

WATER LOG

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PREFACE

The Mississippi-Alabama Sea Grant Legal Program conducts research on a wide range of ocean and coastal law and policy issues in order to provide guidance and information to ocean and coastal resource managers and public policy makers. The Program's research and educational projects are designed to assist the efforts of academia, industry, government, and the conservation community in maximizing beneficial utilization of ocean and coastal resources. Some examples of previous projects include development of materials for an ocean and coastal law course at the University of Mississippi Law School; an analysis of coastal wetlands management in Mississippi; conducting workshops for recreational boat lessors in Mississippi and Alabama on the legal responsibilities of boat owners; a review of oil pollution control mechanisms; and preparation of legal memoranda on specific legal issues for the Alabama and Mississippi Marine Advisory Services.

This issue of the *Water Log* presents summaries of a representative sample of the Program's past and present research.

DISCARDED BY-CATCH IN U.S. COMMERCIAL MARINE FISHERIES

The National Sea Grant College Program points out that a major goal of participating institutions is to increase the value of public benefits derived from the marine environment. Implicit in this statement would appear to be the elimination of needless waste of marine resources. Pelagic, nearshore, coastal and estuarine systems continue to perform the functions which we deem beneficial (i.e. provide economic rent) only so long as they remain in a relatively natural state. Pollution, alterations (such as filling), and the extirpation of certain species have proven detrimental to such functioning, often causing severe economic displacement of users. In this vein, the Mississippi-Alabama Sea Grant Legal Program is involved in a study of the amount and implications of the waste of marine resources accompanying U.S. commercial marine fishery operations as a result of incidentally taken and discarded catch. The Program intends to discuss the social, economic and legal regimes involved, and to formulate suggestions which could result in a reduction of such unused by-catch. In this analysis, by-catch indicates that part of the gross catch incidentally captured due to target fishing

with non-selective gear. Discarded catch is that portion of by-catch which is returned to the waters as whole, and almost always dead, organisms.

An initial starting point in the search for remedies to the discard problem could be an investigation of the feasibility of requiring that fishing become more directed through the use of species-specific gear. Historically, the majority of instances where there has been a recognition of the need for use of such gear has arisen due to a special, protected status surrounding the incidentally caught creature. Three prime examples are: the tuna/porpoise conflict; the Dall porpoise/Japanese high seas gillnet salmon fishery situation; and the southeast Atlantic and Gulf shrimp fisheries by-catch of sea turtles. In each of these cases, concern centered around the deaths of incidentally taken species which were protected under the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361 *et seq.* (1982), and/or the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.* (1982).

Certainly the best known of these examples resulted from a situation in which 300,000 or more of various species of cetaceans (porpoises) were being killed annually by the West Coast purse seine tuna fleet. This occurred because there exists some unidentified relationship which causes the fish and the marine mammals to swim together. The porpoises, being visible from the surface, lead the fishers to the tuna. After location, both tuna and porpoises are set upon and when the nets are pursed, porpoises are caught and suffocate. After being hauled on deck and separated from the catch, they must be thrown back unutilized. Following extended litigation under the Marine Mammal Protection Act, the kills have been reduced to approximately 20,000-25,000 a year, with annual quotas being established by the National Marine Fisheries Service (NMFS). The techniques which make this great reduction possible involve the use of new gear (porpoise safety panel) and new procedures (requiring assurances that porpoises are out of the area of the nets before they are pursed). *Committee for Humane Legislation v. Richardson*, 414 F. Supp. 297 (D.C.D.C. 1976), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976); Nafziger and Armstrong, *The Porpoise-Tuna Controversy: Management of Marine Resources After Committee for Humane Legislation v. Richardson*, 7 *Env'tl. L.* 223 (1977); 50 C.F.R. § 216.24(d)(2) (1983).

In the Japanese gillnet fishery for salmon, Dall porpoises are caught in monofilament drift nets set out at or near the surface in the eastern Pacific within our 200-mile Fishery Conservation Zone. They drown at a rate initially estimated at

