at the TCS 18 website http://www.thecoastalsociety.org/tcs18/ .

Although online submission is preferred, you may email, mail or fax (please identify your track area and whether poster or paper when submitting) your abstract or proposal to:

Kristen Fletcher, Director
Mississippi-Alabama Sea Grant Legal Program
The University of Mississippi
Law Center, Room 518, Post Office Box 1848
University, MS 38677-1848
E-mail: kfletch@olemiss.edu Office phone: (662) 915-7775 Fax: (662) 915-5267

2001 Mississippi Legislative Update

Craig Pake 3L

The following is a summary of coastal, fisheries, marine, and water resources related legislation enacted by the Mississippi Legislature during the 2001 session.

2001 Mississippi Laws 346. (S.B. 2442)
Approved March 12, 2001 *Effective March 12, 2001*

Designates the portion of the Tangipahoa River from the Mississippi-Louisiana state line to U.S. Highway 51 in Pike County, as a state scenic stream. That portion of the Tangipahoa River is now included in the state scenic stream stewardship program.

2001 Mississippi Laws 426. (H.B. 1427)
Approved March 13, 2001 *Effective July 1, 2001*

Amends § 53-9-3 to begin a state program for abandoned mine reclamation, which is in accord with the Federal Surface Mining Control and Reclamation Act. Under this amendment "abandoned mine lands" are those lands and waters that are affected by the mining of coal, sand, gravel, clay, and soil, before August 3, 1977. The abandoned mine must be left in a condition where there is no beneficial use, or there is no continuing responsibility under state or federal law to clean up the area, and the mine prevents beneficial use of the land or it is a danger to the health and safety of the public. This amendment gives the state government the power to take these lands over and clean them up for the public use.

2001 Mississippi Law 466. (H.B. 862)
Approved March 3, 2001 *Effective July 1, 2001*

Amends § 49-15-80 to require all vessels and individuals that are engaged in commercial gig fishing to an annual commercial fishing license. Under the amendment all resident commercial gig fishing vessels shall be issued an annual license for $100, all nonresident commercial gig fishing vessels shall be issued an annual license for $400. Every individual on a commercial gig fishing vessel must have an individual fishing license. The fees for the individual fishing licenses are the same as for vessels, $100 for residents and $400 for non residents.

2001 Mississippi Laws 496. (S.B. 2659)
Approved March 3, 2001 *Effective July 1, 2001*

Amends § 59-21-81 for the purpose of defining all Jet Skis as a "personal watercraft" and requiring all persons who are on board a Jet Ski to wear a personal flotation device approved by the United States Coast Guard. Also

requires that every vessel, 26 feet in length or less, have a personal flotation device approved by the United States Coast Guard for every person under the age of 12 or less and must be worn at all times while the vessel is under way.

2001 Mississippi Laws 499. (S.B. 2851)
Approved March 3, 2001 *Effective July 1, 2001*

Provides for regulation and the protection of paddlefish. The new law prohibits the fishing for paddlefish and disposal of any parts of a paddlefish into the waters of Mississippi. Violation of this law is considered a Class I violation.

2001 Mississippi Laws 553. (S.B. 2593)
Approved April 7, 2001 *Effective April 7, 2001*

Amends § 49-5-7 to conform with the Federal Migratory Bird Treaty Act. Under this amendment no person may interfere with a wild bird, nest, or eggs of the wild bird. However, landowners are not prohibited from controlling certain bird species on land under their control. This section does not authorize the killing of any migratory bird protected under the Migratory Bird Treaty.

2001 Mississippi Laws 560. (S.B. 2772)
Approved April 7, 2001 *Effective July 1, 2001*

Protects drinking water, by making discharges of hazardous waste from the manufacture of controlled substances a felony. This law targets the hazardous waste that is produced by the illegal crystal methamphetamine labs.

Energy Policy, from page 2

The Energy Policy has been largely criticized because of its emphasis on the domestic energy development and its potential adverse effects to the environment, and its recommendations are resulting in congressional dissatisfaction. In June and July, the Republican-controlled House of Representatives went on record opposing drilling off the Florida coast and new oil, gas and coal exploration in millions of acres of national monuments, crimping President Bush's efforts to increase U.S. oil production.[4] The measure was an amendment to an Interior Department spending bill and will postpone new leasing arrangements for offshore drilling in the Gulf of Mexico until April 1, 2002. At press time, the hotly contested Lease Sale 181 in the Gulf of Mexico had been reduced from 6 million acres to 1.5, removing tracts that came as close as 17 miles to Pensacola, Florida. The Senate is considering blocking the sale for a year which would allow for further negotiation. *Water Log* will cover the upcoming energy debate in the Gulf of Mexico in future issues.

ENDNOTES

1. National Energy Policy Development Group, National Energy Policy, at viii (2001) (available online at http://www.whitehouse.gov/energy/).
2. Exec. Order No. 13,211, 66 Fed. Reg. 28,355 (May 22, 2001).
3. Exec. Order No. 13,212, 66 Fed. Reg. 28,357 (May 22, 2001).
4. H. Res. 174, 104th Cong. (2001).

California Coastal Commission Found Unconstitutional

Marine Forest Society v. California Coastal Comm., No. 00AS00567 (Sacramento Super. Ct. 2001).

Craig Pake, 3L

In April, a Sacramento Superior Court judge ruled that the California Coastal Commission is unconstitutional because it violates the California State Constitution's separation of powers doctrine. Even though the Commission is part of the executive branch, two-thirds of its members are appointed by the State Legislature, giving the Legislature the power to appoint and dismiss Coastal Commission members at will.