10,000-15,000 per year. (The Japanese maintain that a much lower annual level of kill occurs, in the range of 5,000). The fishery has also been implicated in the deaths, annually, of 500,000-700,000 sea birds which become trapped and drown as they attempt to harvest the caught fish. As the fishery has been ongoing since the late 1950's, there is now concern that populations of the Dall porpoise may be stressed and declining. The National Marine Mammal Lab and the Japanese are conducting studies to determine exactly what the level of kill is and to suggest possible ways to rectify the problem. Currently, because of a rider attached to the Fisheries Amendments of 1982 to the Commercial Fisheries Research and Development Act of 1964, 16 U.S.C. §§ 779 *et seq.* (1982), the MMPA General Permit issued to the Japanese in 1981 allowing them to incidentally kill or seriously injure up to 5,500 of these porpoises annually has been extended to 1987. *In the Matter of Proposed Regulations to Govern the Taking of Marine Mammals Incidental to Commercial Salmon Fishing Operations*, NMFS Op. MMPAH-1981-1 (April 24, 1981); NMFS, *Final Environmental Impact Statement in the Incidental Take of Dall Porpoise in the Japanese Salmon Fishery* (May 1981); 127 Cong. Rec. H 9449-9454 (daily ed. December 10, 1982) (statements of Rep. Breaux and Pritchard); 50 C.F.R. Part 216 (1982); Newby, *Life History of Dall Porpoise (Phocoenoides dalli, True 1885) Incidentally Taken by the Japanese High Seas Salmon Mothership Fishery in the Northwestern North Pacific and Western Bering Sea 1978 to 1980* (Unpub. dissertation, University of Washington, 1982); 50 C.F.R. § 216.24(d)(5) (1983).

The third major instance mentioned above is that of the incidental kills of sea turtles due to asphyxiation when they are captured during the tow of shrimp trawl nets. The National Marine Fisheries Service estimates that in the South Atlantic and Gulf of Mexico a total of over 45,500 turtles are caught annually and that at least 12,500 of these do not survive the encounter. The turtles involved include some species listed as threatened (e.g., the loggerhead) and others which are endangered (e.g., Kemp's ridley). In response to pressures from conservationists, NMFS has developed gear called the Trawling Efficiency Device (TED)—an example of a government-designed gear modification system which has as its object the elimination of by-catch. TED has been shown effective when used in the South Atlantic and Gulf to increase the numbers of shrimp caught per trawl; to eliminate

(Continued on page 4)

OSC LEASE SALES AND THE COASTAL ZONE MANAGEMENT ACT: CONGRESSIONAL REACTION TO CALIFORNIA v. WATT

In response to the U.S. Supreme Court decision in *California v. Watt*, 52 U.S.L.W. 4063 (January 11, 1984), both Houses of Congress have proposed legislation to amend § 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA). This section currently states that "each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved State management programs." 16 U.S.C. § 1456(c)(1) (1982). In *California v. Watt*, the Supreme Court held, in a 5-4 decision, that the sale of OCS leases is not an activity "directly affecting" the coastal zone within the meaning of the CZMA, because that Act was not intended to reach federal activity which actually occurs outside the coastal zone (defined by the Act to extend to the outer limit of the U.S. territorial sea, generally 3 miles). Therefore, the Court concluded, a consistency determination by the state is not required before such sales are conducted. [For a discussion of *California v. Watt*, see 3 WATER LOG 3 (Oct.-Dec. 1983)].

H.R. 4589, which has 51 co-sponsors, was introduced on January 23 by Representative D'Amours of New Hampshire. Discussing the bill on the House floor, Rep. D'Amours stated that "the Court has seriously misread the intent of Congress and has severely limited efforts to foster Federal/State cooperation [in the management of coastal resources]." Cong. Rec. H4589 (daily ed. January 23, 1984) (statement of Rep. D'Amours). The Senate version of the bill, S. 2324, was introduced by Senator Packwood of Oregon on February 22, and has gained the support of 16 co-sponsors. The purpose of both bills is to clarify legislative intent that OCS lease sales, as well as any other federal activity which "directly affects" the coastal zone, whether the activity occurs within or without the zone, are to be consistent with state management programs to the maximum extent "practicable" (H.R. 4589) or "possible" (S. 2324).

Each bill proposes to amend the § 307(c)(1) consistency requirement of the CZMA to include federal activities which occur within, landward of, or seaward of the coastal zone. In addition, both define "directly affecting" as any activity which

"(i) produces identifiable physical, biological, social, or economic consequences. . . or

(ii) initiates a chain of events likely to result in any of such consequences."

H.R. 4589 requires consistency "to the maximum extent practicable", as does the current § 307(c)(1) provision. Federal activities must be fully consistent unless such conduct is prohibited by federal law, or by the occurrence of some unforeseen circumstance which presents a "substantial obstacle." S. 2324 requires that federal activities be fully consistent with approved state programs, unless the activity is (a) to counter the immediate effects of a declared national emergency, (b) necessary for

reasons of national security, or (c) required by any provision of federal law which prevents consistency. Even when one of these three exceptions applies, the federal activity must still be consistent "to the maximum extent possible."

Hearings on H.R. 4589 were held before the House Subcommittee on Oceanography on March 27, and on S. 2324 before the Senate Committee on Commerce, Science, and Transportation on the following day. Testifying against the bills were John Byrne (National Oceanic and Atmospheric Administration), William Bettenberg (Minerals Management Service, Department of the Interior), Eldon Greenberg (Counsel, Southeastern Fisheries Association), Richard Gutting (National Fisheries Institute), Ed Bruce (Counsel, American Petroleum Institute), and several industry representatives.

In their arguments against the CZMA consistency amendment, the Interior Department, with industry representatives concurring, insisted that placing obstacles before OCS development is not in the national interest. (Note, however, that state coastal management plans are approved on the basis of their being in the national interest.) The NOAA representative recommended study (in the "Advanced Notice of Proposed Regulations" and in conjunction with the 1985 reauthorization of the CZMA) regarding any amendments in response to the Court's holding. That agency intends to strike all references to the OCS in the proposed consistency regulations. The fisheries representatives contended that the proposed amendments are so broad that regional fisheries management councils would be brought within the purview of the consistency requirement, in derogation of the Fishery Conservation and Management Act's purpose of creating autonomous regional institutions with state representation to manage fisheries resources. In addition, all of the opponents to the proposed amendments objected to the breadth of its definitions of "directly affecting" and "maximum extent practicable."

Finally, using the Supreme Court decision as its legal lance, the opponents of the bills contest collectively that Congress' intent in passing the network of laws consisting of the 1972 CZMA, § 19 of the Outer Continental Shelf Lands Act (OCSLA), the National Environmental Policy Act (NEPA), the Endangered Species Act, and the Clean Water Act was to give states an appropriate input procedure. Such procedure, they contend, does not include consistency review of OCS lease sales.

Speaking in favor of the bills were Richard Delaney (Vice-Chairman, Coastal States Organization), John Van de Kamp (Attorney General, State of California), James Ross (Director, Land Conservation and Development Commission), Sarah Chasis (Senior Staff Attorney, Natural Resources Defense Council), and Elizabeth Raisbeck (Friends of the Earth). These witnesses cited the Congressional Record, several federal district court decisions, NOAA regulations, state practice, and Interior's

previous compliance as evidence that the CZMA consistency requirement was intended by Congress, and interpreted by almost everyone, to apply to OCS lease sales. Viewed largely as a states' rights issue, testimony was introduced which pointed to the CZMA promise to states of federal consistency as an inducement to build effective coastal zone management programs. Removal of that inducement threatens the integrity of the Act itself.

The coastal area of each littoral state will inevitably feel the impacts of offshore activities such as OCS exploration and production, seabed mineral extraction (i.e., from the Gorda Ridge, in the North Pacific), ocean dumping of dredged spoil or radioactive waste (i.e., proposed dumping of defunct nuclear submarines off the coast of California), ocean incineration projects, etc. These effects are measured in terms of the impacts of siting on-shore support facilities, fluxes in the labor force of the communities, shifts in community-level business needs and markets, potential conflicts with traditional uses of the area, and environmental pollution, including the possibility of radioactive or toxic waste entering the food chain. All of these activities arguably fall outside of the CZMA consistency requirement, given the Supreme Court's interpretation of the statute in *California v. Watt*, *supra*. This is not to mention landward Federal activity which could also escape consistency review: lumberyard management and Corps of Engineers activity such as dredging, channelization, or dam construction.

Furthermore, this argument runs, the statutory framework which remains after the Supreme Court's interpretation of CZMA [OCSLA § 19, NEPA, Endangered Species Act, Clean Water Act, and § 307(c)(3) of the CZMA] is wholly inadequate as a means of providing effective State input and conflict resolution procedures during the decision-making stages of these activities.

Finally, from a practical standpoint, the bill's supporters point out that the CZMA still requires consistency review at later stages of OCS development; therefore, unless this requirement is taken lightly, it is in everyone's best interest—both state and federal government's and the investors—to comply as early as possible with any approved state management plan.

What is clear at this point is that there are a great number of issues involved in this bipartisan effort, the most important being the restoration of the coastal states' right to participate in the federal/state partnership intended in the CZMA. Mark up on the House side has been scheduled for May 3, and for May 8 in the Senate. No hearing date has been set for the House Committee on Merchant Marine and Fisheries. It is expected that the bills will undergo significant revisions prior to mark up, including a strong possibility of a fisheries exemption. Should the bills be referred to other Committees having jurisdiction, the outcome may be delayed until the next session of Congress or indeed, as NOAA recommended, until the CZMA comes up for reauthorization.