The Coastal Commission was set up in 1972 to be an appeals board for local coastal commissions, which were to be set up statewide. It was intended that each local coastal commission would establish a general development plan for their coastal zone and guidelines on how each area would be managed. Their duties would include granting permits for construction, planning environmentally sound development, and protecting the California coastal areas from misuse and destruction. However, many areas, including Los Angeles and Malibu, have not completed local programs. This has resulted in the Coastal Commission becoming a surrogate local planning agency and instead of acting as an appeal board for local disputes, the Commission now must manage over 100,000 permits statewide.

In a recent case, the Coastal Commission denied a permit to the Marine Forests Society for the continued construction of an experimental artificial reef off the coast of Newport Beach. After the denial, the Commission tried to force the Marine Forests Society to remove the half-built reef from the ocean floor. The group filed a lawsuit in the Sacramento Superior Court, arguing that the California Coastal Commission usurps local government control because the Commission is not answerable to the voters of California. Ronald Zumbrun, attorney for the Marine Forests Society said the lawsuit does not seek to eliminate the Coastal Commission, but rather force the Commission to restructure itself to comply with the constitutional principle of checks and balances.

California could restructure the Commission under the power of the executive branch to comply with the California State Constitution separation of powers doctrine, or the State Legislature could put an initiative on the ballot to change the State Constitution separation of powers doctrine. The citizens of California could also force an initiative to change the state Constitution, which would leave the Commission in place. The California Coastal Commission plans to appeal this case within the year. *Water Log* will monitor the appeal and report any new developments in a future issue.

Efforts to Create Whale Sanctuaries Fail

Adapted from MSNBC News Report

Pro-whaling nations successfully blocked an effort to create whale sanctuaries in the South Pacific and South Atlantic. The protected zones would have provided protection for whale populations in the event that the 15-year moratorium on commercial whaling is ever overturned.

Supporters of the sanctuaries, including Australia, New Zealand and Brazil, say that the move is necessary to allow depleted whale populations to recover to natural levels. However, the proponents failed to win the necessary votes at the International Whaling Commission (IWC) conference, in July.

Those nations opposed to the creation of sanctuaries, including Japan and its allies, contend that the proposal has no basis in science. They argue that the existing moratorium on whale hunting provides adequate protection and that whale populations in many parts of the world are strong enough to withstand some hunting. Japan and Norway would like to abolish the moratorium but seem unable to get the necessary IWC votes to do so. Japan kills about 500 whales a year under an exception to the moratorium that allows whales to be taken for scientific research.

There are two existing whale sanctuaries in the Indian Ocean and the Southern Ocean where no whaling is allowed, even for scientific research. Conservationists say that now it is up to the individual nations of a region to initiate protective measures in their waters.

Lagniappe *(a little something extra)*

Around the Gulf . . .

This summer, Federal and local officials in Alabama announced the creation of a first-of-its-kind gopher tortoise refuge, to be located in south Alabama. The refuge is designed to avoid some of the stand-offs that have occurred when development projects have threatened tortoise habitat areas. Protected under the Endangered Species Act, the gopher tortoise is considered a keystone species of the Southeast's longleaf pine forests and is one of Alabama's most threatened species. The refuge will be maintained as a conservation bank, selling "credits" to developers whose projects threaten tortoise habitat and providing habitat for relocation of tortoise colonies.

The Mississippi Department of Marine Resources announced that Dr. Vernon Asper has been selected as the new chairman of the Commission on Marine Resources. The Commission, composed of seven members appointed by the Governor, represents the interests of non-seafood industry, commercial seafood processors, environmental organizations, recreational and commercial fishermen, and Wildlife, Fisheries and Parks.

Around the Nation . . .

In July, the steam engine from the shipwrecked Civil War ironclad, USS Monitor was recovered from the seabed where the wreck has been resting for nearly 140 years. The Monitor was designed by noted 19th-century engineer John Ericsson, whose innovative design is said to have changed the face of naval warfare. The Monitor took part in the most famous naval battle of the Civil War when it fought the Confederate ironclad, CSS Virginia, in 1862. The site of recovery is 16 miles southeast of Cape Hatteras, N.C. in the protected waters of the Monitor National Marine Sanctuary.

The tax bill signed into law in June brought relief to landowners seeking to permanently protect their farms, ranches, and forest lands for agricultural uses. A landowner who donates a conservation easement on his/her property can receive estate tax benefits, regardless of where the land is located. Previously, the tax exclusion was limited to land near a national park, forest or wilderness area, or located within 25 miles of a metropolitan area. The new law will benefit most those who inherit valuable land that would otherwise be subject to burdensome estate tax bills.

It is expected that the Galapagos Marine Reserve will be declared a UNESCO World Heritage Site. The wider ocean area surrounding the Galapagos Islands is inhabited by over 19 different species of sea birds, thousands of coastal birds, sea lions, sharks and other native species found nowhere else in the world. The islands were named a World Heritage Site in 1978 and the addition of the surrounding marine reserve area will give the islands a greater level of protection.

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Upcoming Conferences

SEPTEMBER, 2001

Submerged Lands Management Conference
September 24-27, 2001, Seattle, Washington

OCTOBER, 2001

11th International Conference on Aquatic Invasive Species
October 1-4, 2001, Alexandria, VA

International Sanctions: Implications for the Oil, Gas and Mining Industries
October 2 -3, 2001, London, England

Historic Preservation Law
October 15-16, 2001, Providence, RI

Federal Lands Law Conference
October 18-19, 2001, Salt Lake City, UT

The Impact of Environmental Law on Real Estate and Business Transactions
October 18-19, 2001, San Francisco, CA

Hazardous Substances, Site Remediation, and New Age Enforcement
October 25-26, 2001, Washington, DC

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