Catherine L. Mills

NATIONAL ESTUARINE SANCTUARY PROGRAM

Over the past two decades, coastal resource managers have experienced a growing awareness of the value of ensuring the ecological integrity of our nation's estuaries. Studies have shown that coastal wetlands are many times more productive than average agricultural lands. They provide the breeding ground for our most important commercial fisheries and are habitat for many game and non-game species of wildlife. Recognizing that the continued economic value of estuaries is dependent upon protection of their interrelated wetlands, Congress passed Public law 90-454 in 1968. 16 U.S.C. § 1222 (1982). It directed the Secretary of the Interior to conduct a general study and inventory of estuaries and the natural resources contained therein. It also provided a mechanism for federal, state and local governments to manage critical estuarine areas.

In November, 1969, the Secretary of the Interior reported to Congress the results of its study, recommending a total coastal zone management effort whereby estuarine areas would be managed by the states with the assistance of the federal government. Dept. of Interior, *National Estuarine Pollution Study*, S. Doc. No. 58, 91st Cong., 2d Sess. (1969). This report was influential in the passage of the Coastal Zone Management Act of 1972. 16 U.S.C. §§ 1451 *et seq.* (1982). Section 312 of this law gives authority to the Secretary of Commerce to make available to coastal states grants of up to 50% of the cost of acquiring and managing estuarine sanctuaries as natural field laboratories. Since that time, fifteen sanctuaries have been designated and two are proposed.

The Estuarine Sanctuary Program (ESP) is managed at the federal level by the Sanctuary Programs Division of the Office of Ocean and Coastal Resource Management. Guidelines for the selection and operation of estuarine sanctuaries under which the ESP has been operating are those promulgated by NOAA as final regulations on June 4, 1974, and as proposed regulations published September 9, 1977. 15 C.F.R. § 920 (1983); 42 Fed. Reg. 45522 (1977). A recent report to the Office of Coastal Zone Management prepared by John R. Clark recommended several changes to NOAA's guidelines which would improve the classification, acquisition and management process. Clark, *Assessing the National Marine Sanctuary Program: Action Summary*, (March 1982). On August 3, 1983, new rules were proposed. 48 Fed. Reg. 35120 (1983).

These newly proposed regulations, which incorporate some of the recommendations in the Clark report, revise the procedures for selecting and designating national estuarine sanctuaries as well as provide additional guidance for their long-term management. Under the changes, the biogeographic classification scheme for identifying and selecting areas is broadened, and an evaluation based upon the typology of the area is added. Greater emphasis is to be placed upon management planning by the states earlier in the site selection process and, at the other end of the spectrum, upon conducting a

programmatic evaluation of sanctuary performance. The financial assistance application and award process is also clarified. Final regulations based upon those proposed rules are scheduled to be published in the Spring of 1984.

Given the pending change in regulations and the limited circulation of the available analyses of the Estuarine Sanctuary Program, the Sea Grant Legal Program has begun a review of the ESP from the viewpoint of its success as a management technique. Several issues will be addressed in the review. First, the history of the enabling legislation which created the ESP will be looked at to determine the role Congress intended for estuarine sanctuaries as a part of an integrated coastal zone conservation program. This will be followed by an analysis of the effectiveness of the regulations and guidelines which have guided the Program to date, compared with anticipated benefits to be derived from the proposed regulations which are scheduled to come into force in 1984. As a part of this analysis, we will explore the development of management plans under both sets of rules and determine whether such plans (past and forecast) further the goals of the ESP. Finally, we will assess the capability of a federal-state partnership to manage this portion of our coastal zone over the long term, and whether this goal has been addressed. The study should allow conclusions to be drawn as to apparent shortcomings of the ESP to date and whether the proposed programmatic changes will provide sufficient remedies.

LACEY ACT

The Lacey Act, found at 16 U.S.C. §§ 3371-78 (1982), is designed to control the marketing of illegally taken fish and wildlife. In general, the Act makes it illegal for any person to import, export, sell or receive any fish, wildlife or endangered wild plant species taken or possessed in violation of any federal or state law. (It should be noted, however, that this section is inapplicable to any activity regulated by a fishery management plan under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 *et seq.* (1982).) Similarly, the law prohibits the same actions with respect to any fish or wildlife taken in violation of any foreign law. For the purposes of the Lacey Act, "person" includes any corporate or individual citizen of the United States; any federal, state or local public agency or governmental body; or any other person or entity that is subject to U.S. jurisdiction.

Within the special maritime and territorial jurisdiction of the United States, it is unlawful under the Act to possess any fish or wildlife taken, possessed, transported or sold in violation of any state, foreign or Indian tribal law, or to possess plants taken in violation of any state law. "Special maritime and territorial jurisdiction" of the United States is a fairly expansive term. In general, it includes the waters within 200 miles of the territorial sea and any vessels belonging

to or possessed by a U.S. citizen, a corporation, or the U.S. government, when they are on those waters. 18 U.S.C. § 7 (1982).

If fish or wildlife are bought or sold in interstate commerce, it is a federal crime to make any false record, label, or identification of them. Attempts at any of the above-mentioned acts are also illegal. In addition, the Act makes it a federal offense for any person to import, export or transport in interstate commerce any package containing fish or wildlife, unless such package is plainly marked or labeled according to federal law.

Violations of the Lacey Act are punishable by civil and/or criminal penalties. Civil penalties of up to \$10,000 per violation can be assessed against a person who violates the law (other than the section on labeling packages). Even if the person did not have actual knowledge that the contraband was illegally acquired, he can be fined if, "in the exercise of due care," he should have known. For violating the provision requiring the clear marking of packages, the accused may be assessed a civil penalty of not more than \$250. Prior to being assessed such civil penalties, the violator must be given notice and opportunity for a hearing before an administrative law judge. This decision is appealable to an appropriate federal district court within 30 days from the date of the order.

Criminal penalties can be applied to any person who knowingly imports or exports any fish or wildlife in violation of any provision of the Lacey Act (other than mislabeling). A further offense is committed if a person knowingly buys, sells or offers to buy or sell illegally taken fish, wildlife or plants with a market value above \$350. Penalties for each violation include a fine of up to \$20,000 and/or up to five years' incarceration. A fine of not more than \$10,000 and/or imprisonment for up to one year can be imposed upon anyone found guilty for knowingly engaging in any conduct prohibited by the Lacey Act (except the mislabeling provision) and who in exercise of due care should have known that the contraband was taken or sold illegally.

Any person who has been granted a federal hunting or fishing license, or any license authorizing the importation or exportation of fish or wildlife may have such a license suspended, modified or revoked upon conviction of a criminal violation of the Lacey Act.

All fish, wildlife or plants confiscated as a result of a violation of this Act are subject to forfeiture to the United States government. Also subject to forfeiture are all vessels, vehicles, aircraft and other equipment used pursuant to a violation of the Act for which a felony conviction is obtained; provided, however, that the owner consented to the illegal act or in the exercise of due care should have known that his property would be used in a criminal violation of this Act. Finally, any person who furnishes information leading to an arrest and conviction under the Lacey Act may be paid an appropriate reward.

Casey Jarman

(Continued from page 1)

from capture finfish which cannot be or are not used by the shrimpers but which are valuable to other commercial efforts; to eliminate up to 97% of entrapped sea turtles; and to exclude other commercially undesirable species such as horseshoe crabs, jelly balls, loggerhead sponges and fat grass. The device also increases the efficiency of the operation by decreasing the amount of nonusable by-catch load which must be towed in the cod bag (only to be discarded later). It thereby may decrease fuel consumption, the costs of which are rapidly becoming a limiting factor as to the amount of time fishers can remain on the water and the distance from shore at which they may successfully operate. TED is now gaining some limited acceptance in the fishing community and is being refined both by users and the National Marine Fisheries Service laboratory in Pascagoula, Mississippi. Increased use of the TED is being furthered by cooperative ventures between Sea Grant Marine Advisory Services (MAS) and shrimpers on both coasts. The Mississippi MAS prepared articles for the local press on the TED last year, and in January, 1984, the Alabama MAS held two workshops to explain the device to its fishermen constituency. NMFS, *Environmental Assessment of a Program to Reduce the Incidental Take of Sea Turtles by the Commercial Shrimp Fishery in the Southeast United States* (August 1983); Watson, *FY 1982 Project Report: Sea Turtle Excluder Trawl*, (NMFS, January 1983).

In the three examples of discarded incidental take mentioned above, there has been marked success, a by-catch reduction, in only one (tuna/porpoise), and in that case solely because of persistence of environmentalists. Furthermore, this limited success relates only to a specially protected group of animals. Yet there are other, arguably more important, problems with broad spectrum, non-selective fishing gear which ultimately must either be addressed, or ignored at mankind's peril. There is now little debate that marine resources are finite and that we will not be able to continue to increase our harvest beyond some as yet only roughly defined maximum limit. Even with increased efforts there already have been recent years where harvests have declined. It is also beyond dispute that the marine environment's carrying capacity is not inviolable; that certain of our activities can negatively affect it. For these reasons, there exists concern by fishery biologists and marine ecologists over the death of large numbers of marine animals for no reason other than the fact that they are incidentally taken by fishermen targeting other species. Sumich, *Biology of Marine Life* (Wm. C. Brown 2nd ed. 1982).

Worldwide figures as to the magnitude of discards are not reliable, but rough estimates are available. In the world shrimp fisheries harvest of 1.1 to 1.5 million tons, by-catch may range from 5 to 21 million tons of which one-half to one-quarter (3-5 million tons) is discarded. (For instance, in the United States shrimp fisheries, it is estimated almost all of the by-catch is discarded, whereas in Southeast Asia, almost all is retained.) In other fisheries, discarded by-catch [including non-target species, and undersized and/or unwanted ("over-the-quota") target

species] is virtually impossible to estimate accurately; but conservative, crude approximations place the level in the 3.6 million tons range. Saita, *Importance and Assessment of Discards in Commercial Fisheries* (FAO 1983).

In the Gulf of Mexico shrimp industry alone, over 150 species of finfish are incidentally taken, resulting in some areas of 15.9 pounds of by-catch being discarded for every pound of shrimp retained. If the South Atlantic shrimp industry takes are added to those of the Gulf, estimates run as high as 1.5 million tons of finfish incidentally caught and discarded annually. This incredibly large figure does not include any assessment of the take of or impact on invertebrates, crustaceans and other organisms which are also incidentally caught and discarded. Neither does it consider the impact of continual disruption of sea bottoms by trawl gear. Pellegrin, *Fish Discards from the Southeastern United States Shrimp Fishery*, in *Fish By-Catch . . . Bonus from the Sea*, pp. 51-54 (FAO 1981); Sumich, *supra*.

Commercial fishing as it is now carried out, in large part using non-selective gear, may well be permanently decreasing the long term productivity of the nearshore environment,

ultimately diminishing the economic and food resource potentials of our ocean. Because of the facts and reasons mentioned, the Program is currently involved in the first year of a three-year study. The first task is to gather and summarize the information available as to the species composition and magnitude of discarded by-catch taken in U.S. commercial marine fisheries. Thereafter, the biological impact of current fishing practices will be summarized. Next, an attempt will be made to ascertain what is being done to direct more research towards investigating fishing methods, storage procedures and marketing strategies which would result in less waste of incidentally caught species; this will include discussions of various incentives and disincentives to implementation of any successful research. Finally, there will be an analysis of how current laws including the ESA, MMPA, and Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801, *et seq.* (1982), affect this situation, concluding, if appropriate, with recommendations as to agency and/or legislative actions necessary to address the problems identified.

Eugene C. Bricklemeyer, Jr.

ENVIRONMENTAL PROTECTION AGENCY

The Environmental Protection Agency (EPA) was established on December 2, 1970, as an independent agency in the executive branch of the federal government. There are ten regional offices nationwide. Alabama and Mississippi are included in Region IV, along with Florida, Georgia, Kentucky, North Carolina, South Carolina, and Tennessee.

The EPA administers most of the federal environmental statutes in force. Some examples of EPA's responsibilities that affect coastal resources are: issuance of permits for the discharge of pollutants into navigable waters; development of effluent guidelines to control the discharge of specific water pollutants; development of criteria that enable states to set water quality standards; administration of grant programs to assist states in financing the construction of municipal sewage treatment plants; cooperation with the Army Corps of Engineers in the issuance of permits for the dredging and filling in of wetlands; establishment of national drinking water standards; coordination, with the Coast Guard, of clean-up of oil and chemical spills on United States waterways; monitoring and regulation of levels of radiation in drinking water, oceans, rainfall, and air.

The EPA has extensive power and authority to enforce its standards. Its preference is to encourage voluntary compliance of environmental laws by industries and communities and to urge state and local governments to perform enforcement activities on their own. However, the EPA can utilize the courts to enforce its standards if a polluter refuses to comply voluntarily and other local efforts fail. Most statutes administered by the EPA require notification to a polluter of a violation prior

to issuance of cease and desist orders. If the violation is not corrected, informal negotiations begin, followed by open hearings and then civil proceedings in United States district court if compliance is not obtained.

Penalties for non-compliance may be severe. For example, violations of the Clean Air Act can amount to \$25,000 per day for as long as each violation continues, along with a possible one-year jail sentence. Under the Safe Water Drinking Act, a daily fine of \$5,000 can be assessed. Similar penalties apply to other violations of EPA administered laws. In addition, the EPA can revoke or suspend licenses and permits for activities regulated by the agency. The Office for Enforcement gathers and prepares evidence and conducts enforcement proceedings for water quality, stationary and mobile sources of air pollution, radiation, pesticides, solid waste toxic substances, and hazardous wastes.

EPA has grown to be the largest federal regulatory agency, as well as one of the most controversial. Despite the controversy, it has been able to force significant reductions in the levels of pollutants in the environment.

For further information on Region IV activities, write to the following address: Region IV, 345 Courtland Street, N.E., Atlanta, Georgia, 30308, Rebecca Hammer, Regional Administrator. EPA's main office for the distribution of information to the public is the Office of Public Information, EPA, 401 M Street, S.W., Washington, D.C., 20460. Anyone seeking information on major enforcement actions, EPA rules and regulations, seizures and court actions, and available publications may contact this office.

*This article is the fifth in a series of articles that is appearing in the WATER LOG describing federal, regional, state and local entities that exercise jurisdiction over coastal resources in Alabama and Mississippi.

BOSTIC et al. v. U.S.

No. 83-139-Civ. 4 (E.D. N.C. Jan. 31, 1984)

In the first lawsuit under the Coastal Barrier Resources Act (CBRA), a North Carolina federal district court judge recently rejected claims by landowners and developers that their property on Topsail Island does not fit into the statutory definition of an undeveloped coastal barrier.

CBRA establishes the Coastal Barrier Resources System (hereinafter the System) which consists of undeveloped coastal barriers off the Atlantic and Gulf Coasts. 16 U.S.C.A. §§ 3501-3510 (West Supp. 1975 to 1982). Maps developed by the Department of the Interior and amended by Congress delineate the coastal barriers incorporated in the System and are included by reference in Section 4 of the CBRA. Effective October 1, 1983, the Act prohibits any new federal expenditures or financial assistance within the System. In addition, it amends the National Flood Insurance Act to prohibit the issuance of new federal flood insurance for any new construction or substantial improvements of structures located within the System.

One of the coastal barriers depicted on the maps includes plaintiffs' property designated as the Topsail Unit. Plaintiffs claimed that the designation of Topsail within the System was erroneous based upon the criteria established by the Department of the Interior when developing the maps and by Congress in Section 3 of the CBRA. In the alternative, they argued that if the maps referred to in Section 4 of the CBRA were the sole determination for the inclusion of property within the System, regardless of any factual criteria, then the means of achieving the goals of the CBRA are irrational.

Recognizing that the maps depicting the System were developed originally by the Secretary of the Interior, the district court judge determined that, nonetheless, they were ultimately the product of independent Congressional action. Citing H. Rep. No. 97-841, the court found that Congress had made changes in Interior's proposed maps, thus indicating that Congress adhered to its own evaluation. It noted additionally that the same House Report indicates that one purpose of the inclusion of the maps in the Act was to prevent protracted litigation over individual designations.

The court held next that the definition of an "undeveloped coastal barrier" in Section 3 of CBRA is merely informational and, as such, does not establish the criteria used by Congress in designating undeveloped coastal barriers. The court cited to S. Rep. No. 97-419 in support of this assertion.

Finally, the court found that the designation of the Coastal Barrier Resource System is a reasonable means of furthering the goals of the Act, i.e., to minimize the loss of human life, wasteful expenditure of federal revenues, and damage to fish, wildlife and other natural resources associated with coastal barriers along the Atlantic and Gulf Coasts.

Casey Jarman

DOCUMENTATION OF FISHING VESSELS

Any vessel of at least five net tons which is used to fish commercially in the fishery conservation zone (the area which extends 200 nautical miles from the seaward boundary of each of the coastal states) must be documented by the Coast Guard unless otherwise exempted. 46 U.S.C.A. § 12108 (Rev. Supp. 1983); 46 C.F.R. § 67.01-5 (1982). Exempted vessels are those: (1) less than 5 tons, (2) not operating on navigable waters of the United States, or (3) non self-propelled when qualified to engage in a coastwise trade and used only in a harbor or on the inland waterways. Such documentation is conclusive evidence that a vessel is legally qualified to be employed in the fisheries trade.

An owner wishing to document a previously undocumented vessel must apply at the Coast Guard documentation office at the desired home port of the vessel or at the office nearest the location of the vessel. The following information must be presented to the Coast Guard along with the application: (1) name of the vessel, (2) tonnage and dimension of the vessel, (3) proof that the vessel was built in the United States or is otherwise specially qualified, (4) evidence of marking, and (5) evidence of title. Upon application, the owner is to designate a home port for the vessel. Once a completed application has been submitted, the owner is issued an official number for the vessel. Renewal of a certificate is made at the vessel's home port.

Once issued, a certificate of documentation will contain the name, description, and home port of the vessel, along with the name of the owner. The home port is the one closest to the owner's domicile address or in the case of a corporate

or partnership owner, the port closest to its business address. The commander of a vessel is responsible for assuring that the appropriate certificate accompanies the vessel.

An important requirement for documentation is that the owner of the vessel be a United States citizen or a business entity (e.g., corporation or partnership), the controlling interest of which is owned by United States citizens. Moreover, a documented vessel may only be commanded by a United States citizen. Under the regulations, an individual is a citizen if he is a native-born, naturalized, or derivative citizen of the United States, or otherwise qualifies as a United States citizen. A partnership is a citizen if all of the general partners are citizens and the controlling interest is owned by United States citizens. If ownership is lodged in a trust, its trustees and beneficiaries must be citizens. A corporation meets the citizenship requirements if: (1) it is incorporated under the laws of the United States, (2) its chief executive officer and chairman of the board of directors are United States citizens, and (3) the number of non-citizen directors does not exceed the number necessary to constitute a quorum.

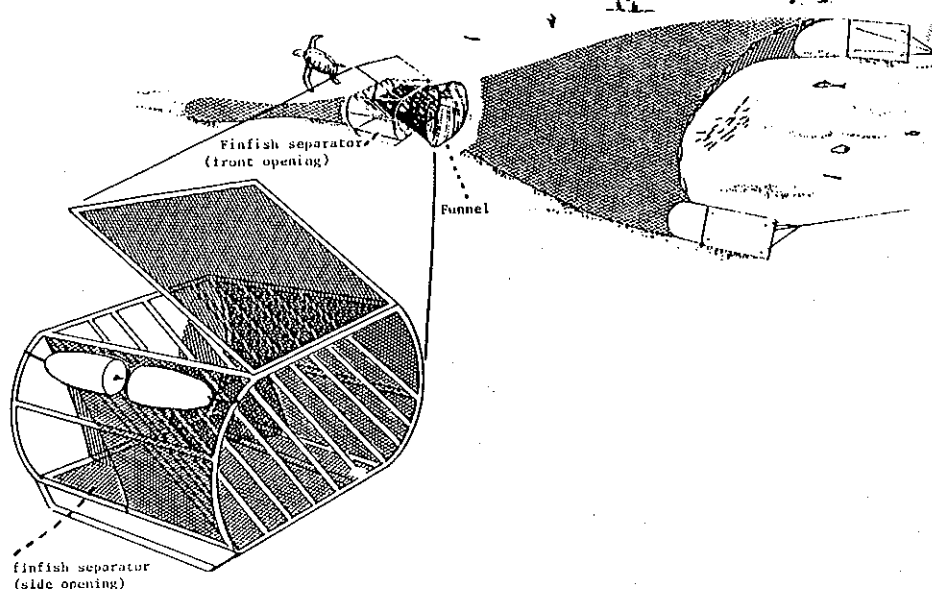
Persons willfully violating documentation requirements are subject to a civil penalty of not more than \$500 per violation. In addition, vessels are liable to surrender and forfeiture to the United States government if the owner knowingly conceals or misrepresents a material fact in its documentation. Similarly, the known fraudulent use of a certificate of documentation makes the vessel liable to seizure and forfeiture.

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Figure 1

TRAWLING EFFICIENCY DEVICE

(THRILLE EXCLUDER DEVICE)



WATER LOG

This newsletter is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. The purpose of the newsletter is to increase public awareness of coastal problems and issues.

If you would like to receive future issues of the WATER LOG free of charge, please send your name and address to: Sea Grant Legal Program, University of Mississippi Law Center, University, Mississippi 38677. We welcome suggestions for topics you would like to see covered in the WATER LOG.

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NOTES

Under a recent out-of-court settlement between the Army Corps of Engineers and a coalition of 16 environmental groups, millions of acres of wetlands will receive increased protection. By the terms of the agreement, the Corps will propose new regulations requiring individual rather than general permits for activities that cause the loss or severe modification of wetland areas more than 10 acres in size. Similar projects affecting between one and ten acres require a special review process which includes advanced notice to the Corps and the state. If the Corps determines that such project will have more than a minimal adverse environmental effect, an individual permit for the work will be required.

At a meeting on March 7, the Alabama Environmental Management Commission denied the plaintiffs' request that an appeals hearing be scheduled to review the Department's action in granting coastal consistency to projects on the Perdido Key area in Baldwin County. The basis for denial was the fact that the request had not been filed within 30 days of the administrative action as required by state law. As a result, an appeal has been filed by the plaintiffs in the Montgomery County Circuit Court asking that the court review the Commission's action in this matter.

A booklet detailing a relatively new alternative to channelization has recently been released. Copies of "Stream Obstruction Removal Guidelines" are available from the American Fisheries Society, 5410 Grosvenor Lane, Bethesda, Maryland, 20814 for \$2.00 each or \$1.00 each for three or more.

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